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Donny BOBO and Michael FORREST
v. STATE of Arkansas

CR 79-146 289 S.W. 2d 5

Opinion delivered October 29, 1979
(In Banc)
[Rehearing denied December 3, 1979.]

John W. Walker and *James P. Massie* and *Ball & Mourton,* by: *Kenneth Mourton,* for appellants.

Steve Clark, Atty. Gen., by: *Dennis R. Molock,* Asst. Atty. Gen., for appellee.

George Rose Smith, Justice. The two appellants were charged with rape, allegedly committed in the early morning hours of December 12, 1978, at the Wilson Sharp athletic dormitory in Fayetteville. Before the trial, which has not yet been held, the defendants filed a motion pursuant to Ark. Stat. Ann. § 41-1810.2 (Repl. 1977), asking that evidence of the proxecutrix's prior sexual conduct with the defendants and with other persons be declared to be admissible.

At the ensuing hearing, in camera, the court held admissible (a) evidence of the prosecutrix's prior sexual relations with the defendants during the 18 months preceding the date of the offense charged and (b) evidence of the prosecutrix's alleged sexual relations with one Bobby Duckworth on the same evening and in the same room as the alleged rape. The court's order provided that the testimony as to item (b) might be developed by direct or cross examination of the prosecutrix, of Duckworth, and of the defendants.

On this interlocutory appeal the defendants contend that three additional trial procedures should have been approved: (1) Introduction of proof of Duckworth's prior sexual relations with the prosecutrix; (2) cross-examination of the prosecutrix about her prior sexual relations with some 15 other persons, at least four of whom were athletes; and (3) introduction in evidence of a nude picture of the prosecutrix published in 1977 in the magazine "Gallery."

The exact language of the controlling act, passed in 1977, is important to our decision. We quote Sections 1 and 2 of the act:

> Section 1. In any criminal prosecution under Arkansas Statutes Annotated 41-1803 through 41-1810, or for criminal attempt to commit, criminal solicitation to commit, or criminal conspiracy to commit an offense defined in any of these sections, opinion evidence, reputation evidence, or evidence of specific instances of the victim's prior sexual conduct with the defendant or any other person is not admissible by the defendant, either through direct examination of any defense witness or through cross-examination of the victim or other prosecution witness, to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose.
>
> Section 2. Notwithstanding the prohibition contained in Section 1 [§ 41-1810.1], evidence directly pertaining to the act upon which the prosecution is based or evidence of the victim's prior sexual conduct with the defendant or any other person may be admitted at the trial if the relevancy of such evidence is determined in the following manner:
>
> > (a) A written motion shall be filed by the defendant with the Court at any time prior to the time the defense rests stating that the defendant has an offer of relevant evidence of the victim's prior sexual conduct and the purpose for which the evidence is believed relevant.
> >
> > (b) A hearing on the motion shall be held in camera no later than three (3) days before the trial is scheduled to begin, or at such later time as the Court may for good cause permit. A written record shall be made of such in camera hearing, and shall be furnished to the Arkansas Supreme Court on appeal. If, following the hearing, the Court determines that the offered proof is relevant to a fact in issue, and that its probative value outweighs its

> inflammatory or prejudicial nature, the Court shall make a written order stating what evidence, if any, may be introduced by the defendant and the nature of the questions to be permitted in accordance with the applicable rules of evidence.
>
> (c) If the Court determines that some or all of the offered proof is relevant to a fact in issue, the victim shall be told of the Court's order and given the opportunity to consult in private with the Prosecuting Attorney. If the Prosecuting Attorney is satisfied that the order substantially prejudices the prosecution of the case, an interlocutory appeal on behalf of the State may be taken in accordance with Rule 36.10(a) and (c), Arkansas Rules of Criminal Procedure. The defense may appeal such court order in like manner if such order is deemed by the defense to be prejudicial. Further proceedings in the trial court shall be stayed pending a determination of the appeal. Provided, a decision by the Arkansas Supreme Court sustaining in its entirety the order appealed shall not bar further proceedings against the defendant on the charge. [Ark. Stat. Ann. §§ 41-1810.1 and -1810.2.]

It will be seen that Section 1 broadly excludes opinion evidence, reputation evidence, and evidence of specific instances of the victim's prior sexual conduct with the defendant or any other person, for all purposes. Section 2 then creates an exception to the general exclusionary rule by permitting the defendant to file a motion to be allowed to offer relevant evidence of "the victim's prior sexual conduct." After an in camera hearing the court is to make a written order determining what evidence is relevant to a fact in issue and has probative value outweighing its inflammatory or prejudicial nature. With the statute in mind, we turn to the appellant's three contentions.

(1) The court correctly excluded evidence of Duckworth's alleged prior sexual relations with the prosecutrix. We have said, in applying this same statute, that information about the prosecutrix's complete sexual history "is usually

totally irrelevant to the charge of rape." *Duncan* v. *State*, 263 Ark. 242, 565 S.W. 2d 1 (1978). We cannot say that the trial court erred in holding that the mere fact that Duckworth may have had sexual relations with the prosecutrix on the same evening and in the same room as the alleged rape established the relevancy of any other relations that Duckworth may have had with her.

(2) The court was right in limiting the scope of the cross examination of the prosecutrix at the forthcoming trial. The court held, properly, that she might be questioned about her prior sexual relations with the two defendants. See *Brown* v. *State,* 264 Ark. 944, 581 S.W. 2d 549 (1979). The court also held that she might be cross-examined about the incident with Duckworth that occurred almost as part of the same episode. But, again, we cannot say that the court erred in holding that the prosecutrix's prior relations with third persons were inadmissible with respect to the central issue of whether she consented to what the State asserts to have been rape. Indeed, if that broad range of inquiry were permissible without a special showing of relevancy, the basic exclusionary rule laid down in Section 1 of the 1977 statute, with respect to proof of specific instances of prior conduct, would pretty well go by the board. The intent of the act, as we said in *Duncan* v. *State, supra,* was to protect the victim from unnecessary humiliation.

(3) We also agree with the trial court's exclusion of the published picture of the prosecutrix. The proof was that she had privately posed for a nude photograph, but she did not send it to the magazine, consent to its publication, or receive pay for it. Thus all that was actually shown was that about a year and a half before the alleged rape, when the prosecutrix was 17, she posed in the nude. The court did not abuse its discretion in holding that the probative value of the exhibit was outweighed by its inflammatory or prejudicial nature. Moreover, Section 2 of the act relates only to proof of the victim's prior "sexual conduct," which in turn is defined in Section 3, § 41-1810.3. Since posing in the nude for a photograph does not fall within that statutory definition of sexual conduct, we are not convinced that the act was meant to permit the introduction of such evidence.

Affirmed.

HARRIS, C.J., not participating.

BYRD, J., dissents.

J. L. CHAVIERS *v.* STATE of Arkansas

CR 79-148 588 S.W. 2d 434

Opinion delivered October 29, 1979
(Division I)

Drake, Bynum & Dennis, Ltd., for appellant.

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

JOHN A. FOGELMAN, Justice. Appellant J. L. Chaviers, the operator of Chaviers Insurance Agency, Inc., an insurance agency in Pine Bluff, Arkansas, was found guilty of eight counts of theft of property and sentenced to two years and a fine of $1,000 on each count with the sentences to run consecutively. He asserts four points for reversal. They are:

I

THE TRIAL COURT COMMITTED ERROR IN REFUSING TO GRANT APPELLANT'S MOTION FOR A MISTRIAL.

II

THE EVIDENCE BEING WHOLLY INSUFFICIENT, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO GRANT APPELLANT'S MOTION FOR A DIRECTED VERDICT FOR APPELLANT ON COUNT 1, COUNT 2, COUNT 4, COUNT 5, COUNT 6, COUNT 7, COUNT 8 AND COUNT 9.

III

THE TRIAL COURT COMMITTED ERROR IN REFUSING TO GRANT APPELLANT'S MOTION TO SET ASIDE THE VERDICT OF THE JURY ON COUNT 7 AND COUNT 8.

IV

THE SENTENCE PRONOUNCED BY THE COURT WAS EXCESSIVE AND CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS.

We find no merit in points I and IV. We do find merit in Point III and in that portion of Point II relating to Counts 7 and 8 of the nine counts in the information on which Chaviers was tried. We affirm the judgment of the trial court as to Counts

1, 2, 4, 5, 6 and 9 of that information. Chaviers was acquitted on Count 3. The judgment is reversed as to Counts 7 and 8.

I

Appellant moved the court to declare a mistrial because of conversations between witnesses under sequestration[1] and a spectator who was interested in the trial. Mr. Patrick Lee, an employee of Southwestern Insurance Group, a group of companies represented by the Chaviers Agency, was present at the trial. Some of the charges against Chaviers were based upon contentions that he had accepted and taken control of premiums paid to him for the issuance or renewal of policies by Southwestern Insurance Company, without having obtained the policies or renewals or without remitting the premiums for them to the company. Robert Malcomb, the underwriting manager for the Southwestern Insurance Group, was a witness for the state. James A. Fecho, a branch manager with Transamerica Insurance Company, was also a witness called by the state. Appellant's motion for a mistrial was made after Fecho had testified, but before Malcomb's testimony was given.

Appellant's wife testified at the hearing on the motion. She said that each time a witness had left the stand, all of the witnesses, who were sitting together, had discussions and looked and pointed and apparently discussed what had been said in the courtroom. She said that she did not hear what Lee said to Malcomb or any other witness to whom he had talked, but that they all stood in front of Lee and appeared to be giving information as to their testimony. At that time, an independent insurance agent had testified as to practices of insurance companies in billing agencies and an insurance

[1]We treat this matter as if the witnesses had been excluded from the courtroom without any request having been made by either party and without any admonition having been given by the circuit judge. Although the record is not clear on this point, appellant states in his brief that the witnesses involved in the alleged conversations had been excluded under the rule. Mrs. Chaviers testified that she saw the spectator in question coming out of the courtroom and coversing with witnesses who were sitting outside. She must have been outside the courtroom herself in order to observe any such conversations. It seems highly improbable that she would have been in a position to observe unless she had been excluded from the courtroom.

salesman for another insurance company had testified about placing liability insurance coverage for one of the complaining witnesses with the Chaviers agency. In addition to these witnesses, Mary E. Johnson, Ray Heaslip and Bobby Davis, who were complaining witnesses, had testified.

Sandra Masters, appellant's daughter, testified that she had been sworn as a witness and had seen Lee going in and coming out of the courtroom and had seen him talking to some man and others who were witnesses. She did not know what Lee was saying or what kind of conversation was going on. She had been sitting with Mrs. Chaviers.

Lee testified that his major purpose in being present was to visit with Malcomb, and that he had lunch with Malcomb and Fecho. He said that he had not discussed the case with the state's witnesses. Mrs. Taylor, one of the complaining witnesses, testified that she had spoken with some of the witnesses when they left the courtroom after testifying, but not about the case nor about their testimony or anything that took place in the courtroom and that she did not hear anything about the testimony. Doris Weaver, a complaining witness, said she had spoken to some of the witnesses who had testified and that she had asked one of the insurance agents what had happened and had been told that it was only routine. Jimmy Ragsdale, a complaining witness, said that the witnesses who were sitting in the hall had engaged in general conversations, but that he did not know who had testified and who had not. He had observed that some of the witnesses, after they had testified and left the courtroom, had spoken with the other witnesses, but he did not hear the conversations.

Malcomb testified that some of the witnesses who had testified had talked with witnesses who had not, but that he had not talked with any witnesses who had testified. He said that he had talked to Lee about what had happened between Chaviers and their company, but not about what went on in the trial. He said that he did talk about the facts of the case as he knew them. Malcomb recalled that Lee had told him about testimony that had been given in the courtroom in

regard to a question about the difference between an account current agent and a direct bill agent.

After hearing this testimony, the trial judge stated that there had been no request to sequester the witnesses or to give a cautionary instruction to them, but that he had probably erred in failing to request that the witnesses not discuss the case or visit with each other during the course of the trial. In denying the motion for mistrial, the circuit judge remarked that granting a motion for mistrial was pretty drastic action and that, from what he had heard, he doubted that any harm to either side had really been done.

We have many times said that declaring a mistrial is an extreme and drastic remedy which should be resorted to only when there has been an error so prejudicial that justice could not be served by continuing the trial. *Holmes* v. *State,* 262 Ark. 683, 561 S.W. 2d 56; *Limber* v. *State,* 264 Ark. 479, 572 S.W. 2d 402; *Wilson* v. *State,* 261 Ark. 820, 552 S.W. 2d 223; *Shackleford* v. *State,* 261 Ark. 721, 551 S.W. 2d 205; *Foots* v. *State,* 258 Ark. 507, 528 S.W. 2d 135. The granting or denial of a motion for mistrial lies within the sound discretion of the trial judge and the exercise of that discretion should not be disturbed on appeal unless an abuse of that discretion is shown. *Parrott* v. *State,* 246 Ark. 672, 439 S.W. 2d 924; *Jackson* v. *State,* 245 Ark. 331, 432 S.W. 2d 876. The facts revealed here do not afford any basis for our saying that the trial judge abused his discretion in denying this motion for mistrial. See *Hutcherson* v. *State,* 262 Ark. 535, 558 S.W. 2d 156.

II

In each count of which he was convicted, Chaviers was charged with having committed the crime of theft of property by unlawfully and knowingly taking unauthorized control of property of another in excess of $100. Each count named the alleged victim. They were: Count 1, Mary J. Ragsdale; Count 2, Eugene Morgan; Count 4, Doris Weaver; Count 5, Anthony D. Johnson; Count 6, Arthur Lee Bradley; Count 7, Transamerica Insurance Group; Count 8, Mrs. Jack Taylor; and Count 9, Bobby Davis.

The statute under which Chaviers was charged, Ark. Stat. Ann. § 41-2203 (Repl. 1977), provides that one commits theft of property if he knowingly takes or exercises unauthorized control over the property of another with the purpose of depriving the owner thereof. Under that section there is a wrongful appropriation when the actor either takes or exercises unauthorized control over the property of another. The term "exercises unauthorized control" is directed at the bailee who lawfully takes control of the property, but subsequently appropriates it to his own use. But the term must be read in conjunction with the clause "purpose of depriving the owner thereof." A deviation from the terms of bailment is theft only if done with the requisite purpose to deprive the bailor. See Commentary, § 41-2203.

The word "property" includes any paper or document that represents or embodies anything of value. "Deprive," in the statute, according to Ark. Stat. Ann. § 41-2201 (4) (a) and (c) means:

> (a) to withhold property or to cause it to be withheld either permanently or under circumstances such that a major portion of its economic value, use, or benefit is appropriated to the actor or lost to the owner; or
>
> *****
>
> (c) to dispose of property or use it or transfer any interest in it under circumstances that make its restoration unlikely.

The offenses were alleged to have occurred during the years 1975, 1976 and 1977. There seems to be no doubt that Chaviers or employees of his agency took control of checks tendered for payment of premiums on insurance policies to be issued or renewed. The question is whether Chaviers purposely withheld or used these payments in a manner that their use or benefit was appropriated to Chaviers' benefit or lost to the owner. One acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result. Ark. Stat. Ann. § 41-203 (1) (Repl. 1977). Thus, the purpose

required is not significantly different from the previous requirement of specific intent in cases of larceny and embezzlement. See *Gilcoat* v. *State,* 155 Ark. 455, 244 S.W. 723; *Mason* v. *State,* 32 Ark. 238; *Heath* v. *State,* 207 Ark. 425, 181 S.W. 2d 231; *State* v. *Guthrie,* 176 Ark. 1041, 5 S.W. 2d 306. By the nature of things, one's intent or purpose, being a state of mind, can seldom be positively known to others, so it ordinarily cannot be shown by direct evidence, but may be inferred from the facts and circumstances shown in evidence. *Smith* v. *State,* 264 Ark. 874, 575 S.W. 2d 677; *Shell* v. *State,* 184 Ark. 248, 42 S.W. 2d 19. We have uniformly held that intent might be inferred from the circumstances connected with the transaction in larceny and embezzlement cases. *Mason* v. *State,* supra; *Bond* v. *State,* 230 Ark. 962, 328 S.W. 2d 369; *Collins* v. *State,* 184 Ark. 20, 41 S.W. 2d 781; *State* v. *Guthrie,* supra. We have also held that the criminal intent to embezzle may be inferred from the act of wrongful conversion of a fund. *Heath* v. *State,* supra; *Smith* v. *State,* 219 Ark. 829, 245 S.W. 2d 226; *Gurley* v. *State,* 157 Ark. 413, 248 S.W. 902. There is no sound reason why the kind of evidence or quantum of proof required to show "a conscious object" should be different from that required to show specific intent.

In pointing out the pertinent testimony on the question of sufficiency of the evidence, we will view the evidence in the light most favorable to the state, considering only that testimony that lends support to the jury verdict and disregarding any conflicting testimony which could have been rejected by the jury on the basis of credibility.

Chaviers had operated the agency until his license was revoked in August or September, 1976. All moneys paid to the agency were deposited in a bank account which was totally depleted on August 9, 1977. After the license was revoked, Chaviers, in February, 1977, began to bid on demolition contracts in Little Rock. Thereafter, he spent not more than one or two hours per day in the insurance office and devoted considerable time to the demolition business, leaving the handling of matters pertaining to his insurance business to his wife and daughter, who had been employed in the agency since 1973. They were paid salaries throughout

their employment. The new business was so unsuccessful that Chaviers discontinued it in July, 1977, after having suffered a loss of approximately $6,000. Chaviers testified that he utilized the agency bank account to pay expenses of his demolition business.

J. L. Stone worked with Chaviers occasionally and Chaviers compensated Stone by giving him the premium for the first year on any policy solicited by Stone. Among the insurance companies represented by the Chaviers agency were: Southwestern Insurance Company, Cavalier Insurance Company, New Hampshire Insurance Company, and Transamerica Insurance Group. Southwestern Insurance Company terminated the Chaviers agency by letter dated January 24, 1977. An officer of Southwestern wrote Chaviers on March 12, 1977, advising him that his attempts to renew policies of the company would not be carried through and returned seven renewal requests with that letter. Chaviers acknowledged that his authority to act, even on renewals, was then terminated. It is possible that Chaviers had an agreement with the company to renew policies that terminated in February, 1977. On renewals, this company's billing procedures were such that a lapse of two or three months between the company's receipt of a request for renewal and a statement calling for payment of the renewal premium was not unusual. Chaviers' agency for New Hampshire Insurance Company was terminated in October, 1975.

Chaviers' agency for Transamerica extended from August, 1973, until April 26, 1976. He had no authority to write new business after July 26, 1976 or renewals after July 26, 1977. His contract with that company was terminated May 15, 1977.

The agency received a letter from the insurance commissioner around July 1, 1977, but, having had her "fill" of this official, Mrs. Chaviers put the unopened letter in a desk drawer where it remained unopened until November, 1977, after Chaviers had been arrested on the original charge contained in the information filed against him, i.e., the Ragsdale transaction. When the letter was opened, complaints of Mrs.

Weaver and Mrs. Ragsdale about the handling of their transactions were attached.

The evidence on all counts followed a similar pattern, particularly those in Counts 1, 2, 4, 6 and 9. In each case, a customer of the agency issued a check to the Chaviers agency for an insurance policy or a renewal of an existing policy. All seem to have been automobile insurance. The checks were dated on various dates between January 27, 1977 and March 12, 1977. The proceeds of the checks went into the agency bank account. Receipts for the premium payments were issued by the Chaviers agency, but the policies were not renewed. These customers learned that the policies had not been renewed. Some of them learned they had no coverage after claims had arisen. None of them received a refund of the money paid for the insurance premium, although all except Mrs. Ragsdale and Mrs. Weaver had sought a refund.

Eugene Morgan (Count 2) talked with Mrs. Chaviers after a claim had arisen prior to the date he gave the check for renewal and was told by her that he would be advised as soon as the agency heard from the company. Finally, on June 15, 1977, he learned by inquiry of Southwestern Insurance Company that his policy had not been renewed and had expired in February, 1977. When his automobile was repaired in July or August, 1977, Chaviers advised Morgan that $200 was deductible under the policy. Morgan checked the policy and found that only $100 was deductible. Nothing was ever said to Morgan by anyone connected with the Chaviers agency about the non-renewal of the policy. Chaviers admitted that Morgan was entitled to a refund of $176, but sought to excuse the failure to make it by saying that the agency had not received any notice of rejection of the request for renewal mailed by him to the company on March 9, 1977 (three days before the date of Morgan's check). He said that no remittance had been made to the company because the agency was never billed for the premium.

Doris Weaver (Count 4) received a notice from Southwestern Insurance Company, two weeks after she had given her check to the Chaviers agency, that her policy had been cancelled for non-payment of premium. When she inquired

of Chaviers, he told her that "it was shuffled up in paper work," that she was insured and that she should not worry. When she had a collision in June, 1977, approximately four months after she had paid the renewal premium, Chaviers promised to send in an accident report showing her coverage, but apparently did not. About two weeks later, after she had been involved in another collision, Chaviers told her that she had nothing to worry about, but did not tell her that she had no coverage. She also made a later payment for another renewal. Her request for a refund in June, 1977, was postponed by Chaviers because of unavailability of his records.

When Arthur Lee Bradley (Count 6) had not received a policy two weeks after he had given his check on March 3, 1977, a secretary in the agency office told him the policy would be mailed. About two months later, he called the agency office and was told that it had "folded." The insurance company had nothing in its records pertaining to Arthur Bradley or any payment from Chaviers on Bradley's account, and its underwriting manager said that Chaviers had no authority on the date the agency took Bradley's check to send in a premium for a policy for Bradley.

Payments made by Bobby Davis (Count 9) in January and February, 1977, were for renewal of a Transamerica policy which had expired on December 19, 1976. On December 20, 1976, there had been a theft of some items from the Davis car. Chaviers told Davis to send an estimate, but that there might be some difficulty because the policy had terminated. After Davis had been in an accident following his premium payments, he learned that his policy had been cancelled for non-payment. He had received no notice that his policy would not be renewed. Chaviers testified that the agency records showed that a refund check had been mailed to Davis, but admitted that there was no cancelled check on the agency account for this refund.

The transaction involved in Count 5 was slightly different. Mary E. (Mrs. Anthony D.) Johnson applied to Stone for farm liability insurance to be procured through the Chaviers agency on June 7, 1975, and gave Stone a check for $160. Stone cashed the check and paid Chaviers for the policy in cash, for which a receipt was issued. The money

was deposited in the agency bank account. Stone did not receive any refund of this premium and did not receive a letter dated July 26, 1975 from Chaviers enclosing a check for a refund of the premium. It is admitted that no refund check ever cleared the Chaviers agency bank account. On June 16, 1975, Chaviers assured Mrs. Johnson that the Johnsons were covered by insurance. On August 6, 1975, he told her he had mailed the policy to them. The Johnsons never received a policy or a refund. The branch manager of New Hampshire Insurance Company, on which the Johnson policy was to have been written, said that sometime in September, 1975, before Chaviers' agency for that company was terminated in October, 1975, he had spoken with Chaviers about the Johnson policy and that Chaviers had stated that he had received no money from Stone for that policy and he had so advised the Johnsons, but mentioned no refund to Stone. Chaviers made no offer to refund the premium to the Johnsons until May 20, 1976, when a hearing was being held by the insurance commission on a complaint against Chaviers.

Appellant says that the evidence is wholly circumstantial, so it must exclude every other reasonable hypothesis other than his guilt. He enumerates several circumstances upon which he relies as being consistent only with innocence as to his intent and purpose. They are: his authority to accept and process renewals for Southwestern Insurance Company up through March 24, 1977 and for Transamerica through May 15, 1977; his lack of personal knowledge of the erroneous receipt of premium payments on the Ragsdale and Taylor accounts; the billing system of these two companies, which permitted a lapse of two or three months between initial submission of a policy renewal and request for payment by the agency; the fact that an agent was justified, in the absence of notice from a company of refusal to renew or issue a policy, in assuming acceptance by the company and anticipating subsequent billing; acceptance of renewals from the Chaviers agency which were billed as late as May, 1977; aborted attempts of Chaviers to sell his agency between March, 1977 and June, 1977 and the transfer of files and records to prospective purchasers on two occasions; the absence of Chaviers from his agency office between Feb-

ruary, 1977, and July, 1977, except for one to two hours per day; inability of Chaviers to recover files and records after May 26, 1977; the chaotic and turbulent state of his business during the period in which most of the questioned premium payments were made; Mrs. Chaviers' description of appellant as being emotionally disturbed, distraught and subject to physical ailments during the period from February to August, 1977; the fact that 80 checks of policyholders for a total of approximately $6,000 were issued and 60 premium refunds totalling $10,000 were made up until August 9, 1977, when the agency account funds were exhausted; the failure of Ragsdale, Morgan, Bradley and Heaslip to communicate their complaints to appellant; the fact that Chaviers knew of only one charge at the time of his arrest in October, 1977, and the subsequent addition of the other counts one year after his arrest and 11 days before trial; appellant's candid acknowledgement that refunds were due prosecuting witnesses, even though he could only rely upon his agency records; the fact that agency records indicated that refunds had been made in the Weaver, Heaslip, Taylor and Davis accounts and that the Weaver, Heaslip and Taylor checks were never deposited to the agency account.

We do not agree with appellant that the evidence was only sufficient to arouse suspicion and the jury was left only to speculation and conjecture in arriving at its verdict, except as to Counts 7 and 8. We certainly disagree with appellant's statement that there was a failure of proof tending to show that appellant converted any insurance payments to his own use, in view of the fact that there was evidence that he paid expenses of his demolition business from the agency bank account, and that this account was depleted before refunds could be made in some instances.

Where circumstantial evidence does more than arouse suspicion, and is properly connected, and, viewing the evidence in the light most favorable to the state, the jury is not left to speculation and conjecture alone in arriving at its conclusion, it is basically a question for the jury to determine whether the evidence excludes every other reasonable hypothesis. *Upton* v. *State,* 257 Ark. 424, 516 S.W. 2d 904. This is such a case, and the jury's verdict is conclusive on this question.

We conclude, however, that the trial judge should have granted appellant's motion to set aside the verdict as to Counts 7 and 8. There is no evidence that either the Heaslip or Taylor checks ever went into the agency account. There was positive testimony that the Heaslip check had not. There was testimony that the Heaslip check had been voided and returned to Heaslip by letter, even though Heaslip denied having received it.

Mrs. Taylor felt sure that her check had been charged to her account but did not have any cancelled check or any record to support her statement. Chaviers testified that, had she produced her cancelled check, a refund would have been made. Mrs. Chaviers testified that she had noted on the copy of the receipt issued to Mrs. Taylor that the check in question had been returned. She had been unable to find any file on this account.

In June, July or August, 1977, Transamerica refunded the Heaslip payment without ever soliciting any explanation from Chaviers or his agency. The evidence that the Taylor check had been cashed was far from satisfactory. Appellant exhibited photographic copies of both the Heaslip and Taylor checks with the word "void" written thereon with his post-trial motion to set aside the verdict. He alleged that these copies of the checks had been found in the books and records of the agency in the state of Alabama, where they had been stored, and were received by him three days after the trial. We do not see how the jury could have done more than engage in speculation as to appellant's purpose in regard to these transactions if this evidence had been before it. For this reason, we feel that the trial court should have set aside the verdict of these two counts.

The motion to set aside the verdict must be viewed as a motion for a new trial. It incorporated an attack on the sufficiency of the evidence to support the verdict and newly discovered evidence. It might easily be said that there was no abuse of discretion in denial of this motion, were it not for the fact that the Heaslip and Taylor accounts were among eight counts added to the information in this case just 11 days prior to trial. The evidence that Chaviers was living at Boaz,

Alabama, and that his wife was working as a nurse there was undisputed. In the peculiar circumstances of this case, we find no lack of diligence and feel that the motion should have been granted as to these two counts. This means only that appellant is entitled to a new trial on these counts, because we cannot say that, without the new evidence as to the checks of Heaslip and Taylor, the evidence would have been insufficient to present a question for the jury. With that evidence before it, the jury could have only speculated as to two equally plausible conclusions as to Chaviers' purpose in these transactions, unless the state was able to rebut this new evidence.

Appellant contends that his sentence of 16 years' imprisonment and $8,000 in fines is so patently severe, when related to the facts and circumstances brought out at trial, that it should be regarded as cruel and unusual and constitutionally impermissible. Of course, that sentence may be reduced because of the reversals on two counts. Appellant contends that the punishment is cruel and unusual because it is so disproportionate to the nature of the offense as to shock the moral sense of the community.

Appellant's convictions on six counts of theft of property still stand. The jury found that six different people had lost property through theft by Chaviers. None of these offenses involved more than $2,500, but each involved more than $100. Thus, they were Class C felonies. Ark. Stat. Ann. § 41-2203 (2) (b) (i) (Repl. 1977). The minimum punishment on each offense was two years. Ark. Stat. Ann. § 41-901 (1) (c) (Repl. 1977). A fine of as much as $10,000 could have been imposed on each count. Ark. Stat. Ann. § 41-803 (3) (c) (Repl. 1977). An argument that the minimum prison sentence permissible under the applicable statute is cruel and unusual is rather strange. No punishment prescribed by statute is cruel and unusual unless it is barbarous, or unknown to the law, or so wholly disproportionate to the nature of the offense as to shock the moral sense of the community. *Carter* v. *State,* 255 Ark. 225, 500 S.W. 2d 368. We cannot say that the sentence in this case was cruel and unusual under this test.

The judgment is affirmed as to Counts 1, 2, 4, 5, 6 and 9.

As to Counts 7 and 8, the judgment is reversed and the cause remanded for a new trial.

We agree. GEORGE ROSE SMITH and HOLT and HICKMAN, JJ.

Carry W. and Allie Lucille CHANDLER
v. Rosie Lillian PALMER et al

79-216 588 S.W. 2d 444

Opinion delivered October 29, 1979

Acchione & King, for appellants.

Blackmon & Zakrzewski, for appellees.

CONLEY BYRD, Justice. This is a boundary dispute between appellants Carry W. and Allie Lucille Chandler who claim title to the strip in question by a deed from Buell Teer and appellees Rosie Lillian Palmer, et al who claim by adverse possession to an old fence erected in 1932 by their predecessor in title. The trial court found the issue of adverse possession in favor of appellees and fixed the boundary between the parties along a new fence erected by appellees some two feet inside of the old fence. For reversal appellants raise essentially fact issues contending that the trial court's findings are against a preponderance of the evidence in that appellees failed to establish: (1) pedal possession; (2) hostile possession; for the statutory period of

seven years (3) the location of the old fence; and (4) the sufficiency of the character of the old fence to give notice to the true owner. We affirm the trial court.

Lillian Palmer testified that she had been acquainted with the property since 1932 when her mother-in-law acquired the title to 12 acres and erected a hog wire fence with two barbed wires around the entire 12 acres. She and her husband acquired the six something acres that she and the other appellees now own from her mother-in-law in 1945. She states that she and her husband used the area up to the old fence for gardening and pasture. Her husband, who died in 1971, repaired the fence from time to time to keep in the livestock they owned. The new fence was erected just inside the old fence after appellants' complained about the clearing out of the old fence.

H. S. McDonald testified that he had lived across the street from the Palmers since 1959 and that there had always been an old fence through the area along the back property line. He stated that Mr. Palmer always maintained a garden and a pasture up to the old fence.

Gorden Palmer testified that he had lived in the area for 32 years except for a few years when he was gone and got married. However, he testified that for 15 years he farmed and pastured up to the old fence line.

Appellant Carry W. Chandler does not deny the existence of an old fence. He admits that his predecessor in title strung some barbed wire along the old fence line to hold in his horses. On redirect he stated that the old fence that appellees' counsel kept describing was where his predecessor straightened up the barbed wire to hold his horses. The old fence vaguely coincided with what is the red line on the survey and is approximately what the new fence coincides with.

Appellants point to *Maney* v. *Dennison,* 110 Ark. 571, 163 S.W. 783 (1914) and contend that the proof here is sufficient to show any particular portion of the lands that appellees have occupied for a sufficient length of time to

ripen into title by limitation. We disagree with appellants, for, as we read the record, the area has either been in an enclosure or occupied by a garden since sometime in 1932. Furthermore, it appears that appellants' predecessor in title by erecting the barbed wire fence along the old fence line for purposes of holding in his horses was acquiescing in the old fence as the boundary.

Neither can we agree with appellants' position that the original entry by appellees and their predecessor in title was permissive. Such suggestion on the part of appellants is not supported by the record.

The assertion that the location of the old fence was not established with definiteness is not supported by the evidence. In fact appellants' own proof tied the old fence in with the red line on the survey. Appellants are not in a position to complain about the fact that the trial court fixed the boundary line in accordance with the new fence since the proof on the part of appellees was more than ample to show their adverse possession to the old fence.

Finally appellants contend that the old fence was not of sufficient character to establish adverse possession. Needless to say the proof shows that the original fence consisted of hog wire and two barbed wires erected to posts. An exhibit shows the tops of some of the old posts sticking out through the honeysuckle vines covering the old fence. Such fences are ordinarily considered as sufficient to establish adverse possession, particularly where the person maintaining the fence maintains a garden and a pasture next to the fence. See *Laney* v. *Arkansas Real Estate Co., Inc.,* 234 Ark. 187, 350 S.W. 2d 911 (1961) and *Dierks* v. *Vaughn,* 131 F. Supp. 219 (E.D. Ark. 1954).

Affirmed.

HARRIS, C.J. not participating.

Euna SCRITCHFIELD et al *v.*
Ralph Robert LOYD, Executor

79-270 589 S.W. 2d 557

Opinion delivered October 29, 1979

Clark & McNeil, for appellants.

Guy H. Jones, Phil Stratton, Guy H. Jones, Jr. and Casey Jones, by: *Phil Stratton,* for appellee.

CONLEY BYRD, Justice. By this appeal appellants, Euna Scritchfield, et al, collateral heirs of Johnnie D. Loyd, deceased, contend that the signature of Johnnie D. Loyd appearing in the attestation clause of his will does not meet the requirements of Ark. Stat. Ann. § 60-403 (Repl. 1971), requiring that the testator's "signature must be at the end of the instrument." The stipulation entered into by the parties shows the following:

> "Marie Hutto, if called as a witness in this cause, would testify in substance as follows: 'My name is Marie Hutto. I reside at Damascus, Arkansas, where my husband, Ray Hutto, and I operate a feed mill. On April 20, 1976, Johnnie David Loyd came to our place of business, bringing with him a blank form headed "Last Will and Testament" and asked me to help him make a will. I told Mr. Loyd I did not know anything about these matters and he then asked if I would write what he told me to in the various blanks in the form, as he requested. I did so. Under Mr. Loyd's instructions, I filled in the

blanks in the will form, and this is the instrument which has been tendered for probate as Mr. Loyd's will. All handwritten portions of the will were written by me, except as hereinafter excepted. Mr. Loyd signed his name "Johnnie D. Loyd" in the upper left hand portion of the will, just below the printed words "Last Will and Testament" and just above the start of the printed portion of the form. He signed the name "Johnnie D. Loyd" in the attestation paragraph below the body of the will. I signed my name as a Notary Public on the line at the end of the will and inserted my commission expiration date to the left of my signature. Ray Hutto and Ralph Porter were also in our place of business at this time, and at Mr. Loyd's request, they signed their respective names as witnesses to the will.' "[1]

Based upon the foregoing facts the trial court ruled that the will was valid. We agree with the trial court.

There is a distinct conflict among the authorities as to whether a signature in an attestation clause qualifies as a signature "at the end." See 44 A.L.R. 3d 701 § 14. Appellants rely upon *In re Estate of George H. Glaze, Deceased,* 413 Pa. 91, 196 A. 2d 297 (1964) and *Sears* v. *Sears,* 77 Ohio St. 104, 82 N.E. 1067 (1907), to support their contention that a signature in the attestation clause does not constitute a signature "at the end" of the instrument. However, we believe the better rule to be that where the testator places his signature in the attestation clause because he believes that it belongs there and with the requisite testamentary intent, it constitutes a sufficient compliance with the statute requiring the signature to be "at the end." See *In re Morey's Estate,* 75 Cal. App. 2d 628, 171 P. 2d 131 (1946) and *In re Schiele's Estate,* 51 S. 2d 287 (Fla. 1951).

Affirmed.

HARRIS, C.J., not participating.

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[1] Attached hereto as an appendix is a photostatic copy of the will.

[redacted]

APPENDIX

77—SHORT WILL — The B[redacted]an General Supply House, Lincoln, Nebr.

Last Will and Testament

FILED
4-5-78
L. J. MERRITT
COUNTY PROBATE CLERK
PAULKNER COUNTY

Johnnie D Loyd

I, Johnnie D. Loyd, of Lamar[redacted] in the County of Faulkner, State of Ark., KD, being of sound mind and memory and considering the uncertainty of this frail and transitory life, do therefore make, ordain, publish and declare this to be my last WILL AND TESTAMENT.

FIRST, I order and direct that my Executor hereinafter named, pay all my just debts and funeral expenses as soon after my decease as conveniently may be.

SECOND, After the payment of such funeral expenses and debts, I give, devise, and bequeath all my personal and realestate property — and all my money, cash on hand or in the bank, to Ralph Robert Loyd.

LASTLY, I make, constitute and appoint Ralph Robert Loyd to be Executor of this, my last will and Testament, hereby revoking all former wills by me made (none.)

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal the 20th day of April, 1976, in the year of our Lord, one thousand nine hundred 76

My Com Exp 12-1-1976 Marie Hatter, Notary Seal

This instrument was on the day of the date thereof, signed, published and declared by the said testator Johnnie D Loyd to be his last Will and Testament in the presence of us who at his request have subscribed our names thereto as witnesses in his presence and in the presence of each other and who do hereby certify that at the time of the execution of said will, the testator was of sound and disposing mind and memory and understanding and under no restraint.

Ralph Porter

Ralph Porter

John O. MAY *v.* Norma B. MAY

79-242 589 S.W. 2d 8

Opinion delivered October 29, 1979
[Rehearing denied December 3, 1979.]

Warren H. Webster, for appellant.

Dodds, Kidd & Ryan, by: *Judson C. Kidd,* for appellee.

FRANK HOLT, Justice. In *May* v. *May,* an unpublished per curiam order dated October 24, 1977, we affirmed appellant's divorce decree because of his failure to comply with Supreme Court Rule 9(d), Ark. Stat. Ann. Vol. 3A (Repl. 1979). Thereupon, appellant filed a motion asking the chancellor to set aside the decree asserting that the property settlement contained therein was not reached by agreement of the parties but was ordered by the court in violation of Ark. Stat. Ann. § 34-1215 (Supp. 1979). The chancellor correctly concluded that all issues presented in the motion to set aside the decree were *res judicata* due to our prior affirmance of the decree. It is well established that a judgment on first appeal is conclusive as to every question of law or fact that was actually decided, or could have been decided, at that time. *Gibson* v. *Gibson,* 266 Ark. 622, 589 S.W. 2d 1 (1979); and *Hollingsworth* v. *McAndrew,* 79 Ark. 185, 95 S.W. 485 (1906).

Further, as noted by the appellee, appellant failed to abstract the allegedly defective divorce decree. Again, the appellant has failed to comply with Rule 9(d).

Affirmed.

HARRIS, C.J., and BYRD and PURTLE, JJ., not participating.

Sharon Louise MORGAN *v.* STATE of Arkansas

CR 78-184 588 S.W. 2d 431

Opinion delivered October 29, 1979

McArthur & Lassiter, P.A., by: *William C. McArthur,* for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Sharon Morgan's three years suspended sentence was revoked by the Circuit Court of Pulaski County. She appeals alleging that the court's finding that she inexcusably failed to comply with the conditions of her probation was clearly against the preponderance of the evidence.

We disagree and affirm the judgment of the trial court.

Sharon Morgan was charged with forgery in March of 1976. Her case was passed several times at the request of her attorney. In December of 1976, when she failed to appear in court, the court ordered a bond forfeiture and an alias warrant to be issued against her. Apparently nothing was done on this warrant because the case was passed several more times. Then in November, 1977, she pled guilty. She was sentenced to three years imprisonment but that sentence was suspended. However, she was placed on probation for one year. The conditions of that probation, which was not disputed, were generally that she was not to leave the area of Little Rock without permission from her probation officer; that she was to notify the probation officer of any change of address; that she should promptly report each month to her probation officer; and, that she should advise her probation officer if she had any unavoidable reason for being unable to report.

In January she requested and received permission from the court to go to California where she thought she had a job. However, it was provided that she report monthly, by letter, to her probation officer. She never went to California; instead she went to Missouri. She made no report for eight months. In September, 1978, she called her probation officer and said she was in Missouri. The officer testified it sounded like a local call. A petition to revoke her sentence was filed and a hearing was held on that petition.

Morgan offered no excuse whatsoever for her failure to report. She admitted that, because the job opportunity failed, she did not go to California; instead she said she went to Missouri, where she obtained employment.

Based on this information, the court revoked the sentence. We are asked to find that the court's judgment was clearly against the preponderance of the evidence.

The applicable Arkansas law is found in Ark. Stat. Ann. § 41-1208(4) (Repl. 1977).

If the court finds by a preponderance of the evidence

> that the defendant has inexcusably failed to comply with a condition of his suspension or probation, it may revoke the suspension or probation at any time prior to the expiration of the period of suspension or probation.

There is no right to probation, rather it is a matter of judicial grace. *People* v. *Williams,* 93 Cal. App. 2d 777, 209 P. 2d 949 (1949). However, when a probationary sentence is revoked, due process requires following a proceeding designed to insure fair treatment of a defendant. *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973). In *Cogburn* v. *State,* 264 Ark. 183, 569 S.W. 2d 658 (1978), we reversed a revocation decision after reviewing in detail the conditions of the probation and the efforts that Cogburn made to comply with that probation. This case is in no way like that of *Cogburn.*

The condition of probation in this case, requiring Morgan to report monthly to her probation officer, was reasonable. Probation by its very nature implies some sort of supervision. If there is to be no supervision, then there is no sense in having probation. In this case, because Morgan offered no excuse whatsoever for her failure to contact her probation officer, we cannot say the judge's findings are clearly against the preponderance of the evidence.

It is argued that the trial court had an inflexible policy of revoking all suspended sentences for similar violations of parole. Certainly, an inflexible policy is not desirable. However, we cannot say the court was wrong in this case simply because it had such a policy. Actually, the only evidence in the record is the testimony of Morgan. There was no corroboration offered as to her whereabouts, her employment or her conduct during this period of time.

Affirmed.

PURTLE, J. dissents.

NORTHWESTERN NATIONAL INSURANCE CO.
(of Milwaukee, Wisconsin) *v.* Nan B. SULCER
and The Estate of Clyde SULCER, deceased

79-197 588 S.W. 2d 442

Opinion delivered October 29, 1979
(Division II)

Rieves, Rieves & Shelton, by: *Elton A. Rieves, III,* for appellant.

No brief for appellee.

JOHN I. PURTLE, Justice. Northwestern National Insur-

ance Company, as surety for the widow who was the administratrix of her husband's estate, paid a claim on her bond because of misuse of the estate funds. The insurance company, after paying the estate, obtained judgment against the administratrix and sought to execute against her dower rights. We upheld the trial court's decision to permit Northwestern to levy upon her dower rights, but declined to advise on what the results would be so far as the general creditors were concerned. *Sulcer* v. *Northwestern National Ins. Co.*, 263 Ark. 583, 566 S.W. 2d 397 (1978). Subsequently, the trial court assigned dower rights to the widow and granted Northwestern's petition to execute upon the dower rights. However, the trial court held that the execution by petitioner on the dower rights broke the barrier of homestead exemption and the entire interest in the homestead was subject to execution by the other creditors. The house and lot were sold and the proceeds are being held pending this appeal.

On appeal, Northwestern argues the homestead exemption runs only in its favor and does not inure to the benefit of the creditors of decedent's estate. We agree with appellant's contention.

The facts are not in dispute. The widow misused the funds from her husband's estate and the insurance company paid the estate $25,333.33 and obtained a judgment in this amount against the widow. When the surety attempted to execute against the widow's interest, she claimed the homestead exemption. The trial court held the widow's interest was subject to levy by the surety. On appeal we affirmed the trial court. *Sulcer* v. *Northwestern,* supra. Thereafter, the trial court assigned dower to the widow and ordered the entire property sold with the interest above the dower to be applied to the claims of the creditors of the estate. The court reasoned once the homestead barrier was removed in favor of Northwestern, it was removed for all purposes. The house was ordered sold with the proceeds to be distributed to costs, to Northwestern for the dower interest and the balance to estate's general creditors. The court synchronized the probate and chancery powers and held a joint sale. The proceeds ($12,000) of the sale are being held pending this appeal.

We held in the first appeal that the homestead exemption granted in the Arkansas Constitution, Article 9, Section 6, did not preclude Northwestern from levying execution on the widow's dower interest. This same provision specifically excludes from homestead exemption execution for purchase money, laborer's and mechanic's liens, taxes and claims against executors, administrators, guardians and receivers. The foregoing claims are in fact not exempt as homestead. However, general creditors of the estate are not authorized to execute against the estate. As executrix, the widow was not entitled to claim the homestead exemption against Northwestern.

Article 9, Section 6, allows the widow to have her dower interest for life in the home place. Additionally, Ark. Stat. Ann. § 62-2702 (Repl. 1971) exempts the homestead of a widow or minor children from sale by a personal representative for payments of the debts of the decedent. Therefore, there is a double exemption protecting the widow's interest from sale by the general creditors. We fail to see any reason why the general creditors of the estate should be allowed to have the homestead sold simply because one authorized to claim against the homestead has done so. They are not authorized to levy execution because they are prohibited by the Constitution and the law.

When Northwestern paid the estate the monies which the widow took from the estate, it became the owner of that much of her interest. The sale as set up by the probate and chancery court did not produce enough money to satisfy the surety's judgment. The effect of the sale as ordered would be an around about way of taking the homestead of the widow in direct controvention of express constitutional and statutory provisions. If the widow's defalcation erased the exemption barrier, the general creditors would benefit at the expense of the surety who has already made the general creditors whole for the misapplication of the funds by the executrix. We do not believe this is the intent of the exemption provisions of the law.

It has been said by one text writer that the homestead is as completely beyond the reach of ordinary creditors as if it

were on another planet. We have stated that the homestead exemption has no creditors except those mentioned in the Constitution. *Bank of Dover* v. *Jones,* 192 Ark. 740, 95 S.W. 2d 92 (1936); *Stanley* v. *Snyder,* 43 Ark. 429 (1884). The only way the exemption may be removed is by waiver or abandonment. Neither have occurred here except insofar as the claim of Northwestern is concerned.

Reversed and remanded.

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

Anne Kay VON LUCE *v.* Robert M. RANKIN, Commissioner of Mental Health Services, Arkansas State Hospital

79-228 588 S.W. 2d 445

Opinion delivered October 29, 1979
(In Banc)

Griffin J. Stockley and *James R. Cromwell* of *Central Arkansas Legal Services, Inc.*, for appellant.

Steve Clark, Atty. Gen., by: *Paul N. Means,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. This is an appeal from the denial of a Petition for Writ of Habeas Corpus in the Pulaski County Chancery Court. Appellant was admitted to the state hospital as a voluntary patient by her guardian and subsequently sought release through a petition for habeas corpus. The chancery court refused to grant the petition because the guardian was not a party to the proceeding.

The question to be determined is whether a guardian may voluntarily confine her ward as a patient in the state hospital against the wishes of the ward and without the ward's consent or a probate court hearing. We do not believe a voluntary admission may be converted to an involuntary commitment without due process of law. Therefore, the writ should have been granted.

On May 10, 1979, Ute Patterson, the daughter of Anne Kay Von Luce, petitioned the Washington Probate Court for appointment of herself as guardian of her mother. On the same date an order appointing the daughter as temporary guardian was issued by the court. The order simply stated that petitioner was an "incompetent." There was an unverified letter from a doctor to the effect that in his opinion Mrs. Von Luce was an "incompetent." The court issued a summons on the same day but it was not served on Mrs. Von Luce until 5 days later. The summons contained the usual 20-day return provisions. However, 4 days after the order appointing the guardian she voluntarily admitted her mother into the state hospital in Little Rock. On June 6, 1979, the ward filed a petition in the Pulaski County Chancery Court seeking a writ of habeas corpus. A hearing was held on the petition the following day and the court, although finding the ward illegally detained, refused to grant the petition because the guardian was not a party to the action. At this hearing the only authorization for holding the incompetent as a patient was an application for voluntary commitment which had been executed by the guardian on behalf of the ward. On the face of this application were the following words:

> NOTE: Arkansas statutes provide that a person may not be held on a voluntary statement against his/her will unless considered homicidal, suicidal, or gravely disabled as defined by law.

There was no order of commitment or any evidence or testimony indicating the petitioner had received notification or been granted a hearing. The order from the Washington Probate Court appointing the guardian was introduced into evidence along with the unverified statement of the doctor which had been presented to the Washington Probate Court. The state hospital did not offer any testimony or other evidence indicating a need for confinement.

On June 20, 1979, this Court granted petitioner's release from the state hospital on application for temporary relief. The ward was released to her guardian and subsequently returned to her home in Washington County. So far as we know, the temporary order of guardianship has expired.

Ordinarily, we would consider this question moot; however, due to the likelihood of such incidents being repeated and the unlikelihood that a decision can be reached on appeal before a temporary guardianship is terminated, we treat the question as one to be considered on the merits as they existed at the time the petition for habeas corpus was heard.

Even if a guardian may voluntarily admit a ward without a hearing or order, when the ward expresses a desire to leave the hospital it is a different situation. If the guardian were permitted to refuse the ward's wishes, then the voluntary admission would become an involuntary one as it relates to the ward. To allow such confinement would contravene the statutory and constitutional safeguards afforded to the mentally ill. The writ of habeas corpus is the primary means by which a detainee may test the legal authority of his custodian. Appellee frankly admits the Pulaski County Chancery Court is the proper forum for such proceedings. Also, it is tacitly admitted the probate order appointing the guardian was of doubtful validity. Since the order has expired, we will not examine that proceeding.

The fact that the custodian held authority to release petitioner was of little comfort in view of the fact that she was held until this Court ordered her release on June 20, 1979. 1979 Ark. Acts No. 817 provide that nothing in the act shall in any way restrict the rights of any person to attempt to secure their release by habeas corpus as provided by the current Arkansas law. The habeas corpus petition has been used to obtain the release of a confinee in the state hospital. *Rowland* v. *Rogers,* 199 Ark. 1041, 137 S.W. 2d 246 (1940). Ark. Stat. Ann. § 34-1733 (Repl. 1962) states:

> If it appear that the prisoner is in custody by virtue of process from any court legally constituted, or issued by any officer in the exercise of judicial proceedings before him, such prisoner can only be discharged in one (1) of the following cases:
>
> First. Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person.

Second. Where, though the original imprisonment was lawful, yet, by some act, omission or event which has taken place afterward, the party has become entitled to his discharge.

Third. Where the process is defective in some matter or substance required by law, rendering such process void.

* * *

The state hospital held no order of any kind which authorized it to detain the petitioner. The only authorization at all was the application completed by the guardian. By no stretch of the imagination can it be said that this application was authority to hold the petitioner against her will. The Arkansas General Assembly treated this subject extensively in Act 817 of 1979. None of the provisions of this Act were followed. Section 3 (A)(B) of Act 817 states:

* * *

(A) Any person who believes himself to be suffering from a mental illness, disease or disorder may make application in writing himself or by his guardian . . .

(B) If at any time the patient who has voluntarily admitted himself or herself to the hospital makes a request to leave, and the Commissioner or his designee or the official in charge of the hospital or his designee determines that the patient is at that time homicidal, suicidal or gravely disabled, then the patient shall be considered to be held involuntarily and the commitment procedures set forth herein shall apply.

* * *

In an involuntary case a hearing must be held within 7 days. The only hearing was on the petitioner's request for habeas corpus.

Mental illness alone is not justification for a guardian or

a state to lock a person up. There must be a meaningful hearing in accordance with due process before such action is authorized. *Wessel* v. *Pryor,* 461 F. Supp. 1144 (Ed. Ark. 1978); *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975). It was stated on the face of the application for voluntary admission that a patient could not be held against his wishes unless the patient was considered homicidal, suicidal, or gravely disabled. In this case there has simply been no attempt on the part of anyone to comply with the provisions of any Arkansas law as it relates to involuntary commitment. Not even a mentally ill person may be confined against his will unless he is afforded due process of law. Act 817 provides that before a person may be committed for 30 days or more there must be a hearing at which clear and convincing evidence is presented to the effect that the ward or detainee is homicidal, suicidal, or gravely disabled. We are not unaware of the problem of society and the mentally ill. The welfare of the people and the mental patient must both be given careful attention. The best interest of both must be weighed and taken into consideration when the question of confinement is at issue. If we were not to require at least substantial compliance with the law to fully protect the rights of incompetents it would be possible for an unscrupulous person to have himself appointed as guardian and then lock his ward in a mental institution and proceed to waste the ward's estate. If a state and the judiciary are not vigilant in the protection of the rights of incompetents it is likely to lead to the abuse of the person and estate of such incompetents. The mentally ill are unable to think and care for themselves in a normal manner and of necessity depend upon the state and the courts for protection. Although due process safeguards do not extend to the voluntary committee they most definitely extend to involuntary detainees. When a voluntary patient seeks relief he must be released or henceforth treated as an involuntary detainee in which case the due process safeguards most definitely apply. We have no choice on the record before us other than to treat petitioner as an involuntary detainee and must hold in this case that the ward was not afforded either procedural or substantive due process. Therefore, the court should have granted the petition for habeas corpus.

Reversed and remanded.

HARRIS, C.J. not participating.

HICKMAN, J. concurs.

DARRELL HICKMAN, Justice, concurring. The majority seem to be saying Section 3(A) (B) of Act 817 of 1979 could be interpreted to mean that a ward can be committed to the Arkansas State Hospital without a hearing.

Quite often a ward has a guardian because of minority. A guardian can be appointed for someone with a physical disability. In such a case it would not seem proper for a guardian to have someone "voluntarily" committed to the Arkansas State Hospital without any notice, without a hearing and without an opportunity to protest.

Ark. Stat. Ann. § 57-625(b) reads:

> b. CARE, TREATMENT AND CONFINEMENT. If the ward be incompetent and for reasons other than minority and shall not have been committed to the State Hospital as otherwise provided by law, the court may, upon petition of the guardian of the person or other interested person, after such notice as the court shall direct, including notice to the guardian of the person if he is not the petitioner, authorize or direct the guardian of the person to take appropriate action for the commitment of the ward to the State Hospital or, while retaining control over and responsibility for the care of the person of the ward, to place the ward in some other suitable institution for treatment, care or safekeeping. Upon petition of the guardian or other interested person, after a hearing of which the guardian of the person and such other persons as the court may direct shall have notice, the court may, for good cause shown, modify, amend or revoke such order. If the condition of the ward be such as to endanger the person or property of himself or others, the guardian may, in an emergency, temporarily confine the ward in some suitable place or deliver him into the custody of the sheriff for safekeeping in the county jail until such time as the court may hear and act upon a petition, which shall be promptly

filed by the guardian, with reference to the commitment of the ward to the State Hospital or for other appropriate provision for his treatment, care and safekeeping.

Act 817 does not expressly repeal Ark. Stat. Ann. § 57-625 and I believe that when the two acts are read together, weight must be given to Ark. Stat. Ann. § 57-625 as controlling in a situation where there is a commitment to the Arkansas State Hospital.

If the majority's position is that a "voluntary" commitment is with the consent of the ward, this ignores the fact that a ward has a guardian because the ward is incompetent, and his power to consent has been removed.

It is my judgment any commitment without a hearing violates due process of law.

I agree with the result reached by the majority, but I respectfully concur with the majority's opinion.

Harold Webster DUNCAN *v.* STATE of Arkansas

CR 79-122 588 S.W. 2d 432

Opinion delivered October 29, 1979
(In Banc)

John W. Achor, Public Defender, by: *William H. Patterson, Jr.,* Chief Deputy Public Defender, for appellant.

Steve Clark, by: *Joseph H. Purvis,* Dep. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant was convicted of four separate counts of aggravated robbery. Since he had three prior felony convictions, he was sentenced to four life sentences to run consecutively.

On appeal it is urged that the trial court erred in refusing to direct a verdict on two counts and that the four consecutive life sentences were an abuse of discretion and amounted to cruel and unusual punishment.

The sentences were individually within the limits set by Ark. Stat. Ann. § 41-1001 (Repl. 1977) and within the trial court's discretion as set out in Ark. Stat. Ann. § 41-903 (Repl. 1977). Also, the sentencing was in accordance with Ark. Stat. Ann. § 51-1005 (Repl. 1977). Therefore, the sentences were not invalid. We have many times held that so long as a sentence is within the statutory limits, it is not ordinarily cruel and unusual. In our opinion the trial court did not commit error as alleged and we must affirm.

Appellant and a companion entered Brannen's Fish Market in Little Rock on March 6, 1978, and pulled a handgun on one of the four persons present. They proceeded to take the money from the cash registers as well as from the individuals. It is true appellant pointed the gun only at the first victim and then became a sort of gentleman robber by standing back with the gun partially concealed under his arm while his confederate proceeded to round up the cash wherever he could find it. The four individuals were herded

into another room where they stayed a few minutes. Upon their return to the original area, it was discovered the two ladies' purses had been pilfered and money and other items were missing, as were the gentlemen robbers. Before having the victims leave the cafeteria area, the intruders had relieved the two men of their billfolds. The facts are hardly in dispute other than all of the victims described appellant in slightly different terms and perhaps did not agree precisely on the scenario as it progressed. He was positively identified by at least three of the victims.

Appellant contends that due to the fact that he was courteous and did not point his pistol at the ladies, there was no aggravated robbery. Ark. Stat. Ann. § 41-2102 (Repl. 1977) states:

> (1) A person commits aggravated robbery if he commits robbery as defined in Section 2103 (§ 41-2103) and he:
>
> > (a) is armed with a deadly weapon, or represents by word or conduct that he is so armed; or

Therefore, there is no validity to this contention. Also, see *Rust* v. *State,* 263 Ark. 350, 565 S.W. 2d 19 (1978). Circumstantial evidence is sufficient to support a conviction if it excludes every other reasonable hypothesis. *Henley* v. *State,* 255 Ark. 863, 503 S.W. 2d 478 (1974). We think the evidence here fits that category.

Four life sentences are not cruel and unusual if two death sentences are not, and we have so held. *Clark* v. *State,* 264 Ark. 630, 573 S.W. 2d 622 (1978). Appellant's contentions are all fully answered in *Hinton* v. *State,* 260 Ark. 42, 537 S.W. 2d 800 (1965), where we held against all points argued here.

Affirmed.

HARRIS, C.J. not participating.

HOUSTON CONTRACTING COMPANY and
CONTINENTAL INSURANCE COMPANY
v. Jessie T. YOUNG

79-297 589 S.W. 2d 9

October 29, 1979

Jacob Sharp, Jr., for petitioners.

Norwood Phillips, for respondent.

JOHN A. FOGLEMAN, Justice. The petition of Houston Contracting Company and Continental Insurance Company for review of the decision of the Court of Appeals rendered on September 19, 1979, is granted pursuant to Rule 29, § 6 (a) and (b) and the mandate to the trial court issued on that decision is recalled.

The question involved is the application of the statute of limitations provided by Ark. Stat. Ann. § 81-1318 (Repl. 1976), a section of the Worker's Compensation Law, when compensation for disability on account of an injury has been paid to the claimant under the laws of a sister state. It appears that the case is one of first impression in Arkansas and that there is a split of the authorities on the question in other jurisdictions. The question involves the interpretation and construction of an act of the General Assembly. The appeal was originally filed and docketed in this court as No. 79-221, under the style of Houston Contracting Company et al v. Jessie T. Young, but was transferred to the Court of Appeals, along with numerous other cases, by Per Curiam order of this court on July 9, 1979, prior to the filing of any briefs in the case. The appeal to this court was taken from the Circuit Court of Union County, which had affirmed the decision of the Workmen's Compensation Commission.

The case is both excepted from the jurisdiction of the Court of Appeals under Rule 29(1)(c) and involves an issue of significant public interest on a legal principle of major importance. Had a brief or jurisdictional statement revealing these facts been filed prior to the date of our order of transfer, the transfer should not have been made.

The respondent, Jessie T. Young, advances the argument that, since petitioner acquiesced in the transfer by failing to object, it accepted the Court of Appeals as the appropriate forum for its appeal, and the petition for review should be denied. Although it is clear that any party to an appeal may move for a transfer of an appeal by this court under Rule 29(3) or for the certification of any appeal to this court by the Court of Appeals under Rule 29(4), the failure to do so is not a waiver of, or bar to, review under Rule 29(6) by this court. The reason is that the Court of Appeals may, and should, upon its own motion, certify to this court any appeal it finds to be excepted from its jurisdiction by Rule 29(1) or to involve an issue of significant public interest or a legal principle of major importance. If, however, the case had been appealed to the Court of Appeals from the Workmen's Compensation Commission under Act 252 or 253 of 1979 [Ark. Stat. Ann. § 81-1323 (b) (Supp. 1979)], the case could

not have been certified or transferred to this court prior to a decision having been made by the Court of Appeals. See *Ward Manufacturing Company* v. *Fowler,* 261 Ark. 100, 547 S.W. 2d 394.

HARRIS, C.J., not participating.

Charles Henry WILLIAMSON and
Jerry MORRIS *v.* STATE of Arkansas

CR 79-139 590 S.W. 2d 847

Opinion delivered November 5, 1979
(In Banc)

[Rehearing denied December 10, 1979.]

William C. McArthur and *C. E. Blackburn,* for appellants.

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

George Rose Smith, Justice. The two defendants, Charles Henry Williamson and Jerry Morris, were charged with criminal conspiracy to commit capital felony murder. The State's proof was that the defendants employed Tommy Lee Baker (a state police officer acting undercover) to murder Jimmy Dale Haney and paid Baker $1,000 in part payment for the contemplated murder. The court, sitting without a jury, found both defendants guilty and imposed sentences of life imprisonment. Five points for reversal are argued, but none has merit.

One of the defendants, Williamson, and the intended victim, Haney, were business associates. They had jointly insured their lives for $50,000, payable to either upon the death of the other. Apparently the other defendant, Morris, accompanied by Williamson, first made an attempt to kill Haney at a motel on September 10, 1977, but that attempt failed.

On September 19 Williamson arranged a meeting with J.O. Stewart, who had actually been working as a confidential informant for the Secret Service in counterfeit money cases. At that meeting, on September 20, Williamson told Stewart that he wanted to have a man killed and asked if Stewart knew anyone who could do it. Stewart said he

thought he could get it done and would undertake to make arrangements.

Stewart reported the matter to the Secret Service. A plan was adopted by which Stewart was to introduce the two defendants to Officer Baker, who was to be presented as an out-of-state "hit man." Those four men accordingly met at a truck stop in Pulaski county on September 24 to arrange for the murder. Officer Baker was wearing a concealed transmitter, which transmitted the conversation to a nearby recording device manned by two other police officers. The conversation (if it took place) leaves no possible doubt about the defendants' guilt. The proposed murder of Haney in return for $2,000 was discussed in detail. Williamson and Baker arranged to meet again the next day. That conversation was also recorded. Williamson paid Baker $1,000 and also gave him a pistol, though it was left up to Baker whether he would use that particular weapon. Two days later the prosecuting attorney filed the present information charging the two defendants with a conspiracy to commit murder.

I. The State introduced the tapes of the two conversations and a typewritten transcription made from them. Officer Baker testified that on March 8, 1979 (two weeks before the trial), he had reviewed the transcript while he listened to the tapes and that it was an accurate recording of the conversations, though he could not remember them word for word. That testimony established admissibility. *Webb* v. *State,* 253 Ark. 448, 486 S.W. 2d 684 (1972); Uniform Rules of Evidence, Rule 901, Ark. Stat. Ann. § 28-1001 (Repl. 1979). There is actually no claim that the transcript is inaccurate. Nor is there any claim of surprise, it being indicated that the defense had been given an opportunity to copy the tapes before the trial.

It is argued, however, that a proper foundation for the introduction of the tapes was not laid, because the State did not call as witnesses the two officers who manned the recording device. In the first place, it is not shown what helpful testimony the officers could have supplied, because there is no indication that they could have known at the time whether or not the recording device was working. Second, Uniform

Rule 901, *supra,* provides that the requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Analogously, we held before the adoption of the Uniform Rules that a photograph might be authenticated by a witness who neither took the picture nor was present when it was taken. *Wheeler* v. *Delco Ben,* 237 Ark. 55, 371 S.W. 2d 130 (1963). Here Officer Baker's testimony was sufficient authentication, especially as there was no proof questioning the authenticity of the tapes.

II. It is argued that the gun which Williamson gave to Baker was not relevant and should not have been admitted in evidence. Suffice it to say that the production of the gun tended to corroborate Baker's testimony.

III. Haney testified on direct examination that he and Williamson had taken out the $50,000 joint life insurance policy. On cross examination he said that the insurance agent, John Paul, had brought in the policy (apparently the application) and that Haney had signed it. He admitted, however, that he had never seen the policy and did not know whether it was in force at the time of the offense charged. Defense counsel then moved to strike "the direct testimony of Mr. Haney." It is now argued that the motion should have been granted.

There are two answers to this argument. One, the motion to strike all the witness's direct testimony was too broad, because much of it was about other matters and was admissible. *Martin* v. *State,* 236 Ark. 409, 366 S.W. 2d 281 (1963). Second, the State was entitled to offer proof of motive, even though that proof is not essential in a prosecution for murder. *Sneed* v. *State,* 159 Ark. 65, 255 S.W. 895 (1923). The policy itself did not have to be produced, because it was not closely related to a controlling issue. Uniform Rules of Evidence, *supra,* Rule 1004 (4). If the parties had applied for the policy and thought it was in force, those facts were admissible to show motive, their weight being for the trial judge to decide.

IV. It is argued that the court should not have permit-

ted the State to prove that Morris apparently tried to kill Haney about two weeks before Williamson first sought to engage a professional killer. Inasmuch as Haney had already testified about the insurance coverage, the earlier attempt was admissible to show motive and ill will. Uniform Rule 404 (b); *Freeman* v. *State,* 238 Ark. 804, 385 S.W. 2d 156 (1964). Such an attempt only 14 days before the crime was certainly not too remote to be relevant.

V. Finally, Haney testified on direct examination about Morris's first attempt on Haney's life, though Haney was not then aware of Williamson's complicity. On cross examination Haney admitted that it had been his expressed intention to find Morris and settle the matter himself rather than to appeal to the police for assistance. It is argued that the trial judge should have acquitted both defendants, on the theory that they acted under duress and were justified in plotting to murder Haney. The argument does not merit discussion.

We have examined the record for other possibly prejudicial errors, but find none.

Affirmed.

HARRIS, C.J., not participating.

Sherman GRANT *v.* STATE of Arkansas

CR 79-156 589 S.W. 2d 11

Opinion delivered November 5, 1979
(In Banc)

John W. Achor, Public Defender, by: *James Phillips,* Deputy Public Defender, for appellant.

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

JOHN A. FOGLEMAN, Justice. Sherman Grant was found guilty of murder in the first degree and sentenced to a term of 40 years' imprisonment. His appeal raises only one ground for reversal, even though it is stated in two points. Basically, his contention is that the trial court erred in denying his motion to suppress incriminating evidence discovered and seized by a police officer in a bedroom he occupied in the home of his foster parents, Rufus Cyrus, Sr. and Dorothy Cyrus. The ground on which the motion was based was that the warrantless search of the room was unreasonable because the written consent given by Rufus Cyrus, Sr., was invalid for two reasons — first, because he had no authority to consent to a search of Grant's room, and second, because his consent was not voluntarily given. Since we find no basis for overturning the finding of the trial court denying the motion to suppress, we affirm.

Detective David Garner, as a member of the homicide and robbery division of the Little Rock Police Department, was assigned on February 13, 1978, to investigate a homicide at 7408 Preston Drive in Southwest Little Rock. He arrived at the scene at 12:40 a.m. and obtained information that caused him to go to the Cyrus residence at 2201 South Battery Street in Little Rock. When he arrived there he found Detective Quattlebaum and Patrol Officers Middleton and Williams. Garner said that two of them were on the second floor of the residence where Grant's room was located, standing with Grant, awaiting Garner's arrival. They conducted no search. On the basis of the information he had obtained, Garner took Grant into custody and conveyed him to the Little Rock Police Department. The other officers remained at the Cyrus residence.

Because he wanted to obtain the advice of the prosecuting attorney as to further procedure, Garner made no attempt to conduct a search at the Cyrus residence. While at

police headquarters, he called the prosecuting attorney and asked whether he should try to get a search warrant or to obtain consent of the father to the search. Based upon the advice he was given, Garner returned to the Cyrus dwelling without attempting to obtain a search warrant. The search was conducted after Cyrus had executed a form bearing the title, "Consent to Search," by which he gave his consent to the search.

When completed, the document bore the signature of Rufus Cyrus, Sr., and Detective D. Garner and Officer S.M. Williams signed their names as witnesses. Otherwise, the document read as follows:

2-13-78
(Date)

2201 S. BATTERY
(Location)

> I, *RUFUS CYRUS SR.*, having been informed of my constitutional right not to have a search made of the premises hereinafter mentioned without a search warrant and of my right to refuse to consent to such a search, hereby authorize officer DET. D. GARNER, ____ , *OFFICER S. WILLIAMS* of the Little Rock Police Department to conduct a complete search of my premises/auto located at *2201 S. BATTERY.* These Officers are authorized by me to take from my premises/auto any letters, papers, materials or other property which they may desire.
>
> This written permission is being given by me to the above-named officers voluntarily and without threats or promises of any kind.

(The portions which are capitalized were handwritten into blanks in the form.)

After this form was executed, the officers went into the room which had been occupied by Grant and found a .45 caliber Colt automatic pistol, two clips of .45 caliber bullets,

one containing five rounds and the other seven, 31 rounds of .45 caliber ammunition in a box and eight rounds of .32 caliber ammunition.

We do not agree with appellant's argument that only he could give consent to a search of the room. We held in *Asher* v. *City of Little Rock,* 248 Ark. 96, 449 S. W. 2d 933 that one having joint possession or equal authority with another over the premises may authorize a warrantless search. The only argument advanced by appellant is that *Asher* is distinguishable because, even though Grant paid Cyrus no rent for the room, he paid board and everything in the room belonged to Grant. We do not think these distinctions are sufficient to show that the consent given by Cyrus was invalid. Under Rule 11.2 (c), Arkansas Rules of Criminal Procedure, consent justifying a search and seizure, in the case of a search of premises, may be given by a person who, by ownership or otherwise, is apparently entitled to give or withhold consent. Garner testified that the two-story building appeared to be a one-family house and that he was told by Cyrus that it was Cyrus's house. Officer Susan Williams testified that Garner was told that Grant was the foster son of Cyrus by Cyrus himself. Cyrus testified that the house was his. He said that Grant had lived with him since Grant was five years old, except for a one-year period during which he was employed by United Parcels. Mrs. Cyrus also testified that she washed Grant's clothes and sometimes put them in the dresser drawer in his room.

The search based on a voluntary consent by Cyrus would be valid under Rule 11.2, which validates consent by any person who, based upon circumstances as they appear to the officer conducting the search, is apparently entitled to give or withhold consent. Although this rule relieves the searching officer of any criminal or civil liability, it does not, standing alone, govern admissibility of things seized during the search. See Commentary to Article IV, Arkansas Rules of Criminal Procedure. The standards for suppression of evidence are set out in Rule 16.2. In Comment I to this rule, it is pointed out that a motion to suppress may be based upon the fact that consent was not given by any person authorized to give consent. The Limitation on Rule 11.2, however, does not mean that the appearance of authority to give consent is

not an important factor in determining validity of consent to search, if the searching officers could reasonably believe in good faith that the one giving consent had authority to do so. *United States* v. *Peterson,* 524 F. 2d 167 (4 Cir., 1975); cert. den. 423 U.S. 1088, 96 S. Ct. 881, 47 L. Ed. 2d 99; *United States* v. *Sells,* 496 F. 2d 912 (7 Cir., 1974).

The question here is whether the search was in violation of the Fourth Amendment to the United States Constitution. That amendment only prohibits, and the exclusionary rule only applies to, unreasonable searches. *Norris* v. *State,* 259 Ark. 755, 536 S.W. 2d 298.

We cannot find any basis for reversing the trial court's holding that the consent was authorized. We held in *King* v. *State,* 262 Ark. 342, 557 S.W. 2d 386, that the mother-in-law of an accused had the authority, as owner and co-occupant of the premises, to consent to a warrantless search of her premises. In *Robinson* v. *State,* 256 Ark. 675, 509 S.W. 2d 808, we quoted *Asher* to the effect that there can be no doubt that an occupant who has a proprietary interest in a building can consent to entry by police officers, a search of the premises and seizure of evidentiary material found there. See also, *Giles* v. *State,* 261 Ark. 413, 549 S.W. 2d 479, cert. den. 434 U.S. 894, 98 S. Ct. 272, 54 L. Ed. 2d 180.

The validity of the consent under the Fourth Amendment standards, however, cannot rest upon the ownership of the premises. *United States* v. *Matlock,* 415 U.S. 164, 94 S. Ct. 988, 39 L.Ed. 2d 242 (1974). Instead, it rests upon mutual use of the property by persons generally having joint access or control for most purposes. The pertinent question is whether the one giving consent possesses common authority or other sufficient relationship to the premises.

There could be little doubt under our earlier decisions about the authority of Cyrus to consent to this search. See *Maxwell* v. *State,* 236 Ark. 694, 370 S.W. 2d 113. Our decisions were in accord with pre-*Matlock* decisions in other jurisdictions. A child, either dependent or emancipated (having reached his majority) does not have the same constitutional right or expectation of privacy in the family home that

he might have in a rented hotel room, and the rights of the father were held to be superior to those of the child, so that the father's consent to a search of the child's room was sufficient to render a warrantless search reasonable. *State* v. *Kinderman,* 271 Minn. 405, 136 N.W. 2d 577 (1965), cert. den. 384 U.S. 909, 86 S. Ct. 1349, 16 L.Ed. 2d 361. See also, *People* v. *Wood,* 31 N.Y. 2d 975, 293 N.E. 2d 559 (1973); *United States* v. *DiPrima,* 472 F. 2d 550 (1 Cir., 1973); *United States* v. *La Vallee,* 417 F. 2d 523 (2 Cir., 1969), cert. den. 397 U.S. 1002, 90 S. Ct. 1150, 25 L.Ed. 2d 413; *United States* v. *Stone,* 401 F. 2d 32 (7 Cir., 1968); *Vandenberg* v. *Superior Court,* 8 Cal. App. 3d 1048, 87 Cal. Rptr. 876 (1970).

In this family situation we think the constitutional standards are met, as they were in *King,* a post-*Matlock* case. Quite a number of jurisdictions have adhered to basic pre-*Matlock* principles in a family situation, such as we have here. In *People* v. *Johnson,* 23 Ill. App. 3d 886, 321 N.E. 2d 38 (1974), it was held that a mother's consent to a search of the room of a son, who was married but living in a house owned by his father and mother and not with his wife, was sufficient basis for a warrantless search. The consent of a mother who was head of the family to a search of her son's room in a family home jointly owned by the mother and son was held valid by *Matlock* standards in *State* v. *Forbes,* 310 So. 2d 569 (La., 1975).

Since it is clear that Cyrus, in addition to being the owner of the premises which constituted and were maintained as a single family dwelling, was the head of the single family household and had not surrendered or relinquished exclusive control of the Grant bedroom or the ability to designate what use could be made of it, by lease or otherwise, he maintained the right to access and control over the entire premises, and had authority to consent to a search of the bedroom. See *United States* v. *Peterson,* 524 F. 2d 167 (4 Cir., 1975), cert. den. 423 U.S. 1088, 96 S. Ct. 881, 47 L. Ed. 2d 99, in which the court found reinforcement in *Matlock.* See also, *Maxwell* v. *Stephens,* 348 F. 2d 325 (8 Cir., 1965), cert. den. 382 U.S. 944, 86 S. Ct. 387, 15 L. Ed. 2d 353, reh. den. 382 U.S. 1000, 86 S. Ct. 532, 15 L. Ed. 2d 490, which the

Fourth Circuit Court of Appeals found particularly persuasive in arriving at its result in *Peterson*. It is not contended that the fact that Grant was a foster son makes any difference — and it doesn't. In any such situation, the status of one in loco parentis and a natural parent should be the same.

Viewing the totality of the circumstances, we cannot say that the trial court erred in holding that Cyrus had authority to consent to the search.

This brings us to the question of voluntariness of the consent given. Appellant argues that, when we view the totality of the circumstances, we cannot find that the state has met its burden of proving by clear and positive testimony that consent had been freely and voluntarily given. The alleged circumstances are: (1) the lack of limitation in the form of the scope of the search as to time, area or items to be seized; (2) the failure of the consent form to advise Cyrus that his consent could be withdrawn or limited at any time prior to completion of the search; (3) several police officers were present, some of whom carried weapons; (4) the request for consent was made at 3:30 a.m., a short time after the foster son had been taken to jail after having been arrested without a warrant; (5) the police had drawn their weapons in making the arrest; (6) when arrested, appellant insisted that his room could not be searched without a warrant, and Detective Garner said that he would get a warrant; (7) Garner returned and produced a paper which at "the head of it said 'warrant,' " which he asked Mrs. Cyrus to sign; (8) after she and Cyrus both refused to sign this paper, Garner said, "Well, I'll get a warrant to search the whole house;" (9) the piece of paper exhibited was not the one Cyrus signed; (10) Cyrus was frightened when he signed the paper; (11) neither Mr. or Mrs. Cyrus had any comprehension of what they were signing; and (12) it would have been easy to have obtained a search warrant.

Even though, in reviewing a trial judge's ruling on a motion to suppress evidence, we make an independent determination based upon the totality of the circumstances, we will not set aside the trial judge's finding unless we find it to be clearly against the preponderance of the evidence. *State*

v. *Osborn,* 263 Ark. 554, 566 S.W. 2d 139; *Mc Guire* v. *State,* 265 Ark. 621, 580 S.W. 2d 198. In our determination, considerable weight is given to the findings of the trial judge in the resolution of evidentiary conflicts. *State* v. *Osborn,* supra. We must, of course, defer to the superior position of the trial judge to pass upon the credibility of witnesses. *State* v. *Osborn,* supra; *Whitmore* v. *State,* 265 Ark. 419, 565 S.W. 2d 133.

When we view the conflicts in the evidence and defer to the trial court's superior position in determining questions of credibility, many of the circumstances relied upon by appellant to constitute the totality must be disregarded. Detective Garner testified that none of the officers had drawn his weapon at the time of the arrest and that no guns were drawn at any time while Garner was at the Cyrus house. Officer Susan Williams did not believe that any of the officers who first entered the Cyrus residence drew a weapon at the time they entered and said that, to her knowledge, no weapons were drawn at any time. Rufus Cyrus testified that the officers did not have their guns drawn when they came in the house.

Detective Garner could not recall Grant's having told him that he would have to have a search warrant before he could search the house. Garner said that there had been no conversation whatsoever between him and Grant about a search of the house. Officer Susan Williams did not hear Grant make such a statement. Only the Cyruses testified that they heard this alleged statement. Grant did not testify at the suppression hearing.

Garner testified that he read the "Consent to Search" form that was introduced in evidence to Cyrus and that Cyrus signed that form. Officer Williams testified that she saw Cyrus sign the form that was introduced and that she signed it as a witness. The testimony of Cyrus and his wife that the paper Garner brought back with him after Grant's arrest was headed with the word "Warrant," and not "Consent to Search," and that the piece of paper Cyrus signed was shorter than that introduced, probably was not very convincing. Even though Cyrus insisted that he had signed a

piece of paper different from the form introduced, he admitted that he had given the officers permission to search Sherman's room. He admitted that much of the content of the paper he signed was the same as part of that of the form introduced. He also verified his signature on the form introduced, but claimed that the exhibit was a photostatic copy. The writing in the blanks and the signatures on the exhibit obviously are not photostatically copied.

There is no evidence of any general search of the entire house. Mrs. Cyrus said that the officers searched the kitchen and Grant's room. Garner testified that when he returned from the police department he told Cyrus that he wanted to search for a weapon. There is no indication that there was any search for anything except weapons and ammunition. Garner said that he read the form introduced to Cyrus and that Cyrus signed it. The testimony of Susan Williams corroborated that of Garner.

A statement that Cyrus could withdraw his consent or limit the search as provided by Rule 11.5, Arkansas Rules of Criminal Procedure, was certainly not required, and the failure of the officers to so advise Cyrus did not invalidate the consent. *Pace* v. *State,* 265 Ark. 712, 580 S.W. 2d 689. It would be illogical to require this advice, since there is no requirement that advice that consent may be withheld be given. *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

This case is quite unlike *Moore* v. *State,* 261 Ark. 274, 551 S.W. 2d 185. The consent by the parents in *Moore* was oral, if given at all. There two police cars containing four officers surrounded the parents' home. Two officers entered the front door. At least one of them had drawn a weapon at the time of entry. There was evidence that the conduct of the officers was different here. Not only was there evidence that none of the officers drew a weapon while in the Cyrus house or when entering it, Detective Garner had first called the Cyrus house by telephone and advised Cyrus that Grant had been involved in a shooting and that police officers would be coming to the house. When Garner said that he would like to talk to Grant, Cyrus invited Garner to "come on." When

the officers came, they asked permission to enter. The officers who first arrived waited until Garner came before undertaking any action, except to prevent Grant's escape. No attempt was made to conduct any search at the time of the arrest or even while Garner was away, although two officers remained at the Cyrus residence. Only after Garner's return was there any discussion of a search. It is interesting to note that State's Exhibit 9 was a sales receipt to Grant for the weapon involved which was found by Mrs. Cyrus in a wastebasket near Grant's bedroom door at 8:00 a.m., long after the police had left.

In attempting to show that Cyrus was frightened by the presence of the officers, Rufus Cyrus testified that six policemen and four detectives were present, and that six policemen were in uniform and two dressed in civilian clothes. Mrs. Cyrus said that at least five detectives came into the house. Their efforts to describe the numerous officers were not convincing. There is no reason to believe that more than the four officers mentioned by Garner and Williams were present. According to Mr. Cyrus, only Officer Williams and one other officer remained in the house during the period of approximately one hour while Garner was away. He said they simply sat down in his den and talked during this period. We cannot help recognizing that there are practical difficulties in obtaining a search warrant at 2:30 a.m.

When we give regard to the trial court's resolution of conflicts in the evidence and of credibility, appellant's chain of circumstances is broken into fragments. We cannot say that the holding of the trial court was clearly against the preponderance of the evidence, so the judgment is

Affirmed.

HARRIS, C.J., not participating.

ARKANSAS STATE MEDICAL BOARD *v.* Garnett LEONARD

79-233 590 S.W. 2d 849

Opinion delivered November 5, 1979
[Rehearing denied December 10, 1979.]

Eugene R. Warren and *Cearley, Gitchell, Bogard, Mitchell & Bryant,* for appellant.

McArthur & Lassiter, P.A., for appellee.

FRANK HOLT, Justice. Appellant charged appellee with

grossly negligent malpractice in prescribing Schedule II drugs in violation of Ark. Stat. Ann. § 72-613 (e) (g) (Supp. 1977) and with violation of both the State and Federal Controlled Substances Acts. Appellant issued an order directing appellee to appear before the Board (34 days later) and show cause why his license to practice medicine should not be revoked. On the date set for the hearing, appellee renewed his request for a continuance, insisting that the large number of prescriptions in question required additional time for trial preparation. Appellant granted appellee's request for a continuance on the condition that appellee refrain from prescribing Schedule II drugs pending the hearing. Appellant, however, refused appellee's request for a closed hearing unless compelled by the courts to do so. Thereupon, appellee filed a petition for a writ of certiorari in the circuit court seeking a reversal of appellant's order restricting his prescribing practices and refusal to hold a closed hearing. The court ruled that the Board had no authority to restrict appellee's prescribing practices prior to the hearing on the show cause order and that the appellee could continue his practice without restriction until a hearing was held before the Board. The court also ordered that the hearing be closed.

Appellant first contends that the lower court erred in holding the physician-patient privilege mandated a closed hearing. Ark. Stat. Ann. § 28-1001, Rule 503 (b) (c) (Repl. 1979), which codifies the privilege, provides:

> (b) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.
>
> (c) The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communica-

tion is presumed to have authority to claim the privilege but only on behalf of the patient.

The policy behind this privilege is to encourage patients to communicate openly with their physicians and to prevent physicians from revealing the infirmities of their patients. *Mutual Life Ins. Co.* v. *Owen,* 111 Ark. 554, 164 S.W. 720 (1914); 81 Am. Jur. 2d, Witnesses, § 231; 8 Wigmore, Evidence § 2380 (McNaughton rev. 1961).

In insisting on a closed hearing, appellee argues that he only seeks to preserve the confidentiality of his patient and that this can result only from a closed hearing. It is true that appellee, by oath and statute, must guard or preserve the confidentiality of his patient so long as the patient claims the privilege. However, any right appellee has to invoke the privilege exists whether the hearing is open or closed. Further, the assertion of the privilege in an open hearing may or may not necessitate closing the hearing while certain matters are discussed. As appellant correctly observes, there is "but slight connection between the patient-physician privilege rule and the question of an open or closed hearing." In our view, Rule 503 (b) (c) does not, contrary to appellee's assertion, mandate that a hearing be initially closed. Consequently, the court erred in holding that the mere existence of the privilege mandated a closed hearing. As pointed out by the appellee, the applicability of the Freedom of Information Act was presented to the trial court; however, that issue is not raised here by appellant.

Appellant next asserts that the court erred in holding that the Board had no authority to restrict appellee's prescribing practices by granting him a continuance on the condition that he not prescribe Schedule II drugs in the interim. When appellee initially requested a continuance, the Board advised that its policy was not to continue a hearing where a physician was charged with excessive prescribing of Schedule II drugs unless the physician agreed not to prescribe Schedule II drugs in the interim. On the hearing date, the Board reiterated its policy and then granted the conditional continuance. There is nothing in the record indicating whether the continuance was by agreement, as asserted by

appellant, or that the condition for a continuance was with appellee's acquiescence. No written order was entered.

The Board clearly has the authority to revoke or suspend a physician's license if it finds that the physician has committed an act, as alleged here, which is defined to be "unprofessional conduct" by the statute. § 72-613. The Board also has the authority to summarily suspend a license pending a hearing if it finds that emergency action is required and "incorporates a finding to that effect in its order." Ark. Stat. Ann. § 5-712 (Repl. 1976).

It is true that appellee's license to practice medicine was not suspended under either of the above statutes. Here the Board, as an agency of the State, granted appellee's renewed request for a postponement of the scheduled hearing upon the condition he refrain from prescribing a certain class of narcotics in the interim. The Board's position is that the drugs being prescribed had a high potential for abuse which could result in severe psychic or physical dependence and addiction. Public policy requires strict regulation and close scrutiny of the dispensation of narcotic drugs. *Hosto* v. *Brickell,* 265 Ark. 147, 577 S.W. 2d 401 (1979). Here the Board, although apparently prepared at the hearing to hear evidence on the charges enumerated in its show cause order, granted appellee's renewed request for a continuance merely to accommodate appellee for additional time to prepare his defense. Suffice it to say that granting of the continuance here was a matter of grace and not a right. We are of the view that the court erred in holding the Board had no authority to temporarily restrict appellee's prescribing practices as a condition to granting a continuance.

Reversed and remanded.

HARRIS, C.J., not participating.

PURTLE, J., dissenting in part.

JOHN I. PURTLE, Justice, dissenting. I concur with the majority in holding appellant is not entitled to have a completely closed hearing in this matter. No doubt the trial court

will protect appellee and his patients from being forced to openly divulge confidential information which is privileged. Whether numbers are used to identify patients or truly privileged information is prohibited from being made public by other means does not require the entire proceeding to be closed.

I dissent from that part of the majority opinion which allows the Board to revoke appellee's license prior to a hearing. Ark. Stat. Ann. § 72-613 (Supp. 1977) provides the Board may suspend a license if it finds the holder of the license has committed certain acts. There has been no such finding here as was pointed out by the trial court. Appellee requested a continuance, which the Board apparently granted without any written findings of any nature. At this point the appellee has not been found to have violated any law, rule or regulation. In my opinion, he stands exactly as he did before a complaint was filed. In effect, the Board revoked his license without a full and fair hearing as required by Ark. Stat. Ann. § 62-614 (Supp. 1977). The Board is further required to reduce the evidence to writing, which record must contain some evidence to support their finding. *Hake* v. *Arkansas State Medical Board,* 237 Ark. 506, 374 S.W. 2d 173 (1964). Neither did the Board comply with Ark. Stat. Ann. § 5-712 (Repl. 1976) by issuing an order based upon findings of fact.

When appellee appeared at the hearing and requested a continuance, the Board had the right to agree to a continuance upon certain conditions, grant the continuance outright or conduct a hearing. Instead, they issued a unilateral order that it granted the continuance upon condition. The condition was that they would take the doctor's license to prescribe certain drugs pending a hearing. There is no statutory authority for such action. Therefore, I am of the opinion appellee should have the right to continue full practice until he has had a full and fair hearing.

Eva PASCALL *v.* Stanley E. SMITH

79-250 588 S.W. 2d 701

Opinion delivered November 5, 1979

Gibson & Gibson, P.A., by: *R. Bynum Gibson, Jr.*, for appellant.

Holmes, Holmes & Trafford, by: *George Holmes*, for appellee.

FRANK HOLT, Justice. The appellant and appellee were divorced in 1965. In 1975 appellee brought this action to quiet title to certain real property, which they have owned as tenants by the entirety before and since the divorce. Appellee based his claim on adverse possession and, in the alternative, sought a partition and sale of the property. Appellant counterclaimed for partition and sale. The trial court, after hearing evidence on the issue to quiet title only, overruled appellant's demurrer to the evidence. We dismissed appellant's appeal without prejudice, because there was no appealable order. *Pascall* v. *Smith,* 262 Ark. 523, 558 S.W. 2d 150 (1977). On remand, the chancellor awarded title to the land to the appellee on his claim of adverse possession. In *Pascall* v. *Smith,* 263 Ark. 428, 569 S.W. 2d 89 (1978), we remanded the action, and in accordance with our opinion, the court sustained appellant's demurrer and dismissed appellee's plea to quiet title. Appellee nonsuited his partition complaint and filed a reply to the appellant's counterclaim

for partition, asserting that the property was not subject to partition because of the "homestead" exception provided in Ark. Stat. Ann. § 34-1801 (Supp. 1979). Appellant's motion to strike the reply as being filed "too late" was overruled by the court. The chancellor found that the statute prevented partition and, therefore, denied appellant's counterclaim. Hence this appeal.

Appellant first contends that the lower court erred in finding that the appellee had not waived his right to defend the partition action. The thrust of her argument is that since appellee initially filed (3 years previously) a partition action, appellee had waived his right or is estopped to raise the "homestead" exception set forth in § 34-1801. The statute provides in pertinent part:

> Any persons having any interest in and desiring a division of land held in joint tenancy, in common, as assigned or unassigned dower, as assigned or unassigned courtesy [curtesy], or in coparceny, absolutely or subject to the life estate of another, or otherwise, or under an estate by the entirety where said owners shall have been divorced either prior or subsequent to the passage of this Act, except where the property involved shall be a homestead and occupied by either of said divorced persons . . .

Prior to the submission of this cause to the court, appellee had the absolute right to nonsuit his partition plea. Ark. Stat. Ann. § 27-1406 (Repl. 1979); *St. Louis, I.M. & S. Ry. Co.* v. *Ingram,* 118 Ark. 377, 176 S.W. 692 (1915); *Lewis* v. *Brown,* 232 Ark. 983, 341 S.W. 2d 772 (1961); and 27 C.J.S. Dismissal and Nonsuit § 20. Therefore, by filing and subsequently nonsuiting his partition plea, appellee did not waive his right nor was he estopped to raise the homestead exemption under § 34-1801.

Appellant argues that since the divorce failed to award possession of the property to either party, the appellee cannot claim the homestead exception in § 34-1801. Appellant's reliance on *Best* v. *Williams,* 260 Ark. 30, 537 S.W. 2d 793 (1976), is misplaced because that case involved the applica-

bility of the constitutional homestead exemption to a partition action and not the exception provided in § 34-1801. Here it appears undisputed that the appellee has lived on the property as his homestead for the past 52 years and in exclusive possession since their divorce in 1965. We hold that the chancellor correctly concluded that the homestead exception in § 34-1801 prevents partition of the property.

Affirmed.

HARRIS, C.J., not participating.

Shirley Wilson GREENWOOD, Guardian
v. Lillie F. WILSON, Administratrix

79-248 588 S.W. 2d 701

Opinion delivered November 5, 1979
(In Banc)

J. Marvin Holman, for appellant.

Benny E. Swindell, for appellee.

DARRELL HICKMAN, Justice. The issue before us is the validity of a will. John F. Wilson signed an instrument on the morning of July 7, 1976, while a patient at St. Mary's Hospital in Russellville. That instrument, which was in the handwriting of his second wife, Lillie, left all his property to her if she survived him. Wilson died a month later.

The validity of that will was contested by the testator's first wife, Shirley Wilson Greenwood, on behalf of a minor adopted child of the first marriage.

The appellant Greenwood claimed that the instrument was invalid because of undue influence exercised by Lillie Wilson and because of Wilson's lack of mental capacity to make a will.

The Probate Court of Johnson County held the will valid. On appeal only two issues are raised: Whether the findings of the probate judge were against the preponderance of the evidence and whether the testimony of Lillie Wilson

about statements Wilson made regarding his intent were admissible. The first issue requires consideration, the second none because Uniform Rules of Evidence, Rule 803(3), permits such statements concerning present intent. See *State* v. *Abernathy,* 265 Ark. 218, 577 S.W. 2d 591 (1979).

The law to be applied to this case has been settled for years. On appeal we review the case *de novo* and will affirm the order of the probate judge unless it is against the preponderance of the evidence. *Orr* v. *Love,* 225 Ark. 505, 283 S.W. 2d 667 (1955); *Sullivant* v. *Sullivant,* 236 Ark. 95, 364 S.W. 2d 665 (1963). (Similar cases decided after July 1, 1979 will be affirmed unless the findings are clearly erroneous according to Rules of Civil Procedure, Rule 52, which is the same standard as "clearly against the preponderance of the evidence." This review criterion, however, does not affect the burden of proof that is imposed on parties in the trial of certain causes. See Note 2, Reporter's Notes to Rule 52.)

Generally, the burden of proving undue influence and the lack of mental capacity would be on the party challenging the will. *Sullivant* v. *Sullivant, supra; Orr* v. *Love, supra.* However, because this will was drafted by Lillie Wilson, the primary beneficiary, there is in effect an offsetting rule which places on her the burden to prove beyond a reasonable doubt that her husband had both the mental capacity and the freedom of will and actions required to render a will legally valid.

As early as 1858 we said in *McDaniel* v. *Crosby,* 19 Ark. 533 (1858):

> When a will is written, or proved to be written by a person benefited by it, or by one standing in the relation of attorney or counsel, and who is also benefited by it, — these are circumstances to excite stricter scrutiny and require stricter proof of volition and agency.

Continuing, the Court quoted favorably from a case of another jurisdiction:

> . . . it is incumbent on those, who, in such a case, seek to establish the will, to show beyond reasonable doubt,

> that the testator had both such mental capacity, and such freedom of will and action, as are requisite to render a will legally valid.

That has been our rule ever since.

In *Orr* v. *Love, supra,* we approved this language and also stated:

> The presumption of undue influence is not one of law but is a presumption of fact and subject to rebuttal. . . . The question of undue influence and mental capacity are so closely interwoven that they are considered together.

In *Sullivant* v. *Sullivant, supra,* we again approved the standard of proof to be one beyond a reasonable doubt.

In the case of *Hiler* v. *Cude,* 248 Ark. 1065, 455 S.W. 2d 891 (1970), we were asked to hold that our decision in *Orr* meant that the burden of proof shifted where a proposed will is drafted by a beneficiary. That same argument is made by the appellant Greenwood. That is, normally a contestant must prove undue influence and mental incapacity; whereas a beneficiary-drawn will must be shown beyond a reasonable doubt to be free from undue influence and made by a mentally capable person.

We clearly held in *Hiler* that the burden did not shift and that the two rules did not conflict:

> We adhere to the rule that the burden of proving mental incompetency, undue influence and fraud which will defeat a will is upon the party contesting it. We hold this burden, in the sense of the ultimate risk of nonpersuasion, never shifts from the contestant. This does not however, conflict with the rule concerning the burden of going forward with the evidence or burden of evidence. As stated in 29 Am.Jur. 2d, 156, Evidence Section 125: 'In short, the burden of proof, in the sense of the ultimate risk of nonpersuasion, never shifts from the party

who has the affirmative of an issue, although the burden of going forward with the evidence may shift at various times during the trial from one side to the other as evidence is introduced by the respective parties.'

Obviously, a proponent of a will, who is a beneficiary and who drafted or caused to be drafted a will, does not enjoy the usual legal advantages given to a document otherwise drawn. For example, a person is presumed to be sane. *First Christian Church* v. *McReynolds,* 194 Or. 68, 241 P. 2d 135 (1952). Also, a proponent of a will only has to show by a preponderance of the evidence the necessary and essential matters to get a will admitted to probate. *C.J.S., Wills* § 383 *et seq.* (1957); *T. Atkinson, Wills* § 101 (2d ed. 1953).

In a will such as that before us, because proof of mental capacity and the lack of undue influence must be proved beyond a reasonable doubt, those advantages, which make it relatively easy to admit a will to probate, obviously do not exist.

It is a burden that one ought to have who is a primary beneficiary of a document drafted or caused to be drafted by that beneficiary. As we said in *McDaniel* v. *Crosby, supra,* ". . . these are circumstances to excite stricter scrutiny and require stricter proof of volition and agency."

Lillie Wilson admitted she wrote out the will because she said John Wilson's hands were shaky and he had an I. V. (intravenous tube) in his hand.

Wilson was hospitalized on July 5th for liver failure. She wrote the will on July the 6th, and it was signed on the morning of July 7th. It reads:

> I, John F. Wilson being of sound mind hereby tells that this is my last will and Testamony. This is to disregard any other wills made before. To my wife Lillie F. Wilson I leave all my property 78.2 Acres more or less and personal possions. She is to be responsible for the estate of my unborn child due Sept. 1976. In the event she dies my brother Jimmy D. Wilson is to be over my childs

estate. If the child dies my nieses Deanna Wilson and Donna Wilsons will be last aires excluding 4 acres of land to my mother and Fatherinlaw — Betty Underwood shall have two acres & Charlie Woodard two acres. Jimmy D. Wilson will be in charge. This being of course if Lillie is not living. To my adopted son Antonnty Jack Wilson I leave the sum of one dollar because he has been took care of with settlements & my social security.

/s/ John F. Wilson (illegible) 7/7/76
/s/ Cheryll A. Shinn, Medical Records 7/7/76
/s/ Sharon C. Bell, Medical Records 7/7/76

There is no doubt the burden was on the appellee to prove beyond a reasonable doubt that John Wilson was not unduly influenced and that he had the mental capacity to make this will.

Undue influence has been defined this way:

As we understand the rule, the fraud and undue influence which is required to avoid a will must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause deprives the testator of his free agency in the disposition of his property. And the influence must be specifically directed toward the object of procuring a will in favor of particular parties. It is not sufficient that the testator was influenced by the beneficiaries in the ordinary affairs of life, or that he was surrounded by them and in confidential relation with them at the time of its execution. (Quoting from 3 Elliott on Evidence, § 2696): 'The influence of the husband over the wife, that of the wife over the husband, of the parents over the children, and of the children over the parents, are legitimate, so long as they do not extend to positive dictation and control over the mind of the testator.' *Puryear* v. *Puryear*, 192 Ark. 692, 700 (1936).

Mental or testamentary capacity has been uniformly defined as:

> . . . (a) the ability on the part of the testator to retain in memory without prompting the extent and condition of property to be disposed of; (b) to comprehend to whom he is giving it; and (c) to realize the deserts and relations to him of those whom he excludes from his will. *Hiler* v. *Cude, supra,* 1076.

We find the appellee did not prove beyond a reasonable doubt Wilson had the mental capacity to execute a valid will. The chancellor's findings in that regard are against the preponderance of the evidence.

Four witnesses testified for the appellee, two employees of the hospital, a doctor and the appellee, Lillie Wilson.

Lillie Wilson testified that she and John Wilson were married in February, 1975, and that she gave birth to his child in October, 1976, 55 days after Wilson's death. She said Wilson was sick and she had him admitted to the hospital on the 5th of July, 1976. He told her he wanted a will and she wrote down on a piece of paper what he told her. She talked to a lawyer the morning of the 6th and received some advice after which she drafted the will, which we have reproduced, in her own handwriting. She said she was told by the lawyer that Wilson could not be under the influence of drugs when he signed the will.

She called Dr. Ernest King and told him that her husband wanted to make a will and he could not be under the influence of drugs when he signed the will. She said the doctor replied "O.K." and agreed to meet her at the hospital early the next morning. She said she arrived at 8:00 a.m. and saw a sign on the door which read, "Withhold Wilson." The doctor came in about 8:30 a.m. and said he would send two secretaries to witness the signature. She said the secretaries had to come back three times because Wilson had diarrhea and was in the bathroom. She said she read the will to Wilson and he signed it.

She was not asked specifically about Wilson's mental condition.

The two secretaries testified that they both signed the document at Dr. King's request.

Cheryll Shinn, a medical transcriptionist, said she signed it sometime between 9:15 and 9:45 a.m. She said that her boss, Sharon Bell, was there and another woman whom she could not identify. She was asked:

* * *

Q. Did he appear to be of sound mind at the time he signed this?

A. I really couldn't answer that.

Q. Was there anything he did or said —?

* * *

A. I really couldn't answer that.

Q. Was there anything he said or did that indicated to you that he was not of sound mind?

A. No, sir.

Q. Did he appear to be under any undue influence or coercion at the time he signed this document?

A. No, sir, he did not. . . .

Shinn said she was present only two or three minutes. She testified she did ask Wilson if that was exactly what he wanted to do and he replied it was.

Sharon Bell, a medical records administrator, testified that she was present three or four minutes and could not recall *any* conversation. She could not identify the wife as being present although she thought there was another person

in the room. She said this was the only time she saw this patient.

Dr. Ernest King, who did not admit Wilson to the hospital but treated him while he was there, said Wilson was suffering from severe hepatic failure — liver failure. He said that Wilson was "acutely ill, critically ill, morbidly ill." King testified that he went to Wilson's room between 8 and 9 a.m. on the 7th of July and talked to Wilson about ten minutes. He said he did not give him a physical examination but he was satisfied that Wilson had the capacity to make a will. That is, that he knew about his property and knew what he wanted to do with it. He was not present later when the will was signed in the presence of the secretaries.

He admitted during cross-examination that Wilson was very ill the night before and had had hallucinations. Dr. King said his knowledge about Wilson's hallucinations prompted him to order a consultation with a psychiatrist for the 8th of July. He said he had seen him in the afternoon of the 6th but not during the night. He said he did not remember or "have in his information" the fact that early the morning of the 7th Wilson was walking the halls and picking bugs off the wall. He verified that Wilson was given 50 milligrams of Demerol and 50 milligrams of Visteril the morning of the 7th. Demerol is a narcotic and Visteril is a tranquilizer.

He admitted the records showed that on the morning of the 7th at 7:30 there was a note that Wilson was out of bed, walking the halls, confused and picking bugs off the bed table, in a condition that King agreed would make Wilson incapable of making a valid will. Dr. King said that he did *not think* Wilson was confused when he talked to him thirty minutes or so later.

He was asked about a nurse's written observation that at 11:00 a.m. on the morning of the 7th, Wilson was "shaking all over, continues to be confused. Dr. King notified." He agreed Wilson would not have been competent at 11:00 a.m. He said he did not remember seeing Wilson that morning; he did not think he did because he had seen him off and on for several days and this was nothing new. He said it had been

two years since the event and he could not recall any conversation that took place with Wilson on the morning of the 7th. Other doctors also attended Wilson.

Barbara Hays, a nurse who came on duty about 6:30 a.m. on the morning of the 7th, made the 7:30 a.m. note. It read:

> Out of bed. Walking in halls. Confused. Picking bugs off bed table when no bugs seen by . . . personnel.

She observed this conduct personally. She confirmed that the record showed that at 5:50 a.m. on the morning of the 7th Wilson received 50 milligrams of Demerol and 50 milligrams of Visteril. She testified that the records showed that on the afternoon Wilson was admitted, which was the 5th of July, he had a convulsion. The record reflected that several times the I.V. tube had been pulled out on the 6th and 7th of July. Wilson also had a bowel movement in his bed.

She made the medical observation and note that at 11:00 a.m. on the 7th he was shaking all over and continued to be confused. She personally observed this conduct. She noted that Dr. King was notified. She made the note at 10:30 on the 8th of July that Dr. Linda Bell, a psychiatrist, was notified of a consultation. She noted that on the 9th of July he continued to be confused. On the 10th of July she made the note that Wilson was coherent when she spoke to him.

There is no doubt that Wilson, when admitted to the hospital, not only suffered from severe physical problems but also from withdrawal symptoms commonly known as the D.T.'s. One report stated that he had been using a half gallon of wine a day; another two gallons of wine a week.

Dr. Steven Bradley Finch, a specialist in psychiatry, was called as an expert witness by the appellant. His conclusion, after studying the medical reports and record, was:

> A. I have formed a conclusion from my examination of the medical records. My conclusion is that this man in all likelihood was suffering from an organic psychosis as

well as his physical disorders and that this was probably related to an alcohol ingestion. It is my further opinion that between the date of admission on July the 5th until the evening of July the 9th or the morning of July the 10th, that the patient was unable to carry a stream of thought to its logical conclusion. And that his judgment was impaired to the extent that he probably could not make a logical judgment.

Reviewing the evidence, it is undisputed that Wilson suffered severely and suffered from hallucinations. A person may hallucinate without outward signs of hallucination. Dr. King admitted he was not competent at 7:30 a.m. and 11:00 a.m. according to hospital records. The great weight of the evidence is he was not mentally competent on the morning of the 7th to make a valid will.

It is possible that he had a lucid interval when he signed the will. Yet the preponderance of the evidence is otherwise. Dr. King, the only witness for appellant on mental capacity, was not present when the will was signed. Neither attesting witness nor Lillie Wilson testified positively about his mental capacity.

The medical records, the testimony of the nurse and Dr. Finch's testimony clearly demonstrate Wilson's condition.

The question must be asked then, where is the evidence beyond a reasonable doubt that Wilson had the mental capacity to make a will? It is not present. We would have to presume that Wilson was in a lucid interval, not confused or suffering from hallucinations or drugs at the precise time he signed the document. We are unwilling to make that presumption in the face of the evidence in this case.

The probate judge's findings are against the preponderance of the evidence and the cause is reversed with directions to dismiss the order admitting the will to probate.

Reversed.

HARRIS, C.J., not participating.

BYRD, J. dissents.

Doyle Anthony JONES *v.* STATE of Arkansas

CR 79-102 589 S.W. 2d 16

Opinion delivered November 5, 1979
(In Banc)

Michael Dabney, Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Dennis R. Molock,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. The Circuit Court of Washington County denied appellant's petition to set aside his guilty pleas pursuant to Rules of Crim. Proc., Rule 37.1 (d) (1976). On appeal it is urged that the trial court erred in refusing to sustain the petition which alleged ineffective assistance of counsel.

On August 5, 1976, appellant entered a guilty plea to a charge of rape and also to a charge of possession of stolen property. He was sentenced to concurrent sentences of 30

years on each with 9 years suspended. On September 19, 1978, he filed his Rule 37 petition pro se. After a full hearing before the trial court, at which hearing appellant was ably represented by appointed counsel, the petition was denied. We are asked to declare that the trial court erred in failing to grant the petition. It is our opinion that the decision of the trial court is supported by the evidence presented at the hearing and we do not find reversible error.

Appellant alleged his guilty pleas were entered because his attorney threatened to withdraw from the case unless he pleaded guilty. The alleged threats came on the date he was scheduled for trial before a jury. The evidence at the Rule 37 hearing included everything appellant desired to present. Several allegations related to matters which cannot be considered on a Rule 37 hearing and will not be discussed in this opinion. For information purposes only, these unrelated matters included allegations that appellant was brought from Missouri to Arkansas without an extradition hearing; that he was never placed in a line-up; and that he was not served copies of the arrest warrants.

Appellant testified at his Rule 37 hearing that his attorney did not subpoena witnesses which he had requested; told him a jury would likely give him 50 to 60 years if he went to trial; that a guilty plea was not discussed until the day of the trial; that he (the attorney) would walk out if a guilty plea were not entered; that the attorney took him outside the courtroom twice before getting him to enter guilty pleas; and that the attorney caused appellant's mother and brother to help persuade him to plead guilty. The appellant's mother and brother testified generally to the same matters. The brother admitted he recommended appellant plead guilty, and the mother stated the attorney told them appellant could get life or possibly the electric chair if he did not plead guilty. She further stated the attorney told her appellant would probably have to serve only 3 or 4 years if he pleaded guilty.

From the record is is quite clear that appellant was most reluctant to plead guilty. It is also clear that his attorney used considerable persuasion in getting him to plead guilty. Nevertheless, it is equally clear that the plea was, in the end,

a voluntary one as evidenced by the following questions and answers:

> The Court: You know of no witnesses nor defense that will help you in either of these cases?
>
> Appellant: No, sir.
>
> * * *
>
> The Court: Has your attorney acted soberly, diligently, and competently in advising you in this case?
>
> Appellant: Yes, sir.
>
> The Court: Do you have any criticism of his conduct in his representation?
>
> Appellant: No, sir.

The original trial attorney took the stand at the Rule 37 hearing testifying that he had contacted all witnesses suggested on behalf of appellant and was convinced none of them would be of any assistance in the defense of the case. He stated he had been practicing law for 11 years and had averaged trying 10 to 12 jury cases per year. He considered the probability that after the appellant had been convicted on either charge he would be sentenced as a habitual criminal on the second trial because he had a prior conviction record. (Appellant had a conviction other than these two charges.) He admitted telling the appellant he would likely receive a sentence of 50 to 60 years if he insisted on a jury trial. In his opinion appellant would have no witnesses and could not afford to take the stand. Also, he admitted he sought the assistance of appellant's mother and brother in persuading him to plead guilty. He denied telling appellant he would walk out on him if he insisted on a jury trial but stated he informed appellant he could go to the jury if he insisted. The sum total of his testimony was that in his professional judgment pleading guilty, and having the sentences run concurrently, was in the best interest of his client.

In essence, appellant's argument appears to be that the employed counsel overrepresented him at the time of entry of the guilty pleas by forcing him to plead guilty. The petition also seems to be a backhanded way of trying to withdraw his guilty pleas. This is not a timely presentation for a Rule 26.1 attempt to withdraw a guilty plea. *Pettigrew* v. *State,* 262 Ark. 359, 556 S.W. 2d 880 (1977). We pointed out the distinction between Rule 26.1 and Rule 37.1 in *Shipman* v. *State,* 261 Ark. 559, 550 S.W. 2d 454 (1977), wherein we stated that a Rule 26.1 petition should be amended to seek relief under Rule 37.1 before it could be considered in a post-conviction collateral attack on a sentence.

There is a presumption that counsel is competent. *Davis* v. *State,* 253 Ark. 484, 486 S.W. 2d 904 (1972). Therefore, it is the duty of appellant to prove ineffective assistance of counsel. *Porter* v. *State,* 264 Ark. 272, 570 S.W. 2d 615 (1978). In the present case the record clearly reveals the sentencing judge became somewhat unsure of appellant's voluntariness and granted a recess on two occasions for the purpose of allowing a discussion between appellant and his retained counsel. At most, the evidence tends to show appellant and his attorney gave conflicting testimony as to the voluntariness of the pleas. Under these circumstances we are unable to say the trial court was not justified in accepting the version of retained counsel over that of appellant in finding the pleas were voluntary. It is our custom to defer to the superior position of the trial court where the disposition of the matter depends upon credibility of witnesses who appear before the trial court. *Gardner* v. *State,* 263 Ark. 739, 569 S.W. 2d 74 (1978). The advice given by retained counsel obviously is within the range of competence demanded of attorneys in criminal cases. *Horn* v. *State,* 254 Ark. 651, 495 S.W. 2d 152 (1973).

Affirmed.

HARRIS, C.J., not participating.

Douglas Orvel WHITE and his wife *v.*
Bill RAY d/b/a RAY'S BUILDING CONTRACTOR

79-240 589 S.W. 2d 28

Opinion delivered November 13, 1979
(In Banc)

Charles G. Vaccaro, for appellants.

Joe H. Hardegree, for appellee.

GEORGE ROSE SMITH, Justice. This is an appeal from the chancellor's refusal to set aside a default judgment for want of valid service of process upon the appellant-defendants.

On July 13, 1978, the appellee Ray, a building contractor, sued the appellants, residents of California, to recover a

$2,246.77 balance due under a contract by which Ray had made improvements to the appellant's property in Montgomery County. Service of process was attempted under Ark. Stat. Ann. § 27-339.1 (Repl. 1979), which requires the Secretary of State to send notice to the nonresident defendant by registered mail. Here the service upon the appellants was defective, because the return receipt from California indicated that the registered letter was being returned undelivered as "unclaimed." Nevertheless, the appelee, on the basis of an affidavit suggesting that the appellants had in fact refused to receive the letter, obtained a default judgment on December 22.

On January 22, 1979, the appellants filed an unverified motion to set aside the decree, citing Ark. Stat. Ann. §§ 29-501, 29-506(7), and 27-1901 (Repl. 1962). The motion alleged that the defendants had been prevented by unavoidable casualty or misfortune from appearing and defending the action. It also alleged that the service of process was invalid, that the defendants had no knowledge that the suit was pending until after the entry of the decree, and that they had a meritorious defense. After a hearing the chancellor denied the motion.

We cannot say, on the record made below, that the chancellor was wrong. The defendants expressly based their motion to vacate on Section 29-506(7), which provides for the vacation of a judgment for unavoidable casualty or misfortune. Section 29-509 requires that a meritorious defense be shown. (Both sections have, in substance, been incorporated in Rule 60, ARCP.) We have consistently held that a defendant seeking relief under these statutes must show that he did not know of the proceeding against him and that he has a meritorious defense. *Renault Central* v. *International Imports of Fayetteville,* 266 Ark. 155, 583 S.W. 2d 10 (1979); *Employers Mut. Cas. Co.* v. *Buckner,* 233 Ark. 564, 345 S.W. 2d 924 (1961).

Here the defendants offered no evidence at the hearing on their motion, electing to rely upon the pleadings and the record of the attempted service. A mere allegation of a meritorious defense, without proof, is insufficient. *Merriott*

v. *Kilgore,* 200 Ark. 394, 139 S.W. 2d 387 (1940). The same thing may be said of an allegation that the defendants had no knowledge that the suit was pending. The plaintiff's proof indicated that defendants had actual knowledge of the suit several months before the default judgment was entered. Hence the chancellor was justified in denying the motion to vacate.

The appellants, in their brief in this court, assert that the default judgment was absolutely void, citing Ark. Stat. Ann. § 29-107 and *Edmonson* v. *Farris,* 263 Ark. 505, 565 S.W. 2d 617 (1978). That statute declares that a judgment entered "without notice, actual or constructive," is absolutely null and void. We so held in *Edmonson,* adding that proof of a meritorious defense is unnecessary. But, first, that statute has to do with a judgment entered without any notice whatever. That showing was not made in the case at bar. Second, in *Edmonson* we cited *Halliman* v. *Stiles,* 250 Ark. 249, 464 S.W. 2d 573 (1971), where we pointed out that the defendant relied not only on Section 29-506 but also on Section 29-107. Here Section 29-107 was not referred to in the motion to vacate nor in the three trial briefs submitted by counsel then representing the defendants. Thus the attack was on the validity of the service, not upon the judgment itself. The difference is that under Section 29-506 the defaulting defendant seeks a trial, so that he can present his defense. Under Section 29-107 he does not seek a trial, but asks that the judgment be declared void. Here the appellants chose to proceed under Section 29-506, but their proof is insufficient.

Affirmed.

HARRIS, C.J., not participating.

James S. MOOSE, Jr. et al *v.*
David GREGORY et al

79-300 590 S.W. 2d 662

Opinion delivered November 13, 1979
(In Banc)

Gordon, Gordon & Eddy, for petitioner.

Edmond M. Massey and *W. P. Hamilton,* for respondents.

GEORGE ROSE SMITH, Justice. In this case the Court of

Appeals reversed the decision of the chancery court, essentially on the ground that the chancellor's conclusion was clearly against the preponderance of the evidence. *Gregory* v. *Moose,* 266 Ark. 926, 590 S.W. 2d 665 (Ark. App. 1979). The petitioners, in seeking a review of the decision of the Court of Appeals, summarize their argument in the closing language of their petition for review:

> The Court of Appeals reversed the findings of fact of the Chancellor when his findings were not clearly against a preponderance of the evidence. *Hackworth* v. *First National Bank,* 265 Ark. 668, 580 S.W. 2d 465.
>
> Public interest justifies a review, because it is of major importance and of first impression.

Counsel do not explain why the case is of major importance or in what way it is of first impression.

We are unanimously of the view that the petition for review should be denied. Ordinarily our order would be, simply: Petition denied. But the Court of Appeals is a new tribunal, created by the General Assembly under the authority of a constitutional amendment adopted only last year. Ark. Const. (1874), Amendment 58. This is one of the few petitions for review that have as yet been filed in the Supreme Court. It presents a peculiarly appropriate opportunity for us to explain why this petition, and similar ones that may be filed in the future, must be denied.

Amendment 58 contains only one sentence pertinent to questions of jurisdiction and review, as between the Supreme Court and the Court of Appeals: "The Court of Appeals shall have such appellate jurisdiction as the Supreme Court shall by rule determine, and shall be subject to the general superintending control of the Supreme Court." Thus the amendment entrusts to the Supreme Court complete responsibility for determining both the initial jurisdiction of the Court of Appeals and the extent to which its decisions are reviewable.

The really important problem has proved to be that of

determining how the Court of Appeals is to be fitted into the appellate system. It might be treated as a purely intermediate court, becoming merely an expensive and time-consuming level in the appellate structure. On the other hand, it might be treated as a court of final authority in the particular area of its own jurisdiction.

We adopted the latter view. We acknowledge our indebtedness to the wisdom of Dr. Robert A. Leflar, an outstanding professor of law and a former member of this court. Dr. Leflar repeatedly urged, from the time Amendment 58 was first proposed, that the new court should not merely add another step to the appellate process. To the contrary, Dr. Leflar urged that the proposed court of appeals have its own areas of jurisdiction, with corresponding final authority. It was Dr. Leflar's thought that cases requiring a determination of public policy or the setting of important precedent should be reserved for the Supreme Court, with more routine cases going to the Court of Appeals.

Last May, after the General Assembly had created the new Court of Appeals, we further implemented Amendment 58 by adopting and publishing Rule 29 of the Rules of the Supreme Court and Court of Appeals. That rule tentatively defines both the separate jurisdictions of the two courts and the narrow grounds on which a decision of the Court of Appeals will be reviewed by the Supreme Court. Fundamentally, Rule 29 embraces four basic points:

1. Certain cases, set forth in Section 1 of the rule, should be appealed to the Supreme Court in the first instance.

2. All other cases should be appealed to the Court of Appeals.

3. The Court of Appeals should transfer to the Supreme Court (a) any case that should have gone to the Supreme Court in the first instance and (b) any case that is found to involve an issue of significant public interest or a legal principle of major importance.

4. The Supreme Court may grant certiorari to review

any case that should have come to the Supreme Court originally, that should have been transferred to the Supreme Court by the Court of Appeals, or that was decided in the Court of Appeals by a tie vote. (Otherwise the decision of the Court of Appeals will not be reviewed.)

We should emphasize the fact that we adopted Rule 29 to put into effect the basic purpose of Amendment 58 to the Constitution. That is, the volume of litigation in Arkansas had grown to such an extent that it could not be handled promptly and properly by a single appellate court. Before the submission of Amendment 58 the Supreme Court's caseload had more than doubled in about 15 years. Appeals were being filed at the rate of almost two a day for each of the 365 days in the year. It had become impossible for one court of last resort to give careful consideration to every case.

Amendment 58 addressed the problem by authorizing the General Assembly to create a court of appeals to shoulder part of the burden. The Amendment, it may be noted, also authorized the General Assembly to create divisions within the court of appeals, to provide for a still greater caseload in the future. Lastly, Amendment 58 vested in the Supreme Court the power to determine the jurisdiction of the court of appeals, so that the total caseload might be apportioned between the two appellate courts.

Rule 29, with such modifications as experience may suggest, is designed to carry Amendment 58 into effect. Ideally, the Supreme Court and the Court of Appeals will each have its own field of primary jurisdiction. Ideally, each court will in effect be a court of last resort, with its decisions having a desirable finality. Ideally, it will be immaterial to the litigant whether his particular case goes to one court or to the other. In either event both parties will have the benefit of an appellate review by a multi-judge court composed of judges having exactly the same qualifications (as Amendment 58 specifies).

Our goal is to provide each litigant with the opportunity for one appeal only, not two. That is why, in the case at hand,

the petitioners' application for certiorari must be denied. The real question before the Court of Appeals was whether the chancellor's decision was clearly against the preponderance of the evidence. The court decided that question. There was no reason why the case should have come to the Supreme Court in the first instance or why it should have been transferred to us by the Court of Appeals. The decision of the Court of Appeals is therefore not subject to review under Rule 29.

Finally, we should state, as clearly and as unmistakably as we can, that the mere possibility that the Court of Appeals may have been wrong in a given case is not a basis for review by this court. No matter whether a particular case goes to one court or the other, the losing litigant understandably feels that the decision was wrong. And perhaps it was, no matter which court decided the case. No court is always right. But if we undertake to examine every decision of the Court of Appeals upon a mere suggestion of error, then we must ultimately read all the briefs and decide every case de novo, as if the Court of Appeals did not exist. There is no other possible course if we accept the position in effect argued by the present petitioners, that we should review the case simply because the Court of Appeals may have erred in finding that the chancellor's decision was against the weight of the proof.

We said early in this opinion that the case presents a peculiarly appropriate opportunity for us to explain our position. That is so because the opinion of the Court of Appeals is actually mistaken in one respect. In the trial court the present petitioners attacked the validity of a trustee's sale of land on two different grounds: first, that the trustee was mentally incompetent to make the sale and, second, that the trustee sold the property for an inadequate price. The chancellor found that the trustee was competent, but set aside the sale for inadequacy of price. The Court of Appeals refused to consider the issue of competency, because there was no cross appeal, but reversed the finding of inadequacy of price.

No cross appeal was necessary. It has long been the rule in Arkansas that the trial judge's decision will not be re-

versed if he reached the right result, even though he gave an erroneous reason. *Greeson* v. *Cannon,* 141 Ark. 540, 217 S.W. 786 (1920). Not infrequently we have affirmed a correct decision upon the very ground the trial judge erroneously rejected. See, for example, *Mobley* v. *Scott,* 236 Ark. 163, 365 S.W. 2d 122 (1963), and *McCrite* v. *Hendrix College,* 198 Ark. 1149, 133 S.W. 2d 31 (1939). A cross appeal is required only when the appellee seeks affirmative relief that he failed to obtain in the trial court, not when he won the case below and merely asks that the judgment be affirmed.

In the case at bar the error of the Court of Appeals has become immaterial in any event, because the petitioners did not complain of it either in their petition for rehearing in that court or in their petition for review. Hence we may fairly use the error as an illustration of why we cannot review decisions of the Court of Appeals, within its own area of jurisdiction, even though it might be argued that the decision was wrong.

Petition denied.

HARRIS, C.J., not participating.

BYRD, J., concurs in the result.

Arnal Wayne GRIFFIN *v.* GEORGE'S, INC.

79-195 589 S.W. 2d 24

Opinion delivered November 13, 1979
(In Banc)

Wommack & Hawkins, by: *Claude S. Hawkins, Jr.,* for appellant.

Crouch, Blair, Cypert & Waters, for appellee.

JOHN A. FOGLEMAN, Justice. The trial judge sustained the general demurrer of George's, Inc., to the complaint of Arnal Wayne Griffin, seeking to recover for personal injuries suffered during the course of his employment by George's, Inc. Originally, there was no indication that this ruling was a final judgment, as Griffin was given 30 days to plead further. See *Griffin* v. *George's, Inc.,* 266 Ark. 646, 587 S.W. 2d 225 (1979). We did not dismiss the appeal, in order that the parties might have an opportunity to establish the finality of the trial court's action. We now have a record reflecting the dismissal of Griffin's complaint, which is, of course, a final order.

Since the dismissal was based upon the sustaining of appellee's demurrer, we must consider as true all facts well pleaded in the complaint and draw all reasonable inferences from those facts in favor of the pleader. *Howell* v. *Arkansas Power & Light Co.,* 225 Ark. 535, 283 S.W. 2d 680; *Tri-B Advertising, Inc.* v. *Arkansas State Highway Com'n.,* 260 Ark. 227, 539 S.W. 2d 430. So we will review the facts alleged in the complaint as if they were facts established as true.

George's, Inc., is engaged in the feed and grain indus-

try. Griffin was an employee of George's at Springdale. On or about July 10, 1974, Griffin, then 17 years of age, was severely, painfully, seriously and permanently injured when, in the performance of his duties, he stepped on loose grain and other foreign objects on the surface surrounding an unguarded grain auger and slipped into and become entrapped in it. This auger constituted an extreme hazard to persons working near it, as appellant was at the time of his injury, for the following reasons: There was no grate, or any other protective guard, to prevent persons coming near the auger from falling into, or becoming trapped in, the auger; a protective grate which had been on the auger when it was installed was removed by Griffin's employer in order to install a "clod-buster" and had never been replaced; the auger was two to three feet below ground level, and the opening into it was funnel shaped, i.e., it was larger at ground level than it was at the level of the auger; the surface at ground level sloped toward the opening of the auger, and, since there was usually grain lying upon this surface, one coming near the opening could easily slip and fall into the unguarded grain auger. This condition was permitted to exist in spite of the fact that it was in direct violation of federal and state statutes and regulations, and could have easily been corrected by installation of a protective covering over the opening. Although the employer was aware that this condition was hazardous and dangerous to its employees and recognized the substantial certainty that it would result in injury to an employee, it wilfully and wantonly disregarded this known danger and gave Griffin a dangerous work assignment which placed him in direct danger of injury by the auger. The employer ordered him to perform this duty without giving him any instructions in the proper and safe manner of performance of his duties or any warnings regarding this dangerous and hazardous condition, in spite of the fact that it was substantially certain that an employee in Griffin's position would be injured by reason thereof. The auger contained a shaft with a blade connected thereto which was revolving on the shaft when Griffin slipped into it and his resulting injuries were compounded by delay in stopping the operation of the grain auger due to the fact that no safety "shut-off" devices had been installed on the auger. Griffin was required to start work at 5:00 a.m. on the day he was injured, in

violation of Ark. Stat. Ann. § 81-707 (Repl. 1976) [Child Labor Act]. He was also involved in the operation of power driven hoisting apparatus in direct and intentional violation of federal regulations. Plaintiff's injuries would not have occurred had this federal regulation not been violated.

The demurrer and the circuit court's order sustaining it were based upon Ark. Stat. Ann. § 81-1304 (Repl. 1976) which makes the rights and remedies of an employee under the Worker's Compensation Law exclusive of all other rights and remedies of the employee for injury or death arising out of and in the course of his employment.

Appellant contends that the trial court erred in sustaining the demurrer because his injury resulted from an intentional tort committed by George's. He recognizes that, in *Haggar* v. *Wortz Biscuit Co.,* 210 Ark. 318, 196 S.W. 2d 1, we held that recovery from the employer for the death of an employee in a wrongful death action based on allegations of gross negligence and unlawful acts of the employer was barred because remedies provided by the Worker's Compensation Law were exclusive. This holding was subsequently construed to mean that recovery for injury or death resulting from gross negligence of the employer was limited to the remedy provided by the Worker's Compensation Law under § 81-1304, but the section was not to apply to a wilful and malicious injury by an assault by the employer on the employee. See *Heskett* v. *Fisher Laundry & Cleaners, Inc.,* 217 Ark. 350, 230 S.W. 2d 28.

Griffin contends that, since his complaint alleges an intentional tort, he is not precluded from proceeding with his common law tort action against his employers. He draws an analogy between the test regarding exclusivity of remedies under the Worker's Compensation Law and the test for allowance of punitive damages in negligence cases. He points out that punitive damages are not recoverable in cases where liability is based upon negligence, however gross the negligence may be, unless there is either an added element of intentional wrong, or its equivalent, conscious indifference in the face of discovered peril, from which malice may be inferred, citing *St. Louis S.W. Ry. Co.* v. *Owings,* 135 Ark.

56, 204 S.W. 1146; *St. Louis I.M. & S. Ry. Co.* v. *Dysart,* 89 Ark. 261, 116 S.W. 224; *Moore* v. *Wilson,* 180 Ark. 41, 20 S.W. 2d 310. Griffin argues that the outer limits of the exclusivity ban should coincide with the limit on the right to seek punitive damages in negligence cases.

Appellant also points out that in *Ellis* v. *Ferguson,* 238 Ark. 776, 385 S.W. 2d 154, we held that the law imputes a constructive intention as to the consequences to an offender and, in some cases, conduct which would otherwise be mere negligence becomes a wilful wrong when there was a reckless disregard of probable consequences by the actor. He also relies upon definitions of intent which extend to consequences which the actor believes are substantially certain to follow from what he does. See Prosser, Torts (4th Ed.), p. 31, § 8; Restatement of the Law, Torts, 2d, p. 15, § 8A. He also cites *Garratt* v. *Dailey,* 46 Wash. 2d 197, 279 P. 2d 1091 (1955), wherein the Washington Supreme Court held that a defendant who moved a chair while plaintiff was in the process of sitting down in the chair, would be liable for the intentional tort of battery, if he acted with knowledge that such result was substantially certain to occur. This case dealt with common law tort liability only.

We think that appellant is asking us to extend our decisions in *Hagger* and *Heskett,* to write an exception into § 81-1304 for injuries or death resulting from wilful and wanton negligence.[1] In *Heskett,* we considered the question whether a wilful and malicious injury inflicted by an officer and general manager of the employer upon the employee is comprehended within the provisions of the Worker's Compensation Act. We held that the vicious, intentional, unprovoked, and *premeditated* assault by the employer upon the employee was not an accident so as to come within the provisions of the Worker's Compensation Act. It naturally followed that the "exclusive remedy" section did not apply in such a case. Actually, it had been alleged in the complaint

[1]Our definitions of wilful and wanton negligence include the element of constructive intent, upon which appellant relies. See *Edwards* v. *Jeffers,* 204 Ark. 400, 162 S.W. 2d 472; *Cooper* v. *Calico,* 214 Ark. 853, 218 S.W. 2d 723; *Scott* v. *Shairrick,* 225 Ark. 59, 279 S.W. 2d 39; *Spence* v. *Vaught,* 236 Ark. 509, 367 S.W. 2d 238; *Carden* v. *Evans,* 243 Ark. 233, 419 S.W. 2d 295.

in *Hagger* that the acts relied upon to avoid the application of that section were gross, wanton and unlawful. There was no departure from *Hagger* v. *Heskett;* instead, we adhered to *Hagger,* and did not relax the strict limitation of § 81-1304. It is also important to remember that our decision in *Heskett* that the employee could seek full damages in a common law action was based upon the premise that an employer wilfully severs the employer-employee relationship by committing a wilful assault upon the employee.

The appropriate construction of § 81-1304 is indicated in Larson's Workmen's Compensation Law, Vol. 2A, p. 13-8, § 68.13, where the writer said:

> Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, or even wilfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injury that robs the injury of accidental character.

Heskett is not inconsistent with this approach. It only excepts acts committed with an actual, specific and deliberate intent on the part of the employer to injure the employee. We relied upon authority that an employer who *deliberately* batters his employee should not be allowed to compel the worker to accept moderate workmen's compensation benefits.

We think the proper result was reached in *Finch* v. *Swingley,* 42 A.D. 2d 1035, 348 N.Y.S. 2d 266 (1973). The effect of that decision is that, in order to avoid the bar of the exclusivity clause on demurrer, the complaint must be based upon allegations of an intentional or deliberate act by the employer with a desire to bring about the consequences of the act, and not upon allegations of wilful and wanton conduct by negligent direction to the employee to use a device known by the employer to be defective or failure to warn the employee of an unsafe condition of which the employer was aware.

In considering § 81-1304, we must keep in mind that if employers are required not only to provide worker's compensation but also to defend tort actions of employees and to respond in damages for torts, there would be a subversion of the very purpose of the whole workmen's compensation scheme of spreading the risk of loss for injuries arising out of, and in the course of, covered employment so that, indirectly and ultimately, the general public bears the burden as a part of the cost of articles produced or services rendered, because there would be no way to spread the risk of the tort liability. See, *Rosales* v. *Verson Allsteel Press Co.*, 41 Ill. App. 3d 787, 354 N.E. 2d 553 (1976).

The trial court properly sustained the demurrer of George's, Inc. to Griffin's complaint, so the judgment is affirmed.

Ginger SHIRAS and
ARKANSAS GAZETTE COMPANY
v. Henry M. BRITT, Circuit Judge

78-34 589 S.W. 2d 18

Opinion delivered November 13, 1979

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

Bill Clinton, Atty. Gen., by: *Martin J. Nevrla,* Asst. Atty. Gen., and *Steve Clark,* Atty. Gen., by: *David L. Williams,* Asst. Atty. Gen., for respondent.

CONLEY BYRD, Justice. During the conspiracy to murder trial of Rodney Coston, and out of the hearing of the jury, respondent Henry M. Britt, Circuit Judge, excluded the public and the press from a "Denno" hearing conducted pursuant to Ark. Stat. Ann. § 43-2105 (Repl. 1977). The respondent, on one other occasion during a proffer for the record of testimony held to be inadmissible, ruled that petitioner Ginger Shiras could remain present during the proffer only upon condition that the respondent could censor any story written about the proffer. Petitioner would not submit to the censorship, and was accordingly excluded during the proffer. This petition was brought to challenge the actions of respondent.

We have reviewed the petition for mandamus, as an after-the-fact situation, for the reasons set forth in *Commercial Printing Co. & Tosca* v. *Lee,* 262 Ark. 87, 553 S.W. 2d 270 (1977).

During oral argument, it was conceded by petitioner that she had no greater rights to attend the trial than any other member of the public. Consequently, we shall only deal with the rights of petitioner as a member of the public.

In asking for the issuance of a writ, petitioners contend that the exclusion from the "Denno" hearing, Ark. Stat. Ann. § 43-2105 (Repl. 1977), and the proffer of proof by the witness was a violation of Ark. Stat. Ann. § 22-109 (Repl. 1962) and Art. 2 § 6 of the Constitution of Arkansas and the First and Fourteenth Amendments to the Constitution of the United States. Respondent asserts that petitioner's legal rights were not violated since the press has only a limited right of access to in camera hearings and that the challenged action of respondent advanced the public interest in a fair

and prompt criminal trial in which the rights of the accused were protected.

Most of the briefs of both petitioner and respondent are centered around her alleged Federal constitutional rights and the recent case of *Gannett Co., Inc.* v. *DePasquale, County Court Judge of Seneca County, N.Y.,* U.S., 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979). However, we need not reach those issues, because as we view the issues before us, they are controlled by Ark. Stat. Ann. § 22-109 (Repl. 1962) which provides:

> "The sittings of every court shall be public, and every person may freely attend the same."

In *Commercial Printing Co., & Tosca* v. *Lee, supra,* after pointing to Ark. Stat. Ann. § 22-109 (Repl. 1962), and the fact that the Constitution of Arkansas does not guarantee a private trial, we stated:

> "This is no new premise. Probably the best known legal writer of all time, Sir William Blackstone, a member of His Majesty's Court of Common Pleas during the 18th Century, in his Commentaries on the Laws of England, Volume 4, Page 1428, Paragraph 5 (Lewis' Edition), stated:
>
> > 'Public wrongs or crimes and misdemeanors are a breach and violation of the public rights and duties due to the whole community in its social aggregate capacity.'
>
> Lay citizens, in criticizing courts in reversing or dismissing criminal cases because of the state's failure to comply with some legal requirement (though perhaps thought to be technical), frequently comment that the courts scrupulously observe every right of a defendant, but sometimes seem to overlook that the public also is directly affected by criminal acts and has a direct interest in the outcome of the proceedings.
>
> Additionally, the courthouses are paid for with public

funds; the judges, jurors, state's attorney (and defense attorneys who have been appointed by the court because of the indigency of their clients) are paid with public funds. The public has every right to ascertain by personal observation whether its officials are properly carrying out their duties in responsibly and capably administering justice, and it would require unusual circumstances for this right to be held subordinate to the contention of a defendant that he is prejudiced by a public trial (or any part thereof).

As stated previously, we have only one question before us, viz, was the court's order excluding the public and press from the *voir dire* valid? It is clear by what has been said that we have answered with an emphatic 'No!' "

Respondent contends that the challenged action actually advanced the public interest in a fair trial by protecting the rights of the accused. In this connection he points out that the most damaging outside information in a criminal trial comes from suppression hearings. He acknowledges that society benefits when there is access to all open court proceedings but concludes that the State's obligation to protect the right of the accused to a constitutionally fair, speedy and impartial trial must be given even greater consideration.

We cannot agree with respondent's emphasis on the rights of the accused for to do so puts the courts in the position of letting the tail wag the dog. Courts operate for the benefit of the public and like Caesar's wife should appear to be above reproach. When the public loses confidence in the ability of the courts to fully and impartially deal with those accused of crime, the public has a tendency to take the law into its own hands. In that case all of society is the loser because the innocent have no way of protecting themselves from their accusers.

Furthermore, the handling of the public's business in secret and behind closed doors not only causes the public to view the results with distrust, but it deprives the public of sufficient knowledge to make adjustments or reform in the

law or the judiciary. Just recently a farmer by trade introduced and put through the General Assembly a judicial redistricting of the several judicial circuits and districts in this State. Needless to say, we have concluded that the rights of the accused to a fair and impartial trial do not exceed the rights of the public to observe justice in progress.

Writ granted.

William Roger WINKLE and Janie WINKLE
v. GRAND NATIONAL BANK

79-178 590 S.W. 2d 852

Opinion delivered November 13, 1979
(In Banc)
[Rehearing denied December 17, 1979.]

Appellants, *pro se*.

Glover, Sanders, Parkerson & Hargraves, by: *Robert S. Hargraves,* for appellee.

James M. McHaney of *Owens, McHaney & Calhoun* for The Arkansas Bankers Assn., Amicus Curiae.

CONLEY BYRD, Justice. On January 22, 1979, the trial court heard the motions of appellants William Roger Winkle and Janie Winkle seeking to stay garnishments and executions and/or dismiss deficiency judgments. The trial court overruled the motions, sustained the writ of garnishment against the employer of William Roger Winkle and held that appellee Grand National Bank could pursue its deficiency judgments subject to appellants' exemption rights. The trial court's order sustaining the garnishment was suspended by an order of the Bankruptcy Court showing that appellants had been adjudicated as bankrupt under Chapter 13 of the Bankruptcy Act.

For reversal of the trial court's order, appellants contend:

> "I. The Chancellor erred as a matter of law in only allowing $500.00 exemption from foreclosure for the entire family of four.
>
> II. The Chancellor erred in dismissing the motion to dismiss the deficiency judgments."

POINT I. We find no merit to this contention. The record before us does not show that appellants have filed a schedule of exemptions as required by Ark. Stat. Ann. § 30-209 (Repl. 1962). Secondly appellants did not object to the action of the trial court when it asked counsel for appellee if appellants were entitled to a $500 exemption. Furthermore, it appears that the matter is now a moot issue before the state courts because of the adjudication in bankruptcy.

POINT II. Appellants' contention here is that the deficiency judgments remaining after disposal of the secured collateral should be dismissed because they were never given proper notice to allow them to file timely objections. We find no merit to this contention. In the first place there was a dispute between appellant Janie Winkle and the attorney representing appellants at the time of the sale of the

collateral as to whether appellants had notice. The trial court accepted the testimony of the attorney over the testimony of Janie Winkle and on review, we cannot say that the trial court's finding on an issue of credibility is contrary to a preponderance of the evidence. In the next place, appellants have not shown how they were injured by the alleged failure to receive notice. Thus, if we should assume that appellants did not receive notice in time to permit them to file timely objections, any such failure to give notice would be harmless error on the record before us.

Affirmed.

HARRIS, C.J., not participating.

Kathy WORKMAN *v.* STATE of Arkansas

CR 79-153 589 S.W. 2d 21

Opinion delivered November 12, 1979

Marcia McIvor, Northwest Arkansas Legal Services, Inc., for appellant.

Steve Clark, Atty. Gen., by: *Nelwyn Leone Davis,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was charged and convicted of hindering the apprehension or prosecution of James Pace for aggravated robbery. Ark. Stat. Ann. § 41-2805 (Repl. 1977). She was sentenced to three years' imprisonment under the Youthful First Time Offender Act.

Appellant first contends, through appointed counsel, that the lower court erred in allowing the state to amend the information during the course of the trial. The amendment changed the notation on the information from a Class D felony to a Class B felony. Appellant argues that this is prohibited by Ark. Stat. Ann. § 43-1024 (Repl. 1977), which provides in pertinent part:

> The prosecuting attorney or other attorney representing the State, with leave of the court, may amend an indictment, as to matters of form, or may file a bill of particulars. But no indictment shall be amended, nor bill of particulars filed, so as to change the nature of the crime charged or the degree of the crime charged.

The appellant asserts that the permitted amendment increased the degree of the crime charged in that a more severe sentence could be imposed for a Class B felony. The appellee, however, correctly responds that the statute under which the appellant was charged specifically provides that

when the crime from which the hindering charge arose is a Class A felony, as here, the offense is a Class B felony. Ark. Stat. Ann. § 41-2805(2) (Repl. 1977).

It is well settled that the information may be amended during the trial as long as the nature or degree of the crime charged is not changed. *Owen* v. *State,* 263 Ark. 493, 565 S.W. 2d 607 (1978). Here in the language of the statute, the appellant was charged before and after the amendment with hindering the apprehension or prosecution of James Pace for aggravated robbery. Clearly, she was sufficiently apprised of the specific crime with which she was charged to the extent necessary to enable her to prepare her defense, that being all that is required. *Lee* v. *State,* 229 Ark. 354, 315 S.W. 2d 916 (1958); and *Underdown* v. *State,* 220 Ark. 834, 250 S.W. 2d 131 (1952). The statutes here do not require that the penalty of the alleged offense be included in the information. Ark. Stat. Ann. §§ 43-1006, 43-1007, and 43-1008 (Repl. 1977). See also *Estes* v. *State,* 246 Ark. 1145, 442 S.W. 2d 221 (1969). We hold that the degree of the alleged crime was not changed by the amendment. Further, the appellant's attorney candidly admitted that there were negotiations with the state's attorney, and at the time of the amendment he was not surprised that the crime charged in the information was in fact a Class B felony.

Appellant's second ground for reversal is that the court erred in admitting into evidence certain of her statements. She contends that the statements were confessions and that she was entitled to a Denno hearing for a determination of their voluntariness pursuant to Ark. Stat. Ann. § 43-2105 (Repl. 1977). The statements in question were made at the sheriff's office at 12:45 a.m. several hours following the robbery. When she and the accused were initially questioned at their apartment concerning the incident, she was not placed under arrest nor taken into police custody. She voluntarily drove her car to the sheriff's office where the accused had been transported by the police. At this point, she was not suspected of any criminal offense. She was questioned only as a witness to "back up" some of the accused's statements concerning his activities during the past several hours. Appellant was not in police custody nor was the investigation focused upon her.

The statements did not constitute a confession. A confession is an admission of guilt as to the commission of a criminal act. *State* v. *Jones,* 188 S.E. 2d 676, 14 N.C. App. 558 (1972); *O'Neal* v. *State,* 468 P. 2d 59 (Okla. Cr. 1970); *Gladden* v. *Unsworth,* 396 F. 2d 373 (9th Cir. 1968); *Norrell* v. *State,* 157 S.W. 2d 784, 116 Ga. App. 479 (1967); and 29 Am. Jur. 2d Evidence, § 523; 23 C.J.S. Criminal Law § 826. Here appellant's statements to the police were, in the words of our statute, a mere continuation of her effort to "conceal[s], alter[s], destroy[s], or otherwise supress[es] the discovery . . . of any fact, information or other thing related to the crime which might aid in the discovery, apprehension, or identification of the person;" and to "volunteer[s] false information to a law enforcement officer." § 41-2805(d)(f). The deliberate act of making false statements to the police concerning Pace's activities the night of the robbery is the essence of the alleged criminal offense and not a confession. An in camera hearing to determine the voluntariness of the statements was therefore not required.

Appellant's last ground for reversal is that there was insufficient evidence to sustain her conviction. She first argues that the state failed to establish that she was aware that Pace had committed aggravated robbery. The thrust of her argument is that the statute requires that her conscious purpose must have been to "hinder the apprehension or prosecution of one whose conduct constituted" aggravated robbery. § 41-2805 provides in pertinent part:

> (1) a person commits an offense under this section if, with purpose to hinder the apprehension, prosecution, conviction or punishment of another for an offense . . .

Although former law (Ark. Stat. Ann. § 41-120 [Repl. 1963]) required that the hinderer have "full knowledge" of the crime committed, the new Code "speaks in terms of the actor's *purpose* rather than the certainty of his knowledge respecting the consummated crime." (Italics supplied.) Commentary, Ark. Stat. Ann. § 41-2805 (Repl. 1977). The statute requires only that the hinderer purposely aid one sought for "an offense."

At trial, Pace, who had been convicted of aggravated robbery, testified that prior to his departure from their apartment, he and the appellant "had a conversation concerning my intent to rob the Pizza Hut." The appellant warned him to "be careful", watched him cut eye holes in a ski mask, and was aware of his earlier intent to borrow a gun. Moreover, upon his return to the apartment after the robbery at gun point, he told the appellant that he had robbed the Pizza Hut and threw $400 on the bed. There is certainly substantial evidence that appellant had reason to believe that Pace had committed "an offense."

Appellant also contends that the state failed to establish that her purpose was to hinder the apprehension of the accused. When the police arrived at their apartment, appellant went into the bathroom to advise Pace that the police wanted to question him. According to Pace, she informed him that she had advised the police that he had been at the apartment "all evening." He so told the officers. At the trial Pace testified that the appellant had given false information to the police. This evidence, together with that previously recited, is amply substantial that the appellant purposely hindered the apprehension or prosecution of a person.

Affirmed.

HARRIS, C.J., not participating.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. Aside from the fact that I feel the evidence was insufficient to support a conviction in this case, I disagree with the majority in allowing the prosecuting attorney to amend the indictment which charged a Class D felony to one charging a Class B felony. Ark. Stat. Ann. § 43-1024 (Repl. 1977) provides:

> The prosecuting attorney or other attorney representing the State, with leave of the court, may amend an indictment, as to matters of form, or may file a bill of particulars. But no indictment shall be amended, nor bill of particulars filed, so as to change the nature of the crime

charged or the degree of the crime charged.

As I read the above statute, the prosecuting attorney is prohibited from changing the indictment to charge a greater crime than is contained in the indictment. There can be no dispute that a Class B felony is a greater crime than a Class D felony. Therefore, the elevation of the degree of the crime was obviously changed during the course of the trial. Nothing in the statute grants authority to amend the indictment "if the defendant is not surprised." The state argues appellant knew they meant to charge a Class B felony sometime prior to actual change. It is equally true the state possessed this same knowledge. I can see no reason to excuse the state from correcting its known mistake at the expense of the appellant.

The information is couched in the terms of Ark. Stat. Ann. § 41-2805 (Repl. 1977). However, the statute is not set out in any place on the information. This same statute has penalties ranging from Class B felony down to Class D felony and even a misdemeanor. Certainly the degree of the offense charged is within the framework of the statute. I agree with the majority the nature of the offense was not changed but I cannot agree that the degree of the offense was not changed in view of the plain words set out in the statute. Had the indictment stated that James Pace had been convicted of a Class A felony, I think the majority view would be more in line. There is no evidence in the record to indicate appellant knew Pace committed aggravated robbery as distinguished from robbery. Robbery is a Class B felony. Ark. Stat. Ann. § 41-2103 (Repl. 1977). Had Pace been convicted of robbery, then if appellant were guilty of hindering his apprehension or prosecution she could not have been guilty of more than a Class C felony.

I simply cannot justify ignoring the statute which prohibits an amendment, increasing the degree of the offense, from being added to an information during the trial. There is no other way I can read this statute without adding to it as I think the majority have done. Therefore, I would reverse and remand or reduce to a lower classification.

S. & L. PAINTING CONTRACTORS, INC.
v. J. D. VICKERS et al

79-259 589 S.W. 2d 196

Substituted opinion on denial of rehearing
delivered January 14, 1980
[Rehearing denied December 10, 1979.]

Gibson & Gibson, P.A., by: *R. Bynum Gibson, Jr.*, for appellant.

Gill & Johnson, by: *B. Kenneth Johnson*, for appellees.

DARRELL HICKMAN, Justice. The only issue before us is the application of the Arkansas Wingo Act. That law essentially provides that foreign companies must register with the

Secretary of State to do business in Arkansas. Failure to register subjects the foreign corporation to the possibility of a fine and makes its contracts unenforceable. Ark. Stat. Ann. §§ 64-1201, 1202 (Repl. 1966). See Note, 25 *Ark. La. Rev.* 578 (1972).

The chancellor held that the appellant, a Mississippi corporation not authorized to do business in Arkansas, could not recover for work done in Arkansas for an Arkansas resident.

We affirm that decision.

The facts are essentially undisputed. The appellant does virtually all its business in Mississippi and less than 1% of its business in Arkansas. It is not registered to do business in the State of Arkansas as required by law; the company's officers did not know of the requirement. Its agents came to Arkansas and entered into a contract in Arkansas to do some work on a residence near Lake Village.

The appellant was not paid for its work and filed an action to impose a lien against the Arkansas residence. The owners, J. D. Vickers and Susan Smith Vickers, as well as several mortgage holders were joined as parties. The Vickers were later divorced and Susan Vickers was deeded the residence. Relying on the Wingo Act, she denied that the appellant could impose a lien and recover on it.

In several decisions we have discussed the Wingo Act. In *Pacific National Bank* v. *Hernrich,* 240 Ark. 114, 398 S.W. 2d 221 (1966), we held that a contract between a non-complying foreign corporation and an Arkansas resident was not merely unenforceable but void *ab initio*. In *Worthen Bank & Trust Co.* v. *United Underwriters,* 251 Ark. 454, 474 S.W. 2d 899 (1971), we said:

> The purpose of the statute is not to permit such corporations to *avoid* liability under such contracts, but the assignment or otherwise, and to put prospective purchasers or assignees on notice that such contracts, even when negotiable or valid on their face, are void and

unenforceable even in the hands of what would otherwise appear to be a bona fide purchaser for value.

The chancellor was correct. This was not an interstate commerce transaction that would make the Wingo Act inapplicable.

There are two other questions raised. Susan Vickers filed a counterclaim against the appellant seeking $2,000.00 damages for alleged negligent workmanship by the appellant. Counterclaims or setoffs are mandatory in Arkansas. Ark. Stat. Ann. § 27-1121 (Repl. 1979); Arkansas Rules of Civil Procedure, Rule 13.

The appellant argues that the appellee, Susan Vickers, waived her remedy under the Wingo Act by filing a counterclaim. It was later dismissed by the chancellor. We hold that appellee did not waive her remedy under the Wingo Act when she filed a counterclaim.

The Colonial Bank of New Orleans, claiming to hold a mortgage on the residence, joined the Vickers' move to have the complaint dismissed. The appellant argues that the bank, because it was not in privity of contract with appellant, had no standing to claim such relief. The bank, however, had a mortgage of record to land on which the appellant sought to impose a lien. The validity of the Bank's mortgage is contested by appellant. Whether the mortgage is enforceable would be relevant to establishing priority between the bank and appellant only if the appellant had a valid claim to a lien. We hold that because of appellant's failure to obey the Wingo Act, it can enjoy no rights under the contract it made in Arkansas and that this disability extends to a priority contest between the non-complying foreign corporations and creditors of the Arkansas resident even though they are not in privity of contract with the debtor.

This is no greater an expansion of the Wingo Act than allowed in *Pacific National Bank* v. *Hernrich, supra,* and *Union Planter's Bank* v. *Moore,* 250 Ark. 272, 464 S.W. 2d 786 (1971), where we held that the Wingo Act voided the claims on a negotiable instrument of a party who would

otherwise have been a holder in due course.

Affirmed.

STROUD and MAYS, JJ., not participating.

Donna PERKINS & Charlene DIGGS
v. Calvin Ronald PERKINS

79-304 589 S.W. 2d 29

Opinion delivered November 13, 1979
(In Banc)

B. W. Sanders and *Toney D. McMillan,* for petitioners.

Henry Morgan, for respondent.

DARRELL HICKMAN, Justice. The petitioners seek review of a Court of Appeals decision in a child custody case citing three reasons: a tie-vote of the Court of Appeals, a significant legal issue and an erroneous application of the standard of review for such a case.

After carefully reviewing the petition, the response and the opinion of the Court of Appeals judges, we find that essentially there is simply a question of fact involved and that is, which party should have custody of the child in question. We find nothing else that would warrant granting the review and, consequently, we deny the petition.

Rule 29.6 of the Supreme Court Rules specifically states that no appeal, as a matter of right, lies from the Court of Appeals to this court. While a tie-vote may be reason for us to review a decision of the Court of Appeals, we do not automatically grant such a review. This is one of those cases that we find does not merit review.

HARRIS, C.J., not participating.

Robert BUSHONG *v.* STATE of Arkansas

CR 79-161 589 S.W. 2d 559

Opinion delivered November 13, 1979
(In Banc)

McDaniel & Gott, P.A., by: *Bobby McDaniel* and *Phillip Wells,* for appellant.

Steve Clark, Atty. Gen., by: *Robert J. DeGostin, Jr.,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Robert Bushong, the appellant, was convicted of possession of marijuana with the intent to deliver it and sentenced to five years imprisonment and fined $5,000.00.

Bushong was charged in Fulton County, Arkansas but tried in Izard County, the court having granted a motion for change of venue.

Bushong alleges four errors: First, there is a three-fold attack on his prosecution under Arkansas' Controlled Substances Act. Bushong alleges the Act amounts to an invalid delegation of legislative authority; that the Commissioner of Narcotic and Toxic Substances has failed to comply with the Controlled Substances Act and the Administrative Procedure Act; and that the Controlled Substances Act is unconstitutional because it is arbitrary, capricious and unreasonable. Second, the State failed to call a material witness who was present during the appellant's interrogation. Third, the court failed to suppress Bushong's statements which, allegedly, were induced by coercion, violence and threats. Fourth, the court erred in admitting an oral statement made by the appellant to Trooper Bob Reynolds.

We find no merit to any of these arguments and affirm the judgment of the trial court.

The appellant put on extensive proof that the Commissioner of Narcotic and Toxic Substances had failed "to

revise and republish'' the schedules in the Controlled Substances Act as required by Ark. Stat. Ann. § 82-2614.3 (Repl. 1976).

Also, the appellant put on evidence that the Commissioner had not complied with the Administrative Procedure Act. This argument relates to a requirement that certain information be filed with the Secretary of State and the clerks of the various circuit courts throughout the state. See Ark. Stat. Ann. § 5-703(d) (Repl. 1976).

Finally, the argument is made that marijuana does not belong in the classification in which it was placed, is not a harmful substance that should be in the Controlled Substances Act, and, therefore, is unconstitutionally controlled.

Because the appellant was prosecuted under a part of the Controlled Substances Act which has not been changed since it was enacted by the General Assembly, the appellant is in no position to argue that he was aggrieved by any failure on the Commissioner's behalf to strictly follow the Administrative Procedure Act. That failure to act would be poor administration, not a defense in this case. For the same reason, the appellant has no standing to attack the Commissioner's authority as an unlawful delegation of legislative authority. *U.S.* v. *Westlake,* 480 F. 2d 1225 (5th Cir. 1973). Neither do we believe that the Commissioner's failure to revise and republish the schedules of controlled substances, at least where no allegation of the lack of actual notice was made, can be used as a defense to a criminal prosecution under a part of the Act as passed by the General Assembly. Compare *Central Arkansas Auction Sale, Inc.* v. *Bergland,* 570 F. 2d 724 (8th Cir. 1978).

The fact that the appellant offered some evidence that marijuana does not belong in Schedule 6 does not mean the General Assembly was wrong in its classification of marijuana. Such legislation is presumed to be constitutional, *State* v. *Baker,* 56 Haw. 271, 535 P. 2d 1394 (1975), and will be upheld if supported by any rational basis. *Pridgeon* v. *State,* 266 Ark. 651, S.W. 2d 225 (1979).

While the appellant offered testimony that marijuana was not as harmful as alcohol or tobacco, we cannot say that the evidence presented by the appellant is so overwhelming and uncontradicted as to convince us that the legislative act in question is arbitrary, capricious and unreasonable and, therefore, violates the due process clause and the equal protection clause of the United States Constitution. See *People* v. *Star,* 400 P. 2d 923 (Colo. 1965).

A pre-trial hearing was held, as required by *Jackson* v. *Denno,* 378 U.S. 368 (1964), to determine if Bushong's statements were voluntary. He admitted to the police officers it was his marijuana. Bushong testified that he was threatened, coerced and intimidated by police officers for several hours before he finally made a statement to two Arkansas State Policemen in Salem about 4:30 p.m. on the date he was arrested. Such an in-custody confession is presumed to be involuntary and the burden is on the State to show that the statement was voluntarily made. *Smith* v. *State,* 254 Ark. 538, 494 S.W. 2d 489 (1973). We make an independent determination of voluntariness of a confession based upon the totality of the circumstances. However, we do not overturn the findings of the trial court unless they are clearly against the preponderance of the evidence. *Degler* v. *State,* 257 Ark. 388, 517 S.W. 2d 515 (1974). Bushong's statements were found to be voluntary by the trial court.

In *Smith* v. *State, supra,* we adopted the rule that whenever an accused offers testimony that his confession was induced by violence, threats, coercion or offers of reward, then the State has a burden to produce all material witnesses who were connected with the controverted confession or give adequate explanation of their absence.

Seven police officers were called to testify at the *Denno* hearing regarding the voluntariness of Bushong's statements. The State did not call a possible witness, Doug Rogers, who was a constable. The appellant objected to the State's failure to call Rogers as a material witness and the State offered no explanation of his absence. The question presented to us is, was Doug Rogers a material witness connected with the confession; should he have been called

by the State or his absence explained?

In *Smith* v. *State, supra,* an Arkansas State Policeman who was accused by the defendant of coercing him and promising him leniency was not called as a witness. Neither was the stenographer called who took down the defendant's statement and who was present during his interrogation. We held these persons were material witnesses. In the case of *Smith* v. *State,* 256 Ark. 67, 505 S.W. 2d 504 (1974), the State did not call one of two police officers who interrogated the defendant. There was evidence the confession was induced by violence, threats and coercion. Both police officers were accused of physically abusing the defendant. We held the absent police officer was a material witness. That officer signed the statement as a witness and was present when the defendant made his statement.

In *Northern* v. *State,* 257 Ark. 549, 518 S.W. 2d 482 (1975), one of two police officers was not called by the State. An allegation was made by the defendant that he was physically abused by the absent officer. The State's explanation of the officer's absence was not satisfactory and we reversed the judgment. In *Gammel & Spann* v. *State,* 259 Ark. 96, 531 S.W. 2d 474 (1976), the State failed to call a witness who was in jail with the defendant. The argument was made that the cellmate, as well as police officers or jailers who placed the witness in the cell, could shed some light on the defendant's argument of an involuntary statement. We refused to extend the *Smith* v. *State,* 254 Ark. 538, 494 S.W. 2d 489 (1973) decision beyond its specific language.

It is no excuse that a defendant fails to call the material witnesses. That burden is clearly upon the state. *Northern* v. *State, supra.*

The Illinois Supreme Court has had extensive experience with this rule. In the case of *People* v. *Sims,* 211 Ill. 2d 425, 173 N.E. 2d 494 (1961), cert. den. 369 U.S. 861 (1962), that Court reviewed its previous decisions and discussed the application of the rule.

Illinois had substantially the same rule that we adopted

in the *Smith* case. However, through the years they used different language in describing the rule. For example, witnesses that were required to be called by the state were described as "All the Police Department men engaged or present at the sweating," "all the persons who had control over the defendant and are allegedly involved in the use of coercion," and "every police officer and every other person connected with taking the confession."

The Illinois Court in *Sims* reviewed its rule and discussed in detail its decisions. In one case where a defendant was grilled constantly over an extended period of time, the State called only one police officer whose testimony covered only one-tenth of the period of time involved, and he did not specifically deny the alleged facts of the defendant. *People* v. *Holick,* 337 Ill. 333, 169 N.E. 169 (1929). In another case, a State's Attorney to whom the defendant complained concerning the tactics of the police was not called. *People* v. *Sloss,* 412 Ill. 61, 104 N.E. 2d 807 (1952). These absent witnesses were determined to be material by the Illinois Court.

On the other hand, a State's Attorney who questioned the accused and took his confession was found not to be a material witness. The accused in that case said he was promised leniency. However, those promises were not made by the State's Attorney but by a sheriff and his deputy at a time when the State's Attorney was not present. There was no claim that the State's Attorney made any improper inducement or that the State's Attorney was present when it occurred. The State's Attorney was not declared a material witness. *People* v. *Scott,* 401 Ill. 80, 81 N.E. 2d 426 (1948).

In another case, several witnesses who had been present at various stages of the interrogation process were not found to be material witnesses. The court concluded, "every person who could be considered a material witness . . . was produced . . ." *People* v. *Jennings,* 11 Ill. 2d 610, 144 N.E. 2d 612 (1957). It was found unnecessary to call some police officers who were present in the police station at the time of interrogation, but who did not participate in the questioning. *People* v. *Gavurnik,* 2 Ill. 2d 190, 117 N.E. 2d 782 (1954).

The Illinois Court concluded that its decisions were consistent and that the principle involved was the same. It said:

> The principle that emerges clearly from all these cases is that the persons who must be called as witnesses or whose absence must be explained are those persons whose testimony would be material on the issue of the voluntary nature of the confession. *People* v. *Sims,* 21 Ill. 2d 425, 432; 173 N.E. 2d 494 (1961).

There is no doubt each case can differ in some respect and it becomes a question of applying the rule to facts in each case.

Bushong does not claim that any coercion or improper inducement occurred when he actually made the statement about 4:30 p.m. on the day he was arrested. That statement was taken by two Arkansas State Policemen, Officers Talley and Turner. It was not disputed that they properly advised Bushong of his rights and that he admitted to them that the marijuana was his. Bushong claims that the coercion occurred after he was arrested early on the morning of the 1st of August, 1977.

At about 3:00 a.m. on August 1st, Bushong and two others were surprised in the woods southwest of Mammoth Springs, Arkansas by two officers, Bob Slayton and Ernie Rose, deputy sheriffs of Fulton County. These two officers had a "stakeout" observing marijuana plants that were hung in trees to dry. Three other officers arrived shortly thereafter, Sheriff Barker, Trooper Martz and Constable Rogers. Bushong and others were held at the scene until about 9:00 a.m.

Bushong testified that he was abused physically by Deputy Sheriff Slayton and Sheriff Barker. He said that Slayton grabbed his beard and struck him. He said Sheriff Barker observed this. At the time he was in a police vehicle. When asked if anyone else observed it, he said that Trooper Martz was sitting in his police car, immediately behind the car in which Bushong was sitting. He did not say any other

witness observed this mistreatment. Bushong testified that he observed one of the other defendants being abused in the trooper's car by Sheriff Barker. He said that one of the other defendants was taken down the road by the sheriff and it sounded to him as if the sheriff beat that defendant.

Trooper Martz testified that he arrived shortly after the arrest and left about 9:00 a.m. During cross-examination he testified that Constable Rogers accompanied him to the scene and was there throughout this period of time and left with him. Bushong never testified that Constable Rogers observed any mistreatment of him, coerced him in any way or abused any of the other defendants in any way.

All of the police officers except the constable testified and denied the allegations of coercion and mistreatment. That is, six officers testified.

Was Rogers a material witness or was he a casual witness? We cannot conclude that he was a material witness. If we decide that he was a material witness, then we might as well say all witnesses who could possibly have witnessed anything must be called by the State. That is an unreasonable burden to place upon the State. There must be some connection between the witness and the alleged acts of coercion or an opportunity to observe the alleged coercion. This record gives no indication that Rogers would have been a material witness in any regard except he happened to be present on the scene and might have observed something.

Bushong never mentioned Rogers in his testimony. One of the other defendants, who was called as a witness, did mention Rogers and it might be inferred from that witness' testimony that the constable, along with Martz and some others, harassed that defendant. But that would require some speculation on our part. It is not alleged that all the police officers abused the suspects or that they were all in a position to observe each alleged act of abuse.

We conclude, therefore, that the trial court did not err in failing to require the State to produce Rogers, nor can we say

the trial court's decision regarding the voluntariness of the statements was clearly erroneous.

Trooper Bob Reynolds testified during the trial that Bushong made a statement to him when he was transporting Bushong from the woods to Mammoth Spring. It is argued that the admission of this statement was erroneous because it surprised the appellant. (The Prosecuting Attorney said he was surprised too.) The appellant also argues a proper *Miranda* warning was not given and the trooper's testimony was totally inconsistent with what he had previously told the appellant's lawyer.

Reynolds testified during the *Denno* hearing and when asked if Bushong made any statements to him he replied "yes" but nobody asked him what the statements were. Later, before the trial, the attorneys for Bushong took a statement from Reynolds which was recorded and in that statement Reynolds said "The man didn't tell me anything."

Reynolds testified that he gave the *Miranda* warning orally to Bushong when he got in the car. However, apparently he failed to tell Bushong that interrogation must cease if at any time during the questioning the defendant wished to remain silent.

Bushong did not deny that he was given his *Miranda* warning at the time he was arrested earlier that morning. The arresting officers said it was given. Reynolds testified that he knew that Bushong had been advised of his rights and, in fact, did not question Bushong, but Bushong simply voluntarily told him about the marijuana. Bushong's attorney was given the opportunity to introduce into evidence the transcript of the tape recording of Reynolds' statement and Reynolds admitted that he had made the statement that the man didn't tell him anything. He explained during redirect-examination that he did not have his notes when he was examined by the lawyer.

The appellant argues that a continuance should have been granted so that the appellant's attorney could get the

tape recording of Reynolds' statement to impeach Reynolds' testimony.

A hearing was held on the voluntariness of the statement and the court concluded that it was voluntary. Nobody asked Reynolds what the statement was. There is no requirement that the *Denno* hearing must involve the details of the statement, only its voluntariness, with ample opportunity for the defense to test the burden of the State. See *Jackson* v. *Denno, supra; Silliman* v. *People,* 114 Colo. 130, 162 P. 2d 793 (1945). The trial court found that Bushong was properly warned of his rights and that the statement he made to Reynolds was admissible. The trial court granted Bushong's attorney a full opportunity to impeach Reynolds' testimony and a continuance to obtain the tape would not have materially aided the defense. We cannot say the trial court's findings were clearly erroneous.

Affirmed.

HARRIS, C.J., not participating.

BYRD, J. dissents.

William Roger WINKLE et ux *v.*
GRAND NATIONAL BANK

78-296 601 S.W. 2d 559

Substituted Opinion on Rehearing
delivered April 21, 1980

Appellant, *pro se*.

Robert S. Hargraves, for appellee-cross appellant.

JOHN A. FOGLEMAN, Chief Justice. This action was commenced by appellee and cross-appellant Grand National Bank against appellants on two promissory notes executed by them on November 5, 1975. They were: a short term ninety-day note in the principal amount of $15,000, with interest at ten percent, renewable at maturity with an eight percent reduction in principal, and a note for the principal sum of $22,000 with ten percent interest to be paid over ten years in one hundred twenty equal installments. Appellee's loan clerk prepared the notes, a deed of trust, a security agreement and a financing statement using the total proceeds of the two notes as the total amount financed and excluding any charges for credit life insurance.

Several errors were made in the preparation of the documents. The deed of trust and the security agreement prepared by the loan clerk referred to only one promissory note for $37,000 and were therefore incorrectly drawn, a fact overlooked by both parties at the time. At the closing, appel-

lants requested credit life insurance on both promissory notes. This required an additional advance of funds, but appellee's loan officer, instead of preparing new documents, tried to make corrections on the face of the notes. These corrections were initialed by Roger Winkle. The amount of the monthly payments in the body of the installment note, however, was not changed to correspond to the adjustment made for the credit life insurance until the discrepancy was discovered at the close of the appellee's business day. The total amount recited as due in the body of the installment note was not corrected. Soon after the notes were executed, appellants received a payment book showing payments which had been increased to cover the amount of the premium for the credit life insurance as a part of the principal. Appellant made these payments for approximately one year in the amount shown in the coupon book, rather than the amount of the lower installment payments indicated in the note.

The Winkles subsequently defaulted on both promissory notes and, on May 5, 1977, the bank brought this suit to collect the balance due on them. The bank, having discovered the errors in the documents, sought reformation of these instruments as well as judgment for the balance due on both notes and foreclosure of the security instruments. Appellants' answer was a general denial but they filed a counterclaim and an amendment thereto, alleging that appellee had violated the Truth in Lending Act and that the loan was usurious. They also sought to recover actual and punitive damages, alleging that the bank's officer had willfully, maliciously, and intentionally misled them in the transaction. The chancellor found that: the Winkles desired to borrow funds sufficient to refinance outstanding obligations and to provide additional capital for their business, Winkle Handbag and Fabric Center; because the loan was primarily (even overwhelmingly) for business purposes, the bank was not required to comply with the provisions of the Truth in Lending Act; the instruments should be reformed to describe the intentions and agreement of the parties; and the $22,000 installment note was usurious. Because appellee is a national bank and, therefore, subject to federal regulation, the judgment rendered for appellants was in the amount of

twice the interest they had paid on the $22,000 note. Appellee bank was awarded the balance due on a renewal of the $15,000 note and the remaining principal of the $22,000 note, less interest and the credit life premium.

Appellants rely upon five points for reversal:

I

THE CHANCELLOR ERRED IN NOT FINDING THE ENTIRE LOAN TRANSACTION USURIOUS BY EXCLUDING THE $15,000 DEMAND NOTE.

II

THAT THE CHANCELLOR ERRED IN NOT VOIDING THE $22,000 INSTALLMENT NOTE.

III

THE CHANCELLOR ERRED IN FINDING THAT A MUTUAL MISTAKE OF ERROR TOOK PLACE IN THE PREPARATION OF A DEED OF TRUST.

IV

THE CHANCELLOR ERRED IN EXEMPTING THIS LOAN TRANSACTION FROM THE PROTECTION OF THE TRUTH IN LENDING LAW AS TO THE RIGHT OF RESCISSION.

V

THE CHANCELLOR ERRED IN SUSTAINING DEMURRER FOR DAMAGES.

Appellee cross-appeals alleging error on three points:

I

THE CHANCELLOR ERRED IN CONCLUDING THAT THE ACCRUAL OF INTEREST USING

THE "RULE OF 78's" RENDERED THE $22,000 PROMISSORY NOTE USURIOUS.

II

THE CHANCELLOR ERRED IN CONCLUDING THAT THE USE OF THE "RULE OF 78's" UNDER THE WORDING OF THE PROMISSORY NOTE RENDERED THE NOTE USURIOUS.

III

THE CHANCELLOR ERRED IN FINDING THAT THE COMMISSION EARNED ON THE CREDIT LIFE INSURANCE PREMIUM RENDERED THE NOTE USURIOUS.

We will first treat appellants' arguments and then consider appellee's three points on cross-appeal.

I

Appellants, in their pro se brief, argue that not only the $15,000 promissory note, but the whole transaction, was usurious because appellee did not prove at trial that credit life insurance was issued on that note and, therefore, a charge for a credit life insurance premium was actually hidden interest. Appellants also contend that the $15,000 note as renewed on April 13, 1976 is usurious on its face.

Appellee bank, while protesting that this issue was raised for the first time in appellants' post-trial brief, stated that the policy was not introduced at trial because of an oversight of counsel. The record reveals that the foundation had been laid for the policy's introduction into evidence, but two copies of the policy on the $22,000 note were introduced instead and appellee's attorney had misplaced the document in question. Because the attorney felt that the validity of the policy was not at issue at trial, the oversight was never corrected. Appellee attached the policy to its post-trial brief as an exhibit. Even though more than one month elapsed between the filing of this brief and the filing of the chancel-

lor's findings of fact and law, the chancellor obviously considered the policy without objection from appellants. The chancellor found that the original figures typed on the face of the note had been changed, when the Winkles elected to take credit life insurance, to include the amount of the premium $51.75 and the changes had been initialed by Roger Winkle.

Appellants complain that appellee failed to produce this policy in response to a subpoena duces tecum which they had caused to be served upon appellee three months before the trial which was held on October 25, 1977. This subpoena called for appellee to bring all documents regarding the execution of the promissory notes for $22,000 and $15,000 to a hearing to be held on June 28, 1977. Although both parties abstract portions of the record, it is not clear to us whether the hearing was held or its nature, if held. It must have been one of several preliminary hearings mentioned in appellants' statement of the case, one of which was held on June 29, 1977. There is no indication that the case had been set for trial on either date. We find no indication that the subpoena required production of the policy, or other documents at the trial.

Appellee's attorney claims to have been misled into the belief that appellants were not raising any issue as to the credit life insurance until the question was raised in a post-trial brief filed by appellants. A stipulation was entered into on October 19, 1977, which was a week prior to actual trial, although it appears that this may have been the date on which the trial was originally set, because the parties agreed in the stipulation that the Winkles were entitled to a continuance. That stipulation included the following paragraphs:

> 2. That the defendants' allegation of usury is evidenced by the computerized statement mailed to them by Systematics, Incorporated, which reflects computation of earned interest for the calendar year 1976.
>
> 3. That said defendants specifically waived any other allegations of usury as to the time of making of the

> promissory notes involved, any demands for payment or any demands made by the pleadings herein.

Appellee and its attorney were cerainly justified in believing that the question of credit life insurance was not an issue until appellants asserted in their post-trial brief that the $51.75 was a masked interest charge because no policy was ever issued.

George Lefler, Executive Vice-President of Grand National Bank testified that a credit life insurance policy was issued, the premium added to the $15,000 principal advanced and interest charged on the total amount financed. Lefler also testified that the credit life insurance was issued by an independent insurance company and the policy issued to the Winkles was in the loan file and still in effect at the time of trial. Mrs. Carolyn Phillips, Assistant Vice-President of Grand National Bank, testified that she took the Winkles' application for credit life insurance. At that time, she claims, she gave Mrs. Winkle a form for a physical examination to be returned directly to the insurer by Mrs. Winkle or her doctor. Mrs. Phillips stated that the habit of the insurance company when it received the physical examination forms was not to notify the bank, and silence was presumed to be acceptance on their part. Mrs. Phillips did not hear from the insurance company and she presumed the Winkles' policy was accepted. Mrs. Phillips also testified that she altered the $15,000 note to reflect the credit insurance.

Appellants also contend that the payments provided for made the note usurious, pointing out that Mike Allen, an accountant called as a witness by the Winkles, testified that he included the credit life insurance premium as principal and calculated the interest allowable on the $15,000 note at 10 percent and found that, considering information statements issued by the bank for the year 1976, there was an overcharge of one cent for that year. He recognized that the statements sent out by the bank were for information purposes mainly to be used by the taxpayer for verification to the Internal Revenue Service as to the amount of interest paid for the year. He also testified that there are untold formulas for computing interest. The Expanded Monthly

Tables published by Financial Publishing Company were exhibited. Neither party abstracted this exhibit, so we cannot show the interest calculations on this note (or its renewals), according to these tables. The note was due 90 days from its date. It was paid by a renewal note dated April 13, 1976. Interest was paid up through the date of this renewal. The renewal note was again renewed on August 20, 1976 at which time interest was paid in full and a reduction made of the principal balance. This note was then renewed on December 17, 1976, when interest was again paid in full and there was a reduction of $600 in principal. It is well known that different methods of interest calculation may produce results that may vary as much as one cent or more, for a one year period, sometimes by the rounding off of odd cents.

Appellants argue that the April 13 renewal shows usury on its face because the interest showed that it was figured for 99 days while the due date indicated in the lower right hand side of the note was July 3, 1976, 81 days from the date of the note. The note was renewed for 99 days. A renewal of this note took place 99 days after its date and there is no indication that the interest paid at that time was excessive. The self-contradictory dates do not, in and of themselves, make the note usurious.

The chancellor found that appellee was entitled to judgment against appellants under the terms of the $15,000 note for the amount of its last renewal on December 17, 1976. We agree. Appellants had the burden of proving usury by clear, satisfactory and convincing evidence. *First American National Bank* v. *McClure Construction Co.*, 265 Ark. 792, 581 S.W. 2d 550; *Arkansas Real Estate Co.* v. *Buhler,* 247 Ark. 582, 447 S.W. 2d 126. This burden they have failed to meet. It is axiomatic that the chancellor's findings will not be reversed unless they are clearly against the preponderance of the evidence. *Gibson* v. *Heiman,* 261 Ark. 236, 547 S.W. 2d 111; *Titan Oil & Gas, Inc.* v. *Shipley,* 257 Ark. 278, 517 S.W. 2d 210.

Appellants also argue that the $22,000 note was usurious on account of credit life premiums charged, but we will treat that question when we consider the cross-appeal.

II

Appellants contend that the chancellor erred in not voiding the $22,000 note because of appellee's fraudulent and material alteration of this instrument, relying on Ark. Stat. Ann. § 85-3-407 (Add. 1961). Section 85-3-407 provides:

> Alteration. — (1) Any alteration of an instrument is material which changes the contract of any party thereto in any respect, including any such change in
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> (a) the number or relations of the parties; or
>
> (b) an incomplete instrument, by completing it otherwise than as authorized; or
>
> (c) the writing as signed, by adding to it or by removing any part of it.
>
> (2) As against any person other than a subsequent holder in due course
>
> (a) alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense;
>
> (b) no other alteration discharges any party and the instrument may be enforced according to its original tenor, or as to incomplete instruments according to the authority given.

Clearly appellants are not discharged unless the alteration is both fraudulent and material, changes the contract of a party thereto and was made without the assent of that party seeking to be discharged. The changes made in the $22,000 note were the result of the Winkles' request for credit life insurance and were reflected with their assent as evidenced by Roger Winkle's initialling of these changes. The subsequent correction in the amount of the monthly payments was merely for the purpose of conforming the payments to the actual agreement of the parties.

We agree with appellants and the trial court that the various errors, discrepancies and corrections rendered the note non-negotiable, but this fact had no effect on the valid-

ity of the note between the parties, even though none of the errors were directly attributable to the Winkles. Carolyn Phillips, who handled the transaction with the Winkles, testified that she had calculated the amount of the monthly payments and had explained to the Winkles that their payments on the note would be $329.97, the correct amount, which was the amount shown in the coupon book sent them two weeks later. Mrs. Winkle said that she called and protested at this time and that Mrs. Phillips said credit would be given if there was any error. Mrs. Phillips said that she could not recall the Winkles voicing any objection. Even though Mrs. Winkle said she mentioned the amount every time they made a payment, the Winkles made these payments by check for a year without noting a protest on them. The name of the unincorporated business of the Winkles was changed to correspond with the name as it was shown on a form previously filled out by the Winkles. We cannot say that there was a preponderance of the evidence to show any alteration of the deed of trust that changed the contract. The contract was for $39,596.40 to be paid in 120 equal installments. The bank simply corrected the error in the amount of the monthly payments to accomplish this agreement. See *Teratron General* v. *Institutional Investors Trust,* 18 Wash. App. 481, 569 P. 2d 1198 (1977); 2 Anderson, Uniform Commercial Code 954, § 3-407:14 (2d ed.) 1971.

III

Appellants assert that the chancellor erred in reforming the deed of trust because of mutual mistake in its preparation. There were two errors in the instrument: the recitation that there was one promissory note in the amount of $37,000 and the statement that the promissory note was payable in equal monthly installments of $290.74. The chancellor found that the deed of trust was executed by the Winkles as partial security for the $22,000 note; that a mutual mistake and error took place in its preparation; and that the deed of trust should be reformed to describe accurately the note it secured.

According to testimony at trial, the reference to one $37,000 promissory note rather than the $22,000 installment loan resulted from a loan clerk's error in the preparation of

the deed of trust. Appellee's loan officer, Carolyn Phillips, testified that the error occurred when the loan clerk improperly used the total principal amount of the loan to be secured, rather than the amount of the installment note. The second error occurred when appellants requested credit life insurance and the amount to be repaid on the note was increased. The original monthly installment of $290.74 recited in the deed of trust was not changed to reflect this increase in the amount of the note.

The only real disagreement about the terms relates to the $15,000 note. The Winkles testified that they were to pay interest only on the $15,000 note until their business improved so they could make payments on the principal.

Proof to establish the right of reformation must be clear and decisive. *Williams* v. *Killins,* 256 Ark. 491, 508 S.W. 2d 753; *Goodrum* v. *Merchants and Planters Bank,* 102 Ark. 326, 144 S.W. 198. There is, however, no requirement that the proof be undisputed. *Meeks* v. *Borum,* 240 Ark. 805, 402 S.W. 2d 408. There is a clear preponderance of the evidence to show that the deed of trust as reformed evidences the parties' intent and agreement. Chancery courts have the power to correct mutual mistakes such as this one and under these circumstances it was appropriate that the chancellor exercise this power.

IV

Appellants argue that the chancellor erred in exempting the loan from the requirements of the federal Truth in Lending Act, 15 U.S.C. § 1601, et seq. Section 1603 (1) of that Act states:

> This subchapter does not apply to the following:
>
> > (1) Credit transactions involving extensions of credit for business or commercial purposes, or to government or governmental agencies or instrumentalities, or to organizations.

The chancellor found that the loan was "primarily, even

overwhelmingly, for business purposes" and that the bank therefore did not come within the provisions of the Truth in Lending Act. In the opening statement of their brief, appellants say that the net proceeds of the loan, after refinancing of all their outstanding loans, both business and personal, were to be used for purchases in the Winkles' business. Mrs. Phillips testified that the Winkles applied for the loan to pay off two loans by First National Bank of Hot Springs and two loans by appellee, which required approximately $34,000. One of the loans by First National Bank was a Small Business Administration loan. The Grand National loans totaled $5,397.67. The balance of the loan proceeds, after payment of these loans, amounted to $3,989.45, and was deposited into the Winkle Fabric account to purchase inventory. Mrs. Winkle testified that the loan from First National Bank had been used to purchase inventory and fixtures, for building rental and for operation of the business and that the proceeds of both loans were used for business purposes. Although Mrs. Winkle testified that the loans retired at Grand National had been personal loans, she admitted that the proceeds had been deposited in the business bank account and that a part of the proceeds of those loans may have been used for the business. The fact that the Winkles may have drawn checks on this account for personal purposes does not change the nature of the loan at the time it was made. The evidence establishes that the proceeds of the loan were applied primarily to retire business debts and purchase inventory. The chancellor's finding that the loan was exempt is supported by a clear preponderance of the evidence.

V

Appellants contend that the chancellor erred in sustaining appellee's demurrer to their claim for actual and punitive damages. A party seeking damages has the burden of proving the claim; if no proof is presented to the trial court that would enable it to fix damages in dollars and cents, the court cannot award damages. *Mason* v. *Russenberger,* 260 Ark. 561, 542 S.W. 2d 745; *Tolbert* v. *Samuels,* 229 Ark. 676, 317 S.W. 2d 715. Appellants failed to establish any proof upon which a judgment for actual damages could have been based,

even if they had established any right to recover damages. Nor can punitive damages be awarded in the absence of actual damages. *Tolbert* v. *Samuels,* supra. In our view of the case, however, they have not established any right to recover any damages.

CROSS APPEAL

I & II

On cross-appeal appellee alleges error in the chancellor's findings that accrual of interest using the "Rule of 78ths" and the use of the rule under the wording of the $22,000 note rendered that note usurious, violating Art. 19, § 13 of the Constitution of Arkansas. The question is whether this note, not usurious on its face or if paid according to its terms, can become a usurious transaction through the use of a mathematical formula, the Rule of 78ths.

The Rule of 78ths is an accounting method of accruing interest and of refunding unearned interest when an installment note is paid before maturity. It approximates the interest accrued by using a system developed on the basis of an installment contract for one year where equal payments are made monthly. The calculation is made on a one year contract by using the number of outstanding payments as the numerator and the total number of payments (1 + 2 + 3 + 4 + 5 + 6 + 7 + 8 + 9 + 10 + 11 + 12) or 78 as the denominator in a fraction then multiplied by the total interest added to the principal to indicate the interest accrued. Thus, 15.38 percent of the total interest to be paid on a one year installment contract, if installments were paid as scheduled, would be considered as having accrued in the first month and 1/78 of 1.28 percent during the twelfth month. For a longer term note, the fraction to be used would be arrived at by using the same method. A series of tests exhibited by appellee reveal that the cross-over point at which the interest calculated as simple interest first exceeds that accruing from application of the Rule of 78ths is near one-third the life of the loan. So, if a borrower voluntarily paid the loan during the first one-third of the term, he would pay more interest than would have been earned on a straight simple interest calculation, but

thereafter, the total interest paid on prepayment would be more nearly equal to that calculated on the conventional simple interest method. The formula was developed to reasonably relate interest earnings to outstanding principal.

The testimony of George Lefler, Executive Vice President of Grand National Bank, described the Rule of 78ths as having nothing to do with calculating interest on a loan, but rather as applying only to prepayment of a loan or the accrual of interest income. Lefler's testimony and the chancellor's findings of fact described the rule's purpose as the acceleration of the payment of interest during the earlier months of the term of an installment note in those cases where the interest for the entire term has been added to the balance of the note.

This note provided that: "Credit on prepayment of this note shall be computed in accordance with the 'Rule of 78ths', there being no penalty for prepayments." Appellee bank, an accrual method taxpayer, contends that because of this provision in the note it had no legal alternative but to accrue and report interest income in accordance with the Rule of 78ths, referring to Treas. Reg. § 1-451-1 (a); Rev. Rul. 72-562, 1972-2 D.B. 231; Rev. Rul. 72-100, 1972-1 C.B. 122. An example contained in Rev. Rul. 72-562, supra, states that if the Rule of 78ths is specified in a contract as the method for determining a prepayment rebate, interest on that installment contract must be accrued in accordance with the Rule of 78ths.

Appellants as borrowers received year-end statements from appellee reflecting the amount the bank had accrued on its books as interest income for that year. The statement received by appellants in January, 1977, read, "Our records indicate you have paid $2,717.97 interest in 1976 on Account 00418009." The account number is the number of the $22,000 installment loan. The bank contends that these statements are informational and do not necessarily reflect the amount of interest actually paid by the debtor, but rather are prepared to reflect the total accrual on a note for the tax year. The chancellor found that interest at 10 percent per annum on this loan would have been $2,496.98 and therefore the

statement sent by the bank reflected interest collected by the bank in excess of 10 percent per annum and that the bank intended to collect interest in excess of 10 percent per annum. We do not consider the Rule of 78ths as it applies to prepayment, there being no question of prepayment in this case.

Certain fundamental rules are adhered to by the courts in determining if usury is present:

> 1. When usury is alleged, the test is whether the borrower promised to pay a greater rate of interest than the law permits and the lender knowingly entered into a usurious contract intending to profit by the methods employed. *Commercial Credit Plan, Inc.* v. *Chandler,* 218 Ark. 966, 239 S.W. 2d 1009; *General Contract Corp.* v. *Duke,* 223 Ark. 938, 270 S.W. 2d 918; *Blalock* v. *Blalock,* 226 Ark. 75, 288 S.W. 2d 327; *Brown* v. *Central Arkansas Production Credit Ass'n.,* 256 Ark. 804, 510 S.W. 2d 571; *Ragge* v. *Bryan,* 249 Ark. 164, 458 S.W. 2d 403; *Peoples Loan & Inv. Co.* v. *Booth,* 245 Ark. 146, 431 S.W. 2d 472; *Davidson* v. *Commercial Credit Equipment Corp.,* 255 Ark. 127, 499 S.W. 2d 68.
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> 2. The burden is upon one asserting usury to show that the transaction is usurious. *Wallace* v. *Hamilton,* 238 Ark. 406, 382 S.W. 2d 363; *Cox* v. *Darragh Co.,* 227 Ark. 399, 299 S.W. 2d 193; *Key* v. *Worthen Bank & Trust Co.,* 260 Ark. 725, 543 S.W. 2d 496; *Poole* v. *Bates,* 257 Ark. 764, 520 S.W. 2d 273; *Brown* v. *Central Arkansas Production Credit Ass'n.,* supra; *Knox* v. *Goodyear Stores, Inc.,* 252 Ark. 530, 479 S.W. 2d 875; *Nineteen Corp.* v. *Guaranty Financial Corp.,* 246 Ark. 400, 438 S.W. 2d 685; appeal after remand, 250 Ark. 832, 467 S.W. 2d 728; *Geyer* v. *First Arkansas Development Finance Corp.,* 245 Ark. 694, 434 S.W. 2d 301; *Peoples Loan & Inv. Co.* v. *Booth,* 245 Ark. 146, 431 S.W. 2d 472; *McCoy Farms, Inc.* v. *J & M McKee,* 263 Ark. 20, 563 S.W. 2d 409. Because of the highly penal nature of our usury law, the plainest principles of justice require that it be clearly shown that the transaction is usurious. *Arkansas Real Estate Co.* v. *Buhler,* 247 Ark. 582, 447 S.W. 2d 126.

3. In determining whether a contract is usurious it must be viewed as of the time it was entered into and it must be presumed that it will be performed according to its terms. See *General Contract Corp.* v. *Duke,* supra; *Sloan* v. *Sears, Roebuck & Co.,* 228 Ark. 464, 308 S.W. 2d 802; *Harris* v. *Guaranty Financial Corp.,* 244 Ark. 218, 424 S.W. 2d 355; *Foster* v. *Universal C.I.T. Corp.,* 231 Ark. 230, 330 S.W. 2d 288, 75 A.L.R. 2d 1260; *Sager* v. *American Investment Co.,* 170 Ark. 568, 280 S.W. 654; *Eldred* v. *Hart,* 87 Ark. 534, 113 S.W. 213; 55 Am. Jur. 331, Usury, § 12; *Hayes* v. *First National Bank of Memphis,* 256 Ark. 328, 507 S.W. 2d 701; *Brown* v. *Central Arkansas Production Credit Ass'n.,* supra; *McCoy Farms, Inc.* v. *J&M McKee,* supra.

4. The actual test of a transaction alleged to be usurious is whether the total amount the borrower will be required to pay is greater than the total amount he could be required to pay to retire the principal indebtedness with interest at 10 percent per annum for the term thereof. *McDougall* v. *Hachmeister,* 184 Ark. 28, 41 S.W. 2d 1088; *Davidson* v. *Commercial Credit Equipment Corp.,* supra.

5. Usury will not be presumed, imputed or inferred where an opposite result can be reached. *Hayes* v. *First National Bank,* supra; *Davidson* v. *Commercial Credit Equipment Corp.,* supra; *Peoples Loan & Investment Co.* v. *Booth,* supra; *Universal C.I.T. Credit Corp.* v. *Hudgens,* 234 Ark. 1127, 356 S.W. 2d 658; *Brittian* v. *McKim,* 204 Ark. 647, 164 S.W. 2d 435; *Brown* v. *Fretz,* 189 Ark. 411, 72 S.W. 2d 765.

Applying these principles, we conclude that the method of accrual used by the bank, the Rule of 78ths, does not render this note usurious. There is nothing in the note itself which reflects any excessive interest charge. Mike Allen, a certified public accountant testifying on behalf of appellants, stated that the note was correct on its face with interest for the term at 10 percent being calculated "right on the button." The chancellor found that if the note had been paid according to its terms, interest would have amounted to ten percent per annum.

The year-end statements sent by the bank were informational only, reporting to the bank's debtors the amount of the bank's annual accrued interest on a loan; the bank was not expecting or demanding payments in accordance with these statements. The statements did not affect or alter the agreement between the parties and the fact that the bank accrued for tax and accounting purposes an amount of interest greater than 10 percent in any year did not affect the debtors' contractual obligation to pay $329.97 per month for a period of 120 months.[1] The reports received by the borrowers reflected the amount of interest the bank was required to accrue on its books and report to the Internal Revenue Service in accordance with IRS requirements and were not statements of appellants' interest obligations under the note. The mere fact that the agreement provided for use of the Rule of 78ths in case of voluntary prepayment by the borrower, even though the agreement stated that there was no prepayment penalty, did not make the note usurious. If the Winkles permitted the note to run until maturity, they would not have paid more than 10 percent per annum in interest, if each installment was paid when due. They could not have been compelled to make any prepayments. They only obligated themselves to pay the installments as they came due, so the contract, as it could have been enforced against them, was not affected with usury. A voluntary prepayment in the exercise of an option given by the contract does not render the contract usurious even though the creditor receives, in the aggregate, a sum more than the principal and the maximum legal rate of interest. *Eldred* v. *Hart,* 87 Ark. 534, 113 S.W. 213. A debtor cannot by making a payment in advance of its due date convert a valid loan into a usurious one. *Green* v. *Mid-State Homes, Inc.,* 245 Ark. 866, 435 S.W. 2d 436. It is our conclusion that the chancellor erred in finding that the use of the Rule of 78ths in the instant transaction rendered the note usurious.

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[1]The result of adopting the contrary view is illustrated by the chancellor's finding that the bank's statement declaring interest accrued on the loan by the bank in 1975 of $481.18 showed that the bank had charged more than 10 percent interest on the $22,000 note in the year 1975. The chancellor made this finding in spite of his finding that the Winkles made *no payments* on the note in 1975.

III

It certainly is not at all clear how the credit life insurance became an issue at the trial. If the case had gone to trial only on the pleadings, it might be understandable. But appellants failed to abstract the stipulation entered into by the parties, the pertinent portion of which has been set out earlier in this opinion. The statements referred to in the stipulation simply stated the interest on the two notes during the year 1976 according to the rule of 78ths. Furthermore, the expert witness called by appellees made his calculations including the credit life insurance premium as principal.

We likewise agree that the chancellor erred in finding that the credit life insurance rendered this transaction usurious. The trial court found, as a matter of fact, and it is not denied, that Roger Winkle initialled a change in both the $22,000 and the $15,000 notes to include credit life insurance premiums. The chancery court's holding on the question of usury was based entirely upon the fact that the insurance policy was for $39,596.40 when the amount borrowed was approximately $25,000. The court found that, since there was a violation of Ark. Stat. Ann. § 66-3806 (1) (Repl. 1966), the lender's 35 percent commission on the amount of the policy in excess of the amount borrowed would render the 10 percent note usurious. The note did reflect an advance of $2,969.79 for credit life insurance. George Lefler, Executive Vice-President of Grand National Bank, testified that the insurance premium was paid to World Service Life Insurance Company, an independent insurance company, for the entire 10-year life of the loan, but that the bank reserved a commission of 33 percent to 35 percent. His testimony is not contradicted. The policy issued by World Service Life Insurance Company of Ft. Worth, Texas, was made an exhibit to Lefler's testimony. Its effective date was November 5, 1975. It was for decreasing term life insurance on Janie Winkle. Roger Winkle was contingent beneficiary. The initial amount of insurance was $39,596.40, the face amount of the note, which was arrived at by adding the insurance premium and a 10 percent finance charge of $14,626.61 to the principal amount of $22,000; but the amount of insurance decreased each month by $329.97, the amount of the

scheduled monthly payment, whether the payment was actually made or not. It is true that the policy was not actually issued by an officer of the bank until the physician's report on Mrs. Winkle's physical condition had been delivered to the bank by Roger Winkle, but the effective date was not changed. The testimony of Carolyn Phillips, an assistant vice-president of the bank, was that, if the company refuses a policy, the entire premium is refunded to the customer.

Mrs. Winkle testified that she had, prior to the loan closing, requested credit life insurance and it had been issued on her husband. On the date of the closing they told the loan officer that they wanted the insurance on Mrs. Winkle instead. Mrs. Winkle said that she and her husband thought that *only* a name change would be involved, but that the loan officer then said that she would probably have to take a physical examination. Mrs. Winkle filled out an application, which contained only general questions about her health. She knew at the time that she "was to go back in later on the credit life insurance."

Appellants conceded in the trial court in their response to appellee's motion for rehearing that the only issue with reference to the credit life insurance was whether excess premiums were charged, and, if so, whether they were excess interest, but that the validity of the policy was not in issue. Appellants also stated that they had no objection to the trial court's taking judicial notice that it is the customary practice of all credit life insurance companies, in the event of the death of the insured, to pay any amount of the insurance not needed to satisfy the outstanding balance of the note involved to the secondary beneficiary or the estate of the insured. It was appropriate for the court to take judicial notice because the statute requires this. Ark. Stat. Ann. § 66-3808 (2) (Repl. 1966). Roger Winkle was the contingent beneficiary named in the policy. George Lefler testified that a rebate would be required if the policy were cancelled.

Mrs. Phillips testified that some of the errors in the loan papers were made because the computations had been made before the Winkles requested credit life insurance and this made a recomputation necessary. The note was actually

prepared for the signature of Roger Winkle on a statement that he did not want credit life insurance. Janie Winkle signed a statement that she desired credit life insurance. Just above the place where Mrs. Winkle signed, the following appears: "THE PURCHASE OF CREDIT LIFE, ACCIDENT AND DISABILITY INSURANCE IS NOT REQUIRED FOR CREDIT." Mrs. Phillips said that the credit life policies are automatically accepted by the insurance company, but, if not accepted, the whole premium is refunded to the customer.

Appellants do not allege or contend that there was any fraud, duress or compulsion in connection with the credit life insurance. They agreed to purchase the insurance and knew the amount of the premium at the time. In their opening statement they say:

> *** The loan was signed by the Winkles. Winkles agreed to purchase credit life insurance on Janie Winkle and were informed that no insurance could be written until checking with insurance company as to whether a physical would be required. A disclosure of what the premium would be was placed in the box for agreement to purchase the insurance. A blank application for credit life was filled in by Janie Winkle regarding age, physical condition and just general information. ***

The basic tenets in usury cases material to this case remain unchanged. Some of them are:

> 1. All reasonable expenses incident to a loan which the borrower agrees to pay or which are paid out by the lender for his benefit are properly a part of the loan proceeds or the amount loaned. *Harris* v. *Guaranty Financial Corp.*, supra; *Lyttle* v. *Mathews Investment Co.*, 193 Ark. 849, 103 S.W. 2d 47; *Brown* v. *Fretz*, supra; *Sidway* v. *Harris*, 66 Ark. 387, 50 S.W. 1002; *Shattuck* v. *Byford*, 62 Ark. 431, 35 S.W. 1107; *Lockhart* v. *GMAC*, 252 Ark. 878, 481 S.W. 2d 350.
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> 2. Insurance premiums paid a third party are proper charges when the borrower agrees to pay them or receives the policy, is not charged an excessive pre-

mium, and receives the benefit of the insurance. *Winston* v. *Personal Finance Co.,* 220 Ark. 580, 249 S.W. 2d 315; *Smith* v. *Eason,* 223 Ark. 747, 268 S.W. 2d 389; *Griffin* v. *Murdock Acceptance Corp.,* 227 Ark. 1018, 303 S.W. 2d 242; *Universal C.I.T. Credit Corp.* v. *Lackey,* 228 Ark. 101, 305 S.W. 2d 858; *Whiddon* v. *Universal C.I.T. Credit Corp.,* 227 Ark. 824, 301 S.W. 2d 567; *Poole* v. *Bates,* supra; *Ragge* v. *Bryan,* supra; *Troxel* v. *Bob Sullivan Chevrolet-Cadillac Co.,* 248 Ark. 1152, 455 S.W. 2d 667.

3. Credit life insurance premiums fall into the same category as other insurance premiums. *Lowrey* v. *General Contract Corp.,* 228 Ark. 685, 309 S.W. 2d 736; *Universal C.I.T. Credit Corp.* v. *Lackey,* supra.

4. The withholding of sums to meet obligations for insurance premiums with the acquiescence of the borrower does not render the transaction usurious, unless the insurance is a subterfuge. *Hartzo* v. *Wilson,* 205 Ark. 965, 171 S.W. 2d 956; *Ragge* v. *Bryan,* supra.

We have approved the inclusion of credit life premiums as a part of the original indebtedness, even where the lender received a 35 percent commission as agent for the insurance company. In *Poole* v. *Bates,* 257 Ark. 764, 520 S.W. 2d 273, we said:

> The principal contention for reversal is based upon the credit life insurance premium. The premium was $55.94, and appellees placed this insurance with an insurance agency; appellees, however, received 35% of the credit life insurance premium as a commission, this amount being in addition to the other moneys under the contract, i.e., the premium was included in the total prior to determining the monthly amount of payments. Accordingly, interest on the commission received by appellees was called for in the monthly payments, and it is appellant's contention that appellees were not entitled to receive interest on that portion of the premium constituting a commission, and since the payments under the contract called for a full 10% interest, that instrument is therefore usurious.

* * * * *

> *** [W]e do not agree that the commission here involved, though, as pointed out in the annotation, a factor to be considered, makes this particular contract usurious. In the first place, this is not a case where the purchaser was compelled to purchase insurance before appellees would finance the purchase of the car; i.e., it was not a charge made for the purpose of allowing them more interest. Rather, it appears that appellant requested this insurance. In the next place, there is no contention that the insurance charge was excessive. In other words, it was a *bona fide* transaction. The charge for insurance was paid and appellant received the benefit requested. The rebate itself was not illegal, nor is there any reason, since appellant asked for the insurance and received exactly what he requested, why such should be illegal. After all, there could be no difference to appellant in purchasing the insurance through appellees, and purchasing it from some company across the street or elsewhere, i.e., there is no showing that the premium would have been less. So long as there is no element of fraud, nor duress or compulsion upon the borrower to take the insurance from the lender, we see no reason why the automobile agent is not as entitled to represent the insurance company, and accordingly receive a commission, as anyone else. In other words, no *unlawful* charge or profit is involved.

The facts in this case take it outside the reach of those cases in which it has been held that credit life insurance premiums or commissions paid to a lender for insurance are to be considered as interest. The premium was paid by the bank to the credit life insurance company in advance. The bank was contractually bound to furnish credit life insurance. The borrower was not compelled to purchase credit life insurance before the bank would make the loan. The borrower was not fraudulently induced to take the insurance. Appellants requested the insurance. There is no evidence to even hint that any of the parties were not acting in good faith. Appellants received the benefit of the insurance. There is no contention that the insurance premium charged was excessive except for the issue as to the amount of the coverage, and there is no showing that the insurance could

have been purchased at a lesser premium. The Winkles had carried credit life insurance on previous loans. The policy was issued effective November 5, 1975, the date of the loan. The issue then turns upon the application of Ark. Stat. Ann. § 66-3806 (1) (Repl. 1966).

The chancellor found that Ark. Stat. Ann. § 66-3806 (1) was violated because "the maximum amount which could have ever been paid under the policy would be something in the neighborhood of $25,000." That statement does not demonstrate a violation of the statute which provides: "The amount of credit life insurance shall not exceed the original amount of indebtedness." The original amount of indebtedness was the face amount of the policy and the note — $39,596.40. If the word "indebtedness" had not been defined in the same act of which § 66-3806 (1) is a part, it might be argued persuasively, but not conclusively, that the chancellor applied the statute properly. The word "indebtedness," as defined by Ark. Stat. Ann. § 66-3804 (5), however, includes "the total amount payable by a debtor to a creditor in connection with a loan or other credit transaction." The total amount payable by the Winkles on the effective date of the policy to the bank on this credit transaction, if the note had been paid according to its terms, was $39,596.40. By the terms of the note, the Winkles promised "to pay to the order of Grand National Bank (herein called Bank), at its office in Hot Springs, Arkansas, the sum of Thirty-four Thousand Eight Hundred-Eight and 80.100 Dollars,[2] in 120 installment[s] of $329.97 beginning December 20, 1975, and on the same date each month thereafter until paid in full . . ."

The decree is affirmed on direct appeal and reversed on cross-appeal. The cause is remanded to the trial court for the entry of a decree and for further proceedings consistent with this opinion.

George Rose Smith, J., concurs.

Hickman, J., concurs in the result.

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[2]This was one of the errors in the preparation of the note and in the upper left-hand corner the amount is correctly stated as $39,596.40.

PURTLE, J., dissents.

GEORGE ROSE SMITH, Justice, concurring. I agree that the Rule of 78ths is valid, simply because an otherwise lawful promissory note is not rendered usurious by a provision requiring the debtor to pay a premium for the privilege of paying the principal debt in advance of its due date. That issue is purely one of law, presented in this case upon undisputed facts. But the majority opinion, by applying to this question of law certain presumptions that are properly applicable only to questions of fact, goes so far astray that I am compelled to make this effort to set the record straight.

Our Constitution, written more than a hundred years ago, provides that contracts for more than 10% interest are void as to principal and interest. Constitution of 1874, Art. 19, § 13. That penalty is so severe that in an early case, turning solely upon an issue of fact, we held that the debtor had the burden of clearly showing that the note in question was usurious. *Leonhard* v. *Flood,* 68 Ark. 162, 56 S.W. 781 (1900). There we said:

> Our law visits on a lender who contracts for usurious interest, however small, a forfeiture of his entire loan and the interests thereon. It follows from the plainest principles of justice that such a defense should be clearly shown before the forfeiture is declared. For this reason, usury will not be inferred where, from the circumstances the opposite conclusion can be reasonably and fairly reached.

Thus the rule of clear and convincing evidence in usury cases was born, though it has had its ups and downs. That is, in some later cases we have specifically said that a preponderance of the evidence is all that is needed to sustain a plea of usury. *Tisdale* v. *Tankersley,* 192 Ark. 70, 90 S.W. 2d 225 (1936); *Dickinson-Reed-Randerson Co.* v. *Stroupe,* 169 Ark. 277, 275 S.W. 520 (1925). Thus we actually have two inconsistent lines of cases. Even so, I have no quarrel with the clear and convincing rule in its proper place, which I take to be the situation in which the debtor seeks to contradict the terms of his written obligation. Thus if the debtor signs a

$500 note, bearing 10% interest, he may fairly be required to show by clear and decisive testimony that he received only $450.

The corollary presumptions against usury with regard to questions of fact have no reasonable application to questions of law. Here the intent of the Constitution cannot be misunderstood: Any attempt by a lender to extort more than 10% interest is so strongly and unequivocally condemned that he forfeits his entire principal as well as his usurious interest. Thus there is no basis whatever for taking the position, as the present majority opinion seems to do, that excessive interest is somehow a favorite of the law, to be zealously protected by the courts.

By and large, this court has discharged its duty to uphold the Constitution. We did hold, in an early case, that it was not usury for a seller to fix a credit price that was in excess of the cash price plus legal interest. *Ford* v. *Hancock,* 36 Ark. 248 (1880). Regardless of the merits of that decision, we later faltered badly be permitting its doctrine to be used as a subterfuge allowing finance companies to charge excessive interest in what were really sales for a cash price.

Our failure to give effect to the spirit of the Constitution came to a sudden halt with the landmark decision in *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S.W. 2d 973 (1952). There we overruled many decisions and effectively put a stop to the use of installment sales as a cloak for usury. There quickly followed a series of decisions that were hammer blows nailing down our position. We rejected a retailer's attempt to use a credit sale as a means of exacting excessive interest, even though no finance company was involved. *Sloan* v. *Sears, Roebuck & Co.,* 228 Ark. 464, 308 S.W. 2d 802 (1957). We required lenders, in writing contracts, to put down in black and white a clear statement of every charge that was being added to the principal and to shoulder the burden of proving that meaningless labels were not concealing usury. *Jones* v. *Jones,* 227 Ark. 836, 301 S.W. 2d 737 (1957). We rejected an unsophisticated lender's testimony that he did not really mean to charge more than 10%, warning lenders that they must at their peril familiarize

themselves with the law. *Brooks* v. *Burgess,* 228 Ark. 150, 306 S.W. 2d 104 (1957). Many other cases might be cited to confirm the position we have steadfastly adhered to since the *Hare* case, that the Constitution means what it says.

Finally, it may be observed in passing that our constitutional ceiling on interest rates is not fundamentally or necessarily bad. The men who wrote the Constitution may have believed in 1874, and might believe today, that high interest rates not only are inflationary but also are a means by which the rich have oppressed the poor since as long ago as Biblical times. That our constitutional ceiling is under fire today results not so much from any inherent defect in the ceiling but from the fact that the other 49 states have no equally low limitation upon interest rates. Until the people change the Constitution, however, our plain duty is to enforce it.

JOHN I. PURTLE, Justice, dissenting. I am compelled to dissent in this case. I agree with the concurring opinion the proper rule is that clear and convincing evidence is required before a contract will be voided upon the grounds of usury. I agree that this rule has had its ups and downs. Today it is down. I further agree that we have at least two lines of inconsistent cases in matters pertaining to usury. After this opinion, you can add another line. There is no question that both the majority and concurring opinion correctly state the rules and laws as they pertain to usury. However, from that point on, I am in considerable disagreement with the majority.

"Usury" was the term originally applied to charges made for the use of money. Any amount repaid in excess of that borrowed was considered usury. This term goes back to at least Biblical times. After the Israelites were returned from captivity, they were allowed to charge Canaanites usury as a means of ruling them. However, Nehemiah, a prophet and governor of Jerusalem in 444 B.C., forbade the charging of usury (interest). Nehemiah 5:7-11. Historically, the various churches taught that charging of interest was sinful; nevertheless, successful merchants and commercial entrepreneurs continued the practice.

An ordinance was passed in London in 1363 which outlawed usury (interest). In 1545 England passed a law

repealing the 1363 ordinance and allowed usury at the rate of 10%. This 1545 law was repealed in 1551 by a statute that specifically declared usury to be prohibited by the word of God. W. Holdsworth, *History of the English Law,* vol. viii, at 100-112 (1926).

Usury, as we know it, is opposed in Arkansas by strong public policy as declared by the constitution and the General Assembly. However, interest has not been considered against public policy. Usury or interest is controlled by law in practically every country in the world. In fact, it was controlled in Arkansas prior to the Constitution of 1874. Rev. Stats. of Ark., ch. 80, § 112, at 469 (1937).

It is impossible for me to study our prior cases and ascertain a clear definition of what constitutes usury in Arkansas. For example, we have held a contract where a lender attempted to receive more than the amount allowed by law from the borrower is usurious. *Home Building & Savings Association* v. *Shotwell,* 183 Ark. 750, 38 S.W. 2d 552 (1931). We have also held if the lender, by mistake of fact or error in calculation, contracts to receive an illegal rate of interest, the contract is not void. *Garvin* v. *Linton,* 62 Ark. 370, 35 S.W. 430 (1896). In *Garvin* excessive interest was reserved through mistake of fact on the part of the lender only, and the excess was held not to be recoverable. Once again, we held that reservation of excessive interest through mistake of fact on the part of the lender did not render the contract usurious in *Aldrich* v. *McClay,* 75 Ark. 387, 87 S.W. 813 (1905). To the same effect, see: *Temple* v. *Hamilton,* 178 Ark. 355, 11 S.W. 2d 465 (1928). In *Mitchell* v. *Duncan,* 190 Ark. 598, 79 S.W. 2d 997 (1935), we held that the wrongful demand of excessive interest did not constitute usury because there was no agreement to pay the excessive demand. Compare this case with *Redbarn Chemicals, Inc.* v. *Bradshaw,* 254 Ark. 557, 494 S.W. 2d 720 (1973), where we held the attempt to collect 1% per month finance charge rendered the contract usurious.

We have held a contract to pay interest greater than 10% per annum renders a contract absolutely void as to principal and interest. *Smith* v. *Eason,* 223 Ark. 747, 268 S.W. 2d 389

(1954). In one very early case, we held that a note bearing 10% interest given to cover supplies and money to be furnished did not render the contract usurious even though there was a failure to furnish a part of the supplies which was given as consideration for the contract. *Lanier* v. *Union Mortgage, Banking & Trust Co.,* 64 Ark. 39, 40 S.W. 466 (1897).

In the case of *First National Bank of Memphis* v. *Thompson,* 249 Ark. 972, 463 S.W. 2d 87 (1971), we held that an error in mathematical calculations resulting from a mistake of law could not be forgiven and could not remove the taint of usury. To the same effect, we have held an error in calculation was not one to be forgiven where the error involved the wrong interest rate. *Ford Motor Credit Co.* v. *Catalani,* 238 Ark. 561, 383 S.W. 2d 99 (1964). However, see *Davidson* v. *Commercial Credit Equipment Corp.,* 255 Ark. 127, 499 S.W. 2d 68 (1973), where we held an error in calculating interest on a mortgage was forgiveable as an act done in good faith. We held in *Davidson* there was no usury.

It seems to me that we are back to "square one"; and, we should make a new beginning as we attempted to do in *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S.W. 2d 973 (1952).

I cannot agree with either the majority or the concurring opinion in matters relating to the Rule of 78ths. The majority seems to believe that the Rule of 78ths is limited to prepayment penalties. The opinion states the Rule of 78ths is an accounting method of accruing interest and of refunding unearned interest by prepayment. I do not understand the Rule of 78ths to be so simple. In fact, the majority clearly states a 10% note paid pursuant to Rule of 78ths would bear interest for the first month, on a one-year contract, at the rate of 15.38% per annum. Actually, the Rule of 78ths requires payment in excess of 10% about the first third of the life of the loan. Thus, the first 10 years of a 30-year loan would bear interest at a rate considerably greater than 10% per annum.

What does the constitution have to say about usury? Although not set out verbatim in either the majority or con-

curring opinion, Art. 19, § 13, Constitution of Arkansas 1874, states:

> All contracts for a greater rate of interest than 10% shall be void, as to principal and interest and the General Assembly shall prohibit the same by law; but when no rate of interest is agreed upon, the rate shall be 6% per annum.

There is no need to spend any time proving the Rule of 78ths violates the plain words of the constitution when the rule is applied to the first year of a 10-year loan such as we have in the case before us.

In the past we have allowed the interest to be calculated over the life of the contract; and, if overall the interest did not exceed 10%, we held such contract did not violate the prohibition against usury. *McDougall* v. *Hachmeister,* 184 Ark. 28, 41 S.W. 2d 1088 (1931). On the other hand, we have held if interest on a contract charged up to the time of the filing of the suit to void the contract exceeded 10% per annum, it was violative of the prohibition against usury. *Ryder Truck Rental* v. *Kramer,* 263 Ark. 169, 563 S.W. 2d 451 (1978).

The Rule of 78ths is designed for collection of the note over the life of the contract and not merely for early prepayment penalty as seems to have been suggested by the majority and concurring opinions. In the event of default, it is always the outstanding balance which is sued for, plus attorneys' fees, abstracting costs, and so on. No credit is allowed for excess interest already paid. In the present case it is admitted that the lender charged about 15% interest on this $22,000 note during the calendar year 1976.

The Rule of 78ths admittedly recognizes accumulation of interest at a rate greater than direct application of the simple interest rates. In a simple interest case, the annual percentage rate is calculated on the actual amount borrowed; whereas, under the Rule of 78ths, or "sum of digits" method, takes into consideration the cost of putting the loan on the books and assures the lender of collecting extra interest, above 10%, in the event of an early payment of the loan.

Using the annual percentage rate of the Rule of 78ths, larger amounts of interest are collected in the earlier stages of the loan. The Rule of 78ths simply collects more than the annual rate during the first third of the contract and collects less during the last two-thirds of the contract. The net amount paid by the borrower, if paid on schedule, is exactly the same.

An example of the two methods of collecting interest is illustrated in the present case. Interest charged on the $22,-000 note for the calendar year 1976, using the sum of digits method, was $2,717.97. Had the interest on the same note been figured at 10% per annum, simple interest would have amounted to $2,496.98, the exact amount found by the chancellor to have been collected by the lender.

If there were no prepayment in this case, and certainly there was not, the appellants were required to pay a rate in excess of 10% per annum for the year 1976. Considering this fact, we should state clearly that we will consider the interest charged over the life of the contract to be the controlling factor. Failing to do this, we should issue a caveat that all contracts employing the Rule of 78ths will be declared void as usurious that are entered into after the date of this opinion.

It is obvious the rate of interest has always been considered a matter of public concern. The wisdom of such a policy was never clearer than it is at this time. With interest running at the rate of 20% and still climbing, the present situation compels one to ponder whether our society can continue to exist as it has in the past. In past decisions we have made reference to Arkansas being a capital starved state. We have also made reference to interest rates driving industry from the state, depriving citizens of jobs, preventing consumers from purchasing necessary goods and supplies, and relating factors to be considered in matters of the rate of interest. All of these preceding factors are matters to be weighed by the people of Arkansas if and when a change in the rate of interest is authorized. Meanwhile, this Court should hold that all contracts in violation of the plain words of the constitution are usurious.

Appellants argued the note should have been cancelled

because of appellee's fraudulent and material alterations to the instrument. In doing so, they rely upon Ark. Stat. Ann. § 85-3-407 (Add. 1961) which is accurately quoted at page 8 of the majority opinion. This contract was changed so many times by the appellee that it could hardly be recognized as the contract the parties signed. For example, the monthly installments were listed on the original note as $290.74 and were changed by the bank to read $329.97. This is only one of several changes which the appellants argue violated the above statute.

One of the loans was for $22,000. The bank added $2969.74 as insurance premium and $14,626.61 as interest which brought the total note to $39,596.40. The bank received 35% of the insurance premium as a commission for selling the insurance. This commission was never paid to the insurance company. Ark. Stat. Ann. § 66-3806 (Repl. 1966) states that credit life insurance shall not exceed the original amount of the indebtedness. In my opinion, the original amount of the indebtedness was $22,000. Therefore, insurance covering the total amount, which would have been paid over the life of the contract ($39,596.40), does not represent the amount of the original indebtedness. At no time would the appellants have ever owed this amount. In fact, the most they could have owed at any one time was $22,000 plus the insurance premium and accrued interest.

At any rate, the insurance policy, if issued at all, was not issued until sometime after the loan was made. The bank and the insurance company required Mrs. Winkle to obtain a physical examination before they would insure her. Obviously, if she had died prior to the furnishing of this information, there would have been no proceeds payable because no policy existed. The fact that the policy, if issued, was backdated is merely a contraption to claim the entire premium was earned.

In *Strickler* v. *State Auto Finance Co.*, 220 Ark. 565, 249 S.W. 2d 307 (1952), we held the imposition of charges for premiums on insurance policies in addition to the 10% by the lender on the borrower was usurious. See also *Jones* v. *Jones*, 227 Ark. 836, 301 S.W. 2d 737 (1957).

For the above reasons I would not grant a rehearing in this case and would uphold the original opinion handed down on November 13, 1979.

Edwin HENDERSON et al *v.*
Herbert B. RUSSELL et al

79-232 589 S.W. 2d 565

Opinion delivered November 13, 1979
(In Banc)

Hixson & Cleveland, by: *R. H. "Buddy" Hixson,* for appellants.

Witt & Donovan, for appellees.

JOHN I. PURTLE, Justice. This case arises from the Logan County (Northern District) Circuit Court's holding that an ordinance by the quorum court prohibiting nepotism by elected county officials was a valid and properly adopted

ordinance. The trial court reviewed the case on a petition for writ of certiorari.

Appellant challenges the trial court's decision on grounds that the quorum court had no authority to pass the ordinance; that it was not passed or published according to law; and that the emergency clause was ineffective. We hold the trial court was correct on all alleged errors, except the emergency clause.

Five or six days prior to its meeting on December 11, 1978, the county clerk mailed the members of the quorum court an agenda which stated nepotism was a matter to be considered. The quorum court had previously passed Ordinance No. 15 on the same subject. At the meeting on December 11, 1978, the quorum court adopted Ordinance No. 20 which was the same as Ordinance No. 15 except for a change in the title and repealing clause. The journal of the proceedings of the Logan County Quorum Court reflects Ordinance No. 20 was called for discussion and one member moved to suspend the rules and place Ordinance No. 20 on the calendar for action on that date. The motion was seconded and the vote to suspend the rules was unanimous. The ordinance was then read for the first time upon motion and second. The rules were suspended for a second and third reading of the ordinance, and it was then passed unanimously. The emergency clause was read only one time before the vote, and it passed unanimously. This session of the quorum court was on a Monday night and the first publication was made in the local weekly newspaper on December 18, 1978. Both the ordinance and the proof of publication were included in the record. The ordinance did not have the word "title" written on it, but it did contain a title. The questioned ordinance had these words following the title: "BE IT ORDAINED BY THE LOGAN COUNTY QUORUM COURT." The county judge approved the ordinance on December 14, 1978.

The case was submitted to the court on stipulation of the facts and briefs. The trial court determined the quorum court had subject matter jurisdiction, and the ordinance was passed and published according to law.

Amendment No. 55 to the Constitution of the State of Arkansas states:

> § 1. Power of quorum court. — (a) A county acting through its Quorum Court may exercise local legislative authority not denied by the Constitution or by law.

Ark. Stat. Ann. § 17-3801 (Supp. 1979) states:

> As provided by Amendment No. 55, Section 1, (a) of the Arkansas Constitution, a county government acting through its Quorum Court may exercise local legislative authority not expressly prohibited by the Constitution or by law for the affairs of the county . . .

We do not find any provision in the constitution nor any law enacted by the General Assembly to prohibit a quorum court from enacting nepotism statutes or ordinances. Therefore, we hold the quorum court had the authority to approve this legislation.

Appellants contend the ordinance was not properly passed nor published according to law. Ark. Stat. Ann. § 17-4003 (Supp. 1977) states:

> * * *
> (2) Style Requirements of Ordinances and Amendments to Existing Ordinances. (a) General Provisions. No ordinance or amendment to an existing ordinance passed by a Quorum Court shall contain more than one (1) comprehensive topic; and shall be styled[:] 'Be it Enacted by the Quorum Court of the County of , State of Arkansas; an Ordinance to be Entitled:'. Each ordinance shall contain such comprehensive title and the body of such ordinance shall be divided into articles, sequentially numbered, each expressing a single general topic related to the single comprehensive topic.

Ark. Stat. Ann. § 17-4005 (Supp. 1977) states:

> (1) Defined. An emergency ordinance or emergency

amendments to existing ordinances may be introduced in the manner provided by law for the introduction of ordinances. An emergency ordinance may be enacted only to meet public emergencies affecting life, health, safety, or the property of people.

(2) * * *

(3) Declaration of Emergency. An emergency ordinance must contain a declaration that an emergency exists and define the emergency. All emergency ordinances shall be designated 'Emergency Ordinance.'

(4) Readings and Publication. An emergency measure does not require separate readings or publication prior to passage; provided, however, that publication shall be initiated within two (2) calendar days, excepting holidays, after approval of the emergency measure by the County Judge.

* * *

From the above statutes it can be seen the conflict arises by the fact that the ordinance in question stated "Be it Ordained by the Logan County Quorum Court." Thus it contained the word "ordained" rather than the statutorily prescribed word "enacted." The word "ordain," as defined by Webster's New World Dictionary, means to "appoint; decree; establish; enact." The same dictionary defines the word "enact" to mean "to make into law; pass (a law); decree; ordain." Thus we have the word "enact" to mean ordain and the word "ordain" to mean enact. No one could be misled by the use of the word "ordain" in place of "enact." We must then consider whether such technicality voids the ordinance. We have long held that statutory construction requires a common sense approach. *Dozier* v. *Ragsdale,* 186 Ark. 654, 55 S.W. 2d 779 (1932). When the General Assembly uses words which have a fixed and well-known signification, they are presumed to have been used in that sense. *State* v. *Jones,* 91 Ark. 5, 120 S.W. 154 (1919). The rule of strict construction will not be used to defeat the obvious intent of the General Assembly. *Ark. State Highway Commission* v. *Butler,* 105 F. 2d 732 (1939). The pri-

mary rule in construing a statute is to ascertain and give effect to the intent of the General Assembly and this intent is obtained by considering the entire act. *Perry Co.* v. *House,* 196 Ark. 317, 117 S.W. 2d 342 (1938). If the language is ambiguous, we consider the subject matter of the act, object to be accomplished, purpose to be served, as well as the remedy and consequence. *Holt* v. *Howard,* 206 Ark. 337, 175 S.W. 2d 384 (1943).

We have held that substantial compliance with publication requirements is sufficient as it relates to Initiative and Referendum amendments. *Johnson* v. *Munger,* 260 Ark. 613, 542 S.W. 2d 753 (1976). A liberal construction is accorded an act in order to effectuate its purpose. *Leigh* v. *Hall,* 232 Ark. 558, 339 S.W. 2d 104 (1960). In *Leigh,* we further held substantial compliance with the law was sufficient to validate an election. We also adhered to the rule of substantial compliance in *Vinsant* v. *Knox,* 27 Ark. 266, (1871); *Trussell* v. *Fish,* 202 Ark. 956, 154 S.W. 2d 587 (1941); and *Cain* v. *Mc Gregor,* 182 Ark. 633, 32 S.W. 2d 319 (1930), where we stated: "The whole proceeding is statutory, and the statute must be substantially followed in all proceedings." Further, there is a presumption that the law was followed, and it is incumbent upon those attacking the validity of a statute to show its invalidity. *Wilson* v. *Luck,* 201 Ark. 594, 146 S.W. 2d 696 (1941).

In *State ex rel Attorney General* v. *Chicago Mill & Lbr.,* 184 Ark. 1011, 45 S.W. 2d (1941), and *Cooper* v. *Town of Greenwood,* 195 Ark. 26, 111 S.W. 2d 452 (1936), we stated:

> It is a well-settled principle of statutory construction that statutes will receive a common sense construction, and, where one word has been erroneously used for another, or word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied. This is but making the strict letter of the statute yield to the obvious intent of the legislature.

Statutes will not be defeated on account of mistakes, errors

or omissions, provided the intent of the General Assembly can be collected from the whole statute. *Hazelrigg* v. *Board of Penitentiary Commissioners,* 184 Ark. 154, 40 S.W. 2d 998 (1931). We have often held that the title of an act is not controlling in its construction even though it is a matter to be considered in determining the meaning of a statute which is otherwise ambiguous. *Matthews* v. *Byrd,* 187 Ark. 458, 60 S.W. 2d 909 (1933). Likewise, the language used in the title of an act is not controlling but may play a part in explaining ambiguities in the body of the statute. *City of Conway* v. *Summers,* 176 Ark. 796, 4 S.W. 2d 19 (1928). We examine the title of an act only for the purpose of shedding light on the intent of the General Assembly. *Lyerley* v. *Manila School District No. 15,* 214 Ark. 245, 215 S.W. 2d 733 (1948).

Ark. Stat. Ann. § 17-4005 (4) (Supp. 1977) provides:

> Readings and Publications (Publication). An emergency measure does not require separate readings or publications prior to passage; provided, however, that publication shall be initiated within two (2) calendar days, excepting holidays, after approval of the emergency measure by the county judge.

The above statute requires such ordinances to be published and states the publication shall be initiated within two (2) days (now seven (7) days) after approval by the county judge. The approval by the county judge was on Thursday, December 14, 1978, and it was published in the next issue of the local weekly newspaper. This publication was on Monday, December 18, 1978. With Saturday and Sunday deleted the publication was at least initiated within two (2) days as contemplated by the General Assembly.

Ark. Stat. Ann. § 17-4005(3) (Supp. 1979) states:

> Declaration of Emergency. An emergency ordinance must contain a declaration that an emergency exists and define the emergency. All emergency ordinances shall be designated "Emergency Ordinance."

Since the statute requires an emergency to be defined,

we now examine the present ordinance to determine whether an emergency is defined. Section 4 of the ordinance states:

> Whereas. County Officers must have Deputies and employees necessary to carry out the essential activities of County Government, it is hereby found that it is in the best interest of County Government that no person be employed as a Deputy or County Employee who is related by affinity or consanguinity within the third degree to any elected official. Therefore, an emergency is hereby declared to exist and this Ordinance being necessary for the immediate preservation of public peace, health and safety shall be in full force and effect from and after its passage and approval.

We cannot find an emergency defined in the above quotation. It has been a fact for more than 100 years that county officers have used deputies to assist in carrying out their work. Also, during this same time many deputies have been related to the office holder within the third degree of affinity or consanguinity. These facts are very similar to those stated in *Gentry* v. *Harrison,* 194 Ark. 916, 110 S.W. 2d 497 (1937), wherein we declared the emergency clause was ineffective. In the *Gentry* case the emergency clause stated that it was a function of the state government to regulate insurance. That was the emergency relied upon and we held it did not state facts sufficient to constitute an emergency. We do not think that fair-minded and intelligent men might reasonably differ in their interpretation of whether an emergency was stated in the emergency clause of Ordinance No. 20. There simply is nothing in the emergency clause to indicate a real emergency existed. We declare that the emergency clause has failed and the ordinance will take effect as it would have had there been no emergency clause.

Affirmed as modified.

HARRIS, C.J., not participating.

FOGLEMAN and BYRD, JJ., dissent.

CONLEY BYRD, Justice, dissenting. If the style require-

ments for enactment of county ordinances, Acts 1977, No. 742, Ch. 5 § 86 [Ark. Stat. Ann. § 17-4003 (Supp. 1977)] could be read in isolation and without regard to other provisions of "The Arkansas County Government Code," I would not bother to enter a written disagreement with the majority's assertion that the nepotism ordinance by using "Be it ordained" was a substantial compliance with the style requirement of "Be it enacted." A look at the authorities generally would support the majority view — *i.e. In re Senate File 31,* 25 Neb. 864 (1889), the term "Be it enacted" was held to be equivalent to "Be it resolved"; *Smith* v. *Jennings,* 67 S.C. 324, 45 S.W. 821 (1903), "Be it resolved" was held to be a substantial compliance with a mandatory constitutional requirement of "Be it enacted"; *State ex rel* v. *Dalles City,* 72 Or. 337 (1914), the terms "Be it enacted," "Be it resolved," and "Be it ordained" were held to be synonymous. In *City of Ft. Smith* v. *Taylor,* 228 Ark. 722, 310 S.W. 2d 13 (1958), we held there was no difference in the legal effect of a resolution and an ordinance.

Presumably those who drafted "The Arkansas County Government Code" Acts 1977 No. 742 [Ark. Stat. Ann. §§ 17-3101 through 17-4208 (Supp. 1977) had access to the foregoing authorities from other states and the decisions of this court and if the General Assembly wanted to make a distinction between resolutions and ordinances, it has the authority to do so. Now to understand my disagreement with the majority's substantial compliance view, it is necessary that the following pertinent portions of "The Arkansas County Government Code," Acts 1977 No. 742, be set forth as follows:

> "Ch. 1, § 1 [Ark. Stat. Ann. § 17-3101 (Supp. 1977)]. This Act constitutes the Arkansas County Government Code.
>
> Ch. 1, § 2(1) [Ark. Stat. Ann. § 17-3102(1) (Supp. 1977)]. Except when a specific definition is given or a technical interpretation is required, words and phrases used in this title shall be construed according to their ordinary usage in the English language.

Ch. 5, § 84 [Ark. Stat. Ann. § 17-4001 (Supp. 1977)]. LEGISLATIVE AUTHORITY. — The Legislative power of county government is vested in the Quorum Court of each of the several counties of the State subject to the limitations imposed by the Constitution and by State law.

Ch. 5 § 85 [Ark. Stat. Ann. § 17-4002 (Supp. 1977)]. COUNTY LEGISLATIVE PROCEDURE. —

. . .

(7) Legislative Affairs. All legislative affairs of a Quorum Court shall be conducted through the passage of ordinances, resolutions, or motions.

. . .

(9) County Ordinance. A county ordinance is hereby defined as an enactment of compulsory law for a Quorum Court which defines and establishes the permanent or temporary organization and system of principals of a county government for the control and conduct of county affairs.

(10) County Resolution. A county resolution is hereby defined as the adoption of a formal statement of policy by a Quorum Court, the subject matter of which would not properly constitute an ordinance. A resolution may be used whenever the Quorum Court wishes merely to express an opinion as to some matter of county affairs and such resolution shall not serve to compel executive action.

(11) Motion. A motion is hereby defined as a proposal to take certain action or an expression of views held by the Quorum Court body; and, as such, a motion is merely a parliamentary procedure which precedes the adoption of resolutions or ordinances. Motions shall not serve to compel any executive action unless such action is provided for by a previously adopted ordinance or state law.

(12) Ordinances may be amended and repealed only by ordinances.

(13) Resolutions may be amended and repealed only by resolutions.

(14) All ordinances shall be subject to initiative and referendum as provided for through Amendment Number 7 to the Arkansas Constitution.

Ch. 5, § 86 [Ark. Stat. Ann. § 17-4003 (Supp. 1977)]. COUNTY ORDINANCE PROCEDURES — ADOPTION AND AMENDMENT. —

. . .

(2) Style requirements of Ordinances and Amendments to Existing Ordinances.

(a) General Provisions. No ordinance or amendment to an existing ordinance passed by a Quorum Court shall contain more than one (1) comprehensive topic; and shall be styled [:] 'Be it Enacted by the Quorum Court of the County of _____, State of Arkansas; an Ordinance to be Entitled:' Each ordinance shall contain such comprehensive title and the body of such ordinance shall be divided into articles sequentially numbered, each expressing a single general topic related to the single comprehensive topic.

. . .

(4) Approval and Publication of Ordinances and Amendments. Upon passage all ordinances . . . shall be approved by the County Judge . . . Such ordinances or amendments shall be published by the County Clerk as prescribed by law.

Ch. 5, § 93 [Ark. Stat. Ann. § 17-4010 (Supp. 1977)].

RESOLUTIONS — ADOPTION and AMENDMENT. —

. . .

(2) Style requirements of Resolutions. General Provisions. No resolution or amendment to a resolution passed by a Quorum Court shall contain more than one (1) comprehensive topic; and shall be styled 'Be it Resolved by the Quorum Court of the County of , State of Arkansas That:'.

. . .

(4) Majority Vote Required. A proposed resolution must be read and adopted by a majority vote of the whole number of Justices comprising a Quorum Court . . .

(5) Resolutions or an amendment to an existing resolution may be introduced and adopted in a single meeting of the Quorum Court.

(6) Upon passage, all resolutions or amendments to existing resolutions shall be entered into the records of the Quorum Court. Publications of resolutions shall not be required except where publication is specified in such resolution adopted by a Quorum Court.

. . .

(8) The power of veto shall not apply to the adoption of resolutions or amendments to resolutions."

To understand what the majority is calling a substantial compliance with the style requirements of *The Arkansas County Government Code* for enactment of an ordinance it is necessary to look at the "alleged" nepotism ordinance which provides:

"AN ORDINANCE PROHIBITING ALL

ELECTED COUNTY OFFICIALS OF LOGAN COUNTY FROM EMPLOYING DEPUTIES AND COUNTY EMPLOYEES WHO ARE RELATED BY AFFINITY OR CONSANGUINITY WITHIN THE THIRD DEGREE TO ANY ELECTED COUNTY OFFICIAL; TO REPEAL ORDINANCE NO. 15 AND FOR OTHER PURPOSES.

BE IT ORDAINED BY THE LOGAN COUNTY QUORUM COURT:

SECTION 1.

That Ordinance No. 15 is hereby repealed.

SECTION 2.

That all elected County Officials of Logan County are hereby prohibited from employing Deputies or County Employees who are related by affinity or consanguinity within the third degree to any elected County Official.

SECTION 3.

Provided, however, this Ordinance shall not prohibit the continued employment of any County Employee or Deputy who is presently serving as a County Employee or Deputy for the remainder of the present term of office.

SECTION 4.

Whereas: County Officers must have Deputies and employees necessary to carry out the essential activities of County Government, it is hereby found that it is in the best interest of County Government that no person be employed as a Deputy or County Employee who is related by affinity or consanguinity within the third degree to any elected official. Therefore, an emergency is hereby declared to exist and this Ordinance being necessary for the immediate preservation of the public

peace, health and safety shall be in full force and effect from and after its passage and approval.

APPROVED:

BUSTER J. TRITT,
County Judge

DATED:
12-14-1975

ATTEST:
Penn S. Smith,
County Clerk

The first obvious defect in style is that the title precedes the enactment clause. The second obvious defect is that the Enactment Clause starts "Be it ordained" instead of "Be it enacted" as required by Acts 1977 No. 742 Ch. 5 § 86(2) [Ark. Stat. Ann. § 17-4003(2) (Supp. 1977)], *supra*. The third defect in the Enactment Clause is that it does not mention "State of Arkansas." After all, the authority for the Quorum Court of the County of Logan to enact any law depends upon the authority given it by the State of Arkansas, yet there is no mention of such authority in the Enactment Clause.

As can be seen from the provisions of *The Arkansas County Government Code, supra,* the General Assembly has gone to great lengths to make a distinction between ordinances and resolutions and has given clear and simple style requirements by which the members of the Quorum Courts and the public can easily distinguish between ordinances and resolutions. However if the majority's "substantial compliance" theory is carried to its logical extension, the businessmen in this State can expect to find legal notices that look like the following:

"Sunday Closing of Business

Be it Resolved by the Quorum Court of the County of White

1. That it is unlawful for any wholesale or retail establishment to remain open on Sundays during the hours of 8:00 A.M. and 5:00 P.M.

APPROVED
John Doe

Date 10-18-79
Attest: Richard Roe
County Clerk"

When the businessman contacts the members of the Quorum Court, he is told that they only passed a resolution that the County Judge approved because of his religious beliefs, but the sheriff and the prosecuting attorney by pointing to our construction of the terms "Be it enacted," "Be it ordained," "Be it resolved" as synonymous can take the position that the Quorum Court passed an ordinance. When the businessmen complain to their State Legislators, the State Legislators can truthfully state that they provided a simple and easy method to distinguish between what constituted an ordinance and a resolution and that it was the Arkansas Supreme Court that created the confusion. I must say that I have always considered it the duty of this Court to give a clear interpretation of the law, —*i.e.* it has the duty of not adding confusion to the law.

Needless to say, I do not think that the "alleged" nepotism ordinance sufficiently complied with the required enactment clause to be valid.

For the reasons stated, I respectfully dissent.

Fogleman, J., joins in this dissent except for that part pertaining to the use of the words "Be it ordained" rather than "Be it Enacted."

Burt BEAVERS *v.* STATE of Arkansas

CR 79-159 589 S.W. 2d 573

Opinion delivered November 19, 1979
(In Banc)

James O. Fels, for appellant.

Steve Clark, Atty. Gen., by: *Dennis R. Molock,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. This is a no-merit appeal from a verdict and judgment sentencing Beavers, as an habitual offender, to two consecutive 50-year sentences for aggravated robbery and kidnaping. Counsel for the appellant and the Attorney General for the State find no merit in the appeal. Beavers has not availed himself of the opportunity to file a pro se brief. We have studied the case and agree that it should be affirmed for want of merit. We point out, however, two defects in the appellant's abstract and brief. First, the testimony has been copied verbatim instead of being abstracted, as required by Rule 9. *Smith* v. *Pond,* 259 Ark. 564, 534 S.W. 2d 769 (1976); *Gray* v. *Ouachita Creek Watershed Dist.,* 239 Ark. 141, 387 S.W. 2d 605 (1965). Second, counsel has not presented the arguable points for reversal, as required by *Anders* v. *California,* 386 U.S. 738 (1967). Counsel merely states, as a conclusion, that in his opinion there is nothing in the record that would arguably support an appeal. The State, however, has supplied the deficiencies.

Affirmed.

HARRIS, C.J., not participating.

Cecil WALTERS *v.* STATE of Arkansas

CR 79-143 587 S.W. 2d 831

Opinion delivered November 19, 1979

Lessenberry & Carpenter, by: *Thomas M. Carpenter,* for appellant.

Steve Clark, Atty. Gen., by: *Neal Kirkpatrick,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. In *Walters* v. *State,* unpublished opinion February 27, 1978, we set aside appellant's 1973 plea of guilty and a twenty-one year sentence to robbery with a firearm. Following a trial by jury, upon remand, appellant was sentenced to consecutive terms of twenty-one years' imprisonment for robbery and fifteen years imprisonment for the use of a firearm in the commission of a felony.

Appellant first contends that the trial court erred in failing to suppress his confession. When, as here, the question of the voluntariness of a confession is raised on appeal, we review all of the evidence and make an independent determination of its voluntariness based on the totality of the circumstances. *Clark* v. *State,* 264 Ark. 630, 573 S.W. 2d 622 (1978); and *Degler* v. *State,* 257 Ark. 388, 517 S.W. 2d 515 (1974). When the voluntariness, as here, depends entirely on the credibility of the witnesses, we must defer to the superior position of the trial judge who observed the witnesses when they testified. *Gardner* v. *State,* 263 Ark. 739, 569 S.W. 2d 74 (1978); and *Whitmore* v. *State,* 263 Ark. 419, 565 S.W. 2d 133 (1978). The finding of the trial judge will not be set aside unless it is clearly against the preponderance of the evidence. *Clark* v. *State, supra;* and *Degler* v. *State, supra.*

Here, the only witness to testify regarding the taking of the confession were a police officer and the appellant. The officer, the only person present when the confession was taken other than the appellant, testified that after he advised the appellant of his rights, the appellant wrote and signed a statement. The officer made no threats or promises to induce the appellant to sign the rights form or write his statement. The appellant denied writing or signing the statement or any other statement. He stated that "the officer probably made it up himself." The appellant identified his signature on the waiver of rights form which was admitted into evidence. Over the appellant's objection, the handwritten signed con-

fession was also admitted into evidence.

The question raised by the appellant pertains to an issue "which could only have been decided on the basis of credibility." *Gardner* v. *State, supra.* In reviewing the circumstances and giving due deference to the determination of the trial court in the case at bar, we cannot say that the finding that the statement was voluntarily made by the appellant was clearly against the preponderance of the evidence.

Neither can we agree with appellant that the trial court erred in failing to grant his motion for a mistrial following a police officer's statement that he had secured an "unlawful flight to avoid arrest" warrant from the FBI when he was unable to locate the appellant after the robbery. It is well settled that the accused's flight from the scene of the crime is admissible as a circumstance to be considered with other evidence in determining his probable guilt. *Russell & Davis* v. *State,* 262 Ark. 447, 559 S.W. 2d 7 (1977); *Murphy* v. *State,* 255 Ark. 90, 498 S.W. 2d 884 (1973); and *Rowe* v. *State,* 224 Ark. 671, 275 S.W. 2d 887 (1955).

Appellant argues that the trial court ordered consecutive (21 years plus 15 years) rather than concurrent sentences solely due to his vindictiveness towards appellant because of his prior successful appeal. Consequently, his maximum sentence should not exceed twenty-one years. We have recently held that a more severe sentence may be imposed on a second trial so long as it is not the result of any vindictiveness by the court towards the appellant arising from the convicted party's prior successful appeal. *Marshall* v. *State,* 265 Ark. 302, 578 S.W. 2d 32 (1979), citing *North Carolina* v. *Pearce,* 395 U.S. 711 (1969). Here the jury assessed an additional fifteen year sentence after determining that the appellant had employed a firearm in the commission of the robbery. Ark. Stat. Ann. § 43-2336 (Repl. 1977); *Redding* v. *State,* 254 Ark. 317, 493 S.W. 2d 116 (1973); *Brown and Bettis* v. *State,* 259 Ark. 449, 534 S.W. 2d 213 (1976). Ark. Stat. Ann. § 43-2337 (Repl. 1977) requires that any additional sentence imposed for the use of a firearm in the commission of a felony "shall run consecutively, and not concurrently, with any period of confinement imposed for conviction of a felony

itself." The sentence imposed by the trial court was precisely that recommended by the jury and consistent with statutory provisions. No prejudicial error is demonstrated.

Appellant also contends that even if the guilty verdict is affirmed, the thirty-six year sentence should be modified by giving him credit for time served. We agree, as does the state, that the approximately five years the appellant served in prison preceding the present sentence should be credited to his sentence. Ark. Stat. Ann. § 41-904 (Repl. 1977); and *Marshall* v. *State,* supra. On this aspect the cause is remanded to the trial court for modification of the judgment.

Affirmed as modified.

HARRIS C.J., not participating.

FARRCO CONSTRUCTION COMPANY et al
v. Webster GOLEMAN

79-277 589 S.W. 2d 573

Opinion delivered November 19, 1979
(In Banc)

Bridges, Young, Matthews, Holmes & Drake, for appellants.

Gibbs Ferguson, for appellee.

DARRELL HICKMAN, Justice. This is an appeal of a Workers' Compensation case by Farrco Construction Company and its insurance carrier. The appellant did not abstract the administrative trial judge's opinion, the Workers' Compensation Commission decision nor the circuit court order, all of which favored appellee, Webster Goleman. We find this a violation of Rule 9(d) of the Supreme Court Rules.

We cannot distinguish this case from *Manes* v. *M.O.V.E., Inc.,* et al, 261 Ark. 793, 552 S.W. 2d 211 (1977) where we affirmed the Workers' Compensation Commission order because the order was not abstracted by the appellant.

We explained in *Bank of Ozark* v. *Isaacs,* 263 Ark. 113, 563 S.W. 2d 707 (1978), the necessity for the appellant's brief to properly contain an abstract of the record. In the case of *Wade* v. *Franklin-Stricklin Land Surveyors, Inc.,* 264 Ark. 841, 575 S.W. 2d 677 (1979), we referred to numerous recent cases which were affirmed because of noncompliance with Rule 9(d). See also Smith, *Arkansas Appellate Practice;*

Abstracting the Record, 31 Ark. L. Rev. 359 (1977).

Affirmed.

HARRIS, C.J., not participating.

GEORGE ROSE SMITH, J., would affirm the judgment on its merits.

CIRCLE REALTY COMPANY *v.*
Harold GOTTLIEB

79-260 589 S.W. 2d 574

Opinion delivered November 19, 1979
(In Banc)

James Howard Smith, for appellant.

Julian Glover and *Friday, Eldredge & Clark,* by: *George Pike, Jr.,* for appellee.

JOHN I. PURTLE, Justice. This case arises from the verdict of a jury on a suit between two Arkansas real estate brokers over the division of a sales commission. A verdict granting one broker half of the commission from the sale by the other broker is brought here on appeal as a matter of right.

Appellant contends the trial court erred in denying a directed verdict; failing to grant judgment n.o.v.; failure to give proffered instructions; and that the contract sued upon was illegal and unenforceable. We agree with the trial court in rejecting the request for a directed verdict and refusing to grant a judgment n.o.v.; also, that the requested jury instructions were not proper and the contract sued upon was valid and enforceable.

Appellee, Harold Gottlieb, a licensed real estate broker in Hot Springs, Arkansas, received information from a New York broker in July 1976 which related to certain property in Hot Springs which the New York broker claimed to have listed for sale. The New York broker was not authorized to sell real estate in Arkansas. The information sent to appellee generally described the property for sale but contained a considerable amount of incorrect information. Appellee made several unsuccessful attempts to sell the property in 1976. Sometime in March of 1977 appellee contacted Rainey Realty, Inc. of Little Rock about working on the sale of the property; however, Rainey suggested Circle Realty Company, a licensed real estate company in Little Rock, might be more likely to find a buyer than Rainey. A representative of Circle Realty Company, Mike Hedrick, discussed the possible sale of the property with appellee on the same date. Appellee left information with Rainey who subsequently passed it on to Circle. Appellee testified he reached an agreement with Circle that if a sale was made by either Circle

or Rainey the commission would be divided 50-50 between the two Little Rock brokers on one hand and the appellee and the New York broker on the other. This was denied by appellant during the trial. Rainey testified he always intended to give appellee some kind of a referral fee. Appellant, Circle Realty, subsequently determined the New York broker did not have an exclusive listing nor an Arkansas license. Appellant and appellee jointly showed the property to a prospect who eventually purchased the property. However, appellant had to dig up most of the information about the property in order to make the sale. The property was sold in May of 1977 but no part of the commission was given to appellee and the appellant refused to pay him anything. The contention was that appellee's claim for participation in the commission came through the New York broker who was not authorized to do business in Arkansas and, therefore, the contract was void.

Appellee filed suit in the Pulaski Circuit Court against Rainey and Circle claiming half of the $30,000 commission which had been paid to Circle. His suit was based upon the alleged oral agreement between the Arkansas brokers. Rainey settled with appellee prior to submission of the case to the jury and was dismissed from the suit. Appellant resisted the claim and the jury awarded appellee $15,000. The commission had been paid by the purchaser pursuant to agreement prior to the sale.

Appellant insisted all the way through the transaction and trial, and continues to do so in this Court, that an essential element of the contract was that appellee must prove the New York broker held a valid property listing from the owner. This was the basis for the motion for a directed verdict and for the judgment n.o.v. This was also the main element in the refused jury instructions. Appellant freely admits it was appellee's efforts which set in motion the chain of events which ultimately culminated in the sale of the property in question.

We think appellant misunderstands the law on the subject. It correctly states the law as it relates to a commission on the sale of real estate when the owner and a broker are

involved. However, here we are dealing with a contract between two brokers, neither of which held an exclusive listing on the property which was sold. Further, the owner is not being charged a commission but rather the purchaser has paid it. All of the cases cited by appellant involve a dispute between the owner and a broker.

A contract or agreement between two brokers is binding and enforceable in the same manner as contracts between other contracting parties. It makes no difference in this case whether anyone had a listing to sell the property because it was in fact sold on agreeable terms. Although we find no Arkansas case in point, other jurisdictions have held one broker may recover from another broker even though a suit could not properly be brought against the owner to recover a commission. *Hohenberger* v. *Schnitzer,* 235 S.W. 2d 466 (Tex. Civ. App. 1951). See also 12 C.J.S. Brokers § 81 which states:

> In order that one broker may recover a share of the commission of another broker it is necessary and sufficient that there be a valid, existing, and applicable agreement between them for a division of the commission, that plaintiff shall have performed his part of the agreement, and that defendants shall have actually received the commission. Where there is such an agreement, it is binding and enforceable and the rights of the parties are governed by its terms and the proper construction thereof, rather than by the contract of sale or exchange or by the ordinary rules which govern the rights of real estate brokers to commissions for sales of land. * * *

Appellee's requested Instruction No. 6 was given without objection and is a correct instruction. It simply stated that appellee could not recover unless the jury determined (1) that Circle Realty Co., Inc. agreed to share the commission on a 50% basis with Harold Gottlieb, and (2) that Gottlieb performed his portion of the agreement. Therefore, the jury was properly permitted to determine the factual issue of whether the parties had an agreement to split the commission. In testing the sufficiency of the evidence as

being substantial on appellate review we need consider only the testimony of the appellee and any other evidence favorable to him. *Love* v. *H.F. Construction Co., Inc.,* 261 Ark. 831, 552 S.W. 2d 15 (1977). If there is substantial evidence to support the decision, it will be affirmed. *Bradley* v. *Hendricks,* 251 Ark. 733, 474 S.W. 2d 677 (1972). The jury is the sole judge of the credibility of the witnesses and if there is substantial evidence to support the verdict we affirm. *Bradberry* v. *Gower,* 247 Ark. 700, 447 S.W. 2d 124 (1969). We review the evidence on appeal in a light most favorable to the jury verdict. *Sardin* v. *Roberts,* 244 Ark. 312, 424 S.W. 2d 889 (1968).

In view of the law and the facts as presented in this case, we find no reversible error.

Affirmed.

HARRIS, C.J., not participating.

Jimmy Lonnie LOVELL *v.* MARIANNA FEDERAL SAVINGS & LOAN ASSOCIATION et al

72-293 589 S.W. 2d 597

Opinion delivered November 19, 1979
(In Banc)

Ray & Donovan, for appellant.

Daggett, Daggett & Van Dover, for appellees.

JOHN I. PURTLE, Justice. The Lee County Chancery Court awarded appellant the proceeds of three certificates of deposit issued by appellee. However, the decree denied prejudgment interest on the proceeds. Ownership of the funds was not in dispute in this matter. The only argument in this appeal is whether the court erred in rejecting appellant's claim for prejudgment interest. The facts were before us in the prior decision which is reported in *Lovell* v. *Marianna Federal Savings & Loan Association,* 264 Ark. 99, 568 S.W. 2d 38 (1978).

Appellant survived as joint payee of the certificates of deposit in the original amount of $36,000. November 13, 1973, he made demand upon appellee for proceeds of the certificates, which had been purchased by his father. Because of doubt as to ownership, appellee filed a declaratory action and paid the funds into the registry of the court. At the first trial it was decided the widow of decedent was the owner of the disputed funds. We reversed the trial court and returned it for judgment in favor of appellant. The trial court

entered a decree in which appellant was declared to be the owner of the funds but denied interest prior to the decree. Appellee paid the proceeds to appellant without prejudice to his claim for interest pending this appeal. We agree with appellant that prejudgment interest should be allowed under the facts and circumstances of this case.

The case is argued very ably by both parties to this appeal. Several Arkansas cases are correctly cited by the parties in support of their arguments. Likewise, the trial court quoted from our cases in support of the decree. We cannot say either the court or counsel misunderstand or misquote the law or cases. We must admit the error of the cases on this subject. They are simply irreconcilable and we must decide which rule to follow in this case and in the future.

In very early cases, such as *Crow* v. *State,* 23 Ark. 684 (1861); *Kelly* v. *McDonald,* 39 Ark. 387 (1882); and *St. Louis I.M. & S. Ry.* v. *Biggs,* 50 Ark. 169, 6 S.W. 724 (1887), we held to the rule that if the damaged or destroyed property had a market value, or other definite standards of determining the value, at the time of loss, damage or destruction, prejudgment interest was allowable. Thus, if marketable property were damaged or destroyed the measure of damages was its value at the time of the loss plus damages in the nature of interest. It does not appear that recovery of interest prior to judgment is dependent upon whether the claim is liquidated or whether it sounds in tort or contract. The test in prejudgment interest cases is whether there is a method of determination of the value of the property at the time of the injury. If such method exists, prejudgment interest should be allowed. Although such damages were usually referred to as damages in the nature of interest, it does not change the fact that such damages were measured by the legal rate of interest allowed by law at the time. Therefore, it may as well be called interest.

The reason for allowing interest in such cases is to compensate the plaintiff for the loss. The time of the loss is used to determine the value of the property. When there has been a delay in compensating the injured party, he has an

additional loss for the period of time for which he has been deprived of the use of the property. During this period of time between the loss and the recovery, the defendant has had the use of plaintiff's recovery. Therefore, the defendant should pay the plaintiff for such additional loss, and the most logical measurement of the additional loss is the rate of interest which is currently in use by those lending money.

It is equally true that in cases where the damages cannot be ascertained at the time of the loss interest before judgment should not be allowed. Damages for personal injuries are not capable of being determined at the time of the injury. In most personal injury claims the amount of money damages cannot be measured until some future date. Therefore, there is no method of measuring the damages at the time of the loss; neither is there a vested property right such as exists in cases where property is damaged. When recovery is had in personal injury cases it is for all damages which the plaintiff has suffered at the time of the recovery. Frequently, such recovery is for damages to occur in the future. If the damages are not by their nature capable of exact determination, both in time and amount, prejudgment interest is not an item of recovery.

Somewhere along the way a line of cases appeared holding that prejudgment interest was not allowed in tort actions. The first such case brought to our attention is *Southern Farm Bureau Cas. Ins. Co.* v. *Hardin,* 233 Ark. 1011, 351 S.W. 2d 158 (1961). This case was followed as late as *Members Mutual Insurance Co.* v. *Blissett,* 254 Ark. 211, 492 S.W. 2d 429 (1973). However, in *Dickerson Construction Co., Inc.* v. *Dozier,* 266 Ark. 345, 584 S.W. 2d 36 (1979), we returned to the former rule which allowed prejudgment interest, at least when applied to growing crops. This was a tort action as were the *Hardin* and *Blissett* cases. We believe the *Dozier* case follows the most logical rule. This rule was followed in *Kennedy* v. *Clayton,* 216 Ark. 851, 227 S.W. 2d 934 (1950), wherein we quoted with approval from *Richards* v. *Citizens N.G. Co.,* 135 Pa. 37, 18 Ark. 600, as follows:

> . . . "Interest cannot be recovered in actions of tort or in actions of any kind where the damages are not in their

nature capable of exact computation, both as to time and amount. In such cases the party chargeable cannot pay or make tender until both the time and the amount have been ascertained, and this default is not therefore of that absolute nature that necessarily involves interest for the delay. But there are cases sounding in tort and cases of unliquidated damages where not only the principle on which the recovery is to be had is compensation, but where also the compensation can be measured by market value or other definite standards. Such are cases of the unintentional conversion or destruction of property, etc. Into these cases the element of time may enter as an important factor and the plaintiff will not be fully compensated unless he receive, not only the value of the property, but receive it, as nearly as may be, as of the date of his loss. Hence it is that the jury may allow additional damages in the nature of interest for the lapse of time. It is never interest as such, nor as a matter of right, but compensation for the delay, of which the rate of interest affords the fair legal measure."

In the present case the certificates of deposit had an exact value on the date appellee refused to pay them over to appellant. He has been wrongfully deprived of the use of these funds since November 13, 1973. These funds had an exact determinable value, both as to time and amount, when appellant was deprived of the use of them. Therefore, he is entitled to the proceeds of the certificates of deposit together with interest from the date of such loss of use, at the rate of 6% per annum, as required by art. 19 § 13, Const. of Ark., until he receives payment.

This case is therefore reversed and remanded to the trial court with directions to proceed consistent with this opinion.

Reversed and remanded.

HARRIS, C.J., not participating.

Vera McENTIRE *v.* Estate of J. L. McENTIRE, Deceased, James C. McENTIRE, Executor, and PINE BLUFF NATIONAL BANK

79-47 590 S.W. 2d 241

Opinion delivered November 19, 1979

[Rehearing denied January 7, 1980.]

C. Mac Norton, Brockman & Brockman, for appellant.

Jones & Petty, for appellees.

OTIS H. TURNER, Special Chief Justice. Prior to De-

cember 18th, 1975, J. L. McEntire maintained a checking account in Pine Bluff National Bank in his individual name with sole authority in the owner to withdraw funds from the account. On December 18, 1975, a new signature card for the account was executed by McEntire and his wife, Vera E. McEntire, permitting either to withdraw funds from the account but retaining the account in the sole name of J. L. McEntire. Thereafter, both Mr. and Mrs. Entire did, on occasion, withdraw funds from the account on their individual signature. On January 6, 1977, J. L. McEntire caused a new signature card to be issued in his sole name withdrawing the authority of Mrs. McEntire to draw funds from the account.

Both signature cards contained the following identical language:

> "You are authorized to recognize either of the signatures subscribed below in the payment of funds or the transaction of any business for this account. . ."
>
> "The below — signed, joint depositors, hereby agree each with the other and with you that all sums now on deposit or herebefore or herafter deposited by either or both of said joint depositors with you to their credit as such joint depositors with all accumulations thereon are and shall be owned by them jointly, with right of survivorship, and be subject to the check or receipt of either of them or the survivor of them and payment to or on the check of either or the survivor shall be valid and discharge you from liability."
>
> "Each of the below — signed appoints the other attorney, with power to deposit in said account monies of the other and for that purpose to endorse any check, draft, note or other instrument payable to the order of the other or both said joint depositors."
>
> * * *
>
> "Your rights or authority under this agreement shall not be changed or terminated by us or either of us except by

written notice to you which shall not affect transactions therebefore made."

J. L. McEntire died subsequent to January 6, 1977. Vera McEntire brought this action against the Estate of her deceased husband and Pine Bluff National Bank to recover the funds on deposit in the account. Thereafter, both parties moved for summary judgment which was granted in favor of the estate and the Bank. From that Judgment, this appeal is taken.

For reversal, Appellant raises two broad issues. First, that appellant, rather than appellee, was entitled to summary judgment; and second, that the Motion for Summary Judgment should not have been granted because there exist genuine issues of material fact.

Under point one, appellant urges that she is entitled to Summary Judgment because a tenancy by the entireties was created in the bank account on December 18, 1975, which could not be destroyed by the unilateral act of J. L. McEntire in removing the cotenant's name from the account. Appellant further urges under point one that the Bank is estopped to deny appellant's absolute right to the balance in the account because checks executed by appellant and drawn on the account were honored by the bank subsequent to January 6, 1977.

Under point two, appellant makes no attempt to state what issues of material fact exist. However, the Complaint alleges (1) that a gift was made; (2) estoppel by the Bank and, (3) the creation of a tenancy by the entireties in the account.

We will first consider appellant's point two in that under the state of the record before us, we find that no genuine issue of material fact exists which would justify a reversal.

In order to establish a completed inter vivos gift, there must be clear and convincing evidence that there was an actual delivery of the subject matter of the gift with a clear intent to make an immediate, present and final gift beyond recall, accompanied with an unconditional release of all fu-

ture dominion and control by the donor over the property delivered. *Porterfield* v. *Porterfield,* 253 Ark. 1073, 491 SW 2nd 48; *Coristo* v. *Twin City Bank,* 267 Ark. 554, 520 SW 2nd 218.

The affidavits produced by appellant leave no issue of fact relating to inter vivos gift and the establishment of the account did not constitute a gift, as a matter of law.

The assertion that Pine Bluff National Bank is estopped by its conduct in honoring checks drawn against the account after January 6, 1977, is without merit. The uncontroverted facts in the record before us are that at the time the bank honored the checks, the authority of Mrs. McEntire to draw funds from the account had already been terminated.

Equitable estoppel is available only to one who has in good faith relied upon the conduct of another and has been led thereby to a change of position for the worse, acted to his injury, or gave up or abandoned a legal right upon the representations or conduct constituting the estoppel. *Geren* v. *Caldarrera,* 99 Ark. 260, 138 SW 335; *Deal* v. *Deal,* 220 Ark. 134, 246 SW 2nd 429; *Thompson* v. *Wilhite,* 131 Ark. 77, 198 SW 271.

Applying the facts of this case to the estoppel rule, it is immediately apparent that the appellant neither alleged or in fact changed her legal position or status because the checks were honored; she has not acted to her injury; and lastly, she gave up no legal right as a result thereof. Whether the checks drawn against the account after January 6, 1977 were paid or dishonored does not alter the legal status of the parties, the nature of the account at any given time, or the legal rights of Mr. or Mrs. McEntire relating to the account. What was done with regard to the account was done within the bounds of the laws of this State and was done *prior* to the acts alleged to constitute an estoppel.

The Bank was acting within its authority in permitting the removal of appellant as one authorized to draw funds from the account. The involved account was held in such a manner that J. L. McEntire (or Mrs. McEntire) could with-

draw or receive payments or withdraw *all* funds therefrom, and any such payments made by the banking institution would be a complete discharge as to the amount paid. *Ark. Stats. Annotated,* § 67-552(h). In addition, the Bank was under no legal duty to notify appellant that she could no longer withdraw funds from the account and no legal right of appellant was impaired or destroyed by the unauthorized payment of checks drawn on the account by appellant subsequent to January 6, 1977.

Appellant implies that a withdrawal of authority, or change of authority to draw upon the account should be distinguished from a withdrawal of the funds and establishment of a new account. We have previously established that there is no such valid distinction and it was thus unnecessary for Mr. McEntire to withdraw the funds and establish a new account as opposed to the course he followed in this instance. To require such would have been superfluous and equity regards substance rather than form. *Davis* v. *Jackson* 232 Ark. 953, 341 SW 2nd 726.

The remaining question under appellant's point two relates to the estate created between this husband and wife upon execution of the account signature card on December 18, 1975. The account, as it existed subsequent to December 18, 1975 and prior to January 6, 1977, was a tenancy by the entireties. Having previously disposed of the inter vivos gift and the estoppel arguments, this leaves only the question of the rights of the parties under a tenancy by the entireties in a bank account — those rights being the subject of established law.

There being no genuine issue of material fact remaining, summary judgment was a proper remedy in this case.

Turning then to appellant's point One urging that appellant, rather than appellee, should have been granted summary judgment on her motion, we consider the rights of tenants by the entireties in a bank account as those rights are governed by our established law and the facts in this case.

As early as 1921, this Court recognized that an estate by

the entireties may be created in personal property. *Union and Mercantile Trust Company* v. *Hudson,* 147 Ark. 7, 227 SW 1. That holding has been consistently reaffirmed through the years, *Black* v. *Black,* 199 Ark. 609, 135 SW 2nd 837, and is now so well recognized that extensive citations are unnecessary.

In 1965, the General Assembly (Act 78 of 1965) established that bank accounts held in the names of persons who designate themselves as husband and wife shall be the property of such persons as tenants by the entireties and upon the death of one of the persons the account shall be payable to the survivor. The statute further provides that the banking institution shall pay withdrawal requests and otherwise deal in any manner with the account upon the direction of any one of the persons named therein. *Ark. Stats. Annotated,* Section 67-552. This was the Statute in existence at the time of creation of the account in question.

In *Black,* supra, we held that the Statute was passed for the protection of the bank in which the deposit was made. Though the Statute existing at the time of the *Black* decision was subsequently amended, we hold that the amendments do not change the character thereof and the statute continues to exist for the same primary purpose.

An estate by the entireties in a bank account differs in one significant aspect from an estate in real property in that the estate exists in the account only until one of the tenants withdraws such funds or dies leaving a balance in the account. Funds withdrawn or otherwise diverted from the account by one of the tenants and reduced to that tenant's separate possession ceases to be a part of the estate by the entireties. *Black* v. *Black,* supra; *McGuire* v. *Benton State Bank,* 232 Ark. 1011, 342 S.W. 2d 77. This does not mean that in a proper case under timely allegations of fraud or other such remedy, that one of the co-tenants could not sustain an action to recover all or a part of the funds diverted or withdrawn by the other. No such allegation or proof exists in this case.

The decree of the Chancellor is in all things affirmed.

Special Justice DOUGLAS SMITH joins in the opinion.

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

FOGLEMAN and HICKMAN, JJ., dissent.

JOHN A. FOGLEMAN, Justice, concurring in part; dissenting in part. Although I agree that summary judgment in favor of the bank was proper, I cannot agree that the estate of J. L. McEntire was entitled to a summary judgment in this case. Perhaps the basis for my disagreement is the majority's treatment of the basic document upon which appellant relies as a signature card. It may be, even though it is not so labelled, but it is much more than that. It is an agreement between J. L. McEntire and his wife, Vera E., both of whom signed the document. The fact that it is an agreement between them is obvious from reading the second paragraph of the quotation in the majority opinion. I simply do not see how anyone could argue that, at least on the face of the agreement, a tenancy by the entirety was not created. This is not a case where the agreement was "in fine print" or where it was on the back of a signature card. It was above the signatures of the parties.

In considering the question whether a tenancy by the entirety existed, it must be remembered that the four unities once required for a joint tenancy are no longer required for a tenancy by the entirety in that a vesting of title at the same time is no longer required when one of the spouses executes an instrument conveying or transferring an interest to himself and his spouse. *Ebrite* v. *Brookhyser,* 219 Ark. 676, 244 S.W. 2d 625; *Harmon* v. *Thompson,* 223 Ark. 10, 263 S.W. 2d 903. We have indicated that this holding would be equally applicable where personal property is involved. *Miller* v. *Riegler,* 243 Ark. 251, 419 S.W. 2d 599. In speaking of *Ebrite* v. *Miller,* we said:

> This decision certainly has not been viewed as unsound for there can be no logic in preventing a spouse from directly giving to his or her marriage partner equal rights in property that is owned, when the same result was permitted by creating the estate through a third party who really held no interest in the property at all.

Consequently, decisions based upon the obsolete premise of unity of time are no longer controlling or even persuasive.

Furthermore, it has long been recognized that a husband may, by simply changing a bank account from his own name to that of him and his wife, create an estate by the entirety. *Black* v. *Black,* 199 Ark. 609, 135 S.W. 2d 837. It has been said that the creation of a "husband and wife" joint account is not a true common law tenancy by the entirety because either party may extinguish the joint estate while both are living as to any part of the money withdrawn from the account and reduced to separate possession. Those holdings are applied where the tenancy is dependent upon the mere establishment of the account in two names or upon statutes. See *McGuire* v. *Benton State Bank,* 231 Ark. 608, 331 S.W. 2d 258, 232 Ark. 1008, 342 S.W. 2d 77. There is no indication whatever that there was any agreement in *McGuire* of the nature of the one involved here.

It must be remembered that appellant's reliance is not placed upon any statute for an investiture of title in her, so cases based upon statutes have neither controlling nor persuasive effect. *Davis* v. *Jackson,* 232 Ark. 953, 341 S.W. 2d 762, relied upon by the majority, is such a case, as is *Coristo* v. *Twin City Bank,* 257 Ark. 554, 520 S.W. 2d 218. It also must be kept in mind that the relationship of husband and wife did exist in the present case, so cases involving parties standing in other relationships, such as *Davis* v. *Jackson,* supra, should carry little weight.

It also must be remembered that this is not a case where the husband was attempting merely to have the account pass to his wife upon his death. Instead, the agreement was that the account be presently owned by the husband and wife jointly, with the right of survivorship. Under the agreement appellant could have withdrawn every cent in the account. There is nothing in the document appellant relies upon to indicate that the arrangement was simply testamentary. Cases in which the attempt was made to merely cause the balance of the account to pass to the surviving spouse on death of the other have no bearing.

It seems clear to me that the widow had the right to

litigate the question of ownership of the funds. In *Union & Mercantile Trust Co.* v. *Hudson,* 147 Ark. 7, 227 S.W. 1, the funds in question were the proceeds of a loan on lands held by a husband and wife as tenants by the entirety. The husband deposited them in his own account rather than in the joint names of the parties. The court said that, in equity, the matter was to be considered as if he had deposited the funds jointly and, because the funds had not been reduced to the husband's separate possession, with the wife's *knowledge and consent,* they were the property of the husband and wife as an estate by the entirety. In this case, under the agreement, the funds were considered as deposited jointly. In *Dickson* v. *Jonesboro Trust Co.,* 154 Ark. 155, 242 S.W. 57, the court held that a tenancy by the entirety in funds withdrawn from a joint bank account by a husband and reduced to this separate possession with the *knowledge and consent* of the wife had been destroyed. In *Dickson,* every cent put into the account belonged to the husband and the wife had never drawn any checks on the account. Still both *knowledge and consent* of the wife were required to validate the husband's destruction of the tenancy by the entirety. Consent is contained in the agreement between the parties here, but there is absolutely nothing to indicate that appellant had any knowledge of Mr. McEntire's reduction of the entire account to his separate possession.

On the executor's motion for summary judgment, it was incumbent upon him to show that there were reasons why the agreement should not be binding. There is no showing that Mr. McEntire did not read and understand the language of the agreement. There is no showing that he did not instruct the employees of the bank in a manner that would indicate an intent contrary to the one carried out. There is nothing to indicate an intent contrary to the one stated in the agreement. See *Park* v. *McClemens,* 231 Ark. 983, 334 S.W. 2d 709. Even though the burden might be different on trial of the case, it certainly was the executor's burden to show such things on motion for summary judgment. The burden is on the movant for a summary judgment to show that there are no material issues of fact. *Pioneer Finance Co.* v. *Lane,* 255 Ark. 811, 502 S.W. 2d 624; *Harvey* v. *Shaver,* 247 Ark. 92, 444 S.W. 2d 256.

The treatment of the question of gift in this case totally disregards the relationship of husband and wife and the authorities cited have no bearing on the question for the reason that neither involved such a relationship. The decision in *Ramsey* v. *Ramsey,* 259 Ark. 16, 531 S.W. 2d is controlling. There we said that where the husband is responsible for property being taken in both names, the fact that the consideration given belonged to the husband only is of little, if any, significance. The reason is that the presumption is that there was a gift of an interest by the husband to the wife, even though the wife may have no knowledge of the transaction. As to that presumption we said:

> The presumption is strong, and it can be overcome only by clear, positive, unequivocal, unmistakable, strong, and convincing evidence, partially because the alternative is a resulting trust the establishment of which, under such circumstances, requires that degree of proof.

The property involved in *Ramsey* was promissory notes. We further said that delivery to the husband is considered as delivery to the husband and wife sufficient to make the gift complete. As I see it, the question of gift relates only to the creation of a tenancy by the entirety. There was a completed gift to appellant of her title as a tenant by the entirety, which has not been shown to have been destroyed by the husband with her knowledge.

We have recently recognized the right of parties to a joint account to litigate the ownership of money which a bank permitted to be withdrawn from a joint account by one co-tenant without the knowledge of the other tenant. *Haseman* v. *Union Bank of Mena,* 262 Ark. 803, 562 S.W. 2d 45. We should at least do the same here by reversing the judgment in favor of the McEntire estate.

I am authorized to state that Mr. Justice Hickman joins in this opinion.

W. A. KRUEGER COMPANY *v.* ST. BERNARD'S REGIONAL MEDICAL CENTER

79-264 590 S.W. 2d 1

Opinion delivered November 26, 1979
(In Banc)

Robert S. Kirschenbaum, Scottsdale, Arizona and *Kelly W. Webb,* of *Webb & Houston,* for appellant.

Branch & Thompson, for appellee.

GEORGE ROSE SMITH, Justice. The appellee obtained a judgment against Homer Dutton and served writs of garnishment upon the appellant. The appellant, as garnishee, filed three successive answers to the appellee's interrogatories, each admitting that the garnishee owed Dutton a certain amount and stating that the garnishee "will turn over such withheld sum less reasonable Garnishee fees of $20 incurred in preparation of this answer [Ark. Stat. Ann. § 31-146 (Repl. 1962)], upon receipt of an Order of this Court to that effect." This appeal is from a judgment against the appellant for the full amounts owed by it to Dutton, without deduction of the three garnishee's fees, totaling $60. For reversal the appellant argues that it is entitled to the asserted fees, each of which is itemized (and erroneously totaled) as follows in the appellant's brief:

Secretarial expense	$12.25
Postage (certified letter)	1.75
Telefax and long distance charges	6.00
Review of pleadings by counsel	5.00
	$20.00

The pertinent language of the statute relied upon reads:

> [The garnishee] shall not be subjected to costs beyond those caused by his resistance of the claim against him; and if he discloses the property of the defendant in his hands, or the true amount owing by him, and delivers or pays the same according to the order of the court, he shall be allowed his costs. [§ 31-146, *supra*.]

We have not decided this precise point, but there is nothing in this statute to except it from our general rule that statutes regulating costs are strictly construed against the party claiming them. *Peay* v. *Pulaski County,* 103 Ark. 601, 148 S.W. 491 (1912); *Hempstead County* v. *Harkness,* 73 Ark. 600, 84 S.W. 799 (1905). Here the particular items claimed by the appellant are either attorney's fees or miscellaneous expenses incidental to litigation. Such items are not recoverable, as costs or otherwise, absent a statute so providing. *Romer* v. *Leyner,* 224 Ark. 884, 277 S.W. 2d 66 (1955); *American Exchange Tr. Co.* v. *Trumann Spec. Sch. Dist.,* 183 Ark. 1041, 40 S.W. 2d 770 (1931). The Texas case cited by the appellant is not in point, for there the controlling Rule of Procedure allowed "reasonable compensation" to the garnishee. *Pan American Nat. Bk.* v. *Ridgway,* 475 S.W. 2d 808 (Tex. Civ. App., 1972).

Affirmed.

HARRIS, C.J., not participating.

BWH, INC., d/b/a THE COUNTRY SQUIRE, et al *v.* METROPOLITAN NATIONAL BANK

79-100 590 S.W. 2d 247

Opinion delivered November 26, 1979
(Division I)
[Rehearing denied January 7, 1980.]

James A. Neal, for appellants.

House, Holmes & Jewell, for appellee.

JOHN A. FOGLEMAN, Justice. Appellee Metropolitan National Bank brought suit against appellants, BWH, Inc., James A. Neal and Charles A. Neal on a promissory note executed by BWH, Inc. and Charles A. Neal. The note was dated August 23, 1977, for $27,000, with interest at the rate of 10% per annum. Appellee alleged that Charles A. Neal and James A. Neal had executed a guaranty of the indebtedness of BWH, Inc. on August 30, 1977. Appellants answered, admitting their status and residence, but otherwise generally denying appellee's allegations. Appellee then filed requests for admissions addressed to James A. Neal and Charles A. Neal separately. No responses were ever filed by either. On September 27, 1978, 19 days after the filing of the requests for admissions, appellee filed a motion for summary judgment, based upon the failure of appellants to answer the requests for admissions. On the same day, appellants addressed interrogatories to appellee, which were answered

October 20, 1978. Appellants filed a response to the motion for summary judgment on October 9, 1978. In the response, appellants stated that there were genuine issues of material fact to be adjudicated, that they verily believed that defenses could be raised by further pleadings, that interrogatories to appellee had been propounded prior to the filing of the motion for summary judgment but that no response had been received, that appellants had been diligent in conducting discovery, and that responsive pleadings by them prior to receipt of responses to the interrogatories would be irresponsible and spurious.

On November 7, 1978, appellants filed an amended response to the motion for summary judgment. Appellants stated that their attorney had received, by regular mail, appellee's request for admissions on September 11, 1978, a notice of trial date of March 5, 1979, on September 19, 1978, and appellee's motion for summary judgment on September 29, 1978. Appellants asserted that the motion for summary judgment was filed prior to the time fixed by statute for answering the requests for admissions. Appellants also alleged that Steve Riggs, appellee's attorney, had, on or about October 3, 1978, indicated to the attorney for appellants that no further action would be taken on the motion for summary judgment until appellee responded to the interrogatories propounded to it, and that appellants' attorney had informed Riggs that there were justiciable issues and valid defenses to be raised and that he was attempting to conduct discovery as provided by law. Appellants excused their failure to file controverting affidavits by saying that appellee had filed no supporting affidavits and the motion was untimely filed. (No objection to the premature filing of the motion had been made in the response filed October 9.) Appellants also alleged that, after their attorney received appellee's response to their interrogatories on October 23 or 24, 1978, he attempted to contact Charles A. Neal, an active member of the United States Army, stationed at Ft. Sam Houston, for the purpose of discussing the responses to the interrogatories and further discovery by depositions, but was unsuccessful until Charles Neal came to Little Rock on October 30, 1978, when it was decided that further discovery was necessary. Appellants also alleged that, on November 2, 1978, their

attorney received a copy of a letter to the circuit judge enclosing a precedent for summary judgment, and indicating that the judge had requested the precedent. Appellants further alleged that on November 3, 1978, appellee's attorney was informed by telephone that appellants had not completed discovery and that they proposed to take the deposition of Weldon McWhirter, an officer of appellee, but, several minutes later, appellant's attorney received a telephone call from the circuit court law clerk, who stated that the summary judgment would be entered, but the judge was out of town and would return on November 7, 1978. They alleged that the law clerk was informed that appellants would file additional pleadings and affidavits. Appellants asserted that they had been diligent in their attempts to complete discovery and file responsive pleadings but were unable to do so without completion of discovery. Appellants also asserted that appellee was not entitled to summary judgment because the motion was untimely filed, since no time for hearing on the motion had been fixed as required by Ark. Stat. Ann. § 29-211 (c) (Supp. 1977) and because appellant was not entitled to summary judgment "as a matter of law required by Ark. Stat. Ann. §§ 29-201 and 29-211."

This amended response was supported by the affidavit of appellant James A. Neal, who is also attorney for appellants. In that affidavit, he asserted that: McWhirter, an officer of appellee, had stated on oath in response to appellants' interrogatory that the promissory note was not a renewal of a previous note or notes but that the note exhibited with the complaint stated on its face that it was a renewal; BWH, Inc. and Charles A. Neal had received no consideration for the promissiory note; Charles A. Neal and James A. Neal received no consideration for the execution of the guaranty executed some seven days after the note was executed; and other guarantors may be liable to appellee or appellants, but entry of summary judgment might be res judicata against said liability or contribution as allowed by Ark. Stat. Ann. § 27-1134.1 (Supp. 1977). This affidavit also contained the following allegations: that appellee's response to an interrogatory was that, as part of the sale of BWH, Inc., the proceeds of the note which was the subject of the suit were used to pay off the outstanding indebtedness of that

corporation evidenced by certain notes, but that affiant had not received any proceeds or documents reflecting that the indebtedness was paid off as part of the sale of the corporation; and that this sale was the subject of an action by Charles A. Neal and James A. Neal to recover damages from Dewey L. Buffington for alleged fraud in the sale of stock in BWH, Inc. by him to the Neals. Appellants again asserted that they had not been granted sufficient time or opportunity for full discovery.

On November 17, 1978, appellants filed a motion to set aside the summary judgment, which had been entered on November 7. The following grounds were alleged: the motion was a nullity because it was untimely filed; the judgment was entered without notice of the date and time fixed for the hearing; the judgment was entered without a hearing; there was no statutory authority specifically allowing for the summary judgment, or, in the alternative, the extent of relief granted exceeded the lawful purpose and intent of summary judgment statutes and the judgment was not well founded in law or fact; the record clearly reflects that there were material issues of fact and law that appellants were attempting to raise by discovery; and the entry of summary judgment within approximately 80 days of the institution of this suit while various pleadings were filed and discovery was being conducted was a denial of appellants' legal right to defend against the claim and unlawfully foreclosed appellants' remedies.

Appellants' motion was denied because the trial judge found that appellants had not, even to the date of the denial, November 22, 1978, injected any factual issues to be resolved in this case.

Appellants contend that summary judgment may be granted in Arkansas only in those specific situations authorized by Ark. Stat. Ann. § 29-201 (Repl. 1979), and that no summary judgment may be rendered in an action on a promissory note. They quote from an article on the summary judgment procedure written by Dr. Robert A. Leflar more than a decade before the adoption of Ark. Stat. Ann. § 29-211 (Repl. 1962). That article contained a statement that most states, like Arkansas, restrict the summary judgment

procedure to a limited group of actions. *Minimum Standards of Judicial Administration – Arkansas,* 5 Ark. L. Rev. 1, 7. In the same comments on summary judgment procedure, Dr. Leflar also pointed out that Rule 56 of the Federal Rules of Civil Procedure made summary judgments available in federal courts in all appropriate cases regardless of the type of action involved.

It is appellants' contention, however, that by the subsequent act (Act 123 of 1961, digested as Ark. Stat. Ann. § 29-211) adopting Rule 56 of the Federal Rules of Civil Procedure, the legislature merely prescribed procedures to be used in the limited group of actions enumerated in other specific statutes, none of which mention actions on promissory notes. They rely particularly on § 2 of the Summary Judgment Act providing that "This Act is cumulative and supplementary to existing provisions governing summary judgments, and does not in any manner amend, repeal, or supersede such provisions." The mere fact that the act did not amend, repeal or supersede existing statutory provisions does not limit the effect of the act to providing a procedure for obtaining summary judgment in cases authorized by other statutes, even if it actually does that. If the act were merely supplementary, appellants' argument would carry more weight. The word cumulative, as used in the act, is indicative, however, of an addition to existing provisions for summary judgments. Since the act is both cumulative and supplementary to existing provisions, we find no merit in this argument.

Appellants argue that, since the General Assembly passed Act 30 of 1961 adding another category to cases in which summary judgments are permissible under Ark. Stat. Ann. § 29-201 at the same session it adopted Federal Rule of Civil Procedure 56, the General Assembly intended to limit the scope of Act 123, so that it is only a procedural implementation of § 29-201. This argument is not persuasive.

Appellants contend that the record and proceedings establish the presence of issues of fact. In this case, appellants' failure to answer the requests for admissions, in effect, admitted the allegations of the complaint. The time allowed

for answer to the request for admissions under Ark. Stat. Ann. § 28-358 (Supp. 1977) was 20 days after the services of the requests. Appellants take the position that there was no service of the request until September 11. Appellants, however, never filed any response to the requests. They satisfied themselves by filing, on October 9, a response to appellee's motion for summary judgment which had been filed on September 29. A response to requests for admissions must be a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why the party to whom the request is directed cannot truthfully admit or deny those matters or written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. Sec. 28-358 (a) (Supp. 1977). Appellants' response to the motion for summary judgment did not begin to conform to these statutory requirements. Those requests must be taken as admitted, because no attempt was made to answer them, either in the allotted time or after its expiration. Ark. Stat. Ann. § 28-358 (a); *Federal Factors, Inc.* v. *Wellbank,* 241 Ark. 44, 406 S.W. 2d 712; *Stocker* v. *Southwestern Co.,* 245 Ark. 350, 432 S.W. 2d 481. These admissions establish the execution of the instruments upon which the suit was brought and that the indebtedness evidenced by the note remains unpaid.

The signatures on the commercial instrument on which suit was brought were not *specifically* denied in the pleadings, so they stood as admitted in any event. Ark. Stat. Ann. § 85-3-307 (1) (Addendum 1961). The signatures being admitted, appellees would have been entitled to a judgment upon production of the instrument, unless the defendant established a defense. Ark. Stat. Ann. § 85-3-307. Appellants have never sought to establish a defense, except for their belated attempt in their amended response to the motion for summary judgment to assert want of consideration. Want of consideration is an affirmative defense to an instrument. Ark. Stat. Ann. § 85-3-408 (Addendum 1961). It was never pleaded, even though appellants filed an answer. Affirmative defenses must be pleaded by answer. Ark. Stat. Ann. § 27-1121 (Repl. 1962). *Stolz* v. *Franklin,* 258 Ark. 999, 531 S.W. 2d 1. Appellants could not raise an issue not raised

by the answer by simply amending their response to the motion for summary judgment. Although the burden of demonstrating the non-existence of a genuine issue of fact is on the moving party, a plaintiff moving for summary judgment after answer has been filed is not required to negate defenses not raised by the answer. See *Ashley* v. *Eisele,* 247 Ark. 281, 445 S.W. 2d 76.

Appellants do not point out any significant fact issue in their brief here. They state that the promissory note, in the handwriting of an officer of the bank, reflects on its face that the note was a renewal,[1] but in answering one of appellants' interrogatories, an officer of the bank had answered that the note was not a renewal of a previous note. Appellants have failed to demonstrate the significance of this apparent conflict.

We are not persuaded that appellants have demonstrated that there is any material fact issue. At best, appellants ask us to speculate that further discovery would develop a material fact issue, without indicating what they expect to discover. A mere suspicion in the mind of the party against whom summary judgment is sought will not create a genuine issue of fact, nor does it suffice as good cause for further discovery. *Marrow* v. *State Farm Ins. Co.,* 264 Ark. 227, 570 S.W. 2d 607. The record before us does not remove the further discover sought by appellants from the category of an outright and unadulterated fishing expedition — something we have never sanctioned under Ark. Stat. Ann. § 28-356 (Repl. 1962). *Marrow* v. *State Farm Ins. Co.,* supra.

Appellants also contend that the summary judgment should be set aside because they were not given notice of the date and time fixed for hearing on the motion as required by Ark. Stat. Ann. §§ 29-202 — 29-204 (Repl. 1979) and § 29-

[1]This statement by appellants is not supported by their abstract of the note which simply states, "Printed promissory note with handwritten entries." After appellee pointed out, in its brief, that appellants had failed to abstract the note and guaranty agreement, appellants attempted to supply the deficiency in their reply brief. This was too late to be considered. *Energy Oil Co.* v. *Rose Oil Co.,* 250 Ark. 484, 465 S.W. 2d 690; *Merritt* v. *Merritt,* 263 Ark. 432, 565 S.W. 2d 603; *Young* v. *Farmers Bank & Trust Co.,* 248 Ark. 613, 453 S.W. 2d 47.

211. The first two sections apply only to proceedings under § 29-201. Failure to hold a hearing under Ark. Stat. Ann. § 29-211 is not always fatal to a summary judgment when a party against whom the judgment is entered is not prejudiced. *Sherman* v. *Keene,* 256 Ark. 850, 510 S.W. 2d 870; *Purser* v. *Corpus Christi State National Bank,* 258 Ark. 54, 522 S.W. 2d 187. Although we do not approve of the disposition of a motion for summary judgment without notice and hearing, we will not reverse a summary judgment when it is manifest that the error is not prejudicial. *Purser* v. *Corpus Christi State National Bank,* supra. Appellants contend that they were prejudiced because appellee's requests for admissions were taken as admitted when appellants' time for answering had not expired under Ark. Stat. Ann. § 28-358 (Supp. 1977). The time allowed for answer under that statute was 20 days after service of the request. Appellants did not seek or obtain an extension of time for answering the requests. They do contend that they were assured by appellee's attorney, on October 3, 1978, that the motion for summary judgment would not be pursued until appellee had answered appellants' interrogatories. Appellants' attorney received these answers on October 23 or 24. The proposed summary judgment was received by appellants on November 2. Appellants filed nothing until November 7, at which time they filed their amended response, a few hours after the judgment had been entered. Since appellants never attempted to answer the requests for admissions, at least prior to November 7, they are in no position to say that they were prejudiced by the filing of a motion for summary judgment one day prior to the expiration of the time for answering the requests, even if appellants' calculation of the time is accepted.

Until the filing of the amended response after appellants' attorney had been advised that summary judgment was about to be entered, appellants had never requested a hearing on the motion for summary judgment. Rule 2e of the Uniform Rules for Circuit and Chancery Courts provides that, unless a hearing on a motion is requested by counsel or is ordered by the court, a hearing will be deemed waived and the court may act upon the matter without further notice five days after the time for the movant's reply to a response has

expired. Under that rule, the court could act, and action on either November 2 or November 7 was not necessarily premature.[2] The reason appellants did not file a request for a hearing between October 24 and November 7 has not been shown. We have no idea what affidavits appellants could possibly have filed in opposition to appellants' motion or the admissions made. Appellants were not excused from filing opposing affidavits to show a material issue of fact, as they seem to think, by appellee's failure to file supporting affidavits when appellee could show entitlement to judgment on the basis of admitted facts and the absence of any issue on any affirmative defense. It is quite difficult to see why appellants could not assert want of consideration for the instruments upon which the suit was based without discovery procedures.

A party opposing a motion for summary judgment must be diligent in countering the motion and mere general allegations which do not reveal detailed and precise facts will not prevent the award of summary judgment. *Ashley* v. *Eisele,* 247 Ark. 281, 445 S.W. 2d 76. We conclude that there manifestly was no prejudice to appellants in not having a hearing on the motion for summary judgment or in the lack of notice.

Appellants also contend that the trial court erred in denying its motion to set aside the judgment. What we have said heretofore is dispositive of the issues raised by that motion. Appellants filed a brief in the trial court in support of that motion. Statements in that brief which are not supported by pleadings or affidavits filed in the case cannot be considered by us on appeal. See *Ashley* v. *Eisele,* supra.

The judgment is affirmed.

We agree. GEORGE ROSE SMITH, HICKMAN and PURTLE, JJ.

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[2] Appellee has endeavored to introduce a copy of a letter addressed to the circuit judge, with copy to appellants' attorney, and dated October 26, 1978, in which he asked a ruling on the summary judgment or, alternatively, to set a hearing on the motion. Appellants' attorney denies that he received such a letter. We do not consider this letter, because we cannot find it in the transcript of the record and the method used to bring in this matter outside the record is highly improper.

Jimmy W. GRIMMETT *v.* Tom F. DIGBY, Circuit Judge

79-239 589 S.W. 2d 579

Opinion delivered November 26, 1979
(In Banc)

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for petitioner.

Lowe & Hamlin, by: *Frank S. Hamlin,* for respondent Home Insurance Co.

CONLEY BYRD, Justice. Petitioner Jimmy W. Grimmett, a state policeman, while patrolling the highways and while on regular duty as an Arkansas State Trooper, made a left turn in front of one of Home Insurance Company's insureds causing damages in the amount of $996.67. When Home Insurance Company brought suit to recover the $996.67, petitioner moved to dismiss the action on the basis that it constituted an action against the State of Arkansas which was prohibited by Art. 5 § 20 of the Constitution of Arkansas and that the jurisdiction of such claims was exclusively with the Arkansas Claims Commission. After the trial court overruled petitioner's motion to dismiss, he filed his petition here for a writ of prohibition raising the same issues.

Article V § 20 upon which petitioner relies provides:

> "The State of Arkansas shall never be made defendant in any of her courts."

We pointed out in *Kelly* v. *Wood, Circuit Judge,* 265 Ark. 337, 578 S.W. 2d 566 (1979), that an automobile 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 Arkansas Constitution Art. V § 20 *supra.* The same principle has been recognized by most of the authorities. See *Belknap* v. *Schild,* 161 U.S. 10, 16 S. Ct. 443, 40 L. ed. 599 (1896), where it is stated:

> "But the exemption of the United States from judicial process does not protect their officers and agents, civil or military, in the time of peace, from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States."

Petitioner readily recognizes our decision in *Kelly* v. *Wood, Judge, supra,* but points out that other states with a provision similar to Art. V § 20, *supra,* have upheld tort-claim acts such as the Arkansas Claims Commission Act, Ark. Stat. Ann. § 13-1401 et seq. (Repl. 1968), and have construed such acts as giving exclusive jurisdiction of all personal injury actions against state employees to such commissions or adjudicatory agencies. In making this contention, the petitioner fails to take into consideration other provisions of the Arkansas Constitution such as Art. 2 § 7 and Art. 2 § 13.

Article 2 § 7 provides:

> "The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; . . ."

Article 2 § 13 provides:

> "Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely, and without

denial, promptly and without delay, conformably to the laws."

In *St. L., I.M. & S. Ry.* v. *Williams,* 49 Ark. 492, 5 S.W. 883 (1887), based upon the foregoing constitutional provisions, we said:

> "Every one is entitled, under the Constitution, to have his rights enforced, his wrongs redressed, and his liabilities determined in the courts, whenever it becomes necessary to compel their enforcement, redress or adjustment, and, when he is liable for damages, as the appellant is in this case, to have the damages he shall pay assessed by a jury. The Legislature has no power to substitute boards of arbitration for the courts, without the consent of parties, and make their awards obligatory and the exercise of the right to seek the aid of the courts to obtain relief from a wrong, or impose upon any one a penalty for exercising such right. To make the action of such a board obligatory or impose such a penalty would be a denial of the right, or a purchase of justice, and a violation of the Constitution."

The foregoing construction given to Art. 2 § 7 and Art. 2 § 13 made it necessary for the people of this State to amend the Constitution [Amendment #26] before a valid Workmen's Compensation law could be enacted. Such provisions would also prevent the General Assembly from giving the Claims Commission exclusive jurisdiction of tort claims against state employees or officers for their unlawful acts.

Writ denied.

HARRIS, C.J., not participating.

FOGLEMAN and HICKMAN, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I must respectfully dissent from the holding in this case, although I concurred in the result in *Kelly* v. *Wood,* 265 Ark. 337, 578 S.W. 2d 566. There is a basic difference in that case and this which is not apparent from the face of the majority opinion in

Kelly. It was not at all clear that Kelly was in the performance of any duty of his employment at the time of the occurrence which gave rise to the action, the trial of which he sought to prohibit. The writ of prohibition is an extraordinary and discretionary writ which should be used cautiously and never granted where the petitioner is not clearly entitled to that relief. *Henderson* v. *Dudley,* 264 Ark. 697, 574 S.W. 2d 658; *Karraz* v. *Taylor,* 259 Ark. 699, 535 S.W. 2d 840; *Wade* v. *State,* 264 Ark. 320, 571 S.W. 2d 231; *Webb* v. *Harrison,* 261 Ark. 279, 547 S.W. 2d 748. Since I did not feel that the petitioner Kelly was clearly entitled to that relief, I concurred in the result, as did the Chief Justice.

The question that concerned me in *Kelly* is not present here. We are squarely presented with the question of the liability of an Arkansas State policeman for an act done or omitted negligently while he is engaged in the performance of his duties. There can be no doubt that petitioner is a state officer. *Downey* v. *Toler,* 214 Ark. 334, 216 S.W. 2d 60. In *Downey,* we said:

> In short, Arkansas State Police are under the control of the State; they represent the State government, and — within the limits of the said Act — they are Statewide law enforcement officials.

We pointed out the nature of the functions performed by the Arkansas State Police and the department in arriving at that conclusion. The purpose cannot be better stated than it was in the first section of that act, now digested as Ark. Stat. Ann. § 42-401 (Repl. 1977), which reads:

> For the purpose of enforcing the motor vehicle laws, traffic laws and other state laws relating to protecting and properly maintaining the State Highway System of the State of Arkansas and to render more effective the apprehension of criminals and the enforcement of criminal law, there is hereby created the Department of Arkansas State Police. The police officers hereinafter provided for shall be known as "Arkansas State Police."

The policemen are employed strictly upon an efficiency

basis, along the lines of civil service; and, as pointed out in *Downey,* hold their offices until and unless removed for cause. Ark. Stat. Ann. § 42-406 (Repl. 1977). They are conservators of the peace and have the powers possessed by policemen in the cities and sheriffs in the counties, which they may exercise anywhere in the state, along with all the power and authority of the State Fire Marshal. They are required to cooperate with regularly constituted peace officers in the state in enforcement of the criminal laws and assist them in the apprehension of criminals. Ark. Stat. Ann. § 42-407 (Repl. 1977). They are furnished vehicles, equipment and supplies necessary for the performance of their duties, and wear insignia bearing the words "Arkansas State Police." Ark. Stat. Ann. § 42-409 (Repl. 1977). Any Arkansas State policeman has the authority, in case of emergency, to deputize any reputable citizen whenever it is deemed necessary for the proper enforcement of the law. Ark. Stat. Ann. § 42-413 (Repl. 1977). Each officer must take the oath required of public officials and furnish a surety bond. Ark. Stat. Ann. § 42-414 (Repl. 1977).

Among the important governmental functions performed by the Arkansas State Police are the following:

> Patrolling the public highways, making arrests, enforcing the laws of this state relating to motor vehicles and the use of the highways; assisting in the collection of delinquent motor vehicle licenses and of gasoline tax and other taxes; determining when a person or persons are the cause of injury to the state highways and arresting persons responsible therefor and persons responsible for injury to other state property. Ark. Stat. Ann. § 42-407 (Repl. 1977).
>
> Providing police protection benefitting any statewide function sponsored or conducted by a state agency, board or commission, state supported college or institution, or by a private non-profit association or organization on public property. Ark. Stat. Ann. § 42-407.1 (Repl. 1977).
>
> Taking or summoning all persons arrested upon

> charges of violating any of the highway laws of the state or any rules and regulations of the Arkansas Highway Commission, Transportation Commission and the Revenue Department governing the highways and any other crime punishable as a misdemeanor before the judge having jurisdiction of the offense; placing persons arrested for felonies in a county jail. Ark. Stat. Ann. § 42-408 (Repl. 1977).
>
> Assisting in the enforcement of all laws of the state prohibiting the unlawful sale or manufacture of intoxicating liquors. Ark. Stat. Ann. § 48-1101 (Repl. 1977).

No one in state government performs any more essential or important function of state government. It is apparent that the duties performed by a state policeman are duties owed the general public.

Only a few states have a constitutional provision like Art. 5, § 20 of our constitution. One of those is the State of Illinois. The language of their constitutional provision and that of Art. 5 § 20 are virtually identical. Illinois law, like our own, exempts a state agency from liability through court action because of this constitutional provision. See *Minear* v. *State Board of Agriculture,* 259 Ill. 549, 102 N.E. 1082, Ann. Cas. 1914B 1290 (1913); *Tri-B Advertising, Inc.* v. *Arkansas State Highway Com'n.,* 260 Ark. 227, 539 S.W. 2d 430.

In *Mower* v. *Williams,* 402 Ill. 486, 84 N.E. 2d 435 (1949), the Illinois Supreme Court considered the question of liability of a highway maintenance man for ordinary negligence in light of the constitutional provision and of case law. The maintenance man was the operator of a state-owned truck with a snow plow and, while engaged in removing snow and ice from the highways, caused a collision between the truck and a privately owned automobile from which the occupants of the automobile suffered damages. The negligent act consisted of entering the intersection with the state-owned truck and snow plow, without looking in the direction from which the plaintiff's automobile was coming, and relying on the statement of a helper that it was safe to

proceed. At the close of all the evidence, a verdict was directed, partly on the basis of common law and statutory immunity. The Appellate Court reversed this action, but the Supreme Court reversed the action of the Appellate Court and affirmed the judgment of the trial court. The Supreme Court rejected the argument that the snow plow operator was liable under Illinois law which held an employee acting in a ministerial capacity liable for negligent performance of his duties. The court explained the import of such decisions on the basis that liability exists where the duty is not a public one but is a duty to the plaintiff individually, not as a member of the general public, but there is no liability for negligence in the performance of a duty to the public so long as the employee exercises his judgment and discretion fairly and honestly.

The Illinois Supreme Court said that it was apparent that the duty being performed was a duty owed the general public. In holding the highway maintenance man immune from liability for ordinary negligence, the Illinois Supreme Court said:

> In the instant case the evidence reveals that defendant was employed by the State Highway Department, that he was assigned by his superiors to be "maintenance man" on a designated strip of some 21 miles of highway. He was assigned other men as helpers and provided with equipment including the snow plow, with which to perform his various duties. He was, in general, left to his own judgment as to when and where he should perform his duties in his assigned territory and as to the manner in which he would use the State-owned equipment furnished him. Under such circumstances his duties were not within the definition of "ministerial" as announced in the Bartels case [*People* v. *Bartels,* 138 Ill. 322, 27 N.E. 1091 (1891)]. Defendant is conceded to be the agent of the State and there is no contention that the removing of the snow from the public highway at the place and time of the collision was not within the duties with which defendant was charged. The removal of snow and ice from one of the main traveled highways is absolutely essential to the welfare and safety of the

> traveling public. There are few, if any, functions of public responsibility which require more prompt and effective action on the part of those charged with such duty. That the removal of such snow and ice is a governmental as distinguished from a ministerial function appears as a reasonable proposition when circumscribed by conditions necessitating the overcoming of the hazard of snow and ice, with its attending danger to life and property, especially when it is of such magnitude that private means are not adequate to deal with the problem, and where the public welfare demands and the public relies on the State to meet the problem. The defendant, as an agent of the State, was charged with a duty that was in no way fixed as to time, mode or occasion and his duty was not ministerial in character.

In a later case, the Illinois Supreme Court held that a police officer, whose city police car collided with the truck of a third party, causing the death of a pedestrian who was struck by the truck, was performing a governmental function on behalf of the municipality by which he was employed and was not liable for the death. *Taylor* v. *City of Berwyn,* 372 Ill. 124, 22 N.E. 2d 930 (1939). The city police officer, Bartunek, was pursuing an automobile in which suspected criminals were riding at the time of the collision, which occured outside the limits of the city by which Bartunek was employed. The Illinois court held that, at the time of the collision, Bartunek was in the performance of his duty as a police officer of the city by which he was employed, and that, because of this fact, a judgment against him was erroneous.

Upon similar reasoning, the Supreme Judicial Court of Massachusetts has held that a state farm officer, acting in the performance of his duty, was not liable for injuries suffered by two passengers, prisoners in the officer's custody, in a collision between an automobile being driven by the officer and another automobile. *Haberger* v. *Carver,* 297 Mass. 435, 9 N.E. 2d 305 (1937). The defendant Carver was a prison officer at the state farm. He was directed by the prison farm superintendent to take the prisoners, who were the injured plaintiffs, to the Superior Court of Suffolk County at Boston to testify in cases pending there. Because the au-

tomobiles belonging to the commonwealth were otherwise engaged, the superintendent instructed Carver to use his own automobile; however, Carver was to be compensated for its use. It was found that Carver was negligent in the operation of his automobile. On that basis, the trial court held against Carver, and denied his motion for a favorable finding on the ground that he, at the time of the collision, was a state officer, acting in the performance of his duty, having the plaintiff in his official custody for transportation, and was not liable to the plaintiff, even though Carver may have been negligent in the operation of the automobile.

On appeal, the Massachusetts court pointed out that, by statute, Carver was a subordinate officer appointed by the superintendent subject to the approval of the commissioner of correction. Consequently, it was held that Carver was entitled to his request for the following rulings by the trial court:

> "The defendant at the time of the accident was a state officer acting in the performance of his duty, having the plaintiff in his official custody for transportation, and therefore the defendant is not liable to the plaintiff even though the defendant may have been negligent in the operation of his automobile."
>
> "That on all the evidence the plaintiff is not entitled to recover."

I am aware of the fact that there are decisions to the contrary in other jurisdictions. I am not aware of one in a jurisdiction having a constitutional provision such as ours.

We did say in *Tri-B Advertising, Inc.* v. *Arkansas State Highway Com'n.,* supra, that the "State of Arkansas, its officers and its agencies" could not be made a defendant in any of its courts, and that "[t]his immunity extends to suits for torts." Although, in the context of that opinion, the statement as to officers might be taken as dictum, I submit that it is a proper approach to the question. The holdings of the Illinois and Massachusetts courts are sound and well reasoned. The state can only act through such officers as

Grimmett in enforcing its laws. Such officers are often required to respond in emergency situations, and they should be able to do so without being restrained by concern over their potential liability for ordinary negligence, for which, in the ordinary case, the employer would be liable under the doctrine of respondeat superior. As a result of this decision, the state will be compelled to provide protection to state officers against the payment of damages in such situations because there is no more important governmental function than that of the state police, in a society based upon the rule of law. Consequently, indirectly, though not directly, the purpose of Art. 5, § 20 will be subverted by requiring payment of damages because of the ordinary negligence of state officers in cases such as this. This action violates the spirit, if not the letter, of our constitutional provision.

I am authorized to state that Mr. Justice Hickman joins in this opinion.

FORD MOTOR CREDIT COMPANY *v.*
George HERRING and Cecil GEISLER

79-251 589 S.W. 2d 584

Opinion delivered November 26, 1979
(In Banc)

Griffin Smith & W. R. Nixon, Jr., by: *W. R. Nixon, Jr.*, for appellant.

Ray & Donovan, for appellees.

FRANK HOLT, Justice. The appellees were purchasers of two pickup trucks which were financed under retail installment contracts with the appellant. The contracts authorized repossession of the vehicles upon the buyer's default. When each appellee became delinquent on his monthly payments, appellant repossessed the trucks in which various items of personal property were stored. Appellant brings this appeal from a judgment awarding appellees $2,000 in actual damages and $17,000 in punitive damages.

Appellant first contends that the trial court erred in submitting the issue of conversion to the jury since no element of force, threats of force, or breach of the peace accompanied repossession. In pre-code cases, we have sustained a finding of conversion only where force, or threats of force, or risk of invoking violence, accompanied the repossession. *Manhattan Credit Co., Inc.* v. *Brewer,* 232 Ark. 976, 341 S.W. 2d 765 (1961); *Kensinger Acceptance Corp.* v. *Davis,* 223 Ark. 942, 269 S.W. 2d 792 (1954).

Ark. Stat. Ann. § 85-9-503 (Supp. 1977) provides in pertinent part of the code:

> Unless otherwise agreed, a secured party has on default the right to take possession of the collateral. In taking possession, a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

Here the contract recited that upon default by the appellee debtors, appellant creditor could invoke the remedies of the U.C.C. "including the right to repossess the property wherever the same may be found with free right of entry." Clearly the appellant had the contractual and statutory authority to repossess the vehicles. *Teeter Motor Co., Inc.* v. *First National Bank of Hot Springs,* 260 Ark. 764, 543 S.W. 2d 938 (1976). In the case at bar there was no personal confrontation or contract between the repossession contractor and either of the appellees when the vehicles were repossessed. There was open access to the vehicles parked in a private driveway or adjacent to the houses. Both were removed during the evening hours without entry into, or dam-

ages to, any structure. Within a few minutes following repossession of Herring's truck, he, in a telephone conversation with the repossessor, admittedly demanded only the right to retrieve his personal items, stating "they [Ford] can have the truck." The next day he telephoned appellant Ford asking permission to "pick up" his payments which was refused. Appellee Geisler's only contact with the appellant was in this same telephone conversation the next day following the repossession. In *Teeter, supra,* we upheld the right of the seller to repossess the vehicle upon default if it could be done without a breach of the peace as provided in § 85-9-503. Here the evidence is clearly insufficient to establish a fact question that the repossession of the trucks constituted a conversion.

Even though the repossession of the vehicles was proper, the question of whether appellant's subsequent retention of certain personal property stored in the trucks constituted conversion was properly submitted to the jury. Conversion is the "exercise of dominion over the property in violation of the rights of the owner or person entitled to possession." *Thomas* v. *Westbrook,* 206 Ark. 841, 177 S.W. 2d 931 (1944). We have also defined conversion as the wrongful taking or dominion over one's property in subversion and denial of his rights irrespective of whether there was a demand and refusal for its return. *Barnett Bros. Merc. Co.* v. *Jarrett,* 133 Ark. 173, 202 S.W. 474 (1918); *Plunkett-Jarrell Grocery Co., et al* v. *Terry,* 222 Ark. 784, 263 S.W. 2d 229 (1953); *Meyers* v. *Meyers,* 214 Ark. 273, 216 S.W. 2d 54 (1948); and *Westark Production Credit Association* v. *Shouse,* 227 Ark. 1141, 305 S.W. 2d 127 (1957). Here, however, the contract specifically provided that "any personalty in or attached to the property when repossessed may be held by the seller without liability . . ." The property consisted mostly of various pieces of concrete equipment and tools jointly owned and stored in the trucks at the time of the repossession. The appellees were partners in the concrete business. The trucks and equipment were used in their means of livelihood. Although the appellant was authorized under the contract to hold the personal property, it could do so only as long as it was necessary to secure possession of the trucks. *Jones* v. *General Motors Acceptance Corp.* 565 P. 2d 9 (Okla. 1977); *General Motors Acceptance Corp.* v. *Vincent,* 183 Okla. 547, 83 P. 2d 539

(1938); and *Ford Motor Credit Co.* v. *Waters,* 273 So. 2d 96 (Fla. App. 1973).

As previously indicated, appellee Herring telephoned the repossession contractor shortly following the repossession and advised him that he "needed my [his] personal effects and tools out of my [his] trucks." Herring requested that the contractor remain a few minutes at the local restaurant where the truck was parked until he, Herring, could arrive to discuss the return of the tools and equipment to him. Herring arrived approximately a minute later, and the truck and tools were gone. The morning after the repossession appellant's employee, in a telephone conversation, denied any knowledge of the tools. A written report by the repossession contractor, dated two days after the repossession, advised appellant about the existence of the personalty in the repossessed trucks. Appellees filed a lawsuit four days after repossession. Appellant released possession of the property to appellees about two months later through arrangements by their attorney. Appellee Herring testified that he and Geisler had to abandon a project due to appellant's retention of their jointly owned concrete equipment and tools. There is no evidence that the retention of the personal property, following a demand for its return, was necessary to the repossession of the trucks. In viewing the evidence most favorable to the appellees, as we must do on appeal, we hold that appellant is not absolutely shielded from liability by the contract terms when it can reasonably be inferred, as here, that it intentionally withheld the property after a demand had been made for it.

Appellant next asserts that there was insufficient evidence to support the jury's award of $2,000 actual damages for the conversion of the trucks and personal property. We agree. As previously indicated, there was a submissible issue only as to conversion of the personalty. Appellant correctly states that the proper measure of damages for the conversion of the personal items was their market value at the time and place of the conversion. *U.S.* v. *Bartholomew,* 137 F. Supp. 700 (D.C. Ark. 1956); *Hardin* v. *Marshall,* 176 Ark. 977, 5 S.W. 2d 325 (1928); *American Soda Fountain Co.* v. *Futrall,* 73 Ark. 464, 84 S.W. 505 (1905); and *Parks* v.

Thomas, 138 Ark. 70, 210 S.W. 141 (1919). The fact that the majority of the items were eventually returned to the appellees does not bar recovery of damages for their conversion but may mitigate the damages. *Norman* v. *Roberts,* 29 Ark. 365 (1874); and *Plummer* v. *Reeves,* 83 Ark. 10, 102 S.W. 376 (1907). Here there was no evidence as to the value of various missing items. As to the items retrieved by appellees, the evidence, as to most items, was primarily based upon the purchase, replacement and rental price. Obviously, the evidence was deficient and did not comport with the recited standard.

Appellant next contends that the court erred in allowing the appellees to read to the jury a colloquy between counsel which took place during a discovery deposition in a different lawsuit between the parties to this action. The court admitted this verbal exchange between counsel as evidence of agency between appellant and its repossessor contractor. From the record before us, it is impossible to determine the precise issues in the prior lawsuit even though the same parties, lawfirms and incidents were involved. It is argued, however, by the appellees that the conversion of the personalty was in issue there and the same issue is presented here plus conversion of the trucks. Therefore, say appellees, the exchange between the parties' counsel in the discovery proceeding is admissible. Even so, the parties, however, may modify or amend their pleadings resulting in additional issues upon a remand. *Sanders* v. *Walden,* 214 Ark. 523, 217 S.W. 2d 357 (1949); and *Loyd* v. *Southwest Ark. Utilities Corp.,* 264 Ark. 818, 580 S.W. 2d 935 (1979). Furthermore, the issue of agency was not raised on this appeal.

Appellant next asserts that the court erred in instructing the jury regarding punitive damages since there was no evidence of force, oppression, or intimidation in connection with the repossession. In *Clark et al* v. *Bales,* 15 Ark. 452 (1854), we said the jury "had the right to take into consideration . . . . the vexation to [plaintiff's] feeling[s], the inconvenience to him arising from the deprivation of his property [hogs], as well as its value, and then to add something by way of 'smart money,' or exemplary damages." Exemplary damages are proper where there is an intentional violation of

another's right to his property. *Kelly* v. *McDonald,* 39 Ark. 387 (1882); *Ft. Smith I. & S. Mills* v. *So. R.B.P. Co.,* 139 Ark. 101, 213 S.W. 21 (1919); and *Parks* v. *Thomas, supra.* In view of the evidence previously recited, we hold that, although the taking was proper, the retention of the personalty after demand for its return constituted a submissible fact question on the issue of punitive damages.

Appellant's last assertion for reversal is that AMI Civil 2d 2217 does not accurately state the law on punitive damages in a conversion action and, therefore, the court erred in reciting this instruction to the jury. That instruction provides in pertinent part:

> Punitive damages may be imposed to punish a wrongdoer and to deter others from similar conduct. Before you can impose punitive damages you must find that _____ knew or ought to have known, in the light of the surrounding circumstances, that his conduct would naturally or probably result in injury and that he continued such conduct [with malice or] in reckless disregard of the consequences from which malice may be inferred.

We agree with the appellant that this instruction was formulated for use in negligence cases. See Committee Comment AMI Civil 2d XXIX. It was not designed, as here, without modification to apply in a case of an intentional tort; i.e., conversion.

Reversed and remanded.

HARRIS, C.J., not participating.

Dwight STERLING *v.* STATE of Arkansas

CR 79-169 590 S.W. 2d 254

Opinion delivered November 26, 1979
(In Banc)
[Rehearing denied January 7, 1980.]

John Patterson, for appellant.

Steve Clark, Atty. Gen., by: *Dennis R. Molock,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. This is an interlocutory appeal from the order of the trial court denying appellant's motion to introduce evidence of the alleged victim's prior sexual conduct at the trial of the case on its merits. It was the holding of the trial court that the inflammatory and prejudicial nature of the evidence outweighed its probative value. Although the court held there was some probative value, there was no holding of relevancy.

Appellant urges the trial court erred in ruling the evidence of the alleged victim's prior sexual conduct would be inadmissible at the trial and further erred in unduly limiting direct examination of the alleged victim concerning her conduct on the night of the alleged rape. We do not find the court erred on either allegation.

Appellant is one of two men charged with the rape of a 13 year old girl on August 8, 1978, in White County, Arkansas, in violation of Ark. Stat. Ann. § 41-1803 (Repl. 1977). Appellant filed a motion to admit (at the trial) evidence of the victim's prior sexual conduct pursuant to the provisions of Ark. Stat. Ann. § 41-1810.2 (Repl. 1977). During the course of the in camera hearing the appellant's counsel inquired of the victim as to her motive in causing the charges of rape to be filed. The specific questions asked at the time were: (1) What did you tell your parents? (2) How much did you drink? The court sustained the state's objection to these questions. The court further commented that appellant could not inquire about acts upon which the present prosecution was based. There was no proffer of the answers nor were other questions presented either as to the acts upon which the prosecution was based or questions relating to other acts of sexual conduct.

Ark. Stat. Ann. § 41-1810.1 (Repl. 1977) prohibits introduction of evidence of a victim's prior sexual conduct. However, the next section of the Act (§ 41-1810.2) reads as follows:

> Notwithstanding the prohibition contained in Section 1 (§ 41-1810.1), evidence directly pertaining to the act upon which the prosecution is based or evidence of the victim's prior sexual conduct with the defendant or any other person may be admitted at the trial if the relevancy of such evidence is determined in the following manner: ***

This statute clearly allows evidence of the alleged victim's prior sexual conduct, as well as evidence directly pertaining to the acts upon which the present prosecution is based, to be introduced or inquired about at the in camera hearing. The purpose of such hearing is to review the evidence to determine whether it is relevant for trial purposes. Unless the court hears such evidence, it cannot properly determine its relevancy. Such conduct, including conduct on the date or at the time of the alleged offense, is proper at the pretrial hearing. Any conduct which relates to consent of the alleged victim is proper, regardless of its time and place. Remoteness in time and absence of similar circumstances go to the relevancy of such conduct and are matters to be considered by the trial court in determining whether such evidence should be excluded at the trial.

Appellant should have been permitted to present any available evidence relating to the victim's prior sexual conduct and any available evidence relating to the acts upon which the present prosecution is based. However, the in camera hearing is not designed to be used as a subterfuge to obtain a discovery deposition from the alleged victim. There is no requirement that the victim present herself for questioning by the accused. We disagree with appellant's theory that all prior acts of sexual conduct are relevant as tending to show consent. To accept such contention would serve to completely defeat the intent of the General Assembly as evidenced by the enactment of Act 197 of 1977. The emergency clause of Act 197 (Ark. Stat. Ann. § 41-1810.1.2.3.4)

specifically recites that evidence in such hearings is limited to that which directly pertains to the act upon which the prosecution is based. The obvious intent of the Act was to encourage victims to prosecute offenders without fear of being humiliated by public questions concerning any and all past acts of sexual conduct.

We agree with the trial court's holding that what the victim told her father or what motivated her to cause the charges to be filed is not within the bounds of the statute or the motion as filed. The motion stated the appellant had information which he desired to present to the court for consideration. We are unable to rule on evidence not proffered or questions not asked. *Duncan* v. *State,* 263 Ark. 242, 565 S.W. 2d 1 (1978). Prior acts of sexual conduct are not within themselves evidence of consent in a subsequent sexual act. There must be some additional evidence connecting such prior acts to the alleged consent in the present case before the prior acts become relevant. The record before us does not show there is any additional connecting evidence which renders the prior admitted consensual acts of sexual conduct relevant in the present case. Had the appellant proffered additional questions and answers we might have been in a position to agree with his contentions. Appellant may cross-examine the alleged victim at the trial about events which may be relevant to his defense. It is possible that matters previously ruled inadmissible could become relevant. Any time before the defense rests he may present a written motion to the court relating to the victim's prior sexual conduct. Ark. Stat. Ann. § 41-1810.2 (a), supra.

Affirmed.

HARRIS, C.J., not participating.

BYRD, J., dissents.

Madelyn ATKINSON, County Clerk, et al
v. EL DORADO SCHOOL DISTRICT NO. 15

79-158 590 S.W. 2d 5

Opinion delivered December 3, 1979
(In Banc)

William A. McLean, Deputy Prosecuting Attorney, for appellants.

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

GEORGE ROSE SMITH, Justice. When the annual school elections were held in Union county on March 14, 1978, the three school districts involved in this case were separate districts. The voters of the Lawson District approved a 40-mill school tax, those of the Urbana District approved a 45-mill tax, and those of the El Dorado District approved a 58-mill tax. Later in March the school boards of the Lawson and Urbana Districts, being unable to maintain the "A" rating required by the Quality Education Act, petitioned the County Board of Education to abolish those districts and annex their territory to "another district." (Ark. Stat. Ann. § 80-4602 [Supp. 1979].) In April the county board approved the two petitions, dissolved the two districts, and annexed their territory to the El Dorado District. In November the county quorum court levied school taxes for each of the three districts at the rate approved in the preceding March school election.

When the time came for the county clerk to extend the

taxes on the tax books, for collection in 1979, the clerk proposed to extend them at the millage rates approved in the school elections and levied by the quorum court; that is, 40 mills for the former Lawson District territory and 45 mills for the former Urbana District territory. The El Dorado District, insisting that its 58-mill tax be levied, brought this suit for an injunction and declaratory judgment requiring the county clerk and the collector to extend and collect the taxes in both the former districts at the El Dorado rate. This appeal is from a decree requiring that the 58-mill tax be levied.

There appears to be no constitutional provision or statute applicable to this particular situation. It is, however, fundamental in our law that the property owners within a school district have the right to vote on the millage rate every year at the school election. Const. Amendment 40; Ark. Stat. Ann. § 80-602 (Repl. 1960). In 1978, when the Lawson and Urbana School Districts still existed, their electors exercised that right and fixed the rate of taxation for all property within the districts. It was only later on that the two small districts were annexed to the El Dorado district, where other electors had voted for a somewhat higher millage rate. The quorum court's decision to levy the school taxes at the rate approved by the electors in each district was reasonable and just. Needless to say, the tax rate for years subsequent to 1978 is to be determined at the annual El Dorado School District elections, in which all the property owners will be entitled to vote.

Reversed.

WORTH JAMES CONSTRUCTION COMPANY *v.* JACKSONVILLE WATER COMMISSION et al

79-278 590 S.W. 2d 256

Opinion delivered December 3, 1979
(In Banc)
[Rehearing denied January 7, 1980.]

Friday, Eldredge & Clark, for appellant.

Paul D. Groce, for appellees.

GEORGE ROSE SMITH, Justice. This is a suit by the appellant, Worth James Construction Company, to enjoin the Jacksonville Water Commission from awarding a construction contract to S & S Construction Company (also a defendant). Worth James contends that it should be awarded the contract, because it was admittedly the low bidder among the six contractors bidding for the job. The chancellor denied relief on several grounds, one of them being that Worth James has no standing to sue and another that the Commission was justified, in the city's best interest, in not awarding the contract to the lowest bidder.

The letting of the contract was governed by Ark. Stat. Ann. § 14-612 (Repl. 1979). That statute, as we have said about a different law, does not provide "that the contract shall be let to the person whose bid is lowest in terms of money." *Street Improvement Dist. No. 130 of Hot Springs* v. *Crockett,* 181 Ark. 869, 28 S.W. 2d 331 (1930). Instead,

the present statute directs that the advertisement for bids contain a statement (as this one did) that the Commission reserves the right "to reject any or all bids." The statute also provides that after the Commission has opened and compared the bids, it shall award the contract to the lowest responsible bidder, "provided that [the Commission] be of the opinion that the best interests of the taxing unit would be served thereby." Here the advertisement for bids tracked that provision by reciting that the Commission reserved the right "to accept the proposal which will best serve the interest of the City of Jacksonville."

The contract was for the construction of more than two miles of 24-inch water line and almost one mile of 12-inch water line. The specifications provided that the pipe to be furnished by the contractor might be ductile iron pipe, prestressed concrete pipe, or pretensioned concrete pipe. The Commission's consulting engineers supplied the bidding forms, which contemplated that each bidder would insert in appropriate blanks a price per foot for at least one kind of pipe, extend the lowest unit price for the total footage, and include the resulting figure in the total bid. There were some 20 other items in addition to the pipe, but it is readily apparent that the bottom-line total was the important figure, since the constituent prices might be adjusted by the bidder pretty much at will.

The bids were opened on May 11, 1979. The figures were compiled in detail and certified by the Commission's engineers. The Worth James bid of $707,586.17 was the lowest of the six bids. Worth James had selected pretensioned concrete pipe for the 24-inch line and ductile iron pipe for the 12-inch line. The appellee S & S's bid of $714,755.10 was the third lowest bid, but it was the lowest bid specifying ductile iron pipe throughout. (The difference in the two bids lay in the other items, as the S & S bid was actually lower than that of Worth James for each of the three kinds of pipe. This is not really material, however, as it was the grand total that mattered. The only significance of the per-foot unit prices seems to stem from a clause stating that in the final settlement the total bid price will be adjusted for variations from the quantities listed on the form supplied to the bidders.)

After the opening of the bids on May 11, the three Commissioners met on May 16 to award the contract. The Commission's manager presented a statement strongly recommending the use of ductile iron pipe, because (a) both management and maintenance personnel had working experience with it, (b) it is a proven material in Arkansas, and (c) there is about 40,000 feet of existing ductile iron pipe in the Jacksonville Water System, which was stated to be a very important consideration in view of there being ductile iron maintenance equipment already on hand. The statement recognized that pretensioned concrete pipe was acceptable and in conformity with the specifications, but the manager thought that the $7,186.93 difference between the two bids (about 1%) could be justified for the reasons he gave. Of course, as Worth James points out, all those matters could have been determined before the specifications and bidding forms were prepared. The manager testified at the hearing below that if the difference between the two bids had been $100,000 instead of about $7,000, he could not have justified the use of iron pipe.

At the Commission meeting on May 16, one of the three commissioners moved that the contract be awarded to S & S on the basis of its use of ductile iron pipe. The motion was seconded, but upon an objection by the Worth James attorney, the motion was tabled to permit the Commission's counsel to research the law. A week later the commissioners met again and were advised by counsel that they could select any bid. They unanimously awarded the contract to S & S. This suit was filed two days later, on May 25.

The chancellor rested his decision in part upon a finding that Worth James has no standing to maintain the suit. The chancellor relied upon *Arkansas Democrat Co.* v. *Press Printing Co.*, 57 Ark. 322, 21 S.W. 586 (1893), and *Bank of Eastern Ark.* v. *Bank of Forrest City*, 94 Ark. 311, 126 S.W. 837 (1910), both holding that the low bidder on a public contract has no standing to question an award to a higher bidder, because the laws requiring competitive bidding are passed for the benefit of the public and can be enforced only at the instance of a taxpayer (or here a ratepayer, as the water line is to be financed by revenue bonds).

We think it best not to explore the question of standing, because an affirmance on that ground might not preclude the maintenance of a rate payer's suit, with attendant delay. The parties and their counsel have expedited this case, doubtless because incessant inflation is a threat both to the city and to the successful bidder. The entire litigation has taken less than seven months. We have no inclination to decide the case upon a ground that might result in delay.

The chancellor found, upon the merits, that "the proof fails to even suggest that in making this contract award to S & S, [the Commission] acted in bad faith, with favoritism, or for any reason except a determination that [the use of iron pipe] was in the best interest of the City. I conclude the statute gives it this discretion, and that this determination is neither unlawful or arbitrary." There is actually no evidence to the contrary; so the issue narrows down to one of law.

As we have seen, both the statute and the advertisement for bids gave notice that the Commission could reject any or all bids and that the Commission reserved the right to accept the bid that would best serve the interest of the city. There is much authority to support the view that the Commission acted within the limits contemplated by the statute. The following statement in an annotation on the subject in 27 A.L.R. 2d 917, 924 (1953), is supported by many citations:

> Where the public officials have the right to reject any and all bids for a public contract, the view is generally taken that they may consider the differences or variations in the character or quality of the materials, articles, or work proposed to be furnished by the various bidders, in determining whether to accept any of the bids, or which bid to accept.

Of course the rejection of the lowest bid must be, as it was here, for good cause and in good faith.

Worth James's real grievance, one that has given us much concern, is that the Commission should have asserted its preference for ductile iron pipe at the very beginning, by requiring truly alternate bids (as North Little Rock did in the

letting of a companion contract for part of the same project). *See* McQuillin, Municipal Corporations, § 29.55 (3d ed., 1966 revision). Instead, the forms for bidding led the bidders to believe that the Commission had no preference among the three specified kinds of pipe. Had Worth James known about the preference for iron pipe, it might, it argues, have submitted an overall bid with a lower figure than the one it inserted as its unit price for 24-inch iron pipe.

Even so, we are unwilling to say as a matter of law that in the circumstances the Commission was without any choice except to accept the Worth James bid, which specified pretensioned concrete pipe. The fact remains that Worth James *did* insert in its bid a figure for ductile iron 24-inch pipe, which, if extended, would have made its bid $74,558.17 more than the one submitted by S & S. Moreover, Worth James has made no offer in its pleadings or testimony to supply iron pipe either for the amount of its own bid or for that of the S & S bid. Thus we cannot say with confidence that Worth James was actually misled to its detriment.

Affirmed.

HARRIS, C.J., not participating.

BYRD, J., dissents.

Gary KEENAN, Administrator of the Estate of Frances Ritcheson *v.* Paul D. PEEVY et al

78-192 590 S.W. 2d 259

Opinion delivered December 3, 1979
(In Banc)

Crouch, Blair, Cypert & Waters, by: *James M. Roy, Jr.,* for appellant.

Davis, Douglas & Penix, P.A., and *Kendall & Schnuntz,* by: *Donald B. Kendall* and *Williams & Williams,* by: *Claude M. Williams, Jr.,* for appellees.

JOHN A. FOGLEMAN, Justice. This appeal was taken from a decree of the chancery court sustaining a demurrer to the complaint of appellant Gary Keenan, as Administrator of the Estate of Frances Ritcheson, against appellee Paul D. Peevy and others and dismissing that complaint. Our review in this situation requires that we accept all facts well pleaded in the complaint as true, draw all reasonable inferences and indulge every reasonable intendment in favor of the pleader, and construe the complaint most favorably to the plaintiff. *Tri-B Advertising, Inc.* v. *Arkansas State Highway Com'n.,* 260 Ark. 227, 539 S.W. 2d 430; *Brewer* v. *Hawkins,* 241 Ark. 460, 408 S.W. 2d 492; *Howell* v. *Simon,* 225 Ark. 535, 283 S.W. 2d 680; *Simms* v. *Tingle,* 232 Ark. 239, 335 S.W. 2d 449. In the light appropriate for review, we will state some allegations as facts.

C. R. Ritcheson died on July 19, 1971. Paul Peevy was appointed administrator of his estate on August 19, 1971, on Peevy's petition. Peevy applied for his own appointment as guardian of Frances Ritcheson, on July 26, 1971 and he was appointed by W. H. Enfield, a circuit judge acting as probate judge on exchange, on the same day. Frances Ritcheson died on August 5, 1973. Gary Keenan was appointed administrator of her estate on July 12, 1976. The complaint in this action was filed on June 27, 1977. Oral arguments on the demurrers were heard on February 6, 1978. The chancellor's memorandum opinion on the demurrers to appellant's complaint was rendered on April 12, 1978, and the order of the chancery court dismissing appellant's complaint was entered April 24, 1978.

At the time of her death, Mrs. Ritcheson owned the following property in her own right:

> Lot 6 in Block 2 of the Replat of Lots 3 and 14 in Block 2, Oakcrest Addition to the City of Rogers, which was conveyed to C. R. Ritcheson and Frances M. Ritcheson, husband and wife, by the entirety, by warranty deed dated March 7, 1964;
>
> 32 acres in the NE 1/4 NE 1/4 of Sec. 14, Township 20 N, R 29 W, which was conveyed to C R. Ritcheson and Frances Ritcheson, husband and wife, as tenants by the entirety, by warranty deed dated August 7, 1970;
>
> 344 shares of common stock of American Telephone & Telegraph Company, issued to Claude R. Ritcheson and Frances C. Ritcheson, as joint tenants, as joint tenants with right of survivorship or as joint tenants with right of survivorship and not as tenants in common;
>
> Certain household goods and effects;
>
> A 1968 Cadillac automobile; and
>
> Two diamond rings.

Appellant alleged that the order appointing Peevy as

guardian and all proceedings had in said guardianship of Frances Ritcheson were null and void for want of jurisdiction of the probate court to make the appointment. The following reasons, among others, were alleged:

> The petition shows on its face that Frances Ritcheson was not an incompetent within the meaning of Ark. Stat. Ann. § 57-601 (c) (2) (Repl. 1971). It stated that she was unable to care for herself because of physical impairment, not that she was mentally incompetent;
>
> No notice was ever given to Frances Ritcheson (who signed the petition for the appointment of Peevy) as required by Ark. Stat. Ann. § 57-601 (a) (1) (Repl. 1971), or to one of her nearest competent relatives by blood or marriage as required by Ark. Stat. Ann. § 57-611 (b) (5) (Repl. 1971);
>
> There was no evidence of compliance with Ark. Stat. Ann. §§ 57-614 — 615 (Repl. 1971), by proof of incompetence of Frances Ritcheson and no evidence that a hearing was held on the petition after proper notice to any party, or that any hearing was held or affidavit submitted on the question of her incompetency;
>
> The petition for sale dated October 7, 1971, states that the property will be sold at private sale, but the notice of sale published in a newspaper as required by Ark. Stat. Ann. § 62-2718 (Repl. 1971), stated that the property would be sold at public sale and there was no compliance with the requirements for a private sale;
>
> An order entered on October 4, 1971, on the petition for sale filed October 7, 1971, set no date for hearing on the petition, but simply stated that a hearing would be held, and no hearing was every held;
>
> No notice of the order of October 14, 1971, was ever given to Frances Ritcheson, Lilly Kerr or Golda O'Brien;
>
> No order of sale was entered in compliance with Ark.

Stat. Ann. §§ 62-2714 — 2717 (Repl. 1977);

An amended order dated April 24, 1972, and filed April 26, 1972, attempting to correct deficiencies in the sale was totally invalid because no petition for the order was ever filed, no notice to interested parties of any hearing on this order was ever given, no hearing date was set and no hearing was ever held;

One order of confirmation refers to an order dated September 3, 1972, a date subsequent to the order of confirmation; the other incorrectly refers to the order of October 14, 1972, as an order of sale. There is no reference in either of two orders confirming the sale to the property purportedly affected by it.

Appellant alleged that deeds by Peevy, as administrator and guardian, purporting to convey the property were wholly null and void not only because of the invalidity of the sale and orders of confirmation and the invalidity of the guardianship itself, but because no petition was ever filed in the guardianship proceeding for the sale of the tract.

Appellant alleged that the petition for sale and the order confirming the sale of the 32-acre tract, entered in the guardianship proceeding, were also null and void, because: (1) the guardianship proceeding was invalid; (2) no notice of the proposed sale was given to Frances Ritcheson or to her nearest relative; (3) there was no notice that any publication was ever made of the order of the probate court setting May 18, 1972, as the date of hearing on a petition for sale; (4) the report of sale was not filed within ten days after the alleged sale; (5) the order confirming the sale was invalid because it was filed on June 8, 1972, two days after the filing of the report of sale.

Appellant also alleged that the sale of a 17-acre tract of land owned by C. R. Ritcheson, in which Mrs. Ritcheson had a right of dower, was invalid, not only for the reasons alleged as to the sale of the lands held by the Ritchesons as tenants by the entirety, but also for the following reasons:

The tract was incorrectly described;

The notice of sale was ineffective because it was dated November 13, 1971, but filed October 26, 1971;

The amended order of sale filed April 24, 1972, and the order confirming it on August 31, 1972, were null and void, because they approved a sale made more than six months after the initial appraisal of the lots.

It was also alleged that a petition for sale of the 17 acres executed on (in the guardianship proceedings) March 20, 1973 and filed on March 22, 1973, was null and void because no notice of the petition was ever given Frances Ritcheson or any interested party before the entry of an order for the sale on March 22, 1973, and any alleged notice to Gary Keenan, as guardian of Frances Ritcheson was invalid because of the invalidity of the guardianship proceeding.

Appellant asserted that an order of sale on April 12, 1973, a report of sale on the same date, and a confirmation of sale on April 19, 1973, were null and void because there was no appraisal of the lands within six months of the date of the orders, no terms of sale were set out and no proper notice was given. Appellant also alleged that the confirmation of the sale was invalid for the same reason the sale of the lands held as an estate by the entirety were invalid.

Appellant then attacked the validity of the sale of the 344 shares of American Telephone & Telegraph Company stock for the following reasons:

The probate court had no jurisdiction over the stock;

The petition for sale filed October 7, 1971, and the order entered October 14, 1971, were never furnished to any interested party;

No notice was given to the heirs;

No date was set for a hearing, no hearing was ever held and no order ever entered allowing the sale of the stock;

No appraisal was ever filed and no report of sale made.

Attacking the validity of the sale of Mrs. Ritcheson's household goods and effects, the Cadillac automobile and the two diamond rings, appellant alleged:

> No notice of the petition for sale of the personal property or the order thereon was ever given to Frances Ritcheson. There was a conflict of interest between Peevy in his capacity as administrator and in his capacity as guardian, so that he could not fulfill his fiduciary capacity in a manner to protect the interests of both Frances Ritcheson and C. R. Ritcheson's estate in receiving notice of the proceedings;
>
> The property was not appraised and no appraisal ever filed in the probate court;
>
> There is no evidence of the identity of the purchaser, how the property was sold or the manner in which payment was to be made by either a report of sale or an order of confirmation.

Appellant alleged that Peevy and his attorney had been allowed fees for the guardianship proceedings and that Peevy should be held accountable for these fees and the bond premium paid. As a basis for recovery of punitive damages, appellant alleged that the acts of Peevy were done wilfully, wantonly, maliciously and with reckless disregard for the rights of Frances Ritcheson and her estate.

Appellant asked that a deed conveying the lot in Rogers to defendant-appellees, G. M. and Ruth S. Tubbs, a mortgage executed by them to defendant-appellee First Federal Savings & Loan Association of Rogers, a deed conveying the 32-acre tract to Charlie W. and Shirley J. Smith, and a deed conveying the 17-acre tract to defendant-appellees Cranel F. Brewer and Clyta F. Brewer, be set aside and held null and void; that the dower interest of the widow and the widow's allowance be recognized, imposed and foreclosed, or in the alternative, that judgment be rendered against Peevy for the fair market value of the dower

interest of Frances Ritcheson in the property; that Peevy be required to restore the 344 shares of American Telephone & Telegraph Company stock, or in the alternative, the court render judgment against him for the fair market value of the stock; that judgment be rendered against Peevy for the fair market value of the household goods, two automobiles and two diamond rings; that Peevy be required to account for funds paid for his fees and those of the attorney employed by him, and the expenses of the guardianship; and that appellant have judgment for punitive damages of $150,000.

Peevy filed a demurrer. In part, it was a demurrer to the jurisdiction of the chancery court. The demurrer was based upon the following:

1. The chancery court had no jurisdiction under Amendment 24 to the Constitution of Arkansas and the probate court had exclusive original jurisdiction.

2. The complaint was a collateral attack upon the orders and judgments of the probate court.

Other grounds for demurrer were:

1. The right of Frances Ritcheson to dower terminated upon her death, it not having been laid off by the heirs, or assigned to her within one year after the death of her husband and that no demand for dower was made by her.

2. The complaint showed upon its face that the cause of action against them was barred by the statute of limitations and by the statutes of non-claim, and no ground of avoidance was alleged.

3. The chancery court had no jurisdiction of the person of Peevy.

4. Defect of parties plaintiff.

The Smiths, the Brewers, the Tubbses, the Snoderlys and First Federal Savings & Loan Association of Rogers

filed general demurrers. They, in effect at least, joined in Peevy's demurrer.

The Smiths, in a brief in the trial court in support of their demurrer, exhibited certain petitions and orders in the chancery and probate courts. We cannot consider these even if we should consider this to be an amendment to the demurrer because a speaking demurrer was not permissible. *Watson* v. *Poindexter,* 176 Ark. 1065, 5 S.W. 2d 299; *Percifull* v. *Platt,* 36 Ark. 456. These matters do not appear upon the face of the complaint, so they must be asserted by answer. Ark. Stat. Ann. §§ 27-1115, 1119 (Repl. 1962); *Watson* v. *Poindexter,* supra.

In sustaining the demurrers to allegations that the probate court had no jurisdiction to do what it did in the estate of C. R. Ritcheson, the chancery court held:

1. The complaint is a collateral attack upon previous orders of the Probate Court of Benton County in the Estate of C. R. Ritcheson and in the guardianship of Frances Ritcheson.

2. Such a collateral attack may not be maintained in the absence of allegations of fraud or lack of jurisdiction.

3. Lack of jurisdiction was raised by the complaint.

4. Chancery court has jurisdiction to afford relief if probate court did not have jurisdiction.

5. The guardian of Frances Ritcheson was not, with respect to the estate of C. R. Ritcheson, a third party so as to make it improper for the probate court to determine ownership of the property in question for the purpose of determining whether it was includable in the estate of C. R. Ritcheson.

6. Since the probate court had jurisdiction of the estate of C. R. Ritcheson and to determine the ownership of property as between the estate and the widow, errors

> committed by the probate court would not render rights judgments void, since they could have been corrected by that court or an appeal from it.

The chancellor treated the demurrers of the defendants as to alleged fraud on the probate court with respect to the administration of the estate of C. R. Ritcheson and the guardianship of Frances Ritcheson as a motion to make the allegations more definite and certain and granted the motion, but appellant elected to stand upon his complaint without pleading further, so the chancery court dismissed the complaint.

A proper treatment of the issues on this appeal has been rendered extremely difficult because appellees Peevy, Smith, Brewer, Schreiber and Snoderly elected not to follow the same sequence and arrangement of points as contained in appellant's brief as required by Rule 9 (c) of the Rules of the Supreme Court and the Court of Appeals. We have not stricken any briefs for such violations, but counsel should give some logical and persuasive reason for not following this rule designed to expedite the disposition of appeals. Because of the deviation here, we will dispose of some contentions made by these appellees before treating the five points for reversal asserted by appellants.

The contention that the finding and determination of a chancery court will not be reversed unless it is clearly against the preponderance of the evidence has no application whatever in an appeal from the sustaining of a demurrer.

We are unable to find anything on the face of the complaint to show that the court has no jurisdiction of the person of any of the appellees. The demurrer on that ground is not well taken. Ark. Stat. Ann. §§ 27-1115, -1119 (Repl. 1962).

The failure of the appellant to exhibit the instruments he sought to have cancelled did not make the complaint demurrable, although a motion to require appellant to make his complaint more definite and certain might have been appropriate. We are baffled by the assertion that appellant advanced no legal theory for the ownership interest of Frances

Ritcheson and only made the bare allegation that, at the time of her death, she owned the three separate tracts of real estate or had a dower interest in view of the fact that appellant attached, as exhibits to the complaint, deeds and stock certificates under which title to real property and corporate stock was claimed. The absence of titles, bills of sale, or other evidence of title to tangible personal property or explanation of the failure to produce them also might have been the basis for a motion to make the complaint more definite and certain, but did not make the complaint demurrable. See *Driesbach* v. *Beckham,* 178 Ark. 816, 12 S.W. 2d 408. An allegation of ownership of tangible personalty is more properly classified as an ultimate fact than as a conclusion, as appellee contends it to be. It is required that facts be stated and not as conclusions, but according to their legal effect, since the fact and not the mere evidence of it must be stated. *Ellis* v. *First National Bank,* 163 Ark. 471, 260 S.W. 714; *Driesbach* v. *Beckham,* supra. A complaint should allege substantive or issuable facts and it is not necessary that the evidence, or a history of the transactions leading up to the essential or issuable facts, be stated. *Strange* v. *Bodcaw Lumber Co.,* 79 Ark. 490, 96 S.W. 152, 116 Am. St. Rep. 92.

Appellees' contention that there is no allegation in the complaint as to the date C. R. and Frances Ritcheson were married and that we cannot assume that the parties had been married for as long as three years is meritless. A sufficient answer to this contention is that exhibits to the complaint show that property was conveyed to them as husband and wife at least as early as 1964. The exhibits to a complaint in an equity case control its allegations and are to be considered in testing the sufficiency of those allegations. *Lavender* v. *City of Rogers,* 232 Ark. 673, 339 S.W. 2d 598; *Fisher* v. *Cowan,* 205 Ark. 722, 170 S.W. 2d 603. Although the facts alleged might not be sufficient to meet appellant's burden of proof if the issue were contested at trial, when we construe the complaint most favorably to the pleader, as we must, it sufficiently states that these parties were husband and wife in 1964, and were, until the death of C. R. Ritcheson. Once a status, such as marriage, is established, it is presumed to continue, until the contrary is shown, or a different and controlling presumption is advanced. *Welch* v. *All persons,*

78 Mont. 370, 254 P. 179 (1927); *Walker* v. *Hall,* 123 Ga. App. 457, 181 S.E. 2d 508 (1971). See also, *Norris* v. *State,* 22 Ark. 524. Appellant did allege that Frances was the wife of C.R. Ritcheson when he died. Thus we read the complaint as alleging that the two were married for at least seven years before Mr. Ritcheson died.

We need not dwell upon the distinction between direct and collateral attacks on probate court proceedings, as it is conceded that appellant's attack is collateral and that it must fail, unless its allegations are sufficient to show that the probate court had no jurisdiction over the property of appellant or no jurisdiction to appoint a guardian for Frances Ritcheson.

Appellant's first point for reversal is that the chancery court erred in holding that the probate court had authority to sell property to which Mrs. Ritcheson had sole title. In making this argument, appellant points out that under Art. 7 § 34 of our constitution, as amended by Amendment 24, the probate court has exclusive original jurisdiction in matters relative to the estates of deceased persons as then vested in the probate court or thereafter prescribed by law. He then asserts that the implementing statute is Ark. Stat. Ann. § 62-2004 (b) (Repl. 1971) and that it sets forth that jurisdiction. Insofar as the estates of deceased persons are concerned, that statute merely provides that the probate court shall have jurisdiction of the administration, settlement and distribution of estates of deceased persons and determination of heirship, construction of wills when incident to administration, establishment of lost wills and such other matters as were then or thereafter provided by law. He asserts that the probate court only had jurisdiction over assets of the decedent at the time of his death, and the probate court had no subject matter jurisdiction over property held by the Ritchesons as an estate by the entirety. He points out that under Ark. Stat. Ann. § 62-2301 (Repl. 1971) the administrator is required to make an inventory of all property owned by the decedent at the time of his death, except such interests as are terminated by reason of his death. He argues that the administrator of the estate of C. R. Ritcheson could not pass title to any such property, because title passed to Frances

automatically upon her husband's death.

Appellant's reliance upon *Farmers Cooperative Ass'n.* v. *Webb,* 249 Ark. 277, 459 S.W. 2d 815, does not settle the issue. There we held that title to real estate of a decedent passed automatically to his heirs upon his death, subject to appropriate provisions for administration under the probate code and the widow's dower and homestead right, if any. The decedent there left a will leaving his property to his wife, but did not mention any of his three children. The executrix treated the real property as an asset of the estate. We held that title vested in the pretermitted children as a matter of law and that it was not vested in the widow by an order of final distribution directing the executrix to deliver all assets of the estate to the widow, as provided by the decedent's will, because the probate court had no power to do this and because the will was a nullity as to the pretermitted children. We clearly recognized that different questions would have been presented had the property been sold under the orders of the probate court for the purpose of paying debts or any other purpose over which the probate court would have jurisdiction. We also pointed out that title to the property was not in issue in the probate court. There is no allegation here that the property was not sold for a proper purpose under the probate code, so the question is actually whether such a sale is void for want of jurisdiction over the property.

Collins v. *Paepcke-Leicht Lumber Co.,* 74 Ark. 81, 84 S.W. 1044, relied upon by appellant, is also distinguishable. There the sale of the lands involved was held to have been beyond the probate court's jurisdiction, because the order of sale showed affirmatively that it was made to pay expenses of administration and not debts of the decedent or expenses incurred in the course of administration to pay debts due personally by the decedent. At the time, the probate court had no jurisdiction to make a sale for the purposes for which that sale was made.

In holding that the probate court had jurisdiction to determine the title to the property held as tenants by the entirety, the chancellor, relying principally upon *Snow* v. *Martensen,* 255 Ark. 1049, 505 S.W. 2d 20, after carefully

reviewing *Ellsworth* v. *Cornes,* 204 Ark. 756, 165 S.W. 2d 57; *Carlson* v. *Carlson,* 224 Ark. 284, 273 S.W. 2d 542; *Hartman* v. *Hartman,* 228 Ark. 692, 309 S.W. 2d 737 and *Hilburn* v. *First State Bank of Springdale,* 259 Ark. 569, 535 S.W. 2d 810, held that, since neither Frances Ritcheson or her guardian were third parties so far as the estate of C. R. Ritcheson was concerned, the Benton County Probate Court had jurisdiction to determine the ownership of the property. Accordingly, the chancellor held that any errors in the probate proceedings were correctible by the probate court, or on appeal from that court, and sustained the demurrer with respect to allegations that the probate court had no jurisdiction over Frances Ritcheson's separate property which passed to her on the death of her husband.

There are several problems with this approach. The first one is that none of the cases reviewed by the chancellor except *Hilburn* involved real estate, and that case was decided upon the basis that the mother of the decedent was a third party, so far as the administration of his estate was concerned. As appellant has pointed out, *Farmers Service Cooperative Ass'n.* v. *Webb,* supra, does emphasize the fact that the probate court had never had jurisdiction over the real property there involved, but that holding is not controlling because real property has been sold in this case, presumably for a purpose over which the probate court had jurisdiction. The probate court has no jurisdiction over real property of a decedent, except for purposes set out in Ark. Stat. Ann. § 62-2704 (Repl. 1971). Under Ark. Stat. Ann. § 62-2401 real property is an asset in the hands of the administrator only when the court finds that it should be sold, mortgaged, leased or exchanged for purposes stated in the statute. Mrs. Ritcheson was an interested party and a distributee in the administration proceeding. Notice of the hearing stating the nature of the application for the sale of real property must be given only to such interested persons as the court may direct. Ark. Stat. Ann. § 62-2714 (Repl. 1971). No notices required by the probate code in the administration of estates of deceased persons are jurisdictional except as provided in Ark. Stat. Ann. §§ 62-2110 and 62-2902. Ark. Stat. Ann. § 62-2101 (Repl. 1972). § 62-2110 has to do with notice of hearing on a petition for the appointment of an adminis-

trator. If the petition is not opposed by an interested party, the court may hear and act on the petition without notice. Ark. Stat. Ann. § 62-2109 (Repl. 1971). There is no allegation in appellant's complaint that Frances Ritcheson opposed the petition for appointment of Peevy. The probate of C. R. Ritcheson's estate was a proceeding in rem. Ark. Stat. Ann. § 62-2101. Appellant does not contend that Mrs. Ritcheson was incompetent at that time. As a matter of fact the only fair inference to be drawn from the pleading is that she was not incompetent. If so, any waiver of notice of sale by her guardian is unimportant.

Appellant points out that it is the duty of the administrator to omit from his inventory those interests in property terminated by the decedent's death. Ark. Stat. Ann. § 62-2301 (Repl. 1971). In the absence of any allegation in the complaint on the subject, we must assume that the administrator performed his duty properly.

Although we have never been confronted with the exact question, it seems that the probate court does have jurisdiction in a contest between an interested person and the personal representative over the title to real property whenever that property is treated as an asset of the decedent.

In *Carlson* v. *Carlson,* supra, the widow claimed ownership of tangible personalty by gift inter vivos. We held that the probate court had the power to decide the question of title. It is true that the property involved was listed in the inventory of that estate, which was an indication that the personal representative was treating that property as an asset of the estate. Here the petition for the sale of the property was an indication that it was being treated as an asset of the estate. It seems that Mrs. Ritcheson could have asserted her title when the petition for sale was filed or at any time thereafter, prior to confirmation.

In *Snow* v. *Martensen,* supra, interested persons challenged the omission of intangible personal property from the inventory, claiming that it was an asset of the estate being administered. We thought the better rule was that probate courts do have jurisdiction to determine the ownership of

property as between personal representatives claiming for the estate and heirs or beneficiaries claiming adversely to the estate. Although Mrs. Ritcheson was neither an heir nor a beneficiary, she was an interested person, as the spouse of the decedent, and a person having an interest in the estate being administered. No reason appears why the same rule should not apply to all interested persons.

We do not agree with the chancellor, however, that the demurrer must be sustained on the basis that the probate court's jurisdiction to decide a contest between the widow and the decedent's estate as to the title to property, which, so far as the record before us on demurrer is concerned, was the sole property of the widow, gave the court such jurisdiction over the property itself, in the absence of an adjudication favorable to the administrator in a contest with the widow. Res judicata cannot be raised by demurrer, unless all the essential facts appear upon the face of the complaint. *May* v. *Edwards,* 258 Ark. 871, 529 S.W. 2d 647; *Adams* v. *Billingsley,* 107 Ark. 38, 153 S.W. 1105. Even though all the essential facts do not so appear, there may well be such a defense. That question and the effect of Ark. Stat. Ann. § 62-2710 (Repl. 1971) and the status of some of appellees, as bona fide purchasers for value, and other defenses, such as estoppel, which may be available to appellees are not now before us, and none of them are foreclosed upon remand.

Appellee contends that a waiver by Peevy, as guardian, of notice of sale of the property (which appears on the face of the complaint to have been that of his ward), by Peevy, as administrator of the estate of C. R. Ritcheson, is sufficient to justify sustaining the demurrer. Appellant alleged that this waiver was void. Putting aside the question of Peevy's apparent conflicting fiduciary duties for the purposes of this decision, we move to appellant's second point, which also concerns the validity of Peevy's action as guardian.

Appellant contends that the guardianship and all proceedings therein are void, because the probate court had no jurisdiction to appoint a guardian for Mrs. Ritcheson. He alleged that the petition for guardianship shows on its face that she was not incompetent within the meaning of Ark.

Stat. Ann. § 57-601 (Repl. 1971), which defines an incompetent for guardianship purposes. Except for those under age, an incompetent is one who is incapable by reason of insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity, of managing his property or caring for himself. The jurisdiction of the probate court in guardianship matters is limited to guardians and persons of unsound mind and their estates as vested in courts of probate at the time of the adoption of Amendment 34 or as thereafter prescribed by law.

The power of the probate court to appoint a guardian in cases such as this, and at all times pertinent on this appeal, is set out in Ark. Stat. Ann. § 57-614 (Repl. 1971). Under that section of the statute, the court must be satisfied that the person for whom the guardian is sought is either a minor or otherwise incompetent. The petition for guardianship must state the nature of the alleged ward's incapacity. Ark. Stat. Ann. § 57-609 (Repl. 1971). In determining incompetency of one other than a minor, the probate court must require that the evidence of incompetency include the testimony or the sworn written statement of one or more qualified medical witnesses. Ark. Stat. Ann. § 57-615 (Repl. 1971). Appellant alleged that the petition for appointment of the guardian merely stated that Frances Ritcheson was unable to care for herself because of physical impairment. The probate court had no jurisdiction to appoint a guardian for such a person, at least under the law at the time of this guardianship proceeding. Any doubt about the matter may be resolved by reference to the comment of the committee which drafted the legislation. Its comment following Ark. Stat. Ann. § 57-601 states, in part:

> Under subsection (2) the inability which would permit the appointment of a guardian is limited to some form of mental incapacity. This Code does not authorize the appointment of a guardian for a person who may be incapacitated physically as long as a person has mental faculties sufficient to understand the nature of his property and to protect it by agent even though he may be unable to do so in person. ***

Thus it is quite clear that the probate court had no jurisdiction to appoint a guardian for a person with an incapacity of the nature of that described in the petition. The argument that the legislature's later adoption of Act 372 of 1974 providing for the appointment of a conservator for one who is unable to manage his property by reason of physical disability somehow validates this appointment is unconvincing. Appellees say that Mrs. Ritcheson signed the petition, but that fact is not shown by the complaint, so we do not consider it. She could not, however, confer subject matter jurisdiction by consent.

Appellant argues that the probate court had no jurisdiction to sell real property when the sale was not necessary to pay debts incurred by C. R. Ritcheson in his lifetime. He contends that immediately upon the death of the husband, title vested in his widow under Ark. Stat. Ann. § 61-149 (b) (Repl. 1971), since she had been married to him for more than three years. The complaint is silent as to the existence of any descendants of C. R. Ritcheson, so we cannot assume that this statute applies in this case. Appellant says, however, that she was entitled to dower and homestead. There is nothing in the complaint to indicate that this property was the homestead of C. R. Ritcheson.

Appellant argues that the administrator could sell the lands only if that were necessary to pay the debts of C. R. Ritcheson, relying upon *Calmese* v. *Weinstein,* 234 Ark. 237, 351 S.W. 2d 437; *Cranna, Administrator* v. *Long,* 225 Ark. 153, 279 S.W. 2d 828 and *Dean* v. *Brown,* 216 Ark. 761, 227 S.W. 2d 623. Appellant's reliance upon quotations from these cases is unjustified because their effect has been nullified by Act 424 of 1961. Since the passage of that act, real estate vests in the heirs of a decedent, subject to the widow's dower and to sale for the payment of debts, the preservation or protection of the assets of the estate, the distribution of the estate or any other purpose in the best interest of the estate. Ark. Stat. Ann. §§ 62-2401 (Repl. 1971), 62-2714 (Repl. 1961); *Doss* v. *Taylor,* 244 Ark. 252, 424 S.W. 2d 541; *Price* v. *Price,* 258 Ark. 363, 527 S.W. 2d 322.

The sale, however, is not necessarily free of the

widow's dower. Such a sale is not void for want of jurisdiction, but is simply inoperative as far as the widow's dower is concerned. *Shell* v. *Young,* 78 Ark. 479, 95 S.W. 798; *Livingston* v. *Cochran,* 33 Ark. 294. See also, *Regional Agricultural Credit Corp.* v. *Polk,* 214 Ark. 285, 215 S.W. 2d 523.

There may be valid defenses as to this claim on behalf of the widow but they do not appear on the face of the complaint. Appellant points out that the sale did not include the tract for which the dower claim is made, but that another tract was erroneously described in that proceeding, so the sale may not have affected Mrs. Ritcheson's rights.

The decree is reversed and the cause remanded for further proceedings consistent with this opinion.

HARRIS, C.J., not participating.

BYRD, J., dissents.

Theodore JONES et al *v.* W. C. REED et al

79-168 590 S.W. 2d 6

Opinion delivered December 3, 1979
(In Banc)

Appellant, *pro se.*

Robert R. Cortinez and *John W. Bailey,* for appellees.

JOHN A. FOGLEMAN, Justice. This an appeal from the judgment of the circuit court affirming the decision of the Alcohol Beverage Control Board (hereafter called Board) transferring a private club mixed drink permit held by VFW Post 9095 from one address or location to another in Little Rock. Since appellants have not demonstrated error in the circuit court proceedings and judgment, we must affirm.

The proceeding was commenced by the filing of an "Affidavit of Transfer" by "W. C. Reed, VFW Post 9095" on May 18, 1978. It was actually an application for the transfer of "Retail Liquor Permit No. 233" from 7300 West 12th Street in Little Rock to 1211 Gamble Road in the same

city. It was alleged in that application that the premises to which the transfer was sought were owned by VFW Post 9095. On June 28, 1978, appellants and others alleged to be 294 in total number, filed a petition with the Board opposing the transfer. On July 11, 1978, a hearing was held before a hearing officer on the transfer application. The report of the hearing states that it was held on the applications of VFW Post 9095 and W. C. Reed, its managing agent, for a transfer of location of "On Premise Consumption, Private Club, Permit #233 and Retail Beer Permit #3990." On July 18, 1978, Karen Jones, Director of Alcoholic Beverage Control Division, denied the application for transfer. That decision was appealed to the Board. At a hearing held by the Board on October 18, 1978, the decision of the Director was reversed and the transfer granted.

On November 14, 1978, Theodore Jones, J. L. Herring and Gerold Grigsby, appellants here, filed a petition for judicial review in the circuit court. The circuit court's judgment affirming the Board's decision was entered January 29, 1979. Appellants list eight points for reversal. They are:

I

THE COURT ERRED IN FINDING THAT A FULL AND COMPREHENSIVE HEARING WAS CONDUCTED BY THE ALCOHOLIC BEVERAGE CONTROL AS EVIDENCED BY THE TRANSCRIPT AND EXHIBITS FILED HEREIN.

II

THE COURT ERRED IN CONCLUDING THAT SUCH MATTERS PERTAINING TO PRIVATE CLUBS ARE PROVIDED FOR ONLY IN ACT 132 OF 1969.

III

THE CIRCUIT COURT ERRED WHEN IT CONCLUDED AS A MATTER OF LAW TO WIT: "2. ACT 189 OF 1973 (48-311 ARK. STATS. ANN.)

SPECIFICALLY STATES THAT IT AMENDS "SECTION 7 OF ARTICLE 3 OF ACT 108 OF 1935, AS AMENDED," WHICH IS THE THORNE LIQUOR ACT, AND THE COURT HELD IN *HINTON* V. *STATE* (242 ARK. 341) "THAT THE THORNE LIQUOR ACT, ACT 108 OF 1935, AS AMENDED DOES NOT COVER ISSUANCE OF PRIVATE CLUB PERMITS." THEREFORE, 48-311 ARK. STATS. ANN. DOES NOT APPLY.

IV

THE COURT ERRED WHEN IT CONCLUDED AS A MATTER OF LAW, TO WIT: 3. "THAT ACT 132 OF 1969 DOES NOT SET OUT ANY METHOD OF APPEAL FROM ISSUANCE OF A PERMIT BY ALCOHOLIC BEVERAGE CONTROL FOR LICENSES TO PRIVATE CLUBS; THEREFORE, APPEALS MUST BE TAKEN UNDER ARK. STATS. ANN. 5-701 ET SEQ WHICH IS THE ADMINISTRATIVE PROCEDURE ACT."

V

THE COURT ERRED IN DEPRIVING APPELLANTS TRIAL DE NOVO BY JURY AND JUSTIFYING ITS JUDICIAL REVIEW BY CITING IN ITS ORDER: "4. IN 5-713 ARK. STATS. ANN. SUBPARAGRAPH (g) IT IS PROVIDED "THE REVIEW SHALL BE CONDUCTED BY THE COURT WITHOUT A JURY AND SHALL BE CONFINED TO THE RECORD, EXCEPT THAT IN CASES OF ALLEGED IRREGULARITIES IN PROCEDURE BEFORE THE AGENCY, NOT SHOWN IN THE RECORD, TESTIMONY MAY BE TAKEN BEFORE THE COURT."

VI

THE COURT ERRED IN SUSTAINING AND AFFIRMING THE ALCOHOLIC BEVERAGE CONTROL "BOARD DECISION" GRANTING

APPELLEE W. C. REED PRIVATE CLUB PERMIT NO. 233, RETAIL BEER PERMIT NO. 3990 AND TRANSFER OF LOCATION.

VII

THE COURT ERRED IN AFFIRMING THE ALCOHOLIC BEVERAGE CONTROL BOARD'S DECISION PERMITTING PRIVATE CLUBS ON PREMISES DISPENSING AND CONSUMPTION OF ALCOHOLIC BEVERAGE WITHIN 200 YARDS OF A CHURCH.

VIII

THE COURT ERRED IN AFFIRMING THE DECISION OF THE A.B.C. BOARD IN THAT THE "BOARD DECISION" FAILED TO MAKE EXPLICIT AND CONCISE FINDINGS OF FACTS AND CONCLUSIONS OF LAW SEPARATELY STATED AS MANDATED IN 5-710 ARK. STATS. ANN.

I

Appellants contend that their witnesses were not heard by the Board. They cite Ark. Stat. Ann. § 5-708 (c) (Repl. 1976), which provides that in every case of adjudication by an agency subject to the provisions of the Arkansas Administrative Procedure Act (as the Board is, see *Byrd* v. *Jones,* 263 Ark. 406, 565 S.W. 2d 131) opportunity shall be afforded all parties to present evidence and argument on all issues involved. Appellants complain that the Board failed to comply with this provision by refusing to hear five or six witnesses they planned to call at the hearing before the Board, and by denying their offer of witnesses to prove variances from the truth in the Alcoholic Beverage Control Report submitted on June 7, 1978, by A. D. Evans, an agent of the Board.

Appellant Theodore Jones was spokesman for those objecting to the transfer. The chairman of the Board asked

him how many witnesses he planned to call. When Jones responded "five or six," the chairman asked Jones if he knew what the witnesses would testify and the general nature of their testimony. The following exchange between the chairman and Jones ensued:

> T. Jones: "I propose to show that a number of the people actually attend this church regularly. Have regularly attended this church in the past on a regular basis, that's one of the things. Would you stipulate to that?"
>
> Ratton: "I think we would so stipulate. How many of these people have attended this church regularly on a weekly basis?"
>
> Bailey: "That'd be five."
>
> Ratton: "All right sir. We will so stipulate that there's five people who regularly, conscientiously attend that church for the services."

Jones later stated, "We have five, acting, participating members in our church" and that he was the operator of a junkyard on the premises where the church was located.

One of the grounds of objection by apellants was that the proposed "liquor outlet" was too close to a church. Since the Board accepted Jones' statement as to the testimony of these witnesses, appellants were not prejudiced by this action of the Board, which is admonished to exclude unduly repetitious evidence. See Ark. Stat. Ann. § 5-709 (d) (Repl. 1976). Appellants' spokesman did not state anything that these witnesses would testify other than the matters set out above.

Appellants contend that on another occasion, they were denied the opportunity to present witnesses to prove variances from the truth in the Alcoholic Beverage Control Report. We cannot consider this argument because the abstract of the record does not reveal what witnesses were to be called, what "variances from the truth" there were in the report, or any statement pertaining to the testimony these

witnesses might have given. Actually the abstract does not show anything pertaining to a denial of the right of appellants to present evidence, other than that pertaining to the church. We can only rely upon the abstract of the record, as it constitutes the record on appeal. *Corning Bank* v. *Bank of Rector,* 265 Ark. 68, 576 S.W. 2d 949.

Appellants have failed to sustain this point or to demonstrate any violation of the equal protection and due process requirements of the Fourteenth Amendment to the United States Constitution which they assert in their argument on this point. We also note that the abstract of appellants' petition for review of the Board's action did not raise any issues as to violations of the United States Constitution.

II

Appellants' argument on this point is totally devoid of any foundation. Act 132 of 1969 [Ark. Stat. Ann. §§ 48-1401 — 48-1418 (Repl. 1977)] is a comprehensive act covering the subject of sale of alcoholic beverages for "on premises consumption." It includes a section (§ 10) governing private club permits. See Ark. Stat. Ann. § 48-1410 (Repl. 1978). Appellants read the preamble and §§ 1 and 12 of the act to require the application of Ark. Stat. Ann. § 48-311 (Repl. 1977) to private club permits. That part of the preamble quoted by appellants reads:

> AN ACT to Reaffirm and Strengthen the State's Policy of Strict Enforcement of the Liquor Laws of This State; ***** to Provide for the Licensing of Private Clubs in Which Alcoholic Beverages May Levy Taxes on Alcoholic Beverages Sold for On-Premises Consumption; to Authorize Cities and Counties to Levy Taxes and Fees Thereon; and for other Purposes.

The portions of § 1 relied upon by them are:

> The General Assembly hereby reaffirms the policy of this State of strict enforcement of alcoholic beverage control laws ***** The General Assembly hereby authorizes and directs all law enforcement officials to en-

force strictly the alcoholic beverage laws of this State.

Section 12 of the act reads:

> "*The Board is authorized to adopt and enforce reasonable rules and regulations governing* the qualifications for permits hereunder, *the operation of licensed premises,* and otherwise *implementing and effectuating the provisions and purposes of this Act, and,* in doing so, *shall be guided,* insofar as pertinent, *by rules and regulations now or hereafter applicable to retail liquor outlets. Nothing in this Act, however, shall be construed as limiting the power of other proper State or Local Governmental Bodies to regulate the operation of establishments under this Act* as may be necessary for the protection of public health, welfare, safety, and morals." (Emphasis as supplied by appellants.)

A policy declaration that liquor laws should be strictly enforced certainly is not a legislative declaration requiring the application of all existing statutes governing intoxicating liquor permits to the "on-premises consumption" type of permit. The direction by the General Assembly that the Board, in adopting rules and regulations governing qualifications for permits and otherwise implementing and effectuating the purposes of the acts, be guided by rules and regulations applicable to retail liquor licenses, "insofar as pertinent" does not require such application. Although the words "rules and regulations" might include statutes, depending upon the context in which they are used, in the usual connotation, these words do not. Ordinarily, these words are taken to mean rules and regulations adopted by administrative boards and agencies such as the Board. In the context in which these words were used in Act 132, they mean just that — the rules and regulations of the Alcoholic Beverage Control Board. Furthermore, the rules and regulations governing retail liquor outlets were, by express language of § 12, to serve only as guidance to the Board and then only "insofar as pertinent."

We do not understand appellants' argument that § 13 of Act 132 bears on this point. It is quite true that this section

does, as appellants point out, give the Director the power to suspend, cancel or revoke a permit granted under the act for violation of the act or any rule, regulation or order of the Board. It does not, as appellants' excised quotation of the section would indicate, authorize any law enforcement agency having jurisdiction over the permitted premises to do so. Such an agency, under this section, may only make a complaint to the Director. The section also, by its specific language, requires that a permittee under the act be given an opportunity to appear and defend as provided by Ark. Stat. Ann. § 48-1312 (Repl. 1977) prior to suspension, cancellation or revocation of his permit, and to appeal under the provisions of Ark. Stat. Ann. §§ 48-1314, -1316 (Repl. 1977) from an order of the Director suspending, cancelling or revoking his permit. These provisions making specific reference to specific statutes, or sections thereof, actually run counter to, rather than support, appellants' argument on this point.

Ark. Stat. Ann. § 48-311 (D) was brought into the statutory scheme by § 1 of Act 189 of 1973, which amended § 7 of Art. III of Act 108 of 1935, commonly referred to as the Thorne Liquor Law. That article dealt with the permits authorized under the Thorne Liquor Law, Subsection (A) of said § 7, which is also subsection (A) of Ark. Stat. Ann. § 48-311 refers to permits "under this act." "This Act" was Act 108 of 1935, which is compiled as Ark. Stat. Ann. §§ 48-101, -48-122, -48-201, -48-206, -48-301, -48-305, -48-309, -48-311, -48-326, -48-807, -48-822, -48-908, -48-937, -48-944 (Repl. 1977). See Compiler's notes Ark. Stat. Ann. §§ 48-311 and 48-301. It appears that § 48-311 (E) would apply to permits under those sections only. Act 132 of 1969 is not, in any sense of the word, an amendment of Act 108 of 1935. Instead, it is a comprehensive act dealing only with the sale or dispensing of alcoholic beverages for "on-premises consumption." We find no error in the trial court's holding that Ark. Stat. Ann. § 48-311 (E) does not apply.

III

Appellants' argument here is, in part, repetitive of their argument under Point II. In addition, however, they say that

the circuit court reached its conclusion that Ark. Stat. Ann. § 48-311 did not apply to private club permits upon a misquotation of language in our opinion in *Hinton* v. *State,* 246 Ark. 341, 438 S.W. 2d 57. We actually do not see that our decision in *Hinton,* rendered prior to the enactment of Act 132 of 1969, has any real bearing on the questions at issue.

IV

Appellants are in error in relying upon § 13 of Act 132 of 1969 in arguing this point. Section 13 applies only to appeals from an order of the Director suspending, cancelling or revoking a permit issued under Act 132. It has nothing to do with appeals from orders of the Board granting a transfer of the location of an outstanding permit. In granting the transfer, there was certainly an adjudication by an agency subject to the Arkansas Administrative Procedure Act. It appears from the format of appellants' Petition and Appeal filed in the circuit court that they did petition for judicial review pursuant to Ark. Stat. Ann. § 5-713 (Supp. 1979), which would govern in this case. In any event, appellants have not shown that the holding of the trial court deprived them of any right they would have had under Ark. Stat. Ann. §§ 48-1312, -1314, and -1316 (Repl. 1977). It appears to us that the review by both the Board and the circuit court was in substantial compliance with these statutes, as well as with the provisions of the Administrative Procedure Act.

V

Appellants argue, however, that, even if the Administrative Procedure Act applies, they were entitled to a jury trial under Ark. Stat. Ann. § 48-311(E) (Repl. 1977) and Art. 2 § 7 of the Arkansas Constitution as amended by Amendment 6, and by the United States Constitution's guarantees of trial by jury, due process of law and equal protection of the law. In relying upon Ark. Stat. Ann. § 48-311, appellants point out that§ 5-713 (A) provides that the Administrative Procedure Act does not limit other means of review provided by law.

The statutory language in § 48-311 relied upon by appellants is:

> *** Any appeal from an order of the Director or Commission shall be made to the circuit court of the county in which the premises are situated, and said appeal shall be tried de novo.

Assuming, but not deciding, that this statutory provision did apply, "trial de novo" certainly does not require a jury trial. For example, on appeals from chancery courts, there is a trial de novo on appellate review, but certainly no right to jury trial. Trial de novo, as used in this statute, simply means that the whole matter is opened up for consideration by the circuit court as if the proceeding had been originally brought in that court. See *Civil Service Commission* v. *Matlock,* 206 Ark. 1145, 178 S.W. 2d 662. Appellants' contentions as to a constitutional right to jury trial were completely answered in *Civil Service Commission* v. *Matlock,* 205 Ark. 286, 168 S.W. 2d 424. There we held that it was error for the circuit court to submit an appeal from the action of a civil service commission to a jury. There we said:

> *** The constitutional guarantee of a jury trial extends only to common law actions, and, of course, the proceeding authorized by the act of the legislature under consideration here is not a common law proceeding, and neither party to such a proceeding was entitled to a jury. "The right of trial by jury shall *** extend to all cases at law." Article II, Section 7, constitution of Arkansas. In construing this provision of the constitution this court, in the case of *Drew County Timber Company* v. *Board of Equalization,* 124 Ark. 569, 187 S.W. 542, said that the right of trial by jury *"is confined to cases which at common law were so triable before the adoption of the Constitution". State* v. *Johnson,* 26 Ark. 281; *Wheat* v. *Smith,* 50 Ark. 266, 7 S.W. 161; *Wise* v. *Martin,* 36 Ark. 305; *Missouri Pacific Railroad Company* v. *Conway County Bridge District,* 134 Ark. 292, 204 S.W. 630.

The constitutional right to trial by jury does not secure the right in all possible instances, but only in those cases in which it existed when our constitution was framed; it extends only to the trial of issues of fact in civil and criminal

causes and has no relation to cases such as this. *McKinley* v. *R. L. Payne & Son Lumber Co.,* 200 Ark. 1114, 143 S.W. 2d 38.

As pointed out in *Matlock* and elsewhere, the so-called statutory "appeal" from administrative agency action is only an adaptation, or perhaps extension, of judicial review of such proceedings which has always been available by certiorari, quo warranto, or other such writs. It has been made quite clear, by our own decisions that the proceedings of a state *administrative board* or tribunal are subject to review on certiorari or other extraordinary writ in the *circuit court,* a court of general original jurisdiction, when the board acts in a *quasi-judicial capacity,* even in the absence of a statutory authorization. *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S.W. 1041; *Howell* v. *Todhunter,* 181 Ark. 250, 25 S.W. 2d 21; *Pine Bluff Water & Light Co.* v. *City of Pine Bluff,* 62 Ark. 196, 35 S.W. 227; *State* v. *Railroad Commission,* 109 Ark. 100, 158 S.W. 1076. See Parker, *Administrative Law in Arkansas,* 4 Ark. L. Rev. 107, 120; Davis, *Mandamus to Review Administrative Action in Arkansas,* 11 Ark. L. Rev. 351, 352; *Certiorari in Arkansas,* 17 Ark. L. Rev. 163, 169, 172.

Amendment Seven of the United States Constitution preserves the right to jury trial which existed at common law when that amendment was adopted, but has no application to a statutory proceeding which is not in the nature of a suit at common law. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1936). This proceeding is, of course, a statutory proceeding which is not in the nature of a suit at common law. The Seventh Amendment is generally inapplicable in administrative procedures, where jury trial would be incompatible with the whole concept of administrative adjudication. See *Pernell* v. *Southall Realty,* 416 U.S. 363, 94 S. Ct. 1723, 40 L. Ed. 2d 198 (1974) and cases there cited. The United States Supreme Court has generally taken the position that Amendment Seven, even after the adoption of the Fourteenth Amendment, does not apply in civil actions in state courts. See Annot., 18 L. Ed. 2d 1388, 1410.

VI

This argument is based partially upon the assumption that appellants are correct in their assertions under points II, III and IV. Appellants, however, seek to apply regulations of the Board pertaining to applications for a permit. This was not an application for a permit. It was only an application for a transfer of the location. The regulations relied upon by appellants do not apply to a change of location, which is covered by § 1.26 of the Regulations of the State of Arkansas Department of Finance and Administration, Division of Alcoholic Beverage Control, Revised October 9, 1974. Even though the document which appears in the record is entitled "Affidavit of Transfer," it also constitutes an application to transfer Retail Liquor Permit No. 233. Appellants say, however, that there was no application for change in location of either a private club permit or a beer permit, but that the Board's order permits both.

It is clear, however, that appellants made their objection to a private club permit for dispensing any kind of alcoholic beverages at the new location. It is also clear that the agency hearings were held on the proposed change of location of both the private club and beer permit. Appellants appeared at, and participated in, those hearings. We find no objection to the hearings on the change of location because of deficiencies in the application. We find nothing in appellants' petition in the circuit court raising any question about the validity or sufficiency of the application. This issue is raised for the first time on appeal. We do not consider such questions, but we point out that it is clear that appellants were not misled and that the hearings covered both the private club permit and the beer permit.

VII

Appellants contend that the oral testimony at the Director's hearing was not included in the transcript and that it would disclose that Gibralter Heights Church of God was located across the street from the proposed new location, and regularly holding church services worshipping God there. Actually, it appears to us that the hearing before the

Board is a hearing de novo and that the evidence before the Director is not automatically before the Board. In any event, if there is any deficiency in the record before us, it was the responsibility of appellants to take steps for correction of these deficiencies. *Arkansas Farmers Association* v. *Towns,* 232 Ark. 997, 342 S.W. 2d 83; *Arkansas State Highway Com'n.* v. *Stupenti,* 222 Ark. 9, 257 S.W. 2d 37.

Appellants claim that the Board stipulated that a church existed across the street and that the transfer was unlawful because of the provisions of Ark. Stat. Ann. § 48-312 and § 1 of Act 699 of 1975 [Ark. Stat. Ann. § 48-345 (Repl. 1977)] prohibiting any new permit within 200 yards of any church.

Ark. Stat. Ann. § 48-312 was § 8 of Art. III of Act 108 of 1935. It provides that a permit issued pursuant to that section shall not be transferrable to any premises other than those for which it was issued. Assuming but not deciding that this section applies to a private club permit, we have held that it limits only the action of the permittee, not the action of the Board. *Smith* v. *Estes,* 259 Ark. 337, 533 S.W. 2d 190.

Section 1 of Act 699 of 1975 does not apply here. It prohibits the issuance of a new permit to engage in the retail liquor business at a location situated within 200 yards of a church. A retail liquor business is that which is contemplated by Ark. Stat. Ann. § 48-309 (Repl. 1977). Under such a permit, one may dispense vineous or spiritous liquors for beverage purposes at retail, but such sales must be in unbroken packages, which may not be opened or any part of its content consumed on the premises where purchased. On the other hand, a private club permit is for dispensation of alcoholic beverages by the drink or in broken or unsealed containers for consumption on the premises. Ark. Stat. Ann. §§ 48-1402 (f), -1410 (a) (Repl. 1977). Furthermore, the definition of "private club" in Ark. Stat. Ann. § 48-1402 (j) is not consistent with the word "business." A private club permittee simply is not engaged in the retail liquor business in the context of Ark. Stat. Ann. § 48-345.

VIII

Appellants state that the Board did not comply with

Ark. Stat. Ann. § 5-710 (b) as to findings of fact and conclusions of law, in the following particulars:

1. The Board stipulated to a church located across the street from the permitted premises but in its decision stated "there purports to be a church" and "from the grounds on which the purported place of worship."

2. There is not a single law citation or conclusion of law stated.

Appellants made no complaint about this deficiency in their petition in the circuit court. Appellants did not choose to abstract the Board's decision in their original brief. They attempted to supply the deficiency in their reply brief. This is not permissible. *Merritt* v. *Merritt,* 263 Ark. 432, 565 S.W. 2d 603.

By their action, appellants have waived their present contention. Although this court may raise the question on its own motion, we are not required to search the record in order to do so. We would add that, although the "decision" set out in appellants' reply brief falls far short of being a model of compliance with the Administrative Procedure Act, it is not so deficient as to be totally void. Since the principal objection of appellants, though not the only one, related to the distance of the private club from the church of which appellant Theodore Jones was the minister, we do not feel that we are called upon to remand this case for further findings and conclusions at this time in view of the circumstances prevailing here.

Since appellants have failed to demonstrate error in the circuit court's review, the judgment is affirmed.

HARRIS, C.J., and BYRD and PURTLE, JJ., did not participate.

Wanda Jo SIMS *v.* FIRST NATIONAL BANK, Harrison

79-244 590 S.W. 2d 270

Opinion delivered December 3, 1979
(In Banc)
[Rehearing denied January 7, 1980.]

Thomas A. Martin, Jr., for appellant.

Terry M. Poynter, of *Poynter, Huckaba & Gearhart*, for appellee.

JOHN A. FOGLEMAN, Justice. The cause of action involved on this appeal was commenced on December 16, 1977, when appellee First National Bank of Harrison filed a third party complaint against appellant Wanda Jo Walls Sims and her husband C. J. Sims for foreclosure of two mortgages in an action which had been instituted by a materialman to establish and foreclose a lien for materials and supplies. One mortgage was on a house in Robinwood II, a subdivision of Harrison, on property owned by C. J. Sims. The other mortgage was a second mortgage on a tract of land owned by appellant in Bergman, Arkansas. Appellant filed a counterclaim and cross-complaint in which she alleged that the

mortgage on her property was obtained by duress and undue influence exercised by her husband, C. J. Sims, that the mortgage was obtained by appellee's fraudulent representative that $15,000 in "new money" would be loaned by appellee if her property was mortgaged as additional security to the bank and that she was entitled to rescind the contract on the ground that no Truth in Lending disclosures regarding the transaction were provided to her.

After a trial on the issues, appellant's contentions were rejected by the chancery court and a decree of foreclosure entered. On this appeal, appellant asserts the following points for reversal:

I

THE COURT ERRED IN FINDING THE APPELLANT'S EXECUTION OF THE MORTGAGE WAS NOT OBTAINED BY DURESS AND UNDUE INFLUENCE AND THAT THE APPELLEE WAS NOT THE PROXIMATE CAUSE OF SAME.

II

THE COURT ERRED IN FINDING THAT THE MORTGAGE SHOULD NOT BE CANCELLED BECAUSE OF FRAUD ON THE PART OF THE APPELLEE BANK.

III

THE COURT ERRED IN FINDING THAT THE TRANSACTION IN REGARDS THE APPELLANT WAS EXEMPT FROM FEDERAL TRUTH IN LENDING LAWS.

We shall treat the points for reversal in the order presented.

Appellant alleged in a cross-complaint against First National Bank that the mortgage on the tract of land owned by her should be set aside and removed as a cloud on her title because her signatures on the note secured by the mortgage and on the mortgage itself were obtained by duress and

threats that her husband would be subject to criminal prosecution if those instruments were not executed. She also alleged that the note and mortgage were obtained by duress and fraud on the part of her husband, C. J. Sims, and that this duress and fraud were the direct results of threats by the bank that her husband would be subject to criminal prosecution. The final decree contained a recital that the court could not find any substantial evidence of duress on the part of plaintiff against appellant, although she may have been upset by the financial circumstances in which her husband, C. J. Sims, found himself and may have feared his being financially ruined. There was evidence that may well have been taken to establish probable cause for a criminal prosecution against C. J. Sims, and threats to prosecute would themselves have been a basis for cancellation on account of duress only if the charge was simulated. See *Union Life Ins. Co.* v. *Johnson,* 199 Ark. 241, 133 S.W. 2d 841; *Shattuck* v. *Watson,* 53 Ark. 147, 13 S.W. 516; *Marvin* v. *Marvin,* 52 Ark. 425, 12 S.W. 875.

C. J. Sims had been a customer of the First National Bank for many years. Numerous loans had been made to him and the relationship had been satisfactory. In March, 1976, the bank made a loan for $37,000 for construction money for a house to be built by Sims in Robinwood II for resale. The Square Deal Construction Company, in which Sims was a partner and Ronnie Paul, the managing partner, was to construct the house. After some $32,000 had been advanced on the construction money loan, Ron Shaver, the bank's loan officer who had handled the loan, found, upon inspection in August or September, 1976, that the house was only one-third complete. It appeared that the bank had little or no security for its loan.

The same construction company was, during the period advances were being made to Sims, doing extensive remodeling on the house located on the tract which was the separate property of appellant. This work was started in February, 1976, for a contract price of $17,000. Appellant had purchased this tract, known as the Bergman property, from C. J. Sims and his former wife, Patricia, in 1975, for $28,000, but the title was not transferred until March 17, 1976, after C.

J. Sims had been divorced from Patricia. Appellant paid $1,000 in cash and assumed a mortgage of $23,000 in favor of a savings and loan association. She made three monthly payments on this mortgage debt. It is not shown how she paid the rest of the purchase price, if she did. Appellant and C. J. Sims were married June 20, 1976, two months after she had been divorced from her former husband, Thomas Walls, to whom she was married when she started negotiations with Sims, a real estate agent, for the purchase of the property. After appellant married Mr. Sims, the monthly mortgage payments were made from their joint bank account. Appellant had been employed by Airport Realty Company, a partnership in which both C. J. Sims and Ronnie Paul were partners. It seems that she was not employed after the marriage.

Sims testified that he withdrew from Square Deal Construction Company in June, 1976, after a total of $32,000 had been advanced by the bank on the construction loan. Mr. Sims testified that this money went to Square Deal Construction Company, except for $7,000 paid for the lot on which the house was to be built. Appellant testified that Sims' withdrawal from this partnership took place four days prior to her marriage to him. She stated that Mr. Sims agreed, at that time, to assume the $17,000 remodeling cost. C. J. Sims testified that when he withdrew from the partnership, it was agreed that Square Deal Construction Company would complete both the house in Robinwood II and the remodeling job. When confronted, Sims told Shaver that not all the money advanced by the bank had gone into the house in Robinwood II, but assured Shaver that he could get the house finished in six months.

Appellant is in no position to assert that the mortgage was obtained by duress because of fear of prosecution of her husband because there is no evidence that anyone connected with the bank made any threat to her to prosecute him or that a representative of the bank induced her to execute the mortgage by any threat of such prosecution. *Goodrum* v. *Merchants' & Planters' Bank,* 102 Ark. 326, 144 S.W. 198, Ann. Cas. 1914A 511. Appellant did not testify that such a threat was communicated to her by the bank or by her

husband. C. J. Sims testified in a deposition introduced into evidence that he did not believe that he ever revealed the threat of prosecution to her. There is simply no evidence that any such threat was ever communicated to her by anyone. It was not contended at the trial, or here, that the agreement under which appellant signed the mortgage constituted the compounding of a felony. An obligation given in settlement of a civil liability arising from a wrong which is both public and private is not invalid because the offender is also subject to criminal prosecution. *Goodrum* v. *Merchants' & Planters' Bank,* supra.

The question here then is whether appellant is entitled to a cancellation of the mortgage on her separate property because of duress by her husband. To some extent, this question is dependent upon whether Mrs. Sims executed the mortgage out of a sense of duty to her husband or by reason of his threats. In order to disturb the chancellor's findings, we must be able to say that, when all the relations of the parties toward each other and the details surrounding the entire transaction are considered, they were clearly against the preponderance of the evidence. *Gardner* v. *Ward,* 99 Ark. 588, 138 S.W. 981. This we cannot do. Neither can we say that appellant met her burden of proof that she was compelled, not merely persuaded, to do what she did. *Oberstein* v. *Oberstein,* 217 Ark. 80, 228 S.W. 2d 615. We could not say that she did meet her burden unless we accept her testimony as credible and disregard evidence tending to lead to a contrary conclusion, and we are unable to do this. In considering this question, it is significant that Mrs. Sims made no claim that the contract was entered into under duress until this foreclosure suit was filed. Silence or acquiescence in the contract for any considerable length of time amounts to ratification. See *Oberstein* v. *Oberstein,* supra. See also, *Pirtle* v. *Pirtle,* 166 Tenn. 180, 60 S.W. 2d 172 (1933).

The mortgage foreclosure was filed on December 16, 1977. On January 3, 1978, appellant filed an answer that was simply a general denial. Her cross-complaint in which she first raised the issue of duress was filed on February 16, 1978. The mortgage had been executed on June 17, 1977, so

for eight months, the duress under which appellant claims to have acted was a well kept secret. It is significant that she did not mention or in anywise indicate to the bank's officers and employees or the notary public who took her acknowledgment that she was not acting freely and voluntarily. See *Rowley* v. *Rowley,* 144 Okla. 157, 290 P. 181 (1930); *Wallach* v. *Hoexter,* 17 Abb. N.C. (N.Y.) 267 (1886); *Marston* v. *Brittenham,* 76 Ill. 611 (1875). The bank's loan officer testified that she came into the bank two hours before the arrival of her husband on the date the mortgage was executed at the bank. He testified that, at the time of closing, the atmosphere was calm and casual like a regular, normal closing. Mrs. Sims testified that she inquired why the mortgage debt matured in only six months, but she does not say that she made any other inquiry or protest. Appellant and her husband were actually separated for more than a week in August, 1977. Her failure to complain as soon as the coercion was eliminated is inconsistent with her complaint in the foreclosure action. *Marston* v. *Brittenham,* supra. See also, *Pirtle* v. *Pirtle,* supra.

In attempting to meet her burden of demonstrating error in the holding of the chancery court and of showing that she had met her burden of proof on this issue, appellant relies upon her own testimony and that of her husband. He testified that, commencing two weeks before he obtained her signature, he regularly discussed the matter of her signing the mortgage and threatened to leave her. She testified that her husband, for more than a week, began talking to her about the mortgage at breakfast, and again whenever he came back home, reminded her of the duties she owed him, accused her of gross disloyalty and threatened to leave her; that she had wanted to talk to her lawyer but was unable to reach him; that she had been married and divorced twice, and feared that her third marriage was beginning to fall apart; and that she had a sick child and an acute need for security. She further relied upon the fact that she gained no financial advantage by executing the mortgage and evidence tending to show that the bank found itself in the position of having a loan of $40,000 outstanding for which it had no collateral, and the fact that Shaver, an officer of the bank, knowing that Mr. Sims was not applying the loan proceeds to the construc-

tion of the house for which the loan was made, made final disbursements totaling $5,000.

Duress by her husband may well be sufficient to invalidate a mortgage executed by a wife to a third party. Duress consisting of threats exciting a fear of such a grievous wrong as death, great bodily injury or unlawful imprisonment, would probably justify a cancellation of a contract if the party, acting under such threats, moved to cancel it promptly. *Burr* v. *Burton,* 18 Ark. 214; *Duncan* v. *Hensley,* 248 Ark. 1083, 455 S.W. 2d 113. See also, *Rowley* v. *Rowley,* supra. The defense of duress was somewhat enlarged in *Perkins Oil Co.* v. *Fitzgerald,* 197 Ark. 14, 121 S.W. 2d 877, where it was asserted against the person making the threats; the person alleging that he acted under duress was totally disabled from future employment, and the coercion which caused him to sign a release of liability for his disabling injury was directed against his step-father's future employment, the loss of which would have seriously affected his mother, himself and the other members of his family. See *Mississippi River Fuel Corp.* v. *Hamilton,* 200 Ark. 475, 139 S.W. 2d 404.

Even under the *Fitzgerald* view, it must be shown that there was a threat of some grievous wrong to establish duress. The threat of a husband to abandon his wife if she does not execute a mortgage on her separate real estate is not sufficient basis for cancellation of the mortgage unless it is made with the knowledge and consent of the mortgagee or the mortgagee knew at the time of the execution of the mortgage that it was executed by reason of such a threat by the husband. *Line* v. *Blizzard,* 70 Ind. 23 (1880); *Luna* v. *Miller,* 171 Okla. 260, 42 P. 2d 809 (1935); *State* v. *Scoggins,* 107 N.C. 959, 12 S.E. 59 (1890); *Marston* v. *Brittenham,* supra; *Wallach* v. *Hoexter,* supra. See also, *Pirtle* v. *Pirtle,* 166 Tenn. 180, 60 S.W. 2d 1972 (1933); *Donahue* v. *Mills,* 41 Ark. 421; *Meyer* v. *Gossett,* 38 Ark. 377. This is but a facet of the general rule that a mortgage executed by a wife cannot be avoided because it was procured by duress practiced by the husband, in the absence of a showing that the mortgagee participated in or had knowledge of it. *Harper* v. *McGoogan,* 107 Ark. 10, 154 S.W. 187. See also, *Hale* v. *Hale,* 245

Ky. 358, 53 S.W. 2d 554 (1932); *Pirtle* v. *Pirtle,* supra; Annot., 4 ALR 864, 868.

The only argument that appellant advances as a basis for knowledge of, or notice to, appellee of duress by C. J. Sims is that the bank was on notice of the relationship between Sims and his wife, and, because of the fact that there was no financial reason for her to enter the transaction, and she had nothing to gain and everything to lose by it, the bank was under the duty to inquire as to the voluntariness of the transaction. This argument by appellant is unconvincing and no authority for it is cited, so we will not consider it extensively. *Dixon* v. *State,* 260 Ark. 857, 545 S.W. 2d 606. We should mention, however, that there is no evidence that the bank knew of any marital problems of the parties, at least part of which arose from the arrest of Mr. Sims' son for some crime, for which he is serving a life sentence; that Sims testified that he assured his wife everything could be worked out in a few months; that Sims probably had more money invested in the property than appellant, who could not account for more than $3,000 of her own money in its acquisition; that appellant testified that if it were to be assumed that his investment in the property was from $17,000 to $22,000, in contrast to her $3,000, it was not unbelievable that he would ask her to put it up as collateral; and that she wanted him to have a chance to clear himself with the bank.

Appellant had the burden of proving duress by clear, cogent and convincing testimony. *Duncan* v. *Hensley,* 248 Ark. 1083, 455 S.W. 2d 133; *Davidson* v. *Bell,* 247 Ark. 705, 447 S.W. 2d 338. This she failed to do.

Because of the relationship of husband and wife, appellant's burden of proof may not have been as great on the question of undue influence, but she was not relieved of the burden of showing the bank's knowledge or participation. We cannot say that she was entitled to cancellation of the mortgage on the ground of undue influence, because there is no evidence that the bank knew of, or participated in, the influence practice upon her. *Harper* v. *McGoogan,* supra. See also, *Marston* v. *Brittenham,* supra.

Appellant contends, however, that she was induced to sign the mortgage by the fraudulent representation of the bank's officer that the bank would loan her husband $15,000 in addition to the existing debt. She admits that the evidence is conflicting on this point. The testimony shows that C. J. Sims' outstanding debt to the bank at the time the mortgage was signed consisted of $37,000 secured by the mortgage on the house under construction and $15,000 represented by unsecured notes. Ron Shaver testified that he did not promise to lend, and that Sims did not request, any additional money. Mrs. Sims testified that she had told Shaver her understanding was that $15,000 additional money would be advanced to finish the house in Robinwood II and that Shaver had said that with six months and $15,000, C. J. Sims could finish the house. She admitted, however, that she had previously testified in a deposition that the $15,000 was to be used for an investment by her husband in an industrial park.

C. J. Sims testified that he understood that the $52,000 note secured by the mortgage included an additional $15,000, and that this was mentioned at the time the mortgage was signed, but that he had told Shaver that he did not need it for a week or two and that he did not want to pay interest on it in the meanwhile. Mr. Sims said that he first learned, through a subsequent conversation with Shaver, that the additional $15,000 would not be advanced two weeks later. Yet, on cross-examination, Mr. Sims testified that he had examined all the notes and mortgages introduced and that there was no question that he owed the money.

Deborah Keef, a loan secretary employed by the bank, testified that C. J. Sims did ask Shaver about additional money, separate from the transaction involving the mortgage which had just been closed. She said Shaver said that he could not disburse any more funds until he saw how this particular transaction worked out. She recalled that Shaver had used the words "wait and see." Shaver said that there had been no discussion of an additional $15,000 up until the closing and that he did not recall the request for additional funds about which his secretary had testified.

The chancellor found that the signing of the instruments

on which the suit was brought was for the purpose of extending the existing loan for six months to give Mr. Sims an opportunity to finish the house and sell it for a sum that would at least reduce the indebtedness.

A mortgage by a married woman to secure her husband's debts, whether they be existing debts or debts to accrue, is valid and enforceable. *Goodrum* v. *Merchants' & Planters' Bank,* 102 Ark. 326, 144 S.W. 198, Ann. Cas. 1914A 511; *Collins* v. *Wassell,* 34 Ark. 17; *Scott* v. *Ward,* 35 Ark. 480. See also, *Ocklawaha River Farms Co.* v. *Young,* 73 Fla. 159, 74 So. 644 (1917). Consideration for the mortgage need not pass to the wife as consideration to the husband is sufficient. *Scott* v. *Ward,* supra. See also, *Gillespie* v. *Simpson,* _____ Ark. _____, 18 S.W. 1050. An extension of time for the payment of the husband's debt is sufficient consideration. *Scott* v. *Ward,* supra; See also, *United States Banking Co.* v. *Veale,* 84 Kan. 385, 114 P. 229 (1911); *Hunt* v. *Central Savings Bank & Trust Co.,* 76 Colo. 480, 231 P. 60 (1925); *Gibson* v. *Sheen,* 128 Neb. 728, 260 N.W. 186 (1935). The question of fraudulent representations resolves itself into one of credibility on which we must defer to the superior position of the chancellor.

Appellant also contends that the chancellor erred in holding that the transaction was exempt from the requirements of Federal Truth in Lending Laws. She makes no contention that the act applied insofar as C. J. Sims is concerned, or that the debt was not primarily a commercial one, as to him. It is her position that, in the absence of duress, undue influence and the promise of the loan of additional money, her mortgage of her separate property could only be attributable to her personal devotion to her husband and concern for his welfare. Because of this, she says that, so far as she was concerned, the transaction became one of consumer credit as defined by 15 USC 1602. Under that section, a consumer credit transaction is one in which the money, property or services which are the subject of the transaction are primarily for personal, family, household or agricultural purposes. Appellant contends that her position is that of an accommodation maker or surety, that the only service or benefit was to her husband and that there could be no more

personal or family purpose for entering into a transaction than saving one's husband from financial ruin.

Appellant relies upon *Cantrell* v. *First National Bank of Euless,* 560 S.W. 2d 721 (Tex. Civ. App., 1977). We find no similarity in that case and this, because the loan in *Cantrell* was made for the purchase of a motor home and the jury there specifically found that the purchase was not for business or commercial purposes and that there was no evidence that the motor home was acquired for anything other than the dwelling of the daughter and son-in-law of the borrower.

We agree with appellee, the chancellor, and the United States District Court for the Eastern District of Louisiana that it is the use of the money, property or services which is the subject of the underlying transaction, and not the nature of the property given as security, that controls. *Sapenter* v. *Dreyco, Inc.,* 326 F. Supp. 871 (1971), aff'd. per curiam 450 F. 2d 941 (5 Cir., 1971), cert. den. 406 U.S. 920, 92 S. Ct. 1775, 32 L. Ed. 2d 120; *Gerasta* v. *Hibernia National Bank,* 411 F. Supp. 176 (1976). Similarly, the subjective motivation of the mortgagor is not controlling.

The decree is affirmed.

HARRIS, C.J., not participating.

James C. WRIGHT *v.* STATE of Arkansas

CR 79-157 590 S.W. 2d 15

Opinion delivered December 3, 1979
(In Banc)

[redacted]

Donald E. Bishop, for appellant.

Steve Clark, Atty. Gen., by: *Joseph H. Purvis,* Deputy Atty. Gen., for appellee.

FRANK HOLT, Justice. A jury found appellant guilty of aggravated robbery (Ark. Stat. Ann. § 41-2103 [Repl. 1977]) as a habitual offender with more than four prior convictions and assessed his punishment at 55 years' imprisonment (Ark. Stat. Ann. § 41-1001 (2) (a) [Repl. 1977]). Appellant, through the public defender, first contends that the court erred in denying his petition for a certificate of summons to several nonresident witnesses, or in the alternative, in denying his motion to depose these witnesses.

The issuance of a petition for certification of a material nonresident witness, which compels attendance at government expense, is not an absolute right and lies within the discretion of the trial court. Ark. Stat. Ann. § 43-2006 (Repl. 1977). See also *Reistroffer* v. *United States,* 258 F. 2d 379 (8th Cir. 1958). It is well settled that the court's ruling on matters pertaining to the trial will not be set aside absent a "manifest abuse of discretion." *Roberts & Charles* v. *State,* 254 Ark. 39, 491 S.W. 2d 390 (1973); and *Petty* v. *State,* 245 Ark. 808, 434 S.W. 2d 602 (1968). Here the appellant entered a plea of not guilty by reason of insanity. At a pretrial hearing, appellant sought the attendance of several nonresident witnesses (three psychiatrists, a pediatrician, an osteopath, and the program director at a California State hospital). The trial court denied the petition and the motion to depose. Appellant argues that this was reversible error because the witnesses' testimony was material and relevant to his insanity defense; i.e., he was suffering from schizophrenia and that a schizophrenic may not be able to control his behavior.

The proffered testimony concerning appellant's mental condition was conflicting. None of the physician witnesses had examined or treated the appellant within the past two years, and some had not seen him in more than four years. The appellant admitted that the 1966 diagnosis of schizophrenia by one of the psychiatrists was contrary to the final report of eight doctors who had declared him sane and returned him to a Texas court to stand trial. He also admitted that although one of the psychiatrists had committed him to a California State Hospital in 1977, the final hospital report had declared him sane, and he was returned to the California court system. The court allowed appellant's request that reports of the various hospitals and treating physicians be admitted into evidence. It appears the Arkansas State Hospital, which found appellant without psychosis, had the benefit of appellant's previous treatments at these hospitals and by these physicians. In the circumstances, we certainly cannot say that the trial court abused its discretion.

Neither can we agree with appellant's second contention that the court erred in denying his motion for a change of

venue due to prejudicial pretrial publicity in the community. Appellant adduced testimony from two local news media representatives that numerous news items were published about this and other pending charges against appellant during the seven months' interim between his arrest and trial. Appellant did not support his petition by any affidavits as required by Ark. Stat. Ann. § 43-1502 (Repl. 1977). There was no evidence 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." Ark. Stat. Ann. § 43-1501 (Repl. 1977). Since the appellant has not met his burden of proof by demonstrating that "a fair trial was not likely to be had in the county", we cannot say that the trial court abused its discretion in denying the motion. *Kirkendall* v. *State,* 265 Ark. 853, 581 S.W. 2d 341 (1979).

Appellant's third contention is also without merit. He avers that the court, after refusing to sequester the jury, erred in not granting a mistrial after five of the jurors had read an allegedly prejudicial newspaper article on the morning of the second day of trial. Although the major portion of the article summarized the testimony and proceedings of the first day, the closing sentences stated that "Wright also faces additional charges of a second count of aggravated robbery, arson and escape in Boone County. No trial date has been set in those cases." When the judge examined the jurors in chambers concerning possible prejudices, each stated in effect that what they had read in the article was covered the previous day in court and nothing they had read would bias or prejudice their opinion as jurors. None indicated they had read the concluding part of the news article. We cannot say that the trial court abused its discretion in refusing to grant a mistrial. See *Moseley* v. *State,* 258 Ark. 485, 527 S.W. 2d 616 (1975); and *Cobb* v. *State,* 265 Ark. 527, 579 S.W. 2d 612 (1979).

Neither can we agree with appellant's contention that the trial court erred in admitting his tape recorded confession into evidence. When the question of the voluntariness of a confession is raised on appeal, we review all of the evidence and make an independent determination based on the totality

of the circumstances. The burden is on the state to prove the voluntariness of an in-custody confession. *Clark* v. *State,* 264 Ark. 630, 573 S.W. 2d 622 (1978). The finding of the trial judge will not be set aside unless it is clearly against the preponderance of the evidence. *Degler* v. *State,* 257 Ark. 388, 517 S.W. 2d 515 (1974). Here one of the officers, during the course of questioning, stated that "things would probably go easier if Wright told the truth". In *Penton* v. *State,* 194 Ark. 503, 109 S.W. 2d 131 (1937), an officer told the accused that "it would go well with him if he told the truth." We upheld the admissibility of the confession stating that the statement "was merely an expression of an opinion, and . . . was not coupled with innuendo or subtleties calculated to deceive the prisoner." In *Crooker* v. *California,* 357 U.S. 433, 78 S. Ct. 1287, 2 L. Ed. 2d 1448 (1958), the court stated that an admonition by an officer to tell the truth does not render a confession involuntary. Here the officer also stated that appellant told him he was "involved in" another robbery and, as requested, he told appellant he "would try to get the FBI involved." Appellant, age 30, is no stranger to the criminal justice system inasmuch as he admittedly has been arrested some twenty times and incarcerated six or seven times. We certainly cannot agree with appellant's argument that his confession was a result of a promise of benefits by the investigator and that the court, therefore, erred in holding the confession voluntary and admissible.

Neither do we agree with appellant's claim that he was in a period of mental stress which made him unable to control his impulses and incompetent to make a confession. Appellant places great emphases on the testimony of a Dr. Jones of the Ozark Regional Mental Health Center who examined him while he was in the county jail. Dr. Jones testified that there was a "possibility of underlying psychosis" in the appellant's mental condition. However, there was no acute psychosis at the time he examined the appellant; the appellant's physical complaints were most likely delusionary; and at the time of the examination, the appellant had good contact with reality. Also appellant's reliance on a 1975 psychotic report of a Dr. Cole at a California State Hospital is also misplaced. Although the report states that the appellant is "at times" "definitely psychotic", a later report by the same

hospital staff adjudged the appellant sane and returned him to the California court system. We cannot say that the 1975 report of Dr. Cole was more credible than that of the staff's report and Dr. Jones' testimony. Further, he was examined by the Arkansas State Hospital staff and found without psychosis.

Appellant further argues that his confession was involuntary inasmuch as he had taken four to six dexadrine tablets, an amphetamine which stimulates the body system, shortly following the robbery and was under the influence of this drug when he gave his confession. He testified that the dexadrine made him "talk a lot" and that he would not have given the statement had he not been under the influence of the drug. The officers testified that appellant seemed normal and coherent and there was nothing in his appearance to lead them to believe that he was under the influence of drugs. Another officer, who had the first contact with the appellant a short time following the robbery, testified that the appellant seemed normal and showed no signs of irregular behavior. It was for the trial court to resolve the credibility of the witnesses. After fully reviewing appellant's three-faceted argument, we cannot say the trial court's finding that appellant's confession was voluntary is clearly against the preponderance of the evidence.

Appellant argues next that there was an invalid, warrantless search of his automobile when he was arrested and certain items found therein must be suppressed. On appeal we make an independent determination of whether this evidence should have been suppressed and affirm the finding of the trial court unless it is clearly against the preponderance of the evidence. *State* v. *Osborn,* 263 Ark. 554, 566 S.W. 2d 139 (1978). Here, based upon a description of the individual who had committed the robbery and the car he was driving, a policeman stopped appellant on a busy highway some distance from the crime scene. Appellant was observed reaching toward the right floorboard. Within a few minutes a state trooper appeared. This officer looked through the car window and saw an open grocery sack containing guns and what appeared to be some prescription bottles on the front floorboard. The officer removed the sack and recovered two

pistols, numerous billfolds and several drug containers.

In *Kelly* v. *State,* 261 Ark. 31, 545 S.W. 2d 919 (1977), we said:

> The observation of evidence in plain view is not a search, or to say the least, not an unreasonable one. A resulting seizure is not the result of an unreasonable search. Looking at what is in plain view, or not concealed, is not a search, as prying into hidden places would be. (Citing cases.) The basic test is whether the officer had a right to be in the position he was when the objects seized fell into his plain view.

To the same effect see *Berry* v. *State,* 263 Ark. 446, 565 S.W. 2d 418 (1978). Here the trial court correctly concluded that the warrantless search was justified under the "plain view" doctrine.

Neither can we agree with appellant's contention that the court erred in denying his motion for a mistrial after a paper sack marked "Wheeler" was shown to the jury. The appellant argues that the name on the sack improperly connects him with the local robbery of a Mrs. Wheeler. The sack contained drug containers taken during the robbery. The state did not introduce the sack into evidence and there was no indication that any of the jurors saw the name. The denial of appellant's motion for a mistrial did not constitute an abuse of discretion by the trial court. See *Cobb* v. *State,* 265 Ark. 527, 579 S.W. 2d 612 (1979).

Similarly, the fact that one of the witnesses subpoenaed by the appellant failed to appear at the trial would not necessitate a mistrial. According to appellant's proffer, this witness would testify that while he was a resident at the Arkansas State Hospital, he had observed conditions that "were not conducive to the performance of psychological or medical examinations in cell block areas." When the court denied appellant's motion for a mistrial, the appellant took the stand and testified that he had been unable to concentrate during the psychological testing. We hold that the trial court did not abuse its discretion in refusing to grant the mistrial.

Appellant's eighth contention that the court erred in denying its motion to quash the amended information is also meritless. One month prior to trial, upon rejection of a negotiated plea, the information was amended to charge the appellant as a habitual offender pursuant to Ark. Stat. Ann. § 41-1001 (2) (a). Suffice it to say, application of the statute does not constitute double jeopardy, the amendment was timely filed, and it was not error for the prosecutor to file the habitual offender charge when the appellant withdrew from plea negotiations. See *Dolphus* v. *State,* 248 Ark. 799, 454 S.W. 2d 88 (1970); *Finch* v. *State,* 262 Ark. 313, 556 S.W. 2d 434 (1977); *Bordenkircher* v. *Hayes,* 434 U.S. 357 (1978); and *Davis* v. *Bennett,* 400 F. 2d 279 (8th Cir. 1968).

Appellant next urges that his convictions of separate felonies, which resulted in concurrent sentences, should only count as one conviction in applying the habitual criminal statute. In effect he argues confinements rather than convictions should be counted. We disagree. Section 41-1001 (2) speaks in terms of convictions rather than confinements. See also *Brown* v. *State,* 264 Ark. 248, 570 S.W. 2d 251 (1978). The burglary exception is not applicable here. Ark. Stat. Ann. § 41-1001 (3) (Repl. 1977).

Appellant's ninth contention is also without merit. Since appellant was brought to trial within the first full term of the Boone County Circuit Court following his arrest, he was not denied his constitutional right to a speedy trial. *Wade* v. *State,* 264 Ark. 321, 571 S.W. 2d 231 (1978); Ark. Stat. Ann. § 22-310 (Repl. 1962); and Vol. 4A, Ark. Stat. Ann., Rules of Crim. Proc., Rule 28.1 (a) (Repl. 1977).

Neither can we agree with appellant's argument that the court erred in denying his motion for examination by a cardiovascular specialist, a neurologist and a nerve specialist during his seven months' incarceration pending trial and forcing him to trial without appropriate medical treatment. Appellant complained of various ailments including heart problems and a painful lump in his neck. The record indicates that he had been examined by at least four physicians and had undergone numerous blood and heart tests to no avail. Suffice it to say that appellant was not denied proper

medical treatment. See *Andrew* v. *State*, 265 Ark. 390, 578 S.W. 2d 585 (1979).

Appellant's final contention that his 55 year sentence exceeds the maximum allowed by law is also meritless. In view of appellant's seven prior felony convictions, the 55 year sentence imposed by the jury was consistent with the plain language of the statutes which provide in pertinent part:

§ 41-2102 (2):

> Aggravated robbery is a class A felony.

§ 41-1001 (2):

> A defendant who is convicted of a felony and who has previously been convicted of four [4] or more felonies, or who has been found guilty of four [4] or more felonies, may be sentenced to an extended term of imprisonment as follows:
>
> (a) not less than fifty (50) years nor more than life, if the conviction is of a class A felony;

Affirmed.

HARRIS, C.J., not participating.

Alfred D. HARKNESS *v.* STATE of Arkansas

CR 78-107 590 S.W. 2d 277

Opinion delivered December 3, 1979
(In Banc)
[Rehearing denied January 7, 1980.]

Thomas G. Montgomery, Public Defender, and *Frank C. Elcan, II,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Alfred D. Harkness was convicted in the Crittenden County Circuit Court of burglary and attempted rape and sentenced to imprisonment for a total of thirty years.

He alleges four errors on appeal. The first regards an erroneous instruction and has merit requiring us to reverse his conviction. The others have none and will be mentioned only because they could arise on retrial.

The court allowed an in-court identification of Harkness by the alleged victim. The appellant argues that the line-up the victim saw at the police station about five days after the offense was impermissibly suggestive and tainted the later in-court identification, making it inadmissible. The victim also made a voice identification of Harkness at the same time. We have examined the record and the trial court's ruling permitting the in-court identification and hold that it passes the test laid down in *Warren* v. *State,* 261 Ark. 173, 547 S.W. 2d 392 (1977).

A police officer was allowed to read to the jury a statement that the victim said Harkness made to her when he attempted to rape her. It is argued this was hearsay and was erroneously admitted as evidence to the jury. The statement read to the jury was:

> Get up. Come with me. Get on the bed. Get your clothes off and get on the bed. I can use this gun and I will hurt you.

The statement was not hearsay because it was not admitted into evidence to prove the truth of the words stated but rather was relevant to the line-up and voice identification of Harkness made by the victim. The line-up and voice identification had been attacked but this was only part of the evidence offered by the State to prove the identification was fairly made and reliable.

A cigarette lighter found by an investigating officer in the victim's home was admitted into evidence as the defendant's. So was a statement made by Harkness when he was

shown the lighter at police headquarters. According to a police officer, Harkness said, "That is my lighter . . . ." It is argued that a proper chain of custody was not established for the introduction of the cigarette lighter. Harkness claimed that he left the lighter in the glove compartment of his vehicle.

The purpose of showing a chain of custody is to prove authenticity. If there is a reasonable probability the evidence is genuine, the trial court's ruling will be upheld. *Baughman* v. *State*, 265 Ark. 869, 582 S.W. 2d 4 (1979).

We find no reason to disturb the trial court's ruling regarding the cigarette lighter.

The error made which requires us to reverse this case was an erroneous instruction stating, in effect, that alibi is an affirmative defense which a defendant must prove by a preponderance of the evidence. That is wrong for two reasons. First, alibi is not an affirmative defense. Second, the State must always prove its case beyond a reasonable doubt. That burden is not shifted to the defendant because alibi is raised as a defense. This case was tried before we adopted the Arkansas Criminal Model Jury Instructions, but they correctly state the relevant rule. AMCI 4008 reads:

ALIBI — COMMENT

> While alibi instructions have often been used by trial courts in Arkansas, alibi is neither a defense nor an affirmative defense under the Arkansas Criminal Code, but rather a position the defendant may assert to create a reasonable doubt of his guilt. Therefore, no jury instruction should be given. See 21 Am. Jur. 2d, Criminal Law, § 136.

We join those authorities which have rejected the instruction given in this case. *See, e.g., Stump* v. *Bennett,* 398 F. 2d 111 (8th Cir. 1968); *Lafave & Scott, Criminal Law* § 8 (1972).

The State argues, however, there was no timely objec-

tion to this instruction. The record, as originally submitted, showed that the defendant's counsel offered objections to the alibi instruction after the jury retired. That would be too late according to our decisions. *Golden* v. *State,* 265 Ark. 99, 576 S.W. 2d 955 (1979).

When the State raised this argument, Harkness asked that we resubmit the case to the trial court to settle the record. Counsel for Harkness argued a timely objection had been made before the jury was given the instructions and that the court noted those objections but asked that counsel make his record after the jury retired. We resubmitted the case to the trial court for a hearing at which the prosecuting attorney, one of the defense counsel for Harkness and the trial judge were sworn and gave their versions of what happened. The prosecuting attorney could not swear that the objection was not properly made before the instruction was given but he was inclined to think it was not. The defense attorney was certain he had made an objection but that the court asked him to make his record after the jury deliberated. The trial judge made no finding, as he could have done, but said:

> . . . I have no memory, really, I was so bewildered and overwhelmed at this criminal term of court, my memory on it is very foggy and I really have no memory about this instruction. I have no memory of — I will say in all candor that I have found it to be a time saving device, when I pretty well have my mind made up on what instructions I am going to give, instead of consuming time while the jury is waiting, *I have asked attorneys on frequent occasions to wait and make their objections while the jury is deliberating, simply as a time saving device,* and I still feel that that is a time saving device and would not want to discourage that practice and discourage attorneys from agreeing to that by penalizing one who in good faith cooperates and then forgets to make an objection, but I just cannot say with any certainty whatsoever whether that happened in this Harkness case . . . . [Emphasis added.]

We have to give the defendant the benefit of the doubt in view of the candid remarks of the trial judge, a man of

undoubted integrity. Therefore, the case is reversed and remanded for a new trial.

Reversed and remanded.

HARRIS, C.J., not participating.

Jack L. GUSTAFSON, Sr. *v.* STATE of Arkansas

CR 78-209 590 S.W. 2d 853

Opinion delivered December 3, 1979
(In Banc)

[redacted]

Duncan & Davis, by: *A. Wayne Davis* and *Phillip J. Duncan,* for appellant.

Steve Clark, Atty. Gen., by: *Joseph H. Purvis,* Deputy Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. Jack L. Gustafson, Sr. was convicted in the Independence County Circuit Court of burglary, attempted theft and soliciting capital murder. He was sentenced to a total of 50 years imprisonment.

He raises numerous issues on appeal. We find prejudicial error was committed and reverse his conviction and remand the matter for a new trial. Our discussion of some of the issues will be limited since there will likely be a new trial.

Gustafson was charged with burglarizing a National

Guard Armory and attempting to steal weapons from that armory. He was also charged with soliciting the murder of Ray Seeley who was seeing his former wife.

Law enforcement officials testified that they learned that Gustafson had made statements while he was in the Independence County Jail, on other charges, that he had automatic weapons for sale and that he planned to burglarize a National Guard Armory. A federal agent wired for sound was placed in the cell with Gustafson. He gave Gustafson a telephone number in Louisiana to call in the event Gustafson was interested in selling the automatic weapons and hiring somebody to commit the murder.

After Gustafson got out of jail on bond he made the telephone call. The undercover agent then met Gustafson at the Red Bird Truck Stop in Batesville. At this meeting a tape recording was made of the conversation. It related to the burglary of the armory and the murder of Ray Seeley and was decidedly incriminating. It was admitted into evidence over the objections of the appellant.

On October 26th, the night after the conversation at the Red Bird Truck Stop, the appellant was shot outside the National Guard Armory in Batesville. Gustafson had a gun and the State offered evidence that a pry bar was in his possession at the time he was shot. There was evidence that the armory had been entered with the use of the pry bar. There was no evidence that any weapons were taken.

The first allegation of error is that any conversations with Gustafson in the jail were obtained in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution as well as Ark. Const., art. II, § 8. Furthermore, the appellant argues that the tape recording made at the Red Bird Truck Stop should have been suppressed as tainted by these violations. The State did not offer as evidence any statements made by Gustafson while he was in jail, but only this later recording. Based on the record before us, all these arguments are without merit. Gustafson's charges in this case were unrelated to those for which he was in jail and there was no requirement that he be

advised of his rights by the undercover agent. *Miranda* v. *Arizona,* 384 U.S. 436 (1966) does not apply to this situation. Neither does *Massiah* v. *U.S.,* 377 U.S. 201 (1964) prohibit the use of the tape. *Massiah* involved gathering information against a defendant through a "bugged" informant. Massiah had already been charged with the crime being investigated and had a lawyer in connection with that crime. The Supreme Court of Virginia in *Hummel* v. *Commonwealth,* 219 Va. 252, 247 S.E. 2d 385 (1978) considered evidence not unlike that obtained against Gustafson. The court distinguished the *Massiah* case:

> While *Massiah* and its progeny stand for the proposition that the Sixth Amendment right to counsel proscribes surreptitious interrogation by a government agent of an accused about an offense with which the accused has already been charged, this exclusionary rule does not apply to information legally obtained in the investigation of a new and different criminal offense initiated by the accused while awaiting trial. *Hummel* v. *Commonwealth,* 219 Va. 252, 247 S.E. 2d 385, 388 (1978).

There was nothing unreasonable in the fact that an undercover agent was introduced in Gustafson's cell in connection with conduct that was unrelated to his incarceration. In *U.S.* v. *White,* 401 U.S. 745 (1971), the Court said:

> If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case. *Id* at 752.

It was not disputed that Gustafson made a telephone call on his own to the undercover agent after he got out of jail. This fact belies the appellant's argument of inducement.

The appellant argues it was error for the prosecuting attorney's "investigator", a material witness, to remain in the courtroom although all other witnesses had been excluded from the courtroom during the trial. The appellee argues that the witness was properly allowed in the court-

room by virtue of Subsections 2 and 3, Rule 615. The Uniform Rules of Evidence, Rule 615, reads:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exlusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

It may have been only harmless error in this case for the trial judge to permit the investigator to remain in the courtroom. The investigator testified after the first witness had been called for the State and his testimony did not appear to relate in any way to the testimony of the first witness. There is no way the "investigator" in this case could qualify as an exception by Rule 615(2). The State did not make a strong case that the presence of the "investigator" was essential to the conduct of the trial. In a criminal case it was not contemplated that such a practice would be routine.

Rule 615, Uniform Rules of Evidence, replaces Ark. Stat. Ann. § 43-2021 which provided for no exception to the rule in a criminal case. An accused under that statute could require all State witnesses be excluded. Rule 615 is the same as the federal rule and its purpose can best be learned by studying the recommendations made to Congress.

Weinstein quotes extensively from Senate Judiciary Committee statements in connection with Rule 615(3), which sheds some light on the intent of the United States Congress in adopting the same rule for federal courts:

> Many district courts permit government counsel to have an investigative agent at counsel table throughout the trial although the agent is or may be a witness. The practice is permitted as an exception to the rule of exclusion and compares with the situation defense counsel finds himself in — he always has the client with

> him to consult during the trial. The investigative agent's presence may be extremely important to government counsel, especially when the case is complex or involves some specialized subject matter. The agent, too, having lived with the case for a long time, may be able to assist in meeting trial surprises where the best-prepared counsel would otherwise have difficulty. *Yet, it would not seem the Government could often meet the burden under rule 615 of showing that the agent's presence is essential* . . . . [Emphasis added.] Report, Committee on the Judiciary, United States Senate, 93rd Cong., 2d Sess., on the Federal Rules of Evidence, p. 26 (1974). As quoted in *Weinstein, Evidence,* par. 615[01].

The Advisory Committee's Notes on Rule 615(3) read:

> The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. See 6 Wigmore § 1841, n.4. As quoted in *Weinstein, Evidence,* par. 615[01].

The exclusionary rule is considered as effective as cross-examination in serving the court to garner the truth. It should not be easily circumvented. On a retrial, unless the prosecuting attorney can demonstrate that his investigator is actually essential to the trial of the case, the investigator should be treated like any other witness.

The appellant argues that the court should have granted a continuance. The attorneys for Gustafson were appointed seven days before the trial. The record is not clear whether the attorneys pursued the matter in a timely manner. The attorneys had been negotiating with the prosecuting attorney about this case for some time before their appointment. A motion for a continuance was not filed until the day before the trial. It is unlikely that such a matter will occur on a retrial.

The prosecuting attorney, over the objections of Gustafson, was permitted to require Gustafson to demonstrate to the jury certain actions of his outside the armory on the

night in question. Gustafson was required to put on the holster and gun that was found in his possession and demonstrate to the jury his actions just before he was shot. We find nothing prejudicial in this demonstration, because Gustafson had taken the witness stand and testified as to what happened; it was relevant to the issue of his credibility, whether he or the officers were telling the truth about Gustafson's actions and conduct as he exited the armory. The precise question was whether Gustafson had his gun in hand.

Gustafson argues that he was entitled to separate trials on the charges of burglary and conspiracy. We find no merit at all to this argument since all the charges were related and grew out of the same conversation and course of conduct. Rules of Crim. Proc., Rule 22.2.

The appellant argues his right to cross-examine Sgt. Bob Reynolds and John Ford was improperly limited by the trial court. There is some merit to this argument. At times counsel for appellant was unduly repetitious, a factor no doubt in the trial court's occasionally limiting cross-examination. This error will no doubt not arise on a new trial. A cross-examiner is given wide latitude and cannot be unduly restricted in eliciting facts which affect a witness' credibility. *Haight* v. *State,* 259 Ark. 478, 533 S.W. 2d 510 (1976).

When Gustafson took the witness stand, as a witness in his own behalf, he was asked by the prosecuting attorney about previous criminal convictions and previous misconduct. The trial judge permitted some of the questions over the objections of Gustafson's lawyer.

There are circumstances where it is possible for the State to introduce into a criminal trial evidence that the defendant has committed crimes unrelated to those which he is charged. One circumstance is in its case in chief, where, in very limited circumstances, the State may offer evidence of other offenses. Ordinarily, such evidence is not permitted. It is prejudicial by nature and should only be used against a defendant in a criminal action in rare cases. See *Alford* v. *State,* 223 Ark. 330, 266 S.W. 2d 804 (1954). Another circumstance is when a defendant in a criminal case takes the

witness stand in his own behalf. His credibility becomes an issue and the State may, under certain circumstances, test that credibility by asking the defendant if he has been convicted of certain crimes or if he is guilty of certain misconduct. *Moore* v. *State*, 256 Ark. 385, 507 S.W. 2d 711 (1974). Gustafson was cross-examined both about previous convictions and about acts of misconduct.

First, Gustafson was asked on cross-examination if he had been convicted of burglary and larceny in Sharp County, Arkansas. He admitted that he had been. It does not appear from the record that this question was improper under Uniform Rules of Evidence, Rule 609. Rule 609 permits such a question only if the crime was punishable by death or imprisonment in excess of one year or if the conviction involves dishonesty or a false statement regardless of the punishment. The trial judge must determine if the probative value of the question outweighs its prejudicial effect. There are other restrictions, for example a 10-year time limit and a provision regarding the effect of a pardon. If a defendant denies being convicted of such a crime, the conviction can be proved by extrinsic evidence.

Next, he was asked if he was not, in fact, guilty of possessing several thousand dollars worth of CB radio equipment which had been stolen from Jay's CB Shop at Batesville. The trial judge sustained an objection to this question. He was then asked if he was not guilty of knowingly possessing a 4-wheel drive Chevrolet pick-up truck which had been stolen from Richard Thomas at Arkansas College in Batesville. Gustafson refused to answer this question, claiming his privilege under the Fifth Amendment. The judge ordered him to answer and he did. These two questions about Gustafson's previous misconduct, because they were not related to convictions but to misconduct, are governed by Rule 608(b) of the Uniform Rules of Evidence which reads:

> (b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by

> extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
>
> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule 608(b) of the Uniform Rules of Evidence changes Arkansas law. Before the adoption of the Uniform Rules it was proper to ask on cross-examination if a defendant was guilty of most any kind of felony. In *Butler* v. *State,* 255 Ark. 1028, 504 S.W. 2d 747 (1974), we reviewed some of our prior decisions which had held that it was proper in certain circumstances to ask a defendant if he was guilty of robbery, interstate transportation of stolen property, rape, larceny or assassination. The rationale of permitting such a question was that a person committing such a crime might be prone to lie.

There is no doubt that Rule 608(b) was intended to restrict the use of such evidence, especially in a criminal case. Our rule is based on the federal rule and most commentators take the position that Rule 608(b) should be interpreted restrictively. See *McCormick, Evidence,* § 42 (2d ed. 1972); *Weinstein, Evidence,* § 608[05] (1978).

We read Rule 608(b) to provide that the trial court may, if it finds good faith and that the probative value of such information outweighs the prejudicial effect, allow such a question about certain offenses. The most important change is that the question must be concerning misconduct which relates to truthfulness or untruthfulness. That is, one element of the offense alleged must be an act of dishonesty. The question cannot regard misconduct which has no relation at all to honesty. *Weinstein, supra,* indicates that misconduct

relating to truthfulness would include forgery, perjury, bribery, false pretense and embezzlement. Obviously, some misconduct would not bear on truthfulness. For example, murder, manslaughter or assault do not *per se* relate to dishonesty. Burglary and breaking and entering would not be such misconduct unless the crime involved the element of theft. Ark. Stat. Ann. §§ 41-2002, 41-2203. We believe that theft, as it is defined in the Arkansas Criminal Code, involves dishonesty. Ark. Stat. Ann. § 41-2201, *et seq.*

We are aware that the use of such information can be highly prejudicial to a defendant in a criminal case and that the use of such information may well be abused. No doubt Rule 608(b) was designed to curb this possible abuse. We find three conditions on the use of such information. First, the question must be asked in good faith. This has always been our rule. *Balentine* v. *State,* 259 Ark. 590, 535 S.W. 2d 221 (1976); *Moore* v. *State, supra,* and *Butler* v. *State, supra.* This means the court may require evidence of good faith before it permits such a question to be asked; that is, that the questioner must have credible knowledge that the offense has been committed, not just information based on rumor or speculation. Next, the court in its discretion should decide if the probative value of the question outweighs the prejudicial effect of such a question. Rule 403, Uniform Rules of Evidence, provides for excluding relevant evidence if its prejudicial effect outweighs its probative value. Finally, of course, the misconduct must relate to truthfulness or untruthfulness and that character trait.

The questions asked of Gustafson relate to misconduct which is defined as theft by receiving in Ark. Stat. Ann.§ 41-2206.

The prosecuting attorney asked Gustafson two questions: Both were, had he not, in fact, knowingly possessed certain stolen property, and the prosecuting attorney identified the property, time and place in both questions, as he should have. Those were, on their face, proper questions. The offense of theft by receiving requires that one *receive, retain* or *dispose* of stolen property knowing *that it was stolen or having good reason* to believe that it was stolen.

Ark. Stat. Ann. § 41-2206. The witness should be able to answer such a question by a simple yes or no. The State may not go beyond that answer, as it may in the case of a conviction, and prove the misconduct by extrinsic evidence.

In the case of *State* v. *Miller,* 92 N.M. 520, 590 P. 2d 1175 (1979), the New Mexico Court dealt with the identical problem. In the *Miller* case there were some fourteen questions asked of the defendant relating to his guilt of various crimes. The Court said:

> . . . The only purpose of the questions was to test defendant's credibility. *State* v. *Coca, supra.* The crimes involved in the questions could not be proved by extrinsic evidence. Evidence Rule 608(b). Defendant answered each of the questions in the negative.
>
> What then was the probative value of the questions? There was none. Under the balancing test required by Evidence Rule 403, the trial court abused its discretion in permitting the questioning because the questions were prejudicial and, in light of the answers, there was no probative value.
>
> We do not hold that a question under Evidence Rule 608(b), which asks for an admission concerning a felony, can never be asked. Our holding is that any one of such questions is prejudicial, see *State* v. *Rowell,* 77 N.M. 124, 419 P. 2d 966 (1966) and, if there is nothing indicating the question has probative value on the question of credibility, it is an abuse of discretion to permit the question. When the question is under Evidence Rule 608(b), a prosecutor, who seeks to have a defendant make an admission concerning a felony when there has been no conviction, hazards a reversal absent a showing of probative value because of the prejudicial nature of the question.
>
> We arrive at the same conclusions.

In *Cox* v. *State,* 264 Ark. 608, 573 S.W. 2d 906 (1978), two statements were made which are inconsistent with this

opinion. It may have been the question asked in *Cox* was improper for other reasons, but our opinion does not show that. We said in *Cox* that it was improper to ask a defendant if he had not, in fact, committed a robbery on the same day of the offense with which he was charged. We said that the question itself was improper and in that regard we were mistaken. Such a question would not be impermissible under Rule 608 if it were asked in good faith and permitted in the discretion of the judge because robbery is an act of dishonesty.

We were also mistaken in *Cox* if we left the impression that a negative answer to an improper question results in no prejudicial error. There is no doubt that such a question harms a defendant's case. When it is proper, about a type of misconduct that is relevant, it is allowed only because it is relevant to the determination of the credibility of the defendant. But to say that a negative answer always removes the prejudice in every case goes too far. Prejudicial error may result whether the question is properly phrased or not. We cannot predict whether prejudice can be removed in every case.

The trial court sustained an objection to the first question regarding the stolen CB radios. For what reason we cannot say. Then the trial court required Gustafson to answer the question about the 4-wheel drive truck. Gustafson claimed his privilege against self-incrimination regarding this question. The trial court, clearly in error, ordered Gustafson to answer the question. Rule 608(b), specifically the last paragraph, provides that the privilege against self-incrimination is preserved in such circumstances. This was prejudicial error that requires us to reverse the judgment of the court.

The difficult question for us is whether both of these questions may be asked of Gustafson at a retrial if he takes the witness stand. That presumes too much. First of all the judge sustained an objection to the first question for some reason finding it improper. No doubt the trial judge had good reasons for sustaining that objection. We would not presume that those reasons no longer exist, although they might.

Obviously that question should not be asked again in this case unless the trial judge in advance makes a decision that it is a proper question, asked in good faith and its probative value outweighs its prejudicial error. The second question, also on its face a proper question, must withstand the same scrutiny by the trial judge whose discretionary judgment we cannot predict. That would, no doubt, have some bearing on possible prejudice. If both questions were deemed improper by the trial judge, it would be difficult to say prejudicial error was not committed by the asking alone.

We cannot predict for future cases what questions will or will not be so improper as to require a new trial. We do not intend to be so restrictive in our application of Rule 608(b) as to remove a valuable tool in garnering the truth. However, we do want it made clear that the use of such evidence in a criminal case creates a real hazard of a mistrial or a reversal. Prosecuting attorneys would be well advised to procure a ruling from the trial judge before asking such quetions before a jury.

Reversed and remanded.

HARRIS, C.J., not participating.

BYRD, J., concurs.

HOLT, J., dissents.

FRANK HOLT, Justice, dissenting in part. I would adhere to the views expressed in *Cox* v. *State,* 264 Ark. 608, 573 S.W. 2d 906 (1978), which is overruled today. The majority's view meets the prophecy of *Weinstein* when he wrote: "Such an approach paves the way to an exception which will swallow the rule." Rule 608(b) was not meant to include every act of dishonesty but only those going to the veracity of the witness.

James LEGGINS *v.* STATE of Arkansas

CR 79-178 590 S.W. 2d 22

Opinion delivered December 3, 1979
(In Banc)

John W. Achor, Public Defender, by: *Sandra Beavers,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. One James Leggins was convicted in the Pulaski County Circuit Court of two counts of aggravated robbery. The jury found he was an habitual criminal, having two prior convictions, and he was sentenced to 30 years imprisonment on each count, the terms to be served consecutively.

The sole argument of error on appeal is that the trial court erred in permitting evidence of a prior conviction of one JAMES LIGION to be submitted to the jury as a prior conviction of this defendant who was named JAMES LEGGINS in the information.

We agree this was error which requires us to reverse the judgment.

A Mississippi County conviction, submitted to the jury as a prior conviction, read JAMES LEGGINS. To this conviction there was no objection. A Crittenden County Circuit Court conviction read JAMES LIGION. The only evidence of this conviction was simply a certified copy of the judgment and an order of commitment offered by the State with no explanation. The judge permitted it to go to the jury as evidence of a previous conviction of the appellant. There was no reference to an alias in any of the documents. Leggins' counsel objected to the Crittenden County conviction being admitted but the trial court permitted it noting that the variation in spelling was a matter of weight to be attached to the document and not one affecting its admissibility.

The prosecuting attorney argued to the jury that the two documents of previous convictions were uncontradicted, introduced in good faith by the State, allowed as evidence by the trial court as convictions of Leggins; none of this was rebutted by any evidence from the defendant.

On appeal the State argues the jury had other evidence which could justify their finding that JAMES LEGGINS and JAMES LIGION were the same person.

A waiver of rights form was signed by this defendant as JAMES LEGGION. So was his statement. These documents were introduced during the trial of the case but were not referred to during the sentence phase of the trial. However, we have to assume that the jury had the benefit of this evidence when it found that the appellant had two previous convictions.

Was the jury's finding, that this defendant, charged as

JAMES LEGGINS, is the same person as one convicted in Crittenden County Circuit Court, charged as JAMES LIGION, supported by substantial evidence? We think not.

Proof of previous convictions is governed by Ark. Stat. Ann. § 41-1003 *et seq.* (Repl. 1977). The jury, or the trial judge sitting as a jury, hears evidence on this issue after the trial. A previous conviction must be proved by " . . . any evidence that satisfies the trier of fact beyond a reasonable doubt . . . . " Ark. Stat. Ann. § 41-1003.

The following are sufficient to support such a finding:

> (1) The jury shall first hear all evidence relevant to the felony with which defendant is currently charged and shall retire to reach a verdict of guilty or innocence on this charge.
>
> (2) If the defendant is found guilty of the felony, the same jury shall sit again and hear evidence of the defendant's previous felony convictions or previous findings of the defendant's guilt of felonies. Defendant shall have the right to hear and controvert such evidence and to offer evidence in his support.
>
> (3) The jury shall retire again, and if it finds that the defendant has previously been convicted or found guilty of two [2] or more felonies, the jury shall consider the previous convictions or findings of guilt in determining the sentence to be imposed for the felony of which the defendant currently stands convicted. Ark. Stat. Ann. § 41-1005.

A defendant may controvert such evidence and offer evidence to rebut the State's. Ark. Stat. Ann. § 41-1005. However, the burden remains on the State at all times to prove such convictions beyond a reasonable doubt.

The prosecuting attorney offered no evidence that this defendant was JAMES LIGION. He referred to the State's good faith, the judge's action in permitting the document to be admitted and the fact that the defendant could prove it

was not he, if that was the case.

We cannot stretch LEGGINS to be the same as LIGION. Nor can we stretch LEGGION to be LIGION. The doctrine of *idem sonans,* which is that absolute accuracy in spelling names is not required if the names, though spelled differently, sound practically identical, cannot work to support the jury's findings.

Some cases applying that doctrine support our conclusion. In *Woods* v. *State,* 123 Ark. 111, 184 S.W. 409 (1916), we held "Woods" was not the same as "Wood", commenting that the "s" at the end of a name is not silent and that the two names were not identical under the doctrine of *idem sonans*. In another case, "Jeffery" and "Jeffries" were not *idem sonans*. *Marshall* v. *Jefferies,* Fed. Cas. No. 9, 128(a) Hemp. 299 (Super. Ark. 1836).

On the other hand, "Vaughn" and "Vaughan" were held to be identical. *Goddard* v. *State,* 100 Ark. 149, 139 S.W. 1121 (1911). "Forshee" and "Foshee" were held as *idem sonans*. *Taylor* v. *State,* 72 Ark. 613, 82 S.W. 493 (1904).

The State argues on appeal that LEGGINS, or whatever his name is, signed an affidavit of indigency as LIGGION, but the State concedes this evidence was not presented to the jury.

We have commented on the failure of a defendant to rebut the State's proof, but those cases involved very minor variations in spelling. In *Higgins* v. *State,* 235 Ark. 153, 357 S.W. 2d 499 (1962), Lawrence John Higgins complained that the FBI document of previous convictions of one "Lawrence Higgins, also known as Lawrence John Higgins," was erroneously submitted as evidence of a prior conviction. We had no problem in finding that Higgins' argument was without merit. In *Henson* v. *State,* 248 Ark. 992, 455 S.W. 2d 101 (1970), Charles Eugene Henson was the named defendant. The previous conviction was of one "Charles Haggard, A/K/A Charles Henson." We also found an objection to this evidence to be without merit. In both the *Higgins* and *Hen-*

son cases we commented that the defendant could have easily offered some proof to support the claim of mistake. However, in the *Higgins* case we adopted the rule that if the State offered evidence of a previous conviction of one of the same name, then a *prima facie* case was made of a previous conviction. That is sound law substantially incorporated in Ark. Stat. Ann. § 41-1003. But in both of these cases the name was the same or substantially the same. That is not true in this case.

The State charged Leggins as the defendant in this case and without any other evidence offered, the jury found a conviction of a man named Ligion to be the same person. The names are not the same, are not pronounced the same and the jury would have to presume that the people were the same. There is no substantial evidence to support this finding.

Undoubtedly our decision would be different if the affidavit of indigency had been submitted to the jury because there is not that much difference between LIGGION, as the defendant signed his name in that form, and LIGION, as the Crittenden County Circuit Court conviction read.

Because this error relates to a previous conviction, we treat the matter as we did in *McConahay* v. *State,* 257 Ark. 328, 516 S.W. 2d 887 (1974). The sentence is reduced to 10 years imprisonment. If the State, through the Attorney General, desires to accept the reduction within seventeen calendar days, the judgment is affirmed as modified. Otherwise, the judgment is reversed and remanded.

Affirmed as modified.

HARRIS, C.J., not participating.

Dr. Jack GIBBINS *v.* Porter HANCOCK et al

79-252 590 S.W. 2d 280

Opinion delivered December 3, 1979
(In Banc)

Henry & Duckett, by: *Gerry L. Brewer,* for appellant.

Friday, Eldredge & Clark, by: *Phillip Malcom, James M. Saxton* and *William T. Baxter,* for appellees.

JOHN I. PURTLE, Justice. The Pulaski Chancery Court denied appellant's petition to contest a will on the grounds it was not filed within six months from the date of notice to probate the will. Appellant contends the five-year time limit applies because actual notice was not given as required by statute.

We are requested to rule that in the absence of strict compliance with the notice of probate statute the five-year statutory period for contesting the will applies. We hold that substantial compliance only is required and affirm the trial court's holding that the appellant had actual and constructive notice of probate of the will. We also disagree with appellant's contention the trial court erred in ruling on the statute of limitations question in a summary manner after a hearing on the question of limitations.

Decedent's will was admitted to probate on December 19, 1975, without notice or hearing. However, the executor prepared and signed the standard notice and mailed copies to the probate clerk along with notice to be mailed to petitioner, the only brother of decedent, with a request for the clerk to mail notice to the interested parties. The envelope to the appellant had been addressed and a registered return receipt attached to the outside of the envelope. The clerk's return address was placed on the return receipt. December 22, 1975, the attorney for the executor mailed a letter and copies of all the papers, including notice of publication, to appellant. This letter was not returned to the attorney although his return address was on the envelope. The first notice of publication ran on December 23, 1975. December 26, 1975, appellant's wife wrote the executor's attorney a letter which stated she hoped all questions had been answered as she did not know what her husband had done with the letter from the attorney.

On January 8, 1976, appellant's attorney filed a special request with the probate clerk asking for notice on all proceedings in the estate. February 9, 1976, the executor's attorney hand delivered a letter and copies of all prior proceedings, including the notice of probate of the will, to the appellant's attorney. The request for notice of all proceed-

ings designated appellant's attorney as the person to receive all such information. In the meantime, the return receipt which had been attached to the letter of December 22, 1975, was returned to the probate clerk without a signature of the addressee as requested. Subsequently, at the hearing on the petition to contest the will, a postal employee testified it was likely that the machine at the post office detached the return receipt from the letter and the receipt was mailed back to the sender. In this case the letter, from which the request had been detached, would customarily be delivered by ordinary mail. In any event, the appellant (addressee) denied having received the letter of December 22, 1975. There is no direct proof that it was received by him. However, information requested in the letter was furnished. The probate of the will continued and final notices were sent to the interested parties, including appellant. No one appeared or objected to the final hearing and the estate was closed on April 4, 1976. The petition to contest the will was filed by appellant on November 20, 1978. It was denied by the court on April 4, 1979, for the reason that appellant had received actual and constructive notice of the probate of the will.

It is admitted by appellant he had actual notice as well as constructive notice of the will being probated. However, he insists there should have been personal notice as set out in Ark. Stat. Ann. § 62-2012 (Repl. 1971). This statute reads in part as follows:

> Notice. — a. When Notice To Be Given. Notice to interested persons need be given only when and as specifically provided for in this Code or as ordered by the court. When no notice is required by this Code the court, by rule or by order in a particular case, may require such notice as it deems desirable.
>
> b. Kinds Of Notice Required. Unless waived and except as otherwise provided by law, and subject to rule of the court or order of the court in a particular case specifying which of the following types of service shall be employed, notices required by this Code may be served either:
>
> (1) By delivering a copy personally to a person, if a

natural person, and if a corporation or a partnerhip by delivering a copy to an individual upon whom civil process may be legally served in behalf of the corporation or partnership, at least ten (10) days prior to the date set for the hearing; or

(2) By leaving a copy at the usual place of abode of the person being served with some person over the age of fifteen (15) years, who is a member of his family, said notice to be served by an officer authorized to serve process in civil actions, at least ten (10) days prior to the date set for the hearing; or

(3) By registered mail, requesting a return receipt signed by addressee only, addressed to the person to be served located in the United States at his address stated in the petition for the hearing, to be posted by depositing in any United States post office in this state at least fifteen (15) days prior to the date set for the hearing; or

(4) By publishing once a week for two (2) consecutive weeks in some newspaper published and having a general circulation in the county, the first day of publication to be at least fifteen (15) days prior to the date set for the hearing, and, in addition, when service by publication only is employed, all persons whose names and addresses appear in the petition shall be served by ordinary mail bearing on the envelope the return address of the clerk, in the same time and manner as provided in subsection (3) with respect to notice by registered mail, except that no registration shall be required; or

(5) By any combination of two or more of the above.

c. By Whom Prepared, Signed and Served. Except when by statute or by order of the court otherwise expressly provided, a notice in a probate proceeding shall be in writing, or print, prepared by or by procurement of the party upon whom rests the burden of giving the notice and signed by the clerk. If service is to be by

mail the person preparing the notice shall deliver the same to the clerk properly prepared for the post and the clerk shall be required only to post the same. Personal service may be made in any part of this state and, except as provided by subsection b (2) hereof, may be made by any person not an incompetent.

d. * * *

e. Service On Attorney. If there be an attorney of record for a party in a proceeding or matter pending in the court, all notices required to be served on the party in such proceeding or matter shall be served on the attorney and such service shall be in lieu of service upon the party for whom the attorney appears.

* * *

Ark. Stat. Ann. § 62-2013 (Repl. 1971) provides notice may be waived by a person submitting to the jurisdiction of the court. We believe appellant voluntarily submitted to the jurisdiction of the court on January 8, 1976, by requesting in writing that notice by ordinary mail of any petition, motion, or other filing of any kind, be sent to his attorney. All past and future notices, including notice of publication, were furnished to appellant's attorney who stated at the hearing on the petition that notice was not an issue. Appellant's attorney stated he was aware of the six-month time limit and discussed it with appellant. In fact, the attorney had a memorandum prepared for appellant regarding the possible contest of the will. Ark. Stat. Ann. § 62-2114 (Repl. 1971) provides a contest must be commenced within six months if the interested party has been notified as required by Ark. Stat. Ann. § 62-2111 (Repl. 1971). This required notice addresses itself to the procedure required by § 62-2012 which is set out above. If notice has not been afforded as set out above a contest is timely if filed within five years after admission of the will to probate.

We believe the court is supported by a preponderance of the evidence in finding that actual notice was received by appellant. No doubt the letter of December 22, 1975, was

mailed as evidenced by the fact that the post office returned the green receipt which was returned to the probate clerk plus the appellant's wife's statement that the letter had been misplaced. Also, information requested in the letter was submitted to the executor's attorney. We realize that appellant and his wife both denied receiving the letter. Even if the letter were not received, the appointment of an attorney of record to receive all notices and proceedings constituted a waiver or submission to jurisdiction of the court in this case.

The burden of proof in this instance was with appellant as to the allegations in the petition to contest the will. *Ross* v. *Edwards,* 231 Ark. 902, 333 S.W. 2d 487 (1960); *Leister* v. *Chitwood,* 216 Ark. 418, 225 S.W. 2d 936 (1950). However, the test in a will contest is whether there has been a substantial compliance with the statutes regarding probate of the will. *Thomason* v. *Ledgerwood,* 211 Ark. 327, 201 S.W. 2d 14 (1947). (This case was prior to the probate code.) *Merritt* v. *Rollins,* 231 Ark. 384, 329 S.W. 2d 544 (1959); and *Edwards* v. *Brimm,* 236 Ark. 588, 367 S.W. 2d 433 (1963). To hold in this case that appellant could contest the will would indeed place form above substance. We do not imply that the procedures set out in the statutes are not to be followed; we hold rather that such procedures have been followed in this case substantially. It is obvious appellant had full knowledge of all proceedings in this matter and has not been misled or had advantage taken of him. Admitted knowledge of the proceedings is a matter to be considered by the court. *Metcalfe* v. *Nichol,* 225 Ark. 574, 283 S.W. 2d 853 (1955). Appellant apparently changed his mind after he knowingly let the statute run on contesting the will.

We know of no rule or law which prohibits the probate judge from considering an affirmative defense which is dispositive of the case without first hearing the merits of the allegations of the petition. It appears to have been the least expensive and less troublesome method of disposing of this contest. There is no allegation that appellant was deprived of the right or opportunity to present all available evidence on the question of whether his petition was barred. All evidence relating to the contest of the will would only have burdened the record. We are not unaware of the allegations in the

petition specifically alleging that notice was not given and the five-year statute controlled. However, these issues were heard and determined adversely to the appellant. It would have served no useful purpose to hear this evidence twice. The mental and physical condition of the decedent has no bearing on the statute of limitations to be applied in this case.

Affirmed.

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

David R. PRINE *v.* STATE of Arkansas

CR 79-173 590 S.W. 2d 25

Opinion delivered December 3, 1979
(In Banc)

Alfred J. Holland, by: *Michael E. Todd,* for appellant.

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

JOHN I. PURTLE, Justice. The trial court affirmed the judgment of the municipal court when appellant failed to appear on the date his case was called in circuit court. The court also denied his motion to set aside its order affirming the municipal court judgment when appellant appeared at a later hour on the same date. This appeal is from rejection of his motion to set aside the affirmance of conviction in municipal court.

Appellant argues on appeal that the court erred by holding appellant had proper notice of the time and date for appearance in violation of Ark. Stat. Ann. § 22-311 (Repl.

1962) and the due process clause of the 14th Amendment to the Constitution of the United States; that it was error to affirm the municipal court judgment at a date prior to the cause being set for trial; that Ark. Stat. Ann. § 44-506 (Repl. 1977) is unconstitutional as applied; that it was error to fail to set aside the affirmance when appellant appeared before the court prior to adjournment on the date set for calling the docket; and that the court erred in refusing to allow appellant's attorney to plead for him on the misdemeanor.

All grounds argued for reversal essentially boil down to whether or not appellant had proper notice of the time and place he should appear and whether or not the court abused its discretion in affirming the judgment of the municipal court. In reviewing the record and the law in this case we agree appellant did not have proper notice.

Appellant was convicted of a misdemeanor in the Paragould Municipal Court on April 23, 1979. Notice of appeal was given and lodged in the Circuit Court of Greene County on May 7, 1979. The conditions of the appeal bond were, among other things, that appellant appear in the Greene County Circuit Court at its next criminal term. The next day of the circuit court met on May 14, 1979. A bench warrant was issued for appellant on May 9, 1979. Apparently the purpose of the warrant was to give appellant notice of his need to appear in court May 14. However, the warrant was never served on appellant. Appellant's attorney appeared on May 14 and announced ready for trial when the case was called. This date was used to sound the docket of all misdemeanor appeals and set them for trial at a time certain. The trial court refused to allow appellant's attorney to plead for him and immediately affirmed the judgment of the lower court when it was determined appellant was not present. Shortly thereafter, appellant, who lived in Jonesboro, was notified and appeared in court at 11:00 a.m., May 14, 1979. Relying upon failure to receive notice and various statutes, appellant moved to set aside the action affirming the municipal court judgment. The court overruled his motion and appellant appealed to this Court.

Ark. Stat. Ann. § 22-311 (Repl. 1962) states as follows:

> When any circuit court is duly convened for a regular term, the same shall remain open for all criminal, civil, or special proceedings until its next regular term, and may be in session at any time the judge thereof may deem necessary; but no such session shall interfere with any other court to be held by the same judge. If the time has not been fixed by the court, or unless in such cases they are required by law to take notice, all interested parties, together with their attorneys, shall receive notice from the clerk of the court of any proceeding affecting their rights, and shall be given time to prepare to meet such proceedings, where the defendant or respondent has answered or otherwise plead.

It is not disputed appellant did not receive actual notice of the time and place he should appear. Therefore, unless he is required by law to take notice of the date and time the Greene County Circuit Court meets, he would have been under no obligation to report on May 14, 1979, unless ordered to do so by the court.

Ark. Stat. Ann. § 44-507 (Repl. 1977) provides if an appellant fails to appear in circuit court, on appeal from municipal court, when the case is set for trial judgment may be affirmed, unless good cause be shown to the contrary. The circuit court admittedly did not send out notices to misdemeanor appellants. The bench warrant which was issued never was served upon appellant and it was the instrument intended to give appellant notice to appear May 14. Neither does the record indicate notice was sent to appellant's attorney. The testimony reflects appellant received notice at 10:00 a.m., May 14, to appear in Greene County Circuit Court on that same date. He immediately traveled from Jonesboro to Paragould and arrived in the courtroom about 11:00 a.m. Upon his arrival he was notified that his conviction in the lower court had been affirmed.

The state recites the affidavit for appeal, issued on April 23, 1979, as notice to appellant. The affidavit simply stated appellant would appear in circuit court on the first day of the next regular term of Greene County Circuit Court. Appellant appeared in Greene County Circuit Court on May 14, 1979.

No time for convening court was given in the affidavit. The state admits prejudicial error exists which requires reversal.

Ark. Stat. Ann. § 43-2102 (Repl. 1977) provides if an accused be charged with a misdemeanor the trial may be had, at the discretion of the court, in the absence of an accused. Certainly, if a trial may be had in the absence of an accused, a plea may likewise be accepted in his absence. Although there is no instrument in the record indicating May 14 was to be used solely for the purpose of sounding the misdemeanor docket, such statement by appellant is undisputed. It is not a violation of the law to allow an attorney to appear and plead for his client.

Ark. Stat. Ann. § 22-311 (Repl. 1962) requires notice shall be given by the clerk of the court in each proceeding affecting a defendant's right, in time to prepare to meet such proceedings. The clerk did not give that notice in this case. The United States Supreme Court stated in *Goss* v. *Lopez,* 419 U.S. 565 (1975):

> . . . there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

So far as appellant was concerned he had no knowledge the case had been set for trial. He appeared at 11:00 a.m. on May 14, 1979, after having been notified by telephone he should be present on that date. His affidavit and bond, filed in the municipal court, stated he would appear at the next term of the circuit court. The Greene County Circuit Court, Criminal Division, did meet at 9:30 a.m. on May 14, 1979. However, Act 505 of 1965 states that the Criminal Division of the Greene County Circuit Court shall convene on the third Monday in May. According to our calculations, this would be May 21, 1979. Therefore, it was error for the court to affirm the municipal court judgment prior to the time appellant was supposed to appear. To deny his right to request a jury trial prior to the first day of court would violate due process of law.

Reversed and remanded.

HARRIS, C.J., not participating.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur solely because it seems clear to me that the first day of the next term of the Circuit Court of Greene County, after the entry of the Municipal Court judgment, was May 21. The affidavit and bond in this case clearly indicated an appearance at the next term of that court. There is nothing in the record to indicate that any other time had been fixed by the trial court in any manner that required all litigants to take notice. Otherwise, I agree with the trial judge that all litigants, particularly those who invoked the jurisdiction of the court, are charged with notice of the convening of its terms and of times fixed in advance for the holding of said court without any notice being served on them, and that there are no due process requirements of notice of such dates.

The very reason for the constitutional provision that the circuit court be held at the times prescribed by law (Art. 7, § 12, Constitution of Arkansas) and the legislation putting the provision into execution [Ark. Stat. Ann. § 22-310 (Repl. 1962 and Supp. 1979)] is to establish a fixed time of which all persons are required to take notice. The basic rule in this regard is stated at p. 230, 21 CJS, Courts, § 148, thus:

> Where the time and place of holding a term or session of court have been properly fixed and appointed, it is the duty of parties having business at such term or session to take notice thereof, or to suffer the penalty, whatever that may happen to be, of their ignorance.***

This rule has special application to one who has invoked the jurisdiction of the court. In *Berry* v. *Sims,* 195 Ark. 326, 112 S.W. 2d 25, we said:

> The appellant wholly misconceives the functions of the court, his own duties and obligations in regard to it in

> the preparation of his case when he has once invoked its jurisdiction. When he shall have set in motion the machinery of the courts, he must take notice of the convenings and adjournments thereof and no obligation in law rests upon the defendant or anyone else to apprise the plaintiff of the fact that courts will convene according to law at regular terms or at special or adjourned sessions.
>
> It is true, courts may not serve the purpose of entrapping the unwary at special or adjourned sessions. The court may cause notice to be given where it is deemed necessary to serve the purposes of justice, but plaintiffs, when once they invoke the jurisdiction of the court, must take notice of the regular or adjourned sessions thereof.

Act 202 of 1943, digested as Ark. Stat. Ann. § 22-311 (Repl. 1962) was never intended to have the effect of relieving parties to proceedings of the requirement that they take notice of the convening of a term of court or of a day of that term to which the session is recessed or adjourned. That act was merely an application of the provisions of Initiated Act No. 3, adopted by the people on November 6, 1936, which made the courts open at all times for criminal proceedings. See § 31, Act 3 of 1936; Leflar, *The Criminal Procedure Reforms of 1936 — Twenty Years After,* 11 Ark. L. Rev. 117, 135. This statute only requires notice when the interested parties are not otherwise required by law to take notice and when the time for a session has not been previously fixed by the court by proper order.

I am not in complete agreement with the majority's statement about the appearance of one such as appellant by his attorney, where, as in this case, imprisonment could be a part of the punishment. It is purely a matter of discretion with the court whether the defendant on a misdemeanor charge shall be permitted to answer the charge by his attorney, without personally appearing in court himself, and the exercise of that discretion cannot be reviewed by this court on appeal, except for abuse. *Warren* v. *State,* 19 Ark. 214; *Bridges* v. *State,* 38 Ark. 510; *Owen* v. *State,* 38 Ark. 512.

See also, *Sweeden* v. *State*, 19 Ark. 205; *Henderson* v. *Town of Murfreesboro*, 119 Ark. 603, 178 S.W. 912; *Martin* v. *State*, 40 Ark. 364.

Donald FRANKLIN et ux *v.* STATE of Arkansas et al

79-191 590 S.W. 2d 28

Opinion delivered December 3, 1979
(In Banc)

Gibson & Gibson, P.A., by: *R. Bynum Gibson, Jr.*, for appellants.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellees.

JOHN I. PURTLE, Justice. The prosecuting attorney of the tenth judicial district filed a petition for abatement of a nuisance, pursuant to Act 118 of 1937 (Ark. Stat. Ann. §§ 34-111 — 119 [Repl. 1962]). The alleged nuisance was a dance hall owned and operated by appellants. On April 30, 1979, the court ordered the dance hall temporarily padlocked without a hearing and without notice to appellants. The order met the requirements of Ark. Stat. Ann. § 34-115 (Repl. 1962). A hearing was held on May 5, 1979, and the order padlocking the property was continued in force pending a final hearing. The trial court upheld the constitutionality of Act 118 of 1937.

The facts are undisputed in this case. Without a hearing or notice to appellants, the prosecuting attorney procured the order from the circuit court padlocking appellants' property on the ground that it was a public nuisance. The only notice received by appellants was the temporary order padlocking their premises and it was nailed to the door of their business in their absence. Appellants applied to this Court for a temporary writ of prohibition which we denied without prejudice, pending the hearing to be held the same day on the order padlocking the premises. At the hearing on May 5, 1979, the trial court determined Act 118 of 1937 was constitutional and extended the order padlocking the property until the permanent hearing on June 7, 1979. Appellants returned to this Court for a temporary writ of prohibition and we granted temporary relief and ordered the matter briefed pursuant to our Rule 16.

Ark. Stat. Ann. § 34-111 (Repl. 1962) states:

> "Dance hall" defined. — Term "dance hall" as used in this act (§§ 34-111 — 34-119) is hereby construed to mean any building, premise, pavilion, or place of business wherein dancing is permitted or conducted, or engaged in, by the public in general, either for profit or not.

Ark. Stat. Ann. § 34-112 (Repl. 1962) states:

> Dance hall as nuisance. — The operation of a dance hall in which, or around which, public disturbances, the unlawful drinking of intoxicating liquors, quarrels, affrays, or general breaches of the peace are frequent, is hereby declared to be a public nuisance, and detrimental to the public morals and may be abated under the provision of this act (§§ 34-111 — 34-119) as hereinafter set out.

Ark. Stat. Ann. § 34-113 (Repl. 1962) grants the prosecuting attorney, among others, authority to proceed under this Act, either in chancery or circuit courts. Ark. Stat. Ann. § 34-115 (Repl. 1962) provides a temporary injunction may be granted without notice or hearing as was done in the present case.

This same Act was considered in the case of *Futrell* v. *State,* 207 Ark. 452, 181 S.W. 2d 680 (1944). In *Futrell* the trial court ordered all the buildings "be closed and not hereafter be used for any purpose whatever for a period of twelve months except by order of the court." We held the order exceeded the powers granted to the court under the statute; because at the time the order was made there had been no contempt proceedings. Prior cases had held such premises could be completely closed for all purposes only where there was a violation of a prior injunction prohibiting unlawful conduct on the premises. We also considered this Act in the case of *Lawson* v. *State,* 226 Ark. 170, 288 S.W. 2d 585 (1956). We modified the order of the trial court which had padlocked a dance hall for a period of one year preventing its operation for any purpose. We reduced the order to one enjoining the use of the property or permitting it to be used for illegal purposes for a period of one year. The order in *Lawson* was the same as that in *Futrell* in that it provided all persons be enjoined "from operating the said place for any purpose whatsoever for a period of one year from this date." We held the order was too broad as the statute was intended to abate the nuisance rather than close the property for all purposes. Citizens have the right to use their property in a

legal manner and courts should not interfere with such rights unless compelled to do so.

We do not find we have previously been asked to view Act 118 of 1937 as to its constitutionality. The case of *Vandergriff* v. *State,* 239 Ark. 1119, 396 S.W. 2d 818 (1965) concerned Act 109 of 1915. The statutes are very similar but they are different. Additionally, the holding of constitutionality in *Vandergriff* was dicta. In the present case the constitutionality of the Act has been squarely presented to us from the beginning. It was raised at the first opportunity and has continued to be a defense in this case. Therefore, we will consider the question of its constitutionality.

Article 2, section 21 of the Constitution of the State of Arkansas states:

> No person shall be taken or imprisoned, or disseized of his estate, freehold, liberties or privileges; or outlawed or in any manner destroyed or deprived of his life, liberty or property, except by the judgment of his peers or the law of the land; nor shall any person, under any circumstances, be exiled from the State.

The Fifth Amendment to the Constitution of the United States requires that no person be deprived of life, liberty or property, without due process of law. Amendment 14, section 1 to the Constitution of the United States reads in part as follows:

> . . . 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.

In *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), the United States Supreme Court considered a somewhat similar case. The Florida statute under consideration provided for taking of property in a summary manner without notice or hearing. In *Fuentes* the Court stated:

> The constitutional right to be heard is a basic aspect of

> the duty of government to follow a fair process of decision making when it acts to deprive a person of his possession. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment — to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our consitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

The Court further stated the requirement of notice and an opportunity to be heard raised no impenetrable barrier to the taking of a person's property. Such safeguards are necessary to avoid unfair or mistaken deprivation of property interest. In *Goss* v. *Lopez,* 419 U.S. 565 (1975), the United States Supreme Court spoke of constitutional safeguards in the following language:

> . . . there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

In the more recent case of *Barry* v. *Barchi,* 47 U.S.L.W. 4812 (S. Ct. June 25, 1979), the Court dealt with a temporary injunction very similar to the one in question. In *Barry* the state had temporarily taken a horse trainer's license, without notice or hearing, because one of his horses, which had finished in the money, was determined to have been drugged. The New York rule, like our statute, provided for temporary suspension of the license without notice or hearing. The United States Supreme Court held that the trainer was entitled to a meaningful hearing before his license could be taken from him. In *Gerstein* v. *Pugh,* 420 U.S. 103 (1975), the Supreme Court struck down a Florida statute which allowed a person to be placed in jail without an opportunity

for a probable cause determination. In *Pugh* the Court stated:

> Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment.

Fundamental requirements of due process require the opportunity to be heard at a meaningful time and a meaningful place before a person may be deprived of life, liberty or property. A temporary injunction, under the circumstances of this case, ordinarily turns into a permanent one. Even a delayed hearing is to a great extent an exercise in futility because even if the rights be restored the deprivation of rights during the temporary injunction cannot be regained. The statute in question here specifically allows the state to proceed without a bond. Therefore, damages incurred as a result of a wrongful temporary injunction would seldom, if ever, be recovered. The record in this case clearly shows there was no threat to life, liberty, or property, at the time the injunction was issued. In fact, the record does not disclose that there was anything more than drinking outside the building going on at this place. There were allegations that fights and other disturbances had occurred but all of the witnesses who testified denied personal knowledge of such occurrences. Merely operating a dance hall is not of itself illegal. Unlawful activities are often carried on outside other places of business.

We hold the statute authorizing a temporary or permanent injunction without notice and an opportunity to be heard fails to meet the fundamental requirements of the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States and article 2, section 21 of the Constitution of the State of Arkansas. The statute is so broad as to allow the closing of a place of business merely upon the verified allegation of a prosecuting attorney without any proof whatsoever in support thereof. The opportunity for abuse of power in such cases is too great to be allowed to continue. Even an honest mistaken belief that a nuisance

was being carried on would deprive the person of his property without due process of law. Therefore, we hold that Act 118 of 1937 is unconstitutional. The case is reversed and remanded with directions for the trial court to dissolve the injunction and cause the property to be returned to the appellants.

Reversed and remanded.

HARRIS, C.J., not participating.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent because I do not think the rigid due process requirements insisted upon by the majority are appropriate in this case or mandated by the due process clauses of the Constitution of Arkansas and the Fifth and Fourteenth Amendments to the United States Constitution. In none of the cases cited by the majority is there the combination of factors presented here. The governmental interest in the prompt and effective abatement of public nuisances is one important factor. In addition, the proceedings are conducted in accordance with procedures in chancery courts, and all courts before which such proceedings are brought have all the jurisdiction and powers of equity courts. Ark. Stat. Ann. § 34-116 (Repl. 1962). Chancery court procedure with reference to injunctions is governed by Rule 65, Rules of Civil Procedure. Under Rule 65 (b), upon application of the party against whom a preliminary injunction or temporary restraining order has been issued without notice, the court *shall* as expeditiously as possible, hold a hearing to determine whether it should be dissolved.

Due process requirements of notice and hearing are not absolute. A great deal of flexibility exists in the requirements of due process of law, which calls only for such procedural protections as the particular situation demands. *Morrissey* v. *Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). Where there is an important government interest involved, the requirements are much less strict than when only private interests are involved. The availability of a prompt hearing at

the instance of the party against whom the governmental action is directed is an important factor in determining whether process is due. In my opinion, the fundamental right to due process is fully recognized and protected by this statute.

In *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), relied upon by the majority, the United States Supreme Court held the statutory procedures violative of due process only because debtors were deprived of their property without provision for hearings at *a meaningful time,* but the court fully recognized that, in limited circumstances, immediate seizure of a property interest, without an opportunity for a prior hearing, is constitutionally permissible. Those circumstances are those in which:

> 1. The seizure has been directly necessary to secure an important governmental or general public interest;
>
> 2. There has been a special need for very prompt action; and
>
> 3. The state has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in this instance.

See *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974), where specific instances were mentioned, viz:

> Thus, for example, due process is not denied when postponement of notice and hearing is necessary to protect the public from contaminated food, *North American Storage Co.* v. *Chicago,* 211 U.S. 306 (1908); from a bank failure, *Coffin Bros. & Co.* v. *Bennett,* 277 U.S. 29 (1928); from misbranded drugs, *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U.S. 594 (1950); to aid the collection of taxes, *Phillips* v. *Commissioner,* 283 U.S. 589 (1931); or to aid the war effort, *United States* v. *Pfitsch,* 256 U.S. 547 (1921).

Even if the holding in *Vandergriff* v. *State,* 239 Ark. 1119, 396 S.W. 2d 818 is now taken to be dictum, I submit that it is sound and correct and that it should be followed, not overruled.

It may well be that the statute was unconstitutionally applied in this case, but, for some reason, appellants narrowed their attack to the facial constitutionality of the statute. It seems to me that the majority, however, is taking the wholly unwarranted step of holding the statute unconstitutional on its face. As a result, it seems that, until the General Assembly can act, there will be no means of abating a public nuisance of the nature covered by the existing statute, however great that nuisance may be. See *The Rendezvous Club* v. *State,* 247 Ark. 670, 447 S.W. 2d 842.

GATZ INSURANCE AGENCY, INC.
et al *v.* Martha CHAMBERLAIN

79-280 590 S.W. 2d 283

Opinion delivered December 10, 1979
(In Banc)

Herrn Northcutt and *Frierson, Snellgrove & Laser,* by: *G. D. Walker,* for appellants.

Dennis Zolper, for appellee.

GEORGE ROSE SMITH, Justice. This is a claim for unemployment compensation. The various administrative agencies denied the claim, finding that the claimant voluntarily quit her job without good cause connected with her work. Ark. Stat. Ann. § 81-1106 (a) (Supp. 1979). The circuit court reversed, sustaining the claimant's contention that her claim falls within an exception in the same subsection, providing that "no claimant shall be disqualified under this subsection if he has voluntarily left his last work to accompany, follow, or join the other spouse in a new place of residence." *Id.*

On July, 7, 1978, the claimant, a resident of Jonesboro, voluntarily left her employment in order to marry Robert J. Chamberlain and move to Indiana, where Chamberlain was living. The couple were married in Tennessee three days later, on July 10, and took up their residence in Indiana.

Even construing the statute liberally, we cannot agree with the circuit judge's extension of its language to reach this case. A spouse, by definition, is a married person, a husband or wife. This claimant was not married when she left her job and thus could not have quit to accompany, follow, or join "the other spouse." The statute as written has *certainty,* which the legislature presumably considered to be desirable; it applies *only* to married persons. But if the statute is interpreted to apply also to a single person who intends to get married three days later, it might equally well apply to one who intends to get married three weeks or three months later. A rule of liberal construction does not mean that the courts are free to substitute vagueness for precision.

The claimant also states that she was "technically" still employed at the time of her marriage, because she was entitled to two weeks' accrued vacation pay when she quit. The record, however, does not even raise an issue of fact on this point, much less establish the claimant's contention. There is no indication whatever that the claimant decided to go on a vacation without terminating her employment. To the contrary, she left for the specific purpose of getting married and moving to another state. She was voluntarily unemployed and free to accept another job on the day she left Jonesboro. The administrative agencies did not find, and

indeed had no basis for finding, that the claimant was still employed by the appellant when she was married three days after she left her work.

Reversed.

HARRIS, C.J., not participating.

PURTLE, J., dissents.

JOHN I. PURTLE, Justice, dissenting. I cannot agree with my brothers in this opinion. The only question is whether appellee quit her job to join her husband. The trial court was absolutely correct in holding that she quit to join her husband. When she left her employment it was for the purpose of joining Robert J. Chamberlain. When she arrived in Indiana he was her husband. It is true that for two days following her last day of work she was not married. However, when she arrived at her new home in Indiana she joined her husband, the express purpose of her leaving her job. It is entirely too technical to disqualify her because she did not marry at least one day before leaving her employment.

We have always construed this statute to confirm to the intent of the General Assembly, until this time anyway, that being to protect people who are unemployed. In the present case we have turned the other direction and given assistance to the cause of increasing the number of unemployed who cannot draw unemployment benefits. In my opinion, the common-sense interpretation of this statute would allow this lady to draw benefits.

HOUSTON CONTRACTING COMPANY et al *v.* Jessie T. YOUNG

79-297 590 S.W. 2d 653

Opinion delivered December 10, 1979
(In Banc)

Laser, Sharp, Haley, Young, Huckabay, P.A., for petitioners.

Shackleford, Shackleford & Phillips, P.A., for respondent.

GEORGE ROSE SMITH, Justice. When two states both have grounds for asserting jurisdiction over a claim for workers' compensation benefits, do payments of compensation made to the injured worker under the laws of one of the states toll the statute of limitations as to a claim later filed in the other state? The few existing decisions in other jurisdictions are split. Larson, Workmen's Compensation, § 78.43 (a) (1976). In the present case our Commission held that running of the statute is not suspended, because payments made under the law of another state do not constitute the "payment of compensation" within the meaning of our statute of limitations. Ark. Stat. Ann. § 81-1318 (b) (Repl. 1976). The Court of Appeals reversed. On review we explained our reasons for

granting certiorari in this particular case. *Houston Contracting Co.* v. *Young,* 267 Ark. 44, 589 S.W. 2d 9 (1979).

There is no doubt that both Arkansas and Texas might have asserted jurisdiction in this case. The claimant was a resident of Arkansas when he was first hired by this employer to work on a construction job in Arkansas in 1941. The employer is licensed to do business in Arkansas. The claimant continued to reside in Arkansas during the 33 years that he worked for the company, in Arkansas, in Texas, and in other states. He was still a resident of Arkansas in 1974 when he injured his back while working for the company on a construction job in Vidor, Texas. He underwent medical treatment and surgery in Arkansas and Texas. The employer has its headquarters in Houston, Texas. The insurance carrier, without controverting the claim, made payments under the Texas compensation law until the claimant employed counsel and filed a claim in Arkansas. The parties do not question the possible jurisdiction of either state.

The Court of Appeals, in disagreeing with the Commission, relied upon *Auslander* v. *Textile Workers Union of America,* 397 N.Y.S. 232, 59 A.D. 2d 90 (1977). There the court undertook to reconcile the conflicting results in other states. The court reasoned that the claimant, on the one hand, should be bound by his acceptance of an official award of compensation in one state if he had actively participated in the procurement of the award and if the employer or insurance carrier had not improperly or in bad faith channeled the claim into that state. If the claimant, on the other hand, did not know that the payments he was receiving were pursuant to the laws of another state, and the payments were not made under an official award, "an employer's or carrier's contention that the payment is 'under the laws of another state' is a self-serving claim which should not be given effect." The New York court concluded that the issue there was one of fact and remanded the cause to the compensation board for further proceedings.

We agree with the general view expressed by the New York court and adopted by our own Court of Appeals, but we disagree with the latter's apparent assumption that no issue of fact is presented in the case at bar. Here no award

appears to have been made in Texas; so it cannot be said that the claimant has elected to proceed under Texas law by actively participating in the procurement of compensation in that state. On the other hand, the claimant testified that his compensation checks came from Beaumont, Texas, and that in response to a letter from the Texas Industrial Accident Board he had filled out a form describing how the accident happened and what treatment he had received. Thus this case, like the one in New York, falls somewhere between the two possible extremes. The Commission must weigh the competing considerations of policy to decide whether the running of the Arkansas statute was tolled by the Texas payments.

The issue was not fully developed in the testimony before the administrative law judge and in fact was not actually decided by the Commission, which treated the question as one of law. We shall not attempt to speculate about the controlling considerations of fairness to be followed when the facts have been fully developed and finally determined. The cause is remanded to the Court of Appeals with directions that it be sent back to the Commission for further proceedings.

Modified and remanded.

HARRIS, C.J., not participating.

FARM SERVICE COOPERATIVE, INC.
v. GOSHEN FARMS, INC. et al

78-196 590 S.W. 2d 861

Opinion delivered December 10, 1979
(In Banc)
[Rehearing denied January 14, 1980.]

Dickson & Ball, for appellant.

Jones & Segers and *Pearson & Pearson,* by: *Thomas Pearson;* for appellees.

JOHN A. FOGLEMAN, Justice. Appellant Farm Service Cooperative, Inc. questions the propriety of a summary judgment dismissing its counterclaim against Goshen Farms, Inc. and cross-complaint against George Melbourn and Carl Rose. This pleading was filed in a suit brought by Goshen Farms, Inc. (hereafter referred to as Goshen) against Farm Service Cooperative, Inc. (hereafter called Farm Service).

The questions at issue will be better understood if we first develop some of the background about which there seems to be no dispute. Goshen leased a dwelling house and four poultry houses, and the equipment therein, to Farm Service by written lease dated March 19, 1969 for a term of three years beginning April 2, 1969. Melbourn and Rose were the only two stockholders of Goshen. Each of them owned one-half of the outstanding capital stock. Melbourn was employed as general manager of Farm Service until his employment was terminated on or about August 15, 1970.

After the termination of the lease Goshen filed an action in the Circuit Court of Washington County (No. 8360) on May 17, 1972, seeking a declaratory judgment declaring the rights of the parties to the lease and recovery of damages for injury to the leased property allegedly done by Farm Service. By agreement of the parties, that part of Goshen's complaint seeking declaratory judgment was tried and a jury verdict adverse to Goshen was rendered on May 12, 1973. It was agreed by the attorneys for the parties that the portion of Goshen's complaint seeking recovery of damages would be deleted and that Farm Service would not plead prior adjudication if an action for damages to personal property should subsequently be filed.

On December 1, 1972, Melbourn had filed an action (No. 8749) against Farm Service claiming damages for the alleged breach of his contract of employment by Farm Service. This case was tried beginning February 3, 1975. A jury verdict in favor of Farm Service was returned on February 5, 1975, and judgment was entered pursuant to that verdict.

On May 24, 1974, Goshen Farms did file an action (CIV 74-351) in the Circuit Court of Washington County seeking to recover $6,000 damages for injury to personal property. This complaint was amended to increase the amount of damages sought to $7,500 on December 5, 1975. This case was set for trial on September 10, 1976, but it was dismissed without prejudice by Goshen Farms on September 2, 1976.

The present action was filed on January 17, 1977. In its complaint, Goshen again alleged that the use of the leased

property and equipment by Farm Service caused extensive damage to the property and equipment, and that Farm Service had breached the lease contract by failure to comply with its agreement to return the leased premises, property and equipment to Goshen upon termination of the lease in the same condition they were at the time Farm Service took possession. Goshen sought damages of $7,500. Farm Service filed an answer, which was a general denial, reserving the right to amend and to file other pleadings if further investigation and discovery procedures warranted the filing of additional pleadings.

Farm Service did file its counterclaim and cross-complaint on April 6, 1977. It alleged that: Goshen was the alter ego of George Melbourn and Carl Rose; and that Melbourn and Rose, through their alter ego, Goshen, had instituted civil action against it for declaratory judgment and for damages on May 17, 1972; that Melbourn had brought his action against Farm Service on December 1, 1972; that on May 24, 1974, Melbourn and Rose, through their alter ego, Goshen, had instituted another action for damages against Farm Service, which it dismissed shortly before the designated trial date; that each action was terminated favorably to Farm Service and that each of them and the present action had been brought by Melbourn and Rose maliciously and without probable cause and for the purpose of harassing Farm Service; that Goshen had, through Melbourn, repeatedly made threats to institute additional civil actions against Farm Service; that Farm Service had been compelled to pay $20,455.12 in attorney's fees in connection with these actions and would be required to pay additional attorney's fees in defending this action; and that appellant was entitled to recover exemplary damages. Farm Service prayed for its attorney's fees, $10,000 exemplary damages and dismissal of the complaint.

The demurrers of Goshen, Melbourn and Rose were overruled on May 12, 1977. Goshen's reply and the answer of Melbourn and Rose were consolidated in a pleading filed May 25, 1977. They denied that Melbourn and Rose, acting through their alter ego, Goshen, had, on May 17, 1972, commenced a civil action against Farm Service, but admit-

ted that Goshen had, on May 17, 1972, commenced a civil action, and that, by an agreement between the attorney for Goshen and the attorney for Farm Service, the issue of damages to property was to be severed and handled in separate litigation.

On April 12, 1978, Goshen, Melbourn and Rose filed their motion for summary judgment on the counterclaim and cross-complaint filed against them by Farm Service, asserting that there was no justiciable issue of fact and that Goshen was not the alter ego of Melbourn and Rose. The motion was based upon the pleadings and judgments in all the actions previously mentioned, including those in the present action, all of which were made exhibits to the motion, along with the following:

1. The affidavit of F. H. Martin, the attorney of record for Goshen in the action filed against Farm Service on May 17, 1972, stating the agreement relating to splitting of that cause of action, so the portion relating to the declaratory judgment on the lease agreement could be tried without prior adjudication being pleaded when the cause of action for damages to personal property was filed. The agreement was confirmed by letter to Martin from James F. Dickson, dated April 25, 1974.

2. The docket sheet in the case of Goshen against Farm Service (No. 74-351), showing an entry dated September 2, 1976, over the signatures of Thomas Pearson and Joseph William Segers, Jr., dismissing the action without prejudice.

3. Responses of Goshen, through its president George Melbourn, to interrogatories propounded to it by Farm Service in No. 74-351.

4. The affidavit of Carl Rose that he was one of the incorporators of Goshen, which was organized and incorporated in December, 1975 and early 1976, that shortly thereafter all the stockholders, except for himself and Melbourn, "passed out of the picture," and that, at the time of the filing of cause No. 8749 by

Melbourn and at all times subsequent thereto, he and Melbourn were the only stockholders of Goshen; and that Goshen Farms, Inc. is a separate entity from him and Melbourn, and that it is still in existence as a corporation.

In its response to the motion for summary judgment, Farm Service asserted that Goshen, Melbourn and Rose were not entitled to judgment as a matter of law upon the ground that the verified pleadings in the case, discovery depositions and interrogatories showed that there remained disputed questions of fact. The affidavit of Walter F. Losey, general manager of Farm Service, was filed with this response. In the affidavit, Losey stated that: after Melbourn was fired as general manager of Farm Service on August 15, 1970, he made numerous statements to Losey and others that he would get even with Farm Service, or words to that effect; that on November 20, 1977, Rose indicated to Farm Service that he was turning over the decision-making process of the corporation to Melbourn; after relating the allegations of the counterclaim and cross-complaint as to the various lawsuits, that no probable cause existed for the filing of the actions; and that Melbourn had also repeatedly made threats to institute additional civil actions against Farm Service.

The circuit court's order granting summary judgment dismissing the counterclaim and cross-complaint was based upon the following reasons:

> The original Case No. 74-351 claimed damages for breach of contract in failing to vacate the premises and excessive damages to poultry equipment. The attorneys for the parties stipulated that the cause of action for damages to poultry equipment should be passed for trial at a future date. The cause of action seeking damages for breach of contract for failing to renew lease resulted in a verdict for defendant.
>
> The contents of the Complaint show no indiscretion or malice expressed or implied. The doing of something a person has a legal and procedural right to do is no basis for malice.

The present suit by Goshen against Farm Service has no connection with the employment controversy between Farm Service Cooperative and George Melbourn. The fact that George Melbourn was a substantial stockholder in Goshen Farms, Inc., in itself is immaterial in piercing the corporate entity unless one of the following is alleged and proved:

(1) To prevent a contravention of governmental policy.
(2) In case of a national emergency.
(3) Fraud.
(4) Inequity of limited liability.
(5) Injustice to controlling shareholder.
(6) Oppression of a shareholder's interest.
(7) Jurisdictional and procedural factors.

None of these grounds have been alleged or proved nor is there any proof of them to justify piercing the corporate entity and holding George Melbourn and Carl Rose personally liable as to the counterclaim for malicious prosecution. The counterclaimant must allege and prove the original proceedings terminated in his favor, *Coffelt* v. *Gordon,* 239 Ark. 619. In addition, Farm Service Cooperative must allege and prove that the proceeding terminated in such a manner that it cannot be revived.

This part of the suit is still pending and unresolved.

The Farm Service Cooperative might well have some cause against Goshen Farms as to the first suit as it was terminated in its favor but such suit would have to be a separate cause of action in another suit. Lack of probable cause in the first suit must be proved independently of the element of malice, *Gazzola* v. *New,* 191 Ark. 724.

The essential elements for the tort of malicious prosecution are:

(1) A proceeding instituted or continued by the de-

fendant against the plaintiff.
(2) Termination of the proceeding in favor of the plaintiff.
(3) Absence of probable cause for the proceedings.
(4) Malice on the part of the defendant.
(5) Damages.

The Farm Service Cooperative in its brief refers to allegations of "Malicious Abuse of Process" but a careful reading of the counterclaim fails to reflect any such allegation.

Farm Service Cooperative refers to the nonsuit of 74-351 of the claim for damage to poultry equipment, which is the same allegation that is contained in this suit, as malicious. The taking of a nonsuit and refiling within one year is a statutory right given to any litigant and cannot be considered as evidence of malice or want of probable cause. This nonsuit also is not a final determination of the lawsuit upon which a suit for malicious prosecution could be brought.

We do not agree with appellees that the order granting summary judgment is not appealable, as a final judgment. It dismisses the counterclaim, and thereby discharges both Melbourn and Rose from this action. The dismissal of this counterclaim was not by granting a motion for dismissal but by summary judgment. A summary judgment could be a judgment on the merits. 6 Moore's Federal Practice (2d Ed.) 56-55, § 56.03. As such, it could be conclusive as to the rights of appellant as to some portions of his counterclaim in a future action. We view the requirements of finality in such a case from a practical, rather than technical, approach. *Purser* v. *Corpus Christi State National Bank,* 256 Ark. 452, 508 S.W. 2d 549. When we do, we find this order appealable.

We stated the rule of finality in *Johnson* v. *Johnson,* 243 Ark. 656, 421 S.W. 2d 605. There we said:

*** For a judgment to be final and appealable, it must in form or effect: terminate the action; operate to divest some right so as to put it beyond the power of the court

to place the parties in their former condition after the expiration of the term; dismiss the parties from the court; discharge them from action; or conclude their rights to the matter in controversy.

Appellant contends that the counterclaim and motions for summary judgment present a question of fact concerning the issue of malicious prosecution. The parties agree that the trial judge correctly stated the elements of the tort of malicious prosecution.

Appellant alleged that there was no probable cause for any of the actions by Melbourn or Goshen, and that they were brought maliciously. Although both are essential elements of the tort of malicious prosecution, malice and probable cause are not convertible terms and neither follows as a legal presumption from the other. *Foster* v. *Pitts,* 63 Ark. 387, 38 S.W. 1114. The two elements must concur. *Gazzola* v. *New,* 191 Ark. 724, 87 S.W. 2d 68. Although a jury may infer malice from lack of probable cause, lack of probable cause may not be inferred from malice. *Malvern Brick & Tile Co.* v. *Hill,* 232 Ark. 1000, 342 S.W. 2d 305; *Louisiana Oil Refining Corp.* v. *Yelton,* 188 Ark. 280, 65 S.W. 2d 537; *Foster* v. *Pitts,* supra; *Chicago, R.I. & P. Ry. Co.* v. *Gage,* 136 Ark. 122, 206 S.W. 141. The burden was on appellees, as movants, to show that there were no justiciable issues of fact. *Lee* v. *Westark Investment Co.,* 253 Ark. 267, 485 S.W. 2d 712. There is nothing in the affidavits or documents filed with the motion for summary judgment to show that there was any probable cause for the actions. Consequently, we must say that appellees have failed to show that there is not a justiciable issue as to lack of probable cause for them; and, since malice may be inferred from lack of probable cause, there was an issue of facts as to malice. This does not mean that the motion for summary judgment must be reversed in its entirety.

Insofar as the declaratory action is concerned, there has been a final determination of the action favorable to appellant, and, if the other elements of the tort of malicious prosecution exist, summary judgment would not be proper. We do not agree that a suit for malicious prosecution on

account of this action could only have been brought as a separate cause of action. Under Ark. Stat. Ann. §§ 27-1121, 27-1123 (Repl. 1962) this cause of action would be barred if not asserted by way of counterclaim in the present action. *May* v. *Exxon Corporation,* 256 Ark. 865, 512 S.W. 2d 11. Of course, the suit by George Melbourn against Farm Service had been terminated favorably to appellant. But the action against George Melbourn for malicious prosecution on that account is not properly the basis of a cross-complaint in the present action unless Goshen is the alter ego of Melbourn. The mere fact that Melbourn owned 50% of the stock of the corporation does not make that corporation his alter ego. Actually, the fact that someone else owns one-half of the corporate stock is a strong indication that it is not.

The affidavit of Rose clearly refutes the allegations of Farm Service that the corporation was the alter ego of Melbourn. It is not alleged that Rose is the alter ego of Melbourn or that he had anything to do with the action brought by Melbourn. Nothing in the sole affidavit presented by Farm Service refutes the statements in the affidavit of Rose. The statement of Rose to Losey, that he was turning the management decisions over to Melbourn, made after the present action was begun, does not begin to support the allegations of Farm Service or refute Rose's statements. There simply is no basis shown for piercing the corporate veil, either by the allegations of the complaint or by the affidavits filed. "... [W]hen the movant makes a prima facie showing of entitlement to the relief sought, the respondent must remove the shielding cloak of formal allegations and demonstrate a genuine issue as to a material fact." *Miskimins* v. *City National Bank,* 248 Ark. 1194, 456 S.W. 2d 673.

There certainly is no basis for a counterclaim for malicious prosecution in the filing of the present action. One of the elements of that tort is termination of the proceeding in favor of the party seeking recovery for malicious prosecution. *Coffelt* v. *Gordon,* 239 Ark. 619, 390 S.W. 2d 633. This action had not been terminated when the counterclaim and cross-complaint were filed or until the motion for summary judgment was granted against Farm Service, so an essential element of the cause of action as to the present complaint is

missing. As a matter of fact no action by Goshen for damages to personal property has been terminated favorably to Farm Service. The deletion of the damage claim from the first action by Goshen by agreement of the parties was certainly not a termination of the proceeding, when it was expressly agreed that prior adjudication would not be pleaded. The dismissal without prejudice of the next action by Goshen was permissible and was not a termination of proceeding in the sense required by the definition of malicious prosecution. In *Coffelt* we pointed out that, until a complaining party has shown that the action against him was unsuccessful, he has not shown that he has suffered any damage, so if he were permitted to sue before he had won the first suit, he might secure a recovery for the bringing of an action which the court entertaining it might find to be well brought.

The present action was permissible under Ark. Stat. Ann. § 37-222 (Repl. 1962); *Oliver* v. *Miller,* 239 Ark. 1043, 396 S.W. 2d 288; *Campbell* v. *Coldstream Fisheries,* 230 Ark. 284, 322 S.W. 2d 79. Until it is concluded, there is no basis for a cause of action against Goshen for malicious prosecution on the claim for damages for injury to personal property. The summary judgment as to that cause of action was correct because it was prematurely brought.

A similar situation was considered in *Hales* v. *Raines,* 162 Mo. App. 46, 141 S.W. 917 (1911), a malpractice action brought after the plaintiff had suffered an involuntary non-suit in a prior suit instituted against a physician on the same cause of action, except for some allegations of negligence omitted in the second suit. The defendant filed a counterclaim for malicious prosecution in the second suit based on the omitted allegations of negligence. The trial court peremptorily instructed a verdict for the plaintiff on the counterclaim. On appeal it was held that this action was proper because it could not be said that the cause of action was concluded or its prosecution ended by the non-suit. The court there said:

> *** One matter which it is essential to show in a suit for malicious prosecution is that the prior prosecution or

> suit is ended, and plaintiff in the malicious prosecution action is finally discharged therefrom. Until such appears, no cause of action as for a malicious prosecution has accrued, for the very good reason that plaintiff in the suit alleged to have been maliciously prosecuted may finally prevail, and thus put an end to the whole matter. In this view the courts universally declare that, where a suit or prosecution has been commenced and afterwards dismissed with the intention of commencing it over again on the same cause of action, and it appears that it has been subsequently commenced thereon, such prior dismissal amounts to no more than a suspension of the prosecution, and is not an ending thereof in the legal sense essential to support a suit for malicious prosecution of the prior action. In other words, until the subsequent suit on the same cause of action is finally disposed of adversely to plaintiff therein, defendant may not maintain a suit on account of its malicious prosecution; for, in contemplation of law, the prior suit is regarded as still pending. ***

We agree with that court and its holding, where, as here, there was a voluntary non-suit, with the right to refile the action within one year.

Appellant relies upon *Greer* v. *Cook,* 88 Ark. 93, 113 S.W. 1009, to support its contention that a cause of action for abuse of process was stated. It reads the opinion in that case as holding that when any action is commenced for vexation and oppression there is an abuse of process. This was not the holding in *Greer*. There we held that the remedy for the institution of a suit by a creditor in a foreign jurisdiction, after a suit on the same cause of action had been reduced to judgment in a justice of the peace court in Arkansas and while an appeal from that judgment was pending, for the sole purpose of vexation and oppression of the judgment debtor, was an action at law for the malicious abuse of process, upon the authority of *Baxley* v. *Laster,* 82 Ark. 236, 101 S.W. 755, 10 LRA (n.s.) 983, 118 Am. St. Rep. 64. It is significant that in *Greer* a writ of garnishment had been issued and served upon the judgment debtor's employer in Arkansas and that the new suit in the foreign jurisdiction included garnishment

proceedings against the employer to seize the same wages covered by the Arkansas garnishment, allegedly for the purpose of defeating the judgment debtor's exemptions in Arkansas.

The trial court correctly held that there were no allegations which would support a cause of action for abuse of process. The following comments on this cause of action in a note entitled "Malicious Prosecution — The Law in Arkansas," by Larry C. Wallace, in Arkansas Law Review, Vol. 22, p. 340 at p. 355 et seq, are appropriate.

> *** This narrow tort, seldom used in Arkansas, means exactly what it says: it is the misuse of some court process, civil or criminal, after it has been properly obtained, for some ulterior purpose not contemplated by law.
>
> The essential elements of abuse of process are usually stated to be: first, an illegal, improper use of the process; second, an ulterior purpose which culminated in the abuse; and third, a resulting damage. In an action for malicious prosecution the court concentrates on the facts before the action was commenced, while in an action for abuse of process, the question is whether the use or application of legal process, after it was issued, was one for which it was designed.
>
> Abuse of process is used as a label for a variety of situations where the circumstances will not warrant an action for malicious prosecution. Use of judicial process which has been held to justify an action for abuse of process includes: (1) wilful and malicious arrest of plaintiff when his innocence is known; (2) personal service procured by fraud; (3) excessive execution on a judgment; (4) vexations and oppressive suits in a foreign jurisdiction, and (5) attachment or garnishment for a greatly excessive amount.

See also, *Baxley* v. *Laster,* supra.

There is nothing here even suggestive of such a cause of

action as the author of that note properly describes. Examples of abuse of process are found in some of our decisions. In *Baxley,* we held that a judgment debtor's allegations that repeated issuance of writs of garnishment by a judgment creditor were to annoy, vex and harass the debtor, to tie up the wages which were his only means of support, and to cause him to lose time and incur expenses in attending court, issuing notices, filing schedules and claims of exempt property, and making defenses to the suits and to endanger his occupation would support an action for abuse of process.

The crux of the cause of action is the improper use of process after it was issued. *Smith* v. *Nelson,* 255 Ark. 641, 501 S.W. 2d 769. There is simply no cause of action for abuse of process stated here.

Appellant complains, however, that appellees argued, in support of their demurrer, that appellant's counterclaim is couched in terms of "abuse of process and/or malicious prosecution." Appellant then says that, if the court had sustained, rather than overruled, the demurrer, appellant could have amended its complaint, but that by reason of the summary judgment, it is deprived of that right. Although there is some question about appellant's right to amend at this state of the proceeding, we feel that it should be given ten days after the filing of the mandate in the trial court to amend its complaint to state a cause of action for abuse of process, if it has one.

The summary judgment is reversed as to Goshen insofar as the declaratory judgment action is concerned, and as to Melbourn, insofar as his suit against Farm Service is concerned; otherwise, it is affirmed, subject to the right of appellant to amend its complaint to state a cause of action for abuse of process within ten days after the mandate from this court is filed in the trial court.

HARRIS, C.J., not participating.

BYRD, J., dissents as to the reversal.

John W. HOLLAND et al *v.* Henry DIETZ

79-113 595 S.W. 2d 931

Substituted opinion on denial of rehearing
delivered February 11, 1980

Daggett, Daggett & Van Dover, by: *W. H. Daggett,* for appellants.

Walker, Campbell & Young, by: *Gene C. Campbell,* for appellee.

JOHN I. PURTLE, Justice. Appellants filed suit to collect a real estate commission from appellee. The chancellor found that appellee was not liable for the commission because the buyer was unable to handle the financing necessary to pay for the property. Appellants argue on appeal that the inability of the purchaser to pay is no defense to appellee because he accepted him as a buyer for the property. Under the facts and circumstances of this case we agree with the chancellor and uphold the decree.

Appellants' listing of the property had expired when they approached appellee about selling a part of the property to the McIntosh Corporation. At this time appellee informed them he had sold the entire properties to a man named Barr. The original listing had been for $6,000,000; this was the price agreed upon between Barr and appellee. However, both the seller and buyer agreed the sale was conditioned upon Barr being able to obtain an acceptable loan in order to complete the sale. At the time of the trial the agreed financing had not come forth.

After appellee informed appellants he had sold the property he wrote a letter, at the request of the listing agent, one of the appellants, stating he had sold the property. The letter did not explain there was a condition to the sale to Barr. So far as the record reveals, there was no other offer and acceptance and no suit by any party for specific performance or damages for breach of contract other than the one before us. The chancellor held, in effect, that the contract between appellee and Barr was conditional and unenforceable. No proof of any kind was offered concerning a sale or attempted sale to anyone other than Barr.

We cannot say the chancellor erred in finding that the sale to Barr was conditional and that the condition had not materialized. We also agree that appellee had the right to enter into any kind of contract he desired after appellants' listing expired. We agree with appellants that had appellee sold the property to someone who had been led to him by the efforts of appellants, even after their listing had expired, he would be obligated to pay them a commission. However, when the owner enters into a contract with one so procured by the listing agent, as here, the owner is not bound to sell on the same terms and conditions as those required by the former listing contract. In fact, he is not bound to sell at all and certainly no commission is due if the offer is rejected or no sale is made.

Both parties rely upon *Moore* v. *Irwin,* 89 Ark. 289, 116 S.W. 662 (1909). So do we. We read *Moore* to state that whenever a broker or agent brings a purchaser to the owner and the purchaser is able and willing to buy the property by way of a valid contract upon the terms named by the owner, the broker or agent is entitled to a commission. In fact, the exact words of the opinion state:

> ". . . the broker becomes entitled to the usual commission whenever he brings to his principal a party who is able and willing to take the property and enter into a valid contract upon the terms then named by the principal, although the particulars may be arranged and the matter negotiated and completed between the principal and purchaser directly."

The *Moore* opinion quoted from *Pinkerton* v. *Hudson,* 87 Ark. 506, 113 S.W. 35 (1908), as follows:

> ". . . where a real estate broker contracts to produce a purchaser who shall actually buy, he has performed his contract by the production of one financially able, and with whom the owner actually makes an enforceable contract of sale. The failure to carry out that contract, even if the default be that of the purchaser, does not deprive the broker of his right to commissions."

Obviously, both of the above extracts from the *Moore* opinion favor appellee. However, appellants look to other language in the same opinion which states:

> "The broker, having presented a proposed purchaser who is capable of entering into a contract of purchase, and willing to do so, has earned his commission when the vendor accepts him and enters into a valid contract with him for the sale of his land, even though the sale is never in fact consummated by reason of the failure of the proposed purchaser to perform his part of the contract. *** If he does so, and enters upon an executory contract for the sale of the land upon his own terms, the broker is entitled to the commission agreed upon, whether the contract is ever fully executed or not. In the absence of contract it is not the business of the broker to see that the purchase money is paid, or to enforce the contract of sale. . . . "

If we were to decide the case upon the theory of the first two quotations above we would have to affirm. On the other hand, if we relied solely upon the last portion quoted above we possibly could reverse. We try to reconcile different opinions whenever possible. When we rely upon a single opinion we must try to determine the basis of the ruling. Do we have conflicting statements in the same opinion? We think not. Upon a careful reading of *Moore* we find the whole opinion is based upon the existence of a valid and enforceable contract between the seller and the buyer. All the language treats the purchaser as being able and willing to enter into the contract. It simply places the responsibility upon the seller to enforce the contract whether the purchaser is later willing or not. We interpret this language to mean that the seller has a duty to enforce a valid contract, regardless of the terms.

If the *Moore* opinion is conflicting, some parts must be treated as being dicta or inartfully stated in order that there be a holding in the case. It cannot hold both ways on the same facts and circumstances. At least the predominant thought in the opinion is that an owner cannot deny a broker

a commission by failing to enforce a contract which he has entered into voluntarily and without fraud or misrepresentation on the part of the broker. On the other hand, an agent will not be permitted to bring an insolvent or fraudulent buyer to the seller and thereby earn a commission.

In the present case we do not believe the facts show the owner is failing to enforce a valid contract. The failure of Barr to obtain suitable financing is a condition which is not under the control of the seller. He cannot enforce it unless Barr reneges on his promise. No one would argue appellants were entitled to a commission if they presented an offer from an insolvent buyer. Nevertheless, appellants claim Barr was a product of their efforts thereby entitling them to a commission even though he is financially unable to complete the transaction. If Barr is their purchaser, he is also their unable purchaser. The elementary requirement of the buyer being able and willing is absent here. Apparently he is willing but unable. He foresaw this possibility and included in his offer a condition of certain financing. There is no evidence that Barr is actually defaulting in order to avoid a valid contract. In fact, his testimony at the trial was to the effect he was still trying to complete the deal.

Since appellee was under no duty to sell the property after the listing expired, he most certainly was free to enter upon a conditional sale if he so desired. If this sale is completed then there will be a legal obligation on the part of appellee to pay appellants a commission of $275,000. This was the decree of the chancellor and we agree it was correct. We uphold the chancellor if the decree was correct but based upon the wrong reason. Had the contract of sale been unconditional, we would hold otherwise.

Affirmed.

FOGLEMAN, C.J., and GEORGE ROSE SMITH and HICKMAN, JJ., dissent on the basis of the dissent of HICKMAN, J., to the original opinion.

DARRELL HICKMAN, Justice, dissenting. The chancellor found against the seller Dietz on all critical issues of fact but

held as a matter of law that since the buyer Barr was unable to pay the purchase price, Dietz was not liable for the commission. The critical findings made by the chancellor are as follows:

. . .

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> The court finds that the plaintiff Holland was instrumental in getting the parties together for the sale and purchase of this property and if the sale to Barr had been consummated the defendant would have owed the commission to Holland. It makes no difference that the first listing agreement had expired at the time that buyer and Dietz entered into the contract of sale since Holland had put Mr. Barr in touch with the defendant during the time that the listing agreement was in effect.

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> However, the preponderance of the evidence is that Mr. Barr is not and was not ever financially able to make the purchase of the property. It is true that he was ready and willing to purchase the property and signed a contract to that effect, but the law contemplates that a buyer provided by a real estate broker shall be 'ready, willing and able' to make the purchase. Even though Mr. Barr signed a contract of purchase there is no evidence that he was financially responsible. The contract would not have been enforceable against Mr. Barr by specific performance.

The chancellor's application of the law was wrong. The inability to pay is no defense in this case.

In the case of *Moore* v. *Irwin,* 89 Ark. 289, 116 S.W. 662 (1909), we held that the financial ability of the purchaser was not relevant unless the real estate broker expressly warranted the purchaser was financially able to pay for the property. In this case it was contended by Dietz that since he selected the buyer, and the buyer was not furnished by the

appellant, there was no liability. When the seller selects the purchaser, then he is in no position to complain of the inability to pay. *Moore* v. *Irwin, supra; Dillinger* v. *Lee,* 148 Ark. 374, 250 S.W. 332 (1923); *Boyles* v. *Knox,* 211 Ark. 426, 200 S.W. 2d 966 (1947); *El Dorado Real Estate* v. *Garrett,* 240 Ark. 483, 400 S.W. 2d 497 (1966).

We do not know from this record whether Barr has actually purchased the property. During the trial he testified that he was still trying to raise the money and intended to buy the property. It may be that he has already purchased it.

The appellee cannot have it both ways. He cannot complain that he is liable because the buyer was not furnished by the broker and at the same time claim he is not liable because the buyer is unable to pay the price. Under those circumstances, Deitz has no complaint that the buyer he selected cannot pay for it. Nobody told him that he could.

Needless to say, I would reverse the decision of the chancellor and enter judgment for the appellant.

FOGLEMAN, J., joins in this dissent.

Andrew J. MONFEE et al *v.* THE URBAN RENEWAL AGENCY OF THE CITY OF NORTH LITTLE ROCK, ARKANSAS

79-58 590 S.W. 2d 32

December 3, 1979

Howell, Price, Howell, P.A., for appellants.

Wallace, Hilburn, Clayton, May & Calhoun, Ltd., for appellee.

PER CURIAM

Upon motion of appellants, this case is remanded to the Chancery Court of Pulaski County and that court is reinvested with jurisdiction for the sole purpose of determining the effect of Resolution No. 1774, adopted by the City Council of the City of North Little Rock, Arkansas, upon its decree from which this appeal is taken.

The Chief Justice, George Rose Smith and Byrd, JJ., did not participate in the consideration of this motion. Special Justice William S. Arnold agrees.

Kenneth MARION *v.* STATE of Arkansas

CR 79-175 590 S.W. 2d 288

Opinion delivered December 10, 1979
(In Banc)

John W. Achor, Public Defender, by: *James Phillips,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Dennis R. Molock,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was charged with rape in violation of Ark. Stat. Ann. § 41-1803 (Repl. 1977). Prior to the trial, appellant filed a motion for an in camera hearing to determine the admissibility at trial of the victim's prior sexual conduct. Ark. Stat. Ann.§ 41-1810.2 (a) (Repl. 1977). After a hearing the court denied the admissibility of some of this evidence. Appellant brings this interlocutory appeal pursuant to Ark. Stat. Ann. § 41-1810.2 (c).

Appellant first asserts that exclusion of the victim's prior sexual conduct at trial impairs his ability to establish his defense to the rape charges. His argument is two fold: (1) application of §§ 41-1810.1 and 41-1810.2 violates his Sixth Amendment due process right at a criminal proceeding to confront his accuser, and (2) at the in camera pretrial hearing, he is forced to reveal certain aspects, the weakness or strength, of his defense in violation of his Fifth Amendment right against self-incrimination.

The application and interpretation of this exclusionary policy in rape cases will not doubt continue to be the source of much litigation. This statute provides that evidence of the victim's prior sexual conduct is inadmissible at trial except where the court, at an in camera hearing, makes a written determination that it is relevant to a fact in issue and that its probative value outweighs its inflammatory or prejudicial nature. Ark. Stat. Ann. § 41-1810.2 (b) (Repl. 1977), and *Bobo and Forrest* v. *State,* 267 Ark. 1, 589 S.W. 2d 5 (1979).

We are satisfied that the exception to the general exclusionary policy and the in camera hearing provide the appellant with a full and fair opportunity to confront his accuser. See *Pointer* v. *Texas,* 380 U.S. 400 (1964). In *Sterl-*

ing v. *State,* 267 Ark. 208, 590 S.W. 2d 254 (1979), we stated:

> This statute clearly allows evidence of the alleged victim's *prior sexual conduct,* as well as evidence directly pertaining to the acts upon which the present prosecution is based, to be *introduced or inquired about at the in camera hearing.* The purpose of such hearing is to review the evidence to determine whether it is *relevant for trial purposes.* (Italics supplied.)

After giving due deference to the right of the accused to present his defense, the statute seeks to protect the victim from unnecessary humiliation at trial based on irrelevant and prejudicial, though probative, evidence. See *Duncan* v. *State,* 263 Ark. 242, 565 S.W. 2d 1 (1978); and *Bobo and Forrest* v. *State, supra.* The appellant certainly has no constitutional right to present irrelevant evidence at trial. Here, for example, the fact that the victim has two illegitimate children and an alleged reputation as a prostitute is not relevant to the central fact in issue; i.e., whether the alleged act of sexual intercourse actually occurred. The court also correctly ruled that the prosecutrix may be questioned on cross-examination concerning her prior sexual involvement with the appellant and that the appellant could testify at trial concerning his prior sexual involvement with the victim. *Bobo and Forrest* v. *State, supra.*

If the statute absolutely barred evidence of the victim's prior sexual conduct, its constitutionality would be suspect in light of *Davis* v. *Alaska,* 415 U.S. 308 (1975). This it does not do. Since this evidence is admissible at trial upon the court's determination that it is relevant to the fact in issue, and that its probative value outweighs its inflammatory or prejudicial nature, we cannot say that the appellant's due process rights are not fully protected.

We are also satisfied that application of the statute does not result in a violation of the accused's Fifth Amendment right against self-incrimination. Appellant's argument is that the in camera hearing aids the prosecution by allowing potential discovery of the strength and weakness of his defense. However, pursuant to the Rules of Crim. Proc., Rule

18.3 (Vol. 4A Repl. 1977), the appellant must reveal, upon the state's request, the nature of any defense which he intends to establish at trial, and the names and addresses of the witnesses who will testify in support of these defenses. Therefore, at the in camera hearing, it appears that the appellant is not forced to reveal any more of his defense strategy than he is required to do under existing procedural rules. Further, similar "rape shield" statutes in other jurisdictions, attacked as here, have been declared constitutional. *State* v. *Blue,* 592 P. 2d 897 (Kans. 1979); *Cameron* v. *State,* 561 P. 2d 118 (Okla. 1977); *Smith* v. *Commonwealth,* 566 S.W. 2d 181 (Ky. App. 1978). Here the statute is a valid exercise of the legislature's authority to shield the victim of a sexual offense from becoming, herself, the defendant.

Appellant's defense to the rape charge was that no sexual intercourse occurred between them on the alleged occasion. He proffered evidence that the charge against him was made by the prosecutrix because of a fight they had as a result of his contracting a venereal disease from her. At the time of the fight, she threatened "she would get even with him". Consequently, the present charge resulted. We cannot agree with the court's exclusion of this proffered evidence. Certainly, upon sufficient proffer as here, the victim's bias, prejudice or ulterior motive for filing the charge is relevant or germane to the question of whether the alleged act of sexual intercourse actually occurred and the probative value outweighs its inflammatory or prejudicial nature. See *Milenkovic* v. *State,* Wis. App., 272 N.W. 2d 320 (1978). There it was also said:

> The offer of proof need not be stated with complete precision or in unnecessary detail but it should state an evidentiary hypothesis underpinned by a sufficient statement of facts to warrant the conclusion or inference that the trier of fact is urged to adopt[,] . . . . [and] it ought to enable a reviewing court to act with reasonable confidence that the evidentiary hypothesis can be sustained and is not merely an enthusiastic advocate's overstated assumption.

Here appellant's counsel was denied effective cross-ex-

amination of a constitutional magnitude when he, after stating an evidentiary hypothesis underpinned by a sufficient statement of facts, was refused the right to reveal "possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand [, a sexual offense]." See *State* v. *DeLawder,* 344 A. 2d 446 (Md. App. 1975). Also see Weinstein's Evidence § 607[03].

Affirmed as modified.

HARRIS, C.J., not participating.

M. E. RATLIFF *v.* Allen C. THOMPSON, Jr. et al

79-275 590 S.W. 2d 291

Opinion delivered December 10, 1979
(In Banc)

Nance, Nance, Fleming & Wood, by: *Stephen K. Wood,* and *Cotton & Blancett,* by: *George Blancett,* Memphis, Tenn., for appellant.

Vincent E. Skillman, Jr., of *Skillman & Durrett,* by: *Jim L. Julian,* for appellees.

DARRELL HICKMAN, Justice. The only issue on appeal in this case is whether a non-resident of Arkansas, who contracted to buy Arkansas land, is subject to the personal jurisdiction of an Arkansas Court in a foreclosure suit on the land.

This lawsuit involves the sale of land located in Crittenden County, Arkansas. The appellant, M. E. Ratliff, signed a contract to buy the land in November, 1976; in March, 1977, the transaction was closed. However, the named purchaser when the deal was closed was not Ratliff, but the W. D. George Cotton Company, a company in which Ratliff owned half the stock.

Two Mississippi banks held mortgages on the land. When the mortgage obligations were not met, the banks brought a foreclosure action against the seller-appellee, who made the appellant a third party defendant. The appellant made a special appearance, which he has preserved, to argue that he is not subject to suit in this case in Arkansas. The chancellor held otherwise and we agree with the chancellor's decision.

It is not disputed that the appellant is a resident of Tennessee, that the negotiations took place in Tennessee, and that the transaction was closed in Tennessee. The chancellor held that Ratliff had an interest in the land and Arkansas had personal jurisdiction under Ark. Stat. Ann. § 27-2502. That statute reads in part:

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

. . .

(e) having an interest in, using, or possessing real property in this State; . . .

This part of the statute was held to be constitutional in *Bowsher* v. *Digby,* 243 Ark. 799, 422 S.W. 2d 671 (1968). The due process clause of the Fourteenth Amendment to the United States Constitution requires a defendant have certain minimum contacts with a state before the courts of that state can exercise jurisdiction over him. *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945). We believe the contracts provided for in the part of the statute quoted above are sufficient to justify the exercise of jurisdiction by our courts over causes of action arising out of such contacts. See *Krone* v. *AMI, Inc.* 367 F. Supp. 1141 (E.D. Ark. 1973).

The chancellor's findings were based on conflicting testimony. The appellees offered testimony that because Ratliff was separated from his wife and a divorce action might be filed, the property, contrary to the provisions of the contract, should be placed in some name other than his. At the March closing the papers were changed to show that the W. D. George Cotton Company would be the buyer. The purchase price remained the same. Two witnesses testified that the reason the buyer's name was changed was because Ratliff might be involved in a divorce action. A lawyer from Mississippi, who was present at the closing, testified as follows:

Q. What I am concerned with, Mr. Freeland, prior to March 4, 1977, were the documents or your information or whatever you prepared, was it for M. E. Ratliff, individually, or W. D. George Cotton Company?

A. The contract was between M. E. Ratliff, individually, and Mr. Thompson's corporations. All of the documents were prepared for M. E. Ratliff, individually.

Q. Well, what happened about them having to be changed to W. D. George Cotton Company? Were you

present when any discussion occurred about this between Mr. Ratliff, Mr. Thompson?

A. On the day of the closing, the morning of the closing . . .

Q. All right, sir.

A. I had the documents prepared for signature by Mr. Ratliff, individually. There was a problem with regard to Mr. Ratliff's wife, whose name, I believe, is LaDonna A. Ratliff. There was a problem as to, whether or not, she would be willing to sign the deed of trust in Tennessee and the mortgage in Arkansas. They were estranged at the time.

Q. Who advised you of that fact?

A. Mr. Ratliff.

Q. All right.

A. And he suggested that —

Q. Now, who is "he?"

A. Mr. Ratliff suggested that the transaction not be closed in his name, individually, but that it be closed in the name of the W. D. George Cotton Company. And that, as far as I know, was the first time they came into the picture.

Ratliff denied that this was the case. He said his original contract had been abandoned by mutual consent and that he did not suggest the name be changed.

The chancellor, in announcing his findings, said:

. . . But it does appear to the Court that at the time of the execution of the contract by Mr. Ratliff, he became the equitable owner of certain Arkansas realty. That the passing of title to W. D. George Cotton Company, Inc. was done at his request and suggestion. The Court finds

there's never been any abandonment of that contract. And all that has expired subsequent to the execution of that contract was with Mr. Ratliff's knowledge and at his direction.

Therefore, it was simply a question of fact. The chancellor found that Ratliff had an interest in Arkansas realty and that this cause of action arose out of that interest.

On review we look to see if the chancellor's finding of fact is clearly erroneous. Rules of Civil Procedure, Rule 52. Since we cannot say that the chancellor's conclusion was erroneous, we affirm the decree.

Affirmed.

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

Opal NELSON *v.* Winton Ray NELSON and Ernest NELSON

79-166 590 S.W. 2d 293

Opinion delivered December 10, 1979
(In Banc)

Hardin, Jesson & Dawson, for appellant.

Donald Goodner, for appellees.

JOHN I. PURTLE, Justice. Appellant was granted a divorce on the ground of general indignities. The bulk of the

parties' real estate holdings was in the name of the husband. The court granted the wife a life estate in one-third of this realty. She was also granted one-third interest in a considerable amount of personal property to which she claimed joint ownership. Her appeal is on the grounds that the court should have found the real and personal property to be jointly owned and she should have received one-half interest in it.

Appellant alleges the court erred in failing to find that the house and lot in the city were owned by the parties subject to an equitable mortgage in favor of the father of the husband; that the other real estate should have been declared joint property; that it was error to give her one-third interest for life in the property alleged to be owned jointly by the parties; that Ark. Stat. Ann. § 34-1214 (Repl. 1962) is unconstitutional; that the court erred in determining ownership of other personal property; that the attorney's fee allowed to appellant was inadequate; and that appellant should have been awarded alimony. We agree with appellant that the residence occupied by appellant and appellee was owned by them subject to an equitable mortgage; that the 543-acre farm was joint property; and that the court erred in determining ownership of certain personal property.

Appellant and appellee were married in 1944; they separated in 1977. All of the property, with minor exceptions, was acquired during the marriage. The appellant worked the farm until all the children were grown. During this time she drove a tractor, hauled hay, picked beans, hauled poles, and did general farm type labor in addition to keeping house, preparing meals, and performing all other normal duties of a housewife. After the youngest child was 18, appellant obtained part-time work in the city and later became employed full time as an attendant at the hospital in Waldron. Her salary of about $400 per month was used in the general family operation. The parties were separated for a period of time in 1973 and effected a reconciliation upon the agreement of the appellee-husband to purchase a home for her in town. At that time they were unable to pay cash for a home and it was purchased by Ernest Nelson and occupied by appellant and appellee. During at least part of this time Winton Ray Nel-

son, the husband, carried insurance and paid taxes on the property in his name. They jointly expended about $9,000 in improving the house in Waldron. They paid no rent to Ernest Nelson, nor did they pay interest or make any payment to him on the purchase of the house. When they were first married, the appellant's father gave them about 10 head of cattle to start their operation. These cattle, of course, are no longer in existence but they did form the nucleus for starting the cattle business.

Appellee's mother purchased the 80-acre farm, which was deeded to appellant and appellee after it was paid for from proceeds of the sale of timber from the purchased land. Part of the 543 acres was purchased by Ernest Nelson and subsequently deeded to Winton Ray Nelson only. There is no indication that the husband received an inheritance or other money with which to purchase any of this property. The land, farming equipment, and personal property were acquired through the proceeds of sales of cattle, timber, and other crops raised on the property. Of course, in later years part of the money appellant earned in her outside employment was used for family purposes. Needless to say, no record was kept of how much money each of the parties spent on any particular piece of property. It is undisputed that in the later years of this marriage appellee did most of the farming himself, including raising jackbeans which were the primary source of income for the family. It was appellant who planted the first crop of jackbeans, consisting of one acre. During her outside employment appellant contributed her money to the upkeep of the family and for repairs and improvements to the house on Elm Street.

There is no question but that the chancellor was justified in awarding the wife a divorce on the ground of general indignities. This matter is not argued on appeal and we will not prolong this opinion by setting out the circumstances which justify the wife being awarded the divorce.

We first consider the property located at 815 Elm Street in Waldron, Arkansas. The trial court found this property was owned by Ernest Nelson. Title to the property was taken in the name of Ernest Nelson. However, it was Winton

Ray and Opal who located the property and subsequently had Ernest purchase it. After the house was purchased, either Ernest or Winton Nelson prepared a note to be signed by appellant and appellee. Appellant refused to sign the note because she felt she had been promised a house in town if she would resume her marital relationship with appellee. She testified that her husband told her the house was theirs at the time they moved in. They continued to live in this house until the separation. Appellant still occupies the house at this time. After taking possession, they remodeled the house which included bricking the outside, repaneling the inside, laying carpet inside the house, replacing the roof, and other repairs. Part of the remodeling money came from appellant's outside employment and part of it came from the sale of timber on the 543 acres of land which is in appellee's name. None of the improvement costs were paid by Ernest Nelson.

At the trial Ernest Nelson testified that a $7,000 note was prepared for the signature of the parties and that is what he expected them to pay for the house. He had expected to receive $650 down payment and allow the balance of $7,000 to be paid out over a period of time. He stated he did not intend to charge any interest although the note mentioned 7%. The note was set up for annual payments of $500 commencing in March of 1974. He further acknowledged that he knew Winton and Opal were making improvements on the property at the time the improvements were being completed. Ernest Nelson lent money to his son on other occasions for the purpose of purchasing real estate and cattle. Usually title had been taken in the father's name until the loan was repaid. Title was then transferred to the son. Winton Ray Nelson's mother had loaned him money to purchase the 80-acre tract of land and when it was repaid, from the sale of timber, she deeded it to Winton Ray and Opal Nelson. The father paid for a portion of the 543 acres and held the title in his name until the loan was repaid, at which time he executed a deed to his son. The father further stated he did not change the insurance on the Elm Street property into his name until the divorce action was filed. He further admitted telling the insurance agent he was selling the Elm Street property to Winton Ray and Opal Nelson. Appellee admitted that while he and his wife were separated in 1973 she told

him that if he would buy her a home in town she would come back to him. He then located the Elm Street property and agreed to purchase it. He did not have the money to pay for it but did persuade his father to buy it. He stated: "We put the deed in his name because he did the paying." He further stated the transaction was not completed because his wife would not sign the papers. He also admitted paying the taxes and insurance at least a part of the time after its purchase. Appellee testified his father would have deeded the property to him at any time he paid his father $7,500.

It is well established that a court of equity will treat a deed, absolute in form, as a mortgage when it is executed for the loan of money or as security for a debt. A court of chancery is authorized to determine the real character of the transaction by the use of any competent evidence, either oral or written, which tends to show the true character of the instrument. Before a deed, absolute in form, may be declared a mortgage the evidence must be clear, unequivocal and convincing. In other words, the evidence must show the transaction was intended as a mortgage and this proof must be such as to satisfy a reasonable mind without hesitation. *Grimes* v. *Evans,* 225 Ark. 770, 285 S.W. 2d 510 (1956); *Ehrlich* v. *Castleberry,* 227 Ark. 426, 299 S.W. 2d 38 (1957); and *Dixon* v. *Dixon,* 210 Ark. 647, 197 S.W. 2d 43 (1946). When we consider, in the present case, that appellant and appellee went into possession of the property, paid insurance and taxes, made extensive repairs and remodeled the house, paid no rent to the holder of the title, and it was a condition of reconciliation, we have no hesitancy in finding this instrument was an equitable mortgage. We find this to be established by clear, cogent and convincing evidence. *Sturgis* v. *Hughes,* 206 Ark. 946, 178 S.W. 2d 236 (1944).

We next consider the ownership of the 543-acre farm. We have long held that a court has a right to divide property acquired through the joint efforts of the parties on an equitable basis. *Stephens* v. *Stephens,* 226 Ark. 219, 288 S.W. 2d 957 (1956). When the parties were married they did not own this property. It was acquired, during the marriage, through the joint efforts of the parties. We are not required to make a determination as to whether more money or effort was ex-

pended on the part of one party or the other in reaching this conclusion. For about 18 years all of the efforts of both parties were directed to the acquisition and operation of the farm. Both of them assisted in raising the children as well as doing all other duties necessary to the operation of the farm. After appellant became employed, outside the home, her money was used to pay household expenses, purchase groceries, and repair and refinish the house in Waldron. In discussing the matter of disposition of property in a divorce proceeding, when the property was held only in the husband's name, we stated in the case of *Williams* v. *Williams,* 186 Ark. 160, 52 S.W. 2d 971 (1932):

> . . . If appellee and appellant, by their joint work, labor and management, acquired the property, a court of equity would, even before the recent statutes, protect the wife's interest in the property.

It would not be equitable to divest appellant of all interest in this property, except for a life estate in one-third of it, after all the years she has labored and toiled with appellee in acquiring and retaining this property. It is obvious from the evidence that it was the joint efforts of the parties which acquired the land, and we hold it would be inequitable to deprive her of the legal and equitable ownership of one-half interest in this property.

We turn to the personal property question at this time. Appellant insists she should have been awarded a one-half interest in the following:

(1) 40 head of cattle, subject to existing loan to Ernest Nelson and the bank of Waldron
(2) A $15,000 check representing proceeds from the sale of jackbeans
(3) A $1500 checking account
(4) Farm equipment
(5) 50 tons of hay
(6) Other items of personal property

We think the law relating to ownership of personal property is the same as that cited in the previous point

relating to ownership of real property. The decree of the court awarded appellant ownership of a 1972 Mercury Comet automobile and the household furniture as well as the appliances accumulated during the marriage. She was also granted possession of the house in Waldron, with the consent of appellee. Winton Ray Nelson was awarded ownership of 70 head of cattle, acquired after the separation, and a 1978 Chevrolet 4-wheel drive pickup truck. Neither party raises any question on appeal about the vehicles or the household furnishings and appliances. Appellant does insist she had a one-half interest in the 70 head of cattle acquired by the appellee after the separation.

We do not find it necessary to treat the other points argued by appellant in view of our holding in this matter. The case will be remanded to the trial court with directions to declare the property at 815 Elm Street to be the joint property of the parties subject to an equitable mortgage in favor of Ernest Nelson in the amount of $7,650 to bear interest at the rate of 7% from the date of purchase in 1973. Unless otherwise directed by the trial court, the estate will be converted to one in common, subject to the above-mentioned mortgage. Possession of the Elm Street property will be awarded to appellant. All of the other property acquired by the parties up to the time of separation will be declared to be owned jointly by the parties. Any valid indebtedness against any of the property will likewise be the joint responsibility of the parties. The $15,000 check for proceeds of the sale of jackbeans is specifically declared to be jointly owned as is the $1,500 joint checking account. The property acquired by the appellee subsequent to the time of the separation is his separate property and the appellant has no interest in it, except such of the jointly held property which may have been used in the purchase of the after acquired property. In view of this opinion, we feel that any additional fees should be paid by the parties respectively. The costs of this appeal are to be assessed against the appellee. The case is reversed and remanded with directions to proceed in a manner consistent with the opinion expressed herein. We have not attempted to deal with every item of personal property because the trial court is in a much better position to make this determination. Ernest Nelson is entitled to be reimbursed

for the cost of taxes and insurance which he paid on the house and lot at 815 Elm Street. The trial court may find it necessary to hold an additional hearing and/or receive other evidence for the purpose of complying with this opinion.

Reversed and remanded.

HARRIS, C.J., not participating.

Jones MORRISON, et al *v.* Larone LOWE and Floy Edelle LOWE

79-103 590 S.W. 2d 299

Opinion delivered December 17, 1979
(In Banc)

Charles S. Gibson, for appellants.

Honey & Rodgers, by: *Danny P. Rodgers,* for appellees.

George Rose Smith, Justice. The appellants, Jones Morrison and his two sons, and the appellees, Larone Lowe and his wife Floy, were neighbors in a rural area, living about a quarter of a mile apart. The Lowes had bought their property from another member of the Morrison family, with an access right-of-way across the Jones Morrison land. At first the relationship between the neighbors was good. Eventually, however, the two families became enemies and finally had a shotgun and rifle shoot-out near the Lowes' house. The Morrisons' gunfire seriously injured Larone Lowe's hands.

The Lowes brought this suit for the personal injuries, Mrs. Lowe's loss of consortium, and punitive damages. This appeal is from a verdict and judgment in their favor. A new trial must be ordered, because of erroneous rulings allowing the plaintiffs to introduce inadmissible and prejudicial testimony.

The principal errors arose from violations of the hearsay rule, which apparently was not clearly understood in the trial court. Rule 801 of the Uniform Rules of Evidence (Ark. Stat. Ann. § 28-1001 [Repl. 1979]) defines hearsay, but the definition does not make any substantial change in the traditional idea about what constitutes hearsay. It is still not permissible for a witness to relate information he obtained from someone else rather than by his own observation. Counsel cannot

avoid the rule, as was attempted repeatedly in the court below, by asking a witness for the substance of an out-of-court statement by someone else rather than for an exact quotation. *Robinson* v. *State,* 255 Ark. 485, 500 S.W. 2d 929 (1973). As we said there: "The prohibition against hearsay would cease to exist if it could be so easily circumvented."

The plaintiffs, at the beginning of their proof, sought to show how the relations between the two families had deteriorated, but the court allowed that proof to include much hearsay. It would have been permissible, for example, for the plaintiffs to testify that they had been told of threats made against their lives by the defendants. *See Lee* v. *State,* 72 Ark. 436, 81 S.W. 385 (1904); McCormick, Evidence, § 249 (2d ed., 1972). Such testimony, although hearsay if offered to prove that the threats had in truth been made by the Morrisons, would nevertheless be admissible, with a proper limiting instruction to the jury, to show that the plaintiffs had reason to be afraid of the defendants and acted in self-defense in the shoot-out that took place.

The plaintiffs, however, were allowed by the trial court to expand the permissible purpose of such preliminary proof to include out-and-out hearsay. We mention three instances of this kind.

First: Mrs. Lowe was allowed to testify that when the telephone company refused to run a line to the Lowes' house, she checked with the company and found that Jones Morrison had protested because he wanted to improve the road before the line was laid. In response to the defendants' objection counsel for the plaintiffs stated: "Judge, she did not testify to a conversation. She testified from looking into the matter at the phone company and reports that she received." The court overruled the objection. That ruling was wrong. The witness's entire statement was outright hearsay, no danger to the Lowes being involved. We do not imply that a telephone employee could not have testified that Jones Morrison objected; we merely hold that Mrs. Lowe could not testify that such an employee told her that Morrison objected.

Second: Mrs. Lowe was allowed to testify that the Lowes' hired hand, Robert Huckaby, told her that he (not the Lowes) had been threatened by the Morrisons. One of the plaintiffs' lawyers argued, in replying to opposing counsel's objection: "But that's not hearsay, Judge. That is not a conversation. It is the report of an event." The witness's testimony was undoubtedly hearsay, merely summarizing what Huckaby had told her. (We are aware that this particular error may have become harmless in view of Huckaby's later testimony to the same effect, but the incident still typifies the errors that occurred.)

Third: Mrs. Lowe was allowed to testify about what Officer Gavin, deceased, had told her as information he had gained by interrogation. When an objection was made, plaintiffs' counsel restated his argument: "He reported it back to her. That makes it an investigation." Again the testimony, merely a narrative of facts reported by the officer, was unquestionably inadmissible under the hearsay rule. We need not enumerate other instances. The record is replete with hearsay testimony that was erroneously admitted, over objection.

A somewhat different error occurred when Jones Morrison was required to admit, on cross examination, that he had been charged with a crime as a result of the shooting. Counsel for the Lowes readily concede in their brief that such cross examination is ordinarily not allowed. *Moore* v. *State,* 256 Ark. 385, 507 S.W. 2d 711 (1974). It is argued, however, that the inquiry was permissible as showing a possible motive for a supposedly fraudulent conveyance made by Morrison, to avoid the claims of creditors. In the first place, Morrison's motive would have been to avoid civil liability, not to escape punishment for a crime. And second, the connection between the conveyance (which may have been in good faith) and Morrison's possible civil liability had such a remote bearing upon the witness's credibility that the court should have disallowed cross examination about the specific act, in the exercise of its discretion under Rules 403 and 608 (b) of the Uniform Rules. The error was presumably prejudicial, suggesting to the petit jury that a grand jury or prosecutor thought Morrison to be criminally responsible for the shooting.

The Morrisons also argue that the court erred in submitting to the jury a form of verdict allowing a finding only against all three defendants, not against one or more of them. The plaintiffs alleged that the father and sons were on a common mission in going to the Lowes' premises, each armed with a gun, and the evidence was all to that effect. In fact, each appellant separately testified that they went together and carried guns not only to use in their search for some hogs that had strayed but also to protect themselves against threats made by the Lowes. On the evidence presented we perceive no sound basis for the jury to differentiate among the Morrisons as to possible liability. Of course a contrary ruling may be called for if the proof is materially different upon a retrial.

Reversed.

HARRIS, C.J., & BYRD, J., not participating.

Michael Wayne DORN *v.* STATE of Arkansas

CR 79-167 590 S.W. 2d 297

Opinion delivered December 17, 1979
(In Banc)

Brockman & Brockman, by: *C. Mac Norton,* for appellant.

Steve Clark, Atty. Gen., by: *Joseph H. Purvis,* Deputy Atty. Gen., for appellee.

George Rose Smith, Justice. This is an interlocutory appeal from the trial court's ruling at a pretrial hearing under the rape-shield statute. Ark. Stat. Ann. §§ 41-1810.1 et seq. (Repl. 1977). The trial court sustained the admissibility of proffered proof concerning prior sexual activity between the prosecutrix and the defendant and concerning a statement made by the prosecutrix suggesting a questionable motive for her charge of rape. The appeal challenges the court's further ruling that evidence of the prosecutrix's reputation for chastity and morality and of her prior sexual activity with third persons would not be relevant. We affirm the court's ruling.

According to the defendant's proffer of proof, at about 2:00 a.m. on November 9, 1978, the prosecutrix, accompanied by other young people, left the Collegiate Plaza, a

night club, and was taken to her home. Before going in her house the prosecutrix saw the defendant, whom she knew, in his car. After the prosecutrix's friends left, the defendant returned and honked for the prosecutrix, who came out and got in the car. The two drove away. The defense contends that the two consumed alcohol and engaged in sexual intercourse by consent. The State asserts that there was no alcohol in the car and that the defendant stopped the car, started hitting the prosecutrix, pulled off her clothes, and raped her.

The defendant's brief states only one point for reversal, but his argument actually includes four separate subordinate contentions.

First, it is contended that, despite the language of the statute, proof of the prosecutrix's reputation is still admissible, as it used to be, to establish the defense of consent. The statute refutes that contention. Section 41-1810.1 explicitly provides that reputation evidence and specific instances of the victim's prior sexual conduct are not admissible to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose. Section 41-1810.2 then creates an exception to the exclusion by permitting the defendant, at a pretrial hearing, to proffer relevant evidence (1) directly pertaining to the act upon which the prosecution is based or (2) of the victim's prior sexual conduct with the defendant or any other person. The exception, however, contains no reference whatever to reputation evidence, which is therefore excluded under the first section of the statute.

Second, it is contended, again in the teeth of the statute, that evidence of the victim's prior sexual conduct with third persons is still admissible as bearing upon her credibility. Section 1, as we have said, explicitly excludes proof of such conduct to attack the credibility of the victim. Section 2 contains no exception to that exclusion as far as credibility is concerned; so such evidence must be excluded when offered for that reason. Apart from the statute, if such evidence had a genuine bearing upon credibility, then every woman would be exposed to such cross examination whenever she testified

in any case whatever, civil or criminal.

Third, it is argued that the statute violates the accused's right to confront the witnesses against him and his right to due process of law. Both those arguments were rejected in *Marion* v. *State,* 267 Ark. 345, 290 S.W. 2d 288 (1979). To the same effect is the holding in *United States* v. *Kasto,* 584 F. 2d 268 (8th Cir. 1978). We need not repeat the reasons given in those cases.

Fourth, it is argued that the statute denies the equal protection of the law, in that the act restricts the defendant's freedom to introduce evidence with no similar restriction upon the prosecution. To begin with, the prosecution is actually restricted by the principle that it cannot bolster its case by proving that the same defendant committed another rape. *Alford* v. *State,* 223 Ark. 330, 266 S.W. 2d 804 (1954). In the second place, the classification made by the rape-shield statute is not arbitrary, being based upon permissible considerations of public policy. We agree with the view expressed by an Indiana Court of Appeals in rejecting this same argument:

> [T]he rape shield statute was a rational attempt by the Legislature to protect the prosecutrix from harassment that might arise if her prior sex life was disclosed in court. Another closely related justification for rape shield laws is that they will aid in crime prevention because victims, knowing that the statute protects them from the embarrassment of the introduction of evidence of previous sexual activity, will be encouraged to report rape offenses. In light of these legitimate state policies, it cannot be said that the disparate treatment of this statute is without a reasonable basis.

Finney v. *State,* 385 N.E. 2d 477 (Ind. App. 1979).

Affirmed.

HARRIS, C.J., not participating.

BYRD, J., dissenting.

ROLLINS NURSING HOME, INC. and
Calvin D. ROLLINS *v.*
M & LC/STILLWELL MORTGAGE CO.

CA 79-136 593 S.W 2d 1

Opinion delivered December 17, 1979
(In Banc)

[Supplemental opinion on denial of
Rehearing February 11, 1980]

Keith G. Rhodes and *Marvin H. Robertson,* for appellants.

Hale, Hendricks, Thurman & Capps, by: *David L. Hale,* for appellee.

JOHN A. FOGLEMAN, Justice. This action is a proceeding brought by M & LC/Stillwell Mortgage Company to register a default judgment obtained by it against Rollins Nursing Home, Inc. and Calvin D. Rollins in the Circuit Court of Broward County, Florida on October 24, 1977. Appellants resisted the registration of the judgment upon the ground that the Florida court had no jurisdiction over them under the Florida long-arm statute. The trial court held that appellants were properly served with summons issued out of the Florida court because they were engaged in a business venture in the sense of the Florida statute, and permitted registration of the judgment. We disagree and reverse.

There is no dispute about the facts. Calvin D. Rollins was an officer of Rollins Nursing Home, Inc. He went to Ft. Lauderdale, Florida in December, 1976, to make an application for a loan from appellees in order to buy three nursing homes in Arkansas. These nursing homes were owned by Arkansas residents. He met with Martin Small and filled out the application for the loan, signing it as agent for the corporation. When Small told Rollins he would have to pay a finder's fee of 1%, an appraisal fee of $2,500 and $4,500 for some item, the nature of which Rollins did not recall, Rollins wrote and delivered the checks on which the Florida suit was based. The checks were not honored because Rollins stopped payment on them three days later, after he had returned to Arkansas. Rollins said that the reason for stopping payment was that the owners of the nursing homes his company was planning to buy backed out on the sale and had advised Small that they were not selling to appellants. Rollins said that no appraisal was ever made because it was not needed.

The applicable Florida statute is Fla. Stat. Ann. § 48.193 (1977). The pertinent portion of that statute reads:

> (1) Any person, whether or not a citizen or resident of this State, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:
>
> > (a) Operates, conducts, engages in, or carries on a business or business venture in this state or has an office or agency in this state.

After hearing the evidence, the trial judge held that trying to borrow $1,200,000 was a business venture and not an isolated occurrence, that more than one act was done in furtherance of the attempt, and that Rollins apparently had some conversations beforehand, went to Florida, executed the checks and a contract binding himself, individually and as guarantor, if the obligation was consummated. Since the trial court held these acts sufficient as a basis of jurisdiction under the Florida long-arm statute, the Florida judgment was sustained under the full faith and credit clause of the United States Constitution.

We disagree with the trial court's determination that the transaction in Florida constituted a business venture in Florida under Florida law. The Florida long-arm statute is strictly construed by the courts of Florida. *Lyster* v. *Round,* 276 So. 2d 186 (Fla. App., 1973); *Chase Manhattan Bank* v. *Banco Del Atlantico,* 343 So. 2d 936 (Fla. App., 1977); *American Baseball Cap, Inc.* v. *Duzinski,* 308 So. 2d 639 (Fla. App., 1975); *Esberger* v. *First Florida Business Consultants, Inc.,* 338 So. 2d 561 (Fla. App., 1976); *Bank of Wessington* v. *Winters Government Sec. Corp.,* 361 So. 2d 757 (Fla. App., 1978); *Escambia Treating Co.* v. *Otto Candies, Inc.,* 405 F. Supp. 1235 (N.D. Fla., 1975); *Citizens State Bank* v. *Winters Government Sec. Corp.,* 361 So. 2d 760 (Fla. App., 1978); *Sausman Diversified Investments, Inc.* v. *Cobbs Co.,* 208 So. 2d 873 (Fla. App., 1968); *James*

v. *Kush,* 157 So. 2d 203 (Fla. App., 1963); *Fawcett Publications, Inc.* v. *Rand,* 144 So. 2d 512 (Fla. App., 1962); *Spencer Boat Co. Inc.* v. *Liutermoza,* 498 F. 2d 332 (5 Cir., 1974). Furthermore, the Florida statute requires more activities or contacts to sustain service of process than are required by the decisions of the United States Supreme Court. *Youngblood* v. *Citrus Associates of New York Cotton Exchange,* 276 So. 2d 505 (Fla. App., 1973).

To reach the trial court's result requires a very liberal construction of the term "business venture" in the Florida statute — one far more comprehensive than the term has ever been given by a Florida court. In *Wm. E. Strasser Construction Corp.* v. *Linn,* 97 So. 2d 458 (1957), the Florida Supreme Court showed by language in its opinion that the facts of this case would not bring it within the Florida concept of business venture. There the Linns, residents of Tokyo, Japan, had, through an attorney-in-fact residing in New York, engaged Strasser to construct a three-unit apartment building on a lot in Miami, Florida owned by the Linns. The court said:

> . . . While at first glance the mere execution of the construction contract might appear in and of itself to be lacking in elements of a business venture, a more mature and thorough consideration of the allegations of the complaint suggest that the Linns had invested in a piece of Florida real estate and, by the agreement, contemplated investing further capital in a purely business enterprise. If the building were completed and the owners then proceeded to collect the rents and enjoy the profits of the Florida operation, we believe it could hardly be contended with success that they were not engaging in a business venture in this State. We think it equally clear that by the purchase of the land and the execution of the construction agreement the Linns were initiating the first substantial steps toward setting themselves up in a business venture in this state. . . .

Of course, in this case, appellants proposed to set up and extend a business venture in Arkansas, not one in Florida, so the mere application for a loan and execution of checks to pay fees in connection with obtaining the loan were lacking

in elements of a business venture, as that term was construed in *Linn* and in cases subsequently mentioned.

Although the Florida Supreme Court held in *State* v. *Register,* 67 So. 2d 619 (1953), that the listing of an orange grove for sale gave a basis for "long-arm" service when considered along with the business venture initiated by the sellers when they acquired the grove, the court said:

> It is Driver's theory that the Webers were engaged in the business of owning and operating a citrus grove and that the listing of the property for sale with Driver was incidental to the operation of the business. Driver here contends that this was sufficient as a basis to obtain substituted personal service on the Webers, as authorized by Section 47.16, supra.
>
> Although we do not agree that the listing of the grove property for sale was a "transaction or operation connected with or incidental to" the business in which petitioners were engaged in this State, to wit: the maintenance and operation of a citrus grove, we believe that the allegations of the complaint filed by Mr. Driver demonstrate clearly that the purchase of the property and the subsequent listing of the same for sale amounted to engaging in a "business venture" as contemplated by our statute.

These decisions (and some others later cited) were rendered on statutes which were in effect in Florida prior to July 1, 1973, the effective date of Fla. Stat. Ann. § 48-193, but they contain language identical, or virtually so, to § 48.193 (1) (a) quoted above. The Florida Supreme Court seems to have construed these words in the same way, whatever statute is involved. It seems unlikely that any construction different from that given the identical language in the earlier act would be given the later act. *Escambia Treating Co.* v. *Otto Candies, Inc.,* 405 F. Supp. 1235 (N. D. Fla. 1975). The rule of strict construction still applies to § 48.193. See, *Georgia Savings & Loan Service Corp.* v. *Delwood Estates, Inc.,* 315 So. 237 (Fla. App., 1975).

Most of the Florida decisions on the particular question

involved here have been made by District Courts of Appeals; however, the Florida Supreme Court has spoken significantly on it, not only in the cases hereinabove cited and in *DeVaney* v. *Rumsch,* 228 So. 2d 904 (1969), as quoted in *Lyster* v. *Round,* infra, but also in *Dinsmore* v. *Martin Blumenthal Associates, Inc.,* 314 So. 2d 561 (1975). In *Dinsmore,* the validity of service was questioned on two separate sections of the Florida long-arm statute. The service was held invalid under the business venture section, but sustained under another. In that case a Florida corporation brought suit to recover a brokerage commission resulting from an exchange of stock of D. J. Dinsmore Company, a South Dakota Corporation, for stock in Jim Walter Corporation, a Florida corporation. On only one occasion did any of the defendants come to Florida for a meeting with officers of Jim Walter Corporation. The court said:

> In order to determine whether jurisdiction can be acquired over the non-resident defendants pursuant to Fla. Stat. § 48.191 (1), *it is necessary to determine whether the individual or corporate defendant, was carrying on a business or business venture in this State. The activities of the person sought to be served pursuant to Fla. Stat. § 48.181 (i) must be considered collectively and show a general course of business activity in the State for pecuniary benefit. DeVaney* v. *Rumsch,* 228 So. 2d 904 (Fla. 1969). A nonresident defendant, which engages the services of brokers, jobbers, wholesalers or distributors, can be doing business in this State pursuant to Fla. Stat. § 48.181 (1) if the nonresident defendant, *through brokers, jobbers, wholesalers or distributors was engaged in a course of conduct in Florida for the purpose of realizing a pecuniary benefit.* Even if the activities of the defendant were not sufficient to constitute a business or business venture pursuant to Fla. Stat. § 48.181 (1), jurisdiction over the person of a defendant can still be acquired under Fla. Stat. § 48.181 (3) if such defendant sells, consigns or leases within this State personal property through brokers, jobbers, wholesalers or distributors. If Fla. Stat. § 48.181 (3) is complied with, even a single sale, consignment or lease raises a conclusive presumption that the defendant is

> operating, conducting, engaging in or carrying on a business venture in this State. *Thus, a defendant may be carrying on a business venture pursuant to Fla. Stat. § 48.181 (3), although that defendant is not carrying on a business or business venture pursuant to Fla. Stat. § 48.181 (1).* The method of service under Fla. Stat. § 48.181 (3) is identical to that explained under Fla. Stat. § 48.181 (1).
>
> Turning now to the applicability of Fla. Stat. § 48.181 (1), *the plaintiff failed to show that the defendant was conducting a general course of business activity in this State. The mere giving of a listing to a business brokerage firm which does business in Florida by a nonresident to sell stock in a foreign corporation does not indicate a general course of business activity in this State. See, Hayes* v. *Greenwald,* 149 So. 2d 586 (Fla. 3d DCA 1963). The record does not reflect any acts taken by the plaintiff in this State on behalf of the defendants . . . [Emphasis ours.]

The United States Court of Appeals for the Fifth Circuit has considered the reach of the section of the Florida long-arm statute involved here. That court, in holding in *Uible* v. *Landstreet,* 392 F. 2d 467 (1968), that the statute did not apply, said:

> The argument that the execution of a promissory note by Landstreet's group and its delivery in Florida where it was to be performed constitutes a business venture in Florida within the contemplation of section 47.16 Florida Statutes, F.S.A., may be disposed of summarily. The Florida courts have held the contrary, *Odell* v. *Signer,* Fla. App. 1964, 169 So. 2d 851, 853; aff'd, *Signer* v. *Odell,* Fla. 1965, 176 So. 2d 94; and so must we, e.g., *Monarch Ins. Co. of Ohio* v. *Spach,* 5 Cir. 1960, 281 F. 2d 401.
>
> We are also unpersuaded by Uible's contention that Landstreet's trip to Jacksonville, Florida, for the closing of the stock purchase was an important jurisdictional element. *Florida Investment Enterprises, Inc.* v. *Ken-*

> *tucky Co., Inc.,* Fla. App. 1964, 160 So. 2d 733, upon which he relies is clearly distinguishable. In that case the nonresident defendant executed a lease on a motel in Florida and "by this instrument committed herself to the accomplishment of many affirmative acts which amounted to operating, conducting, engaging, or carrying on a business or a business venture in this state. Furthermore, it is clearly evident from the record that the instant motel business would not be in existence had not Mrs. Hayes executed the lease." Id. at 740. Landstreet's group made no such commitments.

The court then considered whether other activities of Landstreet and his group were sufficient additional circumstances to render the service made under the statute valid. The court added:

> . . . Put succinctly, this simply adds up to the purchase of stock in a Florida corporation by a group of nonresidents, attendance by one of them at a stockholders' meeting, and inquiry about the financial affairs of the corporation. No Florida court has held, or would hold we think, that such investment activities are within the scope of section 47.16. F.S.A., Cf., *Unterman* v. *Brown,* Fla. App. 1964, 169 So. 2d 522.

In *Spencer Boat Co., Inc.* v. *Liutermoza,* 498 F. 2d 332 (5 Cir., 1974), the same court evaluated the Florida decisions on the questions, saying:

> Defendants' activities in Florida do not fit the literal terms of the statute. To do business or conclude a business transaction is not "to operate, conduct, engage in, or carry on a business or business venture in the state," and the statute must be construed strictly, not broadly. See *Lyster* v. *Round,* 276 So. 2d 186, 188 (Fla. App. 1973) (Citing *DeVaney* v. *Rumsch,* 228 So. 2d 904 (Fla. 1969)); *Young Spring & Wire Corp.* v. *Smith, 176 So. 2d 903 (Fla. 1965).* . . .

The case of Lyster v. *Round,* 276 So. 2d 186 (Fla. App., 1973), involved a check given by a non-resident for the down

payment on a house. The non-resident had stopped payment on the check. The First District Court of Appeals after holding that an isolated transaction involving the sale or purchase of a home did not amount to a business venture under the long-arm statutes, stated:

> In *DeVaney* v. *Rumsch* [228 So. 2d 904, 907] the Supreme Court, speaking through Justice Boyd, propounded the legislative intent in the enactment of the long-arm statute here considered to be: ". . . [T]hat any individual or corporation who has exercised the privilege of practicing a profession or otherwise dealing in goods, services, or property, whether in a professional or non-professional capacity, within the State in anticipation of economic gain, be regarded as operating a business or business venture for the purpose of service under Florida Statute § 48-181, F.S.A., in suits resulting from their activity within the State. As indicated in *Matthews* [*Matthews* v. *Matthews,* Fla. App., 122 So. 2d 571] the activities of the person sought to be served must be considered 'collectively' and show a general course of employment and conduct of carrying on business activity in the State for pecuniary benefit."
>
> * * * * *
>
> Appellees advance the argument that this court should take judicial notice of the expanding economy in Florida and the constantly rising values of real estate in the rapidly growing resort areas of our state. They urge that we proceed from this premise to the assumption that anyone who buys real estate in Florida at this is speculating on the possibility of realizing a profit from his investment even though the purpose of the purchase may be for a home as distinguished from business or developmental property. Although this may have been good argument in the trial court had any evidence been adduced to support such postulates, we do not consider that it can be accepted as a substitute for the clear and convincing proof required under the decisions hereinabove cited in order to demonstrate the applicability of the statute.

In a Florida case somewhat like the one before us, *Odell* v. *Signer,* 169 So. 2d 851 (Fla. App. 1964), it was held that "the signing of a note and the defense of a law suit are not sufficient acts, in and of themselves, to constitute carrying on or engaging in a business or business venture." The court held, however, that the additional circumstances did bring the defendants, officers of a corporation doing business in Florida, within the purview of the Florida statute. The court said that the signing of the note would not be considered in a vacuum, but that the circumstances surrounding its signing must be considered. The reasons for holding that the trial court had jurisdiction over the individual defendants were: (1) the note was signed in order to end litigation which arose from business activities in Florida by the defendant corporation and individual defendants who had served as agents of the corporation in conducting those activities; and (2) the activities of the corporation, which was doing business in Florida, were chargeable to the individual defendants because, as agents of the corporation, they would be personally liable to any third person injured by their tortious activity, so the acts of the corporation which constituted doing business in the state were attributable to these individuals for the purpose of determining jurisdiction.

In *Hyco Mfg. Co. Rotex Intern. Corp.,* 355 So. 2d 471 (Fla. App., 1978), the Third District Court of Appeals used this pertinent language:

> It has been consistently held that an isolated act will not subject a foreign corporation or a non-resident to the jurisdiction of a Florida court. In the case of *Lyster* v. *Round,* 276 So. 2d 186 (Fla. 1st DCA 1973), the court held that an isolated act which, from any objective viewpoint, could not be held to constitute the operation, conduct, engagement in or carrying on a business or business venture, is not sufficient to activate the provisions of Section 48.181, Florida Statutes (1975).

This case is in no wise similar to *Horace* v. *American National Bank & Trust Co.,* 251 So. 2d 33 (Fla. App. 1971) or to *Dublin Co.* v. *Peninsular Supply Co.,* 309 So. 2d 207

(Fla. App., 1975). In *Horace,* a non-resident of Florida contended that his signing of a guaranty agreement in Florida was not sufficient to constitute carrying on or engaging in a business venture in Florida within the meaning of Fla. Stat. Ann. § 48.181. (This statute contains language identical to that in § 48.193). The evidence showed that prior to January 31, 1969, Travel Coach Inc., a Florida corporation doing business in Florida, had a line of credit with American National Bank guaranteed by three individuals. On January 31, 1969, appellant Horace and two other individuals appeared at the bank and substituted their signatures on a guaranty agreement for Travel Coach. Horace and the two others, after informing the bank that they had acquired a 60% interest in Travel Coach, opened a commercial checking account for Travel Coach by executing signature cards. Service upon Horace was held valid. The court held that the acts of Horace, whether considered alone, or coupled with the activities of Travel Coach, created the minimal contacts necessary to meet federal constitutional due process requirements; however, in deciding the question whether the individual defendant in that case was engaged in a business or business venture, the court found that the acts of Horace were such that he came within the purview of the earlier holding in *Odell* v. *Signer,* 169 So. 2d 851 (Fla. App., 1964), but did not hold that the signing of the guaranty alone was sufficient basis for application of the Florida long-arm statute. The Florida court said:

> When we consider the circumstances surrounding the execution of the guaranty in the case sub judice we likewise find something more than just a mere signing of the guaranty. The rationale of *Odell* is applicable to the case sub judice so that the acts of Travel Coach can be imputed to Horace for the *purpose of determining the existence of jurisdiction.* [Emphasis ours.]

The court then said:

> Apart from *Odell* it is our view that the *individual* acts of the defendant in and of themselves irrespective of the activities of Travel Coach established the requisite minimum contacts so as to permit the maintenance of the suit below.

The latter quotation relates to federal due process requirements only.

In *Dublin,* the court held that a concern that had sold its products to three Florida distributors for at least five years, grossing at least $13,000 per year therefrom, was "doing business" in Florida and said this about *Horace:*

> * * * Although one act alone within the state viewed in light of surrounding circumstances, can cause jurisdiction to attach, *Horace* v. *American National Bank & Trust Co. of Ft. Lauderdale,* 251 So. 2d 33 (4th D.C.A. Fla. 1971), the affidavit states there were several acts here. * * *

It is quite significant that the "one act alone" must be "viewed in the light of surrounding circumstances."

We do not see how, in the light of the above holdings, the mere signing of the application and the checks involved here could possibly be held to constitute a business venture.

The judgment is reversed and the cause dismissed.

HARRIS, C.J., not participating.

BYRD and HOLT, JJ., dissent.

Supplemental opinion on denial of rehearing
delivered February 11, 1980

PER CURIAM. Appellee has filed a petition for rehearing advancing an argument and relying upon a subsection of the Florida statute that was never mentioned in its

original brief. That statute is Fla. Stat. Ann. § 48.193 (1) (g) (Supp. 1979), which appellee incorrectly cites in its petition for rehearing as § 48.193 . . . (3) (g). That subsection provides for "long-arm" jurisdiction of actions for breach of contract in the state of Florida by failing to perform acts required by the contract to be performed in that state. Appellee then cites *Madax International Corp.* v. *Delcher Intercontinental Moving Services, Inc.,* 342 So. 2d 1082 (Fla. App., 1977) and *Professional Patient Transportation, Inc.* v. *Fink,* 365 So. 2d 209 (Fla. App., 1978). The first case involved the non-resident defendant's failure to pay for services rendered by a Florida corporation when there was an express promise to pay, and the breach consisted of the debtor's failure to seek the creditor in Florida and make payment, no place of payment having been specified. The latter case simply reversed a judgment quashing long-arm service because the complaint had alleged that the non-resident defendants had breached their agreement to make payment in Florida for services rendered to them by the Florida plaintiff outside Florida. The appellate court held that these facts constituted a breach which amounted to the failure to perform acts required by the contract to be performed in Florida under Fla. Stat. Ann. § 48.193 (1) (g), citing the first case relied upon by appellee here in his petition for rehearing.

The application of the subsection of the statute now relied upon by appellee and of the authorities cited is doubtful, to say the least. In the first place, it does not seem that the "place of payment" was Florida. The checks were drawn on Morrilton Security Bank and the checks bore its address, i.e., Morrilton, Arkansas, so that bank was the payor bank. Sec. 85-4-105 (b) (Add. 1961). The drawer was Rollins Nursing Homes, Inc., whose address was shown on the check as P.O. Box 27, Cabot, Arkansas, 72023. It appears that the place of payment of these checks would have been Morrilton, Arkansas, the address of the payor bank. *See* Brady on Bank Checks (5th Ed.) 27-7, § 27-4. Thus it is not at all clear that the cases now cited by appellee would have any application at all.

In the next place, appellee's Florida judgment was based

upon a complaint seeking *damages* for non-payment of three checks "in connection with a business venture in which Defendants were engaged in Broward County Florida, to-wit: contracting with Plaintiff for the furnishing to Defendants of certain financing for property owned by Defendant, Rollins Nursing Home, Inc. and located without the State of Florida." There was no allegation of breach of contract in the complaint. Thus, jurisdiction of the Florida court was based upon § 48.193 (1) (a) and not § 48.193 (1) (g).

Sec. 48.193 (1) (g) was never invoked in the pleadings in the Florida court in which the judgment was rendered. This "breach of contract" section was barely mentioned in the Arkansas trial court and seems to have been abandoned when appellants' attorney pointed out to the trial judge that no breach of contract was alleged in the Florida complaint. The point appellees now raise, if it has any merit, has undoubtedly been waived.

Rule 20 (g) of the Rules of the Supreme Court and Court of Appeals provides that the petition for rehearing should be used to call attention to specific errors of law or fact which the court's opinion is thought to contain and that counsel are expected to argue the case fully in their original briefs. Petitioner is in no position to ask a rehearing under Rule 20.

The petition for rehearing is denied.

John Elliott GRUZEN *v.* STATE of Arkansas

CR 77-111 591 S.W. 2d 342

Opinion delivered December 17, 1979
(In Banc)

[Rehearing denied January 21, 1980.]

Lessenberry & Carpenter, for appellant.

Steve Clark, Atty. Gen., by: *Dennis R. Molock,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. John Elliott Gruzen was convicted of the capital felony murder of Dana Diane Mize. The jury fixed his sentence at life imprisonment without parole. He has chosen to argue four points for reversal. We will first consider those and later examine other objections to determine whether there was prejudicial error in his trial.

Gruzen pleaded not guilty and not guilty by reason of insanity to the charge that, on April 13, 1976, he had committed the crime of capital murder during the course, and in the furtherance, of the kidnap and rape of Dana Diane Mize under circumstances manifesting extreme indifference to the value of human life.

We first treat Gruzen's argument that the trial court abused its discretion in finding him to be competent to be tried, convicted or sentenced. Gruzen had an extended history of psychiatric problems. At the time of the revolting crime with which he was charged, he was 34 years of age and living at the home of his parents in Maplewood, New Jersey. He was an honor graduate of Rutgers University extension college at Newark, although it had taken him nine years to complete the course of studies.

The crime occurred after Gruzen had left his parents' home in New Jersey on April 8, 1976. He left a note to his parents that he was leaving New Jersey for a time in order to try to straighten out his problems. He returned home on April 16, 1976, and immediately contacted Dr. Max Pusin, a psychiatrist who had treated him for seventeen years. After his consultation with Dr. Pusin, it was disclosed that a crime of the nature of an incident he had discussed with Dr. Eugene Revitch, a forensic psychiatrist to whom Gruzen had been referred by Dr. Pusin, had been committed in Faulkner County, Arkansas. Extradition was waived and Gruzen was returned to this state. The information on which Gruzen was put to trial was filed on April 27, 1976.

Upon motion of the prosecuting attorney, Gruzen was committed on June 8, 1976, to the Arkansas State Hospital for examination. The usual 30-day period of observation was extended for two weeks at the request of the Commissioner of Mental Health. On July 19, 1976, the hospital reported a diagnosis of schizophrenia, paranoid type, that Gruzen was "with psychosis" and indicated that there was a need for treatment of Gruzen. An additional 120 days' observation was granted by the trial court upon the prosecuting attorney's request. There was no change in the diagnosis. Thereafter, a hearing on the competency of Gruzen to stand trial was held. Before formal sentencing, a second hearing on Gruzen's competency was held.

In the report on the first examination, it was stated that it was the opinion of the examining psychiatrist, Dr. A. F. Rosendale, and the joint opinion of the psychiatric staff that Gruzen was mentally ill to the degree of legal irresponsibility at the time of his examination, that he probably was at the time of the alleged offense, that Gruzen did not have the mental capacity to understand the proceedings against him or to assist in his own defense and that he was probably suffering from mental disease or defect of such a degree as to make him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

On December 15, 1976, a hearing was held in order that the trial court might determine whether Gruzen was mentally capable of standing trial. A deposition of Dr. Max Pusin, which had been taken in New Jersey on December 8, 1976, was read into the record. Dr. Pusin testified that he had first examined Gruzen on December 22, 1959. He described Gruzen as one who spent a lot of time in fantasies, both grandiose and erotic, which replaced very harsh reality. He had diagnosed Gruzen as schizoid, and said that Gruzen had, at age 17, deteriorated into a schizophrenic state. He described schizophrenia as the most common serious psychosis in this country. Dr. Pusin had found the presence of paranoid tendencies. He said that Gruzen's thinking was tangential. He stated that, in 1974, Gruzen had unsuccessfully attempted suicide after having investigated and researched the subject, and having become preoccupied with

suicide as early as 1961. Dr. Pusin said that he had caused Gruzen to be hospitalized, for Gruzen's own safety, in a mental hospital in 1961, but that Gruzen had left the hospital contrary to medical advice. He said that Gruzen had renewed his research on suicide in March, 1976. Dr. Pusin said that, after Gruzen's departure from his home April 8, 1976, he returned on April 16 in a great state of excitement, confusion, disorientation and agitation. Dr. Pusin said that he had, on April 17, committed Gruzen to a mental hospital where his diagnosis of paranoid schizophrenia (which Pusin said was acute) was confirmed. Dr. Pusin said that a depressive, progressive depression had been going on since December, 1975 or January, 1976.

Dr. Charles Dean Yohe of Hot Springs, who practices medicine with a specialty in psychiatry, had examined Gruzen three times while he was in the Arkansas State Hospital. Each time took two hours. He had last examined Gruzen the day before the hearing. His diagnosis was schizophrenic reaction, paranoid and catatonic features. His prognosis was very poor. He said he had learned that Gruzen was not taking any medication while he was in jail in Faulkner County. According to him, Gruzen had retreated into fantasies and auditory hallucinations. He expressed the opinion that Gruzen did not know what was going on at the hearing, but had other voices to which to listen. Dr. Yohe had been unable to have full and free communication with Gruzen on any subject and said that Gruzen was incapable of talking "straight" for more than a few seconds and would change the subject three or four times in a single sentence in a very illogical way. In his opinion, Gruzen, in a situation where stress was involved, like a criminal trial, would go "way off the subject." He doubted that, in a criminal case where the punishment might be death, an attorney would get any relevant material from Gruzen. Dr. Yohe found that Gruzen's condition had deteriorated considerably between his last observation of him at the state hospital and the one on the day before Yohe testified.

Dr. Albert Rosendale, the examining psychiatrist, testified that before Gruzen was brought before the combined staff of the hospital on July 19, he had concluded that Gruzen had the mental capacity to understand the proceedings

against him and to assist effectively in his defense, and that, in spite of the fact that he changed his opinion as to diagnosis and joined in the staff opinion, he had observed Gruzen during his subsequent stay in the hospital and, while he was still convinced as to the staff diagnosis of "schizophrenic, paranoid type," he was of the opinion that Gruzen had the capacity to assist in his defense and to understand the proceedings against him at the time of the hearing. Dr. Rosendale emphasized the fact that Gruzen said repeatedly that, upon advice of his attorney, he was not to discuss anything concerning the crime with which he was charged. Dr. Rosendale said, however, that he had not seen Gruzen in two months, and did know what his condition was at the time he was testifying. He stated that Gruzen's condition might have either improved or deteriorated during the two months after he had left the state hospital. He had heard Dr. Yohe's testimony, and did not question that doctor's observation that Gruzen had greatly deteriorated mentally. He said that, if Gruzen were sent back to the hospital he would reevaluate him, and that the psychiatric staff had been asked to reevaluate him, but that he would not be able to comment on his condition three months later.

Lt. Ken McFerrin of the Arkansas State Police, who attended Gruzen's extradition hearing in New Jersey and then brought him back to Arkansas, had visited Gruzen in the Faulkner County jail after the hospital observation and felt that Gruzen was oriented as to time and place and knew where he was. McFerrin said that he and Gruzen had a nice visit, that Gruzen knew him, remembered their association and discussed their trip with him. McFerrin stated that, when he and Gruzen were leaving New Jersey, Gruzen was instructed by his attorney not to talk with "anyone about anything."

At the conclusion of the hearing, the trial judge stated, "The court holds that this is a question for the jury to decide." In this, the court erred. No person who, as a result of mental disease or defect, lacks capacity to understand the proceedings against him or to assist effectively in his own defense shall be tried, convicted or sentenced for the commission of an offense, so long as the incapacity endures.

Ark. Stat. Ann. § 41-603 (Repl. 1977). It is certain, beyond reasonable doubt, that Gruzen has a mental disease or defect. When his fitness to proceed with the trial became an issue, it was the duty of the court to make a determination of that issue, either on the report of the Arkansas State Hospital or after a hearing on that issue. Ark. Stat. Ann. § 41-606 (Repl. 1977). This is a matter that must be decided by the trial judge, and it is reversible error for him to leave the matter to the jury to decide. *Westbrook* v. *State,* 265 Ark. 736, 580 S.W. 2d 702 (1979).

The error in procedure on the question of appellant's competency to stand trial was not in submitting the question to the jury; it was in not making an independent pretrial determination of the issue before putting appellant to trial. In this respect we disagree with the state's argument that submission of the question to the jury cured the trial judge's error in not making the determination himself. The state cites *Forby* v. *Fulk,* 214 Ark. 175, 214 S.W. 2d 920, where it was held that it was not the purpose of an earlier statute on the subject to deprive the jury selected to determine guilt or innocence of a defendant of the determination of the fact question as to the defendant's sanity at the time of the trial. The statute there involved and the statute before us are not at all similar and the question presented is very different. In *Forby,* we simply held that a previous act requiring postponement of trial on the question of guilt or innocence until a jury had determined whether the defendant was, at the time, of unsound mind was repealed by Initiated Act 3 of 1936. We held, however, that Initiated Act 3 did not leave the question of sanity to the Arkansas State Hospital, but merely provided the jury at the time of trial with the assistance of the trained staff of the Arkansas State Hospital on the issue of sanity when it was raised. The statute involved here provides for a procedure completely different from that prescribed prior to the adoption of Initiated Act 3 and from that approved in *Forby.* The failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial. *Drope* v. *Missouri,* 420 U.S. 162, 95 S.Ct. 896, 43 L. Ed. 2d 103 (1975).

It has been suggested that we should not reverse this case on this ground because appellant, rather than argue that the trial judge had erroneously declined to decide this issue, argues only that the court's decision was erroneous. However, in a case where the sentence is life imprisonment without parole, we must examine the record for prejudicial errors. Ark. Stat. Ann. § 43-2725 (Repl. 1977); *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, reh. den. 434 U.S. 977, 98 S.Ct. 540, 54 L.Ed. 2d 471 (1977). Appellant, in order to preserve a question for review on appeal had to do nothing more than make known to the trial court what he sought in the way of a ruling. Ark. Stat. Ann. § 43-2725.1 (Repl. 1977); *Ford* v. *State,* 253 Ark. 5, 484 S.W. 2d 90. Clearly, he sought to be declared unfit to proceed with the trial because of his incapacity to understand the proceeding or to assist effectively in his own defense. But, if there is any doubt about the question having been preserved, it is totally dispelled by the fact that immediately after the court's ruling, Gruzen's attorney stated: "Save our exceptions." Thus, even if this question had not been argued in appellant's brief at all, it would not have been waived, and was not waived, on appeal. *Collins* v. *State,* supra; *Smith* v. *State,* 259 Ark. 703, 536 S.W. 2d 289; Ark. Stat. Ann. § 43-2725 (Repl. 1977).

The fact that there was a great potential for prejudice in the court's failure to rule on the issue may be easily demonstrated, if the mere failure to make a ruling cannot be said to be prejudicial in and of itself. During the course of the trial, Dr. Rosendale, upon whose testimony the state relied heavily at the pretrial hearing, even though he had not seen Gruzen for two months, heard news reports, after this hearing, that Gruzen was fasting. Dr. Rosendale then visited Gruzen in the Faulkner County jail one week before the trial began. Dr. Rosendale was called as a rebuttal witness by the state.

On cross-examination, Dr. Rosendale told of his visit a week before the trial to Gruzen in a jail cell in which Gruzen was the sole occupant. Dr. Rosendale said that Gruzen was delusional at that time, had told Rosendale of a revelation from God about secret passageways at Rogers Hall at the

Arkansas State Hospital that were used by Rosendale, had given Rosendale a special diet he had worked out for the cure of all mental illnesses in prisons and jails, had related that his attorney Jack Lessenberry had claimed to be his defense attorney, but was not working for him, and that Lessenberry's services were not needed because God was taking care of him. Based upon this interview, Dr. Rosendale expressed the opinion that Gruzen could not effectively assist Lessenberry in his defense and that he was of no use whatsoever to Lessenberry in that defense. Rosendale also testified that not only had he failed to gain Gruzen's confidence, but he did not think that Gruzen had cooperated with Lessenberry any better than he had with him.

The probability that there was prejudice is further demonstrated by the presentence hearing. After the verdict was returned, Gruzen's attorney Lessenberry moved for a new trial on the basis that Gruzen had been unable to assist his defense counsel in the preparation for and during the trial. When Lessenberry asked that there be a hearing on the motion, the prosecuting attorney resisted on the basis of the pretrial hearing, saying that the purpose had been to determine whether Gruzen was competent to aid in the preparation of the trial and objected to Lessenberry's being allowed to testify about anything that might have happened during the course of preparations. Lessenberry was permitted to testify. (Gruzen was represented by another attorney at this hearing.) Lessenberry stated that he got no assistance from Gruzen during pretrial preparations or during the course of the trial and that this was the first case in which he had no input or assistance from the defendant. He expressed the opinion that Gruzen was not competent to assist him. He said that he had been unable to separate fact from fantasy in his discussions with Gruzen. We cannot say that the court's error was harmless, since the evidence at the pretrial hearing that Gruzen had the capacity required for trial pursuant to Ark. Stat. Ann. § 41-603 was not beyond doubt and the resulting potential for prejudice was very great. The case must be reversed and remanded for a new trial because of the trial court's failure to make a determination of Gruzen's fitness to stand trial, so we must consider all other matters, either argued on this appeal or, if not argued here, where

objections were made in the trial court, unless they are not likely to arise in a new trial.

The first such matter is appellant's contention that the trial court erred in failing to suppress all evidence obtained as a result of a breach of the psychotherapist-patient privilege. The privilege is recognized in the Arkansas Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979), Rule 503. That rule provides that a patient has a privilege to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his mental or emotional condition among himself, psychotherapist and persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including the patient's family. The state contends that the New Jersey statute governs rather than the Arkansas statute upon which appellant relies. For the purposes of this opinion, we assume, without deciding, that the Arkansas Statute is applicable, even though it is more favorable to appellant than the New Jersey statute.

The question arises from the denial of appellant's motion to suppress evidence. That motion was directed primarily to suppression of evidence definitely connecting Gruzen with the State of Arkansas, during the period in April, 1976, that he was away from his parents' home. The evidence was seized under a warrant to search the dwelling house of Gruzen's parents in New Jersey. The other evidence which appellant contends resulted from the alleged breach of privilege was Gruzen's name.

The evidence discloses that when Gruzen went to Dr. Pusin upon his return to New Jersey he related a story that seemed to be the cause of his agitated condition, but Dr. Pusin was unable to determine whether it was fact or fantasy. Dr. Pusin felt that this situation called for the services of a forensic psychiatrist. Because he had little experience in that area of psychiatry and because he was having difficulty remaining objective due to the fact that he had grown very close to Gruzen during the 17 years of treating him, Dr. Pusin asked Dr. Eugene Revitch to participate in the diagnosis and treatment of Gruzen. After a two or three hour

examination, Dr. Revitch concluded that the incident was factual and that Gruzen was in a psychotic state and potentially suicidal. Dr. Revitch was tormented by the fact that, based on his conclusions, he knew the facts of a horrible crime, but his action was restricted by the patient's privilege. After conferring about the situation with two consultants and an unsatisfactory review of the literature on the subject, Dr. Revitch decided that it was his obligation to find out about the crime. Capt. Donald Vallatt of the office of the prosecutor for Union County, New Jersey had been a friend of Dr. Revitch for 25 years, so Revitch called his friend for information, seeking to confirm his suspicion that he was dealing with reality, not fantasy. Revitch asked Vallatt to find out whether there had been any murders or girls reported missing in Arkansas within the preceding few days. As a result of this inquiry, Lt. John Mason called the North Little Rock Police Department and asked them to check with the National Crime Information Center, and, as a result, learned that an offense such as that described by the doctor had recently occurred in Arkansas. According to Dr. Revitch, when Vallatt asked that he be given the name of the person Dr. Revitch was talking about, the doctor refused at first, but when the officer started shouting, he stated that the person's first name was John. Capt. Vallatt said that Dr. Revitch did not give him any name.

Gruzen's parents were naturally concerned about their son's condition. They were unaware of the story Gruzen had related to the psychiatrists. Either Revitch or his wife told the Gruzens to call Capt. Vallatt if they wanted information about John. When the Gruzens called Vallatt, he quickly connected their call with his conversations with Dr. Revitch and realized that John Gruzen was a suspect in the murder of Dana Diane Mize. He conveyed this information to Lt. John Mason, who, after discussing it with authorities in North Little Rock, applied for a warrant to search the Gruzen residence, relying upon the information received from Vallatt to establish probable cause. Since Gruzen's parents had given their telephone number to the police, the police were able to obtain the address of the Gruzen residence. The items seized enabled Arkansas authorities to make a case against Gruzen, although prior to the disclosures made by

Dr. Revitch, they had no substantive clues whatever as to the identity of the little girl's slayer.

In approaching this question, we must remember that Dr. Revitch was not called to testify at the trial and the state was not endeavoring to introduce any statement made by him. Appellant is attempting to invoke the exclusionary rule developed by such cases as *Weeks* v. *United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914) and applied to the states by such cases as *Mapp* v. *Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961). The exclusionary rule was developed as a deterrent to unlawful action of police officers. It is not applicable to action by private citizens, even when they inform state officers of matters coming to their knowledge. *Walker* v. *State,* 244 Ark. 1150, 429 S.W. 2d 121; *United States* v. *Burton,* 475 F. 2d 469 (8th Cir., 1973).

Appellant seeks to invoke the "fruit of the poisonous tree doctrine," citing *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); and *Wong Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963). This doctrine, which had its inception in *Silverthorne* and gained its name in *Nardone* v. *United States,* 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939), is another facet of the exclusionary rule which has application only when the tree is poisoned by unlawful action by police officers. In *Silverthorne,* it was said that it is knowledge gained by the government's own wrong that cannot be used. In *Wong Sun,* the United States Supreme Court dealt with evidence obtained as the result of an unlawful arrest and an unlawful invasion of the dwelling place of the accused to make the arrest. It was said in that case that the exclusionary rule does not apply when the government independently obtains knowledge of the evidence apart from its own unlawful activity. Appellant's argument that, in cooperating with Capt. Vallatt, Dr. Revitch acted on behalf of the state is neither convincing, nor accompanied by citation of any authority, and we find no merit in it. There was no unlawful action by police officers in discovering the identity of Gruzen. The violation of the privilege by the psychiatrist was not police action.

We do not find the case of *Lewis* v. *State,* 265 Ark. 132,

577 S.W. 2d 415 (1979) analogous to this situation, as appellant suggests. That case involved a holding that the petitioners there were entitled to a hearing on a petition for post-conviction relief on the ground that their constitutional right to counsel had been violated by communication of confidential and privileged information by their retained attorney and an investigator employed by that attorney.

The prosecuting attorney introduced photographs of the body of Dana Mize taken when it was removed from a stock pond on the farm of Richard Hendrickson, where it was discovered by Hendrickson on April 16. One of them showed the position of the victim's body as it floated in the pond, and two of them, taken after the body was removed from the pond, showed injuries to Dana's face. No objection was made to the first of these photographs, but appellant's counsel objected to the two photographs showing damage to the girl's face on the ground that they were inflammatory. Appellant concedes that the question of admissibility of photographs lies largely in the discretion of the trial judge. See *Stewart* v. *State,* 233 Ark. 458, 345 S.W. 2d 472, cert. den. 368 U.S. 935, 82 S.Ct. 371, 7 L.Ed. 2d 197; *Tanner* v. *State,* 259 Ark. 243, 532 S.W. 2d 168. Of course, if a photograph serves no valid purpose and can only result in inflaming the passions of the jury, it is inadmissible. *Perry* v. *State,* 255 Ark. 378, 500 S.W. 2d 387. A photograph is admissible when it tends to corroborate the testimony of a witness, show the nature and extent of wounds or the savagery of an attack, or is useful to enable a witness to better describe objects portrayed or the jury to better understand the testimony. *Davis* v. *State,* 246 Ark. 838, 440 S.W. 2d 244; *Perry* v. *State,* supra; *Stewart* v. *State,* supra; *Tanner* v. *State* supra. If a photograph, although it may be inflammatory, does serve a valid purpose, we will not reverse the decision of the trial court, even in a capital case, unless it is shown that there was a clear abuse of the trial court's discretion. *Hulsey* v. *State,* 261 Ark. 449, 549 S.W. 2d 73, cert. den. 439 U.S. 882, 99 S. Ct. 220, 58 L. Ed. 2d 194. See also, *Tanner* v. *State,* supra; *Milam* v. *State,* 253 Ark. 651, 488 S.W. 2d 16.

The two photographs in question show the flesh on the jaw of the victim torn away from the body, exposing the lower maxillary and the jaw. Dr. Rodney Carlton, then State

Medical Examiner, was called to the stock pond on the Hendrickson farm where the body had been found by Hendrickson. Dr. Carlton testified about the appearance of the face and the tearing of the flesh of the lower jaw, and said that it was consistent with the striking of a blunt force, or with the person having been dragged over a freshly cut stub, or something of that nature. Dr. Carlton said that the photographs accurately depicted the facial injuries he described, and that they indicated a glancing injury. He was not aware of the fact that the pond was being used to grow catfish, but he had assumed that there were fish and turtles in the pond. Dr. Carlton expressed the opinion that Dana was alive when she was put in the pond.

Hendrickson saw the face of Dana Mize when her body was removed from the stock pond. He testified that the flesh around the right side of her mouth was hanging down. Lt. Ken McFerrin was present when the body was taken from the water. He testified that the photographs accurately depicted the condition of the body and the facial injuries. Dr. Bob Bannister, Coroner of Faulkner County, who was also present when the body was removed, testified that the photographs depicted the body as he saw it.

Even though those photographs were corroborative of the testimony of these witnesses, appellant says that the photographs should not have been admitted into evidence because there was no evidence to show who or what caused the tearing of the flesh. It is true that there is no direct evidence in this regard, but there are circumstances from which a jury might draw an inference. Hendrickson said that he kept the area around the pond "bush-hogged." He kept cattle of various colors and breeds there. Dr. Carlton testified that, when he examined the body, he found hair upon it that was of non-human origin. In addition to the facial tear, there were superficial scratches and abrasions about the face which, according to Dr. Carlton, could have been caused by fingernails or briars. It would not be unreasonable for a jury to believe that Dana had been dragged across the field before she was put into the pond or to accept the idea that the facial tear resulted from her face having been dragged across a stub in the field, and that the facial scratches supported such

inferences. Dr. Carlton found bruises on Dana's neck which he said were consistent with manual strangulation.

In *Rodgers* v. *State,* 261 Ark. 293, 547 S.W. 2d 419, we said that the test should always be whether any necessarily inflammatory tendency of a photograph is outweighed by its probative value. We there recognized that this determination lay in the sound judicial discretion of the trial court. In this case, we are unable to say there was an abuse of discretion. We note that Rule 403 of the Arkansas Rules of Evidence [Ark. Stat. Ann. § 28-1001, Rule 403 (Repl. 1977)] now governs this question. Under that rule relevant evidence may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. It may be seen that the rule stated in *Rodgers* has been changed by tipping the scales in favor of the probative value of a photograph. We also note that error may not be predicated upon a ruling admitting evidence unless a substantial right of the objecting party is affected. Ark. Stat. Ann. § 28-1001, Rule 103 (a). This does not affect our previous holdings that weighing of the opposing factors lies within the sound judicial discretion of the trial court, which will not be disturbed on appeal in the absence of a clear showing of abuse of that discretion. We find no abuse here.

Appellant argues that the photographs should not have been presented to the jury when it cannot be stated with any certainty that he actually caused the damage depicted by them. A short answer to this argument is that the test of the trial court's discretion is simply not that rigid. There was circumstantial evidence connecting him with the disappearance of the young girl. The fact that she was last seen with appellant is significant. See *Parker* v. *State,* 252 Ark. 1242, 482 S.W. 2d 822.

Appellant also argues that the photographs should have been excluded because of the bifurcated trial in capital cases. He points out that neither the savagery of the attack nor the sadistic mind of the attacker is an aggravating circumstance the jury is allowed to consider in the second or sentencing

phase of the trial. See Ark. Stat. Ann. § 41-1303 (Repl. 1977). Furthermore, he contends that, under the capital murder statute, no culpable mental state is required under the applicable section of the statute, which is Ark. Stat. Ann. § 41-1501 (1) (a) (Repl. 1977). The statute does require a showing, however, that the death of the victim was caused under circumstances manifesting extreme indifference to the value of human life, and the photographs were relevant on that subject. We cannot say, therefore, that the photographs were not relevant to shed light on that issue. There was certainly no prejudice to appellant in the second stage of the bifurcated trial, because the jury chose the lesser punishment.

Appellant also contends that the jury arbitrarily disregarded the testimony on the issue of appellant's mental disease or defect and, therefore, their verdict is against the weight of the evidence. We do not determine the weight of the evidence on this appeal. The question is whether there is any substantial evidence to support the verdict. Actually, in arguing this point, appellant concedes that he bore the burden of proof on this affirmative defense and that the real question is whether there is any substantial evidence to support the verdict. See *Campbell* v. *State,* 265 Ark. 77, 576 S.W. 2d 938 (1979). But appellant says that the jury arbitrarily disregarded the evidence showing that because of mental disease or defect he lacked capacity to conform his conduct to the requirements of law or to appreciate the criminality of his conduct. The testimony which the appellant says the jury disregarded was that of expert witnesses who expressed opinions on the issue. No useful purpose would be served by a review of all the evidence on this point, other than to show that there was substantial evidence to support the jury verdict which prevents us from saying that the jury arbitrarily disregarded the testimony. As we have previously said, the expert testimony that Gruzen has a mental disease or defect is undisputed. This does not mean, however, that he was necessarily without capacity to conform his conduct to the requirements of law or to appreciate the criminality of his conduct.

A jury is not bound to accept opinion testimony of

experts as conclusive, and it is not compelled to believe their testimony any more than the testimony of other witnesses who testify. *Mutual Benefit Health & Accident Ass'n.* v. *Moore,* 196 Ark. 667, 119 S.W. 2d 499. It may consider an expert's opinion in the light of the expert's qualifications and credibility, the reasons given for his opinion, and the facts and other matters upon which his opinion is based, but it is not bound to accept an expert opinion as conclusive. A jury should give the opinion whatever weight it thinks the opinion should have and may disregard any opinion testimony it finds unreasonable. AMCI 105.

Expert witnesses are allowed to give opinion testimony only as an aid to the jury in understanding questions inexperienced persons are not likely to decide correctly without such assistance, but expert testimony is entitled only to such consideration as it appears to the jury to deserve. *American Bauxite Co.* v. *Dunn,* 120 Ark. 1, 178 S.W. 934, Ann. Cas. 1917C 625.

Testimony of expert witnesses is to be considered by the jury in the same manner as other testimony and in the light of other testimony and circumstances in the case; the jury alone determines its value and weight, and may, under the same rules governing other evidence, reject or accept all or any part thereof as they may believe it to be true or false. *Western Union Telegraph Co.* v. *Byrd,* 197 Ark. 152, 122 S.W. 2d 569; *United States Fidelity & Guaranty Co.* v. *Park,* 254 Ark. 129, 491 S.W. 2d 791. Even when several competent experts concur in their opinions and no opposing expert evidence is offered, the jury is still bound to decide the issue upon its own fair judgment. *Western Union Telegraph Co.* v. *Turner,* 190 Ark. 97, 77 S.W. 2d 633. The jury must consider the opinions of the experts in connection with all the other evidence in the case. *Kelley* v. *State,* 146 Ark. 509, 226 S.W. 137. The jury is the sole judge of the credibility of expert witnesses and the weight to be given their testimony, just as is the case with the testimony of other witnesses. *Kelley* v. *State*, supra. Testimony need not be regarded as undisputed merely because it is not directly contradicted if, from other facts and circumstances in the record, any reasonable inference can be drawn contrary thereto. *Western Union Telegraph Co.* v. *Byrd*, supra.

There was substantial evidence to support the jury verdict. A witness called by appellant, Dr. B. Travis Tunnell, Jr., a clinical psychologist, suspected after his first interview with Gruzen that Gruzen was malingering and might not have been totally honest, and this thought crossed his mind after a second interview. A report of Dr. Tunnell in the form of a letter to the prosecuting attorney included a finding that Gruzen was above average in intellect. Dr. Tunnell testified, in answer to a hypothetical question which included facts in evidence or which might have been inferred from the evidence, about Gruzen's conduct between the time he left New Jersey and the time he took a train to return there and expressed the opinion that Gruzen was competent at that time. Gruzen's mother testified that he did not graduate from high school, but was admitted to college by taking equivalency tests. His intelligence quotient was in the superior intellectual range. Dr. Albert F. Rosendale was the examining psychiatrist who observed Gruzen for 45 days before he was presented to the staff at the Arkansas State Hospital. Dr. Rosendale presented him as being competent.

Dr. Allen Graham Tuff, a psychologist employed at the Human Services Center as Director of Clinical Services, said that his first reaction to the results of one test heavily relied upon by expert witnesses who testified on behalf of appellant was that the test was invalid and above the range of interpretability. In his opinion, it indicated that Gruzen was faking. He said that another test of Gruzen showed a perfect score on judgment and abstract reasoning. This witness was experienced in interpretation of the tests which had been administered to Gruzen. Dr. Tuff, in response to a hypothetical question similar to that propounded to Dr. Tunnell, expressed the opinion that, applying the legal tests applicable in Arkansas as to ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law, Gruzen was legally sane.

Dr. Albert F. Rosendale, who was Chief of the Forensic Psychiatric Section of the Arkansas State Hospital, expressed the same opinion in response to the same hypothetical question. Dr. Rosendale was of the opinion that Gruzen's persistent adherence to his attorney's advice not

to discuss the events pertaining to the charge against him indicated his ability to appreciate the criminality of his conduct.

There was testimony about Gruzen's conduct from the time of his arrival in Arkansas until his return to New Jersey. Some of this conduct was consistent with that of a legally competent person. There was sufficient substantial evidence to support the jury's finding that Gruzen was legally responsible for his acts when the crime was committed.

Although appellant argued no other points for reversal, we have reviewed the record for prejudicial error, as required in a case where the sentence is life imprisonment without parole. Some of the matters to which appellant made objection and requests rejected by the court will not likely arise on retrial. Appellant's motion for a directed verdict at the close of the evidence on behalf of the state on the basis that the state had not shown that he was sane was not well taken. The defense of mental disease or defect is an affirmative defense which defendant must prove by a preponderance of the evidence. Ark. Stat. Ann. § 41-601, -110 (Repl. 1977). We do not deem it necessary to review the evidence which showed that Dana Mize had been kidnapped, raped and drowned, that Gruzen was in and around Little Rock, Conway and Vilonia at the time this happened, that he had rented a car which matched the description of that into which Dana was pulled as she was walking toward her home on the day she disappeared, or that a hair sample taken from the victim matched samples taken from the rented car, other than to say that it was sufficient to present a question for the jury, so motions for a directed verdict were properly denied.

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

HARRIS, C.J., not participating.

PURTLE, J., concurs.

HICKMAN, J., dissents.

JOHN I. PURTLE, Justice, concurring. Were I to allow my emotions to control my judgment I would dissent from the majority view in this capital felony case. However, after

reviewing the record, I am convinced the majority properly state the law as we have treated it in the past. The law has not changed since we stated in *Bly* v. *State,* 263 Ark. 138, 562 S.W. 2d 605 (1978).

> It is our duty in a capital felony case to examine the entire record for not only errors raised on appeal but also those that may be found in the record.

The record clearly reveals appellant raised the issue of competency to stand trial. Ark. Stat. Ann. § 41-606 (Repl. 1977) states:

> If the defendant's fitness to proceed becomes an issue, it shall be determined by the court. If neither party contests the finding of the report filed pursuant to section 605 (§ 41-605), the court may make the determination on the basis of the report. If the finding is contested, the court shall hold a hearing on the issue.

The above statute placed the duty upon the trial court to make the decision of whether the appellant was competent to stand trial. The trial court did not make that determination. It is our duty to return the case to the trial court for a new trial. We are not free to decide any case in a manner which we personally feel expedites justice unless the accused has been afforded due process of law and has received equal treatment. Such consideration is basic to our form of government and required by the Constitution of the State of Arkansas and the Constitution of the United States.

DARRELL HICKMAN, Justice, dissenting. I dissent because the judgment is being reversed for a reason not raised on appeal.

There was no objection preserved in the record regarding the trial court's failure to rule on Gruzen's competency to stand trial. There is no argument at all on appeal that the court erred in not deciding that issue itself.

Not even in capital cases do we search for errors not preserved at the trial level.

While the evidence was strong that Gruzen was in no condition to stand trial, there was substantial evidence to the contrary. If the court had ruled him competent to stand trial, which in effect is what was done, I would not reverse that decision.

In summary, this case is reversed for no reason alleged below or argued on appeal.

Larry W. STEFFEN *v.* STATE of Arkansas

CR 79-130 590 S.W. 2d 302

Opinion delivered December 17, 1979

John W. Achor, Public Defender, by: *William H. Patterson, Jr.,* Chief Appellate Attorney.

Steve Clark, Atty. Gen., by: *Dennis R. Molock,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant Larry W. Steffen was found guilty of aggravated robbery and theft of property exceeding $2,500 in value. Pursuant to the Habitual Criminal Statute the jury fixed his punishment at 50 years on the aggravated robbery charge and 30 years on the theft charge. The trial court directed that the sentences should run consecutively. For reversal appellant makes the following contentions:

> "I. Trial court erred in failing to hold the prosecutor to the bargain made with the appellant in return for his cooperation done in good faith.
>
> II. Trial court erred in failing to grant a mistrial requested due to the highly prejudicial remarks made by the prosecutor in closing argument.
>
> III. Trial court erred in sentencing phase when Contra to Arkansas Statutes Ann. § 41-1001, three (3) single

offenses were counted as multiple convictions for purposes of the Habitual Offenders Statute."

POINT I. Appellant contends that he was told by the prosecuting attorney's office that if he cooperated with the officers in clearing up some crimes in Pulaski County there would be no less than 7 nor more than 10 years on the charges here made against appellant. Lloyd Haynes, deputy prosecuting attorney admits that without the benefit of the office file, he had a conversation with appellant in which he discussed seven to ten years. However, Lloyd Haynes says that he did not recall discussing the fact that appellant was charged as a habitual offender or whether he even knew that appellant was charged as a habitual offender. At the time he did not consider his statements to appellant as being a binding agreement. Appellant did advise Haynes that appellant would "fill up the jail."

Jim King with the Arkansas State Police, who was with appellant when he had the telephone conversation with Lloyd Haynes, testified that the number seven was mentioned but that he did not know whether the appellant or Haynes suggested it. Officer King further testified that Haynes stated appellant would be charged as a habitual offender. Upon cross-examination, King stated that Haynes had said that as soon as the burglaries were "cleared up" by appellant the aggravated robbery charge would be discussed. Appellant, Officer King, and Haynes were the only witnesses to the telephone conversation which is alleged to have resulted in the agreement between the prosecutor's office and the appellant.

The burden of proof on appeal is upon appellant to show the existence of any agreement. *Hammers* v. *State,* 261 Ark. 585, 550 S.W. 2d 432 (1977). Although *Hammers* involved an immunity agreement rather than a plea bargain, the essential issue concerned negotiations and an exchange of promises. The determination of the existence of a valid agreement between the state and the defendant is a matter within the sound judicial discretion of the trial court, *Hammers, supra,* and the trial court's finding as to the existence of the agree-

ment should not be reversed upon appeal absent an abuse of discretion.

It is evident that the testimonies of the three witnesses conflict on the essential question of whether the seven year figure was an exact and binding one or simply an estimate. There is also disagreement as to whether the validity of the agreement was contingent upon appellant first clearing up the unsolved burglaries. Weighing the evidence in the light most favorable to the appellee, it cannot be said that the terms of the purported agreement were established with such exactness that failure to find the existence of an agreement was an abuse of discretion.

POINT II. Appellant's next contention is based upon the following excerpt taken from the prosecutor's closing argument:

> ". . . So there's no doubt what the verdict should be here, ladies and gentleman. He's guilty of aggravated robbery. At this time you're only required to go out and find guilty or not guilty on the robbery and the theft. And, when you come back in, we can talk about sentence."

These remarks, says appellant, were a 'dead give-away" to the "seasoned" jurors that this was to be a bifurcated trial, thus indicating that appellant had prior convictions and resulting in prejudice to him. Appellant did not voice his objection, however, until closing arguments had been completed. The proper time for the objection was immediately following the remarks. *Jones* v. *State,* 248 Ark. 694, 453 S.W. 2d 403 (1970). See also *Shipp* v. *State,* 241 Ark. 120, 406 S.W. 2d 361 (1966). Telling the jurors that they may or may not have further proceedings under similar circumstances has been held without error in absence of objection, *Henson* v. *State,* 248 Ark. 992, 455 S.W. 2d 101 (1970).

POINT III. The appellant's third and final contention goes to the sentencing portion of the trial. The prosecution was allowed to introduce evidence to the jury of three prior burglary convictions against appellant. One of the convic-

tions included aggravated robbery as well as burglary. Another conviction included kidnapping and aggravated robbery as well as burglary, and one conviction was for burglary alone.

Ark. Stat. Ann. § 41-1001 (3) (Repl. 1977) provides, in pertinent part:

> "(3) For purposes of determining whether a defendant has previously been convicted or found guilty of two (2) or more felonies, a conviction or finding of guilt of burglary and of the felony that was the object of the burglary shall be considered a single felony conviction or finding of guilt. . . ."

The trial court, over defendant's objections, allowed the offenses to be counted as six separate convictions for purposes of sentencing under the Habitual Criminal Statute, Ark. Stat. Ann. § 41-1001 (Repl. 1977). The jury subsequently assessed appellant's sentence at fifty years on the aggravated robbery charge and thirty years on the theft charge.

Appellant maintains that under Ark. Stat. Ann. § 41-1001 (3) (Repl. 1977), the prior convictions should have been counted as three rather than six. It is the State's position, on the other hand, that the appellant made no attempt to offer proof that the attending felonies were indeed the objects of the burglaries. However, Ark. Stat. Ann. § 41-1001 (Repl. 1977) is a penal statute and is therefore to be strictly construed. *McConahay* v. *State,* 257 Ark. 328, 516 S.W. 2d 887 (1974). The burden, then, was upon the prosecution to offer proof showing that the attending felonies were *not* the objects of their respective burglaries. Its failure to so do required the prior convictions to be counted as three pursuant to Ark. Stat. Ann. § 41-1001 (3) (Repl. 1977). There is no doubt that appellant was prejudiced by counting his previous convictions as six rather than three. If the count had been three the sentencing range for the aggravated robbery charge would have been ten years to fifty years rather than fifty years to life [Cf. Ark. Stat. Ann. § 41-1001 (1) (a) (Repl. 1977) and § 41-1001 (2) (a)], and the sentencing range on the

theft charge would have been five years to thirty years rather than twenty years to forty years [Cf. Ark. Stat. Ann. § 41-1001 (1) (b) (Repl. 1977) and § 41-1001 (2) (b)].

This court has on previous occasions under similar circumstances reduced the appellant's sentence to the minimum prescribed by law. See *McConahay* v. *State, supra.* Accordingly, appellant's sentence shall be reduced to ten years on the charge of aggravated robbery and five years on the theft of property charge with the sentences to run consecutively unless the State objects to the reduction within 17 calendar days after this opinion becomes final. In the event the State objects to the reduction, the conviction will stand as reversed.

Affirmed on condition of remittitur.

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

BANK OF WALDRON *v.*
SCOTT COUNTY BANK, Et Al

79-165 590 S.W. 2d 654

Opinion delivered December 17, 1979
(In Banc)

Friday, Eldredge & Clark, by: *Hermann Ivester,* for appellant.

Rose, Nash, Williamson, Carroll, Clay & Giroir, by: *William H. Kennedy, III,* for appellees.

FRANK HOLT, Justice. Following a hearing, appellee Arkansas State Banking Board, the appellee State Bank Commissioner concurring, approved a charter application submitted by appellee Scott County Bank for location of a bank in Waldron. At a meeting approximately six weeks later, the Board formally approved the charter and adopted written findings of fact and conclusions of law. The circuit court affirmed the Board's action. Hence this appeal.

At the end of a one day hearing, the Board immediately

rendered its 3-2 decision approving the application. The thrust of appellant's first argument for reversal is that in doing so the Board did not make a sufficient study of the mass of exhibits and data presented by both sides at the hearing before rendering its decision. In other words the Board members could not adequately absorb all of the material presented to justify an immediate decision without discussion and deliberation.

The members of the Board had appellee bank's application and supporting data for individual study approximately five months before the hearing. The Board had allotted two days for the hearing. However, at the close of the first day, the appellant stated that any additional evidence "would probably be cumulative." "The extent to which an independent study of the evidence in the record is necessary to the required exercise of informed judgment must be left to the wisdom and practical good sense of the agency." 2 Am. Jur. 2d Administrative Law § 439. Here the evidence presented at the hearing, including various economic reports and the oral testimony, does not appear to be of a highly technical or complex nature in view of the experience and expertise of the members of the Board. Although the decision to approve the application was made immediately following the presentation of the evidence, we cannot say that it is demonstrated the Board failed to adequately consider the evidence. Accordingly, we hold the Board's decision was not arbitrary and capricious, did not deprive the appellant of due process, was not an abuse of discretion, nor was it in violation of Ark. Stat. Ann. § 67-303.1 (Supp. 1979), which only requires "consideration" of certain factors by the Board.

Appellant's second contention is related to the first and is also without merit. It argues that the Board's failure to allow appellant to respond to the proposed findings of fact submitted by appellee bank or to be heard with regard thereto and the Board's adoption of the proposed findings in toto, was arbitrary and capricious, was an abuse of discretion, and was in violation of appellant's due process rights and Ark. Stat. Ann. § 5-710 (b) (Repl. 1976). Appellee applicant, as the prevailing party, submitted proposed findings of fact and conclusions of law. Appellant admits that its coun-

sel was provided with a copy of this proposed document ten days prior to the scheduled hearing. Its counsel had requested a hearing before any findings be approved by the Board. Unfortunately, appellant's counsel was seriously ill when the proposed document was received. His partner communicated a request for a postponement of the hearing. Appellant did not submit any modifications or comments to the proposed findings or any findings of its own. Neither did its counsel, who was ill, attend the scheduled hearing. The Board, after considering the evidence and reaching the same findings and conclusions, is not prohibited from adopting the proposed findings of fact. § 5-710 (b). Further, we note that the proposed findings and conclusions were not adopted in toto but were revised to a limited extent by the Bank Department before submission to the appellant and the Board for its approval. Postponement of the scheduled hearing, of course, was within the discretion of the Board. In the circumstances we find no improper action on the part of the Board or a violation of any of appellant's rights when the Board adopted, at its scheduled hearing, the proposed findings of fact and conclusions of law.

Appellant's third contention, admittedly inherent in the first two arguments, is that the Board and the Commissioner failed to rule on each proposed finding of fact as required by § 5-710 (b). In view of our previous discussion, it is clear that the Board complied with this statute.

Appellant next contends that the administrative decision is not final until its petition for rehearing is disposed of by the Board and the Commissioner. Eight days after the initial hearing, appellant filed a petition for a rehearing asking the Board to make specific rulings on each proposed finding of fact. While it is true that the Board has never expressly ruled on the petition, we consider the Board's approval of the application final. First, there is no statutory requirement that a rehearing be held before the final decision. Second, the petition did not state any new facts which would be presented at the hearing but merely asked that a hearing be held at which the Board would make specific rulings on the proposed findings. The Board is not required

to make specific rulings except in its final decision. § 5-710 (b). Third, even though the Board apparently has the authority to grant a rehearing before the final decision, Bank Department Rule 32, the decision to do so lies within its discretion. 2 Am. Jur. 2d Administrative Law § 539. We cannot say that the Board's failure to rule on the petition, or to hold a rehearing, was an abuse of discretion.

Appellant next asserts that the approval of the charter was arbitrary, capricious, and an abuse of discretion because there was no substantial evidence to support the findings that the capital structure and future earnings prospects of appellee applicant are adequate. Appellant argues that appellee failed to comply with the Arkansas Securities Act, Ark. Stat. Ann. § 67-1241 (Repl. 1966), in the sale of its stock and this noncompliance exposes the appellee bank to potential ruinous liabilities to its stockholders. Appellee responds that the sale of the shares was properly exempted under the Act. We hold that the appellant lacks standing to complain about this matter as "the only persons who might be hurt would be the subscribers to the stock." *Bank of Glenwood* v. *Arkansas State Banking Board,* 260 Ark. 677, 543 S.W. 2d 761 (1976).

Appellant's sixth contention is two-fold: (1) The Board and the Commissioner did not find that the stockholders of appellee applicant had the confidence of the community as required by Ark. Stat. Ann. § 67-303.1 (Supp. 1979), and (2) there is no substantial evidence to support such a finding. No Arkansas cases are cited, and we find none interpreting this statute in reference to the exactness of the finding required. We are satisfied, however, that the Board's finding was sufficient by stating "a majority of the stockholders are . . . such as to command the confidence of the community." As to substantial evidence, we first observe that at the hearing the appellant's counsel advised the Board that there would be no argument about the character of the people who were asking for the bank charter. Even so, according to appellee's application, supporting data and the Bank Examiner's Investigation Report,[1] the majority stockholders are success-

[1]We granted appellee's motion to make this report part of the record. We now consider it upon reaching the merits of the case.

ful individuals in business, professional and other endeavors and are financially sound. They have good characters and reputations. Two are locally elected public officials. The incorporators, who jointly own 52% of the stock, will serve as the bank's directors and have the primary responsibility of the management of the bank. Community confidence in another of the major stockholders can be inferred from the fact that several Waldron residents sought financing from him through another bank in an adjoining county when they were unable to obtain financing from the appellant bank. In the circumstances we cannot say that there is no substantial evidence to support this finding.

Appellant's seventh contention is also two-fold: (1) the Board and the Commissioner did not find that appellee applicant's stockholders are financially able to discharge their financial obligations as required by §§ 67-303.1 and 67-303.2, and (2) there is no substantial evidence to support such a finding. The thrust of the two-fold argument is that the Board made no finding inasmuch as it and the Commissioner improperly conditioned approval of the charter upon appellee applicant's obtaining FDIC insurance.

We do not agree with appellant that conditioning of the charter approval is in excess of the power of the Board and the Commissioner. § 67-205, in effect, permits the conditioning of charter approval by stating that "if the board shall recommend that conditions designated by it shall be met before the grant of such [an] application, the Bank Commissioner shall grant the application only after the conditions mentioned in such recommendation have been complied with . . . ." Certainly a requirement that the applicant secure FDIC insurance is in harmony with the Board's statutory duty "to attain and maintain the maximum degree of protection for depositers." See Ark. Stat. Ann. § 67-204 (Repl. 1966); and 2 Am. Jur. 2d Administrative Law §§ 300-304.

Appellant asserts last that there is no substantial evidence to support the finding that there "exists a public necessity of the business of the community" of Waldron for another bank as required by § 67-303.1. Contrary to this

contention, there is evidence that Waldron is in an area of the state which is expected to experience substantial growth and development within the next five years. A study indicated that employment in that region will increase by an average of 24%; i.e., 27.7% increase in employment in goods-producing industries and a 20% increase in service industries. Also an increased need is predicted for workers in the region in almost all major occupational groups. Wholesale and retail sales in Scott County have increased significantly in the last five years, indicating a stable economic growth. New residential construction is increasing. There is evidence of a $4 million industrial expansion of a local manufacturer, providing substantial benefits for related service industries. Several firms are planning or beginning coal mining operation in the county. Evidence was adduced that residents of the community were using banks outside the county to meet their banking needs. We hold, although the evidence is in conflict, there is substantial evidence in the record as a whole to support the Board's finding of a public necessity in the community for the proposed bank. See *Arkansas Racing Commission,* supra; and *Arkansas S&L Board* v. *Central Arkansas S&L,* 260 Ark. 59, 538 S.W. 2d 505 (1976).

Affirmed.

HARRIS, C.J., not participating.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result but I strongly feel that the procedures followed by the Arkansas State Banking Board were subversive of the intent and purposes of the Arkansas Administrative Procedure Act and thereby hamper judicial review.

THE EXCHANGE BANK & TRUST COMPANY *v.* Dorothy J. MATHEWS et al

79-186 591 S.W. 2d 354

Opinion delivered December 17, 1979
(In Banc)
[Rehearing denied January 21, 1980.]

Spencer, Spencer & Shepherd, for appellant.

House, Holmes & Jewell, by: *Charles R. Nestrud,* for appellee.

DARRELL HICKMAN, Justice. In 1973, the appellant bank obtained a $72,000.00 judgment against the appellee, Dorothy Mathews. When Mrs. Mathews' house burned in 1978, the bank attempted to attach her portion of the insurance proceeds and apply them to the judgment debt. The Union County Chancellor held the money was a substitute for her homestead and, therefore, constitutionally exempt from execution by the bank.

On appeal the bank argues the chancellor's ruling was

against the preponderance of the evidence. To agree we would have to find the chancellor's decision to be clearly erroneous. Rules of Civil Procedure, Rule 52. This we cannot do. We affirm the decree.

The essential facts are undisputed. The bank's judgment against Mathews was for a business debt. On May 4, 1978, Mathews' house was destroyed by fire. June 2nd, she was divorced and the chancery court ordered the insurance money on the house to be divided between her and her former husband. There was another party that had an interest in the proceeds who is not a party to this appeal. Neither is her former husband.

June 6th she obtained, from the insurance company, a $10,000.00 advance which she used to make a down payment on a new home. She obtained title to this home on June 9th. She had been told by the insurance company that her temporary living expenses at a motel were getting out of hand and she needed to either rent a house or an apartment. Obviously she decided to buy a house.

On June 16th the bank executed on both the lot on which the destroyed house had stood and her new home. She claimed both properties as her homestead and therefore exempt from execution. ARK. CONST. art. IX, § 3. The chancellor ordered that she had to select one piece of property or the other; she selected her new home. The lot was ordered sold and the bank bought it at a forced sale on July 14th.

July 20th the bank garnished the remaining insurance money which was being held by the insurance company because the exact amount of the loss had not been determined.

She claimed the money was exempt as substituted homestead property.

The matter was submitted to the chancellor on the pleadings and the testimony of an agent of the insurance company.

The chancellor found the insurance proceeds exempt from execution, quoting from the case of *Obenshain* v. *Obenshain,* 252 Ark. 701, 480 S.W. 2d 567 (1972):

> When the owner of a homestead voluntarily sells the property, the proceeds of such sale are not exempt. On the other hand, when the property is subjected to a forced sale, the debtor's share of the proceeds *is exempt if he intends to use the money to acquire another homestead.* [Emphasis added by the chancellor.]

The court added:

> Mrs. Mathews did in fact use the $10,000.00 she received from the insurance company for the down payment on another home which she claims as her homestead. . . .

The appellant takes the position that Mrs. Mathews should not be allowed to claim both her new home and the proceeds from the old home and that she abandoned her homestead rights to the proceeds when she elected to claim her new home as exempt. Furthermore, appellant argues there was no evidence that she intended to use the money to purchase a new homestead or pay on her newly acquired home.

We disagree. There is no doubt insurance money or proceeds from a forced sale of a homestead are exempt from execution. *Franklin Fire Ins. Co.* v. *Butts,* 184 Ark. 263, 42 S.W. 2d 559 (1931). Furthermore, those proceeds are exempt from execution for a reasonable period of time to allow a person to invest in another homestead. *Simms* v. *McFaddin,* 217 Ark. 810, 233 S.W. 2d 375 (1950).

Mathews never had the money. She invested all she received in a new home and no doubt the chancellor found she intended to do likewise with the remainder. He emphasized language in the *Obenshain* case regarding intent and referred to the fact that she used the $10,000.00 she received to pay down on her new home.

She never abandoned her claim to the lot or the proceeds; she claimed both at every opportunity. While a person cannot have two homesteads at the same time, the law recognizes that a reasonable period of time must be given a person to invest the money in a new homestead. *Simms* v. *McFaddin, supra.*

This whole matter took place over a period of a few weeks during which the property was being divided by the divorce court, subject to attachment, or in the case of the insurance proceeds, subject to a garnishment action.

It is true that Mathews did not testify she intended to invest the remainder of the proceeds in her new home. However, we think that we can fairly conclude that the chancellor found that she intended to use the remainder of the insurance proceeds to pay on her new home. In order to make certain that the law is not perverted by the appellee, we will affirm the decision of the chancellor on the condition that the money is used by the appellee solely to pay for her new home. The chancery court will retain jurisdiction to insure that this happens.

Affirmed.

HARRIS, C.J., not participating.

John Edward SWINDLER *v.* STATE of Arkansas

CR 79-116 592 S.W. 2d 91

Opinion delivered December 17, 1979
(In Banc)

[redacted]

[redacted]

Don Langston and *John Settle,* for appellant.

Steve Clark, Atty. Gen., by: *Nelwyn L. Davis,* Asst. Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. John Edward Swindler's first trial for killing Randy Basnett, a Fort Smith police officer acting in the line of duty, was held in February, 1977. He was found guilty of capital murder and sentenced to die by electrocution. His trial was held in Fort Smith, Sebastian County. We reversed that conviction because the court failed to grant a change of venue and because the court failed to excuse three jurors. *Swindler* v. *State,* 264 Ark. 107, 569 S.W. 2d 120 (1978). The case was tried again but this time in Scott County, an adjacent county to the judicial district. Swindler was convicted the second time of capital murder and received the same sentence. This is an appeal from that conviction.

The shooting occurred when Swindler stopped off at Fort Smith, Arkansas apparently enroute to Kansas City from South Carolina. He pulled into the Road Runner Service Station just off Interstate 540, which bypasses downtown Fort Smith. It was about 5:00 p.m., Friday afternoon, September 2, 1976.

Basnett, a Fort Smith policeman who was on duty, had stopped to drink a coke with Carl Tinder at the Road Runner Service Station. Tinder ran the service station, which included a small convenience store. Basnett had in the past dropped by from time to time to drink coffee or a coke with Tinder. As they were talking at the counter, inside the station-store, Swindler drove up and parked his vehicle in the middle lane of three lanes under the station canopy. His vehicle was headed east, the driver's side facing the front of the station-store. Swindler went in and asked for directions to Kansas City. Basnett and Tinder told him how to proceed.

Swindler went back outside, raised the hood on his vehicle and was looking after the vehicle when Basnett left the station-store. Basnett got in his police vehicle, which was parked nearby, and drove around to the other side of the station, parking his vehicle to the rear of Swindler's. Apparently Basnett made a radio call and then walked up to Swindler.

Two witnesses testified that Swindler shot and killed Basnett as the officer stood at the car door on the driver's side. Basnett had not pulled his gun until after he was shot. Tinder was one of these eyewitnesses; he was inside the store; the other witness was a man named Steve Cardwell who said he was outside the station.

Basnett was able to fire five or six times through the car door before he died. Basnett fell back, fatally wounded. Swindler, although he was injured, was able to drive off. He was arrested shortly thereafter. The State Police District Headquarters was just across the street from the station.

Four guns and a rifle scope, as well as some ammunition, were found near the vehicle: a .38 Colt revolver, a .38 Smith and Wesson revolver, a 9 shot .22 automatic pistol, all fully loaded, and a .22 caliber rifle containing three live rounds. Over 200 rounds of live ammunition for the rifle were found in or near the vehicle. This evidence was introduced over Swindler's objections.

Swindler's version as to the actual shooting differed. He said he saw the policeman get in his car and thought he was leaving. Swindler went back to seeing after his car and had just gotten into it when he heard a "cock," as a hammer being cocked on a pistol, heard something said to the effect, "damn hippie," and was shot. He said he had a pistol in his belt and another in his pocket and, just as he was laying down the pistol he had taken from his belt, this happened; he turned instinctively and the gun went off. He said he did not know it was a policeman until after he fired. He claimed he was shot first.

He remembered seeing Tinder inside the station-store.

He recalled after the shooting seeing some children about on bicycles. He did not recall seeing the other eyewitness, Cardwell.

The first trial was preceded by news coverage of the killing, of the funeral of the police officer, and of Swindler's past. The coverage was substantial. In some instances the stories contained material that could and, in fact did, result in prejudice to Swindler's right to a fair trial at that time in Sebastian County. The extent of that coverage was discussed at length in our opinion deciding the first appeal. Chief Justice Carleton Harris, in a concurring opinion, especially addressed the problem created by the news coverage of the killing and its relation to Swindler's first trial.

Although the appellant in this case argues some of the same issues regarding a prejudiced community and jury, there is no evidence at all in this record of unfavorable pretrial publicity. The record we have regarding those arguments consists solely of the *voir dire* examination of veniremen (prospective jurors) from Scott County.

We have examined the record not only as to those allegations of error raised on appeal but also other errors as we do in such cases. Rules of Crim. Proc. Rule 36.24. We find no prejudicial error was committed and affirm the judgment and sentence of the trial court.

The first three arguments of error are related and will be discussed together.

I.

The trial court erred in denying the defendant's motions for a mistrial and motions for a second change of venue when it was shown during *voir dire* of the jury that a fair and impartial jury could not be selected to try this case.

II.

The trial court erred in overruling the defendant's motions to declare Arkansas' venue statutes (Ark. Stat.

Ann. Sections 43-1507 and 1518) which permits only one change of venue and Article 2, Section 10 of the Arkansas Constitution which permits a change of venue only to another county in the judicial circuit unconstitutional in violation of the fair trial and due process clauses of the United States Constitution and in refusing to change the venue the second time to a county where the defendant can receive a fair and impartial trial.

III.

The trial court erred in refusing to grant the defendant's motion to excuse jurors for cause (either as a group or singly) and requiring the defendant to exhaust his peremptory challenges to excuse them and to take several jurors who should have been excused for trial.

The United States and Arkansas constitutions entitle a defendant to a fair trial. If, because of pretrial publicity, an impartial jury cannot be seated to try a defendant, his right to a fair trial is violated. *Irvin* v. *Dowd,* 366 U.S. 717 (1961); *Swindler* v. *State, supra; Ruiz & Van Denton* v. *State,* 265 Ark. 875, 582 S.W. 2d 341 (1979).

Swindler's first argument is that, in Scott County, he could not be tried by an impartial jury.

While Swindler's counsel moved six times for a mistrial or change of venue during the 5 days' *voir dire* examination, no evidence at all was offered of pretrial publicity. No affidavits or testimony, showing pretrial publicity or ill feelings in the community as a result of the killing, was offered, as they had been in *Swindler* v. *State, supra* or *Ruiz & Van Denton* v. *State, supra.*

Our law provides affidavits or sworn testimony must be offered to support a motion for a change of venue. Ark. Stat. Ann. § 43-1502.

The only evidence we have of prejudicial pretrial publicity is the *voir dire* testimony of the prospective jurors as 120 jurors were examined. Swindler had not exhausted his

preemptory challenges until after the 11th juror had been selected.

The trial court, no doubt mindful of our decision in the first *Swindler* case, was careful and took pains in selecting this jury.

The fact 120 were examined is not, standing alone, enough to conclude a fair and impartial panel could not be seated.

The judge excluded over 79 people for cause. The jurors seated, while in some instances acknowledging that they knew generally of the crime, Swindler, or the first trial, all said they could set aside what they had heard and try Swindler on the facts and according to the law.

The test of whether pretrial publicity has prejudiced a juror was set forth in *Irvin* v. *Dowd, supra*. It reads:

> It is not required that the jurors be totally ignorant of the facts involved . . . To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented at court. 366 U.S. at 722-723.

Deciding to seat a juror challenged for bias is a discretionary matter with the trial judge. To reject a potential juror, the judge must be satisfied that the juror's state of mind is such that he cannot render an impartial judgment and that seating him will result in substantial prejudice to the rights of the defendant. *Jones* v. *State,* 264 Ark. 935, 576 S.W. 2d 198 (1979).

Swindler's attorney did not move to strike 9 of the jurors selected. One was overseas at the time of the killing; another had read or heard nothing of the case, except from her husband; one knew nothing of the facts but only vaguely

recalled "something" about it; another had read, some three weeks before this trial, the local paper in Scott County about the killing; one recalled some news accounts and probably decided Swindler was guilty because he had been found guilty before; one had seen a "little bit" on T.V. and read in the local paper that a Fort Smith policeman was shot. Another had heard nothing and knew nothing. All of these were selected with no objection. The last juror selected, who knew nothing, was selected after the defense had exercised all preemptory challenges.

The three jurors selected, that the defense challenged for cause, were all selected when the defense had remaining a preemptory challenge. These three did admit to having more knowledge than the others.

Thurman Jones had read the Fort Smith newspapers and seen the "case on T.V." He also read that Swindler was accused of killing two others in South Carolina. He had assumed Swindler was guilty since he had been convicted. Jones was questioned extensively. He acknowledged he could set aside all his ideas and information and give Swindler a fair trial.

Milton Staggs had read and heard some about the case and had formed a "little bit" of an opinion. He said he would have no difficulty in setting aside any information or opinion he had formed.

Henry Sunderman had read and heard of the case. He declared he had no opinion about the case. Since a jury had convicted Swindler before, he had to conclude Swindler might well be guilty. But he said he could do his duty in this case and disregard any information he had about the case.

The judge, in his discretion, decided these jurors could serve. We cannot say the judge clearly abused his discretion in selecting these jurors.

There is no comparison at all between this case and the first *Swindler* case and the *Ruiz & Van Denton* case. The appellant cites as controlling the cases of *Irvin* v. *Dowd*,

supra, and *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966), the case involving Dr. Sam Sheppard. In both *Irvin* and *Sheppard* there was strong evidence of pretrial publicity that prevented the selection of a fair jury. As we indicated there was no such evidence offered in this case. The only real argument the appellant has is that over 80% of those questioned were excused for cause.

We have independently examined the *voir dire,* as we are required to do in such cases. We find that the facts in Swindler's second trial regarding the composition of the jury are not unlike those that were found to exist in the case of *Murphy* v. *Florida,* 421 U.S. 794 (1975). In the *Murphy* case the Court also found that a considerable number of jurors knew of Murphy's crimes and his past crimes. However, the Court did not find that such information alone required a reversal of Murphy's conviction. The Court compared the difference between Murphy's case and that of *Irvin* v. *Dowd, supra.* The Court stated:

> The *voir dire* in this case [Murphy's] indicates no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside. . . .

Applying the tests we have recited, we must conclude that the appellant has not demonstrated such prejudice in the community nor bias on the part of any juror that would require a new trial.

The second argument is meritless. The Arkansas law permitting only one change of venue, and that to a county within the judicial circuit, is not on its face unconstitutional. The case of *Irvin* v. *Dowd, supra,* does not support appellant's argument. The Court in *Irvin* ordered a trial in another county, contra to state law, because the trial judge refused a change of venue simply because state law forbade it.[1] Also, the record in the *Irvin* case, like that in *Swindler* and *Ruiz &*

[1] The Court noted in *Irvin* that the state supreme court had held that the Indiana statute could be circumvented if a defendant could not get a fair trial on one change of venue. *Irvin* v. *Dowd, supra,* at 721.

Van Denton, was replete with evidence of pretrial publicity and a change of venue was obviously necessary.

It is not necessary for us to decide whether these venue laws can result in a denial of a right to a fair trial and due process of law. The question is, could Swindler receive a fair trial, by an impartial jury, in Scott County? We conclude he could.

The third argument has no merit. The single fact that over 80% of the jurors questioned were excused for cause is not sufficient to find that a mistrial should have been granted or change of venue ordered. That is only one consideration. The judge and lawyers spent 5 days selecting a jury. Except for the three jurors objected to, it can hardly be argued the jury was unacceptable. The fact the defense had to use its preemptory challenges (as did the State) is no reason to find a jury could not be seated.

IV.

The trial court erred in denying the defendant's motion *in limine* to prohibit the questions of the veniremen on *voir dire* about their feelings concerning the death penalty.

V.

The trial court erred in excusing for cause any or all of the four veniremen who expressed opposition to the imposition of the death penalty.

These two points were argued as one by the appellant.

The appellant filed a motion *in limine,* which was denied, asking that the State not be allowed to ask prospective jurors whether they opposed the death penalty. Without citing any authority, it is argued that such a procedure denies a defendant a jury composed of a cross-section of the community and, therefore, violates the fair trial and due process requirements of the United States and Arkansas constitutions. This argument does not have any merit as we will

explain in our answer to the fifth assignment of error.

The fifth allegation of error is that four prospective jurors were improperly excused because they expressed opposition to the death penalty. In the case of *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968), the practice of permitting a prosecuting attorney to qualify a jury for the death penalty was not prohibited; what was prohibited by *Witherspoon* is the exclusion of a juror who is not irrevocably opposed to the death penalty.

Of the four prospective jurors excluded by the court on the motion of the State, three of them stated without equivocation that they opposed the death penalty under any circumstances. The other witness did make a statement at one point that he did not believe "he could impose the death penalty." That witness, Murl Carmack, testified as follows:

> Q. Let me ask you this. Do you think the death penalty is proper punishment for some crimes?
>
> A. I wouldn't think so.
>
> Q. Do you believe in the death penalty?
>
> A. Not so much.
>
> Q. Do you understand that under the law of Arkansas that it is the jury that finds whether a person is guilty or not guilty, and then if the jury finds the defendant guilty then the jury actually sets the punishment, that is not done by the Judge. Now, if you were on this jury, and you listened to all the evidence, could you, under any circumstances, vote for the death penalty?
>
> A. I wouldn't want to.
>
> Q. I understand you might not want to, but you know it is the law of Arkansas, and if you listened to the evidence and you found that under our law this was a proper case for the death penalty, then could you follow Arkansas law, or would you stick to your own personal feelings?

A. Well, now I would stick to what I believe in.

Q. So are you telling me that no matter what the facts are, or what the law is, that you would not vote for the death penalty?

A. No, I don't think I would.

Q. Okay, now you say you don't think you would. Can you tell me for sure that you would or would not?

A. *Well, I wouldn't then, I will put it that way.* [Emphasis added.]

Q. No matter what the facts were, or what the law was, you would not vote for the death penalty?

A. No, I don't believe I could, and then have a clear conscience.

THE COURT: No, what he has asked you is, and I want to ask you, too, to be sure that I understand. Is that feeling that you have or your belief so fixed and strong that regardless of what the facts might be, regardless of how bad they might be, or how aggravating they might be, in any case, that under no circumstances could you consider imposing the death penalty?

A. *I wouldn't.* [Emphasis added.]

THE COURT: In any case?

A. I don't believe I would.

DEFENSE ATTORNEY: I have no questions, your Honor.

THE COURT: All right, he will be excused for cause.

We are satisfied that this juror was irrevocably opposed to the death penalty and the court was not wrong in excluding

the juror for that reason. See *McCree* v. *State,* 266 Ark. 465, 585 S.W. 2d 938 (1979).

VI.

The trial court erred in overruling the defendant's motion to reduce the charge on the grounds that the Arkansas death penalty is unconstitutional.

The appellant concedes that we have consistently ruled this point to be without merit, beginning with *Collins* v. *State,* 261 Ark. 195, 548 S.W. 2d 106 (1977), and in every case thereafter where the question has been raised.

VII.

The trial court erred in denying the defendant's motion to reduce the charge on the grounds that causing the death of a police officer in the line of duty should not constitute the offense of capital murder.

The appellant concedes that we held this argument to be without merit in the first appeal. *Swindler* v. *State, supra.*

VIII.

The trial court erred in overruling the defendant's motion to reduce the penalty on the grounds that death by electrocution is cruel and unusual punishment.

The appellant concedes that we held this argument to be without merit in the case of *Ruiz & Van Denton* v. *State, supra.*

IX.

The trial court erred in permitting in evidence any weapons other than the alleged murder weapon over the defendant's objection on relevancy grounds.

The appellant concedes that we held this argument to be without merit in the first appeal. *Swindler* v. *State, supra.*

X.

The trial court erred in permitting in evidence in rebuttal, testimony and exhibits about highway signs along Interstates 40 and 540 over the defendant's objections on relevancy grounds.

The appellant argues that the State simply called two policemen before the jury to prejudice them by showing that policemen were interested in the case so the defendant would receive the death penalty. The State argues that the testimony of the policemen regarding the signs was used to impeach Swindler's testimony that he was looking for Highway 71 to go to Kansas City. The officers' testimony indicated that there were two exits, before the exit Swindler took to the service station, which were clearly marked "Highway 71 North," thereby impeaching to some degree Swindler's testimony that he was looking for a way to reach Highway 71. We find no merit at all to the appellant's conclusion that the officers were used to prejudice the jury. Certainly we find no prejudicial error resulting from the testimony.

XI.

The trial court erred in denying the defendant's motions for a directed verdict and to reduce the charge at the close of the state's case and when both sides rested.

Essentially this argument was answered in *Swindler* v. *State, supra*. We view the evidence on appeal most favorable to the appellee. Viewed in that light there was substantial evidence of premeditation and deliberation. The four loaded guns were enough circumstantial evidence for the jury to conclude that he intended to use them; this, together with the two eyewitnesses' testimony is substantial evidence of the elements of the crime of capital felony murder.

XII.

The trial court erred in denying the defendant's motion for a continuance of the sentencing stage of the trial so that the defendant could present an expert witness who

was prepared to testify that the cruel nature of death by electrocution and possibility of rehabilitation are mitigating circumstances.

Whether a trial court grants or denies a continuance is a matter of discretion and we only set aside a ruling if we find the court abuses that discretion. *Russell & Davis* v. *State,* 262 Ark. 447, 559 S.W. 2d 7 (1977). We find no such abuse in this case. This argument is misplaced because whether death by electrocution is cruel and unusual punishment is a question of law and not of fact; nor is it a circumstance to be considered when a jury deliberates on mitigating circumstances. It is not up to the jury to decide how a defendant dies. Death by electrocution has been decided by the General Assembly as the means of execution in such cases. Ark. Stat. Ann. § 43-2611 (Repl. 1977).

XIII.

The trial court erred in permitting in evidence over the defendant's objection State Exhibit No. 55 which purported to reflect that the defendant had been convicted of armed robbery and in overruling the defendant's objection to Sentencing Instruction (a) which permitted the jury to find that the defendant committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person.

We ruled this evidence admissible on the first appeal. *Swindler* v. *State, supra.*

XIV.

The trial court erred in overruling the defendant's objection to Sentencing Instruction (B), which permitted the jury to find that the defendant in the commission of the capital murder, beyond a reasonable doubt, knowingly created a great risk of death to a person other than the victim.

We ruled against the appellant on this same issue in the

first *Swindler* case. However, it is argued that the testimony was substantially different in this case. Swindler's attorney cross-examined in detail the witness Tinder who was inside the service station at the time of the killing. He argues that it was impossible for Swindler to have intended to create a great risk of death to other people. We disagree. The shots were fired in the direction of the station-store front. The evidence is that the officer was struck twice and that Swindler fired twice, but that does not mean that Swindler had any regard for other people in the vicinity. According to the evidence there were at least three people other than the officer in the vicinity; Tinder, Cardwell and Mrs. Cardwell. Swindler could not even swear that he only shot twice; he could not swear that he knew he shot a policeman until after it was done. Tinder was standing behind the counter inside the store front that was virtually all glass. The fact that there may have been a few gasoline pumps or stanchions between Swindler and the store front begs the question. The question is, was there sufficient evidence to support a finding that Swindler knowingly created a great risk of death to other people. There was ample evidence Swindler had no regard for the lives of others in the vicinity. Such evidence was in Tinder's testimony, Cardwell's testimony, all those loaded guns, and even Swindler's own testimony.

XV.

> The trial court erred in permitting in evidence over the defendant's objections State's Exhibits Nos. 56 and 57 which were a computer printout message, complaint and warrant for defendant's arrest for unlawful flight to avoid prosecution and in overruling the defendant's objection to Sentencing Instruction (D) which permitted the jury to find as an aggravating circumstance that the capital murder was committed for the purpose of avoiding a lawful arrest or effecting an escape from custody.

We ruled against the appellant's argument on this issue in the first appeal. *Swindler* v. *State, supra.*

XVI.

The death verdict was returned on the basis of passion

and prejudice by the jury and when this court compares death penalty cases, the death verdict should be set aside and the defendant be sentenced to life without parole.

We find no evidence that the jury's verdict was based on passion or prejudice. We adhere to the majority opinion in *Collins* v. *State, supra,* which says that we will compare death penalty cases and that we can reduce a sentence if we find it was the result of passion and prejudice. We have reduced one death sentence to life without parole. *Giles* v. *State,* 261 Ark. 413, 549 S.W. 2d 479 (1977). Comparing this killing to others that we have considered, there is hardly any room for argument that the appellant has any grounds for asking for leniency.

In conclusion, Swindler received a fair trial. Therefore, the judgment and sentence in this case are affirmed.

Affirmed.

HARRIS, C.J., not participating.

Charles PATTERSON *v.* STATE of Arkansas

CR 79-187 591 S.W. 2d 356

Opinion delivered December 17, 1979
(In Banc)
[Rehearing denied January 21, 1980.]

William R. Wilson, Jr., for appellant.

Steve Clark, Atty. Gen., by: *Robert J. DeGostin, Jr.,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Associate Justice. We granted appellant's petition for certiorari in this case pursuant to Rule 29(6)(a) and (c). The court of appeals, in a split decision, affirmed in part and reversed in part. In granting certiorari we will consider this case as if were filed in this Court from

the beginning. However, this does not imply we could not take jurisdiction of less than the entire case. Rule 29 (1) designates matters which should have been filed in this Court originally and are included by reference in the provisions of Rule 29 (6) (a). Constitutional and statutory interpretation arguments are interwoven throughout the appeal and it would not be practical to separate them for purpose of consideration by this Court.

The original appeal was from a jury conviction of appellant in the Lawrence County Circuit Court. The conviction was on one count of conspiracy to commit bribery and six counts of bribery. Appellant was sentenced to 7 one-year periods of confinement which were to run consecutively.

On appeal it is urged that the court committed many prejudicial errors. One alleged error is that it was prejudicial to force appellant to trial on a 22-count information filed by the prosecuting attorney which counts were identical to two indictments previously returned by the grand jury. These grand jury indictments were still pending at the time of the trial. The other alleged errors concern interpretation of statutes and rules of evidence. Due to the complexity of the grounds urged for reversal, it is deemed appropriate to deal with them separately in order of the argument. We find prejudicial error and remand for a new trial.

The facts of this case reveal appellant was named in three separate indictments by the Independence County Grand Jury on October 20, 1977. Two of the indictments charged appellant with bribery and conspiracy to commit bribery. Several defense motions were filed prior to November 18, 1977, when appellant was again called before the grand jury. When he appeared before the same grand jury, which had previously indicted him, he was offered a form of immunity. The circuit judge had signed some immunity forms with the name of the witness left blank. In this case the prosecuting attorney wrote appellant's name on one of the improper blank forms which had been signed by the judge. The judge was not in the county on this date. On advice of counsel, appellant exercised his Fifth Amendment rights and refused to testify. The next day appellant filed a motion

attacking the entire grand jury proceedings. A conference was held in Jackson County on July 21, 1978, at which time the court granted a defense motion to change the venue to Lawrence County and scheduled the trial to commence on August 21, 1978. A pretrial hearing was held in Independence County on August 11, 1978, at which time the appellant was arrested as he entered the courthouse. The arrest was based upon an information which had been filed on August 8, 1978. The 22-count information contained the identical allegations included in two of the earlier indictments. Both oral and written objections were filed attacking the information. Appellant specifically requested the indictments be dismissed in view of the subsequent information filed on the same matters.

The trial commenced before a jury in Lawrence County on August 21, 1978. The appellant insisted the indictment should be dismissed but his motions and request were denied. The last motion to quash the indictments was made orally during the trial at the time appellant was seated in the witness stand. The court again rejected the request to quash the grand jury indictment and appellant elected not to testify. There had been no request that the third indictment be quashed, and we are unaware of the charges contained in that indictment. During the course of the trial testimony of an alleged co-conspirator was presented, over appellant's objection and request for a limiting instruction. The court declined to give a limiting instruction at the time the testimony was given but indicated it might be given later. At the close of the trial the court declined to give a limiting instruction apparently on the theory that the co-conspirator's testimony had been properly connected by evidence independent of the testimony of the co-conspirator. Also, a mistrial was denied when one witness testified appellant had tried to get him to commit perjury in another case. The court instructed the jury to disregard this testimony. Another witness gave unresponsive testimony to the effect that he was scared to tell the grand jury the truth because he feared his family might be harmed. There was no other evidence indicating a basis for such fear nor did the witness furnish any supporting testimony upon which the fear was alleged to be predicated. Another motion for mistrial was denied by the

court. A former sheriff testified he had made an investigation into the charges in this case and decided they were true. A request for a mistrial was again denied and the jury was again told to disregard this opinion evidence. One Buckshot Nicholson identified a written statement he had given the prosecutor three days prior to the trial. This statement was his version of some of the facts to which he was testifying at the trial. The written statement was admitted into evidence and submitted to the jury over the objection of appellant.

A bootlegger testified she had a telephone conversation with appellant and the conversation was recorded. Her telephone was tapped by the state with her consent and the recorded conversation was introduced into evidence over the objection of appellant. This same bootlegger was alleged to be a co-conspirator. During the closing summation by the prosecutor he made the statement that he would like to know what the appellant had to say about it. (Appellant had not taken the stand.) Also, he argued in his rebuttal that if the jury only fined appellant his father would pay it for him. The trial court had, on motion of the appellant, directed him not to discuss the penalty because it had not been discussed in his summation nor had the appellant's attorney discussed it. Again the motion for mistrial was denied. Appellant was convicted of seven of the 22 counts and sentenced to 7 one-year sentences, to run consecutively.

I.

THE TRIAL COURT ERRED IN FORCING THE DEFENDANT TO TRIAL ON THE INFORMATION WITHOUT FIRST QUASHING THE TWO PRIOR INDICTMENTS ON THE IDENTICAL ALLEGATIONS.

We cannot agree with the state's contention that this argument is totally absurd, frivolous, and an affront to the intelligence of anyone capable of reading the record and statute. Ark. Stat. Ann. § 43-1031 (Repl. 1977) states:

> If there shall be, at any time, pending against the same defendant, two (2) indictments for the same offense, or

> two (2) indictments for the same matter, although charged as different offenses, the indictment first found shall be deemed to be suspended by such second indictment, and shall be quashed.

As we read the statute, it requires the first of duplicate indictments to be quashed. Appellant's motion to quash these two prior identical indictments was denied up through the beginning of appellant's defense at the trial. We have held this statute is not self-executing. In *State* v. *Dimler,* 251 Ark. 753, 475 S.W. 2d 152 (1972), we stated:

> . . . Also, the statute cited by appellant is not self-executing, i.e., the first indictment is not automatically suspended or superseded when a second information is filed, but only after an order has been entered. *** It is thus apparent that the court must enter an order quashing the first indictment or information before the provisions of the statute become effective; indeed, the statute itself uses the language "shall be quashed", and even then, such action would have to be taken before a trial of the defendant on information. . . .

It may well be that appellant could have successfully pleaded former jeopardy if he were tried and convicted on the still pending grand jury indictments. However, he should not be put to such inconvenience and expense in view of the plain meaning of the statute. Since the statute is mandatory and in view of our prior holding in *Dimler,* supra, we find the court erroneously failed to quash the two pending grand jury indictments upon motion of appellant.

II.

THE TRIAL COURT ERRED IN REPEATEDLY REFUSING TO GIVE A LIMITING INSTRUCTION WHEN THE PROSECUTION OFFERED INTO EVIDENCE, FROM THE OUTSET OF THE TRIAL, STATEMENTS OF ALLEGED CO-CONSPIRATORS.

Statements of alleged co-conspirators are inadmissible as hearsay unless they are vicarious admissions. The state-

ments must be connected by other evidence which establishes the conspiracy independent of the statement. The existence of the conspiracy must be independently proved before the jury is allowed to consider statements of co-conspirators. *Glasser* v. *United States,* 315 U.S. 60 (1941). The trial court has discretion to vary the order of proof. *Dyas* v. *State,* 260 Ark. 303, 539 S.W. 2d 251 (1976). In Dyas we stated:

> We have held that it is within the discretion of the trial court to permit the statement of an alleged conspiracy to be introduced at the prosecution of a fellow conspirator before evidence tending to prove the conspiracy has been introduced. (Cites omitted.) Here, as in Easter, it was later in the testimony of the same witness that the evidence tending to establish the conspiracy was introduced and it was a matter within the sound judicial discretion of the court to control the order in which the testimony should be adduced.

Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001, Rule 104 (b) (Repl. 1979), states:

> Relevancy Conditioned on Fact. Whenever the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

We do not find that we have had occasion to interpret Rule 104. The plain meaning of this statutory rule indicates the trial court has discretion in the order of admitting testimony of a co-conspirator. Uniform Rule of Evidence 105 states:

> Whenever evidence which is admissible as to one (1) party or for one (1) purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Thus it would appear in reading both rules that it was the

duty of the court to grant a limiting instruction. However, the court had discretion as to the order of admissibility. The 8th Circuit Court of Appeals considered a similar situation in *United States* v. *Bell,* 573 F. 2d 1040 (8 Cir.) (1978), and therein stated:

> . . . caution the parties (a) that the statement is being admitted subject to defendant's objection; (b) that the government will be required to prove by a preponderance of the independent evidence that the statement was made by a co-conspirator during the course and in furtherance of the conspiracy; (c) that at the conclusion of all the evidence the court will make an explicit determination for the record regarding the admissibility of the statement; and (d) that if the court determines that the government has failed to carry the burden delineated in (b) above, the court will, upon appropriate motion, declare a mistrial, unless a cautionary instruction to the jury to disregard the statement would suffice to cure any prejudice. . . .

Although AMCI 201 was not in effect at the time of the trial, it essentially sets out what we believe to be the best rule in handling the admission of testimony of co-conspirators. In view of the requirement that the jury must find beyond a reasonable doubt that the conspiracy did in fact exist, it appears a limiting instruction should have been given at some time during the trial. Of course, this question will not arise at the retrial of this case because AMCI 201 is now available for use in such cases and should be given, at sometime during the proceeding, upon request by the defendant.

III.

THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN THE PROSECUTING ATTORNEY ELICITED TESTIMONY FROM A PROSECUTION WITNESS TO THE EFFECT THAT APPELLANT HAD SUBORNED PERJURY IN A PREVIOUS, UNCONNECTED CASE.

During the state's presentation of the case in chief,

testimony of a police officer was elicited which indicated appellant had attempted to persuade the officer to commit perjury in an earlier unconnected case. Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001, Rule 404 (b) (Repl. 1979), states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Both parties agree this testimony was improper. We agree it was improper and obviously the trial court agreed in view of the fact that the jury was instructed to disregard this testimony. Obviously, this will not happen at the next trial. There was no attempt to bring the testimony in under any exception to Rule 404 (b). Aside from the rule, we have many times held evidence of another crime, independent and unconnected to the one under consideration, is inadmissible. It is usually considered prejudicial error. *Alford* v. *State,* 223 Ark. 330, 266 S.W. 2d 804 (1954); *Rios* v. *State,* 262 Ark. 407, 557 S.W. 2d 198 (1977); *Satterfield* v. *State,* 245 Ark. 337, 432 S.W. 2d 472 (1968); and *Cobb* v. *State,* 265 Ark. 527, 579 S.W. 2d 612 (1979).

IV.

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR A MISTRIAL WHEN A PROSECUTION WITNESS GAVE UNSOLICITED TESTIMONY TO THE EFFECT THAT THE APPELLANT WAS A DANGEROUS MAN.

One witness made a voluntary and unsolicited statement to the effect that the reason he failed to tell the grand jury the truth was because he feared for the safety of his family. At this point the prior inconsistent statement had not been mentioned. This was the only evidence in the record indicating appellant was a dangerous man. After objection by appellant's counsel the court permitted the witness to

repeat the same statement again. This witness may have subsequently had an opportunity to explain why his testimony was not the same as he had given before the grand jury but it was improper to permit him to volunteer this information in advance of opening the door. Although it does not appear this precise question has been presented to us in any previous case, we feel the proper rule would be to declare such unresponsive testimony to be error if presented without justification as was done in this case. This, too, will not likely reoccur in the new trial.

V.

THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE MOTION FOR A MISTRIAL AFTER THE PROSECUTING ATTORNEY ELICITED A STATEMENT FROM A DEFENSE WITNESS WHICH, IN EFFECT, WAS AN OPINION BY THE WITNESS THAT THE APPELLANT WAS GUILTY AS CHARGED.

The witness, a former sheriff, in effect, stated after he had made his own investigation of the allegations in the indictment and information he had concluded they were true. The only logical conclusion to be reached from this testimony is that the witness believed appellant was guilty. The court admonished the jury again to not consider this evidence. A mistrial was requested and refused both before and after the admonition. We consider this opinion evidence in light of Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001, Rule 704 (Repl. 1979), which states:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

The testimony of this witness on this point was not otherwise admissible. It was not admissible for any reason at all; therefore, it constituted error. This statement was not embraced within any response to a prior question. Whether appellant was guilty or innocent was a matter entirely within

the province of the jury and it is improper for the witness, or even the court, to express an opinion as to the guilt or innocence of appellant.

VI.

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE A SIGNED STATEMENT OF A PROSECUTION WITNESS, WHEN THE STATEMENT WAS MADE ON SATURDAY, AUGUST 19, 1978, JUST THREE DAYS BEFORE THE TRIAL COMMENCED.

The witness had made a written statement at the request of the prosecuting attorney two or three days before the trial. This statement was introduced into evidence and copies furnished to the jury over the objection of the appellant. The state offered it for the purpose of proving the guilt or innocence of appellant.

Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001, Rule 801 (c) (Repl. 1979), defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. This statement was expressly made for the purpose of proving the truth of the matter asserted and obviously was not made while testifying at the trial or hearing. We cannot fit the statement into any of the exceptions to the hearsay rule. The statement was apparently worded by the prosecuting attorney and signed by the witness as reflected by the response of the witness to a question about the statement when he replied:

> "No, I didn't word it just that way, but that is the way it is."

If such statement were allowed, the prosecuting attorney could round up all his witnesses on the eve of a trial and prepare a statement for each to sign and hand the statements to the jury thereby emphasizing the evidence and testimony in a light most favorable to the state. The defense would, no doubt, adopt the same procedure if such evidence were held

admissible. The situation could develop whereby the jury would decide the case on a series of written statements presented to them at the time of the trial. We think the case of *Brown* v. *State,* 262 Ark. 298, 556 S.W. 2d 418 (1977), controls in this case and the statement was pure hearsay. It should not have been admitted into evidence.

VII.

THE TRIAL COURT ERRED IN ADMITTING A TAPE RECORDED CONVERSATION BETWEEN APPELLANT AND PROSECUTION WITNESS ROBERT A. CLARK.

The state had tapped the witness's telephone with her consent. Thereafter she engaged the appellant in a conversation which was recorded. The tape of this conversation was presented to the trial jury over the objection of the appellant, who had not consented to the tap and in fact did not know the conversation was being recorded.

The Federal Omnibus Crime Control Act, 18 U.S.C. § 2511 (2) (c), provides intercepted telephone conversations may be used provided one of the parties to the conversation consents thereto. Appellant argues this witness did not give true consent because the state promised she would be "protected." Also, appellant claims this was a violation of the Fourth Amendment to the United States Constitution. We disagree with appellant on these contentions. It was not shown that the witness cooperated and consented to the tap because of duress or threats of any nature. She stated she voluntarily consented to the conversation being recorded. A party to a conversation who mistakenly believes the other party will keep the conversation in secret is not prejudiced by the fact that such confidence is betrayed. *United States* v. *White,* 401 U.S. 745 (1971); *Kerr* v. *State,* 256 Ark. 738, 512 S.W. 2d 13 (1974). In view of the facts of this case we think the intercepted conversation was properly received in evidence.

VIII.

THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR A MISTRIAL AFTER

THE PROSECUTION COMMENTED, IN CLOSING ARGUMENT, ON APPELLANT'S FAILURE TO TESTIFY IN HIS OWN BEHALF.

The statement by the prosecuting attorney was at least subject to misinterpretation by the jury even if it were not intended as a remark referring to appellant's failure to testify. We need not cite authorities for the proposition that the prosecuting attorney cannot call the attention of the jury to the fact that an accused has failed to testify. Since there will be a new trial, this statement will not be repeated in its present context.

IX.

THE COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR A MISTRIAL AFTER THE PROSECUTING ATTORNEY DISCUSSED PUNISHMENT IN HIS REBUTTAL CLOSING ARGUMENT IN DIRECT VIOLATION OF THE TRIAL COURT'S ORDER THAT HE NOT DO SO.

The prosecuting attorney argued about the penalty to be imposed although he had been instructed not to do so by the trial court. This instruction resulted because neither the state nor appellant's counsel argued the penalty in their closing summation. The court again admonished the jury to not consider this statement and denied the motion for a new trial. This is another error not likely to occur at the future trial.

X.

INTENTIONAL VIOLATIONS OF APPELLANT'S DUE PROCESS RIGHTS CREATED MOST OF THE PREJUDICIAL ERRORS IN THIS CASE; THEREFORE RETRIAL WOULD CONSTITUTE A VIOLATION OF DOUBLE JEOPARDY.

We need not cite authority for the rule that a retrial is not barred by reversal of a conviction because of prejudicial error. Appellant recognizes the general rule but contends an

exception exists in a case where the prosecution creates the errors through bad faith or harassment. In other words, the state should not be allowed to create a mistrial for the purpose of getting another whack at the accused. Neither should the state be permitted to harass and intimidate an individual by intentionally causing him to be tried more than once.

Although the errors were numerous and sometimes appeared not to be unintentional, we cannot say that the prosecution acted in bad fath or with intent to harass the appellant by intentionally causing a new trial. This was obviously a trial where both counsel proceeded with vigor. However, the admission into evidence of the written statement of the witness Buckshot Nicholson constituted prejudicial error. Since we are considering this case as if the appeal were filed here, the case is reversed and remanded to the circuit court for a new trial.

Reversed and remanded.

HARRIS, C.J., not participating.

FOGLEMAN, J., would affirm opinion of the court of appeals.

WINSLOW DRUMMOND *v.* Lou A. DRUMMOND

79-83 590 S.W. 2d 658

Opinion delivered December 17, 1979

Dale Price, for appellant.

Ben Rowland, of *Rowland & Templeton,* for appellee.

JOHN D. ELDRIDGE, Special Justice. The parties were divorced on May 9, 1973 by a decree of the Pulaski Chancery Court. The Court awarded custody of their three minor children to the Appellee and directed Appellant to pay alimony and child support.

Subsequently, on June 7, 1978, the Appellant filed a petition in the Pulaski Chancery Court seeking the custody of the children and an abatement of the obligation to pay child support and alimony. The petition also sought to relieve Appellant of the duty to maintain life insurance policies for the benefit of Appellee.

After pretrial procedures and hearing the trial court ordered a change in the custody of the children from the Appellee to the Appellant, but refused to terminate or modify the alimony payments or to relieve Appellant of his duty to make the life insurance premium payments. The insurance obligation was deemed to be contractual and not subject to change by the court. From this decision Appellant has appealed. The Appellee has not appealed from the order divesting her of the children's custody.

At the time of the divorce in 1973, the parties entered into a complete property settlement and support agreement which was incorporated into the decree. The provisions pertinent to this appeal are as follows: The Appellee was to have custody of the three children, Judith, Kathryn and Winslow, who were at that time age 11, 9 and 6½ years, respectively. Appellant was directed to pay Appellee $225.00 per month per child until the child reached age 21 years. The decree further provided that as each child reached the age of 21 the amount payable to Appellee as alimony for her support should be increased by $50.00 per month. Alimony was fixed at the sum of $600.00 per month. Both the amount of alimony and the child support payments were to be increased on January 1st of each year to correspond with the increase, if any, in the Cost of Living Index of the Bureau of Labor Statistics. Appellant was to create and convey to a trust three life insurance policies on his life with his wife and children as beneficiaries and to maintain them in force.

The Agreement was expressly provided to be noncontractual with respect to the provisions for alimony and child support and both parties reserved the right to apply to the court having jurisdiction for such revision of alimony and child support as future changes in the parties' circumstances might justify.

The testimony and the answers to requests for admissions given by Appellee establish that following the divorce she had engaged in sexual relations with two married men on several occasions. It was admitted that some of these episodes occurred in her residence in the absence of the children. Finally, on the nights of June 3-4 and June 6-7, 1978, Appellee permitted one of the men to spend the night with her in her home while the children were there. One of the children informed the Appellant of these facts. On the morning of June 7th he took the children to his home and on the same date filed the petition which is before us on appeal.

The trial court held that although the conduct of the Appellee warranted a change in custody, it did not constitute such a change of circumstances as to justify either a termination or reduction in the alimony payments. Such payments had escalated at the time of the hearing to $725.00 per month and were subject to a revision on January 1, 1979. The trial court further directed the Appellant to pay Appellee's attorney a legal fee of $1,000.00.

The appeal raises two issues: first, that the trial court erred in holding that alimony payments should not be reduced or terminated; and, second, that an attorney's fee to Appellee's attorney should not have been awarded.

The parties are graduates of Duke University, Appellant with a LL.B. degree and Appellee with a B.A. degree. The parties were married prior to Appellant's graduation from law school, and Appellee worked as a secretary during Appellant's last two years in law school, helping to support them. Since the parties moved to Little Rock, Appellant has engaged in private law practice and is a partner in a Little Rock law firm.

During their married life in Little Rock, Appellee attended to their home and children and was not employed.

Since the divorce, Appellee has taken Library Science and other courses at the University of Arkansas at Little Rock, completing approximately twenty semester hours. At the time of the hearing in August, 1978, Appellee was a full

time secretarial employee earning $600.00 per month, with take-home pay of $113.00 per week.

The first question which the court must decide is whether sexual misconduct (specifically adultery) on the part of a divorced spouse can justify the termination of alimony received from the former spouse. We do not think that it can, in the absence of other circumstances such as living openly with and being supported by a paramour or gross promiscuity amounting to prostitution. No such elements are present in this case. Alimony is not awarded as a reward to the receiving spouse or as punishment of the spouse against whom it is charged. It is an effort, insofar as is reasonably possible, to rectify the frequent economic imbalance in the earning power and standard of living of the divorced husband and wife. Its continuation is not dependent on the good conduct of either spouse. While each case must and should be governed by its particular facts, it can be stated as a general principle that alimony should be terminated or modified by circumstances which relate to its need by the recipient or the ability to pay by the spouse against whom it is assessed.

This is consistent with the rationale of the one Arkansas case which has considered this principle. In *Byrd* v. *Byrd,* 252 Ark. 202, 478 S.W. 2d 45 (1972), we held:

> It is apparent that the reason for the rule which we have adopted in cases of remarriage [termination of alimony payments] does not apply in this instance, for there is no indication that Mrs. Byrd's supposed paramour has assumed any responsibility for her care and maintenance. Nor is it shown by the weight of the proof in the case at bar that Mrs. Byrd has assumed the other man's name and held herself out publicly as his wife. In that extreme situation at least two courts have approved a termination of the former husband's obligation to pay alimony. *Grant* v. *Grant,* 52 Cal. App. 2d 359, 126 P. 2d 130 (1942); *Coggins* v. *Coggins,* 289 Ky. 570, 159 S.W. 2d 4 (1942). In New York the same result has been reached by statute. *Waddey* v. *Waddey,* 290 N.Y. 251, 49 N.E. 2d 8 (1943).

> In the court below the evidence was in sharp conflict. Even if we should accept Byrd's contention that he and his supporting witnesses established instances of immorality on the part of Mrs. Byrd, we are not prepared to say that a former husband is entitled to sit in judgment of his divorced wife's conduct, any more than she is entitled to take such a position with respect to his conduct.

In *Christiano* v. *Christiano,* 41 A. 2d 779 (Conn. 1945), the Connecticut Supreme Court of Errors held that the frequent public drunkenness of a divorced wife and many arrests did not justify the suspension or termination of her alimony. The court said:

> . . . "[T]he great weight of authority holds that, in the case of an absolute divorce, misconduct by a wife after the decree is granted is no ground for depriving her of alimony which has been awarded her, and this conclusion is most commonly put upon the ground that after the divorce she no longer is in any way responsible to her former husband for her conduct. [Citing among other cases, *Pauley* v. *Pauley,* 280 Ky. 66, 132 S.W. 2d 512; *Suozzo* v. *Suozzo,* 16 N.J. Misc. 475, 1 A. 2d 930; *Hayes* v. *Hayes,* 220 N.Y. 596, 115 N.E. 1040; and *Stanfield* v. *Stanfield,* 22 Okl. 574, 98 P. 334.]

The court, in *Christiano, supra,* aptly summed up the basic thread of these decisions as follows: "It is not the function of the Court in this civil action to attempt to serve as an agency for her moral regeneration."

The annotation in 6 A.L.R. 2d 853, 859, as supplemented, confirms the conclusion here reached that misconduct of a divorced person per se, unless there are other elements present, should not serve as a basis for termination of alimony in the absence of inability of the divorced spouse to continue payment or lack of need on the part of the recipient spouse. *Horner* v. *Horner,* 222 So. 2d 791 (Fla. Dist. Ct. App. 1969).

The second question which this Court must decide is

whether the circumstances in which the parties now find themselves have changed sufficiently since the date of the divorce in 1973 to warrant a modification of the terms of the original decree with respect to alimony. In this respect we are unable to agree with the ruling of the trial court.

After the divorce the Appellant remarried. His second wife had the custody of two minor children, ages 11 and 13, by a previous marriage. After the change in custody ordered by the trial court Appellant's three children were added to the family group. Thus, he now has the obligation to support his second wife, provide a home for five children between ages 11 and 18, and support, maintain and educate his own three children. His second wife is receiving some payments from her former husband for the support of Appellant's stepchildren.

Appellant's income from his law practice, although substantial, will not permit many luxuries after he has paid his income and other taxes, paid insurance, taxes and other expenses relative to his residence, and provided for his large family. In addition, he will very soon be faced with paying for the college education of his two oldest children.

The Appellee, on the other hand, is now freed from the obligation of caring for and supporting her three children. She has secured employment and has commendably begun post graduate studies which, if pursued, should enable her to obtain income substantially greater than she is now earning. The record indicates that she is a well educated, intelligent and articulate person with a substantial potential for improvement in her earnings.

It is our opinion that there have been changes in the circumstances of the parties sufficient to necessitate a modification of the alimony payable by the Appellant. The alimony will be reduced to $600.00 per month with no provision for escalation or reduction unless there should occur substantial later changes in the circumstances of the parties. We are motivated in this regard by the belief that the Appellee has herself the ability to increase her income by her own efforts. We are further persuaded by the needs of the three

children. The reduced alimony is to be effective on the first of the month following the date when this decision becomes final.

The third question for decision is the matter of attorney's fees to be paid to Appellee's attorney. We agree with the trial court that a fee of $1,000.00 is reasonable for the time and effort expended by the attorney on the issue of alimony termination or modification and this allowance should be affirmed. We further award him a fee of $750.00 for his services in connection with this appeal, to be paid by the Appellant. Costs of this appeal are assessed against the Appellant.

Affirmed as modified.

SMITH, FOGLEMAN, BYRD and HICKMAN, JJ., disqualified and not participating.

Special Justices J. L. SHAVER, JOHN B. HAINEN and JOHN BURRIS join in this opinion.

HARRIS, C.J., not participating.

John F. WELLS, Individually, and The People of Arkansas upon the Relation of John F. Wells, *v.* Joe PURCELL, Lieutenant Governor of Arkansas et al

79-289 592 S.W. 2d 100

Opinion delivered December 31, 1979
(In Banc)

[redacted]

James F. Lane, for appellants.

Steve Clark, Atty. Gen., by: *Jackson Jones,* Asst. Atty. Gen., for appellees.

JOHN A. FOGLEMAN, Justice. John F. Wells, individually and as a citizen and taxpayer of the State of Arkansas, filed his petition for mandamus in the Circuit Court of Pulaski County, seeking to compel Joe Purcell, Lieutenant Governor of the State of Arkansas, Knox Nelson, President Pro Tem of the Arkansas Senate, and John E. Miller, Speaker of the Arkansas House of Representatives, to adjourn, or attempt to adjourn, their respective chambers of the Seventy-second General Assembly, or to certify the facts of their disagreement over their adjournment date to the Governor, so he could, under his constitutional authority, declare an adjournment. Petitioner exhibited Senate Concurrent Resolution 91, by which it was resolved, with the concurrence of the House of Representatives, that upon a date subsequently to be chosen, the Seventy-second General Assembly would stand in recess until the second Monday in January, 1981, then to be adjourned sine die, unless adjournment occurred earlier.

Respondents admitted that the General Assembly was in extended recess, but denied that appellants were entitled to any relief. They exhibited Senate Concurrent Resolution 14, by which the Senate, with the concurrence of the House of Representatives, had resolved, by a two-thirds vote of each chamber, to extend the regular biennial session beyond a 60-day duration.

It has been suggested that petitioner has no standing to

bring this proceeding because it is a public right, not a private one, he is seeking to enforce. It is true that the statute defining the writ states that it is granted upon the petition of the aggrieved party or of the state, when the public interest is affected. Ark. Stat. Ann. § 33-102 (Repl. 1962). Our statute on this subject has not varied materially since the adoption of the Civil Code in 1869. See § 519, Civil Code of Arkansas; § 7021, Crawford & Moses Digest; § 9001 Pope's Digest, Ark. Stat. Ann. § 33-102 (1947). Early cases supported the contention that, where petitioners alleged no interest to be protected, other than the interest of the public, they were not aggrieved, and were not entitled to an order granting the writ, because in a matter where only the public interest is affected, the writ can only be granted upon application of the state. *Fuller, ex parte,* 25 Ark. 443. It was later held that when the writ is sought for the enforcement of a public right, common to the whole community, it is not necessary that the relator have a special interest in the matter, or be a public officer, but the proceeding must be in the name of the state. *Moses* v. *Kearney,* 31 Ark. 261. Although the action there was dismissed because the applicants for the writ were designated only as residents and owners of lots, there was a clear intimation that, had they applied in the name of the state, their petition should have been considered. Still later in *Willeford* v. *State ex rel,* 43 Ark. 62, a writ of mandamus was granted to compel the clerk and two justices of the peace, who were assisting the clerk in canvassing election returns from an election on the question of moving a county seat, to proceed with the count of the votes in three townships from which they were irregularly transmitted, but was denied as to the returns from another township because the chancery court had taken jurisdiction to inquire into allegations of fraudulent voting. On appeal, this court not only sustained the writ as to the vote in the three townships, but held that the chancery court had no power in the matter, reversed the denial of the writ as to the remaining township and remanded the cause with directions to the trial court to issue the writ. *Moses* involved an effort by the petitioners to require the clerk to remove his office from Lewisburg back to Springfield, based upon their contention that Springfield was still the county seat of Conway County. The real distinction in the two cases is that the proceeding was brought in

Willeford in the name of the state upon the relation of the petitioners, while that in *Moses* was not.

The rule is well settled, that when, in the absence of statutory regulation, the proceedings are for the enforcement of a duty affecting not a private right, but a public one, common to the whole community, it is not necessary that the relator should have a special interest in the matter, or that he should be a public officer. *Moses* v. *Kearney,* supra; *Beene* v. *Hutto,* 192 Ark. 848, 96 S.W. 2d 485. It seems that in *Beene,* this court indicated that the statutory formality of proceeding by styling the action in the name of the state upon the relation of the actual petitioners (who were citizens and taxpayers of the affected county) may have been more liberally construed than in earlier cases, because the contention that the action was improperly brought, because not brought in the name of the state, was rejected upon two grounds, i.e., that a suit may be brought by a private citizen to enforce a public duty and Art. 16, § 13 of the Constitution of Arkansas specifically provides for suits brought by taxpayers to protect inhabitants of a city, county or town against the enforcement of any illegal exaction. See also, *Buchanan* v. *Halpin,* 176 Ark. 822, 4 S.W. 2d 510.

Because of the styling and allegations of the petition in this case, we need not decide whether petitioner Wells could have proceeded in his own name. The caption of the petition shows the style of the case as "JOHN F. WELLS, INDIVIDUALLY, AND THE PEOPLE OF THE STATE OF ARKANSAS, UPON THE RELATION OF JOHN F. WELLS." It is alleged in the petition that Wells is a citizen and taxpayer and that all other taxpayers to, and citizens of, this state have an interest in the proper performance of the duty with which Wells is seeking to enforce compliance. We take this petition to be in substantial compliance with our statutory requirement that the action be in the name of the state. See *Radel Concrete Products, Inc.* v. *Clermont County Board of Health,* 107 Ohio App. 159, 152 N.E. 2d 307 (1957). We point out that the respondents have not questioned the standing of the petitioner to bring this action, either in the trial court or on appeal.

It remains, however, to be seen whether the petitioner is

entitled to the relief he seeks. At the outset, we must point out that, under the common law, the writ did not run to the legislative branch of the government. *People* v. *Best,* 187 N.Y. 1, 79 N.E. 890, 116 Am. St. Rep. 586, 1 Ann. Cas. 58 (1907); *People* v. *Morton,* 156 N.Y. 136, 50 N.E. 791, 41 LRA 231, 66 Am. St. Rep. 547 (1898); *State* v. *Bachrach,* 107 Ohio App. 71, 7 Ohio Ops. 2d 402, 152 N.E. 2d 311 (1958), affd. 168 Ohio St. 268, 6 Ohio Ops. 2d 425, 153 N.E. 2d 671. Although Ark. Stat. Ann. § 33-102 (Repl. 1962) clearly states the power of the circuit court to issue the writ to an executive, judicial or ministerial officer to perform an act, the performance of which is enjoined by law, there has been no statute attempting to authorize the courts to issue the writ to the legislature.

The writ of mandamus cannot be issued to the legislature, even when the duty sought to be compelled is clear and unmistakable. *Fergus* v. *Marks,* 321 Ill. 510, 152 N.E. 557, 46 ALR 960 (1926); *Lamson* v. *Secretary of Commonwealth,* 341 Mass. 264, 168 N.E. 2d 480 (1960); *Scarborough* v. *Robinson,* 81 N.C. 409 (1879).

The doctrine of separation of powers, stated in Art. 4, § 2 of our constitution, has probably been the barrier to attempts to extend the reach of the writ to the legislature. Neither of the three separate departments of government is subordinate to the other and neither can arrogate to itself any control over either one of the others in matters which have been confided by the constitution to such other department. *Fergus* v. *Marks,* supra. The legislature, under the separation of powers, can neither be coerced nor controlled by judicial power. *Scarborough* v. *Robinson,* supra; Annot. 74 Am. St. Rep. 544.

The legislature is responsible to the people alone, not to the courts, for its disregard of, or failure to perform, a duty clearly enjoined upon it by the constitution, and the remedy is with the people, by electing other servants, and not through the courts. *Fergus* v. *Marks,* supra; *Fouracre* v. *White,* 7 Boyce (Del.) 25, 102 A. 186 (1917); *Person* v. *Doughton,* 186 N.C. 723, 120 S.E. 481 (1923). See also, *In re Senate Resolution 4,* 54 Colo. 262, 130 P. 333 (1913).

The matter is summarized concisely in an annotation appearing in 153 ALR at p. 522, viz:

> It is well settled that the courts have no power to enforce the mandates of the Constitution which are directed at the legislative branch of the government or to coerce the legislature to obey its duty, no matter how clearly or mandatorily imposed on it, with respect to its legislative function.

The Maryland Court of Appeals put the matter in the proper perspective long ago. In *Watkins* v. *Watkins,* 2 Md. 341 (1852), that court said:

> In regard to that part of the argument of the learned counsel for the appellant which was based on the supposititious case, that if the foregoing reasoning be correct, the senate might defeat both the spirit and letter of the constitution by a failure to obey its injunctions, we have only to observe, that in all human contrivances confidence must be reposed somewhere, and that under the distribution of the powers of government in our State, it is not given to the judiciary to *compel* action on the part of a co-ordinate branch of the government. Its authority is confined to *restraining* the potency of its enactments when they transcend constitutional limits.

It is appellant's contention that the provisions of the Constitution of Arkansas clearly limit the duration of the regular biennial sessions of the General Assembly and establish a clear and unmistakable duty of the General Assembly to adjourn, or attempt to adjourn, upon the completion of regular or special session business. Appellant pointed out that the date fixed for the convening of the Seventy-third General Assembly by Ark. Stat. Ann. § 4-101 (Repl. 1976) is the second Monday in January, 1981. The petitioner quotes Art. 5, § 17 of our Constitution, which provides that the regular biennial sessions of the General Assembly shall not exceed 60 days in duration, unless by a vote of two-thirds of the members elected to each house. Petitioner also points out that, after completion of the business enumerated in a proclamation for an extraordinary or special session of the

General Assembly, it can remain in session for a period not to exceed 15 days by a vote of two-thirds of all members elected to both houses. Art. 6, § 19, Constitution of Arkansas. He also relies upon the constitutional provision that, if the House and Senate disagree over the time of adjournment of either a regular or special session, the Governor has the authority to declare the adjournment, if the facts of the disagreement are certified to him by the presiding officers of the two chambers. Constitution, Art. 6, § 20.

There is certainly no clear limitation upon the legislative power to extend the session by a two-thirds vote and no clear specification of a time beyond which, in the discretion of the General Assembly, exercised by the vote of two-thirds of the members of both houses, the session may not be extended. The determination of the date for termination of an extended session is a matter of legislative discretion.

It must always be remembered that the state's constitution is neither an enabling act nor a grant of enumerated powers, and the legislature may rightfully exercise the power of the people, subject only to restrictions and limitations fixed by the constitutions of the United States and this state. *Jones* v. *Mears,* 256 Ark. 825, 510 S.W. 2d 857; *St. L. I. M. & S. Ry. Co.* v. *State,* 99 Ark. 1, 136 S.W. 938. Under our system of government the legislature represents the people and is the reservoir of all power not relinquished to the federal government or prohibited by the state constitution. *Rockefeller* v. *Hogue,* 244 Ark. 1029, 429 S.W. 2d 85; *Hackler* v. *Baker,* 233 Ark. 690, 346 S.W. 2d 677.

Adjourning and extending a legislative session are clearly among the powers of the General Assembly. It has exercised its powers. Even if they have been exercised erroneously, it is clear that the Circuit Court of Pulaski County had no power, without violating Art. 4, § 2 of the Arkansas Constitution and extending the scope of the writ of mandamus, to issue the writ to that body. Assuming, however, that the General Assembly had been subject to that writ, mandamus could not have been used to correct an erroneous decision already made. *Burney* v. *Hargraves,* 264 Ark. 680, 573 S.W. 2d 912.

Appellant contends, however, that the actions of the presiding officers of the two houses of the General Assembly can be controlled by mandamus. He does not specify just what these presiding officers should be required to do. Mandamus will not lie to compel the presiding officer of the senate or the speaker of the house to perform any act which is within his legislative functions, except for acts which are purely ministerial in character. *State* v. *Bolte,* 151 Mo. 362, 52 S.W. 262, 74 Am. St. Rep. 537 (1899); *Kavanaugh* v. *Chandler,* 255 Ky. 182, 72 S.W. 2d 1003, 95 ALR 273 (1934). See Annot., 66 Am. St. Rep. 556, 18 Am. Dec. 239. The only act on their part, which could be said to be ministerial, is to certify the disagreement of the two houses to the Governor, so he could adjourn the session. But the two houses are not in disagreement, even if they are in error. These officers are totally devoid of power to act in the matter. The courts have no supervisory powers over the legislature, a separate and coordinate branch of government. *In re Love's Estate,* 186 N.C. 714, 120 S.E. 479. To undertake to compel the presiding officers to act contrary to the action of their respective houses would constitute an attempt to supervise those actions, in violation of Art. 4, § 2. Mandamus cannot be used to undo legislative action or to compel revocation or rescission of legislative action in violation of the doctrine of separation of powers. *State* v. *City of Shreveport,* 231 La. 840, 93 So. 2d 187 (1957).

The eyes, ears and hands of the presiding officer of a house of the General Assembly are those of the house; he carries forward that which the house determines; and it would be intolerable that the presiding officer, even if he be the lieutenant governor, of a house should have the power to act against its will and determination or to refuse to act in defiance of its will. *State* v. *Corley,* 36 Del. 135, 172 A. 415 (1934). It has been held that the courts have no power under the separation of powers, by mandamus or otherwise, to interfere in any manner with the proceedings of either of the component branches of the General Assembly, or even with the actions of its clerks, so long as they are acting in obedience to the will of those bodies. *Fox* v. *Harris,* 79 W. Va. 419, 91 S.E. 209 (1917).

The authority of the appellees and respondents, the

Lieutenant Governor, the President Pro Tem, and the Speaker, seems to us to be strictly limited, in the matter before us. We would not know how to specify what they should do, if we should order that the writ be granted. It would certainly be contrary to the separation of powers for a court to order them to act contrary to the expressed will of the bodies over which they preside.

The writ of mandamus does not create or confer authority upon the officer to whom it is directed. It should be directed to those whose duty it is to do the thing required. It must clearly appear that the person to whom it is directed has the absolute power to execute it; otherwise it should not be issued. Where the duty sought to be enforced is imposed upon the senate and the house and those bodies have refused to do that which is sought to be compelled, neither the president of the Senate nor the Speaker of the House has the power, without the concurrence of the house over which he presides, to execute the order, if made. *Turnball* v. *Giddings,* 95 Mich. 314, 54 N.W. 887, 19 LRA 853 (1893).

One seeking a writ of mandamus must show a clear, certain and specific legal right and the absence of any other specific, adequate legal remedy. *Arkansas State Highway Employees Local 1315* v. *Smith,* 257 Ark. 174, 515 S.W. 2d 208; *Bunting* v. *Tedford,* 261 Ark. 638, 550 S.W. 2d 459; *Girley* v. *Wood,* 258 Ark. 408, 525 S.W. 2d 454. The purpose of the writ is to enforce the performance of a duty or a legal right after it has been established and not to establish a legal right. *Kirkwood* v. *Carter,* 252 Ark. 1124, 482 S.W. 2d 608; *Brown* v. *Curtis,* 254 Ark. 162, 492 S.W. 2d 235. The duty to be enforced by mandamus must be one which is clearly, specifically and peremptorily enjoined by law. *Arkansas State Highway Employees Local 1315* v. *Smith,* supra. Where petitioner is not clearly entitled to the relief sought, this extraordinary writ will not be granted. *Henderson* v. *Dudley,* 264 Ark. 697, 574 S.W. 2d 658; *Brown* v. *Curtis,* supra. Mandamus may not be used to determine in advance what the petitioners' rights are or the action to be taken shall be. *Bunting* v. *Tedford,* supra.

Appellant has failed to show a clear, certain, specific or

established legal right which can be enforced by writ of mandamus to the presiding officers of the houses of the General Assembly. The courts cannot interfere with the legislature or the legislative process; they can only determine the validity of its acts. *State* v. *Meyers,* 38 Wash. 2d 330, 229 P. 2d 506 (1951).

The circuit court properly denied mandamus.

The judgment is affirmed.

HARRIS, C.J., not participating.

HICKMAN, SMITH, and PURTLE, JJ., concur.

DARRELL HICKMAN, Justice, concurring. While I agree that mandamus is not a proper remedy in this case, the constitutionality of the General Assembly's extension of its regular session is too important a question to ignore. The law is well settled that a legislature cannot enact legislation after the expiration of its session. *State, ex rel Heck's Discount Center, Inc.* v. *Winters,* 147 W. Va. 861, 132 S.E. 2d 374 (1963). See also, *Dillon* v. *King,* 87 N.M. 79, 529 P. 2d 745 (1974).

The General Assembly convened for its regular 60 day session early in 1979. It recessed on April 20, 1979, and is to remain in recess until the second Monday in January, 1981, approximately when its next regular session is to begin. While the legislature has apparently gone home, it has left the door open to recall itself at any time. It is at least possible that such a procedure infringes on the governor's prerogative under the Arkansas Constitution to call the General Assembly into special sessions. See ARK. CONST., Art. VI, § 19.

The Arkansas Constitution provides that the General Assembly shall meet bienially for 60 days and may extend a session only by a vote of two thirds of the members of each house. ARK. CONST., Art. V, § 17. No doubt it was intended that an extended session would be used by the General Assembly to finish its business. I do not believe that

the Arkansas Constitution can be fairly read to mean that the legislature can remain in session at all times.

This procedure may violate the doctrine of separation of powers in other ways. One of the reasons given by the General Assembly for going into this extended session, as it is called, is so that it may reconsider any bills disapproved by the governor. The Arkansas Constitution would seem to grant to the governor the right, at the end of its regular session, to veto any bills without the fear that the veto power would be thwarted. The General Assembly may, by holding itself ready at all times to reconsider a bill vetoed by the governor, have crossed that vague line of the separation of powers guaranteed by the constitution. ARK. CONST., Art. IV, § 1 and Art. VI, § 2.

This practice by the General Assembly has apparently been going on for some years but it should be reconsidered. The simple fact that a definite date has been set for the termination of the extended session may not save such a practice, especially when that date is an unrealistic one, one that cannot be satisfactorily defended except by a severe strain on the interpretation of the Arkansas Constitution.

While we do not have the authority to mandamus the General Assembly regarding its business, we do have the responsibility to pass on the acts of the General Assembly and it may well be that any action taken by the General Assembly during such a session will be illegal, a consequence no doubt the General Assembly would not welcome.

GEORGE ROSE SMITH and PURTLE, JJ., join in the concurrence.

James IRONS *v.* STATE of Arkansas

CR 79-179 591 S.W. 2d 650

Opinion delivered January 7, 1980

Thomas L. Cashion, for appellant.

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

JOHN A. FOGLEMAN, Chief Justice. We are tremendously handicapped in our review of this appeal from the denial of appellant's petition for post-conviction relief under Rule 37 of the Rules of Criminal Procedure by the mysterious abandonment of virtually all the grounds of the petition on appeal. The only point for reversal is: "The Court erred in not setting aside the verdict because the record does not show where an attorney was ever appointed for the defendant."

This point might be summarily disposed of because the record clearly shows that an attorney was appointed for appellant more than a year before he entered the plea of guilty. The argument in appellant's brief does not appear to be consistent with the statement of the point. The entire argument is as follows:

> Appellant only has one argument and that is that he does not remember anything that allegedly happened. That he was intoxicated and cannot remember when in an intoxicated state. The record does not indicate that he was advised of his rights or properly appointed attorney.
>
> Appellant states further that for the reasons set out above that the sentence be vacated and that he be released from his present confinement.

The scope of the argument is broader than the point stated. This argument could properly be disposed of under the rule of *Dixon* v. *State,* 260 Ark. 857, 545 S.W. 2d 606. Instead, we have reviewed the record as abstracted and find reversible error.

Appellant was sentenced to 15 years on July 18, 1978, upon his plea of guilty to a charge of raping his daughter, then 12 years of age, on April 7, 1977. This plea was entered after observation of appellant at the Southeast Arkansas Mental Health Clinic, and several continuances of his trial. The clinic had reported that appellant was without psychosis, appeared to understand the charges against him, and seemed to be responsible for his actions at the time of the report.

Appellant's motion under Rule 37 was filed February 26, 1979. Appellant alleged that:

> 1. He was questioned at length on several different occasions without an attorney present to represent him during all phases of the interrogation period.
>
> 2. He was represented by an appointed attorney, who made no effort to defend him, but threatened him

with an excessive sentence should he desire a jury trial.

3. He was arrested without a warrant.

4. He was denied a preliminary hearing.

5. The prosecuting attorney presented false statements before the court.

Since appellant entered a plea of guilty, he is precluded from raising a defense on this appeal. *Thacker* v. *Urban,* 246 Ark. 956, 440 S.W. 2d 553; *Cromeans* v. *State,* 242 Ark. 464, 414 S.W. 2d 399. The matter of his intoxication was not a matter properly to be considered on a petition for post-conviction relief. This relief is not available to one who could have raised the issue asserted on collateral attack in the trial court before sentencing, but did not. *Coleman* v. *State,* 257 Ark. 538, 518 S.W. 2d 487. For the same reason, the question of the voluntariness of his pretrial confession is not itself a basis for post-conviction relief. These matters are significant only in relation to the charge of ineffective assistance of counsel. The alleged denial of a preliminary hearing and the alleged falsity of the statements of the prosecuting attorney fall into the same category. See *Keating* v. *State,* 255 Ark. 638, 501 S.W. 2d 607.

When there is a collateral attack on a plea of guilty, rendered upon advice of counsel, the inquiry is not addressed to the merits of claims of constitutional deprivation prior to the entry of the plea, but it is focused upon the question whether the plea had been made intelligently and voluntarily upon advice of counsel. Such deprivations are pertinent only in evaluating the advice rendered by counsel. *Horn* v. *State,* 254 Ark. 651, 495 S.W. 2d 152. If appellant's plea of guilty was entered voluntarily and was not the result of ineffective assistance of counsel, any other possible defenses, except for jurisdictional defects, were waived by him. *Horn* v. *State,* supra; *Rimmer* v. *State,* 251 Ark. 444, 472 S.W. 2d 939; *Wilson* v. *State,* 251 Ark. 900, 475 S.W. 2d 543. His petition does not assert any jurisdictional defects.

Our inquiry is confined, then, to the question whether

the plea of guilty was voluntary and not the result of ineffective assistance of counsel. We begin with the presumption that counsel was competent. *Horn* v. *State,* supra. We might also infer that the alleged "threats" of counsel that, if appellant went to trial, he would get a sentence of more than 50 years and it would tear up appellant's family, do not show ineffective assistance of counsel, because, if there was sufficient evidence to show that he committed the crime with which he was charged, such a sentence would not be an unlikely one, and "tearing up a family" would not be an unusual consequence.

Appellant's allegations did entitle him to the hearing he was accorded on the question of ineffective assistance of counsel. *Cullens* v. *State,* 252 Ark. 995, 482 S.W. 2d 95. The burden of proving his allegations rested upon petitioner. The trial court held that he failed to meet that burden. In order to overturn that holding, we would have to find that it is clearly against the preponderance of the evidence. *Porter* v. *State,* 264 Ark. 272, 570 S.W. 2d 615.

Appellant testified that his appointed attorney, David Powell, visited him in jail a couple of times, and that he had contacted his attorney during the eleven months he was at liberty on bond awaiting trial. He said that the attorney did not go over the case with him because there was nothing to go over and because appellant was stuck with a false statement, which Irons denied having made to the investigating officers. He stated that Powell did not want to hear anything about the statement and only wanted to hear about the case. He said that he told Powell that he knew nothing about the charge and that he had been drunk and was on the floor when he was awakened at about 2:30 a.m. on the date of the alleged rape.

Irons testified that he had made this incriminating statement after he had several times requested and been denied an attorney both before answering any questions and while being questioned. He said that he made this incriminating statement upon the understanding that he would be sent to the state mental hospital for help he needed in connection with his drinking, and that this statement, prepared by an

officer, would help in getting him admitted. The statement Irons signed related that he was intoxicated at the time of the alleged occurrence and didn't remember what had happened; that he did remember having picked up his children at his brother's house and having played dominoes and eaten some eggs with them, after which he sent all of them except Gloria to the front room and sent her to the bedroom, where he later went, pulled off her panties and laid down and tried to have intercourse with her, but did not know whether he did or not; and that he then told Gloria to go take a bath, but remembered nothing after that until his wife awakened him at about 2:00 a.m. At that time, his pants were unzipped but his belt was still fastened.

The record in this case does not reflect any compliance with Rule 24.5, Arkansas Rules of Criminal Procedure; *Boykin* v. *Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); and *Byler* v. *State,* 257 Ark. 15, 513 S.W. 2d 801. This rule, and the cases cited, require that the trial judge ascertain whether a plea of guilty is voluntary. There is no constitutional requirement that the trial judge make the explanations of the right to jury trial and of the maximum possible sentence required by *Boykin,* and a silent record does not require automatic reversal, if it be proved at a post-conviction evidentiary hearing that the plea was voluntarily and intelligently made. *Smith* v. *State,* 264 Ark. 329, 571 S.W. 2d 591. On the record before us, under the holding in *Smith,* the question is whether the plea was intelligently and voluntarily made. The burden, which would otherwise have been on appellant, fell upon the state at the post-conviction hearing as to the plea of guilty, in view of the absence of any record of the proceeding when the plea of guilty was entered. The key question on a record like this is whether the deficiencies in the proceedings were supplied by the record made at the post-conviction hearing. *Byler* v. *State,* supra. The findings of the trial court would so indicate.

We are unable to find an appropriate basis for the trial court's findings. The record, as abstracted by appellant's attorney, shows that a hearing on a motion to suppress appellant's statements as involuntary was set, but no dispo-

sition of that motion is shown by the record. The attorney who represented Irons did not testify. Appellant's testimony stood uncontradicted. He said that he told his attorney he would not enter a plea of guilty, and that he did not plead guilty of his own free will, but did so because his attorney told him if he went to trial they would tear his family up and he would get 50 years, because "they" wanted him to plead guilty. He also testified that, when he appeared before the judge for the entry of a plea, he told the judge he was not guilty, but that he would take the 15 years the state had offered to recommend. When the judge refused to accept that plea, Irons said that he said, "Well, I'm not guilty, but I plead guilty and take the fifteen" and that this was the way the plea went down. He stated that he was not satisfied with his attorney, and that he thought he had gotten a bad deal from the law officers. Irons said that he had never been in court before.

It may well be that a proper plea agreement, advantageous to Irons, had been entered into, and properly carried into effect, but the record does not so disclose. It was mandatory that the trial court determine whether the plea was the result of a plea agreement, require that the agreement be stated, and, if the judge had not previously concurred in the agreement, advise the defendant that the agreement was not binding on the trial court and that the disposition, if the plea was entered, might be different from that contemplated by the agreement. *McGee* v. *State,* 262 Ark. 473, 557 S.W. 2d 885. It was also mandatory that the trial judge determine whether there was a factual basis for the plea. Rule 24.6, Arkansas Rules of Criminal Procedure.

It may well be that there was full compliance with all the requirements essential to sustain the plea of guilty. We do not hesitate to say that all deficiencies in the record of the plea proceedings might have been corrected by evidence of compliance presented at the Rule 37 hearing. But the state totally failed to make the necessary showing. The prosecuting attorney did not resist appellant's request for a jury trial and left the matter with the court. We cannot, on the record made in the trial court, justify affirming this judgment, in spite of the unsatisfactory presentation of the matter on

behalf of appellant. So far as this record discloses, the assistance of appellant's appointed trial counsel was ineffective and appellant's plea of guilty was not intelligently and voluntarily made.

The judgment of the trial court is reversed and the cause remanded with directions to set aside the sentence imposed and the judgment of conviction, and for further proceedings on the charge against appellant.

STROUD and MAYS, JJ., not participating.

Felix Vaughan TAYLOR *v.* David PARTAIN, Judge

CR 79-184 591 S.W. 2d 653

Opinion delivered January 7, 1980
(In Banc)

Wiggins, Christian & Garner, for petitioner.

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

GEORGE ROSE SMITH, Justice. The question is: Should a prosecution for unlawful failure to file a 1976 Arkansas in-

come tax return be brought in Sebastian county, where the taxpayer was a resident, or in Pulaski county, where the law required that the return be filed? The Sebastian Circuit Court overruled the defendant's motion to dismiss for want of jurisdiction and venue. We granted a temporary writ of prohibition and now hold that Pulaski county is the proper venue.

The information charges that Taylor failed to file his return on May 15, 1977, which was its statutory due date. Ark. Stat. Ann. § 84-2027 (Repl. 1960). The return must be filed with the Commissioner of Revenues at his office at Little Rock (in Pulaski county). *Id.* Failure to make any return, with intent to evade the requirements of the statute, is a misdemeanor. § 84-2036 (6).

The general rule is that a failure or omission to act, such as the failure to file a document in a certain county, is an offense committed in the county where the act should have been performed. *State* v. *Civella,* 368 S.W. 2d 444 (Mo., 1963), citing authority. We followed the general rule in *Louisiana & Ark. Ry.* v. *State,* 85 Ark. 12, 106 S.W. 960 (1907), where the statute made it a misdemeanor for the railroad company to fail to build a station at a certain point on its line. We held that the failure to build the station was an offense in the county where it should have been built, not in the county where the company had its domicile.

The Attorney General argues, however, that the income tax law provides that the failure to do any act required by the statute shall be deemed "an act committed in part at the office of the Commissioner in Little Rock." § 84-2036 (9). Even so, the statute does not say that the failure shall also be deemed to be an act committed in part at the taxpayer's residence. The statute, it must be noted, applies as well to nonresident taxpayers, whose actions outside this state are not being made a criminal offense in Arkansas. Moreover, the statute refers only to "any act required by or under the provisions of" the income tax law. That law did not require this taxpayer to do any act in Sebastian county. It did require him to file a return in Pulaski county.

A similar argument was rejected by the United States

Supreme Court in *United States* v. *Lombardo,* 241 U.S. 73 (1916). There the statute required that a certain written statement be filed with the Commissioner General of Immigration, in Washington, D.C. The defendant, a resident of Seattle, Washington, was charged there with having failed to file the statement. The prosecution argued that since the statement could have been deposited in the mail in Seattle, though the statute did not specify that action, the offense should be deemed a continuing one that occurred both in Seattle and in Washington, D.C. The court pointed out that "filing" is not complete until the document is delivered and received. "Anything short of delivery would leave the filing a disputable fact, and that would not be consistent with the spirit of the act." Furthermore, for the courts to create a continuing offense when the statute had not done so would create needless confusion.

The same thing is true in the case at bar. If we should go beyond the language of the income tax statute by saying that the offense occurred also in Sebastian county, then this taxpayer or another in his situation might raise an issue of fact by proof that he was not in the county on the due date of the return or that he customarily signed his return forms in the office of an accountant or tax consultant in an adjoining county, who also mailed them. We see no reason to create the possibility of uncertainty when the legislature intended that none should exist.

The writ of prohibition is granted.

STROUD and MAYS, JJ., not participating.

CULLUM & BOREN-McCain Mall, Inc.
v. James E. PEACOCK et al

79-282 592 S.W. 2d 442

Opinion delivered January 7, 1980
(In Banc)
[Rehearing denied February 11, 1980.]

Barber, McCaskill, Amsler, Jones & Hale, for appellant.

McMath, Leatherman & Woods, P.A., by: *Phillip H. McMath,* for appellees.

JOHN I. PURTLE, Justice. We have considered the juris-

dictional statements of the parties in taking this case for consideration. It is our opinion that Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979), Rules 401, 402 and 403 are required to be interpreted in deciding this case.

Appellees recovered a judgment, in the Pulaski County Circuit Court, against appellant, Cullum & Boren, as a result of appellee, James E. Peacock, being shot by one Francis T. Blodgett, with a handgun purchased from appellant. Recovery was based upon common law negligence of appellant in selling the handgun to Blodgett. This appeal is from the jury verdicts in favor of James E. Peacock in the sum of $170,000 and for his wife, Charlotte Peacock, in the sum of $30,000.

The judgment was against Blodgett, who does not appeal, and appellant, jointly and severally. On appeal it is urged that the trial court erred in three respects: (1) In failing to grant a directed verdict for appellant, (2) allowing the desposition of Blodgett to be presented to the jury, and (3) in failing to hold as a matter of law that appellant could not be more negligent than Blodgett. We agree the deposition of Blodgett regarding his consultation with a psychiatrist more than 13 years previous to the shooting was prejudicial error. We do not reach the question of comparative negligence because a retrial may not present the same question.

The facts reveal Francis T. Blodgett appeared at Cullum & Boren at the McCain Mall in North Little Rock, Arkansas, on February 15, 1978, and sought to purchase a .38 pistol. The manner in which Blodgett inquired about the purchase aroused the suspicion of the salesman, McDonald. When Blodgett selected the pistol he wanted, he did not have enough money to pay for it. Therefore, he left the store with the declared intent of obtaining additional money for the purchase of the pistol he had selected. While Blodgett was gone McDonald requested John Moore, a fellow employee of Cullum & Boren, to observe Blodgett upon his return in order to determine whether he thought Blodgett was acting strangely. Upon Blodgett's return McDonald engaged him in conversation and observed him to the extent he was satisfied Blodgett was a suitable person to purchase the pistol. During the conversation prior to the purchase, Blodgett

stated he had recently been burglarized and wanted to purchase a gun that would make a big hole. There is a dispute as to whether he stated he wanted one which would make a big hole in a man. Blodgett experienced no difficulty in filling out the handgun purchase form (ATF #4473) required when a person purchases a firearm. The purchaser appeared calm and answered all questions without assistance. After Blodgett left the store, McDonald went to the front and discovered Blodgett was apparently loading the gun while seated in his vehicle in the parking lot near the appellant's store. This upset McDonald and he notified his supervisor, Charlie Keck, who called the Jacksonville police to report the incident. It is disputed whether Keck told the officer that Blodgett had stated he wanted a gun which would "make a big hole in a man" or whether he stated he wanted one "which would make a big hole." In any event, Blodgett shortly appeared at Peacock's office and shot him about three times, without any known reason.

The jury answered interrogatories which set the damages at $170,000 for Peacock and $30,000 for his wife. The negligence was apportioned on 25% to Blodgett and 75% to Cullum & Boren.

We first consider the question of whether the trial court should have granted a directed verdict. The issues were presented to the jury solely on the theory of common law negligence on the part of Cullum & Boren. We do not believe the case of *Franco* v. *Bunyard,* 261 Ark. 144, 547 S.W. 2d 91, cert. denied, 434 U.S. 835 (1977), has any application to the present case. In *Franco* we held the failure to follow the federal gun control act in selling a firearm was evidence of negligence. However, in the present case the evidence is undisputed that the gun control act was followed. There is no Arkansas statute relating to the sale of firearms to individuals by retailers. The General Assembly, which speaks for the people of Arkansas, has not seen the need to enact legislation regulating the sale of handguns. It is not the function of the courts to enact legislation. Therefore, there is no statutory negligence to be considered in the present case.

We find sufficient evidence in the record of this case to

justify submitting the case to the jury against appellant on the grounds of common law negligence. On appeal we consider the evidence in the light most favorable to the appellee. It was a question of fact whether Blodgett requested a weapon which would blow a big hole in a man. Obviously appellant's employees were suspicious of the purchaser. We cannot say as a matter of law there was no substantial evidence upon which the jury could have reached its verdict.

We next consider the question of whether the court erred in admitting that portion of Blodgett's deposition which indicated he had been treated by a psychiatrist between 1960 and 1965, the latest treatment having occurred more than 13 years prior to the date of the incident upon which this cause of action is based. Blodgett had been under the treatment of a physician for a number of years prior to this incident. The present attending physician indicated Bodgett was reacting normally to the medication which was being prescribed. Admittedly, there was a possibility that Blodgett could have saved up his medicine and taken what amounted to an overdose at any particular time. However, this is a possibility which does not rise above speculation. There was no evidence whatsoever presented at the trial to indicate that Blodgett was suffering from mental disease which related back to 1965. In fact, the earlier treatment was not for a mental disease so far as the record shows. We think this evidence was controlled by Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979), Rules 401, 402 and 403. These rules are as follows:

> Rule 401. "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. 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.
>
> Rule 403. Although relevant, evidence may be ex-

> cluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The evidence of the previous psychiatric consultation is governed by these rules. Although it may be argued the evidence was relevant, it may be fairly said that its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or was misleading to the jury. It seems likely the jury may have relied upon this evidence which in reality had no connection with the shooting that occurred on February 15, 1978. There simply is no connecting evidence between the prior psychiatric treatment and the present condition of Blodgett. We do not believe that the evidence of his prior psychiatric consultation had any tendency to make the existence of the allegations in this case more probable or less probable than it would have been without the evidence. Introduction of this portion of Blodgett's deposition constituted prejudicial error.

As to whether Cullum & Boren could be found more responsible than Francis T. Blodgett is not considered at this time because on retrial the responsibility may not be apportioned in the same manner.

For the above reason the case is reversed and remanded for a new trial.

Reversed and remanded.

STROUD and MAYS, JJ., not participating.

Eddie POWELL, Mayor of the
City of North Little Rock et al
v. Frank HENRY et al

79-129 592 S.W. 2d 107

Opinion delivered January 14, 1980
(In Banc)

Jim Hamilton, for appellants.

John T. Harmon, Judith A. Rogers and *Tommy H. Russell,* by: *John T. Harmon,* for appellees.

JOHN A. FOGLEMAN, Chief Justice. On December 30, 1976, the Chancery Court of Pulaski County entered a decree in an action brought by Frank Henry and others against the mayor and aldermen of North Little Rock and the manager of the North Little Rock Electric Department, holding that the city improperly charged their electrical customers $639,226.24 and ordering a refund, on a pro rata basis. The court denied a request for allowance of attorney's fees to the attorneys representing the customers in the litigation which resulted in the decree. On February 25, 1977, the plaintiffs in the action filed a motion for clarification, stating that the court had misinterpreted their prayer for payment of attorneys' fees as a prayer for judgment against the defendants for those fees, in addition to the amount of the overcharge, when they had actually requested that these fees be paid from the refunds made to the customers. On March 9, 1977, the chancery court modified its previous decree to require the city to bear all costs of the refund and pay interest on any refunds due but unpaid after April 30, 1977, and retained jurisdiction on the question of allowance of attorneys' fees to plaintiffs' attorneys. On April 1, 1977, the chancery court presided over by a chancellor on assignment, ordered the payment of $95,884.31 as attorneys' fees to John Harmon, Tommy H. Russell and Judith Rogers, who had represented the customers in the litigation. On May 4, 1977, the chancery court, with the regular chancellor presiding, set aside this order, but reinstated it on December 27, 1978, after a rehearing on the matter. Appellants appeal from this last order or decree, asserting the following points for reversal:

I

PLAINTIFFS' ATTORNEYS MAY NOT

RECOVER ATTORNEYS' FEES IN *QUANTUM MERUIT,* BUT MUST RECOVER ON THEIR CONTRACT WITH PLAINTIFFS.

II

ACT 822 of 1977 (CODIFIED AS ARK. STATS. ANNO. § 84-4601) IS NOT APPLICABLE TO THE PRESENT CONTROVERSY.

III

A REASONABLE AMOUNT OF ATTORNEYS' FEES SHOULD NOT EXCEED 5 PERCENT OF THE TOTAL RECOVERY OF THE TAXPAYERS' ACTION.

We find no reversible error and affirm the decree.

I

Appellants contend that the attorneys for the plaintiffs in the action were limited to the fee of 25% of the recovery of the original plaintiffs employing them, relying upon *Terral* v. *Poe,* 190 Ark. 346, 79 S.W. 2d 69, insofar as it related to a division of attorney's fees between Terral and Poole. We are unable to see any comparison between that case and this. There Poole, an attorney, accepted employment by Terral as an associate in the trial of two cases for a fee of $100 per cause. When there was a rather large recovery in the two cases, Poole sought to recover $775.62, or 25% of the total fees, on the basis of quantum meruit. We held that Poole was bound by his contract and limited to the fee to which he agreed in the contract. This case might furnish some precedent in a contest between these attorneys and the named rate paying plaintiffs in the litigation. If any of these clients are complaining of the allowance made, it is not reflected by the record. As we understand the record in this case, the action was a class action, which resulted in the recovery of a substantial amount which constituted a common fund. The allowance of attorneys' fees from a common fund established or augmented through the efforts of the attorneys to whom

the fee is allowed is a well recognized practice and is proper. *Bradshaw* v. *Bank of Little Rock,* 76 Ark. 501, 89 S.W. 316; *Valley Oil Co.* v. *Ready,* 131 Ark. 531, 199 S.W. 915; *Marlin* v. *Marsh,* 189 Ark. 1157, 76 S.W. 2d 965.

We do not consider that our holding in *City of Ft. Smith* v. *Southwestern Bell Telephone Co.,* 220 Ark. 70, 247 S.W. 2d 474, is applicable here, or that it is contrary to the holding in the cases just cited. There nine cities sought to have the fees of their attorneys paid for a proceeding in which they successfully protested a telephone rate increase and refunds to subscribers were ordered. The basis of that decision was that these attorneys were representing the cities, not the rate payers. Here the situation is quite different. The attorneys were representing the rate payers in litigation against the city.

In arguing this point, appellants complain that it is extremely difficult for the court to determine the value of the service of these attorneys, in view of the fact that they did not keep time records and only provided subjective and self-serving estimates as to the time spent on the case. Appellants then assert that the burden of providing accurate and ascertainable records of time spent on behalf of the plaintiffs should be on these attorneys. This argument, which is only stated, without citation of authority, is not convincing and might well be disposed of under the rule of *Dixon* v. *State,* 260 Ark. 857, 545 S.W. 2d 606. It would have been desirable to have had time records, if they were kept, but there is not now, and never has been, any rule of law or procedure in this state that requires submission of time records in support of a request for payment of attorneys' fees. While the time spent is an important element to be considered in determining the reasonable value of an attorney's services, it is not the controlling factor and is sometimes a minor one. *Love* v. *U.S. F. & G. Co.,* 263 Ark. 925, 568 S.W. 2d 746. We have recently had occasion to address our attention to the relationship of time records and the expenditure of time in relation to the allowance of attorney's fees in *Lytle* v. *Lytle,* 266 Ark. 124, 583 S.W. 2d 1 (1979). There we found that other factors were just as important as the time devoted to a case. In *Marlin* v. *Marsh,* supra, we pointed out that the amount of the recov-

ery was important and indicated that the trial court properly took into consideration the ability of counsel, the nature and extent of the services rendered and the result obtained. The chancellor who made the allowance here, and whose action was reinstated by the regular chancellor, took these factors into consideration. Although such allowances should not be entirely on a contingent fee basis, they should be such that competent lawyers would not refuse to accept employment in cases of this sort. *Old Republic Insurance Co.* v. *Alexander,* 245 Ark. 1029, 436 S.W. 2d 829. Naturally, the uncertainty of ultimate recovery is an element to be considered in accomplishing this purpose. We do not consider that the allowance of 15% of the recovery put the allowance on a contingent fee basis. It was an appropriate means of distributing the burden.

II

We agree with appellants and appellees that Act 822 of 1977, which was passed, and became effective, after the entry of the original decree in this case, is inapplicable. Furthermore, we do not understand the decree to be based upon the act.

III

Appellants again emphasize the failure of the attorneys to keep detailed time records. They point out that according to their testimony, Harmon estimated that he spent 25 hours per week, Russell estimated 12 hours per week, and Rogers estimated an average of 10 hours per week, during the pendency of the cases. Appellants then calculate that multiplying these estimated hours for the period of 16 weeks that the litigation was pending by a factor of $75 per hour, which they say was shown to be reasonable by the attorneys at the hearing, produces a total of $58,800, which is less than two-thirds of the award, but considerably more than the 5% appellants consider reasonable. Although accurate time records would have been helpful in considering the reasonableness of the fee allowance in this case, it is our position that time spent is only one significant factor in such considerations. *Lytle* v. *Lytle,* supra. Other factors in this case are

at least equal in importance, and may perhaps carry considerably greater weight.

Appellants seek to establish a basis for their position that 5% of the refund was a reasonable fee allowance by referring us to cases involving class actions where the fund involved ranged from $137,600 to $7,200,000 and attorneys' fees were not allowed on a percentage basis. By arithmetical calculation they arrive at percentages ranging from 4% to 5% of the funds involved in those cases, as against 15% allowed in this case. Appellants then somehow translate our reduction from $15,000 to $10,000 of the fee allowed in a partition suit (*Cole* v. *Scott,* 264 Ark. 800, 575 S.W. 2d 149) into an expression of this court's intention that 4% to 5% will constitute the outer perimeters of a chancellor's discretion in awarding attorneys' fees from a common fund. We find no language in that opinion indicative of any such intention. As a matter of fact, we are not aware of any recent decision in which this court has passed upon allowances of attorneys' fees where the percentage of the fund or recovery has been given any significance. We have enumerated pertinent factors on several occasions. See, e.g., *Lytle* v. *Lytle,* supra; *Robinson* v. *Champion,* 251 Ark. 817, 475 S.W. 2d 677; *Equitable Life Assurance Society* v. *Rummell,* 257 Ark. 90, 514 S.W. 2d 224.

It seems to us that the assigned chancellor, whose award was reinstated by the regular chancellor, took into consideration many of these factors. He made these findings:

1. There has been a substantial economic benefit bestowed upon the class;
2. There was personal and professional hardship incurred by the attorneys of record;
3. There was a vindication of an economic right;
4. The ligitation was novel;
5. The plaintiffs' case was difficult and there was substantial time devoted to the case;
6. Counsel possessed extraordinary skill and competence.

John Harmon testified about his experience in dealing

with utility rates and with class actions and anti-trust proceedings and his previous practice of public utility law generally. He anticipated a harmful effect upon his practice in North Little Rock because he detected an adverse attitude toward him by members of the city council when he appeared before them in connection with his practice after he became engaged in this litigation. He related the necessity for lengthy discovery processes and the protection of confidential sources of information gained from employees of the electric department, and classified the litigation as complex.

Expert testimony was given by Messrs. Walter Davidson and Dale Price of the Pulaski County Bar Association. Davidson told of his experience in public utility practice over a period of three to four years, and of the scarcity of attorneys engaged in that type of practice, which he called a "specialty-type" item. He considered a rate of $70 per hour in that work as a conservative figure designed to promote a continuing relationship with a client, but felt that a higher fee basis was appropriate in a case such as this, where the establishment of such a relationship was not a factor. In his opinion, considering the results and the fact that collecting any fee was dependent upon a favorable termination of the litigation, 25% of the recovery was reasonable. He considered the complexity of the case, the experience of the attorneys involved, the results accomplished, the urgency of the case, other business lost, the lack of a continuing client relationship and the contingency of the compensation as pertinent factors in fixing the amount of the fee.

Price considered the specialized nature of utility rate cases, the lack of a prospect of a continuing lawyer-client relationship, the urgency of the case, the contingency of the fee and the fact that the suit was against a political entity in arriving at his opinion that a fee of 20 to 25% of the recovery would be reasonable. He expressed the opinion that fees of $75 to $100 per hour, and "even upwards" were a fair hourly rate in the locality, and said that in fixing an hourly rate, the political factor, the potential necessity for discarding other business, and the urgency of the case were important factors in determining whether the hourly rate should be $75, $100, or even more.

In view of the record before us, we are unable to say that there was any abuse of discretion in the allowance of attorneys' fees in this case, which we should have to do in order to reverse or modify that award. An important factor in our consideration of the fee allowance in this case is the realization that inadequate compensation will cause attorneys who are competent to handle this type of litigation to shun it, or if they accept it, fail to devote sufficient time to adequately prepare or present the case. This is an appropriate consideration in matters of this sort. *Old Republic Insurance Co.* v. *Alexander,* 245 Ark. 1029, 436 S.W. 2d 829. The individual rate payer ordinarily cannot afford to employ counsel because attorneys' fees and other expenses could be expected to exceed his prospective recovery. If attorneys do avoid employment such as that accepted by the attorneys in this case because they cannot expect to be adequately compensated, even if they are successful, there would be few cases where excessive charges would ever be refunded. The fact that no one who is the beneficiary of the recovery is complaining about the award is not without significance. The standing of appellants in this matter is not clear, even though the abstract of the record does not reveal that it was ever challenged in the trial court.

The trial court had considerable discretion in making fee allowances. We are unable to say that the fees allowed were indicative of any abuse of the discretion of the chancellors.

The decree is affirmed.

HICKMAN, J., not participating.

Special Justice A. D. McAllister, Jr., concurs in part and dissents in part.

A. D. MCALLISTER, JR., Special Justice, concurring in part, dissenting in part. On this second appeal in this case appellants claim that the allowance of attorney's fees in the amount of $95,884.31 to three attorneys whose efforts in a taxpayers' class action had established a common fund of $639,226.24 was improper and excessive. The first appeal is reported in *Henry* v. *Powell,* 262 Ark. 763, 561 S.W. 2d 296

(1978), wherein this court reversed an appeal from the regular chancellor's[1] order setting aside a special chancellor's order (initially allowing the fee) for want of an appealable order. The opinion in *Henry* v. *Powell,* supra, was handed down on February 13, 1978. Thereafter, the regular chancellor reinstated the special chancellor's order approving payment of the fee.

Three attorneys of the Pulaski county bar, representing 12 named plaintiffs (5 of whom subsequently withdrew) on a contingent fee basis of 25% of any amounts recovered, filed a complaint for their clients and "all others similarly situated" for an accounting and refund of all moneys alleged to have been illegally exacted by the electric department of North Little Rock and for recovery of reasonable attorney's fees.

This court has said that the one person in the best position to evaluate and make an award of attorney's fees was the chancellor before whom the entire proceedings were conducted. *Robinson* v. *Champion,* 251 Ark. 817, 475 S.W. 2d 677 (1972). And that no one is more intimately acquainted with the proceedings, the character of the services performed, and the attorneys who took part in the litigation than the chancellor who tried the case. *Marlin* v. *Marsh & Marsh,* 189 Ark. 1157, 76 S.W. 2d 965 (1934).

Even though this court usually defers to the superior perspective of the trial judge for an assessment of the various factors enumerated in the majority opinion in any determination of reasonable attorney's fees, we have not hesitated to reduce an allowance for attorney's fees when, based upon the entire record, we cannot find adequate support for the allowance. *Equitable Life Assurance Society of the United States* v. *Willie Runnell,* 257 Ark. 90, 514 S.W. 2d 224 (1974). Since the chancellor who originally heard this case did not make the allowance of attorney's fees, a review of the entire

[1]The regular chancellor was Judge Hickman, not Judge Bullion as reported in *Henry* v. *Powell,* supra. Judge Taylor was the special chancellor assigned by order of the chief justice of this court to hold court for the week of March 28 through April 1, 1977 in the absence of Judge Bullion. Judge Hickman properly disqualified himself in *Henry* v. *Powell,* as well as in this case.

transcript of the trial court is in order.

The original complaint was filed on August 10, 1976 and subsequently amended. No interrogatories, requests for admissions of facts, responses or objections thereto, or discovery depositions are shown in the record. A motion for preliminary hearing, answer, amended answer, a 55 page memorandum and pre-trial brief and motion for summary judgment were filed by the city. An 8-page brief was filed by one of the three attorneys. Although a summons was issued for appearance of the North Little Rock bookkeeper to testify on behalf of the plaintiffs at trial on November 12, 1976, there is no evidence in the record that the hearing was stenographically recorded.

On November 17, 1976, appropriately under the pleadings, the trial court appointed an attorney, Jerry D. Jackson, as a master in chancery "to examine the evidence, hold hearings, investigate the records . . . or do any other acts necessary to determine what the extra charges were . . . and report to the court his findings in dollars and cents . . ." The order instructed the master to study certain specified exhibits among others and authorized the master to hire an accountant if necessary. The master filed his 22 page report on December 28, 1976, and on December 30, 1976 Judge Hickman entered a final order finding that the master's report was "accepted without objections by either party". The order directed the city to refund $639,226.24 to the city's electric customers on a pro-rata basis. The master's fee of $1500.00 for 14.1 hours of work was approved but plaintiff's request for attorney's fees was denied.

As Judge Hickman became a member of this court on January 1, 1977, the remaining proceedings in the trial court were conducted by Judge Bullion, elected to succeed Judge Hickman, and by Judge Taylor, the special chancellor.

In my opinion, the three attorneys should not be allowed a fee for their efforts to obtain or to enforce collection of their own fees. The record of the proceedings before the trial court reveals that the efforts of the master and the court itself may have well exceeded the "in court" efforts of the

three attorneys leading to the establishment of the fund on December 30, 1976. The "out of court" efforts of the three attorneys leading to the establishment of the fund is not sufficiently documented.

Since the prayer of plaintiff's compliant was for the recovery of attorney's fees from the city rather than from the common fund it is readily apparent why Judge Hickman concluded that there was no existing statutory authority to assess an attorney's fee against the city.

John Harmon testified that the "first serious effort" to recover attorney's fees in excess of 25% of the amount recovered for the 8 named plaintiffs came after March 18, 1977, the effective date of Act 822 of 1977 which authorized fees for the attorneys of record in taxpayer refund actions for monies illegally exacted by a county, city or town before distribution of the balance to the members of the class.

The order establishing the common fund is shown at pages 157-8 of the 395 page transcript. The remaining 237 pages reflect principally and almost exclusively the efforts of the three attorneys to obtain and enforce collection of their fees by execution and garnishment. These efforts include the two appeals to this court and the actions taken by a special master and the city to comply with Judge Bullion's order entered March 9, 1977 which found that the city had withdrawn its previously filed petition for rehearing and review of Judge Hickman's order of December 30, 1976 and appointed Price, Waterhouse & Co., certified public accountants, to calculate and oversee the refunds to the electric customers. By this order the court retained jurisdiction "for clarification pertaining to attorney's fees due plaintiffs out of the fund."

We are here considering the rights of 8 named plaintiffs, their 3 attorneys, and the rights of more than 32,400 unnamed plaintiffs who did not participate in the litigation and had no notice of any of the proceedings. Most importantly the proceedings involving the allowance of attorney's fees, which would reduce the total refund payable to the unnamed plaintiffs by the amount of such allowance.

This court noted in *Henry* v. *Powell,* supra, that Judge Taylor awarded the attorney's fee of $95,884.31 out of the common fund, at a hearing on April 1, 1977 which was not stenographically reported. The record does not reflect whether the unnamed plaintiff members had received reasonable notice of and an opportunity to be heard on the issue of allowance of attorney's fees. The lack of such notice may well violate traditional standards of procedural due process, but due process is not in issue here.

On May 4, 1977, Judge Bullion entered an order approved by all counsel of record setting aside Judge Taylor's order awarding attorney's fees which was reversed by this court in *Henry* v. *Powell,* supra, for want of an appealable order.

After remand and on December 27, 1978 Judge Bullion conducted an evidentiary hearing on the allowance of attorney's fees without notice to the unnamed plaintiffs. The three attorneys and two expert witness attorneys, who had nothing to do with the litigation, all testified before Judge Bullion at the stenographically reported hearing.

The potential of a class action case for abuse in award of attorney's fees out of a common fund was first recognized in *Trustees* v. *Greenough,* 105 U.S. 527 where the U.S. Supreme Court warned that court awarded attorney's fees should be "made with moderation and a jealous regard to the rights of those who are interested in the fund."

The unnamed plaintiffs, numbering over 32,400, had little or no opportunity to exercise any measure of control over the conduct of the litigation by the three attorneys or in the allowance of their attorney's fees. Without this opportunity and little incentive (the individual refunds would have been less than $20.00 per customer) the unnamed plaintiffs could hardly be expected to register any complaints. The common fund itself once established, no longer belonged to the city so the city had little incentive to oppose any allowance of attorney's fees out of the fund. In both the *Love* and *Lytle* cases, cited in the majority opinion, the awards of attorney's fees were vigorously opposed in an adversary

proceeding between two named parties both represented by their own attorneys.

Although most state courts, including our own, have considered few class action cases involving the allowance of attorney's fees, the federal courts have struggled with the problem for many years.

An experienced and prominent group of judges and lawyers prepared for use in class action cases in the federal courts a Manual of Complex Litigation.[2]

The Manual states that "few subjects associated with the class action device have generated as much critical commentary in recent years as the matter of attorney's fees."[3] It urges strict compliance with exacting standards approved by the courts to insure that awards of attorney's fees are not abused.

Although the standards for determining attorney's fees in class actions enunciated by the federal courts are somewhat varied, many federal appellate courts are requiring the federal trial courts to hold evidentiary hearings and to award attorney's fees only upon specific findings of facts based on proper standards rather than upon unsubstantiated discretion coupled with a recital of the various factors considered.

Illustrative of this trend is *Lindy Brothers Builder, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F. 2d 161 (C.A. 3. 1973), (Lindy I), an antitrust class action case, in which the Third Circuit held that the district court's "failure to hold an evidentiary hearing and its failure to follow proper standards in awarding fees to attorneys constituted an abuse of discretion", and found that "the mere listing of

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[2]Manual for Complex Litigation, § 1.47, reprinted in Volume 1, Part 2, Moore's Federal Practice, pages 77-85 (2d Ed. 1948).

[3]See 7A C. Wright and A. Miller, Federal Practice and Procedure § 1803 (1976 Supp.); Lawyers and Involuntary Clients In Public Interest Litigation, 88 Harv. L. Rev. 849 (1975); Attorney's Fees in Individual and Class Action Antitrust Litigation, 60 Cal. L. Rev. 1656 (1972); Handler; The Shift from Substantive to Procedural Innovations in Antitrust Suits; The Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 9-10 (1971).

four factors for consideration by the court makes meaningful review difficult and gives little guidance to attorneys and claimants."

In *City of Detroit* v. *Grinnell,* 495 F. 2d 448 (C.A.2. 1974), also a class action case, the Second Circuit observed that the initial duty of the trial court was "to ascertain the number of hours which the attorney and his firm spent on the case," the next step was "to place a value on that time . . . with a proper index being the hourly rate to which attorneys of like skill in the area would be typically entitled for a given type of work on the basis of an hourly rate of compensation." Like the *Lindy* court, the *Detroit* court then considered several "less objective factors such as the risk of litigation, and concluded that an evidentiary hearing of the relevant facts on the issue of attorney's fees was a necessity." See also *Johnson* v. *Georgia Highway Express, Inc.,* 488 F. 2d 714 (C.A. 5, 1974) and *Merola* v. *Atlantic Richfield Co.,* 493 F. 2d 292 at 297 (C.A. 3 1974).

Our own Eighth Circuit in *Grunin* v. *International House of Pancakes,* 513 F. 2d 114 (C.A 8, 1975) has approved and followed *Detroit* and the *Lindy* four-step test in a class action case holding at page 128 of its opinion:

> "The *Lindy* standards as interpreted in the *City of Detroit* and *Merola* provide the appropriate test for determining a discretionary fee award in a class action context."

The Manual for Complex Litigation states that the standards imposed in the federal decisions "make it imperative that counsel be required to keep precise records of the hours spent in working on the case and of the specific tasks which were performed in the time recorded."[4] The Manual also states that the award of attorney's fees must be based upon these records and not upon estimates and recommends that the trial courts order counsel at the beginning of the action to keep accurate time sheets describing precisely how much time was spent in each activity and whether the activ-

[4]See Volume 1, Part 2, Moore's Federal Practice, at page 1.50.

ity itself was of benefit toward resolution of the case.

In the recent case of *In Re Anthracite Coal Antitrust Lit.*, 81 F.R.D. 499 (1979), after counsel for the class representatives had mailed notices to all customers of the defendants who might be members of the class, an evidentiary hearing was conducted on the petition for award of attorney's fees and costs. The petitioning attorneys made the following information available at the hearing: a written analysis of the work performed by each attorney, paralegal and law clerk, by date, description of services and amount of time expended; a detailed listing of all expenses incurred, including the date of incurrence, type and amount of expense; a statement of the normal billing rate of each attorney; and a narrative description of the proceedings and the asserted impact of each attorney's service upon the result achieved.

In *Miller* v. *Mackey International, Inc.*, 70 F.R.D. 533 (1976), the court appointed an independent attorney as guardian ad litem to represent the interests of the class in connection with the proceedings for determination of the attorney's fees. The court said:

> "Because the interest of the class members is specifically adverse to the interest of their lawyers who seek an attorney's fee to be awarded from the settlement fund, the class members must be protected. The attorney for the defendant has little concern for the manner in which the fund is divided. Consequently, the court appointed an experienced attorney as guardian ad litem for members of the class . . . this procedure both achieves protection for members of the class and enables the trial judge to remain in an impartial position."

See also: *Haas* v. *Pittsburgh Nat. Bank,* 77 F.R.D. 382 (1977).

The following factors militate against my affirmance of the full amount of the award of attorney's fees in this case:

1. The failure of any of the attorneys to record their time and furnish to the court a breakdown of who spent time,

both in and out of court, and in what endeavor so as to avoid duplication of effort. See *Colson* v. *Hilton Hotels Corp.*, 59 F.R.D. 324 (N.D. Ill. 1972).

2. The failure of one attorney to supply the court with any information relating to his standard hourly rate. See *Grunin* v. *International House of Pancakes,* supra.

3. The two judges who presided over the hearings which resulted in the allowance of attorney's fees had not presided over the substantive proceedings which culminated in the establishment of the common fund. See *White* v. *Auerbach,* 500 F. 2d 822 (C.A. 2, 1974).

4. Much of the work leading to the establishment of the common fund was necessarily performed by a master and the court without objection of any of the parties. See *Alpine Pharmacy, Inc.* v. *Chas. Pfizer & Co., Inc.*, 481 F. 2d 1045 (C.A. 2, 1973).

5. Supervision of distribution of the refunds was performed by a second master appointed by the court without objection of any of the parties. See *Alpine Pharmacy, Inc.* v. *Chas. Pfizer & Co., Inc.*, supra.

6. That no notice of the evidentiary hearing on the allowance of attorney's fees was given to the unnamed plaintiff members of the class. See *In Re Anthracite Coal Antitrust Lit.*, supra.

7. The unnamed plaintiff members of the class were not represented by counsel *i.e.* a guardian ad litem at the two hearings on the award of attorney's fees. See *Flast* v. *Cohen,* 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968).

8. Both hearings on the issue of attorney's fees resulted in an identical award of 15% of the common fund suggestive of an arbitrary discount of the 25% contingent fee contract. See *Illinois* v. *Harper & Row Publishers, Inc.*, 55 F.R.D. 221 (N.D. Ill. 1972); Manual For Complex Litigation, reprinted in Vol. 1, Part 2, Moore's Federal Practice, § 1.47 (2d Ed. 1974).

9. The transcript of the trial court record shows that much, if not most, of the "in court" attorney's time was spent to obtain and enforce collection of their own fees. See *Lindy Bros. Builders* v. *American Radiator and Sanitary Corp.,* 540 F. 2d 102 (3d Cir. 1976) (Lindy II).

10. The use of three attorneys without appropriate documentation to support the need for three separate attorneys. See *The Mutual Life Ins. Co.* v. *Owen,* 111 Ark. 554, 164 S.W. 720 (1914).

The three attorneys testified that altogether they spent 47 hours a week for 16 weeks on the case *i.e.* an aggregate of 752 hours. On the award of $95,884.31, their hourly rate would have been $127.50. The qualifications and experience of Walter Davidson, one of the two expert witnesses, was the most nearly comparable to that of John Harmon. Mr. Harmon did not testify as to his usual and customary hourly rate but Mr. Davidson testified that his usual and customary hourly rate was $70.00. The expert witnesses had no knowledge of the time spent by the three attorneys. Neither of the expert witnesses testified that they had handled any utility rate class action cases.

Upon consideration of the transcript of the entire trial court record in the light of the affirmative factors (enumerated in the majority opinion) and the negative factors (enumerated in this opinion), I would award a reasonable attorney's fee to counsel for the class in the amount of $52,640.00, for their services rendered, both in and out of court, which were concluded with the establishment of the fund on December 30, 1976. I would not award attorney's fee for the efforts exerted by the three attorneys after December 30, 1976 to obtain and enforce collection of their own fees.

As modified by reduction of the allowance of attorney's fees from $95,884.31 to $52,640.00 (752 estimated hours times $70.00 per hour), I would affirm.

Mr. Justice George Rose Smith joins in this opinion.

STATE of Arkansas *v.* John GLENN and David HAMILTON

CR 79-191

Opinion delivered January 14, 1980
(In Banc)

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for petitioner.

William R. Simpson, Jr., Chief Deputy Public Defender, and *Alan Nussbaum,* for respondents.

GEORGE ROSE SMITH, Justice. Early in the morning of February 4, 1978, a homicide occurred at the home of the

respondents, Glenn and Hamilton, in Little Rock. The fatal shooting arose from an argument between the respondents on the one side and two visitors, Eichenbaum and Parker, on the other, about the sale of marihuana. The police investigated the homicide, and later in the month Parker was charged with the murder of Eichenbaum. Both the respondents testified as witnesses for the State at a preliminary hearing in the murder case, held in the municipal court on February 22.

On May 30 the two respondents were jointly charged in the present case with possession of marihuana on the night of the homicide, with intent to deliver. Both defendants filed motions to suppress evidence of certain marihuana seized during the police investigation. The case was tried without a jury on March 19, 1979. The court first heard the evidence on the motions to suppress and tentatively granted the motions. The hearing then went on to the merits of the case. After both sides had rested the judge indicated that he would also exclude the State's remaining evidence upon the marihuana charge; that is, two statements taken from Hamilton by the police and the testimony of both defendants at the preliminary hearing on the homicide charge against Parker. A month later, after the parties had submitted briefs on the admissibility of the evidence, the judge adhered to his position and announced that the charges would be dismissed for insufficiency of proof. The judge, however, offered to permit the prosecution to take an interlocutory appeal on the evidentiary questions, adding that if the case were reversed it would have to be tried all over again, as the judge might have forgotten the testimony by then. The deputy prosecutor replied that he would take the interlocutory appeal. The court took the case under advisement pending the outcome of the appeal.

An interlocutory appeal, presenting three questions about the admissibility of evidence, was taken to the Court of Appeals. That tribunal, in an unpublished opinion delivered on September 19, reversed the trial court on two of the three points and remanded the cause for further proceedings. We granted certiorari in the belief that the case presented a question of statutory interpretation with respect to

Uniform Evidence Rule 804, Ark. Stat. Ann. § 28-1001 (Repl. 1979).

We do not reach the merits of the State's contentions, for it is too late for appellate jurisdiction to be invoked by means of an interlocutory appeal. Of course, the want of an appealable order is a jurisdictional matter that this court will raise itself.

The Rules of Criminal Procedure (1976) permit an interlocutory appeal by the State only with respect to a pretrial order suppressing evidence. Rules 16.2 and 36.10. At that point jeopardy has not attached. The rules are intended to permit the State to obtain a review of a ruling upon the admissibility of evidence essential to the prosecution's case. (As originally drafted, Rule 36.1 similarly allowed a defendant to enter a conditional plea of guilty and take an interlocutory appeal after the denial of a motion to suppress evidence. That provision, however, was deleted before Rule 36.1 was approved. See the third paragraph [which should also have been deleted] of the Commentary following Rule 36.1.)

Jeopardy attaches when the jury is finally sworn to try the case or, in a trial to the court, when the taking of evidence begins. *Jones* v. *State*, 230 Ark. 18, 320 S.W. 2d 645 (1959) (jury trial); Annotation, 49 A.L.R. 3d 1039 (1973) (nonjury trial). Thus the State might have taken an interlocutory appeal after a pretrial hearing upon the motions to suppress the seized drugs, but that procedure was no longer available when the trial proceeded to the merits. A criminal trial cannot be suspended for weeks or months to allow an appeal from an interlocutory ruling upon the admissibility of evidence. Nor can this case be tried all over again, as the trial judge suggested, owing to the prohibition against double jeopardy.

It follows that the trial court's rulings that the State's evidence was inadmissible must stand, whether correct or not. There being no other substantial evidence to sustain the charges, the cause must be remanded for the entry of a final judgment for both defendants.

Reversed.

Truman BOLDEN *v.* STATE of Arkansas

CR 79-134 593 S.W. 2d 156

Opinion delivered January 14, 1980
(In Banc)
[Rehearing denied February 19, 1980.]

Anthony Wayne Emmons, Dyersburg, Tenn., for appellant.

Steve Clark, Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was convicted of first degree battery, a class B felony. We reversed and remanded. *Bolden* v. *State,* 262 Ark. 718, 561 S.W. 2d 881 (1978). On retrial he was again found guilty of first degree battery, receiving a sentence of ten years' imprisonment. He brings this appeal which was certified to this court from the Court of Appeals pursuant to Rule 29, § (1) (J), Rules of the Arkansas Supreme Court and Court of Appeals.

When we review the evidence in the light most favorable

to the appellee, as we must do on appeal, we agree with appellant there is no substantial evidence to support his conviction for first degree battery. There is no evidence from which the jury could have found, without resorting to surmise and conjecture, that appellant had committed first degree battery under any of the provisions of Ark. Stat. Ann. § 41-1601 (Repl. 1977), which provides in pertinent part:

> (1) a person commits battery in the first degree if:
> (a) with the purpose of causing serious physical injury to another person, he causes serious physical injury to any person by means of a deadly weapon; or
> (b) with the purpose of seriously and permanently disfiguring another person, or of destroying, amputating or permanently disabling a member or organ of his body, he causes such an injury to any person; or
> (c) he causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life; or . . .

To sustain a conviction of first degree battery, "life endangering conduct" must generally be involved; there must be a severe injury in conjunction with a wanton or purposeful culpable mental state; and each recited subsection of § 41-1601, *supra*, "describes conduct that would produce murder liability if death resulted." Commentary to § 41-1603. Clearly, an element of first degree battery is the intent to inflict serious physical injury. *Golden* v. *State*, 265 Ark. 99, 576 S.W. 2d 955 (1979).

Here a policeman testified that he was writing a citation, charging appellant with a traffic offense when he was unexpectedly struck in the back of the head. He was felled and dazed by the blow. A struggle ensued. According to the officer, the appellant and his brother kicked and beat him about his head and chest. The officer suffered a broken jaw and ribs. The officer had not produced (drawn) any weapon when he received the blow; his gun holster was snapped when he received the blow; and he had no idea what type of instrument, if any, caused the injury. His nightstick was in the front part of the car. The appellant was in the back seat of the patrol car, within reach of the nightstick, immediately

prior to his receiving the blow. The officer did not know what caused the injury. The physician who examined the officer shortly after the incident testified that he had not observed any contusion on the officer's head, and there was no physical evidence of a severe blow to the back of the head. With regard to his jaw injury, the officer testified that he did not know what had caused the injury, although, as previously indicated, appellant and his brother kicked and beat him about his head and chest. Although the officer testified that the appellant got possession of his gun during the struggle, pointed it at him, and threatened to kill him, he did not testify that the appellant had struck him with the gun, nightstick or any weapon. The physician testified that the injury could have resulted from a blow from someone's fist. The appellant admitted only that it was possible he hit the officer with his elbow during the scuffle.

This recited evidence would only justify a conviction of second degree battery pursuant to § 41-1602 which provides in pertinent part:

> (1) A person commits battery in the second degree if:
> (a) with the purpose of causing physical injury to another person; . . . or . . .
> (c) with the purpose of preventing a law enforcement officer or fireman from acting in the line of duty, he causes physical injury to any person . . .

Appellant's other assignments for reversal have no merit since they are unsupported by convincing argument or citation of authority. *Dixon* v. *State,* 260 Ark. 857, 545 S.W. 2d 606 (1977).

Since the evidence is insufficient to support a conviction of first degree battery, the judgment is reversed and the cause remanded.

HICKMAN, J., concurs.

STROUD & MAYS, JJ., not participating.

William Earl DAVIS *v.* STATE of Arkansas

CR 79-160 592 S.W. 2d 118

Opinion delivered January 14, 1980
(In Banc)
[Rehearing denied February 4, 1980.]

Ray & Donovan, for appellant.

Steve Clark, Atty. Gen., by: *Joseph H. Purvis,* Deputy Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was charged with capital felony murder. Ark. Stat. Ann. § 41-1501 (a) (Repl. 1977). Following plea negotiations, he entered a plea of guilty to first degree murder (Ark. Stat. Ann. § 41-1502 [Repl. 1977]) and was sentenced to 25 years' imprisonment. Shortly thereafter, appellant petitioned for postconviction relief pursuant to Ark. Stat. Ann. Vol. 4A, Rules of Crim. Proc., Rule 37 (Repl. 1977). After an evidentiary hearing, the court denied the petition and hence this appeal by present appointed counsel.

We first consider appellant's contention that the court erred in finding that he had not been denied effective assistance of counsel. He primarily argues that his attorney should not have allowed him to plead guilty to a lesser offense because there was insufficient evidence to convict him of capital murder, the crime with which he was charged in the information. The decision of counsel to approve a plea of guilty to a lesser offense is a judgment question. *Carney* v. *State,* 250 Ark. 205, 464 S.W. 2d 612 (1971). Appellant must prove by a preponderance of the evidence that his attorney has by his acts or omissions made the proceedings "a farce and a mockery of justice," or that appellant's representation by counsel was "so patently lacking in competence or adequacy" that it is the court's duty to correct it. *Sheppard* v. *State,* 255 Ark. 40, 498 S.W. 2d 668 (1973). The burden was on the appellant to overcome the presumption that his attorney was competent. *Clark* v. *State,* 255 Ark. 13, 498 S.W. 2d 657 (1973).

Appellant never accuses his attorney of forcing him to waive his right to a jury trial, or of even advising him to plead guilty. He admits that his attorney did an "admirable job"

during pretrial proceedings. Appellant's then appointed attorney testified at length at the Rule 37 hearing. During his investigation of the case, he made in excess of 20 trips between West Helena and Marianna to discuss the case with the appellant and other persons acquainted with the case. He estimated that he had spent between 150 and 400 hours in the preparation of the case. He filed numerous motions, including a motion for change of venue, motion to quash petit jury panel, motion for continuance, motion for bill of particulars and discovery, and a petition for appellant's commitment to the State Hospital for psychiatric examination. He also discussed the case with attorneys for the codefendants in the murder charge. They indicated that their clients would testify against the appellant if the case went to trial. The court had granted the state's motion to compel attendance of two out-of-state witnesses whose testimony would link the appellant to the murder weapon. The attorney also testified that he was satisfied that there was a factual basis for the appellant's guilty plea; that he read and explained the plea statement to the appellant; and that in his opinion the appellant was well aware of what was happening. He stated that on the day the plea was entered he told the appellant that he did not have to accept the negotiated agreement and that he could secure a new attorney and a jury trial if he so desired. We hold that the trial court was correct in finding the appellant was not denied effective assistance of counsel.

Appellant also contends that the court erred in accepting his guilty plea without establishing that the plea had a basis in fact as required by Rules of Crim. Proc., rule 24.6. The factual basis of a guilty plea, if not sufficiently determined during the plea proceedings, may be established at the Rule 37 post conviction hearing. *Deason* v. *State,* 263 Ark. 56, 562 S.W. 2d 79 (1978). Here the court found there was a sufficient factual basis for appellant's plea.

Written statements by the appellant and his codefendants were introduced into evidence at the hearing. In his statement, appellant admitted that he was at the victim's house on the night of the murder and that he intended to rob the victim. The codefendants, in their statements, placed the appellant at the scene of the murder; stated that the appellant

showed them money with "blood on it"; and that appellant told them that he shot the victim. Although the codefendants testified that their previous statements were false and had been coerced, the state offered evidence to the contrary. We agree there was a factual basis for the guilty plea.

Appellant also contends that the court erred in not permitting him to introduce evidence, or proffer proof, of threats, promises of leniency and "bond denial" which caused him to enter his guilty plea. Also that the unsanitary living conditions of the local jail and the denial of medication to him made his confession and plea involuntary. The thrust of his argument is that he agreed to confess to a crime he did not commit solely to escape from the miserable living conditions at the local jail. Even if we consider the issues sufficiently alleged or raised at the evidentiary hearing, appellant's signed plea statement and evidence presented demonstrates that the plea was voluntary. When the plea was entered, appellant was represented by competent counsel. Upon inquiry by the court, appellant stated that he was entering the plea freely and voluntarily and on the advice of counsel, and it was not the result of threats and violence. He was fully informed as to the facts surrounding the charges and the possible sentence upon conviction of felony murder. Also he was satisfied with the services rendered by his attorney and that he had no complaints about his representation. The court instructed appellant that it was not bound by the prosecutor's recommendations. The record reflects that appellant was given every opportunity to raise any possible defense he had to the charges. Having failed to do so, he is now precluded from collaterally attacking his sentence. *Robertson* v. *State,* 252 Ark. 333, 478 S.W. 2d 878 (1972); and *Horn* v. *State,* 254 Ark. 651, 495 S.W. 2d 152 (1972).

Appellant's argument that the court intended that he be required to serve 1/3 of his 25 year sentence, less any credit for good time served, is an issue raised for the first time on appeal. Therefore, we do not consider it. *Davis* v. *State,* 253 Ark. 484, 486 S.W. 2d 904 (1972).

After a full review of the record, we hold there was no violation of appellant's constitutional rights.

Affirmed.

STROUD & MAYS JJ, not participating.

William E. BEAUMONT, County Judge of Pulaski County, Arkansas *v.* Richard B. ADKISSON, Circuit Judge

79-311 593 S.W. 2d 11

Opinion delivered January 14, 1980

James L. Sloan, for petitioner.

Steve Clark, Atty. Gen., by: *Russell Meeks III,* Deputy Atty. Gen., for respondent.

Robert L. Brown, of *Harrison & Brown, P.A.,* for Amicus Curiae, County Judges Association of Arkansas.

DARRELL HICKMAN, Justice. William E. Beaumont, County Judge of Pulaski County, asks for a writ to prohibit Pulaski County Circuit Judge, Richard B. Adkisson, from ordering Beaumont to show cause why he should not be held in contempt of court. We granted a temporary stay and now make it permanent.

Adkisson, who is one of five Pulaski County Circuit Judges, issued an order September 7, 1979, finding that two of his employees, a Probation Officer/Bailiff and a Secretary/Case Coordinator, should be paid salaries of $16,500.00 per year. The order recited, as its authority, Act 629 of 1979, Acts of Arkansas. The order instructed "Pulaski County, Arkansas, the county judge thereof, and all other appropriate officers of Pulaski County, Arkansas" to pay the salaries. The court's order is Exhibit A to this opinion. Act 629 is Exhibit B.

Beaumont presented an ordinance to the Pulaski County Quorum Court which would have appropriated the money to pay these salaries, however, the quorum court on two occasions failed to pass the ordinance. Consequently, Beaumont was told by Judge Adkisson to appear and show cause why he should not be held in contempt for refusing to pay the salaries as ordered.

Beaumont argues in his petition that the act he has been commanded to perform is illegal and that, therefore, the court has no jurisdiction to enforce it. Beaumont attacks the order on four grounds. First, Act 629 violates the equal protection clause of the state and federal constitutions. Second, that a county judge cannot expend funds for which there has been no appropriation. Third, that Act 629 violates the ban in the state constitution on local legislation. Fourth, that it unconstitutionally delegates legislative power to a judicial officer. We will deal only with the third and fourth points.

Adkisson argues in his response that Act 629 is not discriminatory, that he can order a county judge to pay money where the administration of justice is involved, that Act 629 is permissible local legislation because it deals with the administration of justice, and that the legislature can delegate to a judicial officer the right to set, within limits, a salary.

The County Judges Association has filed an *amicus curiae* brief and essentially argues that Amendment 55, Section 3, to the Arkansas Constitution prohibits the county judge from disbursing funds without a quorum court appropriation; that the General Assembly has no authority to fix the number of county employees or the compensation they receive, or that, in any event, there has to be an appropriation; and that the court's order is invalid.

Prohibition is the proper remedy in this case. We said in *Duncan* v. *Kirby, Judge,* 228 Ark. 917, 311 S.W. 2d 157 (1958).

> . . . The writ of prohibition lies where an inferior court is proceeding in a matter beyond its jurisdiction and where the remedy by appeal, though available, is inadequate. . . . And where it appears that an inferior court is about to proceed in a matter over which it is entirely without jurisdiction under any state of facts which may be shown to exist, then the superior court exercising supervisory control over the inferior court may prevent such unauthorized proceedings by the issuance of a writ of prohibition. . . . *Id.* at 920.

There is no doubt that the Act violates Amendment 14 to the Arkansas Constitution, which reads: "The General Assembly shall not pass any local or special acts. . . ." Act 629 applies only to the "Fourth Division Circuit of the Sixth Judicial Circuit;" the Act does not apply to the other four circuit judges in the Sixth Judicial Circuit. There are five circuit judges in the Sixth Judicial Circuit. Ark. Stat. Ann. § 22-365(f) (Repl. 1962). We have since declared that there is no longer any distinction among divisions. All circuit judges have equal authority and responsibility. See *Harkness* v.

Harrison, 266 Ark. 59, 585 S.W. 2d 10 (1979).

The only way that Act 629 could be legal is if it were held to be an act relating generally to all the circuit courts in the Sixth Circuit and it is determined to be essential to the administration of justice. Cf. *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S.W. 844 (1905) (act abolishing judicial district not unconstitutional). In the case of *Buzbee* v. *Hutton,* 186 Ark. 134, 52 S.W. 2d 647 (1932), we upheld an act which created a separate chancery clerk for Pulaski County. We reviewed the reasons that the chancery court of Pulaski County was different, in a class to itself, from other chancery courts and held that the classification by the legislature was not unreasonable or arbitrary. In the case of *McLellan* v. *Pledger,* 209 Ark. 159, 189 S.W. 2d 789 (1945), we held that a salary act for the court resporter of the Fourth Chancery District did not violate Amendment 14 to the Arkansas Constitution. The act was essential to the administration of justice. Although the court named served a limited territory, the act was general in its operation.

These cases relate to legislative acts that apply generally to all officials in a general category, although only one person might hold the office affected. The act before us distinctly limits itself to one of five circuit courts in a circuit and clearly violates the intent of Amendment 14. The Act is an example of the very sort of legislation that Amendment 14 was designed to prevent.

Since the Act is void, it follows that the respondent court had no jurisdiction to issue its order. In the case of *Mears* v. *Adkisson,* 262 Ark. 636, 560 S.W. 2d 222 (1978), we held that where a court order was based on an invalid act, the court had no jurisdiction to act and, therefore, its order was void and subject to a writ of prohibition.

Act 629 is also an unlawful delegation of legislative authority. It delegates to the "Sixth Judicial Circuit, Fourth Division Circuit Court" the right to set the salaries of two employees. While Act 629 does provide that the sum will be not less than $15,600.00, nor more than that which the court reporter receives, a sum not limited, it gives a judge a right to

set a salary. We have held before that circuit judges cannot set salaries. *Mears* v. *Adkisson,* 262 Ark. 636, 560 S.W. 2d 222 (1978).

The respondent judge argues that we have held in previous cases that it was not a delegation of legislative authority for certain state agencies to fix salaries within defined limits. The case of *Hooker* v. *Parkin,* 235 Ark. 218, 357 S.W. 2d 534 (1962), is cited as authority for that argument. In the *Hooker* case the question was raised whether the Highway Commission and the State Board of Education were unlawfully delegated the authority to fix the salaries of employees. The act in question in the *Hooker* case gave both departments the right to determine the number of employees needed and to fix their salaries within maximum authorizations. We held that this did not violate ARK. CONST., art V., § 29, which requires an appropriation by the legislature before money can be withdrawn from the state treasury. The distinction between the *Hooker* case and the case before us is that in *Hooker* the legislature had *appropriated* the money to pay the salaries which were authorized and set a limit on how much could be paid. In this case there has been no appropriation by the General Assembly. In effect, the court is legislating the salaries, as evidenced by its order.

Whether the state may order a county to pay salaries in such circumstances is not properly before us. It is also unnecessary for us to reach the question of whether there has to be an appropriation by the county before such a state act is valid. Neither is this a question of whether a court can order a county to pay expenses regarding the administration of justice where the county refuses to pay those necessary expenses.

We should point out that Beaumont is not subject to a contempt procedure in this case. Amendment 55 changed the duties of the county judge from being those of an official who pays claims as a judicial officer to those of an officer who pays claims as an administrative officer. See *Mears* v. *Hall,* 263 Ark. 827, 569 S.W. 2d 91 (1978). The quorum court appropriates the money and the county judge simply executes those appropriations as an administrative officer. The

county judge could not pay the funds unless they were appropriated. It would require an illegal act on his part. That was not the case before Amendment 55. Therefore, it was improper to consider him in contempt of court.

FOGLEMAN, C.J., concurs in part and dissents in part.

STROUD and MAYS, JJ., not participating.

EXHIBIT A

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

IN THE MATTER OF THE SALARY OF
THE PROBATION OFFICER/BAILIFF,
and THE SECRETARY/CASE
COORDINATOR OF THE FOURTH
DIVISION OF THE PULASKI COUNTY
CIRCUIT COURT EX PARTE

ORDER

Pursuant to the authority of Arkansas Act 629 of 1979, the court finds that the salary of the Probation Officer/Bailiff and the Secretary/Case Coordinator should be increased to and set at $16,500.00 per year, a sum which does not exceed the annual salary of the court reporter of the Fourth Division of the Pulaski County Circuit Court; that the present compensation is inadequate for these positions and the added compensation is necessary to keep competent personnel employed in the positions; and that the court has the discretion under said Act to set the salaries of the said Probation Officer/Bailiff and Secretary/Case Coordinator at $16,500.00 per year; and hereby directs Pulaski County, Arkansas, the county judge thereof; and all other appropriate officers of Pulaski County, Arkansas to pay same.

It is, therefore, CONSIDERED, ADJUDGED and ORDERED that the salaries of the Probation Officer/Bailiff and the Secretary/Case Coordinator shall be and is hereby

increased to and set at $16,500.00 per year, beginning October 1, 1979, payable on the same periodic pay periods now used for county employees; and Pulaski County, Arkansas, the county judge thereof and all appropriate county officers are hereby ORDERED and DIRECTED to forthwith pay the salaries of the said Probation Officer/Bailiff and Secretary/Case Coordinator as herein directed, beginning October 1, 1979.

/s/ Richard B. Adkisson
Circuit Judge

EXHIBIT B

ACT 629, Ark. Acts of 1979

"An Act To Amend Act 3 of 1971, To Provide For An Increase in Salaries, And For Other Purposes."

Be It Enacted By The General Assembly of the State of Arkansas:

Section 1. Section 1 of Act 3 of 1971, as amended, is hereby amended to read as follows:

"Section 1. There is hereby created the office of Probation Officer/Bailiff, Deputy Probation Officer/Clerk and Secretary/Case Coordinator of the Fourth Division Circuit Court of the Sixth Judicial Circuit.

The Sixth Judicial Circuit, Fourth Division Circuit Court, is recognized as the Court created by Act 15 of the First Extraordinary Session of 1970."

Section 2. Section 3 of Act 3 of 1971, as amended, is hereby amended to read as follows:

"Section 3. The Probation Officer/Bailiff shall be appointed by the Judge of the Sixth Judicial Circuit Court, Fourth Division, and shall serve at the will of the Judge. In addition to the Probation Officer/Bailiff, the Judge may appoint one Deputy Probation Officer/Clerk and a Secretary/

Case Coordinator who will serve at the will of the Judge."

Section 3. Section 4 of Act 3 of 1971, as amended, is hereby amended to read as follows:

"Section 4. The salary of each person appointed as set out in Section 3 shall be set at the discretion of the Judge of the Sixth Judicial Circuit, Fourth Division, at a sum not less than Fifteen Thousand Six Hundred Dollars ($15,600.00) per annum, but not to exceed that of the court reporter, which shall be paid by Pulaski County, Arkansas."

Section 4. All laws and parts of laws in conflict with this Act are hereby repealed.

Section 5. It is hereby found and determined by the General Assembly that the position of Probation Officer/Bailiff, Deputy Probation Officer/Clerk and Secretary/Case Coordinator are necessary to insure efficient and proper administration of justice in the Fourth Division of Circuit Court in the Sixth Judicial Circuit and that increased salaries as provided in Section 4 of this Act must be provided immediately. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval.

[Approved by Governor March 28, 1979]

JOHN A. FOGLEMAN, Chief Justice, concurring in part, dissenting in part. I agree that the writ should issue in this case solely because under Amendment 55 and Act 742 of 1977, the county judge cannot disburse funds that have not been appropriated by the quorum court. Amendment 55, § 3 provides that the county judge shall authorize and approve disbursement of all appropriated county funds. Nowhere does it appear that he has any constitutionally conferred authority to disburse funds that have not been appropriated. Act 742, § 78 (B) (2) [Ark. Stat. Ann. § 17-3901 (B) (2) (Supp. 1979)] provides that, before approving vouchers for payment of county funds, the county judge must determine that there is a balance of funds in the pertinent appropriation and that

the expenditure is in compliance with the purposes for which the funds are appropriated. There is also a provision that no money shall be paid out of the treasury until the same shall have been appropriated by law and then only in accordance with such appropriation. See *Mears* v. *Hall,* 263 Ark. 827, 569 S.W. 2d 91. So it is clear that the county judge has no legislative authority to disburse county money that has not been appropriated.

On the other hand, if Act 629 of 1979 and the trial court's action based upon it are valid, appropriation by the quorum court would be automatic, as the quorum court would have no discretion in the matter. *Mears* v. *Hall,* supra. *Quattlebaum* v. *Davis,* 265 Ark. 588, 579 S.W. 2d 599. Even though we said, in *Quattlebaum,* that the county court [judge] would have no discretion in determining whether payment should be made of obligations of a county mandated by the General Assembly, this does not mean that the county judge can be held in contempt for failure to pay funds from the county treasury, where, as here, the quorum court has refused to make an appropriation, and where no other proceedings to establish the county's liability have been had.

These are two bases upon which the majority finds Act 629 invalid. I do not agree that either basis is sound. Holding that the act is local legislation is contrary to every decision of this court where the administration of justice is concerned, particularly where the single court involved may issue summons to every county in the state, as every circuit court in Arkansas may do. Ark. Stat. Ann. § 27-312 (Repl. 1979).

It must be remembered that counties are still civil divisions of the state for political and judicial purposes and are the state's auxiliaries and instrumentalities in the administration of its government. They are political subdivisions of the state for the administration of justice. The word "county" signifies a portion of a state resulting from a division of the state into such areas for the better government thereof and the easier administration of justice. In these respects we have clearly held that nothing in Amendment 55 changed the status of the county insofar as its primary purposes and functions (one of which is the administration of justice) are

concerned. *Mears* v. *Hall,* supra.

In *Mears* we said:

> *** An act does not have to be *necessary* to the administration of justice in order to avoid the ban against local legislation. It is not local legislation if it pertains or relates to the administration of justice.

We then added:

> In the case cited by the majority in *McLellan* v. *Pledger,* 209 Ark. 159, 189 S.W. 2d 789, the issue pertained to fees of the clerk of the Chancery Court of Sebastian County and those of the stenographer of the Tenth Chancery District, and it was held that the act allowing a fee to the court stenographer to be credited to the "Stenographer's Fund Account" of the chancery district was not local legislation. The reason was that the statute *related* to the administration of justice because under modern conditions, the court reporter is an essential officer in reporting the proceedings of the courts. See *Sebastian Bridge District* v. *Lynch,* 200 Ark. 134, 138 S.W. 2d 81. The same question was involved and the same answer given in *McLellan* v. *Pledger,* supra. Other cases holding that legislation *relating* to the administration of justice is not local are: *Smalley* v. *City of Ft. Smith,* 239 Ark. 39, 386 S.W. 2d 944; *City of Stuttgart* v. *Elms,* 220 Ark. 722, 249 S.W. 2d 829. Legislation dealing exclusively with the functions of a court of statewide jurisdiction is not local legislation. *Buzbee* v. *Hutton,* 186 Ark. 134, 52 S.W. 2d 647. The rationale of these holdings was first stated in *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S.W. 844, in the following language:

> *** Though such an act relates to a court exercising jurisdiction over limited territory, it is general in its operation, and affects all citizens within the jurisdiction of the court. Whether an act of the Legislature be a local or general law must be determined by the generality with which it affects the people as a whole,

> rather than the extent of the territory over which it operates; and, if it affects equally all persons who come within its range, it can be neither special nor local, within the meaning of the Constitution. ***

We elaborated upon this rationale in an opinion on rehearing in *Webb* v. *Adams,* 180 Ark. 713, 23 S.W. 2d 617, in treating and disavowing an intention to impair the holding in *Waterman,* saying:

> *** This is in recognition of that principle of state sovereignty under which the state, through its Legislature, may protect its own interest, and, by virtue of it, the Legislature may treat every subject of sovereignty as within a class by itself, and bills of that kind are usually held to be general and not local or special laws. ***

Again, in speaking of the rationale of *Waterman* in *Cannon* v. *May,* 183 Ark. 107, 35 S.W. 2d 70, we said:

> *** A Missouri case was cited in support of the ruling. The Supreme Court of Missouri based its holding on the principle that the judicial system of the state was a whole and that acts dealing with the courts have been usually held general *although not applicable to every court of like nature in the state.* The ruling proceeds upon the doctrine that the judicial department of the state is a "composite unit." *** [Emphasis mine.]

The rationale of *Waterman, Cannon* and *Webb* was relied upon in *Buzbee.*

In *Smalley* v. *City of Ft. Smith,* 239 Ark. 39, 386 S.W. 2d 944, we upheld Act 88 of 1963 against the contention that it was unconstitutional as local legislation and said that "legislation *relating* to the administration of justice is not local," citing *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S.W. 844 and *Buzbee* v. *Hutton,* 186 Ark. 134, 52 S.W. 2d 647. [Emphasis mine.]

In *City of Stuttgart* v. *Elms,* 220 Ark. 722, 249 S.W. 2d 829, the act involved, Act 210 of 1949, fixed the salary of municipal judges throughout the state. It contained a provision that it should not apply to any city having a population of not less than 11,000 and not more than 11,800. Only the city of Jonesboro would have come within these limits, enabling that city to increase or decrease the salary fixed by the act. We said that the rule that a statutory classification must have regard to the character of the legislation and not be arbitrary "does not apply where the subject matter of the act *relates* to the administration of justice, as it does here," citing *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S.W. 844. [Emphasis mine.] Obviously, the number of people affected by the operation of the circuit court in Pulaski County, which is not only the most populous county in the state but also a large financial, commercial, industrial and governmental center, exceeds the number which would have any contact with a municipal court in Jonesboro by hundreds of thousands.

If we didn't mean that legislation relating to the administration of justice was not local legislation under Amendment 14, we should not have said so, over and over. See Anderson, *Special and Local Acts in Arkansas,* 3 Ark. L. Rev. 113, 124.

Given today's crowded court dockets and the prevalence of crime, who is to say that either a secretary/case coordinator or a probation officer/bailiff are non-essential to the administration of justice in the particular court involved? Obviously, the General Assembly of the State of Arkansas thought they were essential. Statutory authorization has been given circuit judges to require the payment of expenses incident or necessary to a speedy and efficient administration of justice. Pope's Digest § 2858; Crawford & Moses Digest § 2230.[1]

Every act carries a strong presumption of constitution-

[1]Once again, I point out that the compiler of statutes has not included this statute in Ark. Stat. Ann. upon the unwarranted assumption that it had been superseded by Ark. Stat. Ann. § 22-349.1 (Repl. 1962). The latter statute pertained only to expenses of judges and had no bearing whatever upon the expenses which were the subject of Pope's Digest § 2858.

ality, and in any attack on constitutionality, there must be a clear incompatibility between the act and the constitution before it is held unconstitutional. All doubts must be resolved in favor of the act. *Jones* v. *Mears,* 256 Ark. 825, 510 S.W. 2d 857; *Carter* v. *State,* 255 Ark. 225, 500 S.W. 2d 368, cert. den. 416 U.S. 905, 94 S. Ct. 1610, 40 L. Ed. 2d 110. It must also be remembered that, if it is possible for the courts to so construe an act that it will meet the test of constitutionality, the act must be so construed. *Stone* v. *State,* 254 Ark. 1011, 498 S.W. 2d 634.

The presumption of constitutionality fully applies when a statute is attacked as local or special, and, where it is doubtful whether the act violates the constitution, the doubt must be resolved in favor of constitutionality. *State* v. *Lee,* 193 Ark. 270, 99 S.W. 2d 835; *Whittaker* v. *Carter,* 238 Ark. 1074, 386 S.W. 2d 498.

It is true that an act is special when it *arbitrarily* separates some person, place or thing from others upon which, but for the separation, it would operate, but classification is still permissible if it bears a reasonable relation to the purpose of the statute. *Berry* v. *Gordon,* 237 Ark. 547, 376 S.W. 2d 279; *Hensley* v. *Holder,* 228 Ark. 401, 307 S.W. 2d 794. But where differences in effect of a statute are reasonably related to the purposes of the law, the statute is general and not local or special. *Whittaker* v. *Carter,* supra.

A statute that is limited in effect to only one or a few classifications is not local or special if the classification is not arbitrary and bears a reasonable relation to the purpose of the act. *Thomas* v. *Foust,* 245 Ark. 948, 435 S.W. 2d 793. The General Assembly may make a classification where it is appropriate, germane to the subject and based upon substantial differences which make one situation different from another. *Simpson* v. *Matthews,* 184 Ark. 213, 40 S.W. 2d 991. The judgment of the General Assembly in making statutory classifications should be controlling, unless the classification is clearly arbitrary or is manifestly made for the purpose of evading the constitution. *Simpson* v. *Matthews,* supra.

We have dealt with the question of local and special

legislation in relationship to salaries in *Lawhorn* v. *Johnson,* 196 Ark. 991, 120 S.W. 2d 720, where a statute provided for payment of the expenses of county judges acting in their capacities of road commissioners in every county except three. The act provided that, in those counties, the salary fixed should also cover the expenses of the office, without any explanation of the reason for the classification. We said:

> *** We cannot agree that this had the effect of making the act local or special. The compensation provided in the counties named was deemed sufficient by the Legislature to cover all the necessary expenses of the road commissioner and the Legislature had the right to so find and provide.

Given the presumption of constitutionality and due regard to the extent of the General Assembly's control of statutory classifications, the majority has gone much too far in holding the act in question manifestly unconstitutional. It may be, but there is inherent in the legislative action a finding that the classification was appropriate and warranted. There is too much that we do not know to warrant an arbitrary declaration that the act is local and special. Does this judge preside over trials of both civil and criminal cases? If so, a case coordinator would have more burdensome duties and greater responsibilities than if not. How does the number of cases usually disposed of on this judge's docket compare with the number on the dockets of other judges? How many people have been released on probation in criminal cases whose supervision is under the ultimate control of this judge? How does the pay range compare with that of like employees on the staffs of other judges? These and many other questions should be answered before this court declares such an act unconstitutional as local and special in this limited action for prohibition in a contempt proceeding.

I cannot agree that Act 629 is an unlawful delegation of legislative authority. The judge no more fixes the salary than does the Arkansas State Highway Commission or the State Board of Education who were involved in *Hooker* v. *Parkin,* 235 Ark. 218, 357 S.W. 2d 534. The holding there that the acts involved did not violate Art. 5, § 29, has nothing what-

ever to do with delegation of legislative power and nothing whatever to do with this case. Nobody has ever contended that Act 629 violates anything other than Art. 4, a contention that was also made in *Hooker* — a major detail which the majority chooses to overlook.

In *Hooker* in treating the contention that Act 200 of 1961 was unconstitutional in that it directed unlawful delegation of power in violation of Art. 4 of the Arkansas Constitution, we held that there was nothing in these powers delegated to the Highway Commission that contravened Art. 4, saying:

> *** The act establishes the maximum salaries and wages for a maximum number of employees by grades and classes. The act does permit the Highway Commission to employ a lesser number of employees and to pay less than the maximum salaries and wages to employees in the various grades and classes. The need for employees and the salary or wage deserved by the individual employee are left for the Highway Commission's determination. The delegation of this power is necessary for the orderly and efficient operation of the Highway Department and is not repugnant to Article 4 of the State Constitution. The Legislature has the right to delegate that power to determine facts upon which the law makes or intends to make its action depend. *McArthur* v. *Smallwood,* 225 Ark. 328, 281 S.W. 2d 428. In this case the facts we repeat are: first, the need for the employee, and second, the ability and efficiency of the employee.

In speaking of Act 465 of 1961, relating to the State Board of Education, we said:

> The State Board of Education is empowered to determine the need for employees and to fix the number of employees and salaries, within maximum authorizations. In this connection what we have said about Act 200 suffices here. The Governor is authorized to reduce the amount to be expended for Transportation Aid in each fiscal year. We find that his action must depend upon the facts to be determined and that this require-

ment meets the test set forth in *McArthur* v. *Smallwood,* supra, and as further set forth in *State* v. *Davis,* 178 Ark. 153, 10 S.W. 2d 513, as follows:

> "The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation."

We went on to point out that Art. 5, § 29 provided that the General Assembly shall fix salaries and fees of all officers in the state and that no greater salary or fee than that fixed by law shall be paid to any officer, employee or other person. Even though it was not contended here that Act 629 violated Art. 5, § 29, what we said there would be applicable here, viz:

> Act 465 does not authorize the payment of a greater salary or fee to any employee than the amount fixed by law. We construe this provision to mean that the Legislature has the sole authority to establish the maximum remuneration to be received by any State employee and to establish the maximum number of such employees. We can find no requirement to the contrary.

Absolutely no significance was given in *Hooker* to the fact that appropriated funds were involved in treating the "salary-fixing" powers delegated to the two agencies of the executive branch of the government. Why can a judicial officer of our government not fix salaries within a given range, if executive officers can? In its consideration of *Hooker,* the majority has not treated the questions raised here at all.

It would be far, far better if the court would leave the answer to the question of constitutionality to another day

when the facts are before us. We avoid questions as to constitutionality of statutes when it is possible to decide a case without deciding them. *McNew* v. *McNew,* 262 Ark. 567, 559 S.W. 2d 155; *Osage Oil & Transportation, Inc.* v. *City of Fayetteville,* 260 Ark. 448, 541 S.W. 2d 922; *Bell* v. *Bell,* 249 Ark. 959, 462 S.W. 2d 837; *Satterfield* v. *State,* 245 Ark. 337, 432 S.W. 2d 472. Under our holding in *Bell,* the majority's treatment of the constitutionality of the act is "pure *dictum.*" The *Bell* holding is exceptionally applicable to this case which involves prohibition in a contempt proceeding.

Gloria WILLIAMS *v.* STATE of Arkansas

CR 79-163 593 S.W. 2d 8

Opinion delivered January 14, 1979

Spencer, Spencer & Shepherd, for appellant.

Steve Clark, Atty. Gen., by: *Joseph H. Purvis,* Deputy Atty. Gen., for appellee.

DARRELL HICKMAN, Justice. The appellant, Gloria Williams, was convicted of committing first degree battery upon her ten-month old daughter and sentenced to 10 years imprisonment. It was essentially a case of child abuse.

On appeal she alleges six errors, most of which are without merit and which will be briefly discussed. One error requires reversal.

The first error alleged is a lack of evidence to support the jury's finding of guilt. At the time of the alleged abuse, Gloria Williams was living with a man named Grady Madison. He was not her husband. She took the child to the doctor on September 12, 1978. The doctor believed that the child had been abused. He called the police. The evidence showed that the child was suffering from severe injuries which included burns, six fractured ribs, two arm fractures and various bruises and contusions about her body. The medical testimony was that the child had suffered from child abuse. Williams denied abusing the child in any way and

suggested that perhaps the child had fallen, or as Madison told her, that she had been burned from boiling water. Most of the evidence was circumstantial but there was sufficient evidence to support the jury's findings that Williams had abused the child. We no longer distinguish between an accessory and the principal, Ark. Stat. Ann. § 41-301, *et seq.* (Repl. 1977), and there is no doubt that she could not have been around the child without knowing of the injuries. Compare, *Limber* v. *State,* 264 Ark. 479, 572 S.W. 2d 402 (1978). Furthermore, there is some evidence that she may have injured the child herself. For example, Madison testified that she grabbed the child up by an arm and a leg on one occasion.

She and Madison were tried jointly. Madison testified that he did not know what caused all the injuries. He said that one time another child had pulled some boiling water off a stove onto the child. Testimony suggesting that the water could not have been pulled off the stove as he explained, was presented to impeach his version of the incident. Therefore, we find the argument that there was insufficient evidence to support the verdict or that a directed verdict should have been granted is without merit.

The appellant and Madison were charged separately but the court ordered the parties to be tried together. The appellant argues individuals who are separately charged by information cannot be jointly tried. We disagree. Rules of Crim. Proc., Rule 23.1 provides for such a trial. It reads:

> (a) The court may order consolidation of two (2) or more charges for trial if the offenses, and the defendants if there are more than one (1), could have been joined in a single indictment or information without prejudice to any defendant's rights to move for severance under preceding provisions.
>
> (b) The court may order a severance of offenses or defendants before trial if a severance could be obtained on motion of a defendant or the prosecution.

That does not mean that parties can be joined in a trial if prejudicial error might result. For example, see Rules of

Crim. Proc., Rule 22.3. In this case there was no allegation of prejudice and we find none as a result of the trial.

The appellant argues that she was denied her full quota of peremptory challenges. The court ruled that since the parties were being tried jointly they only had eight peremptory challenges as a pair, not eight each. The court correctly interpreted the law. Ark. Stat. Ann. § 43-1929 (Repl. 1977) reads:

> When several defendants are tried together, the challenge of any one of the defendants shall be the challenge of all.

In the case of *Hearne* v. *State,* 121 Ark. 460, 181 S.W. 291 (1915), we reached the same result. The *Hearne* case was upheld in *Lewis & Wren* v. *State,* 220 Ark. 914, 251 S.W. 2d 490 (1952). In those cases, unlike this one, the defendants were jointly indicted, but we do not believe this is a significant distinction. Any prejudice would lie in requiring a joint trial that should not be ordered in the first place; if that decision is proper, then no prejudice can result in limiting the peremptory challenges.

The appellant objected to the introduction of photographs of the infant, some of which were taken after the child was taken to the doctor. There is no doubt that they were graphic evidence of the child's injuries and were probably not ignored by the jury. But photographs will not be excluded simply because they are gruesome. *Tanner* v. *State,* 259 Ark. 243, 532 S.W. 2d 168 (1976). The danger of unfair prejudice created by a photograph must substantially outweigh its probative value before we will exclude it. *Gruzen* v. *State,* 267 Ark. (Dec. 17, 1979). The court below correctly applied this rule. These photographs represented portions of the body of the child and the battery of that child was the question in issue. The fact that some of them were made after the child was first examined does not bear on their admissibility if the photographs were properly identified as representing the condition of the child after she had received treatment. Compare, *Hughes* v. *State,* 249 Ark. 805, 461 S.W. 2d 940 (1971).

The court committed error when it admitted into evidence a statement allegedly made by the appellant to the doctor.

The appellant's lawyer filed a motion for discovery prior to trial and requested all statements that might at any time have been made by the appellant to police officers and others. The State responded to the motion without disclosing that the appellant made any statement to Dr. Pullig, in the presence of a policeman, when she took the child to the doctor. Apparently, the night before the trial the prosecutor learned that Dr. Pullig would testify that the appellant told him that if she knew he were going to call the police she would not have taken the child to him. The prosecutor did not promptly notify the appellant's attorney of this information the next morning but waited until after the lunch break and after the *voir dire* of all the prospective jurors, and then informed the appellant's attorney just before the trial started. The appellant's attorney moved to exclude the evidence as violating Rules of Crim. Proc., Rule 19.2. That rule reads:

> If before trial, but subsequent to compliance with these rules, or an order entered pursuant thereto, a party discovers additional material or information comprehended by a previous request to disclose, he shall promptly notify opposing counsel or the other party of the existence of such material or information. If additional material or information is discovered during trial, the party shall notify the court and opposing counsel of the existence of the material or information.

The record indicates that according to Dr. Pullig, a police officer was present in his office when she made the statement. There is no doubt, then, that the police officer knew of the statement. That knowledge is imputed to the prosecuting attorney. See Arkansas Rules of Criminal Procedure, Rule 17.1. See also Commentary to Article V.

The court must act in such a situation. The evidence must be excluded or a continuance granted. In the case of *Hughes* v. *State,* 264 Ark. 723, 574 S.W. 2d 888 (1978), we

held it was not error if the court granted a recess so that the defendant's attorney could question the witness. In this case the court gave the appellant no relief.

We are not saying the statement is inadmissible testimony. That is a separate question. The court's error was its failure to enforce the rule of discovery that imposes upon the State an obligation to timely inform the defendant of all information it has been properly requested to furnish. In this case we do not feel that the information was timely furnished. The judge abused his discretion in admitting the statement and, therefore, we reverse the judgment and order a new trial.

Reversed and remanded.

STROUD and MAYS, JJ., not participating.

Lee Ray OWEN, Executor, et al
v. Opal OWEN

79-287 592 S.W. 2d 120

Opinion delivered January 14, 1980
(In Banc)

Gary E. Johnson, for appellants.

Max B. Harrison, for appellee.

JOHN I. PURTLE, Justice. The will of John F. Owen was admitted to probate on June 11, 1976. His widow subsequently elected to take against the will. May 18, 1978, the probate court assigned dower and homestead rights to the widow and directed certain payments be made to her. Certain properties were ordered sold to satisfy the widow's claims. May 15, 1979, the court directed the executor to comply with the order of May 18, 1978. On June 12, 1979, the executor appealed from the order of May 15, 1979.

For reversal appellant claims article 9 § 6 of the Constitution of Arkansas is violative of the Fourteenth Amendment to the Constitution of the United States and further that the following Arkansas statutes are unconstitutional: Ark. Stat. Ann. § 60-501 (Repl. 1971), Ark. Stat. Ann. §§ 61-201, 61-202, 61-203, 61-207, 61-210, 61-228, 61-229 (Repl. 1971), and Ark. Stat. Ann. § 62-2501 (Repl. 1971). The allegation is these statutes are unconstitutional because they arbitrarily discriminate on the basis of gender. We affirm the trial court because a timely appeal was not filed.

The facts reveal John F. Owen executed a will on June 21, 1972, in which he left all his bounty to his wife, Mildred Owen. The will provided, in the event Mildred did not survive him, his bounty would be divided equally between the eight children born to decedent and Mildred. Mildred predeceased the decedent and he married Opal sometime before he died on May 28, 1976. His original will was not revoked during his lifetime. The record as abstracted does not show how long decedent and appellee were married. In any event, his will was admitted to probate on June 11, 1976, at the request of his son, Lee Ray Owen, who had been nominated as executor in the will.

Inventory of the estate was filed on December 7, 1976. The next item abstracted in the record is a memorandum brief filed by appellant on November 8, 1977, in which he alleged the appellee already owned a homestead, left by her former husband. The memorandum also alleged Opal Owen had abandoned the homestead in decedent's estate. The argument was apparently based upon the provisions of article 9 § 6 of the Constitution of Arkansas. The thrust of the

argument contained in the memorandum was that appellee could not claim two homesteads.

November 23, 1977, the court ordered the claimed homestead exonerated from an existing mortgage in view of the solvency of the estate. May 19, 1978, the court entered an order pursuant to a final hearing before the court on the petition of Opal Owen for dower and homestead rights in the properties of decedent. This order assigned the widow one-third of all personal properties of the estate and ordered the sale of all real properties, including the selected homestead, and that the widow be paid $2,500 from the proceeds of said sale for the purpose of acquiring another homestead. Also, the order directed payment to the widow of certain sums as her share of rents which had been collected by the estate.

Nothing further appears to have occurred until the order of May 15, 1979, wherein the court directed compliance with its former order of May 18, 1978. By this time additional rents had been collected and these were apportioned in accordance with the prior order of the court. The court noted the objections of appellant as to the constitutionality of the dower and homestead statutes. Obviously an appeal was filed although it is not noted in the abstract or brief. The record does not disclose whether the estate has been closed.

Although the appellant makes excellent arguments concerning the constitutionality of certain provisions of the constitution and the laws, we do not reach them because there was no timely appeal. Ark. Stat. Ann. § 62-2016 (Repl. 1971) provides for appeals to the supreme court in matters relating to decedents' estates:

> a. . .
>
> b. . .
>
> c. When an appeal is taken with respect to any appealable order in the administration of a decedent's estate, made prior to the order of final distribution, other than an order admitting or denying the probate of a will or appointing or refusing to appoint a personal representa-

tive, the Probate Court or Supreme Court may in its discretion order that the appeal be stayed until the order of final distribution is made and that the appeal be heard only as a part of any appeal which may be taken from the order of final distribution. This subsection shall not apply to guardianships.

d. When an appeal is taken from the order of final distribution in the administration of a decedent's estate, all prior appealable orders and judgments to which the appellant has filed objections in writing within sixty (60) days after the order of judgment was rendered and from which an appeal has not theretofore been taken, except orders admitting or denying the probate of a will or appointing a personal representative shall, at the election of the appellant, be reviewed. The appellant shall indicate such election by clearly stating in the appeal the orders which he desires to have reviewed.

. . .

Section (g) provides that appellate procedures applicable to equity cases will be applied except as stated in the act. The exceptions are those stated above.

The order of May 18, 1978, was final as to the dower and homestead rights of appellee and was an appealable order. Ark. Stat. Ann. § 27-2101 (Repl. 1979) and Ark. Stat. Ann. § 62-2016 (Repl. 1971). *Boyd* v. *Bradley,* 239 Ark. 120, 388 S.W. 2d 107 (1965); *Johnson* v. *Johnson,* 243 Ark. 656, 421 S.W. 2d 605 (1967); *Smith* v. *Smith,* 235 Ark. 932, 362 S.W. 2d 719 (1962); and *Watkins* v. *Watkins,* 242 Ark. 200, 412 S.W. 2d 609 (1967).

Whether the 30 day (Ark. Stat. Ann. § 27-2106.1 (Repl. 1979)) or 60 day (Ark. Stat. Ann § 62-2016 (Repl. 1971)) time limit for appeal applies is of no consequence because appellant complied with neither. Based upon the record before us we have no choice but to affirm the decree of the court entered herein on May 18, 1978.

Affirmed.

STROUD AND MAYS, JJ, not participating.

James E. SCOTT *v.* STATE of Arkansas

CR 79-206 592 S.W. 2d 122

January 14, 1980

PER CURIAM

Petitioner was convicted by a jury of rape on February 24, 1970, and was sentenced to be executed. On December 24, 1970, this sentence was commuted to life imprisonment by the Governor. We affirmed, *Scott* v. *State,* 249 Ark. 967,

463 S.W. 2d 404 (1971). On June 11, 1976, petitioner filed a petition for permission to proceed in circuit court under Arkansas Criminal Procedure Rule 37 for postconviction relief. We denied his petition for postconviction relief:

Petitioner raises the following grounds for postconviction relief:

(1) racial discrimination was involved in the selection of the jury panel; (2) racial prejudice at the time of the trial mandated a change in venue; (3) weapons obtained by an unreasonable search and seizure were improperly admitted at trial; (4) the jury was erroneously instructed on pardons and paroles; (5) trial counsel was ineffective in failing to adequately investigate and prepare for trial, failing to move for a change of venue, and failing to challenge the racial composition of the jury.

He asks us to waive the portion of Rule 37 which provides that all grounds for relief must be raised in one petition. He contends that the sole point alleged in the previous petition, the racial composition of the jury panel, was raised on appeal in only one sentence and was presented in a general and conclusory manner in the prior petition. He argues that we should find this issue to not have been "finally adjudicated." He also asserts that although his other grounds were not raised in the previous petition, we should find that these issues were "inadvertantly neglected" by the attorney who drafted that petition. The petition in the present matter was filed by a law student under supervision.

Rule 37.2(b), Rules of Criminal Procedure (1976), states:

> All grounds for relief available to a prisoner under this rule must be raised in his original or amended petition. Any grounds not so raised or any grounds finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence or any other proceedings that the prisoner may have taken to secure relief from his conviction or sentence may not be the basis for a subsequent petition.

The first postconviction petition alleged that "black citizens were intentionally and systematically excluded from service on the jury" in violation of petitioner's constitutional rights. This allegation was initially raised on appeal. Since the record was void of any reference of discrimination, we declined to speculate on the racial composition of the jury panel. When the issue was again raised in the first postconviction petition, we found that not only had this point been raised and decided adversely to petitioner on appeal, but that it was still being raised in conclusory terms without supporting facts or evidence. We note that two more of petitioner's present allegations were addressed on appeal and rejected. Counsel had argued that the trial court should have recognized the racial prejudice and hatred the community was experiencing and ordered a change of venue to insure a fair trial. We refused to speculate since there was nothing in the record to support the allegations. We also considered the circumstances surrounding the search that resulted in the seized weapons and concluded the search was reasonable.

Petitioner's petition for postconviction relief is denied. Rule 37 clearly provides that a prisoner will not be allowed to file subsequent petitions unless his petition falls within the specified exceptions. This petition does not meet those requirements. Petitioner has had two full opportunities to present his allegations to us. Each time he was represented by counsel. Petitioner has failed to satisfactorily show why his attorney could not have raised the allegations in his first postconviction petition. Thus, we see no need to go behind the rule to allow this subsequent petition because petitioner has failed to clearly demonstrate manifest injustice resulting from his several opportunities for redress.

Furthermore, this petition was not filed within three years from the date of commitment as required by Criminal Procedure Rule 37.2(c). The rationale for the provision is clearly demonstrated in this case since we note that the attorney who represented petitioner at trial and on appeal and the circuit judge who presided at the trial are both dead.

Accordingly, the petition for permission to proceed in

circuit court under Criminal Procedure 37 is denied.

Petition denied.

ST. PAUL INSURANCE COMPANY
and AMERICAN BURGER SYSTEMS, INC.
v. Deborah TOUZIN

79-318 592 S.W. 2d 447

Opinion delivered January 21, 1980
(In Banc)

Laser, Sharp, Haley, Young & Huckaby, P.A., for petitioners.

O. W. Pete Wiggins, Sr., for respondent.

George Rose Smith, Justice. Gordon Bruce Touzin, of North Little Rock, was an employee of American Burger Systems, which had eating places in Pulaski and Hot Spring counties. At about 2:00 a.m. on January 6, 1977, Touzin was killed when the company van he was driving at high speed struck a bridge abutment in Saline County and left the highway. The Workers' Compensation Commission denied this claim for death benefits, finding that Touzin's intoxication was a substantial cause of his death. The circuit court affirmed. The Court of Appeals reversed, holding that there was no substantial evidence to support the Commission's finding of intoxication.

On the issue of intoxication the decisive evidence before the Commission was the report of a blood-alcohol test which showed that Touzin's blood contained more than twice the percentage of alcohol that is presumed to show

intoxication. Ark. Stat. Ann § 75-1031.1 (A) (3) (Repl. 1979). The Court of Appeals held that the insurance carrier had not laid a sufficient foundation for the introduction of the test, by showing that it was taken in compliance with the statute and regulations. §§ 75-1045 and -1046. We granted certiorari to consider the interaction between the statute and the section of the Workers' Compensation Law which provides that the Commission shall not be bound by technical or statutory rules of evidence or by technical or formal rules of procedure. Ark. Stat. Ann. § 81-1327 (Repl. 1976).

In harmony with many decisions on the point, we view the evidence in the light most favorable to the Commission's decision. Touzin left the company's place of business in Malvern at about five o'clock on the afternoon preceding his death. There is no evidence of his activities between that time and about 12:45 a.m., when he rang the doorbell at the home of Mr. and Mrs. Neil Deimel, who had gone to bed. Mrs. Deimel was the manager of the company's restaurant in Malvern. Mr. Deimel went to the door and explained that his wife, whom Touzin wanted to see, had retired. Touzin visited with Deimel and left at about 1:30. Deimel testified that there was no indication that Touzin had been drinking. His wife heard the conversation between Touzin and her husband and reached the same conclusion.

The fatal accident occurred on the highway about 20 miles from the Deimel home. Touzin's vehicle struck the bridge abutment, traveled along the top of the concrete guard rail for some 63 feet, and hurtled through the air to a point beyond the fence bordering the right of way. State Trooper Bailey arrived within a few minutes. He testified that the engine of the vehicle was back in the passenger area and Touzin was lying dead in the rear part of the van. Officer Bailey smelled the odor of alcohol and saw one or two empty beer cans in the van. He wanted a blood-alcohol test and called the county medical examiner, Dr. Kirk, who came to the scene and helped remove the body. At the Saline Memorial Hospital Dr. Kirk withdrew a blood sample from the decedent's heart and turned it over to a registered nurse who was present. She labeled the sample and later delivered it to Mrs. Rose, a medical technician with 12 years' experience,

who tested the blood sample. All blood tests for law enforcement agencies in Saline county were done at the hospital's laboratory.

In testing the blood Mrs. Rose put it in a machine that used the enzymatic method, which had been evaluated and approved by the State Health Department in 1970. Mrs. Rose testified that the machine had been approved by that Department. She said that the machine is kept constantly in calibration, by calibrating it every day with controlled products. The chief medical technologist at the hospital also testified that the machine had been approved, but she explained that they did not get formal written approval until some four months later, when the issue was raised as a result of this case. The Commission specifically found that the machine had been certified and approved by the Arkansas State Department of Health.

Dr. Kirk testified that the blood-alcohol reading of .20 percent showed a state of intoxication, indicating the consumption of the equivalent of more than 10 cans of beer. Touzin's widow, the claimant, testified that her husband drank "a few beers now and then." She said she had never observed him under the influence of alcohol, but she admitted that when the police telephoned to inform her of the tragedy she asked if alcohol had been involved.

The Court of Appeals, for two reasons, was mistaken in holding that the insurance carrier had not laid a sufficient foundation for the introduction of the results of the blood-alcohol test.

First, the compensation law provides that the Commission is not bound by technical rules of evidence or procedure, but may "conduct the hearing in a manner as will best ascertain the rights of the parties." § 81-1327, *supra*. Professor Larson discusses at length the cases construing such provisions in workers' compensation statutes. He concludes that the factfinders are expected to adhere to basic rules of fair play, such as recognizing the right of cross examination and the necessity of having all the evidence in the record. On the other hand, a compensation commission undoubtedly

has expertise much superior to that of a jury in the weighing of testmony and should therefore be left to determine the probative value of hearsay testimony and other proof that might not be admissible in a court of law. Larson, Workmen's Compensation Law, §§ 79.00 and 79.80 — 79.84 (1976). The admissibility of the blood-alcohol test falls in the latter category.

Here the Commission, within the leeway conferred by the compensation law, certainly conducted the hearing in such a manner as to best ascertain the rights of the parties. Only four persons had any part in the blood-alcohol test: Officer Bailey, who ordered it, a licensed physician, a registered nurse, and an experienced technologist whose qualifications were shown. All four testified and were cross examined. The machine had been approved and was constantly kept in proper calibration. The Commission was fully justified in finding that the test results had probative value.

Second, the testimony would have been admissible even under the more strict rules that prevail in a court of law. The statutes regulating blood-alcohol tests are primarily intended for criminal cases, but they are pertinent when such a test is used in civil litigation. *Newton* v. *Clark*, 266 Ark. 237, 582 S.W. 2d 955 (1979). Even in criminal cases, however, substantial compliance with the statute and with the Health Department rules is all that is demanded. *Munn* v. *State*, 257 Ark. 1057, 521 S.W. 2d 535 (1975). That degree of compliance was shown in this case.

The Court of Appeals in effect required an *affirmative* showing of the strictest possible compliance, by emphasizing various *negative* aspects of the record: The absence of proof that Mrs. Rose had been certified by the Department, or that Officer Bailey had initialed the sample, or that Dr. Kirk had drawn the required amount of blood or taken precautions against its dilution with "pleural or pericardial fluids." Those details are for the most part not in the statute but in the Department of Health regulation.

Judicial notice may be taken of that regulation, but the proper procedure is for the party relying on such judicial

notice to aid the court or administrative law judge by calling attention to the regulation. *Turnage* v. *Gibson*, 211 Ark. 268, 200 S.W. 2d 92 (1947); Uniform Evidence Rule 201 (d), Ark. Stat. Ann. § 28-1001 (Repl. 1979). Here there was no reference to the regulation during the taking of the testimony; it first appears in a brief filed after the hearing. And even then the deficiencies specified by the Court of Appeals were not mentioned by counsel. It would have been a simple matter, while the witnesses were on the stand, for opposing counsel to ask about each of the deficiencies, had they been thought material. As we have said in a similar situation: "If counsel thought that no proper foundation had been laid, the point should have been brought specifically to the court's attention. Had that course been followed the omission now complained of might readily have been supplied in the trial court." *Conway* v. *Hudspeth*, 229 Ark. 735, 318 S.W. 2d 137 (1958). We find ample substantial evidence to support the Commission's decision.

Reversed.

HOUSTON GENERAL INSURANCE CO. and HOUSTON FIRE AND CASUALTY CO. *v.* ARKANSAS LOUISIANA GAS CO.

79-203 592 S.W. 2d 445

Opinion delivered January 21, 1980
(In Banc)

Wright, Lindsey & Jennings, for appellants.

Wayne Boyce and *Griffin Smith*, for appellee.

FRANK HOLT, Associate Justice. Appellants paid the losses incurred by their insureds as a result of an explosion and fire which allegedly was caused by the negligence of the appellee. Following our reversal in *Erwin, Inc.* v. *Ark. La. Gas Co.*, 261 Ark. 537, 550 S.W. 2d 174 (1977), appellants were substituted as plaintiffs for the individuals and businesses originally named as plaintiffs. A jury found for the appellee, and on appeal two grounds are urged for reversal.

Appellants first contend that the court erred in refusing to admit the testimony of Kinerd Gates concerning certain statements made to him by Arvil Alvis, an agent of the appellee, about gas leaks in the alley where the explosion and fire occurred. Appellee responds that the testimony was properly excluded because there was no foundation for its admission. The excluded statements were contained in Gates' deposition which was being read to the jury because he was unable to testify at trial. One of the excluded statements was made four months prior to the explosion at which time Alvis allegedly told Gates and his wife there was "one helluva leak in that alley" where the explosion occurred. The other statement was made to Gates in the alley a month or two prior to the explosion there. Alvis allegedly told him

that he was "checking for a leak, gas leak." The court refused to admit the statements on the ground they were hearsay.

We hold that these proffered statements are not hearsay. They fall within the definition of an admission of a party opponent as set forth in Ark. Stat. Ann. § 28-1001, Rule 801 (d) (2) (iv) (Repl. 1979), which provides:

> (d) A statement is not hearsay if: . . . (2) Admission of a party opponent. The statement is offered against a party and is . . . (iv) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship . . .

The range of statements admissible under the agency standard was broadened considerably by this rule which is a verbatim adoption of the Federal Rules of Evidence, rule 801 (d) (2) (D), 28 U.S.C.A. "Once agency, and the making of the statement while the relationship continues, are established, the statement is exempt from the hearsay rule so long as it relates to a matter within the scope of the agency." Weinstein's Evidence § 801 (d) (2) (D) [01], p. 162. See also *Mahlandt* v. *Wild Canid Survival, Etc.*, 588 F. 2d 626 (8th Cir. 1978); *Process Control* v. *Tullahoma Hot Mix Paving Co.*, 79 F.R.D. 223 (E.D. Tenn. 1977); and *Pino* v. *Protection Maritime Ins. Co., Ltd.*, 599 F. 2d 10 (1st Cir. 1979). The rule insures the trustworthiness and reliability of the admission by providing that such statements are admissible only if made during the existence of the relationship. An employee is unlikely to jeopardize his job by making false statements which are costly to his employer. Weinstein's, *supra*.

Here in response to appellee's objection as to hearsay, appellants' attorney stated that he understood the proof would be that when Alvis made the statement he was an employee of Arkla engaged in responding to leak complaints and making repairs on gas lines. The proffer was sufficient to establish that the statements were made during the existence of the relationship and related to a matter within the scope of

the employment. In view of this proffer, the court erred in refusing to admit these statements. Neither can we agree with appellee's argument that the evidence, identical to the proffered evidence, was later elicited by appellants from Alvis.

We are also of the view that the court erred in permitting the local fire chief to testify concerning his investigation as to the cause of several other explosions and fires which had occurred in the vicinity a few months before and after the explosion and fire causing the damages here. Evidence of similar occurrences is admissible only when it is demonstrated that the events arose out of the same or substantially similar circumstances. The burden rests on the party offering such evidence to prove the necessary similarity of conditions exists. *Arkansas Power and Light Co.* v. *Johnson*, 260 Ark. 237, 538 S.W. 2d 541 (1976). See also *Fulwider* v. *Woods*, 249 Ark. 776, 461 S.W. 2d 581 (1971). Here appellee offered no evidence that the conditions surrounding the other fires, including one fire ascertained as being caused by arson, were similar to the fire involved in this case.

Consequently, the evidence as presented is not relevant to the cause of this particular fire. Ark. Stat. Ann. § 28-1001, Rule 401 (Repl. 1979). Neither do we agree with appellee's argument that the appellants, by cross-examining appellee's witness, had "open[ed] up" the issue thereby justifying the local fire chief's testimony.

Reversed and remanded.

STROUD & MAYS, JJ, not participating.

Homer Lloyd MOORE *v.* STATE of Arkansas

CR 79-227 592 S.W. 2d 450

Opinion delivered January 21, 1980

Vincent E. Skillman, for appellant.

Steve Clark, Atty. Gen., for appellee.

PER CURIAM. The appellant, Homer Lloyd Moore, through his attorney, has filed a motion for rule on the clerk.

The Clerk of this Court properly refused to accept the tendered record in this case because it was not tendered timely.

The judgment was entered April 3, 1979. A motion was filed on May 22, 1979, to extend the time for filing the transcript. The trial judge signed the order extending the time until December 26, 1979.

When the record was tendered more than seven months had elapsed from the date of the judgment.

In an affidavit attached to the motion, Vincent E. Skillman, Jr., the attorney for the appellant, stated, "That the time computed was incorrect not due to any fault of the said Homer Lloyd Moore, or anyone else to my knowledge."

We have recognized that sometimes an appeal must be accepted where to do otherwise would be a denial of a constitutional right; that is, the right to effective assistance of counsel.

In *Harkness* v. *State*, 264 Ark. 561, 572 S.W. 2d 835 (1978), we recognized this principle. Subsequent to *Harkness* in the per curiam opinion, Regarding Belated Appeals in criminal cases, dated February 5, 1979, we adopted a policy of publishing a per curiam order when we had to grant an appeal because counsel for no good cause tendered an out-of-time transcript.

In civil cases, an appeal will be granted if a record is tendered beyond a legally authorized date only if there is unavoidable casualty. In criminal cases, the rule is that we will do so only if there is an affidavit showing a "good reason." Rules of Crim. Proc., Rule 36.9.

None of these rules or decisions apply to the problem before us.

The affiant lawyer in this case does not cite good reasons, nor really any reason for not timely tendering the record. It is the duty and responsibility of counsel for an appellant to see that the record is timely filed. In effect, counsel for the appellant says it was not the fault of anyone. For that reason we deny the petition for a rule on the clerk.

We do not hold that we will deny a belated appeal if good reason is shown.

SOUTHWESTERN BELL TELEPHONE COMPANY
v. ARKANSAS PUBLIC SERVICE COMMISSION

79-201 593 S.W. 2d 434

Opinion delivered January 28, 1980

Wayne E. Babler, William C. Sullivan, D. D. Dupre; Hershel Friday and *Hermann Ivester,* of *Friday, Eldredge & Clark,* for appellant.

Robert H. Wood, Jr., Steven K. Cuffman, and *Steve Clark,* Atty. Gen., by: *Michael O'Malley,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Chief Justice. This appeal is the product of the inexorable march of inflation. Appellant, Southwestern Bell Telphone Company (hereafter referred to as Bell) seeks a reversal of the circuit court's affirmance of the order of the appellee Arkansas Public Service Commission (hereafter called PSC) setting aside proposed new intrastate rate schedules filed by the telephone company on March 1, 1976, and allowing the company to file a new rate schedule designed to produce additional revenues amounting to slightly more than one-third of those anticipated from the schedule proposed by the company.

On March 1, 1976, the telephone company sought PSC approval of a new rate schedule pursuant to Ark. Stat. Ann. § 73-217 (Repl. 1957). It would have produced an increase of annual revenues to the company amounting to approximately $18,180,000. By an order entered March 29, 1976, the commission suspended the proposed rates for six months, the maximum period of suspension allowed under Ark. Stat. Ann. § 73-217 (b), the applicable statute. Pursuant to the provisions of that statute, the telephone company, on August 1, 1976, made the proposed tariffs effective under an "Agreement & Undertaking" approved by PSC, and these rates were collected until June 20, 1978. The six months' suspension expired on September 29, 1976, both by the terms of the order and by operation of law. Hearings on appellant's application were not even commenced until November 15, 1976. They were concluded on November 24, 1976. Briefing time was allowed thereafter and the last briefs were filed on January 3, 1977. No order was entered by PSC until September 1, 1977. That order not only set aside the rates proposed by the telephone company, it also required the refund of all revenues collected by the company on the basis of its proposed rates in excess of those authorized in the order. On December 9, 1977, PSC entered an amended order authorizing an additional $26,120 in annual revenues.

The application filed by the telephone company was based upon a rate of return of 9.27 percent on the original cost of its property used in providing intrastate telecommunications service in Arkansas based on a test year ending December 31, 1976.. This rate of return had been approved by PSC just six months prior to the filing of this application in the last previous rate proceeding involving appellant. Appellant asserted that the increase authorized by the earlier proceeding had proven insufficient to produce the rate of return allowed. The order entered September 1, 1977, as amended, fixed the rate of return at 8.31 percent and allowed increased annual revenues based on that rate applied to a test year rate base valued as of June 30, 1976.

Appellant's petition for review by the circuit court was filed November 11, 1977, after PSC had failed to act upon appellant's petition for rehearing filed September 21, 1977.

The circuit court affirmed the PSC order on March 22, 1979.

Bell has presented its arguments in nine (stated) points for reversal. The arguments and contentions made under those points are to some extent overlapping and sometimes repetitive. Many of them would be more appropriately addressed to PSC than to the courts. We will endeavor to deal with Bell's basic arguments without attempting to treat the individual points separately. We must, however, give due regard to the limitations on the scope of judicial review and to the expertise of the commission. The scope of judicial review is neither so narrow as PSC would have it nor so broad as Bell asks us to make it. It is fixed by Ark. Stat. Ann. § 73-229.1 (Repl. 1979). The courts can only determine whether: (1) the commission's findings as to the facts are supported by substantial evidence; (2) the commission has regularly pursued its authority; and (2a) the order or decision under review violated any right of the petitioner under the laws or Constitution of the United States or the State of Arkansas. It is only the findings of fact that are tested by the standard of substantial evidence, which is a question of law. *Arkansas Public Service Com'n.* v. *Continental Telephone Co.*, 262 Ark. 821, 561 S.W. 2d 645; *State Highway Com'n.* v. *Byars*, 221 Ark. 845, 256 S.W. 2d 738; *J. L. Williams & Sons* v. *Smith*, 205 Ark. 604, 170 S.W. 2d 82; *St. Louis Southwestern Ry. Co.* v. *Braswell*, 198 Ark. 143, 127 S.W. 2d 637. All of the questions to be determined, then, are questions of law. In answering these questions, the courts may not pass upon the wisdom of the commission's actions or say whether the commission has appropriately exercised its discretion. *City of Ft. Smith* v. *Southwestern Bell Telephone Co.*, 220 Ark. 70, 247 S.W. 2d 474; *Allied Telephone Co.* v. *Arkansas Public Service Com'n.*, 239 Ark. 492, 393 S.W. 2d 206; *Arkansas Power & Light Co. v.* Arkansas Public Service Com'n., 226 Ark. 225, 289 S.W. 2d 688; *Harding Glass Co.* v. *Arkansas Public Service Com'n.*, 229 Ark. 153, 313 S.W. 2d 812. The judicial branch of the government must defer to the expertise of the commission. *Arkansas Power & Light Co.* v. *Arkansas Public Service Com'n.*, supra. See also, *Fisher* v. *Branscum*, 243 Ark. 516, 420 S.W. 2d 882. Judicial review is not reduced to a formality, however, and it is for the courts to say whether there has been an arbitrary or

unwarranted abuse of the commission's discretion, even though considerable judicial restraint should be observed in finding such an abuse. *Incorporated Town of Emerson* v. *Arkansas Public Service Com'n.*, 227 Ark. 20, 295 S.W. 2d 778; *Arkansas Public Service Com'n.* v. *Continental Telephone Co.*, supra. It is not for the courts to advise the commission how to discharge its functions in arriving at findings of fact or in exercising its discretion. *Arkansas Power & Light Co.* v. *Arkansas Public Service Com'n*, supra; *Ohio Bell Telphone Co.* v. *Public Utilities Com'n.*, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1937). On the other hand, it is clearly for the courts to decide the questions of law involved and to direct the commission where it has not "pursued" its authority in compliance with the statutes governing it or with the state and federal constitutions. In questions pertaining to the regular pursuit of its authority, the courts do have the power and duty to direct the commission in the performance of its functions insofar as it may be necessary to assure compliance by it with the statutes and constitutions. The question of reasonableness of the commission's actions relates only to its findings of fact and to a determination of whether its action was arbitrary.

We must remember that the commission action has been reviewed in the circuit court and that the burden is on the appellant to demonstrate error in that court's judgment. See *Fisher* v. *Branscum*, supra.

Appellant first contends that its proposed rates became effective upon the expiration of the suspension and, as a result, none of the revenue collected prior to September 1, 1977, is subject to refund. The suspension order provided that the rates were suspended for six months, "or until such earlier time as the Commission may order." Appellant argues that its proposed rates became effective on September 30, 1976, and that PSC lost its power to act with regard to the rates and any revenues collected under them. The commission is authorized to suspend proposed rates pending its investigation and decision, but not for a period to exceed six months. There is no indication whatever of any legislative intent that PSC should entirely lose jurisdiction of the rate proceeding by its failure to reach a decision within the sus-

pension period. By the same token, the time limitation is not meaningless, as it would be, if the refund order is held valid. It should be remembered that the hearings on the rate increase were not even commenced during the suspension period. The only purpose of the limitation on the suspension is to prevent the "regulatory lag" between the filing of an application for a rate increase and the commission's decision from having a confiscatory tendency. If the commission's decision can be delayed for 18 months after the filing of the application by the utility, it could be delayed for two or three times that long. In these days of galloping inflation, the passage of time can be crucial. Perhaps the delay was attributable to the heavy load falling upon PSC as a result of inflationary trends. If, however, the utility has no protection from a long delayed decision which requires a refund, repetitive applications for rate increases will be filed by it during the pendency of its initial application. This would only serve to increase the workload of the commission and produce additional delay. The time limitation must be given some meaning. We take it to mean that, in this case, the commission had no authority to order a refund of revenues collected on the basis of the proposed rates between the date of the expiration of the suspension order and the date of the order fixing the rates allowed. By the clear language of § 73-217, it is only the operation of the rates that may be suspended, but that suspension cannot exceed six months. See *New England Telephone & Telegraph Co.* v. *Public Utilities Co.*, 362 A. 2d 741 (Me., 1976); *State* v. *Montana-Dakota Utilities Co.*, 89 N.W. 2d 94 (N.D., 1958). On the other hand, we do not agree with appellant that refunds of collections made between August 1, 1976 and September 30, 1976, could not be ordered because no valid rate order was entered within the time limitation on the power of suspension in § 73-217. See *Application of Montana-Dakota Utilities Co.*, 102 N.W. 2d 329 (N.D., 1960). Bell had no vested rights in collections under bond of the difference between the old rates and the new ones it proposed collected during the suspension period. *Application of Montana-Dakota Utilities Co.*, 111 N.W. 2d 705 (N.D., 1961).

We reject PSC's suggestion that a holding that it may not order a refund of revenues collected after the expiration

of the suspension period would constitute a court-imposed time limit on the commission's deliberations. The time limit was imposed by the General Assembly. It must be remembered that the PSC is a creature of the legislature and that, in rate-making, it is performing a legislative function, which has been delegated to it. *City of Ft. Smith* v. *Department of Public Utilities*, 195 Ark. 513, 113 S.W. 2d 100; *Arkansas Power & Light Co.* v. *Arkansas Public Service Com'n.*, 226 Ark. 225, 289 S.W. 2d 668. The commission was created to act for the General Assembly and it has the same power that body would have when acting within the powers conferred upon it by legislative act. *Department of Public Utilities* v. *Arkansas Louisiana Gas Co.*, 200 Ark. 983, 142 S.W 2d 213. The General Assembly certainly has not surrendered the power to fix time limitations on the actions of its own agency. PSC's order of suspension clearly recognized that the limitation on its suspension of rates had some significance by suspending "new intrastate rates, tolls and charges . . . for a period of six (6) months, or until such *earlier* time as the Commission may order." [Emphasis ours.]

If PSC does not enter a suspenion order prior to the stated effective date of the proposed rates, those rates, by the clear language of Ark. Stat. Ann. § 73-217 (a) and (b), would "go into effect" or "become effective." The suspension order simply suspends the proposed rates for six months "beyond the time when such rate or rates would otherwise go into effect." Appellee has not suggested any other meaningful application of the six months' limitation.

PSC does argue that its action was proper under Ark. Stat. Ann. § 73-217 (c) because it is directed to determine and fix the just and reasonable rate or rates to be charged or applied by the utility for service "from and after the time said new rate or rates took effect," and in the same order fix the amount or amounts plus interest, if any, to be refunded to the consumer which were collected by the utility "during the time such new rate or rates were in effect." When all the subsections of § 73-217 are read together, it is clear to us that it was contemplated by the General Assembly that the investigation and hearing should be completed and an order for a refund made during the suspension period. We agree that

PSC had the power and authority to order the refund or any rates collected during the suspension period which it ultimately found to be excessive, in spite of the time limitations in § 73-217. We did not even approach the questions involved here in *Department of Public Utilities* v. *McConnell*, 198 Ark. 502, 130 S.W. 2d 9, relied upon by appellee.

PSC also argues that Bell's "Agreement and Undertaking" guaranteed repayment of any amount which the commission found excessive. The particular language relied upon is:

> Should any portion of such rates in excess of the rates in effect immediately prior to August 1, 1976, be finally determined to be excessive by the Commission, Southwestern Bell Telephone Company does hereby agree and undertake to insure the prompt payment of any refunds ordered by the Commission together with interest thereon not to exceed Ten Percent (10%) per annum.

Certainly this agreement is not to be taken as an open-ended commitment to pay a refund directed by an order that is made without authority. Furthermore, we take this agreement to be the "bond" or substitute therefor required by Ark. Stat. Ann. § 73-217 (b). Thus, the agreement was, in effect, a statutory bond. As such, the terms of the statute are considered as if they are written into the bond, and, in determining the extent of liability on the bond, the language of the statute is controlling over the language of the bond. *Miller* v. *State*, 262 Ark. 223, 555 S.W. 2d 563; *Empire Life & Hospital Insurance Co.* v. *Armorel Planting Co.*, 247 Ark. 994, 449 S.W. 2d 200. When this agreement is read in the light of the statute, it does not require any refund that the commission could not order under the statute. In other words, the agreement could not bind Bell to do more than the commission could require under the statute and the agreement cannot have the effect of increasing PSC's power or Bell's obligation.

In ordering the refunds for rates collected after the expiration of the suspension order, PSC did not regularly

pursue its authority, so that portion of its order must be set aside upon judicial review, and the judgment of the trial court reversed to that extent.

Appellant also contends that the PSC order of September 1, 1977, is totally void, or, in the alternative, can only have prospective effect because the commission failed to enter its order within 60 days of the hearing as required by Ark. Stat. Ann. § 73-229 (Repl. 1979). This 60-day period expired on January 23, 1977, if it began to run when the hearing of evidence was concluded. If the filing of briefs is considered as a part of the hearing, the 60-day period expired on March 4, 1977, which was nearly six months prior to the date when the order was finally entered.

We have previously held that PSC was not deprived of jurisdiction after the expiration of the 60-day period to act on a petition to close a business office of a utility. *City of DeWitt* v. *Public Service Com'n.*, 248 Ark. 285, 451 S.W. 2d 188. Appellant distinguishes that situation from this by saying that in *DeWitt* the limitation on time was "an immaterial matter of convenience," while in a rate case time is an extremely critical matter, as shown by the intricate timing mechanisms established in Ark. Stat. Ann. § 73-217 and by the apparent discriminate use of the words "shall" and "may" in § 73-229. In *DeWitt* we held that the statute was directory and that non-compliance did not void the PSC order.

Appellant's arguments are appealing, but we reject them largely because there would be gross inconsistency in saying that the same words in the same statute have the effect of voiding commission action in one type of case governed by the statute and not in another. It is hardly possible to say that the statutory provision is directory in one type of case and mandatory in another, and there is no language in *DeWitt* that admits that possibility.

To hold PSC action in this case void because it was robbed of jurisdiction and power on the basis of this statute would, in effect, overrule *DeWitt*. Since *DeWitt* itself involved a construction of the statute, we are reluctant to do

this, particularly in view of the fact that the General Assembly made changes in the section involved after our decision in *DeWitt* without affecting our interpretation. Our statute is unlike the one considered in *Mt. Konocti Light & Power Co.* v. *Thelen*, 170 Cal. 468, 150 P. 359 (1915), relied upon by appellant. The statute there related to action upon petitions for rehearing and specifically provided that, upon failure of the commission to act within the time allowed by the statute, any party to the proceeding could take the commission's order to be affirmed. Appellant advances the argument that *DeWitt* is distinguishable because the PSC order involved there had no retroactive effect. If, indeed, this part of the statute is directory but not mandatory, we cannot well hold that PSC's failure to act deprived it of the power to order a refund of the additional revenues collected under bond, even though we do find that failure to render a decision within 60 days after the filing of the briefs in the case renders the final action of PSC prospective in all other respects. We had no occasion to consider this question in *DeWitt*. On this point, we find the holding in *Fuller-Toponce Truck Co.* v. *Public Service Com'n.*, 99 Utah 28, 96 P. 2d 722 (1939) very persuasive. The Utah court held that the effect of delay in rendering a decision beyond a similar statutory limitation was to allow the parties to act in the interim without fear of penalty, but not to deprive the commission of jurisdiction and power to act prospectively. See also, *Hartman* v. *Glenwood Telephone Membership Corp.*, 197 Neb. 359, 249 N.W. 2d 468 (1977).

Bell contends that it was deprived of due process of law because the PSC, without notice to Bell until the PSC staff filed its testimony only 14 days before commencement of the hearing on Bell's application, changed the methodology followed by the commission in its order of September 4, 1975, upon Bell's application for a rate increase made in that year. As a result, PSC concluded that Bell was entitled to a rate of return of 8.31 percent rather than the 9.27 percent rate of return authorized by PSC in the 1975 order. Bell argues that, in filing the application involved here, it relied and had a right to rely, upon the rate then fixed. Bell emphasizes the fact that its application was in strict conformity with the previous order and the accounting procedures adopted in that pro-

ceeding by PSC as proposed by Touche Ross & Company, an independent accounting firm employed by the PSC staff. The staff conceded that this was true. Bell's statement that the rates allowed in 1975 had failed to produce the rate of return allowed in the same order and that its application was based upon that failure is not seriously contested.

The differences in methodology and changes in procedure of which Bell complains relate to the end of test periods used in determining company expenses, revenues and investment in plant and to the approach to the rate of return necessary to enable the company to obtain capital necessary for its operations.

Bell's proposed test year ended December 31, 1976, ten months after the date of the application. Bell calculated that, at the end of the test year, its capital structure would consist of 54.11 percent common equity, 39.79 percent debt and 6.10 percent cost-free capital, and its embedded cost of debt would be 7.11 percent. Applying 12 percent return on equity, as authorized by the 1975 rate order, would produce an overall rate of return of 9.32 percent, but Bell sought rates which would produce only an overall return of 9.27 percent on the December 31, 1976, rate base. Bell calculated that, based upon adjustments to the December 31, 1976 test year, in conformity with methods approved by PSC, Bell's return, based on the rates allowed in the 1975 order, would amount to only 6.85 percent. J. B. Nichols, Bell's vice-president and general manager for Arkansas, testified that, in framing the application, the methodology employed by PSC in its last previous rate case, including all the disallowances to revenues, expenses and investments, was utilized. This was also conceded. This witness said that the test year was chosen because of the attrition that occurs over a period of time due to the addition of new plant investment at higher cost than previous plant investment and the effect of delay which would occur during the consideration of Bell's request for rate relief. He stated that rate relief based solely upon the relationship among revenues, expenses, and investment that existed in the past would prevent a utility from realizing the allowed rate of return either at the time of the order or at any time in the future and that Bell never caught up with its

growth when a truly historical test period was used. He said that, at the time he testified, he had found it necessary to change certain projections made in April for the end of 1976. At least one of the changes was based upon data from the first seven months of 1976. Nichols pointed out that a future test year, consisting of nine months of actual data and three months of projected data, had been used in its last previous rate case. He said that Bell had furnished monthly data to the commission staff on actual performance as compared to forecast performance which showed that revenues and expenses had been within one to one and one-half percent of the forecasts, and that Bell's record for forecasting, which had been furnished to the commission staff, demonstrated a very high degree of accuracy over a period of ten years. W. W. Lampkin, Bell's chief supervising accountant for Arkansas, testified that, during that period, Bell's actual operating revenues had averaged 0.6 percent below that budgeted and its operating expenses, 1.1 percent above that budgeted. Bell's witnesses pointed out that at the time of the hearings in the middle of November, 1976, the idea that their proposed test year was a future test year was virtually moot. They also testified that, in calendar year 1975, no commission in the country had allowed the Bell system a rate of return on common equity as low as its actual return. According to them, this fact demonstrated that future test years had become necessary for utilities because the expense of future growth was greater than the growth in revenue produced. Bell's chief supervising accountant said that a future test year required certain forecasts of changes in the economy that might occur and that projections were made from historical trends.

Jerrell Clark, Chief of Accounting & Finance with PSC, chose the test year ending June 30, 1976, because it was based upon actual audited results of operations for that 12-month period. He said that it had been adjusted to year end level and for known changes in revenue and expenses for one year, assuming no growth. Clark said that Bell's future test year required projections with projections.

Lampkin elaborated on the reasons for the test year selection made by Bell, saying that there were three reasons:

first, an attempt to reflect the condition which could reasonably be expected to exist at the time of the hearing, recognizing that rates are made for the future; secondly, the company's historically good job of estimating future levels of revenues, expenses and investment, and, lastly, counteraction of the regulatory lag. He said that, at the time of the hearing, the staff's test period did not give an accurate picture of Bell's financial picture, and that the use of such a test period would require Bell to seek additional rate relief in a very short time, which he believed was not in the best interest of the public, the commission, or Bell.

Bell produced evidence that a minimum return of 14 percent on equity capital was required by it in order to raise large amounts of equity capital, that Bell's cost of long term debt was 8.42 percent and that its embedded cost of debt was 6.75 percent as of February, 1976. This testimony was given by Bell officers.

Basil L. Copeland, an economist on the staff of PSC since August, 1975, recommended a rate of return of 8.28 percent on the rate base, which he said would produce a return of 8.82 percent on investor supplied capital, including a return of 11.5 percent on American Telephone & Telegraph Company (hereafter referred to as A T & T) common equity. According to him, the 9.27 percent rate previously allowed did not take into consideration the effect of A T & T leverage on A T & T's ability to earn a given return on equity. This was important because Bell is a wholly owned subsidiary of A T & T. In this situation, according to Copeland, there is a "double leverage" which exists in a holding company arrangement when leverage, i.e., debt, exists at the parent as well as the subsidiary level, and, unless this double leverage is given effect by a compensating adjustment in calculating the cost of capital, that cost will be incorrectly calculated and the subsidiary may earn more than its true cost of capital. Copeland explained two acceptable methods of calculating the cost of capital for a wholly owned subsidiary when double leverage exists. One of them used the subsidiary's debt and equity ratios, but only permitted the subsidiary to earn its parent's cost of capital on its equity. The other used a consolidated capital structure. He recommended that the commission use the first method, because

there would likely be variations in capital structures and embedded debt costs among subsidiaries. Copeland said that the method he had used to calculate Bell's cost of capital had been adopted by commissions in Iowa, Minnesota, New Jersey, New York and Wisconsin. He said that the methods universally employed by experts to estimate the cost of equity were subjective and amenable to any result desired. He explained a rather complicated mathematical formula which he said produced an objective result.

In rebuttal, Bell offered the testimony of William P. Dukes, Professor of Finance at the College of Business Administration of Texas Tech University. He pointed out that Copeland's recommended rate of return was below the 8.31 percent reported in the Wall Street Journal on November 10, 1976, as the AAA utility bond rate. He disagreed with Copeland's approach and took the position taken by the Tennessee Public Service Commission, i.e., cost of equity is a subjective factor which cannot be determined by precise mathematical formula but requires the application of informed judgment. He and other witnesses stated that Copeland had misapplied the basic model from which he had derived his formula, and that the formula incorporated economic variables which were unlikely to be repeated and assumed market equilibrium during a period when the "swings" were the widest in market history. These witnesses pointed out other matters which they took to be flaws in Copeland's approach and in his formula.

We have been troubled by the apparent inconsistency in PSC's approval of different methods of accounting and different methods of computation of rates of return on different occasions, fully recognizing that it may be quite difficult to establish hard and fast rules to be utilized and followed in determining a fair rate of return but, at the same time, thinking that a more uniform application of established and predictable criteria would lead to fairer and more understandable results. *Arkansas Power & Light Co.* v. *Arkansas Public Service Com'n.,* 261 Ark. 184, 546 S.W. 2d 720. While we understand appellant's bewilderment, neither it, nor our concern, can be translated into a judicial mandate requiring the commission to take the same approach to every rate

application, or even to consecutive applications by the same utility, when the commission, in its expertise, determines that its previous methods are unsound or inappropriate to the particular application.

In effect, Bell is asking us to apply the doctrine of res judicata to require PSC to apply the methodology used by it in entering the 1975 order. But res judicata has little application to regulatory action by an agency in fixing utility rates, because rate-making is a legislative, not a judicial function. *Duquesne Light Co.* v. *Pennsylvania Public Utility Com'n.*, 176 Pa. Super. Ct. 568, 107 A. 2d 745 (1954); *State* v. *Alabama Public Service Com'n.*, 293 Ala. 553, 307 So. 2d 521 (1975); *General Telephone Co. of Southwest* v. *Robinson,* 132 F. Supp. 39 (E. D. Ark. 1955). It has been held that every rate order may be superseded by another, not only when conditions change, but also when the administrative understanding of the same conditions changes. 2 Davis, Administrative Law Treatise 610, § 18.09. See also, *Rockwell Lime Co.* v. *Illinois Commerce Com'n.*, 373 Ill. 309, 26 N.E. 2d 99 (1940); *State Airlines, Inc.* v. *Civil Aeronautics Board,* 174 F. 2d 510 (D.C. Cir., 1949), reversed on other grounds, 338 U.S. 572, 70 S. Ct. 379, 94 L. Ed. 353 (1950).

In *Arkansas Power & Light Co.* v. *Arkansas Public Service Com'n.*, 226 Ark. 225, 289 S.W. 2d 668, we held that PSC was not bound by an earlier order authorizing the inclusion of construction work in progress in a utility's rate base, and that the constitutional rights of the utility were not invaded by a change in that order, so long as proper notice was given to the utility. In that case, we relied heavily upon the holding of the Vermont Supreme Court that a commission such as PSC is not bound to the service of any formula or combination of formulas. The Vermont court had pointed out that, in *Federal Power Com'n.* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 86 L. Ed. 1037, 62 S. Ct. 736 (1942), the United States Supreme Court had held that such agencies are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. We have also held that no public utility has a vested right to any particular method of valua-

tion. *City of Ft. Smith* v. *Southwestern Bell Telephone Co.*, 220 Ark. 70, 247 S.W. 2d 474. When we made that statement, we were considering rate base, but, of course, that is an important element in fixing rates. The principle is just as applicable to rate of return — and both factors are involved here. The commission has a wide discretion in choosing its approach to rate regulation. *New England Telephone & Telegraph Co.* v. *Dept. of Public Utilities,* 371 Mass. 67, 354 N.E. 2d 860 (1976). The differences involved here related to the fixing of rates on the application now under consideration and on previous applications. The rate of return was diminished by use of an approach involving a method which took into consideration the "leverage" attributable to the fact that Bell is a wholly owned subsidiary of American Telephone & Telegraph Company. It is the result reached, not the method employed, that is controlling, and it is not the theory, but the impact, of the rate order, that counts in determining whether rates are just, reasonable, lawful, and non-discriminatory under § 73-217. If the total effect of the rate order cannot be said to be unjust, unreasonable, unlawful or discriminatory, judicial inquiry is concluded, and infirmites in the method employed rendered unimportant. *Federal Power Com'n.* v. *Hope Natural Gas Co.,* 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333 (1944).

We are not possessed of the expertise necessary to evaluate the testimony of the experts in the field of economics. Evaluation of the testimony was for the commission, not the courts. *Arkansas Public Service Com'n.* v. *Continental Telephone Co.,* 262 Ark. 821, 561 S.W. 2d 645. We are in no position to say that the testimony of Copeland had no reasonable basis. This we would have to do, in order to hold that it did not constitute substantial evidence. *Wallace* v. *Williams,* 263 Ark. 702, 567 S.W. 2d 111; *Arkansas State Highway Com'n.* v. *Geeslin,* 247 Ark. 537, 446 S.W. 2d 245.

The test year to be used is a matter lying within the discretion of the commission, although the commission should consider complete and accurate information with respect to a later period of time, when available, as a check on the continuing validity of the test year experience in a

period of rapid change. *Matter of Wilmington Suburban Water Corp.*, 367 A. 2d 1338 (Del. Super., 1976). Both Clark for the PSC and Lampkin for Bell testified as to proper adjustments to be made on account of actual experience between June 30, 1976, made on account of actual experience between June 30, 1976, and the date of the hearing. The commission, in its order, recognized the necessity for making these adjustments, and did so, following its staff recommendations to a great extent. The test year was a matter lying within the discretion of the commission and it preferred a historical test year because of the ability of its staff to audit the financial data presented by the utility, because some elements are eliminated, and because a future test year is not amenable to verification. We have held that the commission should not use a test year ending after the date of its hearing because promises and predictions are not a substitute for proof. *City of Ft. Smith* v. *Southwestern Bell Telephone Co.*, 220 Ark. 70, 247 S.W. 2d 474.[1] The only hesitation we have in holding that PSC did not abuse its discretion is the fact that the test year adopted ended some 15 months prior to the commission's decision. We conclude, however, that we are in no position to hold that there was a clear abuse of discretion.

In further pursuing Bell's argument that its constitutional rights were violated, we first point out that we do not consider the fact that Bell had no notice that the PSC staff would recommend a change in methodology and procedures followed in considering Bell's last previous rate application until 14 days prior to the hearing, because Bell proceeded without asking that it be given additional time to rebut the testimony offered by the staff upon its assumption that PSC would reject the staff's approach, and because Bell did actually attack the staff's methods by rebuttal testimony, includ-

[1] It may be that the march of inflation will require different approaches in the future. We recognized in the cited case that rates fixed must be reasonable and just for a reasonable time in the future. There we approved consideration of anticipated future extensions by a utility. It may well be that a factor for anticipated inflation will become a necessary ingredient in rate determinations, if annual, or even more frequent rate applications are to be avoided, but we are in no position to say that there was proof in this case that would have required the incorporation of such a factor in the formula used by PSC.

ing that of an independent expert witness whose qualifications were impressive.

Since Bell had no vested right in the methodology or formulas previously used or the procedures followed by the commission and since it was afforded full opportunity to show that the changes made by the commission in the methods and procedures used in regard to Bell's last previous rate application were improper, we find no denial of due process of law. The Fourteenth Amendment's protection of property is a safeguard of the security of interests that one has already acquired in specific benefits, to which he has a legitimate claim of entitlement, rather than an abstract need or desire. *Board of Regents* v. *Roth,* 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Bell is in no position to say that it was denied due process of law.

In considering contentions that a PSC order prescribing rates is repugnant to the due process clause of the Furteenth Amendment and that it deprives a utility of its property without just compensation, the order must be viewed as having the same force as would a like enactment by the General Assembly. *Bluefield Waterworks & Improvement Co.* v. *Public Service Com'n.,* 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923). The question, according to *Bluefield,* is whether the rates fixed are confiscatory. A utility which would upset a rate order on the constitutional grounds asserted by Bell carries the heavy burden of showing that it is invalid because it is unjust and unreasonable in its consequences. If the total effect of the rate order cannot be said by the reviewing court to be unjust or unreasonable, the fact that the method used by the regulatory body to reach its result may contain infirmities is not important. *Federal Power Com'n.* v. *Hope,* 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333 (1944). When we give appropriate deference to the expertise of PSC, and view the PSC order as having the same force as a legislative enactment, we must say that Bell has failed to meet its heavy burden of showing that the rate order was confiscatory and Bell's constitutional rights violated.

Bell also contends that the commission abused its dis-

cretion and denied Bell due process of law by failing to grant its petition for rehearing. This petition was filed on September 20, 1977. In that petition, Bell alleged that the delay in acting upon its rate application, coupled with the use of a rate base which represented values 14 months prior to the PSC order, resulted in a confiscation of Bell's property in violation of the state and federal constitutions. It also incorporated many of its contentions previously set out in this opinion. The basis of Bell's argument that the rates fixed by the PSC order were confiscatory was its contention that the PSC finding that Bell's cost of equity was 10.2 percent was unreasonably low and not based upon substantial evidence, and that the adoption of the test period ending June 30, 1976, was inconsistent with inflationary economic development during the period intervening between the end of that period and the date of the order. Most of the petition was devoted to arguments and contentions made in the trial court and in this court as to limitations on the commission's powers by time schedules set out in the governing statutes. Bell asked that the PSC order of September 1, 1977, be abrogated or modified to approve the rates as filed and to eliminate or modify the obligation to make refunds and for all other relief to which it might be entitled. The petition was supported by affidavits of James B. Nichols, Vice-President and General Manager for Arkansas, and W. W. Lampkin, an accountant who had testified on behalf of Bell. By his affidavit, Nichols undertook to demonstrate that between June 30, 1976, the end of the test year adopted by the commission, and September 1, 1977, the date of the PSC order, Bell had invested $139,000,000 in Arkansas, only part of which was assigned to interstate operations. In his affidavit, Lampkin stated that Bell had an annual revenue deficiency of $16,885,000, even at the 8.31 percent rate of return authorized by PSC and that, as of June 30, 1977, appellant would earn no more than 7.2 percent on its investment.

We agree with appellee that the granting or denial of a petition for a rehearing is a matter resting largely within the discretion of a regulatory agency in rate cases. The real question before us is whether the denial of the petition for rehearing was an abuse of the commission's discretion. Bell's arguments that it is not receiving any return on approx-

imately $62,000,000 invested in its plant between the end of the test year and the PSC order, and the obvious fact that a regulated business cannot adjust its prices to meet inflationary increases in its costs, as an unregulated business can, are very appealing. They emphasize the necessity for more prompt action on a rate application than was taken here. After deliberate consideration of these arguments, we have finally concluded that we should not say that there was an abuse of discretion in this case. It seems to be the general rule that the denial of a petition for rehearing by an agency such as PSC should be set aside on judicial review only for the clearest abuse of discretion. See *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 66 S. Ct. 687, 90 L. Ed. 821 (1946); *Northeast Broadcasting, Inc.* v. *Federal Communications Com'n.,* 400 F. 2d 749 (D.C. Cir., 1968); *Reese Sales Co.* v. *Hardin,* 458 F. 2d 183 (9 Cir., 1972).

In view of the limited scope of judicial review of the action of an agency performing a legislative function, we deem this rule to be appropriate and conclude that appellant has not shown such a clear abuse of discretion that overturning the commission's action is warranted in this case, in spite of the fact that we feel that PSC approached the outer limits of its latitude of discretion. It was pointed out in *Interstate Commerce Com'n.* v. *Jersey City,* 322 U.S. 503, 64 S.Ct. 1129, 88 L. Ed. 1420 (1944), that there is always a gap between the time the record is closed and the time the administrative decision is promulgated, particularly when (as here) the issues are difficult, the evidence intricate and the consideration of the case careful and deliberate. The court also referred to *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 284 U.S. 248, 52 S. Ct. 146, 76 L. Ed. 273 (1932), upon which Bell relies, and pointed out that its effect had been promptly restricted to the special and exceptional facts there involved and that it stood virtually alone, as an isolated instance of that court's interference with the exercise of the discretion of the Interstate Commerce Commission's granting or refusing to reopen a hearing. The exceptional facts there involved were the closing of the record in September, 1928, the entry of an order to be effective on June 1, 1931, without reopening the proceeding and taking further evidence, and the drastic reduction in the operating

income of the carriers involved in the depression year of 1930, which results in impairment of their credit. We have concluded that the facts in this case approach, but do not reach, the exceptional situation there involved. The time lapse is great, but not as long, even if the effects of inflation are taken to be as great as those of the Great Depression, and there is no showing that Bell's income has been so drastically affected that its credit is impaired. In arriving at our decision, we have considered the fact that Bell was not totally without any other remedy. Bell relied upon a test period ending December 31, 1976. It certainly had no basis for assuming that PSC would act on a test period other than the one suggested by Bell or that proposed by the staff. There is nothing in the laws governing utility rate-fixing that would have prevented Bell from filing proposed rate changes based upon a test period that would include the new investment while PSC deliberated upon the previous application. We also conclude that Bell has not clearly shown that the rate of return upon its investment is confiscatory. If it was, Bell could have asked for emergency relief on the ground of immediate and impelling necessity under Ark. Stat. Ann. § 73-216 (b).

Bell has also failed to show that the fact that the commission's order did not consider Bell's investment between June 30, 1976 and September 1, 1977, even though it was in use on the date of the order was, in this case, a violation of either the due process clauses of the Arkansas and United States Constitutions or of the prohibition against the taking of private property for public use without compensation. If Bell had shown that the rates allowed were confiscatory, then its contention would be sustained. The affidavit of Tompkin, and its supporting exhibits, showed that the rate base actually grew from $350,585,089 on June 30, 1976, to $390,877,000 on December 31, 1976, and to $412,827,000 on June 30, 1977. The parties agree that if Lampkin's unaudited valuations are used, there would be an earnings deficiency of $10,000,000. On the record before us, we are unable to say that these rates were confiscatory, as a matter of law. Bell's proposed test period was December 30, 1976, and was based largely on projections. The determination of the appropriate test period is to a great extent a matter addressing itself to the

expertise of the commission. It is extremely difficult for the courts to say that the commission's determination is erroneous, unless it is confiscatory. No problem would have presented itself to us had PSC acted within the statutory time frames.

In arriving at the conclusion that the belated action was not confiscatory, we take into consideration the fact that Bell will not be required to make refunds for collections on its proposed rates between September 29, 1976, and the date of the commission order and the fact that PSC fixed the rate of return at 8.31 percent, the rate Bell witnesses indicated would be essential to retention of its AAA bond rating.

Bell contends that, according to the holding in *Bluefield Waterworks & Improvement Co.* v. *Public Service Com'n.*, 262 U.S. 679, 43 S. Ct. 675, 67 L. Ed. 1176 (1923), the failure of PSC to consider the value of its plant at the time it made the order deprived it of due process of law. Bell quotes language from the opinion in *Bluefield* that rates which are not sufficient to yield a reasonable return on the value of the property at the time it is being used to render the service are unjust, unreasonable and confiscatory and their enforcement deprives a public utility of its property in violation of the Fourteenth Amendment. There was a different problem in *Bluefield,* however. There the commission had fixed the value of the utility's property, without giving any weight to the greatly enhanced cost of construction after World War I. The valuation used ignored the cost of reproduction of the property, basing its valuation upon the pre-war cost of construction. No new or added construction was involved in the court's decision. The court actually quoted from and relied upon its earlier opinion in *Willcox* v. *Consolidated Gas Co.,* 212 U.S. 19, 29 S. Ct. 192, 53 L. Ed. 382, 48 LRA (n.s.) 1134, Ann. Cas. 1916 A 18 (1909). In that case it had been held that if the property of a utility has increased in value since it was acquired, the utility was entitled to that increase. But the court there held that the value of the property is to be determined "as of the time when the inquiry is made regarding the rates." The language quoted from *Bluefield* by Bell must be viewed in the light of the fact that *Willcox* was cited, and quoted in support of that language.

Bell also says that PSC's requirement that it pay interest at the rate of 10 percent per annum upon the refunds to be made by it is unreasonable, arbitrary and not supported by substantial evidence. Bell points out that PSC allowed the maximum interest rate permissible under Ark. Stat. Ann. § 73-217 (d), and that no evidence was introduced or offered as to the appropriate rate of interest. Bell contends that it is patently unreasonable to allow this rate of interest when, in the same order, it was held that Bell was entitled to only 8.31 percent return on its investment. The statute leaves the rate of interest to the discretion of the commission. Even though there was no evidence on the question, we may take judicial notice of the fact that interest rates are presently very high, and also were high at the time of the commission's decision. We agree with Bell that it did not have the burden of showing the interest rate appropriate to the case, or even to offer evidence on the question. We also agree that any evidence on this particular point given at a hearing would, in these times, have been rendered insubstantial by lapse of time between the hearing and the entry of the PSC order because of the steady increase in interest rates during that period. We do not think that the interest rate was dictated by Ark. Stat. Ann. § 73-214 (Repl. 1979), fixing the rate of interest to be paid upon customer deposits, although that provision might be worthy of consideration by the commission. We are unable to say, however, that there was an abuse of the commission's discretion in view of the statute allowing interest at the rate of 10 percent per annum on judgments in favor of creditors, unless the court rendering the judgment, in his discretion, reduces the rate. See Ark. Stat. Ann. § 29-124 (Repl. 1979).

The judgment of the trial court is reversed insofar as the refunds ordered by the Public Service Commission are concerned, but otherwise it is affirmed. The cause is remanded to the trial court for the entry of a judgment directing the commission to enter an order setting aside its order for a refund of refunds collected between September 29, 1976 and September 1, 1977 by Southwestern Bell Telephone Company on the basis of its proposed rates and otherwise consistent with this opinion.

STROUD and MAYS, JJ., not participating.

Carl HERRICK *v.* Donald G. ROBINSON

79-272 595 S.W. 2d 637

Opinion delivered January 28, 1980

[Supplemental opinion on denial of rehearing March 31, 1980.]

J. Harrod Berry, for appellant.

Spitzberg, Mitchell & Gill, by: *Christopher Barrier,* for appellee.

JOHN A. FOGLEMAN, Chief Justice. Appellee Donald G. Robinson brought this action against appellant Carl Herrick and Herrick's son and daughter-in-law, David and Beverly,

seeking to recover $9,200, as the balance he alleged to be due him on the purchase price for the inventory and business name of Park Hill Custom Framing and Molding Company, which he had operated in North Little Rock. Appellant and the other defendants defended on the ground that their agreement to purchase was tentative and conditional, and that they had been induced to enter into the agreement by material misrepresentations and concealment of facts by Robinson. They alleged that they had rescinded the contract. Carl Herrick also counterclaimed seeking to recover the amounts he had paid to Robinson on the purchase price, and money he had put into the business operation, the dismissal of Robinson's complaint and "all other equitable relief." The allegations pertaining to the fraudulent representations were that Robinson had falsely represented that the business was in good financial condition, that not much was owed on it and the business obligations could and would easily be taken care of from the net proceeds of a pending sale of his home, that the average gross monthly income of the business was $3,500 to $4,000, that the stock and equipment were in good condition and saleable, that large orders could be expected, and that all accounts receivable were good. Appellant alleged that his defenses were equitable and that the case should be transferred to equity. The counterclaim contained allegations that, as an inducement to the Herricks to purchase the business, its assets, good will and trade name, Robinson misrepresented and exaggerated the amount and condition of the assets, sales volume, earning ability and financial condition of the business and concealed the actual condition of the business as to accounts payable, lienable obligations and certain accounts receivable. Appellant alleged that these misrepresentations and concealments were made with the intent that they be relied upon by the Herricks, and that they did so, to their detriment and damage. Appellant again alleged that he had no full, plain, adequate and complete remedy at law and that, his remedies being equitable, the case should be transferred to equity. Appellee denied appellant's right to rescission and pleaded estoppel and laches as defenses to the counterclaim.

After having denied appellant's motion to transfer the case to equity on September 25, 1978, the case was tried to

the court without a jury and the circuit judge, after hearing the evidence, rendered a written opinion on December 7, 1978. In it he made many findings of fact, among which the following are significant on this appeal:

> The Herricks and Robinson met on a Sunday afternoon at the place of business involved, discussed a purchase price of $35,000, and agreed upon a negotiated price of $25,000 and the purchaser, through David and Beverly Herrick, took possession on the following day, Monday, November 2, 1976.
>
> Carl Herrick notified Robinson that the transaction was being terminated by a letter dated March 14, 1977.
>
> The amount of the balance for which Robinson sued was arrived at by giving the Herricks credit for $3,500 Carl Herrick paid him and $12,452.69, as the net proceeds from the sale of the assets of the business at an auction.
>
> In spite of alleged misrepresentations, the Herricks took an inventory and any shortcomings were readily available to the defendants.
>
> Any and all liens, even if not disclosed to the defendants before the purchase, were known to appellant before the defendants quit the business and were in fact satisfied in either December, 1976 or January, 1977, and, as additional security to purchaser, Robinson caused a receiver to be appointed, whose duty it was to receive the balance of $21,500 on the purchase price from the defendants and immediately satisfy claims of creditors which would affect the business.
>
> Appellant became discouraged and even frustrated, because of the inability of David and Beverly to settle differences with Robinson on such matters as the amount of the purchase price, and because of the belated feeling that the family business venture was not so good and a costly mistake had been made.

The case could have very easily been transferred to chancery court, but appellant's motion to transfer was denied without objection, once it was agreed trial would be without a jury, the attorneys for both parties realizing that some equitable principles would necessarily be applied.

There was justification for allowing appellant an additional credit of $2,000 for bills paid, accounts receivable and personal property not in working order. After allowing this credit, Robinson was entitled to judgment for $7,113, but no interest, because the parties failed to fix a day certain for payment of the balance of the purchase price.

Before judgment was entered, appellant filed a motion for a new trial, on the ground that the judgment was not sustained by sufficient evidence and was contrary to the law and the evidence. Appellant pointed out the following examples:

1. The finding that any and all liens were satisfied by January, 1977, was erroneous because a valid lien of Twin City Bank, based upon a security agreement covering all the assets sold, was not satisfied until a balance of $10,500 was paid from the proceeds of an auction sale in a chancery court receivership held on August 10, 1977, after the Herricks had surrendered possession of the business.

2. Tax liens, especially one in favor of the federal internal revenue service, were still unpaid at the time of the trial and appellant did not know of the internal revenue service lien until long after the down payment on the purchase price was made and possession of the business taken.

3. The $21,500 balance on the purchase price would not have been sufficient to satisfy all business debts and liens.

Appellant also stated that both the above liens constituted a

breach of the seller's warranty under Ark. Stat. Ann. § 85-2-312 (Add. 1961) and constituted a ground for cancellation of the contract.

The judgment entered contained additional findings of fact. Among them were these:

1. The contract was between Robinson and appellant Carl Herrick and, in certain respects, David and Beverly acted in behalf of Carl.

2. The balance of the purchase price, remaining after down payments totalling $3,500 were made, was to be paid within a reasonable time.

3. By the terms of the contract, Robinson was not only to deliver the inventory and business premises, but also to assure the purchaser of clear title, in connection with which he was to compile a list of creditors of the business, and the purchaser was to make a complete inventory of the business.

4. Since the parties, by their actions, made the Bulk Sales Act inapplicable, the state court receivership was necessary to accomplish a conveyance free of claims of creditors.

5. An inventory was promptly taken in November, 1976, and defendants were aware they were purchasing the business at a "distress price" and that the inventory was not in first class condition.

6. By failing to act promptly, defendants waived the deficiency in the inventory and the attempt of appellant to rescind the contract was ineffective because it was not timely.

7. Appellant was entitled to credit for $508.74 for the proceeds of accounts payable [receivable] incorrectly credited to Robinson and to $1,491.26 credit for deficiencies in the equipment sold.

After the judgment was entered, appellant filed an

amendment to his motion for a new trial. In it he alleged that the federal internal revenue service had on January 3, 1979, served a "Notice of Levy" on him for delinquent taxes amounting to $6,705.31. By this notice, he was notified that demand for payment had been made on Robinson, but that Robinson had neglected or refused to pay this amount. The levy was upon "all property and rights to property, monies, and credits" in appellant's possession belonging to Robinson and all sums of money or other obligations owing by appellant to Robinson, or on which there was a lien under Chapter 64, Internal Revenue Code. It included a demand upon appellant for the amount necessary to satisfy this tax liability or for such lesser sum as appellant might be indebted to Robinson. The levy indicated that it was for the unpaid balance and statutory additions owed by Robinson for income taxes and social security taxes withheld for tax periods ending March 31, June 30, and September 30, 1976.

Appellant's first point for reversal is stated thusly:

I

TRIAL COURT ERRED (A) IN DISMISSING COUNTERCLAIM OF CARL HERRICK AND GRANTING JUDGMENT TO PLAINTIFF, AND (B) IN FAILING TO ACT UPON AND GRANT MOTION FOR NEW TRIAL, BECAUSE OF EFFECT OF:

A & B.

1. THE UNDISPUTED EVIDENCE, WHICH SHOWS THE EVIDENCE INSUFFICIENT TO SUPPORT THE JUDGMENT.

2. APPELLEE-SELLER'S MISREPRESENTATIONS AND CONCEALMENTS RELIED AND ACTED ON, AND FAILURE TO COMPLY WITH UNDERSTANDING AND MAKE BUSINESS CONFORM, IN GENERAL.

3. THE UNDISCLOSED INTERNAL REV-

ENUE AND SALES TAX LIENS.

4. THE UNDISCLOSED TWIN CITY BANK LIEN.

5. THE FAILURE OF SELLER TO COMPLY WITH BULK SALES PROVISIONS.

6. THE RECEIVERSHIP PROCEEDINGS TO SELL TO APPELLANT'S SON AND DAUGHTER-IN-LAW, AND INSOLVENCY OF THE BUSINESS.

7. LACK OF MEETING OF MINDS SUFFICIENT FOR CONTRACT.

ALSO

8. IF THERE WAS CONTRACT AS TO APPELLANT: (A) THERE WAS TOTAL FAILURE OF CONSIDERATION; (B) APPELLEE ABANDONED IT.

9. TRIAL COURT'S FAILURE TO TRANSFER TO EQUITY WAS ERROR.

Appellant argues I (A) and (B) jointly. We will treat the stated subheadings as noted.

1, 2, 3 and 4

Appellant argues that the undisputed documentary evidence and the undisputed unbiased testimony of the Twin City Bank loan officer negate the possibility of the evidence on behalf of appellee rising to the dignity of substantial evidence and show "overwhelmingly" that appellant was entitled to recover. Appellant points out that the inventory was to be according to that written on some yellow sheets of paper by Robinson, and that Robinson admitted that he had represented the value of inventory at $62,000 and that the Herricks were buying the business on the basis of this representation. The inventory sheets disappeared shortly after the Herricks took possession, probably while Robinson was

still living in the building in which the business was conducted. The same inventory sheets, or most of them, were in Robinson's possession and produced by him at the time of the trial. Robinson testified that this inventory was made about a month and a half prior to the sale. No list of creditors was delivered to the Herricks until February 8, 1977, when it was delivered to appellant's attorney after that attorney had written Robinson about the matter on February 3. A creditors' list was not even prepared until the last part of December and it was used by Robinson in a receivership proceeding instituted by him on January 20, 1977.

After the auction sale in the receivership proceeding, $10,500 of the net proceeds of $12,387 was applied to Robinson's indebtedness to Twin City Bank. Robinson admitted that in a balance sheet he had prepared, he had included his dwelling house, with an accompanying statement that it had been sold for $68,500 and that the proceeds would be sufficient to pay all notes payable. The house was actually sold for the indicated purchase price, but the proceeds were not sufficient to pay Twin City Bank. This balance sheet showed fixed assets of $147,650.94 and liabilities of $78,078.50. Robinson admitted that he could have represented that his lease on the building in which the business was located was transferrable, but he would not have known that to be a fact. He also admitted that he could have told the Herricks that he would personally attend to having the lease transferred.

Robinson could not recall telling the Herricks the names of his creditors, but said that he told them that the proceeds of the sale of the business would go toward retirement of his debts, and he would receive nothing. He admitted having represented that the business was "an ongoing business concern" and that it was a good viable business that could be profitable if operated properly, but that he had later admitted that the business was, in truth and fact, a sick one. He did not tell the Herricks of his indebtedness to Twin City Bank secured by a lien on his dwelling house and the business inventory and fixtures. He did not advise the Herricks of the actual and potential tax liens.

Without detailing the testimony further, there is indeed

overwhelming evidence that appellant was induced to enter into the agreement with Robinson by misrepresentation and concealment that constituted fraud, either actual or constructive. *Parker* v. *Johnston,* 244 Ark. 355, 426 S.W. 2d 155; *Lane* v. *Rachel,* 239 Ark. 400, 389 S.W. 2d 621. Cf. *Fausett & Co.* v. *Bullard,* 217 Ark. 176, 229 S.W. 2d 490; *Farmers Cooperative Ass'n.* v. *Garrison,* 248 Ark. 948, 454 S.W. 644. Appellant had the right to, and did, elect the remedy of rescission on the ground of fraud. Appellant's defense and counterclaim were based upon the premise that he had rescinded the contract. For a rescission to be effective, however, it must be timely.

One who desires to rescind upon the ground of fraud or deceit must, as soon as he discovers the truth, announce his purpose at once, adhere to it, and act with reasonable diligence, so that all parties may be restored to their original position as nearly as possible; if he continues to treat the property involved in the transaction as his own or conducts himself with reference to the transaction as though it were still subsisting and binding, he will be held to have waived the objection and will be as conclusively bound by the contract as if the fraud had not occurred. *First National Bank* v. *Coffin,* 184 Ark. 396, 42 S.W. 2d 402; *Ratliff* v. *Bank of New Orleans & Trust Co.,* 266 Ark. 492, 586 S.W. 2d 237 (1979); *McCormick* v. *Daggett,* 162 Ark. 16, 257 S.W. 358; 13 Am. Jur. 2d 530 (Cancellation of Instruments), § 44. Furthermore, as a condition precedent to an effective rescission, the party rescinding must restore, or offer to restore, the opposite party to his former position. *Davis* v. *Tarwater,* 15 Ark. 286; *Bellows* v. *Cheek,* 20 Ark. 424; *Stanford* v. *Smith,* 163 Ark. 583, 260 S.W. 435. See also, *United States* v. *Arkansas Mills,* 216 F. 2d 241 (8 Cir., 1954).

There is substantial evidence to support the trial court's finding that appellant had failed to act promptly and that the attempt of appellant to rescind the contract in March, 1977, was ineffective because it was not timely. Robinson testified that the Herricks took a physical inventory of the business during the two week period following their taking possession. Although the Herricks testified that this inventory was not complete until the first week in December, it is clear that

they were aware of substantial shortages even earlier, and certainly knew that the value was much less than $62,000. They had confronted Robinson with the fact that there was a great deficiency in late December or early January. The younger Herricks had some previous knowledge concerning the business. David Herrick had worked there for three years ending a year or year and a half prior to the sale, and had been familiar with all aspects of the business except for bookkeeping. Beverly Herrick also had worked for Robinson at one time and she knew, at the time of the transaction, that there had been some deterioration of the business and some of its inventory. Possession of the place of business and its physical inventory were not surrendered to Robinson until June or July, more than seven months after the Herricks took possession. Possession was surrendered to Robinson when the owner of the property asked Herrick to vacate the building. Robinson received notice of this from the landlord. At the time of the negotiations, which took place at the place of business, the electricity had been turned off. Robinson testified that he had then told the Herricks that he had been unable to pay the bill for electricity. Robinson never gave the Herricks a copy of his lease on the building. The Herricks did not actually demand the list of creditors until February, even though it appears that Robinson had promised to deliver a list of creditors and accounts receivable not later than the first week in January, 1977, three months after the Herricks had taken possession. It was more than one month thereafter that appellant attempted to rescind the contract.

Robinson testified that he told the Herricks when the down payment was made that he was using that money to pay electrical and telephone bills and other such bills in order that they could continue to operate the business. There was evidence that the Herricks were fully informed of the extent of the Twin City Bank debt during the month of November. It is clear that they knew of the balance due the bank in early December, after a part of the proceeds of the sale of Robinson's house had been applied to that debt. It certainly was clear at that time that the proceeds of the sale of the house did not pay all of Robinson's notes payable. By November 24, appellant knew that Robinson was delinquent in remitting

sales taxes and furnished money for the payment of delinquencies in order to obtain the necessary sales tax permit, but the retailer's permit was "put on hold" because of additional delinquencies. Beverly Herrick learned of the internal revenue service lien in November or December. When the Herricks sent payments to suppliers for items they had ordered, they were credited to Robinson's past due accounts and some of these suppliers put limitations on purchases and others demanded cash payments. As a consequence, the Herricks had trouble obtaining supplies.

Appellant's only excuse for waiting until March 14 to rescind was that for weeks and months the Herricks had repeatedly asked for and expected a list of creditors and that they felt that, if it was forthcoming, they could go ahead and had hoped the matter could be worked out. Since rescission requires prompt action after the discovery of fraud, the question of timeliness of the attempted rescission was one of fact. *Kilgo* v. *Continental Casualty Co.,* 140 Ark. 336, 215 S.W. 689; *Siegel, King & Co.* v. *Penny & Baldwin,* 176 Ark. 336, 215 S.W. 2d 1082; *Cross* v. *Rial,* 227 Ark. 1124, 305 S.W. 2d 129; *Newton National Bank* v. *Newbegin,* 74 F. 135 (8 Cir., 1896); Annot. 72 ALR 726, 752. It was resolved against appellant on the basis of substantial evidence.

Appellant invokes authorities relating to actions for breach of warranty, but they are inapplicable because appellant elected to rescind rather than to seek to recover for breach of warranty. The remedies are not consistent, because rescission is based upon disaffirmance of the contract and recovery for breach requires its affirmance. *Cleveland* v. *Biggers,* 163 Ark. 377, 260 S.W. 432; *Lane* v. *Rachel,* 239 Ark. 400, 389 S.W. 2d 621; *Kotz* v. *Rush,* 218 Ark. 692, 238 S.W. 2d 634; *Yeates* v. *Pryor,* 11 Ark. 58.

Appellant also relies upon Ark. Stat. Ann. § 85-2-608 (Add. 1961) governing revocation of acceptance of goods. Even if applicable, the language of the statute itself requires that revocation occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in the condition of the goods which is not caused by their own defects. The reasonableness of the time is ordinarily a question of fact for the

factfinder. *Dopieralla* v. *Arkansas Louisiana Gas Co.,* 255 Ark. 150, 499 S.W. 2d 610; *Gramling* v. *Baltz,* 253 Ark. 361, 485 S.W. 2d 183. We do not reverse the factfinder's answer to the question if, as here, substantial supporting evidence exists. *Frontier Mobile Homes* v. *Trigleth,* 256 Ark. 101, 505 S.W. 2d 516.

As appellee points out, there has never been an effective tender to Robinson of the assets purchased by appellant or an offer to restore Robinson to his position as it existed at the time of the agreement. But a restoration must be possible. *Desha* v. *Robinson,* 17 Ark. 228. A contract cannot be rescinded, except by mutual consent, where the circumstances have been so altered by part execution, that the parties cannot be put in statu quo. *Bellows* v. *Cheek,* 20 Ark. 424. Appellant relies on the statement in his letter of March 14, that he offered back, as far as he was concerned, the said business operation. Appellant put David and Beverly in possession of the business. Leaving them in possession was hardly a restoration to Robinson, particularly after they had operated the business from November 1 until May 31, selling from the inventory and purchasing supplies. The record, as abstracted, gave absolutely no basis for the court to restore Robinson to his former position. Appellant made no mention of restoration or offer of restoration in his answer or counterclaim, but sought to recover not only his down payment of $3,500 but also $2,500, which he advanced for the operation of the business. This relief was totally inconsistent with an action based on rescission, but was consistent with an action at law for damages.

5

Appellant is in no position to complain of appellee's failure to comply with Ark. Stat. Ann. § 85-6-101 et seq (Add. 1961) commonly known as the Bulk Sales Act. These provisions are primarily for the protection of the creditors of the seller and compliance with the Act is not compulsory, insofar as the seller is concerned, unless compliance is required by the buyer. There is no evidence that appellant required compliance with this statute or that compliance by the seller was a term of the agreement. Non-compliance was not, in this case, a ground for rescission.

6

We have been unable to determine the materiality of the chancery court receivership to the present litigation. If it is relied upon as a ground for rescission, it is immaterial for we have concluded that the right to rescind was beyond question.

7

Appellant's argument on this point is that the contract was conditional, that the conditions were a satisfactory inventory check, furnishing of credit information, and deciding how the purchase price was to be paid, and that, as a result, there was no meeting of the minds. It seems odd that one would seek to rescind a contract that did not exist. Although appellant alleged in his pleadings that the agreement was "a tentative and conditional oral understanding," there was no allegation that there was no meeting of the minds. We do not agree with appellant that the purchase price remained unsettled or that subsequent agreements on the part of Robinson to make adjustments because of discrepancies discovered show that there was no meeting of the minds at the time the contract agreement was made.

Actually appellant alleged that the balance of the purchase price was to be paid "later," after Robinson had furnished information as to the indebtedness and financial condition of the business and a mutually acceptable written inventory and itemization of stock, supplies, furniture, fixtures, and equipment and other assets and personal property. Robinson testified that there was an agreement entered into between the parties, and that, while no specific time was fixed for payment of the balance of the purchase price, it was to be paid within a reasonable time after financing had been arranged by the buyers. Appellant testified that at the time of the meeting concerning the sale and purchase, there was an agreement that a week to ten days was reasonable to work out the balance of the financing.

To say the least, there was substantial evidence to justify the circuit court's finding that there was a contract and that the balance of the purchase price was to be paid within a reasonable time.

8

Appellant contends that there was a total failure of consideration in this case, because the property was sold to him with a warranty against incumbrances but was later sold for debts which were liens against it at the time of the sale. Not all property involved here was sold to satisfy liens. Part of it was sold by the Herricks while they were operating the business. The receivership sale was made some five months after appellant gave notice of rescission, so that fact gave no grounds for rescission. Failure of consideration was not mentioned in appellant's pleadings and is raised for the first time on appeal.

Appellant also says that Robinson abandoned the contract by dealing with David and Beverly Herrick in attempting to negotiate a sale to them. A part of the acts relied upon occurred after appellant's notice of rescission, so they could hardly constitute an abandonment of the contract by Robinson. There was substantial evidence to justify the trial court's finding that the contract was with appellant, but that David and Beverly acted in his behalf in some respects. Appellant alleged that the purchase of the business was to be primarily for the benefit of David and Beverly. Appellant testified that David and Beverly signed the checks on the money he put into the business, including the one for the $2,500 down payment. They operated the business after they took possession. They were responsible for checking the inventory. Appellant said he was not even present when the final price of $25,000 was agreed upon by David, Beverly and Robinson. Beverly talked to Robinson about inventory discrepancies. The dealings between Robinson and David and Beverly prior to appellant's attempted rescission do not clearly show an abandonment of the contract by Robinson. Abandonment of the contract was not asserted as a defense in appellant's answer. This issue also seems to have been raised for the first time on appeal.

9

The motion of appellant to transfer the cause to equity was denied on the basis of the pleadings. After having heard

the evidence in the case, the circuit judge rendered a memorandum opinion stating that the case could very easily have been transferred to chancery, but that the motion to transfer was denied without objection, once it was agreed that the trial would be without a jury. The record does not reveal that the transfer to equity was waived, even though there must have been an agreement that the case be tried without a jury.

Rescission is a remedy cognizable both at law and in equity. *Philpott* v. *Superior Court of Los Angeles County,* 1 Cal. 2d 512, 36 P. 2d 635, 95 ALR 990; Annot. 95 ALR 1000. See also, 17 A CJS 504, Contracts, § 413. A suit for rescission can be brought in equity only if relief cannot be obtained in a court of law. *Philpott* v. *Superior Court of Los Angeles County,* supra; 17 Am. Jur. 2d 955, Contracts, § 485. If money alone has been paid by a rescinding party, the law implies a promise by the other party to repay it and this implied promise is the basis for the common law action for money had and received. *Bellows* v. *Cheek,* supra; *Lafferty* v. *Day,* 7 Ark. 258; *Desha* v. *Robinson,* supra; *Philpott* v. *Superior Court of Los Angeles County,* supra; 17 Am. Jur. 2d 955, Contracts, § 485.

It is error to deny a transfer to equity or the motion of a defendant raising an equitable defense only when that defense is exclusively cognizable in equity. *Daniel* v. *Garner,* 71 Ark. 484, 76 S.W. 1063; *Childs* v. *Magnolia Petroleum Co.,* 191 Ark. 83, 83 S.W. 2d 547. On the face of the pleadings there was nothing to indicate that appellant's defense was cognizable only in equity or that his remedy at law was not adequate. There was no instrument to be cancelled or any other basis for relief except for the question of appellant's right to recover the part of the purchase price he paid. Consequently, there was no error in the denial of the motion to transfer.

I C

C. HONORABLE TRIAL COURT'S DECISION IS IN ERROR BASED ON CASE AS A WHOLE.

Appellant points out that there is clear factual error in the trial judge's statement in his memorandum opinion that any and all liens were satisfied in December, 1976 or January, 1977. We agree that this is a statement which is not supported by the record. We also think that it is immaterial in the view we have taken of the case as to the right of rescission.

II

SUPREME COURT SHOULD REVERSE AND, THIS NOT HAVING BEEN JURY TRIAL, RENDER FINAL DECISIONS OR SEPARATE CAUSES FOR FINAL DECISION AND/OR REMAND.

We do not fully understand appellant's argument. He contends that appellant was clearly entitled to recover and to have the claim against him dismissed, so he asks that we reverse the judgment against him and either render judgment for him or remand the case for the entry of such judgment in his favor as the evidence warrants; or, in the alternative, reverse, dismiss the judgment in favor of appellee and remand appellant's counterclaim. Since there was substantial evidence that appellant's attempted rescission was not timely, we need not consider this point.

The judgment is affirmed.

HICKMAN and PURTLE, JJ., dissent.

Supplemental Opinion on Denial of Rehearing
delivered March 31, 1980

[redacted]

[redacted]

JOHN A. FOGLEMAN, Chief Justice. Some of the arguments advanced by appellant on his petition for rehearing are such that we deem it appropriate to issue this supplemental opinion in denying the petition. For the most part, we will not consider arguments which are mere repetition of those already considered by the court. Rule 20, Rules of Supreme Court and Court of Appeals, Ark. Stat. Ann., Vol. 3A (Repl. 1979).

In his petition for rehearing appellant asserts that there was error in the finding in the original opinion that his attempted rescission was not timely. We did not so find. We found that there was substantial evidence to support the trial court's finding that it was not timely. Appellant argues, however, that, in making that finding, we should disregard the testimony of Robinson, because his conduct was fraudulent and because little weight should be given statements of a witness which are vague on details he should know and which are manifestly wrong on others. The credibility of Robinson, and the weight to be given his testimony, were matters for determination by the trial court. We are not at liberty to disregard any testimony to which the trial court has accorded some weight. Furthermore, our finding that there

was substantial evidence to support the trial court's finding in this respect was not based entirely on the testimony of Robinson.

As a part of his argument on rehearing, appellant again asserts that his son and daughter-in-law were in possession of the business by arrangement with appellee and not through appellant. The trial court specifically found that the purchaser, Carl Herrick, took possession through his children and that possession was retained until June 4, 1977. The trial court also found that, in some respects, David and Beverly Herrick acted in behalf of Carl Herrick in taking possession. We fully understand that appellant took the position in the trial court that David and Beverly were put in possession by appellee and that appellant had nothing to do with their remaining in possession. But when the evidence is viewed, and all reasonable inferences drawn, most favorably to appellee, we certainly cannot say that there was no substantial evidence to support the trial court's findings.

Appellant argues that he was relieved of tender of restoration because there was no evidence that appellee would accept the business back and the evidence indicates clearly that he would not have. He relies upon *Adams* v. *Berg,* 199 Ark. 1096, 137 S.W. 2d 912 and *Galloway* v. *Russ,* 175 Ark. 659, 300 S.W. 390. Neither case is applicable here. In *Adams,* the plaintiff sought cancellation of an oil and gas lease and the recovery of the purchase money paid by him. It was contended that the plaintiff had failed to offer to return the interest in the lease conveyed to him. We held that this was unnecessary since the cancellation would accomplish that very purpose and thus amounted to an offer to reconvey. In *Galloway* the property involved was a refrigerating machine. The buyers promptly informed the seller that they would not accept it, and were informed by the sellers that they thought they could hold the buyers under the contract. The machine was never installed, as the dispute arose before installation. There was no impediment to restoration in either case. The real problem here is not the question of tender, even though we did note that there had never been an effective tender of the assets purchased or an offer to restore Robinson to his position as it existed at the time of the

agreement, and that appellant made no mention of restoration or offer of restoration in his answer or counterclaim. The important fact is that even though appellant offered to relinquish any interest he had in the *business,* he, through his son and daughter-in-law, had operated the business for more than four months prior to appellant's attempted rescission, selling the assets in the regular course of business, and buying inventory for use therein, and continued in possession and operation of the business for an additional two or three months thereafter. Under any circumstances, appellee would have been entitled to some accounting for these assets and a restoration to that extent. See *Parker* v. *Johnston,* 244 Ark. 355, 426 S.W. 2d 155. But the record, as abstracted, does not indicate any basis on which that could be done.

Appellant asserts that what he received was worthless. He also contends that there was a failure of consideration and that this issue was raised in the trial court and not for the first time on appeal, as stated in the original opinion.

The only allegations in appellant's pleadings that could be taken to raise the issue of failure of consideration in the trial court are statements from which appellant asserted that the "business indebtedness" was "large" and in excess of the value of the assets. In his brief here, appellant argued that there was a *total* failure of consideration. He placed specific reliance upon 77 CJS Sales, § 22b, par. 3, in which it is stated that there is an entire failure of consideration for property sold with a warranty against encumbrances if it is sold for debts which were liens against it at the time of the sale or if it did not have a value in excess of prior encumbrances existing at the time of sale, provided such encumbrances have prevented any substantial use or enjoyment of the property by the buyer. Although it is clearly established that the value of the business was misrepresented to Carl Herrick, the trial court did not find that there was a failure of consideration, if the matter was actually in issue. Appellant filed a motion for new trial and an amended motion for new trial. In neither of them did appellant suggest that the trial court had overlooked this issue. More importantly, even though the burden was on appellant in the trial court to show that there was a total failure of consideration and to demon-

strate that there was error on the part of the trial court in failing to hold for appellant on that issue, appellant has failed to show that the business purchased was worth less than the liens against it on the record before us, which is the record abstracted. Appellant's house was covered by some of these liens and Twin City Bank was paid over $22,000 from the proceeds of the sale of the house. The balance of the Twin City Bank lien was extinguished when the physical assets of the business were sold in the receivership proceeding. At the time of the sale to appellant it appears that the federal tax lien was less than $5,000. Although it is clear that the inventory was of less value than represented, the inventory taken by Beverly Herrick is not abstracted. It was admitted that the values she placed on the items were a matter of her own opinion. There is simply no means by which we can determine the value of the items sold by the Herricks or the value of those items retained by Robinson which appellants contend were properly assets of the business they purchased, or for that matter of the inventory actually received by the Herricks. On this record, we cannot say that the trial court erred in not holding for appellant on the question of failure of consideration. Furthermore, we cannot say, on the record abstracted, that the assets purchased were worthless or that they were worth less than the liens against them at the time of the sale.

Appellant also contends that we erroneously stated that his action for rescission was inconsistent with recovery for breach of warranty, because we did not take into consideration the provisions of the Uniform Commercial Code. There is a problem in attempting to apply the Uniform Commercial Code Article on Sales, where, as here, there is a sale of a group of assets, some of which are goods, such as inventory and equipment, and others, e.g., the business name, goodwill, and accounts receivable, are not goods. See Ark. Stat. Ann. §§ 85-2-105, 85-2-107 (Add. 1961). It has been held that, in a sale such as this, the UCC provisions governing sales apply to the sale of goods, but not to the sale of that part of the assets which are non-goods. *Foster* v. *Colorado Radio Corp.*, 381 F. 2d 222 (10 Cir., 1967). In a case in which the sale of a business involved *goods only* it was held that the Article applied but the rule of *Foster* was recognized. *Miller*

v. *Belk,* 23 N.C. App. 1, 207 S.E. 2d 792 (1974). It has also been held that, when the physical assets are of little significance in a sale of both tangible and intangible assets (unlike the case before us), the contract should be viewed as one integrated contract, and Article 2 of the UCC is inapplicable. *Field* v. *Golden Triangle Broadcasting, Inc.,* 451 Pa. 410, 305 A. 2d 689 (1973), cert. den. 414 U.S. 1158, 94 S. Ct. 916, 39 L. Ed. 2d 110 (1973). The *Foster* rule was recognized and applied in a case involving the sale of a cordwood business, where, unlike the case before us, the entire purchase price was allocated by its terms among the various items of tangible property which were transferred by the sale. *Melms* v. *Mitchell,* 266 Or. 208, 512 P. 2d 1336, 65 ALR 3d 376 (1973). The Oregon court later pointed out that in *Melms,* the entire contract and the conditions thereof had to do only with goods as defined by the Uniform Commercial Code. It also stated flatly that there was no precedent for treating a contract as completely under the UCC provisions where (as here) it covers both goods and non-goods. *Meister* v. *Arden-Mayfair, Inc.,* 276 Or. 517, 555 P. 2d 923 (1976). The *Foster* rule, which seems to be generally accepted, would require that this contract be viewed in two parts, but this is not possible on the record before us.

If the UCC applies, it appears that appellant is correct in his contention that remedies for material misrepresentation or fraud include all remedies for non-fraudulent breach and that neither rescission, a claim for rescission of a contract for sale, nor rejection of the goods bars, or is inconsistent with, a claim for damages or other remedy. Ark. Stat. Ann. § 85-2-721 (Add. 1961). But appellant relies, in part, upon Ark. Stat. Ann. § 85-2-711 (Add. 1961) for recovery of damages in addition to the portion of the purchase price paid by him, pointing out that where the buyer rightfully rejects or justifiably revokes acceptance, he may cancel and may, in addition to recovery of the purchase price as has been paid, have "cover" and damages for non-delivery. There was no evidence of "cover" as defined in Ark. Stat. Ann. § 85-2-711 (Add. 1961). The measure of damages for non-delivery is the difference between the market price at the time the buyer learned of the breach and the contract price together with incidental and consequential damages but less expenses

saved in consequence of the seller's breach. Ark. Stat. Ann. § 85-2-713 (Add. 1961).

As heretofore pointed out, the record as abstracted, does not disclose evidence from which these damages could have been awarded, unless the $2,500 advanced for operation of the business is considered as an incidental or consequential damage. These expenses are not a consequential damage, as defined in Ark. Stat. Ann. § 85-2-715 (2) (Add. 1961). Nor can we say, as a matter of law, that it was an incidental damage as a reasonable expense incident to appellee's breach under Ark. Stat. Ann. § 85-2-715 (1). Appellant also relies upon Ark. Stat. Ann. § 85-2-711 (3), giving a buyer a security interest in goods in his possession and control for any payments made on the purchase price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody. There is nothing in the record, as abstracted, to show that the $2,500 advanced by appellant was for any of these purposes. What is just as important, is that § 85-2-711 (3) does not apply unless there has been a rightful rejection or justifiable revocation of acceptance of the goods involved. As appellant points out, under the UCC there is no magic in the words "cancellation" or "rescission." Ark. Stat. Ann. § 85-2-720 (Add. 1961). But rejection must be within a reasonable time after delivery of the goods and is ineffective unless the buyer seasonably notifies the seller. Ark. Stat. Ann. § 85-2-602 (Add. 1961). This is the same requirement as has always been made as to rescission and the trial court held that this was not timely done. Consequently, appellant must be taken to have accepted the goods unless, after reasonable opportunity to inspect them, he made an effective rejection. Ark. Stat. Ann. § 85-2-606 (1) (a) and (b) (Add. 1961). He also must be deemed to have accepted the goods if he did any act inconsistent with the seller's ownership if that act was ratified by the seller. Ark. Stat. Ann. § 85-2-606 (1) (c) (Add. 1961).

For the reasons heretofore stated, there was an acceptance by appellant, unless that acceptance was revoked. Revocation must occur within a reasonable time after the buyer discovers or should have discovered the ground for it

and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller. Ark. Stat. Ann. § 85-2-608 (Add. 1961). The court's finding as to timeliness of the "rescission" is a bar to an effective revocation, as is the retention of possession and selling of the goods after the ground for revocation should have been discovered. Appellant's remedies, then are those available for breach of contract in regard to accepted goods. Ark. Stat. Ann. § 85-2-721 (Add. 1961). These remedies include damages as set out in Ark. Stat. Ann. § 85-2-714 (Add. 1961). Recovery is barred under the first subsection of that section, which allows recovery of loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable, in the absence of notice of the breach to the seller within a reasonable time after the buyer discovers or should have discovered the breach. The trial court's finding on timeliness of "rescission" bars appellant's recovery under that section. As we have previously pointed out, the record as abstracted does not show any basis for finding the difference between the value of the goods accepted and the value they would have had if they had been as warranted. Nor can we say that special circumstances show proximate damages of a different amount. Thus, we cannot say there was a basis for allowing additional damages under Ark. Stat. Ann. § 85-2-715 (2); or that additional damages should have been allowed as incidental and consequential damages under Ark. Stat. Ann. § 85-2-715 (Add. 1961).

The burden was on appellant to demonstrate error in the judgment of the trial court. *Commercial Union Insurance Co.* v. *Henshall,* 262 Ark. 117, 553 S.W. 2d 274. He has not sustained that burden so the petition for rehearing must be denied.

HICKMAN, J., dissents and would grant the rehearing.

COMMISSIONER OF LABOR and ARKANSAS EMPLOYMENT SECURITY DIVISION *v.* Carl D. PURNELL and PURNELL PROPERTIES, INC.

79-286 593 S.W. 2d 157

Opinion delivered January 28, 1980
(In Banc)
[Rehearing denied February 19, 1980.]

Herrn Northcutt, for appellants.

Terry F. Wynne, of *Bridges, Young, Matthews, Holmes & Drake,* for appellees.

GEORGE ROSE SMITH, Justice. Joan Johnson, an employee of the appellees, quit her job to move with her husband to another city. When Mrs. Johnson applied for unemployment compensation, the Employment Security Division mailed a Notice of Claim Filed to the employer on June 1, 1971. In accordance with the Division's Regulation 10, the Notice required the employer to return the form to the Commissioner of Labor, with certain information, within seven days from the mailing date of the Notice.

Purnell, the employer, was out of the country on vaca-

tion and knew nothing about the notice until the seven-day period had expired. It was Mrs. Johnson's responsibility to forward mail received at Hot Springs to the Purnell office in Pine Bluff, but her departure kept the notice from being forwarded. As a result of the employer's failure to respond to the notice within the seven days, the employer's contributions under the Employment Security Act were ultimately increased by $1,392.71.

The employer's protest against the increase was denied by the Employment Security Division. The chancellor, in this proceeding brought by the employer for a review of the Division's decision, held that Regulation 10 was so arbitrary as to deny due process of law. The decree directed that the increase in contributions be refunded or credited against the employer's future liability for contributions. This appeal is from that decree.

We emphasize at the outset that whether Mrs. Johnson was or was not disqualified from receiving benefits had no bearing upon the increase in the employer's contribution rate. When the employer returned to the United States and responded to the Notice shortly after the expiration of the seven days, the Division informed him that "there is no provision in the Law for the late return of a claims notice regardless of the reason for such late return." To the same effect is this paragraph in the stipulation of facts in the chancery court:

> The Petitioner's experience rating was increased, not because of the claim filed against it, but because he did not respond to the Notice of Claim within seven (7) days of its mailing.

The increased contribution rate would have been imposed under the regulation even if the postal service had delivered the Notice of Claim after the expiration of the seven days or had never delivered it.

We agree that the regulation is invalid, because due process requires at a minimum that a person be given notice and a reasonable opportunity for a hearing before he is

deprived of his property by state action. *Davis* v. *Schimmel,* 252 Ark. 1201, 482 S.W. 2d 785 (1972). A somewhat similar regulation was held invalid in *Smith* v. *Iowa Employment Security Commission,* 212 N.W. 2d 471 (Iowa, 1973).

We cannot agree with the Commissioner's argument that a 1971 act, reserving to the legislature the right to amend or repeal any part of the Employment Security Law, kept this employer from asserting the deprivation of a vested property right. Ark. Stat. Ann. § 81-1125 (Repl. 1976). Here the loss was not attributable to an amendment or repeal of any part of the act, and in any event a statute cannot withdraw the protection of the due process clause simply by a declaration that no vested right shall arise. Nor is the Commissioner's position sustained by federal and state decisions broadly upholding the validity of employment security statutes. None of the cases cited considered the constitutionality of a regulation such as the one now in issue.

Affirmed.

Jack SWEENEY *v.* Nancy SWEENEY

79-115 593 S.W. 2d 21

Opinion delivered January 28, 1980
(In Banc)

[Rehearing denied February 19, 1980.]

Johnson & Lewis, Ltd., by: *Fletcher C. Lewis*, for appellant.

Boyett & Morgan, P.A., by: *James L. Morgan* and *Mike*

Millar, for appellee.

FRANK HOLT, Justice. Appellee was granted a divorce from appellant on her counter-claim of general indignities. She was awarded permanent alimony, attorney's fees and a statutory interest in appellant's real and personal property pursuant to Ark. Stat. Ann. §§ 34-1211 and 34-1214 (Repl. 1962). This appeal, by present counsel, is from the final decree. Appellant contends these statutes are unconstitutional.

We first consider the validity of § 34-1211, which authorizes the permanent awards made here. Before doing so, the question of appellant's standing, which appellee raises, must be resolved. To have standing to challenge the constitutionality of a statute, it must be unconstitutional as applied to the litigant. *Carter and Burkhead* v. *State,* 255 Ark. 225, 500 S.W. 2d 368 (1973). It is well established that a litigant can question the validity of a statute "when and insofar as it is being, or is about to be, applied to his disadvantage . . ." *Block* v. *Allen,* 241 Ark. 970, 411 S.W. 2d 21 (1967). Here appellant was required to pay appellee temporary maintenance and attorney's fees during the pendency of this action, which awards were made permanent by the first decree. Clearly appellant has standing to challenge the constitutionality of § 34-1211 since he was and continues to be financially obligated to the appellee under the decree rendered pursuant to this statute. By seeking a ruling from the chancellor as to its constitutionality, as applied to him, he properly raised the constitutional issue in the trial court.

In support of his argument that § 34-1211 is a gender-based classification and therefore unconstitutional, appellant relies upon *Orr* v. *Orr,* 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979); and *Hatcher* v. *Hatcher,* 265 Ark. 681, 580 S.W. 2d 475 (1979). Here appellant correctly points out that in *Hatcher* we held § 34-1210, which authorizes temporary maintenance and attorney's fees for the wife, unconstitutional as being violative of equal protection rights citing *Orr.* In *Orr* Alabama statutes, similar to ours, were declared unconstitutional. We hold Ark. Stat. Ann. § 34-1211 (Repl. 1962), which is undisputedly gender-based, likewise uncon-

stitutional. We deem it appropriate to observe, however, that *Orr* and *Hatcher* were rendered subsequent to the trial of this case or during the pendency of this appeal.

Appellant next contends that § 34-1214, which pertains to a wife's property rights upon divorce, is unconstitutional, because it is also gender-based in its classification. This issue is raised for the first time on appeal and therefore we cannot consider it. *Hatcher* v. *Hatcher, supra.*

Appellant next contends that the chancery court erred in granting appellee a statutory interest in appellant's Ford Motor Company and Honeywell retirement benefits. The decree provides that appellee receive a one-third interest in the retirement benefits with Ford but does not mention the Honeywell benefits. Pension benefits which are vested but not currently due and payable are not personal property. *Knopf* v. *Knopf,* 264 Ark. 946, 576 S.W. 2d 193 (1979). Here on the record before us, it is not demonstrated that any retirement benefits are currently due and payable.

Finally, appellant contends that Act 705 of our 1979 General Assembly cannot be applied to sustain the chancellor's order. This act was enacted during the pendency of this appeal and amended §§ 34-1210, 34-1211, 34-1213, and 34-1214 by making them gender-neutral rather than gender-based. Substantive rights are clearly affected by this act and the statute cannot be retroactively applied absent clear legislative intent to that effect. *Chism* v. *Phelps,* 228 Ark. 936, 311 S.W. 2d 297 (1958). Here no emergency clause was enacted and neither is there express language regarding retroactive applicability. The act, therefore, is prospective in its application. Since the statute, § 34-1211, in effect when the chancellor's order was entered, is unconstitutional and since Act 705, subsequent to the order, is prospective in its application, no statutory law exists to apply on remand.

Even so, it has been suggested that we delineate some guidelines for the chancellors in cases now pending with respect to alimony upon rendition of the decree of divorce between the *Orr* decision and the effective date of Act 705 of 1979.

It is true that we recognized in *Hatcher* that "[d]ivorce and the incidental rights, responsibilities and liabilities of a divorce, are purely statutory." At common law, there was no power to award alimony. 1 Nelson, Divorce & Annulment (2d. Ed.) 5, § 1.02, and Am. Jur. 2d, Divorce & Separation, § 534. Ark. Stat. Ann. § 34-1211 (Repl. 1962), which gives authority to the chancellor to award alimony, has been in effect for approximately 150 years. The pronouncement of *Orr* and *Hatcher,* as indicated, requires the invalidation of this statute. To meet the obvious requirements of *Orr* that this type statute be neutral and not gender-based, our legislature, within a month, enacted Act 705 of 1979. Even though our legislature acted expeditiously to correct the hiatus created by *Orr,* a void of statutory law has existed during the interim between *Orr* and the effective date of Act 705 of 1979 affecting this and perhaps numerous other cases. In this unusual situation, we think the broad power of equity should be allowed to fashion a remedy to meet the demonstrated needs of divorced spouses in order to prevent harsh and inequitable results.

In *Whitaker & Co.* v. *Sewer Improvement Dist. No. 1 of Dardanelle, Ark.,* 229 Ark. 697, 318 S.W. 2d 831 (1958), we said: "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." As further indication of the inherent powers of equity to do substantial justice between divorced parties, we said in *Conner* v. *Conner,* 192 Ark. 289, 91 S.W. 2d 260 (1936):

> Notwithstanding the fact that the wife may be the guilty spouse, the trial court, in the exercise of a sound discretion, if the facts and circumstances in the particular case warrant it, may allow her alimony, attorney's fee, and costs. This power is inherent in the court, although not provided by statute. This court said in the case of *Prior* v. *Prior,* 88 Ark. 302, 114 S.W. 700 that: 'Whether dependent upon enlarged powers conferred by the statute or not, we think it is settled that a court has the power to allow alimony to a wife against whom a decree for divorce is granted on account of her misconduct.'

In the circumstances, we hold, with respect to this and other

cases pending during this brief void of statutory law, that a chancellor may, within the exercise of inherent power and sound discretion, award alimony to the wife or husband as is justified by the facts and circumstances.

Here, as indicated, the chancellor's award of alimony cannot be sustained pursuant to § 34-1211 nor Act 705 of 1979. However, it is well recognized that we review chancery cases *de novo* on appeal and affirm when it appears correct from the record as a whole even though the chancellor has based his decision upon the wrong reason. *Morgan* v. *Downs,* 245 Ark. 328, 432 S.W. 2d 454 (1968).

Affirmed.

HICKMAN and STROUD, JJ., concur.

FOGLEMAN, C.J., and MAYS, J., concur in part and dissent in part.

DARRELL HICKMAN, Justice, concurring. The majority has reached the only result it can, unless a small number of people are to be the victims of a legal hiatus.

The United States Supreme Court in *Orr* v. *Orr,* 440 U.S. 268 (1979), held in effect that most of the alimony statutes in this country were unconstitutional. That decision would not have created too serious a problem if alimony had been a right recognized by common law. But it is not. Alimony is essentially a creature of statute. Certainly, this has always been the rule in Arkansas. If one followed a legalistic line of logic, then the appellee could be denied her right to alimony because the chancellor, after *Orr,* would have no authority to grant it. However, to deny the appellee alimony would be a greater judicially created injustice than that which some may think the majority is committing here. I think the majority is simply granting to a small number of people a right that people before them, who were members of the same class, and people after them, who are members of the same class, would have. Unless this grant is made, this small number of people will not have a right, which would be a great injustice. I do not believe the chancery courts have

the inherent power to deal with this. I think the majority is giving the courts that power, a decision in which I concur.

STROUD, J., joins in this concurrence.

JOHN A. FOGLEMAN, Chief Justice, concurring in part; dissenting in part. I agree that appellant had standing to challenge the constitutionality of Ark. Stat. Ann. § 34-1211 (Repl. 1962) and that this section of the statute is unconstitutional by the standards established in *Orr* v. *Orr,* 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979). I also agree that Act 705 of 1979 is prospective in effect. I would add that it could not have been retroactive. A decree of absolute divorce was granted Mrs. Sweeney upon her counterclaim. There has been no attempt, on appeal, to obtain a reversal of that portion of the decree. It has become final; it is not affected by the decision here, and is the basis for any allowances made to her and for any award of property. Her rights were then fixed. Even if it could be argued that the rights of appellant and appellee upon entry of the divorce decree were not property rights, they were certainly substantive rights. It is well settled generally that retrospective laws are unconstitutional if they affect substantive or substantial rights. *Gillioz* v. *Kincannon,* 213 Ark. 1010, 214 S.W. 2d 212.

My point of departure from the majority opinion commences just after the statement that no statutory law exists to apply on remand. In my judgment, the opinion might well have ended there, because if no statutory law exists, no law whatever exists authorizing the allowance of alimony where the divorce is absolute. It was *only* by statute that the meaning of the word alimony was extended to include an allowance by the court on dissolving the bonds of matrimony. *Bauman* v. *Bauman,* 18 Ark. 320; *Wood* v. *Wood,* 54 Ark. 172, 15 S.W. 459.

There has never been any common law right to alimony, attorney's fees or award of property to a spouse obtaining a divorce. The matter is treated extensively in a well recognized text on the subject of divorce, and is capsuled by the writer in an early section of the text, viz:

As a result of the history of the subject, discussed in

> the preceding section, the law of divorce and jurisdiction to grant absolute divorces are statutory. It has been repeated time after time, in fact, that divorce proceedings are "purely" or "entirely" statutory, and that divorce is a special statutory remedy. The power of the courts over divorce suits is derived entirely from the statutes, and is wholly dependent thereon. For example, only such judgments may be entered as are authorized by statute, and all the legislative requirements must be fulfilled to give the court jurisdiction. Not only must the statutes be strictly complied with, but they are also, usually, rather strictly construed.

1 Nelson, Divorce & Annulment (2d. Ed.) 5, § 1.02.

The matter is also explained in an annotation relating to alimony. See 34 ALR 2d 313, at p. 319, where it is stated thusly:

> The matter of divorce a vinculo matrimonii is entirely statutory in origin. At common law the courts did not have the power to grant such a divorce; and even the English ecclesiastical courts could not or would not grant a divorce. And the better view is that the power to award permanent alimony in connection with a divorce a vinculo matrimonii depends on the existence of statutory authorization, and that there is no such thing as a common-law power to grant permanent alimony in connection with such a divorce. * * *

The matter of alimony is also treated at p. 658, 24 Am. Jur. 2d, Divorce & Separation, § 534, viz:

> * * * But in the case of an absolute divorce terminating the matrimonial ties, the duty of support no longer exists at common law, and in the absence of a statute continuing the obligation of maintenance beyond the dissolution of the marriage, it is difficult to find a basis for awarding permanent alimony. The better view would appear to be that the right to award permanent alimony on decreeing a dissolution of the marriage can be based solely upon express statutory provision. Indeed, the

broad statement is frequently made that all authority to award alimony is referable solely to the written law, and that authority to award alimony must be conferred by statute or it does not exist.

The broad power of equity seems to have greatly expanded in the nine months following our decision in *Hatcher* v. *Hatcher,* 265 Ark. 681, 580 S.W. 2d 475. There was much greater leeway in *Hatcher,* where temporary alimony was involved, but the majority followed a very narrow and restrictive course there. The comparison is reminiscent of straining at a gnat and swallowing a camel.

In *Hatcher,* the majority, in striking down Ark. Stat. Ann. § 34-1210 (Repl. 1962), said:

> The fact that the Arkansas law in question only relates to temporary, as opposed to permanent, alimony is not significant. . . . It is not a question of temporary or permanent alimony. It is a question of a gender-based classification of the statute.

Now, it makes a tremendous difference. In *Hatcher,* the majority said:

> The appellee has argued that we should simply hold that the law applied 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 — determines the

> grounds for, the defenses against, divorce; because divorce is always regulated by statute.

What has changed since *Hatcher?* Now the majority says that, in spite of the fact that we said in *Hatcher* that divorce and the incidental rights, responsibilities and liabilities of a divorce are *purely* statutory, in this unusual situation, the broad power of equity should be allowed to fashion a remedy to meet the demonstrated needs of divorced *spouses* in order to prevent harsh and inequitable results.

Has it now become the function of the courts to legislate? Are divorce and the incidental rights and liabilities purely statutory - except in an unusual situation? If so, what constitutes an unusual situation? In *Hatcher,* this court declined the invitation to make the law governing temporary alimony apply to both husbands and wives. Today the court says that "during this brief void of statutory law, a chancellor may, within the exercise of inherent power and sound discretion, award alimony to the wife or husband as is justified by the facts and circumstances." Why so, in the case of permanent alimony and not in the case of temporary alimony?

I am mystified by a temporary vesting of inherent power in the chancery courts. What is the source of this power? It is difficult for me to see how alimony can be converted into a matter for the exercise of equity powers for even a brief period. "To treat a divorce suit as one in equity is historically an error, however, as a suit for absolute divorce was unknown to the common law, either in the law courts or in chancery." 1 Nelson, Divorce & Annulment (2d. Ed.) 8, § 1.03.

I am also troubled by our failure to deal with the question of constitutionality of Ark. Stat. Ann. § 34-1214 (Repl. 1962). Even though the question was raised for the first time on appeal, it will inevitably arise upon remand. Perhaps it is better to follow this procedure, since appellee did not address the issue of constitutionality.

I am authorized to state that Mr. Justice Mays joins in this opinion.

ELCARE, INC. *v.* Charles L. GOCIO,
Executor of the Estate of Ralph W. BIGGER, Deceased

79-253 593 S.W. 2d 159

Opinion delivered January 28, 1980
(In Banc)
[Rehearing denied March 3, 1980.]

Little, McCollum & Mixon, by: *James G. Mixon,* for appellant.

Gocio & Dossey, by: *Jerry B. Dossey,* for appellee.

FRANK HOLT, Justice. Appellee's decedent, 68 years of age, entered into two contracts with the appellant for the purpose of securing lifetime housing and medical services at the Concordia Life Care Center owned by the appellant. One contract was entitled "Care Agreement" and the other, "Contract for the Sale of Life Estate in Living Unit." Approximately six weeks prior to his death, the decedent delivered to appellant a written notice of cancellation of the

Contract for Sale specifically citing Paragraph 5. The notice of cancellation and termination of occupancy was to be effective on the date of delivery. Following the decedent's death, appellant refused to comply with appellee's request on behalf of the decedent's estate for a refund of a percentage of the original purchase price in accordance with the notice and the terms of the contract. In refusing the request, appellant cited Paragraph 16 (d) of the Care Agreement which required a resident to give 120 days' notice of cancellation of that contract. Appellant took the position that this cancellation provision also governed by reference the cancellation of the Contract for Sale. Therefore, the effective date of the termination was 120 days from the date of the written notice to cancel the Contract for Sale. Further, since the decedent died prior to the expiration of the 120 days' notice, the contract was terminated by his death and no refund was due according to the provisions of the Contract for Sale. Upon a review of the evidence, including the two contracts, the trial court, sitting as a jury, ruled that the cancellation notice of the sale contract was effective upon delivery and the appellant was obligated to repurchase the life estate as provided in the contract.

The only issue presented by this appeal is whether the 120 days' notice provision in the Care Agreement also governed the cancellation of the Contract for Sale. Appellant argues that the contracts should be treated as a single agreement; that Paragraph 5 (A) of the Contract for Sale merely sets out the formula for the repurchase price in the event the contract is cancelled pursuant to Paragraph 16 (d) of the Care Agreement; and that the Contract for Sale can be unilaterally terminated only upon 120 days' written notice by the resident. Therefore since the notice to cancel was not effective when given, there was no substantial evidence to support the trial court's ruling. Appellee responds that the provisions in the contracts governing cancellation are confusing and ambiguous and, consequently, should be construed most strongly against the drafter, namely, the appellant. The lower court, therefore, correctly ruled that the Contract for Sale was cancelled upon delivery of the written cancellation notice.

The Care Agreement provides in pertinent part:

16. TERMINATION OF AGREEMENT. This agreement shall be terminated as follows:

(a) Upon death of Resident. . . .

(d) By Resident, by serving on Corporation one hundred twenty (120) days written notice of his desire to do so; but in such case, Resident's contract shall not terminate until the end of 120 days except by mutual agreement in writing of Corporation and Resident. The Resident will be charged with such amounts as will cover other expenses incurred in connection with any repairs or replacement of the property of Corporation caused by the Resident. The Resident shall be obliged to sell his Life Estate in said Living Unit to the Seller at the price as set forth in Paragraph 5 (A) of the Contract for the Sale of Life Estate in Living Unit, referred to in Paragraph 1 hereof. Payment of the repurchase price shall be made within 120 days of the termination date.

In the event this contract is terminated, Corporation shall be entitled to all unearned portions of the Maintenance Fee.

The Contract for Sale Agreement reads in pertinent part:

5. (A) In the event Buyer desires to terminate his occupancy, Care Agreement or his interest in said Living Unit, Seller shall be obliged to repurchase the Life Estate in said Living Unit and Buyer shall be obliged to sell his Life Estate in said Living Unit to Seller as follows:

(1) On the day which the premises are made available to the Buyer for his occupancy and during the remaining days of that same calendar month, the repurchase and sales price shall be eighty (80) percent of the original sales price.

(2) Each calendar month thereafter, the repurchase and

sales price shall decrease by three-fourths (3/4) of one (1) percent for the next one hundred (100) months.

(3) Thereafter, the repurchase and sales price shall be five (5) percent of the original sales price.

(B) In the event the Seller (other than for reasons stated in Paragraph 4 hereof) terminates Buyer's Care Agreement, Seller shall be obliged to repurchase the Life Estate in said Living Unit and Buyer shall be obliged to sell his Life Estate in said Living Unit to Seller in the same manner as set forth in subparagraph 5 (A) above.

(C) In the event of the death of one of the holders of the Life Estate, the monthly maintenance fee will be adjusted to the current single rate for a comparable unit for the surviving occupant. Upon the death of either a single occupant or of the surviving occupant, as the case may be, both this Contract and the Care Agreement shall automatically be terminated, and the Living Unit shall revert to the Seller.

The contracts were executed on the same day, were part of the same transaction, and were designed to provide an integrated program of housing and medical care for the decedent and other residents. Paragraph 1 of the Care Agreement provides that no legal obligations are created pursuant to the agreement until the parties sign the separate Contract for Sale, and that the Contract for Sale is incorporated by reference. Similarly, Paragraph 8 of the Contract for Sale provides that if the parties do not enter into the Care Agreement, the Contract for Sale is cancelled. In view of these provisions, we agree with the finding of the trial court that the contracts were incorporated by reference. However, when there is uncertainty or ambiguity in a contract or contracts and they are susceptible to more than one reasonable construction, then we must construe them most strongly against the party who drafted them, the appellant here. *Barton* v. *Perryman,* 265 Ark. 228, 577 S.W. 2d 596 (1979); *Christmas* v. *Raley,* 260 Ark. 150, 539 S.W. 2d 405 (1976); *Prepakt Concrete Co.* v. *Whitehurst Bros., Inc.,* 261 Ark. 814, 552 S.W. 2d 212 (1977). Further the drafter of a docu-

ment is in a better position to convey a clarity in meaning by its choice of phraseology and words, and if there are any uncertainties, they will be construed against the drafter of the form if the language bears more than one reasonable meaning in its interpretation. *Hall* v. *Weeks,* 214 Ark. 703, 217 S.W. 2d 828 (1949); and *Pate* v. *Goyne,* 212 Ark. 51, 204 S.W. 2d 900 (1947).

Here, tested by these standards, we hold there is substantial evidence to support the court's findings that if a buyer were required to give 120 days' notice of his desire to terminate the Contract for Sale, Paragraph 5 (A) (1) and part of 5 (A) (2) would be "meaningless", and that if the 120 days' notice governed termination of both contracts, the third sentence of Paragraph 16 (d) would be "totally unnecessary". This is a reasonable construction even though we treat the contracts as a single instrument. The appellant, the proponent of the contracts, was in a better position to prevent any ambiguities by easily expressing its intent in plain English by reiterating the 120 days' cancellation notice in the cancellation provision of the Contract for Sale. The written notice of cancellation submitted by the decedent effectively cancelled the Contract for Sale on the date of delivery.

Since there was no notice of cross-appeal by the appellee, we do not consider the issues presented therein.

Affirmed on direct and cross-appeal.

FOGLEMAN, C.J., dissents.

JOHN A. FOGLEMAN, Chief Justice, dissenting. It is extremely difficult for me to see how it can possibly be said that the two instruments involved are the result of a single transaction and are incorporated into each other by reference[1] (which makes them a single contract) and then say that there are two separate and independent means of termination for each contract. If all provisions are read in the light of each other, the two provisions in question can be read harmoni-

[1] This was the actual holding of the trial court which the majority finds to have been justified.

ously. This the courts must do, if at all possible. *Continental Casualty Co.* v. *Davidson,* 250 Ark. 35, 463 S.W. 2d 652. There are provisions other than those reproduced in the majority opinion that are material to the inquiry here. In reading these provisions and those set out in the majority opinion, the court should give heed to its own teachings in *Fowler* v. *Unionaid Life Ins. Co.,* 180 Ark. 140, 20 S.W. 2d 611. In essence, they were: The intention of the parties to a contract is to be gathered, not from particular words and phrases, but from the whole context of the contract, even though the immediate object of the inquiry is the meaning of an isolated clause; the interpretation must be upon the entire contract and not upon disjointed or particular parts of it; the contract must be viewed from beginning to end and all its terms must pass in review, for one clause may modify, limit or illuminate the other; seeming contradictions must be harmonized, if that course is reasonably possible; and each of a contract's provisions must be considered in connection with the others.

In the "Contract for the Sale of Life Estate in Living Unit," there are these provisions:

> 3. *** It is understood Seller reserves for its duly authorized officers and employees the right of entry and use as to the facilities aforesaid for management, maintenance and emergency purposes and any other purpose in connection with the duties imposed on Seller by Care Agreement with Elcare, Inc., sometimes herein referred to as "Care Agreement", executed in connection with this agreement and made a part hereof by reference. Seller agrees to furnish a policy of title insurance for the life estate in said Living Unit, in an amount equal to the purchase price, subject, however, to exceptions contained in the above description and as otherwise herein contained.
>
> 4. Time shall be and hereby is made the essence of this contract and of each and all of the conditions herein contained. ***
>
> 8. In the event Buyer and Seller do not enter into the

agreement known as Care Agreement of Elcare, Inc., or that agreement is voided prior to occupancy of Living Unit by Buyer, the sum of *Twenty-five Hundred and no/100 Dollars ($2,500.00)* paid herewith shall be refunded to Buyer and this Contract shall be cancelled.

Pertinent provisions of "Care Agreement of Elcare, Inc." are:

RECITALS:

A. ELCARE, INC. is a business corporation organized under the laws of the State of Arkansas for the purpose of founding and maintaining residences and other facilities, referred to sometimes herein as Concordia, for persons primarily over sixty-five (65) years of age, operated or to be operated in accordance with policies and directives of all applicable government agencies. Its residences and facilities are operated on a non-discriminatory basis and afford equal treatment and access to services and facilities as to all persons regardless of race, sex, color, religion, creed, national origin, or ancestry.

B. Resident is *68* years of age; has made application for residence; and such application has been approved by the Corporation, subject to the provisions of this contract;

NOW, THEREFORE, IT IS AGREED:

1. Prior to the time this agreement creates any legal obligations, Resident, and Corporation shall sign the Contract for the Sale of Life Estate in a Living Unit, in the properties known as Concordia, as required by the Corporation, and said sale contract is hereby incorporated by reference.

2. The Corporation agrees to furnish the Resident meals, care, facilities and services enumerated in this section, and no others, for the rest of the natural life of Resident, and so long as Resident remains in the accommodations maintained by Corporation and carries out his obligations under this contract.

h. CHANGE OF ACCOMMODATIONS.

*****

The Corporation will furnish convalescent care, determined necessary by the staff physician, in its own or suitable outside medical facility, unless hereinbefore excluded. If convalescent hospitalization exceeds three (3) months and it is the opinion of the staff physician, in conference with Resident's personal physician, members of Resident's family, and/or Resident's Guardian or Conservator, that convalescent hospitalization will be permanent, Corporation will have the right and will be obliged to repurchase Resident's interest in said Living Unit and Resident will be obliged to sell his interest in said Living Unit to Corporation in the same manner as set forth in Paragraph 5 (A) of the Contract for the Sale of Life Estate in Living Unit. Credit for the repurchase of Resident's interest in said Living Unit will be applied to payment of the monthly maintenance fee charged under Section 3 of the Care Agreement. In the event of Resident's death prior to reimbursement of Resident's interest, if any, the remainder will be paid to Resident's Estate.

7. AGREEMENTS, CANCELLATIONS AND REPURCHASES. ***

The Corporation reserves the right of action of its Board of Directors to cancel this Care Agreement for what is, in the judgment of the Board, good and sufficient cause. It is specifically agreed that such "good and sufficient cause" shall include, but not be limited to, termination of Resident's rights according to the terms of Paragraph 4 of the Contract for Sale of Life Estate in Living Unit. Thereupon, the Corporation will be discharged from all obligations hereunder. In the event of such cancellation of the Care Agreement, Corporation shall have the obligation to repurchase the Living Unit of Resident at the price set forth in Paragraph 5 (B) of said Contract for Sale of Life Estate in Living Unit, and Resident shall be obliged to sell said Life Estate in his Living Unit to Corporation for the price and as provided in Paragraph 5 (B) of said Contract.

To reach the conclusion reached by the majority and by the trial court, it is necessary to find that two agreements which are so interdependent as to constitute a single contract may be terminated at different times by different means, although one never could have come into effect without the other.

It is significant that the determination of the repurchase price depends upon the time of *occupancy* of the Living Units by the Buyer. It is clearly contemplated that the execution of the Care Agreement and the occupancy of the Living Unit may not be simultaneous, because, under paragraph 8 of the contract for sale of the Living Unit, the down payment is to be refunded if the parties do not enter into the Care Agreement or if the Care Agreement is voided prior to the occupancy of the Living Unit by the Buyer. What is more important, the provision for payment under 5 (A) of the sale agreement could never be meaningless, because the 120 day notice is not applicable if the Resident and Corporation mutually agree upon an earlier termination.

Giving effect to paragraph 5 (A) of the sale agreement to the exclusion of paragraph 16 of the Care Agreement is error, because the two are reconcilable. *Continental Casualty Co.* v. *Davidson,* 250 Ark. 35, 463 S.W. 2d 652. Whatever the construction of paragraph 5 (A) standing alone may be, it must be read in connection with other clauses limiting it. *Continental Casualty Co.* v. *Davidson,* supra.

In other words, the two clauses are not really conflicting and certainly not hopelessly so. They can, and certainly should be, harmonized. Paragraph 5 provides the means of arriving at the amount to be paid the resident upon a termination by the resident, when agreed to by the corporation. It also provides the formula for determination of the amount to be paid to the resident if there is a termination by the corporation under another provision of the contract.

I simply do not see where the evidence, outside the contracts themselves, enters into the matter at all.

I would reverse the judgment.

Charles Rudolph PACE *v.* STATE of Arkansas

CR 79-125 592 S.W. 2d 21

Opinion delivered January 28, 1980
(In Banc)

Mickey Buchanan, for appellant.

Steve Clark, by: *Dennis R. Molock,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Following a jury trial, appellant

was found guilty of possession of heroin with intent to deliver in violation of Ark. Stat. Ann. §§ 82-2604, 82-2605, and 82-2617 (a) (1) (i) (Repl. 1977) and was sentenced to thirty years imprisonment. We agree with his contention that the conviction must be reversed inasmuch as the testimony of his admitted accomplice, the only witness who testified as to his commission of the crime, was insufficiently corroborated.

Ark. Stat. Ann. § 43-2116 (Repl. 1977) provides that a felony conviction cannot be had "upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof." The corroborating evidence need not be sufficient in and of itself to sustain a conviction and, if substantial, may be slight and not altogether satisfactory and convincing; however, it must do more than raise a suspicion of guilt. *Olles* v. *State,* 260 Ark. 571, 542 S.W. 2d 755 (1976). Circumstantial evidence may be sufficient if the evidence is unequivocal and certain in character, of a material nature, and tends to connect the defendant with the crime. *Roath* v. *State,* 185 Ark. 1039, 50 S.W. 2d 985 (1932). Evidence relied on to corroborate an accomplice must, independently and without the aid of the accomplice's testimony, establish the commission of the offense and the connection of the accused therewith. *Olles* v. *State,* supra; *Ford* v. *State,* 205 Ark. 706, 170 S.W. 2d 671 (1943); and *Froman and Sanders* v. *State,* 232 Ark. 697, 339 S.W. 2d 601 (1960). As indicated, it is not sufficient if it merely shows that the offense was committed and the circumstances of the offense. § 43-2116, supra.

The facts surrounding the search which resulted in the filing of charges against the appellant are not in dispute. The local sheriff received a tip from officers observing a house owned by appellant's accomplice that a quantity of heroin had been brought to the house from Dallas. There was evidence, aside from the testimony of the accomplice, that appellant would be bringing drugs into the Texarkana area the morning of the raid. A search warrant was procured, and, following a search of the accomplice's residence, three sepa-

rate quantities were seized. Criminal charges were filed against four of six individuals, including the appellant. No heroin was found on the appellant's person, in the room where he was found, nor in his automobile. It appears appellant and three or four others arrived in two separate cars about two or three hours before the raid. There was evidence that appellant associated with known drug dealers and users in the area; and on one occasion (in the local area) a month before the raid, and on another occasion (in Dallas) two months before the raid, he was observed participating in a drug transaction.

Appellant's admitted accomplice, an inmate at Cummins Prison who had been convicted of possession of heroin with intent to deliver arising out of a sale at his home, testified that he had sold heroin on a percentage basis for appellant; appellant, accompanied by a woman companion, had brought the heroin from Dallas that morning; appellant and his companion had rested for two or three hours in a room of the house (where the largest quantity of heroin was found); he had observed the woman companion remove heroin from her bra and give it to appellant who then gave some to him; he had observed appellant sell heroin to two individuals the morning of the raid; and, further, there was no heroin anywhere in his house prior to appellant's arrival. Upon reviewing all the evidence in the light most favorable to the appellee, we hold that the evidence is insufficient when the recited testimony of the accomplice is eliminated to establish the commission of the offense and the connection of the accused therewith.

As we stated in *Ravellette* v. *State,* 264 Ark. 344, 571 S.W. 2d 433 (1978):

> No one should be deprived of his liberty or property on mere suspicion or conjecture. Where inferences are relied on, they should point to guilt so clearly that any other conclusion would be inconsistent. This is so regardless of how suspicious the circumstances are.

We need not consider the other grounds urged for rever-

sal inasmuch as the evidence is insufficient to sustain a conviction.

Reversed and dismissed.

Larry Bee BLY *v.* STATE of Arkansas

CR 79-108 593 S.W. 2d 450

Opinion delivered January 28, 1980
(In Banc)

John M. Bynum and *Robert E. Irwin,* for appellant.

Steve Clark, Atty. Gen., by: *Dennis R. Molock,* Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. Appellant was convicted of murder in the first degree and sentenced to life in prison. This was a retrial of the prior conviction of capital felony murder which was reversed by this Court in *Bly* v. *State,* 263 Ark. 138, 562 S.W. 2d 605 (1978). On appeal he alleges 8 points for reversal. We will deal with them in the order of appearance in the brief. The points argued generally deal with lack of corroboration, collateral estoppel, improper offer of evidence, and the introduction of improper evidence. However, we do not find prejudicial error in any of the contentions argued by appellant and therefore affirm the conviction.

Arthur Ed Burns was brutally murdered on October 13, 1976, by means of stab wounds to the heart and having his throat cut. The evidence, except for the testimony of the accomplice, Marty Tumbleson, was circumstantial. The accomplice testified that he was present with the appellant and

the victim at the time of the murder. He described how the three of them got together at a service station in Clarksville about 9:00 or 9:30 p.m. on October 13, 1976, and drove around in a white Chevrolet automobile for some time. He described the actions of the appellant in beating the victim, who was 71 years of age, in the back seat of the car. The victim lost a considerable amount of blood while in the automobile. After driving around looking for wine, they eventually stopped on Lake Dardanelle at a location known as Cabin Creek. Appellant removed the victim from the vehicle and took him behind the automobile where he continued to beat him. Appellant then borrowed the accomplice's knife and stabbed Burns in the heart while he was lying on the ground behind the automobile. Following this, the appellant handed the knife to the accomplice, who was 17 years of age, who stabbed the victim in the chest again. Thereafter appellant instructed him to remove the body from the area and cut Burns' throat, which he did. According to the accomplice, they then drove to a place called Minnow Creek where they washed the blood from the automobile with some type of chemical. Tumbleson and the appellant then drove back to Clarksville and arrived at the South Park Service Station where they purchased gas and cigarettes with $2 they had taken from the victim. Then they went to the Caprice Restaurant where they met Jennifer Tumbleson, the accomplice's sister. Although this witness made some four different statements, some of which were inconsistent, we are reciting only his testimony at the trial. He subsequently entered a plea of guilty to murder in the first degree.

Tumbleson testified that he and the appellant, along with his sister Jennifer, left town in the automobile that night. He went to sleep after they had driven for awhile and when he awoke they were at a roadside park. The following morning they drove into Mississippi where they discarded their clothing, which had bloodstains on them, and threw the knife in the Mississippi River. Thereafter they headed back into Arkansas and the accomplice departed the company of the other two at Hazen, Arkansas, and hitchhiked back to Clarksville.

Roger Holman testified he saw the appellant, the vic-

tim, and the accomplice at the Save Service Station between 9:00 and 9:30 p.m. on October 13, 1976, in a 1964 cream colored automobile. The accomplice joined the appellant and the victim at the station after the two had arrived in the automobile. When they left the station, about 9:30 p.m., the accomplice was driving the vehicle. He had also noticed a knife strapped to the body of the accomplice. His wife, Patricia Holman, testified essentially to the same facts.

Mervin Ferrish operated the Caprice Restaurant in Clarksville. He observed the appellant and Tumbleson at his place of business about 11:15 p.m. on October 13, 1976. The two of them were in a white Chevrolet automobile. Tumbleson called his sister, Jennifer, over to the automobile where appellant and the accomplice were seated. Jennifer was employed by Ferrish at the restaurant. At that time he advanced her $20. Although she was supposed to return to work the next day, it was two or three weeks before she appeared again.

Alan Ferrish testified he worked at the Caprice Service Station on October 13, 1976. He filled a white Chevrolet automobile gas tank for the appellant, Tumbleson and Jennifer shortly after 11:00 p.m. on the same date. He observed the three of them leave in the vehicle.

On October 15, 1976, Chesley Shirrod, a junk dealer in Memphis, purchased a 1964 white Chevrolet automobile from Jennifer and the appellant. He paid the sum of $50 and received a bill of sale after Jennifer exhibited ownership papers to him. Shirrod identified appellant at the trial as the man who was with Jennifer when he purchased the car. He kept the car a week or so and turned it over to a Mr. Goza who was interested in purchasing the vehicle. He testified the vehicle was not altered in any manner while he had it in his possession.

Don Goza testified he took possession of the car from Shirrod about the middle of October, 1976 and took it deer hunting the following day. The car was subsequently confiscated by the Arkansas State Police. He thought the vehicle was picked up by the police a few days after it came into his possession.

Bill Bounds, a member of the Arkansas State Police, investigated some of the events of this crime. He took possession of the automobile in question on November 9, 1976, and had it towed to West Memphis where he examined it in detail for evidence. He noticed some discoloration in the back seat and on the floor board. He took samples of the fabric from the seat and from the floor mat. These samples were marked for identification and turned over to the state toxicologist for laboratory analysis.

Berwin Monroe, Chief Criminologist for the State of Arkansas, testified he analyzed the samples received from Bounds and found traces of human blood in the exhibits, which he identified at the trial.

Doug Stephens, an investigator for the Arkansas State Police, aided in the investigation of this matter. He visited the scene of the crime and obtained pictures of the body and of the surrounding territory before the body was moved. He also drew diagrams or sketches of the area which he admitted were not to scale. His investigation commmenced on October 16, 1976. He described the scene to the jury and exhibited the pictures which were introduced into evidence. He further described the nature of the wounds on the body of the victim.

Sheriff Meek assisted in the investigation and his testimony was essentially the same as that of Doug Stephens.

Rodney Carlton, then State Medical Examiner, performed an autopsy. He found bruises and scratches about the face of the victim. He also described the stab wounds to the chest and the wound to the throat of the victim. It was his feeling the wounds to the chest initiated the victim's death. He further stated the throat wound revealed the trachea, carotid arteries and jugular vein were damaged. He also found the victim's blood alcohol content was 0.19 percent by weight.

I.

THE EVIDENCE IS LEGALLY INSUFFICIENT TO

SUSTAIN THE CONVICTION SINCE TUMBLESON WAS AN ACCOMPLICE AND HIS TESTIMONY WAS NOT CORROBORATED BY OTHER EVIDENCE TENDING TO CONNECT BLY WITH THE COMMISSION OF THE CRIME.

Tumbleson described every detail of the event, including the crime scene and the flight. There is no doubt his testimony alone would support the conviction of the appellant were it not for the rule that a conviction cannot stand upon the uncorroborated testimony of an accomplice. Ark. Stat. Ann. § 43-2116 (Repl. 1977). We must examine the record to see if such corroboration existed in this case. The corroborating evidence must tend to connect the accused with the crime and must be independent of the evidence given by the accomplice. *Froman* v. *State,* 232 Ark. 697, 339 S.W. 2d 601 (1960); *Burnett* v. *State,* 262 Ark. 235, 556 S.W. 2d 653 (1977), cert. denied 435 U.S. 944 (1978). Corroborating evidence may be circumstantial so long as it is substantial. *Olles* v. *State,* 260 Ark. 571, 542 S.W. 2d 755 (1976). A test on the sufficiency of corroborating testimony of an accomplice is if the accomplice's testimony were eliminated from the case, would the other testimony establish the commission of the offense and the connection of the accused therewith. *Froman,* supra. The independent evidence itself need not be of such substantial character as to support a conviction without the testimony of the accomplice. *Shipp* v. *State,* 241 Ark. 120, 406 S.W. 2d 361 (1966); *Gardner* v. *State,* 263 Ark. 739, 569 S.W. 2d 74 (1978), cert. denied 440 U.S. 911 (1979).

Several witnesses saw the appellant, Tumbleson and Burns drive away in a 1964 Chevrolet about 9:30 p.m. on the date of the murder. Other witnesses saw appellant and Tumbleson return to the same area in a white Chevrolet about 11:00 p.m. on the same day. The victim was not with them when they returned. Witnesses also saw the appellant, Tumbleson and Jennifer drive away from Clarksville shortly thereafter. Mr Shirrod testified he purchased the car in Memphis on October 15, 1976. Jennifer Tumbleson had ownership papers to the vehicle and executed a bill of sale. This evidence was introduced at the trial. We have held the

flight by an accused is a circumstance to be considered in determining his guilt. *Murphy* v. *State,* 255 Ark. 90, 498 S.W. 2d 884 (1973); *Centeno* v. *State,* 260 Ark. 17, 537 S.W. 2d 368 (1976). The evidence of human blood on the samples taken from the vehicle several days later tend to have some probative value, especially in view of the testimony clearly showing the vehicle had not been tampered with. When the above testimony and evidence is considered we think it tends to substantially connect the appellant with the commission of the offense. *Jones* v. *State,* 254 Ark. 769, 496 S.W. 2d 423 (1973); *Olles,* supra. In this case where the murder weapon had been disposed of in the Mississippi River and there were no direct witnesses to the murder, other than the accomplice and the accused, who refused to testify, there is no way to prove the guilt of the accused other than by circumstantial evidence. We hold circumstantial evidence introduced in this case is substantial and tends to connect the appellant with the offense.

II.

THE DOCTRINE OF COLLATERAL ESTOPPEL PREVENTS THE STATE OF ARKANSAS FROM TRYING BLY FOR FIRST DEGREE MURDER BECAUSE THE JURY AT THE FIRST TRIAL AND A SPECIAL FINDING FOUND SPECIFICALLY THAT BLY DID NOT KILL BURNS.

Appellant urges collateral estoppel should be applied in this case. He contends the finding of the jury, during the mitigation stage of the first trial, that Burns was killed by someone other than the appellant, brings this doctrine into force thereby causing appellant to be immune from prosecution for first degree murder. This argument is based upon the premise that first degree murder was necessarily included in the trial for capital felony murder. Ark. Stat. Ann. §§ 41-106 and 107 (Repl. 1977) relate to this doctrine. § 41-106 relates to prosecution for the same offense, and § 41-107 relates to former prosecution for a different offense. We have the prosecution for a different offense under consideration here. Ark. Stat. Ann. § 41-107 reads:

A former prosecution is an affirmative defense to a

subsequent prosecution for a different offense under the following circumstances.

(1) The former prosecution resulted in an acquittal or in a conviction as set out in section 106 (§ 41-106) and the subsequent prosecution is for:

(a) any offense of which the defendant could have been convicted in the first prosecution; or

(b) an offense based on the same conduct, unless:

(i) 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; or

(ii) the second offense was not consummated when the former trial began.

(2) The former prosecution was terminated by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact which must be established for conviction of the second offense.

(3) The former prosecution was terminated under the circumstances described in section 106 (§ 41-106) and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been terminated.

Obviously, the first trial did not result in an acquittal. The charge included the present charge but was not an acquittal of the first degree murder charge by reason of being convicted of capital felony murder. There was not a necessary determination of the appellant's guilt on first degree murder in the finding of his guilt in capital murder. In setting the first conviction aside the appellant is back where he

started. He is presumed innocent of first degree murder when the trial commences just as he was presumed innocent of capital felony murder when his first trial started. Capital felony murder requires the death to have been the result of actions taken during the commission or attempt to commit a felony. First degree murder may be committed in the same manner; however, first degree murder may also be committed only by premeditation and deliberation for the purpose of killing the victim. There is no requirement that first degree murder be the result of actions pertaining to a felony. Ark. Stat. Ann. § 41-1502 (1) (b) (Repl. 1977). The defense of collateral estoppel is not warranted under the facts or the law in this case. In making this determination, we hold that the finding of the jury on mitigation of circumstances has no bearing on the issue of guilt or innocence of the appellant.

III.

THE OFFER BY THE STATE OF ARKANSAS OF THE TRANSCRIPT OF APPELLANT BLY'S TESTIMONY IN THE FIRST TRIAL, AND THE ENSUING DISCUSSION BEFORE THE BENCH AMOUNTS TO A COMMENT ON THE APPELLANT'S FAILURE TO TESTIFY.

The record shows appellant's motion to exclude his former testimony in the prior trial was granted. Also, the record shows it was out of the hearing of the jury. Without need of citation we state unequivocally this was not prejudicial to the appellant.

IV.

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO REHEAR A PORTION OF TESTIMONY WITHOUT FIRST DETERMINING WHAT SUCH TESTIMONY WAS.

After deliberating for some time the jury returned and requested to hear parts of Marty Tumbleson's testimony again. Prior to allowing the jury to hear this testimony, the court inquired of the attorneys whether there were any ob-

jections. The entire jury was in the room at this time. Neither the state nor the defense objected to it being heard again by the jury. In fact, both specifically stated they did not object. Obviously, appellant waived any objection he may have had to this procedure. We do not hear matters on appeal for the first time. The issue must be raised at the trial level. *Hughes* v. *State,* 264 Ark. 723, 574 S.W. 2d 888 (1978).

V.

THE TRIAL COURT ERRED IN ADMITTING A PORTION OF BLOODSTAINED SEAT COVER IN EVIDENCE WITHOUT PRELIMINARY PROOF TENDING TO SHOW THE CONDITION OF THE SEAT COVER AT THE TIME OF THE CRIME, OR IMMEDIATELY THEREAFTER.

We discuss the facts under Point I as they relate to the description of the stained seat cover which was introduced into evidence. It seems the testimony of the witnesses clearly showed the vehicle was in essentially the same condition as it was when the appellant departed possession of it. Appellant objected to the introduction of the bloodstained fabric because the state failed to show the stain was on it when the appellant last had control of it. Whether the evidence was relevant was the determining factor. Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979), Rule 401, 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.

Rule 402 makes all relevant evidence admissible. We think this evidence was relevant as having a tendency to corroborate the testimony of Tumbleson. We have previously allowed bloodstained clothing to be introduced. *Atkinson* v. *State,* 223 Ark. 538, 267 S.W. 2d 304 (1954). The trial judge did not abuse his discretion in this matter. *Gardner* v. *State,* supra.

VI.

THE TRIAL COURT ERRED IN LIFTING THE SEQUESTRATION OF THE JURY OVER APPELLANT'S OBJECTION.

The jury was sequestered the first night of the trial. Several jurors indicated a second night of sequestration would cause some hardship to them. Also, the sheriff informed the court it would be virtually impossible to find adequate quarters for them at that time of day. The trial court instructed the jury that under no circumstances were they to discuss the matter with each other nor were they to listen to news accounts or read the newspapers. They were allowed to return to their respective homes the second night. The following morning, when they returned, the court again questioned them as to whether they had violated his previous instructions. He went so far as to inquire of each individual juror as to whether he had abided by the admonition. Under the circumstances, we do not feel it was prejudicial error to fail to sequester the jury on the second night, especially in view of the extent to which the court went to protect the integrity of the jury. This is a matter that is within the sound discretion of the trial court and such determination will not be deemed improper unless there is a showing of abuse of this discretion. *Hutcherson* v. *State,* 262 Ark. 535, 558 S.W. 2d 156 (1977).

VII.

THE TRIAL COURT ERRED IN PERMITTING TESTIMONY BY INVESTIGATOR STEPHENS CONCERNING THE ALLEGED CRIME SCENE.

We can see no prejudicial error whatsoever in the trial court allowing Doug Stephens to give a description of the murder scene. It is also helpful to the jury to have an explanation of the area in order to better understand the testimony as it is given. Stephens' testimony was the first given and apparently intended to give the jury an over-all understanding of the geographical territory which would be discussed during the trial. The drawings which Mr. Stephens intro-

duced were admittedly not drawn to scale. However, there is no indication that anything about either drawing was prejudicial to the appellant. Several witnesses later referred to the drawings during their testimony. Obviously, this was of assistance to the witnesses in offering their testimony and probably aided the jury in understanding what the witness was saying. We view the matter to be governed by our decision in *Pinson* v. *State,* 210 Ark. 56, 194 S.W. 2d 190 (1946); *Howell* v. *Baskins,* 213 Ark. 665, 212 S.W. 2d 353 (1948).

VIII.

THE STATE FAILED TO PROVE BLY WAS AN HABITUAL OFFENDER UNDER ARK. STAT. ANN. § 41-1002.

One of two prior convictions introduced by the state indicated appellant had received only a 6-month sentence. Appellant objected to this conviction being introduced because it was not shown on the document the offense was a felony. The court made a determination that the challenged conviction was in fact a felony before permitting it to be presented to the jury. The court relied upon a computer printout to determine the offense was a felony. Subsequent examination of the Oregon statute revealed it was in fact a felony. Therefore, the court took a chance in relying upon the printout and it turned out to be correct. We see no prejudice to appellant in this case.

We have examined the record of this trial for potential errors which have not been briefed by the appellant. We do not find any prejudicial errors which were not treated by the appellant in his brief.

Affirmed.

MAYS and HICKMAN, JJ., dissent.

DARRELL HICKMAN, Justice, dissenting. I would reverse and dismiss the judgment for lack of corroborating evidence.

The majority recites our decisions on corroboration of

an accomplice and then proceeds to disregard them.

The testimony of an accomplice is suspect — usually the accomplice has made a deal to save his own hide in return for testimony against another suspect. The General Assembly has wisely enacted a law that prevents a defendant from being convicted on such testimony alone. Ark. Stat. Ann. § 43-2116 (Repl. 1977).

Our previous cases have strictly enforced this statute. For example, we have held that the accomplice's testimony must be totally eliminated and what remains examined. The question is, will the remaining evidence establish the commission of the offense and tend to connect the accused with the crime. *Froman & Sanders* v. *State,* 232 Ark. 697, 339 S.W. 2d 601 (1960).

In *Green* v. *State,* 265 Ark. 179, 577 S.W. 2d 596 (1979), we held that presence alone at the scene of the crime was not sufficient to corroborate the testimony of an accomplice.

In *Dunn & Whisenhunt* v. *State,* 256 Ark. 508, 508 S.W. 2d 555 (1974), there was evidence that the defendants had been seen riding around with the other alleged accomplice to a robbery shortly before the crime. Moreover, in *Dunn & Whisenhunt,* a witness even corroborated the accomplice's story that the defendants attempted to establish an alibi by cashing a check at a tavern. We held all this was not enough. Here the majority, relying entirely on the testimony of the accomplice Tumbleson, recites the facts in detail. But totally disregarding Tumbleson's testimony, what can we find to connect Bly to the crime of murder in the first degree? He was seen about 9:30 that night in a car with Tumbleson and the victim. Later that night he and Tumbleson were seen alone in a car together. The majority says there is evidence of flight. What flight? The evidence is that the defendant's girlfriend sold a car in Memphis and that Bly was there and took the money. That is not flight. *Smith* v. *State,* 218 Ark. 725, 238 S.W. 2d 649 (1951). That is somebody selling a car in Memphis, Tennessee.

It is argued that blood drops were found in the back seat. So what?

It really should not make any difference if Bly was present at the scene of a crime which occurred several miles from where Bly was observed in a vehicle.

While the testimony of the accomplice may seem believable and be detailed, it alone carries no weight. We require additional facts. There are simply not enough in this case.

Where is the evidence that tends to show that Bly killed Ed Burns?

The defendant is presumed innocent until proven guilty; the evidence in this case is just as consistent with Bly's innocence as with his guilt. He was simply seen in a vehicle with the deceased and Tumbleson before the crime and in a vehicle with Tumbleson after the crime. He was not placed at the scene. There is no evidence whatsoever that Bly killed or participated in the killing of Burns.

This is the second trial. At the first trial Bly testified; so did his girlfriend and his mother-in-law. There was evidence of flight in that case, and based on that record we found that there was sufficient evidence to support a conviction of some sort of homicide. That evidence was not present at this trial and we cannot consider it.

The majority has created a precedent which flies in the face of all of our decisions regarding the testimony of an accomplice.

MAYS, J., joins in this dissent.

Albert Ted SCOTT Jr. *v.* STATE of Arkansas

CR 79-133 593 S.W. 2d 27

Opinion delivered January 28, 1980
(In Banc)

Robert A. Newcomb, for appellant.

Steve Clark, Atty. Gen., by: *Julie W. McDonald,* Deputy Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. The trial court denied appellant's petition for relief pursuant to Rule 37. Petitioner had alleged ineffective assistance of counsel and failure to knowingly, voluntarily, and intelligently enter a guilty plea. For his appeal from the adverse ruling on his petition the appellant urges the court erred in finding he knowingly, voluntarily, and intelligently entered a guilty plea and that the trial court failed to make statutorily required written findings of act and conclusions of law. We disagree with appellant on both arguments.

Appellant had entered a guilty plea and charges of theft of property and aggravated robbery. He was sentenced to 35 years on the robbery charge and 15 years on theft. The sentences were to be served concurrently. About two months after sentencing appellant filed his Rule 37 petition. The trial court conducted a hearing on the Rule 37 petition on October 3, 1978, and overruled the petition in an order dated October 12, 1978. The appellant was represented by the public defender at the Rule 37 hearing. At the request of the court, the order, including the findings of fact and conclusions of law, was prepared by the prosecuting attorney. Appellant was granted a belated appeal from this ruling on June 18, 1979.

Appellant and an accomplice were accused of using threats of physical force while taking property, having a value in excess of $100, from Thomas and Katherine Ladd on September 19, 1977. The accomplice pleaded guilty and was prepared to testify on behalf of the state at the appellant's trial which was set for April 25, 1978. Appellant's employed attorney, James Massie, was present and announced ready for trial on the date scheduled. Massie had worked out a plea bargain with the prosecutor and told appellant he did not feel they could beat the charges. Appellant was also charged as a habitual offender because he had at least three prior felony convictions. The retained counsel explained the minimum and maximum sentence the appellant could receive. He also explained the charges and the possibility of conviction but left the decision to appellant as to whether he wanted to plead or go to the jury. After a conversation with his girlfriend, or wife, the appellant in-

formed his attorney he desired to plead guilty. His attorney informed him that the prosecution had found fingerprints at the scene which indicated the appellant was there. The court asked the appellant if he wanted to plead guilty or have a jury trial. Appellant informed the court he wanted to plead guilty. Before accepting the plea, the court explained the penalty on the aggravated robbery was 50 years to life and the penalty on theft of property was 10 to 20 years. The following questions and answers are set out verbatim:

> The Court: Is anybody forcing you to do this?
>
> Defendant Scott: No, sir.
>
> The Court: You're doing it of your own free will?
>
> Defendant Scott: Yes, sir.
>
> * * *
>
> The Court: ". . . may be sentenced to an extended term of imprisonment, as follows: Not less than 50 nor more than life." So, apparently, it makes the minimum 50.

The court then examined the habitual offender act and explained it carried a penalty of 10 to 50 years or life. The court again inquired of the defendant if he wanted to plead guilty, and he replied, "Yes, sir." The court then stated: "You're sure you want to do that? If you want to back out and have a jury trial, I have a jury in there ready to try you." The defendant then stated he did not actually commit the robbery. Thereupon the court admonished the appellant not to plead guilty if he were not guilty. Then for at least the third time appellant stated he wanted to enter a guilty plea. The court proceeded to sentence him to 35 years on aggravated robbery and 15 years on theft with the sentences to run concurrently.

After the Rule 37 hearing the court instructed the prosecuting attorney to draw up the order denying the petition. Appellant alleges this is in violation of Rule 37.3 (c) which requires the court to make written findings of fact and conclusions of law.

The evidence clearly shows the appellant knowingly, intelligently, and voluntarily entered a plea of guilty. The record of the Rule 37 hearing clearly reveals appellant stated at least three separate times that he wanted to enter a guilty plea. He admits the court and his attorney advised him of the possible penalty. Further, he knew his fingerprints were found at the scene and that the accomplice would testify against him. In view of this record and the evidence, it appears his attorney advised him well.

We stated in *Byler* v. *State,* 257 Ark. 15, 513 S.W. 2d 801 (1974), that a trial court must determine whether a guilty plea was intelligently and voluntarily made and that a silent record would not satisfy such requirement. That is still the law and we reaffirm it now. Although we were dealing with what was then called Rule 1, we have the same criteria for the present Rule 37. The record is not silent here; it is replete with testimony clearly showing the appellant was informed of the possible penalty, the right to a jury trial, and the probable evidence against him. At least three times he repeated his desire to plead guilty. We think the court met the requirements of *Boykin* v. *Alabama,* 395 U.S. 238 (1969), as well as requirements of Rule 24 and our prior decisions.

The second point argued by appellant is the court failed to make written findings of fact and conclusions of law because the prosecuting attorney drafted the order at the request of the court. This is such a common practice it gives us no concern whatever. When the court approved and signed the instrument he adopted it as his own. It makes no difference who drafted the order so long as the court approved it. We hold this was in compliance with requirements of the law.

Affirmed.

MAYS, J., not participating.

Alma KOLLMEYER, Circuit Clerk and Ex-Officio Recorder of Washington County, Arkansas; and Washington County, Arkansas *v.* Richard B. GREER

79-290 593 S.W. 2d 29

Opinion delivered January 28, 1980

Kim M. Smith, Prosecuting Attorney, by: *Andrew J. Ziser,* Deputy Pros. Atty., for appellants.

Charles W. Atkinson, for appellee.

JOHN F. STROUD, Justice. This is a suit by a taxpayer seeking to void ordinances of the Washington County Quorum Court levying an additional local recording fee on deeds and other instruments. The Chancellor granted Plaintiff's Motion for Summary Judgment, declared the ordinances void and ordered a refund of the fees collected.

On January 1, 1977, Amendment 55 to the Arkansas Constitution became effective, granting to the counties greater legislative authority in local affairs. In what it thought to be a valid exercise of this new legislative authority, the Washington County Quorum Court, on November 17, 1978, adopted Ordinance No. 78-31, establishing a county fee of $1.00 per page for the filing and recording of all real estate deeds, mortgages, deeds of trust, release deeds, plats, survey plats, materialmen's liens and certificates of assessment. The Ordinance provided that this fee was in addition to all other fees provided by law. Some two months later, the Quorum Court adopted Ordinance No. 79-10, amending No.

78-31 to raise the county fee to $2.00 per page for such filing and recording.

Richard Greer, appellee herein, brought suit on March 1, 1979, seeking to have the ordinances establishing the fees declared unconstitutional, the county enjoined from collecting the fees, and an order directing the county to refund those fees already collected. The case was submitted to the Washington County Chancery Court on a Motion for Summary Judgment, as the facts of the case were not in dispute; only the interpretation of particular Arkansas Statutes was at issue. On May 23, 1979, the trial court declared the fee ordinances void and ordered a refund of the monies collected after awarding 10% of such sum to the attorney for appellee. The defendants, Alma Kollmeyer, et al, have brought this appeal, and contend that the trial court erred in its interpretation of the law.

In determining the validity of Washington County Ordinances No. 78-31 and No. 79-10, one must resolve Amendment 55 and its enabling act, Act 742 of 1977, with Act 333 of 1977 (digested in part of Ark. Stat. Ann. § 12-1720). The provisions of Act 742 most relevant to this action are codified as Ark. Stat. Ann. §§ 17-3701 - 17-4014 (Supp. 1979). Amendment 55, § 1(a), states:

> A county acting through its Quorum Court may exercise local legislative authority not denied by the Constitution or by law.

Appellants cite Ark. Stat. Ann. § 17-3801(k) (Supp. 1979), which sets out some of these powers that are available to local governments:

> . . . impose a special assessment reasonably related to the cost of any special service or special benefit provided by county government or impose a fee for the provisions of a service; . . .

Appellants also cite Ark. Stat. Ann. § 17-3802(2) (Supp. 1979) as supportive of their position, wherein the legislature provided that:

> A county government, acting through the Quorum Court, may provide through Ordinance for the establishment of any service or performance of any function not expressly prohibited by the Arkansas Constitution or by law.

There are at least two other Arkansas statutes relevant to this appeal. Ark. Stat. Ann. § 17-3802(1) (Supp. 1979) sets out those necessary services which counties must provide for its citizens, and the relevant part of that statute provides:

> (d) . . . court and public records management, as provided by law, including registration, recording, and custody of public records; . . .

The statute that is dispositive of the issues in this appeal is Ark. Stat. Ann. § 12-1720 (Repl. 1979), which provides.

> The uniform fees to be charged by the recorders in the various counties in this State shall be as follows:
>
> > (a) For recording deeds, deeds of trust, mortgages, release deeds, power of attorney, and other recordable instruments, except as hereinafter prescribed, $3.00 for one page (one side only) and $1.00 for each additional page.

Ark. Stat. Ann. § 12-1720 is controlling in this case, for it sets out the amount that should be charged for such recording services, and provides further that these fees should be "uniform" throughout the state. Washington County Ordinances No. 78-31 and No. 79-10 exceed the authority granted to the counties by Amendment 55 and Ark. Stat. Ann. § 17-3801, et seq, in that they are contrary to and inconsistent with Arkansas law, in this case Ark. Stat. Ann. § 12-1720.

The statutes and Constitutional amendment cited by appellants state that the counties may engage in a broad range of activities so long as they are not expressly prohibited or denied — and it is appellants' contention that nowhere is the charging of an additional fee for recording

services expressly prohibited. Ark. Stat. Ann. § 17-3808(a) provides:

> A county government exercising local legislative authority is prohibited the exercise of any power in any manner inconsistent with State law . . .

The ordinances adopted in this case were inconsistent and in conflict with Ark. Stat. Ann. § 12-1720 and are, therefore, void.

It is appellants' contention that "uniform" in Ark. Stat. Ann. § 12-1720 refers to the method of computation of the fee rather than the amount charged. They base this argument on the fact that the previous statutes allowed recording fees to be computed either on a per word or per page basis for the recording of deeds, mortgages and similar instruments. We disagree with appellants' interpretation of the usage of the word "uniform" and feel that the first sentence of the statute, "The uniform fees to be charged by the recorders . . ." indicates the intent of the legislature to establish a standard *amount* of recording fee. This is further emphasized by the emergency clause of the statute declaring an emergency:

> . . . because of the confusion and uncertainty existing in the various counties throughout the state under the present laws relative to the legal fees entitled to be charged by the circuit and chancery clerks and recorders in this state for the services they render . . .

Furthermore, Webster's Third New International Dictionary, p. 2498 (1961), defines "uniform" as:

> marked by lack of variation, diversity, change in form, manner, worth or degree: showing a single form, degree, or character in all occurrences or manifestations.

Act 333 of 1977 (digested in part as Ark. Stat. Ann. § 12-1720) effectively precludes the counties from charging any different fee for such recording services, for to do so would violate existing Arkansas law. This situation is comparable to the federal doctrine of pre-emption that is utilized in reconciling federal law with any state law that seeks to regulate the same subject matter. As noted by the United

States Supreme Court in *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947), one must inquire if "the federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Further, in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158, 98 S.Ct. 988, 55 L. Ed. 2d 179 (1978), the Court stated:

> Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute.

In *Confederated Tribes of Colville* v. *State of Washington,* 446 F. Supp. 1339, 1358 (E.D. Wash. 1978), the U.S. District Court stated, "It is well established that when Congress passes legislation in implementation of one of its enumerated powers, it may be so pervasive as to preclude any state regulation in the same field."

The General Assembly should be clear when it intends to pre-empt a field that otherwise could be validly regulated by county ordinance, but we feel the language of Act 333 of 1977 (digested in part as Ark. Stat. Ann. § 12-1720) does contain such clarity. Considering all of the arguments and law relevant to the issue, including the alternative argument of appellants that Act 742 of 1977 takes precedence over Act 333 of 1977 due to its subsequent adoption, we find the decision of the trial court correct and it is affirmed.

Attorneys for appellee are awarded an additional $1,000 as an attorneys' fee, to be paid from the monies collected pursuant to Ordinances No. 78-31 and No. 79-10 prior to the refunds. Appellee's prayer for additional attorneys' fees for preparing the supplemental transcript and supplemental abstract is granted in the amount of $250, and appellee's prayer for additional costs for the preparation of the supplemental transcript is also granted in the amount of $20. However, appellee's prayer for additional costs for the printing of the supplemental abstract is denied for failure to strictly comply with the provisions of Supreme Court Rule 9 (e) (1) requiring a statement from the printer indicating the additional printing cost.

Charles O. FINNIE *v.* STATE of Arkansas

CR 79-42 593 S.W. 2d 32

Opinion delivered January 28, 1980

James E. Davis, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

JOHN F. STROUD, Justice. A jury convicted Charles Finnie of second degree murder in the Circuit Court of Miller County and sentenced him to twenty years imprisonment. Appellant contends the refusal of certain character testimony was reversible error and that he was denied effective assistance of counsel because of the association of his attorney and the special prosecutor.

Appellant Charles Finnie was charged with first degree murder in the shooting death of Earl Tatum on May 7, 1977. Claiming self-defense, appellant entered a plea of not guilty, was tried before a jury and found guilty of the lesser included offense of second degree murder on September 13, 1977. Appellant failed to file a timely appeal, but later sought Rule 37 post-conviction relief and moved for a new trial, both of which were denied. On June 11, 1979, this Court granted appellant's motion for belated appeal.

Appellant alleges for reversal that the trial court's ruling prohibiting the witness Kress W. Nowlin from testifying as to the peaceful and law-abiding nature of appellant denied him his rights under the Sixth and Fourteenth Amendments to the United States Constitution. The Uniform Rules of Evidence adopted in Arkansas provide for the use of character evidence in certain cases. Rule 404 provides in part:

> (a) Character Evidence Generally. 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) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same . . .
>
> (Uniform Rules of Evidence, Rule 404, Ark. Stat. Ann. § 28-1001 [Repl. 1979])

As noted earlier, appellant was charged with first degree murder, to which he pled not guilty and claimed self-defense. Thus, the traits of being peaceful and law-abiding were pertinent to both the crime with which he was charged and the

defense upon which he relied. Therefore, this character evidence was admissible in the trial below. Rule 405(a) of the Uniform Rules of Evidence sets out two of the methods by which character may be proven:

> (a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

In the instant case, appellant properly sought to introduce evidence of his reputation for being a peaceful and law-abiding citizen. He called the witness Kress W. Nowlin to testify as to that reputation. After Mr. Nowlin had told the Court that he knew the reputation of the appellant in the community for being peaceful and law-abiding, the following exchange took place:

> By Mr. Gunter [the prosecutor]:
> Your Honor, I would like at this time to take the witness on voir dire.
>
> By the Court:
> All right.
>
> VOIR DIRE EXAMINATION
>
> By Mr. Gunter:
> Q. Mr. Nowlin, you are about to give some testimony, or you came here for the purpose of giving some testimony in response to the question just asked?
>
> A. That's right.
>
> Q. I just want to ask you if you came here prepared to testify about what you know, or are you coming over here to testify about what other people have said?
>
> A. What I know.

By Mr. Gunter:

> The witness is not qualified for reputation and character testimony, and I move it not be allowed.

After defense counsel once again on redirect examination attempted to show the witness to be qualified to give character testimony as to reputation, the prosecutor's objection and motion that the witness be prevented from giving such testimony was sustained by the trial court.

It is apparent from the record that both Mr. Nowlin and the trial court were confused by the question put to the witness by the prosecutor. Defense counsel had correctly established Mr. Nowlin's qualifications for giving the testimony sought, but the "When did you stop beating your wife?" type question asked by the prosecutor created a ball of confusion that was never unraveled.

The United States Supreme Court has recognized the value of character testimony to a defendant in those cases in which a particular trait of character is involved in the crime with which he is charged — as in the present case where the defendant, charged with murder, sought to put on evidence as to his peaceful and law-abiding nature. The Court has noted:

> He [defendant] may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt . . . (*Michelson* v. *United States,* 335 U.S. 469, 476, 69 S.Ct. 213, 93 L. Ed. 168 [1948]; *Edgington* v. *United States,* 164 U.S. 361, 17 S. Ct. 72, 41 L. Ed. 467 [1896]).

We cannot say that the exclusion of the character evidence offered by appellant was harmless error; error is presumed prejudicial unless we can say with confidence it is not. *Buckeye Cellulose Corp.* v. *Vandament,* 256 Ark. 434, 508 S.W. 2d 49 (1974); *Allen* v. *Ark. State Hwy. Comm'n.* 247 Ark. 857, 448 S.W. 2d 27 (1969).

Since this appeal has been decided on the grounds that appellant was wrongfully prohibited from putting on testimony as to his reputation for being peaceful and law-abiding, it is unnecessary to rule on appellant's other contention — that the officing arrangements between defense counsel and the special prosecutor were so interconnected as to deprive appellant of effective assistance of counsel and a fair trial. As the appellant is presently represented by the Public Defender, this possible conflict should not occur on retrial. We do, however, take this opportunity to note that we do not condone representation of adverse interests, especially in criminal cases, by attorneys whose law practices are substantially connected. The interests of justice, and public confidence therein, require attorneys to take every reasonable step to protect the rights of their clients, and to avoid even the appearance of a conflict of interests in their representation.

Reversed and remanded.

J. L. WILSON FARMS, INC. et al
v. Johnny WALLACE et al

CA 79-135 590 S.W. 2d 42

Opinion delivered October 31, 1979
Rehearing denied December 5, 1979
Released for publication December 5, 1979

Macom, Moorhead & Green, by: *William M. Moorhead,* for appellants.

Charles A. Walls, Jr., for appellees.

ERNIE E. WRIGHT, Chief Judge. This appeal to the Arkansas Supreme Court was assigned to the Court of Appeals pursuant to Rule 29(3).

Appellees, Johnny Wallace and Chester McGee, filed action for damages against Appellants, J. L. Wilson Farms, Inc., Humphrey Flying Service, Inc. and Ned Brown, for damages to their respective 1974 cotton crops, allegedly caused by aerial spraying of a hormone type herbicide, 2-4-D, on the Wilson rice fields in the vicinity of appellees' cotton crops.

From a jury verdict and a judgment awarding damages in the aggregate amount of $36,717.20 in favor of Wallace and $980.35 in favor of McGee, appellants bring this appeal and allege three points for reversal which are hereafter separately discussed.

I.

Appellants contend the court erred in refusing appellants' motion to exclude from the jury the fact that the pilot of the plane, Ned Brown, who made the aerial application of the Herbicide to the Wilson rice fields in the vicinity of appellees' crops was not licensed to do so. Appellants contend the evidence had slight relevance, if any, and great prejudicial effect.

The court overruled appellants' motion to exclude testimony showing the Appellant, Ned Brown, was not licensed by the Arkansas Plant Board to make applications of the hormone herbicide by aircraft.

Act 152 of 1951 declared 2-4-D and any herbicide which the Plant Board, after investigation and public hearing, determines to be injurious to vegetation other than vegetation it was intended to affect, to be a public nuisance and prohibited the sale or use except in accordance with regulations as might be made by the State Plant Board. The regulation of the Plant Board issued pursuant to the Act was received in

evidence as joint exhibit #3. The regulation determines 2-4-D in certain conditions to be highly injurious to vegetation other than vegetation it is intended to affect, and it requires any commercial aerial applicator to first obtain authorization from the State Plant Board. It provides for the screening of such pilots based on their past history in the application or supervision of application of such herbicides. Appellees were permitted to prove the pilot, Appellant Ned Brown, had not complied with the regulation by obtaining the required Plant Board authorization. Evidence was also presented showing the aircraft belonging to the Appellant, Humphrey Flying Service, Inc., had not been inspected by the Plant Board to determine whether the spraying equipment of the plane met the requirements of the Plant Board regulation. Certificates are issued by the Board for aircraft and equipment approved for spray applications. The regulation details maintenance requirements incident to the spraying system and the requirement of notification to the Plant Board in writing of the name and address of the owner or owners of susceptible crops treated by the aircraft and the date of the treatment. The regulation further provides that unannounced spot check of equipment and application methods and jobs in progress will be made by the Plant Board; and that only pilots holding valid authorization from the Plant Board may apply hormone-type herbicides.

The regulation is extensive and detailed. The obvious intent is to prevent damage to others in the vicinity when a herbicide of this type is applied by aerial spraying. There was evidence aerial application of this herbicide results in floating of the substance for substantial distances with resultant damage to broad leaf crops. Injury to crops in the vicinity is partially dependent on weather conditions.

Neither J. L. Wilson, Inc., the owner of the rice fields being sprayed, the pilot who did the spraying, Ned Brown, nor Humphrey Flying Service, Inc., the owner of the aircraft involved, notified the Plant Board of the spraying. The plane and equipment were not approved by the Plant Board and the pilot, Mr. Brown, was not authorized to make aerial applications of the herbicide. Although Mr. Brown testified he was familiar with the requirements of the Plant Board and

that his plane and equipment were up to the standards required by the regulation, he was one of the defendants in the action and the court properly admitted evidence showing the appellants had not complied with the regulations of the State Plant Board calculated to safeguard the interests of others in the vicinity of the spraying. The appellees were not bound by the testimony of the Defendant Brown and the evidence of failure to comply with the Plant Board regulation was properly admitted for the jury's consideration along with all other evidence. We hold the regulation was a proper consideration for the jury in determining the issue of negligence. *Dunn* v. *Brimer,* 259 Ark. 855, 537 S.W. 2d 164.

II.

Appellants contend there is no substantial evidence from which the jury could find that the herbicide, applied in a water base by aircraft, to a rice field over a mile from appellees' nearest cotton fields was an inherently dangerous product as defined by the court. The court told the jury that an "inherently dangerous product" is one, use of which for the intended purpose necessarily involves a risk of serious harm to the property of others regardless of the degree of care which is used in its preparation and use.

Nine of the jurors answered "yes" to the interrogatory submitted to them on the inherently dangerous product theory of the case.

There was substantial testimony in the record tending to show the application of this herbicide by air necessarily involves a risk of serious harm to broad leaf crops of others regardless of the degree of care which is exercised in its use, and the evidence was sufficient to support the jury finding that the product is inherently dangerous when used under the circumstances in evidence. *Chapman Chemical Company* v. *Taylor et al,* 215 Ark. 630, 222 S.W. 2d 820.

III.

Appellants contend that it was only because appellees were permitted to use incompetent evidence that any material damage was shown.

The evidence of which appellants complain relates to the introduction by appellees of yields of cotton per acre for prior years on the lands for which crop damage is claimed for 1974, the averaging of yields of prior years, and showing the difference between the prior three and four years average yield and the 1974 yield. The difference was categorically stated as the crop loss for 1974. It is contended the evidence of injury to the 1974 cotton crop by comparison with prior years average yields was too speculative to submit the issue to the jury. This evidence was introduced by appellees without objection by appellants. However, appellants moved for a directed verdict at the close of the appellees' case and also at the close of the appellants' case, contending the evidence of production on the same fields for prior years had no validity bearing on the amount of yield loss for the year 1974 because, it was contended that there are great variations in year to year yields. Also, appellants contended there was considerable cold and wet weather in the summer of 1974 that reduced the yield. Appellants contend any damage to the crop in 1974 should have been shown by a comparison of yields for that year in undamaged cotton fields in the same vicinity with similar soil and farming methods.

However, evidence was offered on behalf of the Appellee, Mc Gee, of the reduced production on his thirteen acres of cotton as compared to his nearby undamaged cotton field.

Appellants contend the evidence was too speculative and conjectural to submit the issue of damages to the jury because of lack of substantial proof of damages, and that there was no proof of costs that would have been incurred incident to harvesting and marketing of the lost portion of the cotton crop, had it not been damaged.

We conclude from the evidence that the yield from cotton grown on the same lands in the area here involved is affected so much by weather conditions and other variables that the use of an average yield per acre for the preceding three or four years is not a reliable guide to the yield that would have been reasonably expected in the year 1974, absent injury from the herbicide. However, the testimony of Appellee Mc Gee whose cotton lands were near the Wallace

cotton fields and three-fourths mile from the Appellee Wilson rice fields reflected a per acre loss in yield of his cotton as compared to his nearby undamaged cotton in 1974 in the amount of 161 pounds per acre. We find this evidence to be the only substantial and reliable evidence upon which to predicate judgments in favor of appellees. Any judgment in excess of the amount warranted by this evidence would necessarily depend upon speculation and conjecture. It is to be noted the testimony of Appellee McGee and appellants' witness, Bobby Frizzell, showed they sustained a large reduction in yield in their 1974 undamaged cotton fields, on lands similar to the Wallace and McGee cotton lands, a fact which further demonstrates the speculative nature of attempting to determine crop injury by use of production figures for prior years.

Computing the loss of the Appellee Wallace for the 299.1 acres of cotton at a reduced yield, reasonably attributable to the spraying, of 161 pounds of cotton per acre would result in an aggregate yield loss in 1974 in the amount of 48,155.1 pounds. The evidence shows the cotton brought thirty-nine cents per pound and this would amount to a loss of $18,780.49. The seed on this amount of cotton at $20.00 per bale, as shown by the testimony, would have yielded an additional $1,926.20, giving a gross loss damage to the Wallace cotton in the amount of $20,706.69. This would be reduced by a payment in the amount of $289.21 Appellee Wallace received as a disaster payment from the ASCS Office for that year, leaving a net damage in the amount of $20,417.38 as the maximum net damage to Appellee Wallace supported by substantial evidence. It is true this makes no allowance for any reduction of damages by costs that might have been incurred in the harvesting and marketing of the portion of the crop lost by reason of damages. However, the evidence reflects Wallace and McGee each had his own cotton picker and the testimony was there would have been no extra cost. It may well be that any extra cost would have been negligible since the machinery had to be operated over the lands to gather the reduced yield available for harvesting. The jury was properly instructed and we find no prejudice under this contention, *Moore* v. *Lawson,* 210 Ark. 553, 196 S.W. 2d 908 (1946).

The evidence of reduced yield on the 13 acres of herbicide damaged cotton belonging to Appellee McGee showed a reduction in yield as compared with other parts of his cotton crop on similar lands for the year 1974 in the amount of 161 pounds per acre and an aggregate loss of 2,093 pounds of cotton. He received thirty-eight cents per pound for his cotton and this shortage amounted to $795.00. His testimony showed the loss on seed for this amount of lint weight would be from $80.00 to $100.00. Appellee McGee also offered evidence of what his 1974 shortage would run using prior three years' production as a basis for determining loss. Using this method his loss was stated to be $988.00 plus $100.00 for seed loss. We hold the maximum loss to Appellee McGee supported by substantial evidence to be $895.00.

The judgments are reduced to the amounts herein stated in order to strip the judgments of amounts awarded upon speculative evidence calculated to determine the crop loss by using cotton production averages for prior years as a basis. The evidence was patently unreliable for establishing the loss in yield for 1974. The appellate court has authority to reduce the judgments to amounts supported by substantial evidence. *First National Bank of Minneapolis* v. *Malvern,* 171 Ark. 994, 287 S.W. 185 (1926).

We do not suggest the prior years' yields would be incompetent evidence for corroborative purposes. We merely hold that loss in production simply using the average of such yields as a basis for determining crop damage or injury does not constitute substantial evidence to support a verdict to the extent the verdict is supported only by such evidence.

The judgment in favor of Appellee Wallace is modified by reducing the aggregate judgment to $20,417.38; and the judgment in favor of Appellee McGee is modified by reducing same to $985.00.

As modified the judgments are affirmed, and the modified judgments are pro-rated among the three appellants on the same per centum basis as the original judgments.

NEWBERN, J., dissents, and PENIX, J., joins in the dissent.

DAVID NEWBERN, Judge, dissenting. The majority holds that evidence of prior year crop yields is not a sufficient basis to sustain a jury's damages determination. To the extent this court's decisions are precedents, I believe we are setting a bad one, and unnecessarily so.

The standard measure of damages for loss of part of a growing crop is the market value of the crop measured by the expected yield less the cost of maturing, harvesting and marketing the crop. Dobbs, *Remedies,* § 5.2, p. 325 (1973). In this case the majority deems deficient the evidence as to the "expected yield" part of this formula. Without citation of authority, the majority reduces this judgment because it finds evidence of prior year production speculative. But it finds evidence of a crop harvested by one of the plaintiffs in the same year to be a sufficient basis to sustain part of the jury's award.

Evidence of production from prior years was admissible and sufficient to sustain the verdicts and judgment. This case presents a classic example of well-represented plaintiffs stating "categorically" their losses and well-represented defendants presenting evidence that the plaintiffs should not recover as much as they think they should. The jury had before it evidence of the average crop yield of the Wallace operation as well as evidence of the yield of the untainted crops of Mc Gee. Other evidence was presented with respect to weather conditions in 1974. The jury thus had before it a well-developed case on the issue of damages, and we should not disturb their fact determinations.

Early cases showing the acceptability of evidence of average yield per acre, along with other evidence, include *Lester* v. *Highland Boy Gold Min. Co.,* 27 Utah 470, 76 P. 341 (1904), and *Sayers* v. *Mo. Pac. Ry.,* 82 Kan. 123, 107 P. 641 (1910). More recent cases include, *Bryant* v. *McCann,* 297 So. 2d 262 (La. App. 1974), where the court notes how the trial judge itemized the damages to various of the plaintiff's crops caused by the defendant's cattle, and then says:

> In making those calculations, the trial judge determined the average yield which the plaintiff had obtained

> in prior years for the same type of crops, raised in the same place and in the same manner. He then determined the market value of his 1972 crops, computed according to the method set out in the *Trahan* case, supra, [average yield less cost of marketing, harvesting and maturing the crop]. We think the trial judge was conservative in determining the average yield and market value of most of those crops.
>
> We find no error in the method used by the trial judge in determining the loss sustained by the plaintiff. [297 So. 2d at 267.]

The Mississippi Supreme Court recently dealt with a 1974 cotton crop loss under circumstances remarkably similar to those of the case before us. In *Mid-Continent Aircraft Corp.* v. *Whitehead,* 357 So. 2d 122 (Miss. 1978), the plaintiff attempted to rely on federal government "projected yield" figures to show his crop injury. The court said it was error for the trial court to consider those figures, but then it very clearly relied on the average yields for the three years prior to 1974 as its basis for saying:

> The history of actual production tends to negate substantial damage to the 1974 cotton crop traceable to the herbicide, but we conclude there was a case (though skimpy) sufficient to go to the jury. [357 So. 2d at 126]

The court's point was that the average yield of 633 pounds for the year 1971-1973 was not very different from the 1974 yield of 604 pounds.

In the case before us, the evidence showed the 1974 crop to be far below the average displayed to the jury and far below any one of the figures showing annual yield on each property farmed by Wallace. It is true there were variations from year to year in the prior year figures, but they could have been caused by any number of factors, like weather. That does not make those figures "speculative," especially where the jury has before it evidence of other factors, like weather, and the defendants have every opportunity to explain, as they did here, that the plaintiff's crop could have

been affected by factors other than their toxic spray.

Finally, I believe it would be instructive to look at the most recent crop damage case decided by the Arkansas Supreme Court and compare the evidence it approved as sufficient with that presented here. In *Sullivan* v. *Voyles,* 249 Ark. 948, 462 S.W. 2d 454 (1971), the court had before it the testimony of a farmer about loss to his "truck crop" due to the defendant's negligent spraying. He testified about the condition of the crop in the field and gave his opinion what its ultimate yield at the market would be. The court said that was sufficient, citing *Railway Co.* v. *Lyman,* 57 Ark. 512, 222 S.W. 170 (1893).

I cannot escape the conclusion the evidence here was far less speculative than that in the *Sullivan* case, and I believe it was no more speculative than the evidence the majority approves as sufficient to set Mr. Wallace's damages, i.e., evidence of the same year per-acre yield of a different farmer who may have different resources, skills and motives from those of Mr. Wallace.

I believe the evidence properly submitted to the jury in this case was sufficiently substantial to form the basis of its award to Mr. Wallace. Similarly, I do not see any reason to limit the jury to one factor with respect to Mr. McGee's loss. Therefore, I would affirm.

Judge Penix has authorized me to say she joins in this dissent.

ARKANSAS FARM PRODUCTS, INC. *v.* FORD MOTOR CREDIT COMPANY

CA 79-154 590 S.W. 2d 48

Opinion delivered October 31, 1979
Rehearing denied December 5, 1979
Released for publication December 5, 1979

Dennis L. James, of *Southern, Matthews & James,* for appellant.

Griffin Smith and *W. R. Nixon, Jr.,* for appellee.

ERNIE E. WRIGHT, Chief Judge. This appeal to the Arkansas Supreme Court was assigned to the Court of Appeals pursuant to Rule 29(3).

On April 22, 1977 appellant purchased a tractor from Walt Bennett Ford Company in Little Rock for $12,750.00, paying $2,750.00 down and executing a retail installment contract for the balance of the purchase price in the amount of $10,000.00, plus $1.00 for the cost of filing the lien with the Motor Vehicle Division, and including a finance charge of $1,074.76. The aggregate amount of $11,075.76 was scheduled to be paid in twenty-four consecutive monthly installments of $461.49 each on the 5th day of each month beginning June 5, 1977.

The contract required the buyer to maintain insurance against loss or damage to the property to protect the interest of the holder of the contract.

The contract was immediately assigned to the Appellee, Ford Motor Credit Company. Appellant made his monthly payments through March, 1978. At that time he had permitted the insurance on the vehicle to expire and was notified by letter dated March 13, 1978 he must furnish evidence of insurance or pay off the obligation. He failed to provide the insurance and appellee filed a replevin action on April 7, 1978. Appellant filed an answer and later an amended answer contending the contract should be declared void as usurious. The contention was based on the inclusion of the $1.00 lien registration fee in the principal amount of the contract and the allegation that a $50.00 charge was provided to be deducted from interest rebate in the event the buyer should pay the debt before maturity.

At trial it was not disputed that the seller incurred and paid $1.00 to register the lien with the Motor Vehicle Division. Appellant contends the court erred in failing to hold the $1.00 lien registration fee constituted interest in determining the issue of usury.

We hold the seller was permitted to include the $1.00 lien registration fee incurred in the face amount of the contract. In *Lockhart* v. *GMAC,* 252 Ark. 878, 481 S.W. 2d 350 (1972), involving an issue of usury the court said:

> Not every charge made to the borrower which benefits the lender will render a transaction usurious simply because the interest rate is a full 10% particularly if the charge is reasonable, is made in good faith and is reimbursement for a payment to a third person for something appropriate to establishing or protecting of the lender's security. For instance, we have recognized the propriety of such charges as property inspection fees, expense of an abstract of title, title examination fees, insurance premiums paid a third party, recording fees, expense of obtaining a release of a prior lien, and title insurance premiums. (Citing numerous cases.)

In *Brown* v. *Fretz,* 189 Ark. 411, 72 S.W. 2d 765 (1934), the court held a mortgage bearing the highest legal rate of interest was not usurious because the borrower was required

to pay for recording the mortgage and other incidental loan closing expenses.

Appellant contends the court erred in failing to hold the $50.00 acquistion fee mentioned in paragraph (14) of the contract was interest making the contract usurious.

The contract does not impose any unconditional requirements on the buyer to pay all or any part of the $50.00 acquistion fee. Under the terms of the contract the buyer is obligated to pay the debt in twenty-four equal consecutive monthly installments on the 5th day of each month beginning June 5, 1977. The payments are not scheduled to be paid on or before the 5th of each month. Under the contract the buyer is not required to pay any part of the $50.00 acquisition fee unless the buyer elects to pay the contract off before due. Then the $50.00 item or a part thereof determined by a formula based on total number of payments in relation to unpaid installments would be deducted from the unearned interest rebate, and the rebate would be computed under a formula called the "sum of digits method."

At the time of trial the contract had not been paid off so no part of the $50.00 item had been paid by appellant. In the suit appellant indicated his prior desire to pay the contract off, but contended he would have been required to pay all or part of the $50.00 item and that this made the contract usurious.

The appellee's evidence was that if appellant paid the balance of the contract as of the date of trial, January 15, 1978, the portion of the $50.00 acquisition fee that would have been deducted from the interest rebate would have been $1.67 under the rule of 78s, which is the sum of digits method, used to determine the rebate decimal. Appellee's testimony was that the $50.00 acquisition fee is not in the finance charges in the contract and does not affect the transaction in any way, unless the buyer elects to prepay the contract under item (14) of the contract. In this event in computing the interest rebate the buyer is chargeable with a portion of the $50.00 item determined by a decimal expressing the ratio of the number of payments remaining divided by

the number of original payments. The appellee's evidence was that this same practice and rebate calculation is used in all retail installment contracts handled by it in Arkansas.

We hold the provision in the installment contract for the deduction of a $50.00 penalty, or a fractional part thereof determined by multiplying the $50.00 by a decimal determined by dividing the number of unpaid payments by the total number of payments is not usurious. Under this circumstance the penalty charge is not interest, but is a reasonable and permissible charge for permitting the buyer to pay off the contract in advance of the due date. Obviously a lender in setting up its records for a finance or installment contract incurs some expense, and while it may well contemplate absorbing that expense when the contract runs for the full period, it is understandable it would expect the obligor under the contract to pay some penalty for prepayment. Otherwise, the finance company might often be in a position of incurring expense incident to the contract only to have it paid off in full in a matter of days.

In *Eldred* v. *Hart,* 87 Ark. 534, 113 S.W. 213 (1908), the court held that where the instrument evidencing an installment debt is free of usury if paid according to its terms, the transaction is not rendered usurious by the debtor voluntarily paying the debt in full before some of the installments matured, even though as a result the creditor receives a total sum amounting to more than the principal and maximum legal rate of interest.

In the present case the appellant elected not to carry the insurance the contract required him to carry for the protection of the security interest of the holder of the contract. The insurance, in the event of loss, would also inure to the benefit of appellant. Thus, it was the voluntary action of the appellant that brought the penalty clause concerning prepayment into prospective operation when appellee elected to replevy the vehicle upon breach of the insurance clause of the contract. When appellee sought to replevy, appellant raised the issue of usury.

The case does not fall within the ambit of *Arkansas*

Savings & Loan Association v. *Mack Trucks of Arkansas, Inc.*, 263 Ark. 264, 566 S.W. 2d 128 (1978), which held the charging of a fee, service charge, points, a discount or taking interest in advance would be added to the stipulated interest in determining whether usury was involved. The $3,400.00 loan commitment fee in that instance was taken by the lender out of the loan proceeds. No condition such as an election to pay the loan before maturity was involved.

Likewise, the cases of *Sosebee* v. *Boswell,* 242 Ark. 396, 414 S.W. 2d 380 (1967) and *Foster* v. *Universal C.I.T. Credit Corp.*, 231 Ark. 230, 330 S.W. 2d 288 (1959) involved monies exacted by the lender that did not involve a contingency within the control of the debtor.

Affirmed.

PENIX and NEWBERN, JJ., dissent.

MARIAN F. PENIX, Judge, dissenting. Under Rule 29 APPELLATE JURISDICTION OF THE COURT OF APPEALS

1. All cases heretofore appealable to the Supreme Court shall, from and after July 1, 1979, be appealed to the Supreme Court:

a. All cases involving the interpretation or construction of the Constitution of Arkansas; . . .

This case involves an interpretation of Article 19, Section 13 of the Constitution of the State of Arkansas. The Section 13 reads:

> Usury — Legal rate. — All contracts for a greater rate of interest than ten percent per annum shall be void, as to principal and interest, and the General Assembly shall prohibit the same by law; but when no rate of interest is agreed upon, the rate shall be six per centum per annum.

For the foregoing reasons it is my belief the case should be transferred to the Arkansas Supreme Court. Therefore, I respectfully dissent.

DAVID NEWBERN, Judge, dissenting. I agree with Judge Penix's observation that this case falls squarely within Rule 29(1)(a) which deprives us of jurisdiction to determine cases "involving the interpretation or construction of the Constitution of Arkansas."

It is particularly distressing to me that we refuse to certify this case to the Supreme Court in accordance with Rule 29(4)(a) because such an important question is presented and because of the obvious need for the Supreme Court to clarify and define the limits of *Arkansas Savings & Loan Association* v. *Mack Trucks of Arkansas, Inc.,* 263 Ark. 264, 566 S.W. 2d 128 (1978). Although Judge Penix did not find it necessary to say so in her opinion, she has authorized me to say she agrees with my conclusion that the $1.67 penalty or pre-payment fee charged by the appellee is usury when seen in the light of the *Mack Trucks Case*. Thus, with Judge Hays not participating, we reach a three to two decision on the merits of this important case which should not be before us.

Our conclusion that the *Mack Trucks Case* applies is based on the broad but clear statement there that "the moneylender cannot impose upon the borrower charges that in fact constitute the lender's overhead expenses or costs of doing business." 263 Ark. at 267-268. We do not quarrel with the majority position that, unlike *Mack Trucks,* we have before us a charge which is somewhat within the borrower's control, but that addresses only one principle stated in that case and not the one we quote. In this case, an employee of Ford Motor Credit testified the prepayment charge was made to cover the cost to the lender of the money the lender has to borrow in order to extend credit to its customer. Thus, this business risk of a loss to the lender resulting from prepayment is transferred to the borrower. This may be unlike the "commitment fee" dealt with in *Mack Trucks,* but I cannot see how it fails to constitute a part of overhead or the cost of doing business.

Eldred v. *Hart,* 87 Ark. 534, 113 S.W. 213 (1908), was decided seventy years before *Mack Trucks,* and although I can certainly distinguish it and the case before us from *Mack*

Trucks, I cannot do so in any way that reconciles them to its language to my satisfaction. I hope our Supreme Court will undertake the task, and I regret we have not taken our opportunity to reduce speculation whether they will do so.

Claude RICE and Charlotte RICE, his wife,
John C. PARRISH and Leona PARRISH, his wife,
and John ALLEN *v.* Georgea Black McKINLEY

CA 79-130 590 S.W. 2d 305

Opinion delivered October 31, 1979
Released for publication December 5, 1979

Ray H. Bowman and *Malcolm Smith,* for appellants.

Andrew L. Clark, for appellee.

M. STEELE HAYS, Judge. This is an appeal from a decree granting the specific performance of a contract entered into between appellant, Claude Rice, and appellee, on February 6, 1968.

Appellant argues that no contract existed, citing *Myers* v. *Snider,* 226 Ark. 849, 294 S.W. 2d 495 (1956), to the effect that one seeking specific performance must prove the essentials of a valid contract and a readiness to perform the contract.

As to the first part of the argument, it is clear that the letter signed by appellant on February 5, 1968, and by appellee on February 6, 1968, meets all the requirements of a binding, valid contract. The letter plainly imposes mutual obligations on the signees, Claude Rice and Georgia Black McKinley, and the promises of one party is a sufficient consideration for the promises of the other. *Abbott* v. *Arkansas Utilities Company,* 165 F. 2d 339 (1948); *Southern Surety Company* v. *Phillips,* 181 Ark. 14 (1930). Appellant says there was no "meeting of the minds," but the letter is clear and specific in the obligations undertaken by each party, that is: appellant expressly recognized that appellee was the owner of the disputed strip, that he would erect a fence before a given time, that he would fill a certain ditch at the end of the lease period, that the parties would select a surveyor to do necessary surveying and bear the expense equally, that each would convey certain lands to the other following the survey and that appellee would lease to appellant the strip in dispute for five years with right of renewal for an additional five years at $12.50 per acre per year. A "meeting of the minds" is defined simply as an agreement reached

by the parties to a contract and expressed therein, *Hudson* v. *Columbian Transfer Company,* 100 N.W. 402, 37 Mich. 255, or as the equivalent of mutual assent or mutual obligation, *Wetherbee* v. *Gary,* 381 P. 2d 237. Clearly, the letter expresses an agreement and recites a mutual exchange of obligations entirely sufficient to meet the essentials of a contract.

As to the second part of the argument, we find nothing in the record during the entire period under question to support the argument that appellee was not ready and willing to perform. In fact, it appears that the appellee recognized the agreement and was ready to perform those things required of her under its provisions. She accepted the annual lease payments, permitted appellant to farm the lands under the lease, joined in the letter of February 3, 1972, ordered a survey and agreed to pay one-half of the expense, indicated her willingness to go forward with the agreement through Mr. Jenning's contact with Mr. Dover in 1970, wrote to the Parrishes and to appellant, and finally, tendered her deed to the appellant in March of 1974.

Appellant admits the genuineness of his signature, but argues that the letter-contract could not have been signed, as appellee states, on February 5 and 6, 1968, relying on Defendant's Exhibit No. 1, a letter dated February 29, 1968, in which modifications were discussed. It is evident that changes were made after the dates recited in the letter-contract, but appellant appears to have both expressly and impliedly accepted and concurred in those modifications by acting on the contract in numerous ways and having received the benefits of the agreement over several years and cannot now be heard to deny its very existence.

Next, the appellants insist that the suit filed by appellee on January 28, 1976, is barred by the statute of limitations and by laches. Appellee contends that this point was not raised below and cannot now be raised on appeal, citing *Campbell* v. *State,* 265 Ark. 575 and *Garner* v. *Holland,* 265 Ark. 536. But the record shows that an amended answer on behalf of appellants, Claude Rice and Charlotte Rice, was filed on January 19, 1977, pleading the statute of limitations

and laches, so the argument that the issues were not raised properly in the court below is without merit.

Thus, the final, and more difficult, issue presented by this appeal is the question of limitations and laches. In a thorough and well reasoned memorandum opinion, the chancellor held, correctly, that the applicable statutory period of limitations was five years and rejected the appellant's contention that inasmuch as the agreement was dated February 6, 1968, the deadline for filing suit would have been February 6, 1973. The error of appellant's position is that the period of limitations runs from the point at which the cause of action accrues rather than from the date of the agreement. Admittedly, the nature of the agreement here is such that determining when the cause of action accrues is not without difficulty, but we believe the chancellor was correct in holding that the cause of action did not accrue until sometime after January 29, 1971, and therefore, the suit filed on January 28, 1976, was within the five-year period.

When did the appellee's cause of action accrue? The letter contract between the parties provided that a surveyor would be selected by agreement and the cost borne equally, and, using that survey as a basis, the appellant Rice would convey to appellee Parcel "B" and appellee "in turn" would convey Parcel "A" to him. Whether the survey of L. C. Keefe (Plaintiff's Exhibit No. 2) is the survey contemplated by this provision, or the unfinished survey referred to in the Memorandum Opinion of the chancellor is not entirely clear. Appellant argues that the April (1968) survey is the one contemplated and we are inclined to agree, inasmuch as it purports to describe the two tracts (Parcel "A" and "B") and is made for "Claude Rice and the Farelly Lake Company." However that may be, the issue is moot for the reason that the parties voluntarily chose to defer the exchange of deeds until the litigation mentioned in Paragraph 4 of the agreement was completed. This deferment was at the suggestion of appellant's attorney and was sensible in light of the likelihood that the outcome of the litigation would necessitate a correction of the description in the deeds.

What we perceive to have occurred, therefore, is that

the parties *mutually agreed* to defer to an undesignated time in the future the agreed exchange of deeds and allowed the matter to remain in that posture until Mr. Jennings began renewing efforts to bring the matter to a head. Under these circumstances, we find no law, nor do appellants cite any, which holds that the statute of limitations was operating and we agree with the chancellor that there is no just basis on which to apply it.

Appellant insists that the statute of limitations is not tolled by "conversations" and surely that is true. But the point is that this is not a case in which one party to an agreement is in default in an obligation due at a specified time, or has breached a duty on a certain date. In those instances, it is clear that a tolling of the statute of limitations requires more than "conversation." But where, as here, the parties have entered into an agreement which requires a series of mutual acts, some unilateral, some bilateral in character and have left the time of those acts open-ended, and where one contrives to receive the benefits of the agreement, and make lease payments annually thereunder, the cause of action does not accrue until one party has by word or conduct indicated to the other a repudiation of the agreement.

As stated, we find no case presenting precise authority, but the spirit of this point is supported by the general statements of the law and by the dictum in related cases.

In *Federal Land Bank of St. Louis* v. *Miller,* 184 Ark. 415 (1931), the statute of limitations was pleaded in defense of a suit by way of intervention by a mother to cancel a deed given to her son, in consideration of the son's promise to suitably maintain her, alleging that the son had failed to keep his agreement. The son had subsequently given a deed of trust to the appellant bank, and then defaulted in the payments to the bank and in support of the mother. Denying the defense of limitations, the court said:

> The insistence that the intervener is barred by the statute of limitations from the assertion of her claim of maintenance may be disposed of by saying that her son

> and grantee never at any time repudiated the obligation which he assumed in consideration for the execution and delivery of the deed to him. [184 Ark. at 420]

American Jurisprudence, 2d, Volume 51, Limitations of Actions, Section 127, states the rule to be as follows:

> If a right of action depends upon some contingency or a condition precedent, the cause of action does not accrue and the statute of limitations does not begin to run until that contingency occurs or the condition precedent is complied with.
>
> Thus, an agreement to convey an interest in property after partition cannot be enforced until partition, and the statute of limitations does not begin to run against a suit to enforce such agreement until that time. If one promises to pay when able, a cause of action does not arise and therefore the limitation period does not start to run until there exists such an ability to pay. And a like principle applies when payment is to be made out of a particular fund to be created by the act of the debtor.

Finally, there is an element of waiver and estoppel present in the appellant's benefitting under the agreement on the one hand and asserting the defense of limitations on the other. Section 431 of American Jurisprudence, 2d, *supra*, states:

> One cannot justly or equitably lull his adversary into a false sense of security, thereby causing him to subject a rightful claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought.

If it were necessary to fix the time appellee's cause of action occurred, it would, we believe, be the end of the lease period, i.e. December 31, 1972, plus the lapse of a reasonable time thereafter, as it was not until this point in time that the appellant was in breach of any obligation of the agreement (except the exchange of deeds, which was postponed at

appellant's suggestion) as it was not until the end of the lease that appellant was to perform the filling of the ditch. Applying the five year period of limitation to this accrual makes it apparent that appellee's suit on January 28, 1976, was within the statute.

Nor do we agree that the doctrine of laches should work to defeat the appellee's suit to enforce the agreement. Laches is an unreasonable delay by the party seeking relief under such circumstances as to make it unjust or inequitable to the other party to enforce the agreement. The appellant was at least an equal participant in the delay in exchanging deeds and cannot be heard to say that laches should protect him, or that appellee's delay was without cause. *Grimes* v. *Carroll,* 217 Ark. 210, 229 S.W. 2d 668 (1950); *Norfleet* v. *Hampton,* 137 Ark. 600, 209 S.W. 651 (1919); *Gravel* v. *State,* 181 Ark. 216, 26 S.W. 2d 57 (1930).

The decree of the lower court is, therefore, affirmed.

DESOTO, INC. and ALLSTATE INSURANCE COMPANY *v.* Lucille PARSONS

CA 79-55 590 S.W. 2d 51

Opinion delivered October 31, 1979
Rehearing denied December 5, 1979
Released for publication December 5, 1979

Hardin, Jesson & Dawson, for appellants.

Wiggins, Christian & Garner, for appellee.

JAMES H. PILKINTON, Judge. This is a workers' compensation case. By an opinion of the Administrative Law Judge, claimant, Lucille Parsons, was awarded temporary total disability benefits continuing through an undetermined date, it being found that her healing period had not yet ended. From that decision, appellants perfected their appeal to the full Commission, which affirmed. Appeal was then taken to the Sebastian Circuit Court, which affirmed the decision of the Workers' Compensation Commission. From that decision, the appellants have perfected an appeal to the Supreme Court of Arkansas, and the case has been assigned to the Arkansas Court of Appeals under Rule 29(3).

On this appeal appellants post two arguments. One objection is that claimant failed to give timely notice of injury within the provisions of Ark. Stat. Ann. § 81-1317(a). Their other argument is that claimant has failed to establish by any

substantial evidence that she suffered an aggravation of a pre-existing infirmity in her back.

Respondents maintain that claimant at no time gave notice of a back injury during either of her two periods of employment with respondent-employer. The claim itself is for the previously mentioned aggravation occurring in early March, 1978. Testimony given by the claimant indicates that she experienced back pain during her first period of employment (November, 1976, until May, 1977) and that it forced her to leave work. She was re-employed in July, 1977, and the following September again began to experience back pain. She consulted Dr. Ralph Ingram in October, 1977, and was told that she had arthritis. Claimant returned to work and worked until March, 1978, when she quit because of persistent back pain.

Respondents insist that there was never any mention made in March, 1978, of a back injury necessitating her leaving work at that time. And that the period from which claimant had to give notice began running in September, 1977. Claimant filed a claim with the Commission on May 27, 1978.

Among the exceptions to the requirement in Section 81-1317(a) that notice of injury or death be given within sixty days after the date of such injury or death is subsection (c)(2) which provides that such failure of notice may be excused.

> ". . . if the Commission determines that the employer has not been prejudiced by failure to give such notice, . . ."

In its opinion the Commission made the following findings:

> It is our view that claimant comes within this exception. It is clear in the claimant's testimony that she never really associated her back pain with any injury in the sense that the word would likely be comprehended by the lay mind. Claimant felt that she suffered from arthritis and was in fact told this by Dr. Ingram in October, 1977. After a brief absence from work following

this episode and after working for a few more months she again saw Dr. Ingram who referred her to Dr. Peter Irwin, an orthopedic specialist, in March, 1978. His diagnosis was of "degenerative disc disease, L5-S1." Claimant has not worked since March, but upon her quitting work she sought benefits under a union insurance program. Although she received one check, she was notified by her union that her benefits should be discontinued because of a letter they received from Dr. Irwin indicating claimant's disability to be work-related. They suggested that claimant apply for any benefits to which she felt entitled under the compensation policy carried by respondent-carrier. It was at this point that the claimant filed for compensation benefits.

Claimant was not in a position to give notice of injury because she wasn't aware, until notified by her union, that she had a claim cognizable under workers' compensation. Respondents were not prejudiced by this failure of notice — it hasn't deprived them of an opportunity to prepare a defense and to deny the claimant a hearing under these circumstances would be unfair. Claimant neglected to report her disability as work-related only because she never felt it to have been an "injury" as that word is commonly understood.

As there is substantial evidence to support this determination of the Commission, we find no merit in the argument made by appellants that appellee's notice of injury to the employer was not timely filed.

Appellants also argue that the other findings of the Workers' Compensation Commission are not supported by substantial evidence, and must therefore be reversed. We cannot agree. See *Bettendorf & Co.* v. *Kelly,* 229 Ark. 672, 317 S.W. 2d 708, for definition of accidental injury within the meaning of the act. Also *W. Shanhouse & Sons* v. *Sims,* 224 Ark. 86, 272 S.W. 2d 68, as to proof required to establish date of injury.

The Commission was obligated in this case to resolve in claimant's favor any reasonable doubt as to whether the

aggravation of a pre-existing condition grew out of and occurred within the course of her employment. *Brooks* v. *Wage,* 242 Ark. 486, 414 S.W. 2d 100. And on appeal from a decision of the Workers' Compensation Commission, this court must view the testimony in the light most favorable to Commission's findings, and will draw all reasonable inferences in that light. *Purdy* v. *Livingston,* 262 Ark. 575, 559 S.W. 2d 24. If there is any substantial evidence to support the Commission's findings, its decision must be affirmed. *Barksdale Lumber Company* v. *McAnally,* 262 Ark. 379, 557 S.W. 2d 868 (1977), *Meadors Lumber Co.* v. *Wysong,* 262 Ark. 425, 557 S.W. 2d 395 (1977).

Dr. Irwin was questioned concerning a causal relationship between appellee's employment and her condition, as follows:

> Q. Dr. Irwin, as I understand her (claimant's) condition is a congenital type condition?
>
> A. Part of it is sir, yes sir.
>
> Q. What part of it is and what part of it isn't?
>
> A. Well I have to clarify that a little bit. It's not basically a congenital problem so we will call it a developmental problem. . . . She has a developmental problem which is a curvature in her back and they call this an idiopathic scoliosis. . . . Because of the scoliosis, which is a side-ways curvature in her back, there's an awful lot of stress placed at the lower part of the back and because of this, there's a disc place there between the fifth lumbar and first sacral vertebrae begins to wear out, this is where the diagnosis of degenerative disc disease comes from.
>
> Q. You've never made any contention have you Doctor that this was caused by her employment?
>
> A. Not to my knowledge sir.
>
> Q. The only thing you are saying is, that you feel like

the things that she did in her employment aggravated these pre-existing condition of scoliosis and degenerative disc disease?

A. Yes sir.

After a careful review of the evidence and resolving all reasonable doubts in favor of the Commission's findings, we have concluded that there is substantial evidence to support the opinion and award made by the Workers' Compensation Commission.

Affirmed.

PENIX, J., dissents.

MARIAN F. PENIX, Judge, dissenting. While I recognize a decision of the Workers' Compensation Commission has the same effect as a jury verdict, I cannot agree there is substantial evidence to support a finding the claimant suffered a compensable injury on or around March 1, 1978. There is no evidence to support the claimant's contention she ever reported a back injury to her employer, to the plant nurse, or to fellow workers.

There is no basis in the record for the finding the claimant suffered an injury arising out of and in the course of her employment on March 1, 1978. While it is not necessary for a claimant to point with absolute certainty to a *specific time of injury,* the claimant must still point to some injury or incident. The testimony of Dr. Irwin indicates the claimant has a developmental arthritic problem and that her job could have aggravated this condition resulting in her back problems. To make an award for the aggravation of a pre-existing condition, however, there must be a "reasonably clear history" of some injury or occurrence. *Green* v. *Lion Oil Co.,* 215 Ark. 305, 220 S. W. 2d 409 (1949); *Tri-State Construction Co.* v. *Worthen,* 224 Ark. 418, 274 S.W. 2d 352 (1955). More is required than a doctor's opinion, based upon the facts as related to him by the claimant, to show the aggravation of a pre-existing condition. It is necessary to show some incident which precipitates the aggravation.

Furthermore, the claimant never alleged an injury occurred on March 1, 1978. The claim for benefits alleged the injury occurred in September of 1977. The Workers' Compensation Commission had no evidence on which to date the injury as occurring on March 1, 1978.

I find there to be no substantial evidence to support the award. I would reverse and dismiss the claim. Therefore, I respectfully dissent.

Lydianna BOENSCH *v.* Clint CORNETT and Shirley CORNETT, husband and wife

CA 79-134 590 S.W. 2d 55

Opinion delivered October 31, 1979
Rehearing denied December 5, 1979
Released for publication December 5, 1979

Festus H. Martin, for appellant.

Robert L. Whitlock of *Everett & Whitlock,* for appellees.

MARIAN F. PENIX, Judge. This case was appealed to the Arkansas Supreme Court and by that Court assigned to the Arkansas Court of Appeals pursuant to Arkansas Supreme Court Rule 29(3).

On November 1, 1977 Lydianna Boensch entered into an alleged contract with Clint and Shirely Cornett agreeing to sell real property to the Cornetts. Mrs. Boensch, a licensed real estate agent, had listed the property with Schultz and Taylor, Inc., of Fayetteville, for whom she worked. Another licensed agent, Gary Griffin, presented an offer and acceptance dated November 21, 1977, signed by Clint Cornett and Shirley Cornett, to Lydianna Boensch which she signed. The written statement described the property thus:

> The real property and improvements belonging to Mrs. Lydia Boensch containing all the property located south of a country road dividing the total estate, that part being between 85 and 90 acres more or less.

The agreement further provided the Cornetts were to pay $37,500.00 for the property. $10,500 was to be in cash and the balance of $27,000 was to be two equal payments of $13,500, the first payment due and payable exactly (1) one year after closing date and the second payment due exactly one year after the first payment. The Cornetts paid Mrs. Boensch $5,000 of the earnest money and tendered the balance of $5,500 on November 30. Mrs. Boensch refused to accept the $5,500 and also refused to convey title to the Cornetts. The Cornetts brought suit for specific performance. Mrs. Boensch raised the affirmative defense of the Statute of Frauds. Based upon Cornetts' complaint, exhibits, request for admissions of fact served and answered by Mrs. Boensch and the allegation there remained no genuine issue of material fact, the chancellor granted a summary judgment for the Cornetts.

The chancellor ordered Mrs. Boensch to furnish Cornetts with an abstract of title within one week from date of decree. The decree further provided if the abstract was not merchantable the Cornetts were entitled to a return of earnest money, and if it was merchantable Mrs. Boensch must convey the property to the Cornetts upon payment of the remainder of the $5,500 down payment.

Mrs. Boensch appeals alleging the offer and acceptance agreement signed on November 21, 1977 is void under the Statute of Frauds. Mrs. Boensch's reasons for reversing the summary judgment are:

1. There is no key in the description in the offer and acceptance itself from which the property can be located and identified.

2. The court erred in finding a key to the description from pleadings rather than from the contract itself.

3. Partial payment of earnest money and a willingness to continue under the contract are not sufficient partial performance to remove this transaction from the Statute of Frauds.

In order to be enforceable, a contract for the sale of land

must comply with the Statute of Frauds. [Ark. Stat. Ann. § 38-101]. This requires the memorandum to be in writing, to be signed by the party to be charged, and to contain all the essential terms. *Reynolds* v. *Havens,* 252 Ark. 408, 479 S.W. 2d 528 (1972). A description of the land to be conveyed is an essential term. The issue in this case is whether the description contained in the offer and acceptance is adequate. We believe it is.

While extrinsic evidence may not be used to add to or change a deficient description, it may be used to decipher or make intelligible the terms of the contract. We believe the meaning of the description becomes plain and certain when the circumstances surrounding the negotiations and writing are disclosed. The circumstances demonstrate the parties had no doubt as to the piece of land being bought and sold. Extrinsic evidence can be used to clarify the description. *Moore* v. *Exelby,* 170 Ark. 908, 281 S.W. 671 (1926).

If the memorandum furnishes a means by which the realty can be identified, it need not describe the property with the particularity required for deeds. The writing itself provides the key to the description. "The real property and improvements belonging to Mrs. Lydia Boensch" is the phrase which permits extrinsic evidence to be introduced to make intelligible this description. We believe the line of Kentucky cases to be persuasive on this point. In *Burton* v. *Lafavers,* 254 S.W. 2d 730 (1953), the Court of Appeals of Kentucky stated, " . . . the description is regarded as sufficient if it identifies the property when it is read in light of the circumstances of possession or ownership and of the situation of the parties when the negotiations took place and the writing executed." Here extrinsic evidence demonstrates Mrs. Boensch, a licensed real estate agent, owned only one piece of property. This property was divided by the Cove Creek Road in Washington County. The southern part of this property contained approximately 85 acres. The use of the admissions of fact as extrinsic evidence to explain the description was proper.

We believe the memorandum satisfies the Statute of Frauds. Therefore we need not discuss the issue of partial

performance. The granting of specific performance was permissible.

Turning to the cross appeal, we believe the chancellor erred in forcing the Cornetts to elect their remedy prior to trial. Jurisdiction was proper in the Court of Equity. Once jurisdiction attaches, the Clean Up Doctrine permits the Chancery Court to consider all facets of the matter in controversy. *Smith* v. *Dixon,* 238 Ark. 1018, 386 S.W. 2d 244 (1965); *Ashworth* v. *Hankins,* 241 Ark. 629, 408 S.W. 2d 871 (1966). While the Cornetts may not avail themselves of both remedies, the election may be held in abeyance until it can be determined whether specific performance is available. The chancellor is directed to determine if specific performance is possible. If this remedy is no longer available, it must be determined whether damages should be awarded due to the breach of contract.

Affirmed in part; Reversed in part.

Johnny THORNTON *v.* STATE of Arkansas

CA CR 79-20 590 S.W. 2d 57

Opinion delivered October 31, 1979
Released for publication December 5, 1979

Gary R. Gibbs, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* for appellee.

GEORGE HOWARD, JR., Judge. On September 13, 1976, appellant entered a plea of guilty to a charge of Criminal Use of a Prohibited Weapon. He was sentenced to a term of three years to the Department of Correction, which was suspended on condition of his good behavior, and fined $100.00.

On April 5, 1979, the Prosecuting Attorney of Garland County filed a petition for revocation of appellant's suspended sentence. A hearing was conducted on September 16, 1979, resulting in the revocation of appellant's suspended sentence and a sentence to the Department of Correction for one year. The trial court found, as a justification for revoking the sentence, that appellant had possessed a controlled substance, marijuana, and had committed a battery upon the person of Quana Mershell.

Appellant's argument for reversal may be briefly summarized as: Appellant was never processed for probation and, consequently, the court could not revoke that which has never been granted or instituted; the trial court erred in finding that appellant had been provided with a written statement containing the conditions under which his suspended sentence was predicated as required by Ark. Stat. Ann. § 41-1203 (1977 Repl.); and the court erred in finding that appellant had inexcusably failed to comply with the conditions of his suspended sentence.

After reviewing the record, we are persuaded that appellant's contentions are without merit and we affirm the trial court.

The record shows that when appellant received the suspended sentence, the trial judge carefully and clearly advised appellant what was expected in order for him to remain on probation. The court stated, among other things, that appellant must support his dependents and not violate the law in any form or fashion. After this admonition, the court asked appellant whether appellant understood the conditions of his probation. Appellant replied that he did. The court then requested the appellant if there were any questions that appellant wanted answered or matters clarified, and the appellant responded by saying "no."

While the record does not reflect that appellant ever had a conference with the probation officials, or that appellant actually received documents articulating the conditions of his probation, we are persuaded that this omission does not vitiate appellant's suspended sentence and probation which was granted in open court and in the presence of appellant. It must be remembered that only the trial judge has the discretion to suspend the imposition of a sentence and grant probation. Probation officers, on the other hand, supervise and aid probationers and make periodic reports to the court regarding the progress that a probationer is making. Moreover, it is readily understandable why there was, perhaps, no communication between appellant and the probation officials. Appellant, at the time of his trial, was on parole under a sentence in the State of Texas and the Texas authorities were interested in having appellant returned to Texas in connection with a possible parole violation. As a matter of fact, appellant was returned to Texas within a matter of days after his appearance before the trial judge. Under these circumstances, we are unable to see how appellant was prejudiced in any way assuming, without deciding, that appellant was not afforded a written document containing what was expected and required of him under his probation in Arkansas. Indeed, it is clear that there was substantial compliance with the requirement that appellant be advised explicitly with reference to the conditions under which he was being released.

Finally, we are convinced that the trial court's finding that appellant had inexcusably failed to comply with the

conditions of his probation is supported by a preponderance of the evidence.

Quana Mershell testified that while she was visiting in appellant's apartment, appellant gave her marijuana to smoke; and that during the course of the night, the appellant struck her at least ten times with his fist and open hand. Appellant denied that he had marijuana in his possession and further denied that he struck Quana. The trial court, obviously, disbelieved the appellant's version of the incident while accepting the testimony of Quana. The trial court was presented with a fact question and it was the court's responsibility to resolve the conflict and determine the credibility of the witnesses.

Appellant argues that inasmuch as Quana admitted smoking marijuana, she was an accomplice and her testimony is insufficient to support the action of the trial court. We reject this argument. It must be remembered, that a defendant, in a revocation proceeding is not being tried on a criminal charge — in the instant case, possessing marijuana and battery — where the defendant's guilt has to be established beyond a reasonable doubt, but here, only a preponderance of the evidence is necessary to support a finding that a probationer has inexcusably breached a condition associated with his release resulting in a revocation order. Moreover, it must be remembered that when a person is on probation, his liberty is conditional as distinguished from being absolute.

Affirmed.

Lonnie COSSEY *v.* STATE of Arkansas

CA CR 79-56 590 S.W. 2d 60

Opinion delivered October 31, 1979
Released for publication December 5, 1979

Robert E. Irwin, for appellant.

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

DAVID NEWBERN, Judge. The appellant was convicted in Russellville Municipal Court of driving while intoxicated. He appealed and was again convicted after a jury trial de novo in the circuit court, and he was fined $500. It was allegedly his second such offense. The appellant contends his arrest by a Russellville city policeman outside the city limits was illegal. He also contends that evidence based on a gas chromatograph test of his breath should not have formed the basis of an instructed presumption of intoxication because the machine used was not calibrated on the day the test was given. Because we find it necessary to reverse on the

inadequacy of the breath test as a basis for the presumption, we will not need to deal with the arrest question.

The appellant was arrested and tested for bodily substance (breath) alcohol content on May 13, 1978. Although there was some testimony as to his actions and appearance indicating he had been drinking, the appellee rests its argument here on the correctness of the jury instruction of the presumption of intoxication based on the gas chromatograph test. The authority for the presumption is Ark. Stat. Ann. § 75-1031(1) (Supp. 1977), which provides, in part, the following:

> (A) In any criminal prosecution of a person charged with the offense of driving a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the defendant's blood at the time alleged as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance, shall give rise to the following presumptions:
>
> * * *
>
> 3. If there was at that time, 0.10 percent or more by weight of alcohol in the defendant's blood, urine, breath or other bodily substance, it shall be presumed that the defendant was under the influence of intoxicating liquor.
>
> * * *
>
> (c) The chemical analysis referred to in the above paragraphs shall be made by a method approved by the Arkansas State Board of Health. The method approved may be proved by a certificate duly acknowledged by a representative of the State Board of Health and said certificate shall be admissible per se in any criminal prosecution and shall not be subject to any objections on grounds of hearsay. Provided, however, said machine has been duly certified at least once in the last three months and the operator thereof is properly trained and certified. This law shall apply only in misdemeanor cases and not in felony cases.

Ark. Stat. Ann. § 75-1046(b) (Supp. 1977), says that for such an analysis to be valid, it must have been "performed according to methods approved by the State Department of Health or by an individual possessing a valid permit issued by the State Department of Health for this purpose . . ." The statute provides the department may approve measuring methods or techniques and, in part "(c)," may "promulgate rules and regulations necessary to carry out the purposes of [the] act."

Arkansas Department of Health Regulation, AP-340 (Rev. 1971), provides:

> *Breath Testing Instruments.* Instruments designed to test direct breath samples shall be calibrated no less frequently than once each day the instrument is in operation by a Senior Operator or Operator Supervisor, using appropriate solutions of ethyl alcohol, and using methods and techniques for calibration recommended by the manufacturer of the calibration device as approved by the Department.

In this case, the evidence was that the machine was calibrated on May 10 and May 15, 1978, but not on May 13, 1978, the day the appellant was tested.

Of course, the appellee does not argue that because the operator was certified he could disregard the health department regulations dealing with the method of testing for alcohol presence. Although the language of the statute is disjunctive, we find the intent of it to be that even certified operators may not ignore the regulations on operation and maintenance of the chromatograph, if their testimony is to form the basis of a presumption of intoxication.

The appellee argues, however, that there has been "substantial compliance" with the regulations, citing *Munn* v. *State,* 257 Ark. 1057, 521 S.W. 2d 535 (1975). The *Munn Case* concerned a finding by the court that there was no prejudicial effect where a blood sample was not tested within two hours of the alleged offense as required by health department regulation. The sample was taken about 12:40

a.m., and the alleged offense occurred at 9:30 p.m. the previous evening. Testing within this three-hour period was held to have been substantial compliance with the two-hour requirement where the testimony indicated that all other requirements were met and that blood alcohol content decreases as time passes.

We cannot find substantial compliance here, however. All we know is that the instrument was calibrated on May 10 and again on May 15. Although there is some testimony that the calibration procedure revealed, on the 15th, that the instrument was in the same, proper condition it had enjoyed on the 10th, in view of the clear requirement of the regulation, we should not allow speculation as to its condition on May 13. We hold there was no substantial compliance here, and unlike the *Munn Case,* there is no evidence upon which we can conclude this failure to abide by the regulation was not prejudicial to the appellant.

In addition, the appellant vigorously complains there was no testimony given that a measurement of body substance alcohol content "by weight," as required by the statute, was conducted. As the trial judge stated in the record before us, this may raise a serious question of testimony adequate to raise the statutory presumption, but we need not address it in view of the other inadequacy we have found.

We hold the evidence was not sufficient to form the basis of the instructed presumption. The other evidence produced in the case would not have supported a guilty verdict, and because we find the case has been fully developed, we dismiss rather than remand for new trial. *Edens* v. *State,* 235 Ark. 284, 357 S.W. 2d 641 (1962). See also, *Paschal* v. *State,* 245 Ark. 396, 432 S.W. 2d 879 (1968).

Reversed and dismissed.

Vickey DEATHERAGE *v.* Charles L. DANIELS, Director of Labor and L. T. TINER

CA 79-99 590 S.W. 2d 62

October 31, 1979
Released for publication December 5, 1979

Appellant, *pro se.*

Herrn Northcutt, for appellee.

PER CURIAM

The appellant was employed as a legal secretary by the law firm of the appellee, L. T. Tiner. The appellant applied for employment security compensation because of her alleged dismissal from her employment. The appellee, Mr. Tiner, contends she left her employment voluntarily. The

appellant was denied compensation, and an appeals referee found she had voluntarily left her job and was thus ineligible for compensation. Section 5(a) of the Employment Security Act provides an employee who quits work without good cause connected with the work is disqualified. Ark. Stat. Ann. § 81-1106(a) (Supp. 1979). The referee's finding was affirmed by the Board of Review. We must determine whether the record contains substantial evidence to support the conclusion that the appellant left her work voluntarily. *Terry Dairy Products Co., Inc.* v. *Cash,* 224 Ark. 576, 275 S.W. 2d 12 (1955).

The appellant, who was a full-time employee, testified she spoke with her employer, Mr. Tiner, on a Friday afternoon and asked him "how he would feel" about her becoming a part-time, rather than full-time employee. She explained to him that she wanted time to get started in her own insurance business. She testified further that his response was that it would be "fine" with him, but he wanted to check with his associate in the firm, and he would call her Monday. The appellant testified Mr. Tiner did not call her the following Monday, and that she had great difficulty getting in touch with him, but that she finally did so several days later.

Mr. Tiner took the position below, and the Director of Labor takes the position here, that the appellant left her employment voluntarily. At the hearing, Mr. Tiner did not deny telling her he "did not need her" anymore when the appellant spoke with him the week following their Friday afternoon conversation. When asked by the referee why he had told the appellant that, Mr. Tiner replied that the appellant had been out looking for other jobs, that she had used his telephone for personal calls and had on one occasion lied to him about her reason for being absent from work.

Although those statements about the appellant might have contributed to a contention that she was terminated by her employer for cause, that was not the issue below or here. The sole question is whether there is substantial evidence the appellant left her work voluntarily. There is not. The statements made by Mr. Tiner were conducive to a conclusion he terminated this employee. At no point did he state he

had given her a choice between full-time employment and termination. Nothing contradicts her alleged assumption she still had a job, at least on a part-time basis, until Mr. Tiner told her he no longer needed her.

Reversed with directions to the Employment Security Division, Department of Labor, to award unemployment compensation to the appellant to the extent she is entitled to it consistent with this decision.

JUDGE PENIX dissents.

MARIAN F. PENIX, Judge, dissenting. It is not unreasonable for an employer to expect his employee to be available for work the hours and days for which she is hired. In this case Ms. Deatherage indicated she was seeking other employment. Under such circumstances her employer was under no obligation to wait around wondering whether or not he still could rely on Ms. Deatherage. In order to run an efficient law office, an employer must have a reasonable assurance his secretary will be available for work and will not be out looking for other employment. Ms. Deatherage's initiative in seeking other employment is tantamount to her quitting her job voluntarily.

I respectfully dissent.

Mary B. JACKSON *v.* Charles L. DANIELS, Director of Labor, State of Arkansas and DONOVAN'S INN

CA 79-205 590 S.W. 2d 63

October 31, 1979
Released for publication December 5, 1979

Appellant, *pro se*.

Herrn Northcutt, for appellees.

PER CURIAM

The claimant has appealed from a decision of the Board of Review affirming the Appeal Tribunal of the Arkansas Employment Security Division which held that the claimant was ineligible for benefits under Section 5(a) of the Arkansas Security Law until she had thirty days of covered employment. The determination of the Appeal Tribunal was that the claimant voluntarily left her employment without good cause connected with the work.

The claimant had been employed at Dee Dee's Restaurant (now Donavan's Inn) and recently had become manager. In this position she had hired two employees. The restaurant was then acquired, unexpectedly it appears, by Mr. Ivan Rodenz.

On July 6, 1979, the claimant's employment terminated and she filed for unemployment benefits, giving as the reason for separation: "Laid off, lack of work." The response of the employer was that claimant "asked to be the first one laid off."

The claimant testified that, under the impression that the staff was to be reduced, she told Mr. Rodenz that if he needed to lay someone off, she hoped it would be her as she hated to see the two employees laid off whom she had so recently hired.

The employer testified that it was necessary to lay off "quite a few" and in answer to whether he would have retained the claimant had she not made the statement, he answered, "It is hard to say because it would have caused a little friction having them as managers for two days and then being replaced by somebody else, it would have been dif-

ficult for her to really put forth complete effort for me."

On this testimony the Appeal Tribunal determined that claimant had voluntarily left her employment, stating that the Tribunal has consistently held that where a worker notifies his company that he wants to be laid off, he has, in effect, brought about his own separation.

We see an appreciable difference in an employee communicating directly to an employer that he wishes to be laid off and what occurred in this case.

Here the employee simply expressed the preference that if anyone was laid off, she hoped it would be her. This is hardly the same as a direct request to be laid off. Furthermore, in this claim it is admitted that a reduction in staff of at least three employees was necessitated at the decision of the employer. The fact that the claimant preferred to be one of them rather than those she had hired does not alter the underlying fact that her employment ended by reason of work reduction and not, as the Appeal Tribunal stated, for personal reasons.

Reversed with directions to enter the appropriate order awarding unemployment compensation to claimant as she may be eligible.

C. W. SPRATT *v.* STATE of Arkansas

CA CR 79-7 590 S.W. 2d 65

Opinion delivered November 7, 1979
Released for publication November 28, 1979

James W. Haddock of *Holloway & Haddock,* for appellant.

Steve Clark, Atty. Gen., by: *Robert J. DeGostin, Jr.,* Asst. Atty. Gen., for appellee.

ERNIE E. WRIGHT, Chief Judge. This appeal to the Arkansas Supreme Court has been assigned to the Court of Appeals pursuant to Rule 29(3).

Appellant was convicted by a jury in Chicot County Circuit Court of battery in the first degree in violation of Ark. Stat. Ann. § 41-1601, and from the judgment brings this appeal asserting the following point for reversal.

> The trial court erred by reading two separate and distinct charges and informations against the appellant to the entire prospective jury panel and the prosecuting attorney in his voir dire made mention of separate and distinct felony charges pending against the appellant other than the charges of one felony to be tried on March 29, 1979 in the Circuit Court of Chicot County, Arkansas.

In addition to the charge of first degree battery, appellant was subsequently charged in a separate information with the offense of terroristic threatening against the same individual involved in the battery charge.

At a pre-trial hearing on February 23, 1979 with counsel for the State and appellant present and participating, the court, without objection, set both cases for trial on March 29, 1979 at 1:00 o'clock P.M. The order setting the cases for trial included the docket number of both cases and bore the clerk's notation that copies of the order were mailed to the attorneys on February 23, 1979. The order contained a provision stating, "No change in this setting will be made except on written order of the court obtained not less than five (5) days prior to trial."

On trial date, upon all parties announcing ready for trial, the judge proceeded with preliminary steps to qualify a jury for the joint trial of the two cases pursuant to the prior order setting them for trial at the same hour, and read to the jurors the two charges against appellant. Counsel for appellant then announced he was not aware the charges were to be tried together, and moved to sever and for a mistrial because of both charges being read to the jury. The court granted separate trials, and announced the battery charge would be tried. The judge, out of the presence of the jury, overruled the motion for mistrial.

The prosecuting attorney during voir dire asked a question of a juror to clarify whether the juror was referring to the battery charge or the other charge in stating he had knowledge of the matter. The juror was excused by the judge.

Appellant argues the reading of the two charges by the judge and the reference to the second charge by the prosecuting attorney during voir dire constituted prejudicial error.

The appellant had knowledge as early as February 23, 1979 that the cases were set for joint trial on the same date and hour. He had ample opportunity to request separate trials and did not do so. We conclude under the circumstances here, the appellant invited any error in both charges being read to the jury. After charges had been read, no prejudice resulted in the prosecuting attorney inquiring of the juror on voir dire as to which charge he had knowledge. The juror had not identified the charge as to which he had knowledge. The appellant made no request for an admonishment by the court to the jury to disregard any mention of any second charge. *Randle* v. *State,* 245 Ark. 653, 434 S.W. 2d 294 (1968).

Affirmed.

James M. ELLIS, Jr. *v.* STATE of Arkansas

CA CR 79-66 590 S.W. 2d 309

Opinion delivered November 7, 1979
Rehearing denied December 12, 1979
Released for publication December 12, 1979

Michael Dabney, Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

ERNIE E. WRIGHT, Chief Judge. This appeal to the Ar-

kansas Supreme Court has been assigned to the Court of Appeals pursuant to Rule 29(3).

Appellant was convicted by a jury in the Washington County Circuit Court of aggravated robbery, a class A felony, in violation of Ark. Stat. Ann. § 41-2102, and from the judgment brings this appeal urging three points for reversal, hereinafter separately discussed.

I.

Appellant contends the court erred in refusing to instruct the jury that, "Self-induced intoxication is an affirmative defense to a prosecution if it negates the evidence of a purposeful mental state."

There was evidence showing appellant had been drinking prior to the alleged robbery and that he was drunk at the time of the alleged robbery.

The appellant took the stand and gave detailed testimony as to his actions and places he drove and people he encountered for several hours spanning the period before and after the alleged burglary. However, his testimony as to how he came into possession of money, over a case of oil, several cartons of cigarettes and other items was rather vague. He testified the station attendant just turned the money and various items over to him, and the next morning he realized what had happened and was planning to return the property after work, and was arrested early that morning.

Appellant offered the following instruction and objected to the court's refusal:

> Self-induced intoxication is an affirmative defense to a prosecution if it negates the existence of a purposeful mental state.

The appellant has not set out in his brief the instructions the court gave. Supreme Court Rule 11(f) requires the appellant in all felony cases to abstract such parts of the record as

are material to the points to be argued in his brief. The prior rule requiring the Attorney General to supply an abstract in felony cases no longer obtains. Rule 11(f) provides that when the sentence is death or life imprisonment, the court reviews all errors prejudicial to the appellant, but the objections are to be abstracted. Since appellant has not set out or abstracted in his brief the instructions that were given by the court, the court does not consider the asserted error. A proper consideration of the asserted error requires that the court have before it in the brief the instructions given by the court. Here, the appellant has failed to include in his brief all of Instruction No. 9 and has set out only the one sentence to which he objects. He has set out none of the other instructions given. Under these circumstances the established rule is that on appeal the court assumes the jury was properly instructed.

Since Rule 11(f) now requires the appellant in felony cases in which the punishment is not death or life imprisonment to abstract the material parts of the record, the same rule now applies to such cases as the court has applied in misdemeanor cases in considering assignments of error in the giving or refusing of an instruction. The court does not consider the assigned error absent an abstract of the instructions given, and will assume the jury was properly instructed. *Chapman* v. *State,* 201 Ark. 91, 143 S.W. 2d 575 (1940), *State* v. *Baker,* 209 Ark. 896, 192 S.W. 2d 977 (1946), *Branton* v. *State,* 214 Ark. 861, 218 S.W. 2d 690 (1949).

Ark. Stat. Ann. § 43-2725 (Act 333 of 1971) provides the court on appeal need only review those matters briefed and argued by the appellant except in cases in which the punishment is life sentence or death.

The law on the necessity for setting out in the brief the instructions given in order to obtain review of an asserted error in the giving or refusing of an instruction has long been settled in misdemeanor and civil cases.

In *Greenville Stone & Gravel Co.* v. *Chaney*, 129 Ark. 96, (1917), the court said:

It appears that the court gave thirteen instructions to the

> jury. Error is assigned by counsel for the defendant to the action of the court in giving three of these instructions. None of the instructions given by the court are set out in his abstract except those to which objections are made. The instructions should always be set forth in full, and a failure to do so invokes the presumption that correct instructions were given curing those complained of, if they are curable. (Other cases cited.)

This rule has been followed for many years. *Strickland* v. *Quality Bldg. & Security Co.,* 220 Ark. 708, 249 S.W. 2d 557 (1952).

In *Bank of Ozark* v. *Isaacs et al,* 263 Ark. 113, 563 S.W. 2d 707 (1978), the court explained in detail the necessity for the rule requiring that the brief contain an abstract of all matters from the record necessary for considering an asserted error.

The Arkansas rule has been followed in misdemeanor and civil cases of requiring the instructions to be briefed when error is assigned for the giving or refusing of an instruction, which rule should now be followed in felony criminal cases in view of Ark. Stat. Ann. § 43-2725, is in accord with the rule of the Illinois Supreme Court as announced in *People* v. *Tabet, et al,* 402 Ill. 93, 83 N.E. 2d 329 (1949). In the opinion upholding a felony conviction the court said:

> The abstract does not recite that the instructions as therein enumerated are all of the instructions which were given or tendered on behalf of plaintiffs in error or the People. The supreme court is not called upon to consider an assignment of error based upon the giving or refusing of instructions where the abstract does not show the above information.

The appellant sought review in the United States Supreme Court and certiorari was denied. 336 U.S. 970, 69 S. Ct. 933 (1949).

What we have said is dispositive of the issue raised under Point I; however, we point out the instruction is

substantially the language of Ark. Stat. Ann. § 41-207(1) as it existed prior to Act No. 101 of 1977 which eliminated self-induced intoxication as a statutory defense. While self-induced intoxication appears to remain a common law defense to a crime in which an essential element is that the act be done knowingly or purposefully, the defendant has the burden of establishing the defense by a preponderance of the evidence. The instruction offered contained no provision as to the burden of proof. *Johnson & Keeling* v. *State,* 259 Ark. 773, 536 S.W. 2d 704 (1976). The instruction was also abstract and was not directed specifically to whether the defendant was so intoxicated at the time of the act that he was incapable of acting purposefully.

II.

It is contended the court erred in not granting appellant's motion for directed verdict.

The prosecuting witness testified appellant came to the service station the witness was operating, held something in his hand pointing at him and told him he had a gun, told him he had killed a "guy" in Winslow, and told him to put more than a case of oil and ten cartons of cigarettes in his car and other items and to give him all the money he had, $270.00. The witness testified he was scared, could not tell if appellant had anything in his hand and complied with the demand. The police recovered some of the property and money. The appellant took the stand and gave a detailed account of his actions, places he drove and people he encountered for several hours before and after the alleged robbery. He admitted being at the station allegedly robbed and obtaining possession of the money and other items, but claimed the witness gave the money and property to him. He testified he started drinking about noon before the incident which occurred about 8:00 to 9:00 o'clock that night. There was other evidence that he had been drinking before the incident, and testimony of one witness that sometime after the incident he was "totally drunk". He testified the next morning upon realizing what had happened he planned to take the property and money back after he got off work that day. He was arrested at a cafe early the next morning.

We conclude there was evidence that appellant took the

property and money from the prosecuting witness by threats and representing by word and conduct that he had a gun. There was substantial evidence to support the verdict. *Balentine* v. *State,* 259 Ark. 590, 535 S.W. 2d 221 (1976).

III.

Appellant contends the court erred in refusing to instruct the jury as to the lesser assault instruction offered by the defendant.

The abstract does not set out any instruction appellant here asserts was offered and refused. We, therefore, do not consider the asserted error.

Affirmed.

HAYS, PENIX and NEWBERN, JJ., dissent.

DAVID NEWBERN, Judge, dissenting. I cannot agree with point one in the prevailing (there is no majority) opinion. I believe the trial judge should have instructed the jury on the defense of intoxication. When viewed as a whole, the instructions given actually misled the jury because they mentioned that intoxication is not generally a defense to prosecution for a crime, but failed to say it might be a defense to a crime requiring a specific intent.

The prevailing opinion does not deal so much with the merits of this problem as with the fact that the appellant abstracted only the refused instruction and one of the instructions given by the court. The prevailing opinion takes the position the appellant may not object to the failure to give requested instructions unless all of the instructions given by the court have been abstracted. The basis of this holding seems to be that by amending Rule 11 (f) in 1975 (see 258 Ark. 770-H) to place the responsibility in felony cases on appellants, rather than on the Attorney General, to abstract the record, the Supreme Court intended to invoke all the prior decisions on abstracting the record in civil and misdemeanor cases. The Supreme Court has never held anything like that. Nor has it made any such statement. For us to

do so in this case exalts form over substance to an intolerable degree. Given the authorities cited in the prevailing opinion, it is also completely unnecessary.

Before dealing with the Arkansas authorities cited in the prevailing opinion, it would be well to consider the Illinois case cited, *The People* v. *Tabet,* 402 Ill. 93, 83 N.E. 2d 329 (1949), and the implication left by the prevailing opinion that denial of certiorari by the U.S. Supreme Court in that case somehow amounts to approval of its holding. In that case, the statement is made that the court could not tell from the abstract whether the instructions enumerated were all of the ones tendered to or given by the court. The problem perceived by the Illinois Supreme Court was not the lack of abstracted instructions, but the failure to say that they were all of the ones given *or tendered.*

The prevailing opinion here does not suggest that there is any rule in Arkansas which requires a person appealing a conviction to make such a declaration. Perhaps it would be well to institute a rule requiring an appellant, such as the one in this case, to say the instructions abstracted are all of the ones relevant to the point in issue which were tendered to or given by the court. We have not done so.

At any rate, the real problem in the *Tabet* case was not the failure to abstract instructions. Rather, it was the court could not determine by looking to the abstract or the record or both how or by whom certain instructions had been modified, and it could not tell by whom certain instructions were tendered. Thus, the statement quoted in the prevailing opinion is only dictum and not very persuasive at that.

Of course, denial of certiorari by the U.S. Supreme Court is meaningless in view of the completely discretionary nature of the writ in these circumstances. See, Wright, Miller and Cooper, *Federal Practice and Procedure,* § 3504 (1975). A better indication of the U.S. Supreme Court's attitude on this matter is its own Appellate Rule 30 (a), which deals with appendices to briefs filed there which are comparable to our own abstracts. That section of the rule concludes as follows: "The fact that parts of the record are not included

in the appendix shall not prevent the parties from relying on such parts." *F.R. App. P.* 30(a).

Moving on to the prevailing opinion's citation of Arkansas authorities, the only criminal cases cited on this point in the prevailing opinion are *Chapman* v. *State,* 201 Ark. 91, 143 S.W. 2d 575 (1940); *State* v. *Baker,* 209 Ark. 896, 192 S.W. 2d 977 (1946); and *Branton* v. *State,* 214 Ark. 861, 218 S.W. 2d 690 (1949). In the *Baker* and *Branton* cases, there was no issue with respect to instructions. *Baker* dealt with a failure to abstract testimony and *Branton* with failure to argue points for reversal. In the *Chapman* case, the appellant objected to instructions given by the court but abstracted none of them. These were all misdemeanor convictions appealed long before the 1975 amendment to the rule. They are hardly authority for the assertion that, even in misdemeanor cases, where the appellant argues failure to give an instruction he must abstract all of the instructions given by the court.

On the civil side, the prevailing opinion cites *Strickland* v. *Quality Bldg. & Security Co.,* 220 Ark. 708, 249 S.W. 2d 557 (1972), a case where the appellant argued error in instructions given but abstracted none of the instructions given or refused. It also cites *Bank of Ozark* v. *Isaacs, et al.,* 263 Ark. 113, 563 S.W. 2d 707 (1978), which dealt with failure to abstract pleadings or judgment. *Greenville Stone & Gravel Co.* v. *Cheney,* 129 Ark. 95, 195 S.W. 13 (1917), however, is a case cited which requires an abstract of instructions which were given as a predicate for arguing on appeal that requested instructions were improperly refused. In that case, no supreme court rule was cited. Even if Rule 9 (f) imposes the requirement (and it does not say so) in civil cases, that does not settle the matter for criminal cases.

There is just too much at stake in criminal cases for the system to impose such a rigid requirement. We clearly are not called on to impose it by the literal language of the rule, and yet we seem to be imposing it because of a questionable analogy to civil cases which the prevailing judges have been stimulated to make because of a revision of the applicable rule. Before 1975, an appellant who was convicted of a

felony had no responsibility for abstracting the record. The state was required to do it all. *Hughes & Bridges* v. *State*, 249 Ark. 805, 461 S.W. 2d 940 (1971); *Mosley* v. *State*, 255 Ark. 536, 501 S.W. 2d 225 (1973). It simply does not follow that because the rule has been amended to require an abstract by such an appellant, the requirement is the same as in civil cases. The language of the new Rule 11 (f) is similar to that of Rule 9 (f), but the history of Rule 11 (f) is obviously very different, and even if the abstracting requirement is apposite for civil cases under Rule 9 (f), that does not necessitate that Rule 11 (f) be construed the same way.

It is enough if the appellant furnishes an abstract of the record which is sufficient to permit us to make an informed decision. It would be foolhardy to require an appellant to abstract instructions which are in no way relevant to the area of law as to which he requested an instruction and was refused, especially when the appellee has an opportunity to abstract in its brief any instruction which it feels cured the problem raised by the appellant.

In the case before us, however, there is another reason for not holding the appellant to such a rigid abstracting standard. The appellee included in its brief all of the instructions given at the trial which related to the point in issue. Thus, even if we were to impose the strict rule drafted by the prevailing judges out of whole cloth (or at least out of civil cases cloth), this would be a very poor case in which to do it.

The only item of any substance in the prevailing opinion's treatment of the merits of the instruction which was requested and refused is that it was incomplete because it did not mention the "burden of proof." For that point, the case of *Johnson & Keeling* v. *State*, 259 Ark. 773, 536 S.W. 2d 704 (1976), is cited. That case was one where an accused requested an instruction which contained an assumption that a certain person was an accomplice, and the evidence had raised a question of fact whether he was or was not. The holding was that the instruction requested was erroneous. The case says nothing, and certainly does not reach such a holding, to the effect that a requested instruction dealing with an affirmative defense to a crime must specify that the

defendant has the burden of proof. Had the court decided to give the instruction requested by the appellant here, such an instruction on the burden of proof would have been appropriate, but to say the instruction requested was incomplete without it puts the shoe on the wrong foot. No doubt such an instruction on the burden of proof of an affirmative defense raised by the defendant could have been requested by the state. It might have been appropriate for the court to have worked it in to its other instructions on the general burden of proof in a criminal case. This reference to tailoring instructions brings us to the merits of the requested instruction and the trial court's refusal to give it.

As pointed out in the prevailing opinion, there was plenty of evidence the appellant took the property while "representing by word or conduct" that he was armed. Under those conditions, robbery becomes aggravated robbery. Ark. Stat. Ann. § 41-2102 (1) (a) (Supp. 1979). A part of that offense is, of course, the commission of robbery. According to Ark. Stat. Ann. § 41-2103 (1) (Repl. 1977), "[a] person commits robbery if *with the purpose* of committing theft . . . he . . . threatens to immediately employ physical force upon another." (Emphasis added.) Substantial, competent evidence showed the defendant threatened a service station attendant with immediate bodily harm if he would not turn over money and merchandise to the appellant. The station attendant said the appellant made him believe he had a weapon, and the appellant spoke of being a two time loser and how "another murder" would not matter. Although the strong evidence that the appellant committed these acts was important to the jury, it is not important here, where we can see equally strong evidence he was intoxicated before, during and after the commission of the offense, and the question on appeal is whether he was entitled to the requested instruction.

There is no doubt that aggravated robbery is a "specific intent" crime, and the appellee does not argue it is not. The Arkansas Supreme Court made it clear in *Varnedare* v. *State,* 264 Ark. 596, 573 S.W. 2d 57 (1978), that the burglary statute, Ark. Stat. Ann. § 41-2002 (1) (Repl. 1977), which contains the same "with the purpose" phrase, is one involv-

ing specific intent which is subject to negation by evidence of intoxication. Thus, in this case where there was strong evidence of intoxication, it was clearly and appropriately raised as a defense. It certainly was raised sufficiently to warrant an instruction.

Counsel for the appellant asked the following instruction be given:

> Self-induced intoxication is an affirmative defense to a prosecution if it negates the existence of a purposeful mental state.

The court refused to give the instruction over the objection of the appellant's counsel. The record does not show the reason it was refused.

The following instructions dealing with intent were given:

> Intoxication that is self-induced is no defense to prosecution of a crime:
>
> Intoxication means a disturbance of mental or physical capacities resulting from the introduction of alcohol, drugs or other substances into the body.
>
> Self-induced intoxication means intoxication caused by a substance which the actor knowingly introduces into the body, the tendency of which to cause intoxication he knows or ought to know.
>
> Requirements of culpability: (1) A person does not commit an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act which he is physically capable of performing. (2) A person does not commit an offense unless he acts with a culpable mental state with respect to each element of the offense that requires a culpable mental state. In other words, the State must prove the defendant intended to do what he did and that he actually did each of those, either theory that you might take.

Each of the statements made by the court in the instructions quoted above is correct in the abstract, but a juror looking at them together would reasonably have concluded he or she should allow the strong evidence of intoxication to play no part in the determination of the guilt or innocence of the accused. The abstracts and briefs are ample to show this misstatement of the law.

Some temporary confusion might have resulted from the repeal, in 1977, of Ark. Stat. Ann. § 41-207 (1), which provided:

> Self-induced intoxication is an affirmative defense to a prosecution if it negates the existence of a purposeful or knowing mental state.

However, the Arkansas Supreme Court averted the confusion by quickly pointing out in the *Varnedare* case, *supra,* that the repeal of the statute had the effect of reinstating the common law. At common law, in Arkansas, voluntary intoxication has been a defense to crimes requiring a specific intent. The chain of cases making it so began with *Wood* v. *State,* 34 Ark. 341 (1879). The last of the common law chain of cases citing *Woods* v. *State, supra,* was *Olles and Anderson* v. *State,* 260 Ark. 571, 542 S.W. 2d 755 (1976), where it was held the question of intoxication sufficient to negate the intent to steal should have gone to the jury.

The argument presented by the appellee here in support of its contention the instruction requested by the appellant should not have been given is that it was defective because it referred to the defense as an "affirmative" one. How the use of that term could have been prejudicial to the state is difficult to see. Whether the defense is affirmative or not is hardly crucial where the evidence supports it. Even if we felt obliged to give serious consideration to this criticism of the instruction, however, we find the criticism to be incorrect. In the *Varnedare* case, *supra,* (264 Ark. at p. 599) the Arkansas Supreme Court specifically mentioned that the common law intoxication defense in the *Olles* case, *supra,* "was raised as an affirmative defense."

Although we are not required to look for errors in the rejected instruction which are not argued by the appellee, I have done so, and I find none. Obviously, the instruction is abstract, but certainly no more abstract than the first of the above-quoted instructions given by the court which the appellee argues was a correct statement of the law. The appellant's counsel apparently was trying to word the instruction as carefully as possible to assure it would be given by the court. He was laboring under some handicap due to the revision in the law mentioned above and the resultant lack of an Arkansas model instruction which could have been submitted. See, *AMCI,* p. 285, Comment to § 4005.

Although it might be said that the court would have confused the jury had it instructed that voluntary intoxication is not a defense to prosecution and then said voluntary intoxication is a defense to a crime which requires a mental purpose or specific intent, such an assertion requires one to close one's eyes to the practice and the practical need for the court to explain seeming inconsistencies to the jury. The appellant was entitled to have his theory of the case presented to the jury. He requested an instruction which was not an incorrect statement of the law in any way and and which was supported by substantial evidence. *Lighter* v. *State,* 157 Ark. 261, 247 S.W. 1065 (1923). This rather simple statement does not require further buttressing, but because of the factual similarity and the language used in the opinion, *Johnson* v. *People,* 145 Colo. 314, 358 P. 2d 873 (1961), is cited. There the Colorado Supreme Court reversed a conviction for aggravated robbery because the lower court failed to give an instruction on a defense asserted by the defendant. Evidence was produced tending to show the defendant had withdrawn from a conspiracy to commit the offense sometime before it was committed. The defendant offered an instruction which his counsel asserted covered their theory of the case.

> It was refused by the trial court and no instruction was given which directed the attention of the jury to any particular theory of defense relied on by defendant. . . . While the instruction tendered on behalf of the defendant did not specifically deal with this theory of defense,

> it was nevertheless involved in the tendered instruction. It is apparent from the record that defendant relied on the evidence . . . that he abandoned the plot to commit a burglary. . . .
>
> It is axiomatic that the accused in a criminal case is entitled to an instruction based on his theory of the case. [358 P. 2d at 876]

The burden of this dissent is not to say that a trial court has a duty to instruct on a theory of defense as to which no instruction is requested. Rather, it is to say that he or she has a clear obligation to give correct, requested instructions in a way which will assist the jury in applying the law to the evidence. The court could easily have done so hereby explaining that although intoxication does not excuse criminal conduct, generally, when prosecuted for certain crimes, such as aggravated robbery, an accused may not be convicted unless found to have had a specific intent (here the intent to steal), and that if the accused is found to have been so intoxicated as to have been unable to have formed that intent, he is not guilty of the offense charged. The instruction requested by the appellant was not the only or best way to instruct the jury. However, it was not an incorrect instruction, and it could have been and should have been tailored so that when combined with other correct statements of the law the jury would have been able to do its job and the appellant would not have been deprived of his right to have the jury evaluate his defense.[1]

For the foregoing reasons, I respectfully dissent, and I am authorized to say Judges Hays and Penix join in this dissenting opinion.

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[1]For good discussions of the jury instruction duty of a trial court, see, Note, 1963 *Wash. U. L. Q.* 353 (1963), and Robinson, *A Proposal for Limiting the Duty of the Trial Judge to Instruct the Jury Sua Sponte,* 11 *San Diego L. Rev.* 325 (1974). In the latter article, the author presents a thorough, nationwide study of the requirement that a trial judge instruct the jury even absent instructions requested by the parties. The position he takes is that a court should not be required to instruct *sua sponte,* with certain exceptions. One of the exceptions is that the judge should be required at least to instruct which party has the burden of proof on any issue raised by the evidence in the case and what that burden requires. 11 *San Diego L.R.* at p. 349.

HOME INSURANCE COMPANY *v.*
Bobby Jack SPEARS and Shirley Jean SPEARS et al

CA 79-136 590 S.W. 2d 71

Opinion delivered November 14, 1979
Released for publication December 5, 1979

Davis, Bassett, Cox & Wright, for appellant.

Everett & Whitlock, for appellees.

M. STEELE HAYS, Judge. This is an action in tort arising as the result of personal injuries suffered by the appellees — Bobby Jack Spears, Rex England and Donald Jackson. The injuries occurred when the three, who were area farmers, fell from a bridge belonging to Washington County. Appellees and a number of other farmers had gathered to observe pollution tests which were being conducted on the creek below. In order to observe the tests, the three men were either sitting upon or leaning against the iron railings located on each side of the bridge. The railings collapsed, and the appellees fell into the creek bed below, causing the personal injuries complained of.

The jury returned a verdict for the appellees, but found that they were guilty of contributory negligence to the extent of 25%, and the damages were reduced accordingly. The amount of the judgment for each of the appellees after reduction was as follows:

Bobby Jack Spears — $30,000

Shirley Jeanne Spears (his wife) — $750

Donald Jackson — $30,000

Shirley Jean Jackson (his wife) — $1875

Rex England — $6375

From this judgment, the defendant, Home Insurance Company, appeals, asserting five points for reversal.

The first point raised by the appellants is that the trial court erred in refusing to grant appellant's motion for a directed verdict. Specifically, the appellants allege that the three appellees were mere licensees while on the bridge and therefore, were owed no duty by the county except to avoid harming them by wilful and wanton misconduct. The testimony indicated that the appellees went to the bridge primarily for the purpose of watching the pollution tests being conducted. Hence, the appellant argues that the appellees did not use the bridge for its intended purpose: as a means of transit. The appellant also argues that since the county received no benefit from the appellees being on the bridge, then their status, while there, was inevitably that of licensee.

We cannot agree. All of the cases cited in the appellant's brief, with one exception, are cases which come under the Federal Tort Claims Act. 28 U.S.C.A. § 2674 states that the United States shall be liable, "respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a *private individual* under like circumstances." Hence, in many instances, the Federal courts are applying the economic benefit test, that is, whether the owner of the premises receives some pecuniary gain, either real or potential, by the plaintiff's presence on his land, to determine the status of the plaintiff as either licensee or invitee.

However, an alternative theory in determining the status of the plaintiffs is the "invitation test." In the latter case, a person becomes an invitee when the premises are made open to the public, and he enters pursuant to the purposes for which they are thrown open. There must be some basis for the person believing that the premises have been made safe to receive him. However, when the premises are made open to the public, the assurance will be implied. This second theory is now accepted by a clear majority of the courts. *Bunnell* v. *Waterbury*, 103 Conn. 520, 131 A. 501 (1925); *Dowd* v. *Portsmouth Hospital*, 193 A.2d 788 (N.H. 1963); *Smyke* v. *State*, 117 N.Y.S.

2d 163, 203 Misc. 186; *Guilford* v. *Yale University,* 128 Conn. 449, 23 A. 2d 917 (1942). [See also 65 C.J.S. *Negligence* § 63 (41) and Prosser on *Torts* 4th Ed., pp. 388-390.] Some jurisdictions have gone so far as to reject the distinction between licensee and invitee and apply a simple negligence standard, regardless of the status of the plaintiff. *Rowland* v. *Christian,* 70 Cal. Rptr. 97, 443 P. 2d 561 (1968); *Mile High Fence Company* v. *Radovich,* 175 Colo. 537, 489 P. 2d 308 (1971); *Pridgen* v. *Boston Housing Authority,* 308 N.E. 2d 467 (1968); *Peterson* v. *Balach,* 294 Minn. 161, 199 N.W. 2d 639 (1972).

In the instant case, the property upon which the appellees were injured was a public bridge. Guard rails were placed on either side of the bridge, and the evidence presented at trial indicated that they were improperly installed. Although the appellant argues that the rails were not used for their intended purpose since the appellees were either sitting or leaning upon them, we believe that this question properly addressed itself to the jury. It was for the jury to decide whether, under all the circumstances, there was negligence. We believe that the trial judge properly denied appellant's motion for a directed verdict and submitted the issue to the jury upon a correct instruction of the law.

Appellant's second point for reversal is that the trial court erred in permitting testimony concerning an offer to pay medical expenses and an offer to settle the claims. Evidence was introduced by the appellees, over appellant's objection, of Mr. England's testimony concerning a conversation between the Washington County Judge and Mr. England, in which the county judge told him to bring all of his medical bills and "the insurance company would pay it." Rule 409 of the Uniform Rules of Evidence states:

> Evidence of furnishing, offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

If there were doubt as to the purpose for which this evidence was offered, the record clearly indicates that appellee's purpose was to introduce evidence on the question of liability. The appellee admits that the testimony was "simply to show the issue of liability." (Tr. 583).

Recently, the Arkansas Supreme Court has had the opportunity to interpret this rule in *Ferguson* v. *Graddy*, 263 Ark. 413, 565 S.W. 2d 600 (1978). In that case, Justice Fogleman, speaking for the majority, stated that the intent of the rule is that it is in the best interest of the society "that humanitarian and benevolent instincts need not be hobbled by the hazard that assistance to an injured person be taken as admission of liability in a personal injury action."

Under the rule as stated, this evidence should not have been received over appellant's objection and its prejudicial impact on the issue of liability must be assumed.

The appellants also allege that the trial court erred in refusing to give the jury a modified version of AMI 612, dealing with the assumption of the risk. We do not agree. Upon instructing the jury as to the defense of assumption of the risk, there must be some evidence upon which the jury can find that the plaintiffs had knowledge and appreciation of danger which they allegedly assume. *Mercury Mining Company* v. *Chambers*, 193 Ark. 771, 102 S.W. 2d 543 (1937). In this case, there was no such evidence. There was no evidence to show that plaintiffs knew the guard rails were defective and might break if leaned upon. We hold that the jury was given proper instructions on contributory negligence and that there was no evidence upon which an assumption of the risk instruction would be justified.

Finally, appellant would have us reverse on two further arguments: that the court erred in permitting an economist to testify as the amounts a farm worker might have been expected to earn projected over the work expectancy of the plaintiffs, and that it was error to instruct the jury as to that part of AMI 2206 which relates to the recovery of past and future earnings or profits. We deem it unnecessary to discuss the second point for the reason that the case must be retried and the propriety of AMI 2206 will depend upon the evidence presented at the second trial rather than in the record before us. As to the other part of the argument, no error by the trial judge occurred in refusing to strike the testimony of Dr. Phillip Taylor. Dr. Taylor simply testified as to the approximate gross earnings farm laborers of the ages of the

respective plaintiffs could expect to earn at current wage levels over the remainder of their productive years. The evidence had a reasonable relevancy to the issue of damages and cannot be said to be immaterial even though the plaintiffs operated their own farm units and therefore their earnings would be affected by market considerations, weather conditions, their own efficiency, et cetera. The plaintiffs also contributed their own labor in the farming operation, and the jury was entitled to hear evidence dealing with the value of farm labor. At least as early as 1895, Arkansas has recognized the loss of earning capacity as a proper matter of inquiry in personal injury cases. *Railway Company* v. *Dobbins*, 60 Ark. 481 (1895). See also *Arkansas Power & Light* v. *Tolliver*, 181 Ark. 790 (1930).

Corpis Juris Secundum, *Damages*, Sec. 87(b), p. 958, states:

> The measure of damages for the diminution of one's capacity to earn money, or for loss of future earnings, involves numerous considerations as a broad general rule. All evidence tending to show the character of plaintiff's ordinary pursuits and the extent to which the injury was prevented, or will prevent him from following such pursuits is admissible.

Evidence which may be of help to a jury in weighing the issue of damages should be admitted even though it fails to provide a mathematical valuation of the impairment. *Leave* v. *Boston Elevated Railway Company*, 28 N.E. 2d 483 (Mass. 1940). Further, the admissibility of this evidence was within the sound discretion of the trial judge, and that discretion was not misused. *Little Rock Gas & Fuel Company* v. *Coppedge*, 116 Ark. 334 (1914); *Arkansas Power & Light Company* v. *Johnson*, 260 Ark. 237, 538 S.W. 2nd 541 (1976).

The judgment is reversed and remanded.

Lou Ella THOMPSON, widow of William THOMPSON, deceased *v.* SELLERS & SONS CONSTRUCTION COMPANY

CA 79-66 589 S.W. 2d 596

Opinion delivered November 7, 1979
Released for publication November 28, 1979

Huey & Vittitow, for appellant.

Shackleford, Shackleford & Phillips, P.A., for appellees.

JAMES H. PILKINTON, Judge. This is an appeal by Lou Ella Thompson from a decision of the Arkansas Workers' Compensation Commission denying her claim for benefits as the widow of William Thompson, a deceased employee.

The question before us on appeal is not whether there is substantial evidence in the record to sustain Mrs. Thompson's claim; the issue is whether there is substantial evidence to sustain the Commission's findings in favor of the employer. *Tigue* v. *Caddo Minerals Co.*, 253 Ark. 1140, 491 S.W. 2d 574 (1973). *Arkansas Foundry Co.* v. *Cody*, 251 Ark. 57, 470 S.W. 2d 812 (1971). In arriving at an answer to this question we must give the evidence its strongest probative force in favor of the Commission's findings. *Tigue* v. *Caddo Minerals Co.*, supra. *Bentley* v. *Henderson*, 251 Ark. 203, 471 S.W. 2d 548 (1971).

William Thompson, age 58, was employed by Sellers & Sons Construction Company as a carpenter. He was working on a project at the Georgia-Pacific plant in Fordyce, Arkansas. The week preceding his death he had worked forty-eight hours, three eight hour days and two twelve hour days. The day of his death was a Wednesday, November 30, 1977. He had not worked the preceding four days. On the day he died Mr. Thompson commenced work at 7:00 a.m., setting forms in a drainage ditch, and was engaged at that task until about 10:00 a.m., when the superintendent directed Mr. Thompson to go inside to do other work.

While inside a building the decedent worked cutting holes in the ceiling. Mr. Thompson went to the plant lunchroom at noon and, at that time, the superintendent decided to halt the work for the rest of the day because of rain. The decedent then went with the superintendent to a tool shed. He got into the cab of a truck belonging to Georgia-Pacific, with other workers, to drive to where their automobiles were parked. After driving a short distance, Mr. Thompson commenced to gasp and fell across the passengers, apparently dead. He was pronounced dead on arrival at a local hospital by Dr. Jack Dobson.

A claim was filed before the Arkansas Workers' Compensation Commission by appellant, as widow of the decedent. Appellee denied that Mr. Thompson sustained an accidental injury arising out of and in the course of his employment which caused his death. A hearing was held before an Administrative Law Judge, at which time the deposition

of Dr. Jack Dobson was introduced into evidence, and the medical reports of Dr. Wayne Elliott, the pathologist who performed the post-mortem examination, were also introduced into evidence.

The Administrative Law Judge entered an order finding that the decedent did not sustain a compensable heart attack. The claim was denied and dismissed. On appeal to the full Commission, the Workers' Compensation Commission also denied and dismissed the claim finding that Mr. Thompson did not sustain a compensation injury.

The opinion of the two doctors appears in the record. Dr. Jack Dobson, a general practitioner at Fordyce, Arkansas, examined the body, but he had never seen Mr. Thompson during his lifetime. Dr. Dobson suggested an autopsy which was performed by Dr. Elliott, a pathologist at El Dorado, Arkansas. The autopsy report indicated that Mr. Thompson had suffered a heart attack some 14 years earlier. Dr. Elliott expressed an opinion that decedent died of his ischemic coronary disease, either as a result of arrhythmia or an infarction of sufficient severity to preclude historic changes prior to death. Dr. Dobson stated that he did not have an opinion as to whether the decedent died from arrhythmia or from an infarction. He could not answer the question as to whether arrhythmia relates to work effort. He said "I can't answer that question because I'm just not aware of the relation between work and stress and the induction of arrhythmia." When asked whether the work or labor performed that day would cause or contribute to the death if the decedent did in fact die from a myocardial infarction, Dr. Dobson replied that "any infarction in a person with 80% occlusion of the coronary arteries could be induced by labor." However, he went on to say: "I think it could have, the amount of work he did that day. Again, I don't know whether it did."

We have two doctors with slightly differing opinions regarding causal connection of the heart attack with the job in this case. Dr. Elliott says that there was nothing in his findings to indicate any causal connection to the work. Dr. Dobson states that it could be, but he simply does not know.

Dr. Dobson was reluctant to even admit a possibility of causal connection.

In denying the claim the Commission found that the medical evidence in this case does not establish that the work Mr. Thompson was doing on November 20, 1977, was a sole or a contributing cause of the fatal heart attack he suffered on that day. Therefore the claimant has not met the burden of proof required. After a careful review of the record, we are unable to say that there is no substantial evidence to support the Commission's findings.

The decision of the Commission is affirmed.

Otha Lee CONLEY *v.* STATE of Arkansas

CA CR 79-45 590 S.W. 2d 66

Opinion delivered November 7, 1979
Petition for Review denied December 3, 1979
Released for publication December 5, 1979

Robert A. Newcomb, for appellant and cross-appellee.

Steve Clark, Atty. Gen., by: *Catherine Anderson*, Asst. Atty. Gen., and *John Wesley Hall, Jr.*, for appellee and cross-appellant.

JAMES H. PILKINTON, Judge. Appellant was charged with burglary and rape in violation of Ark. Stat. Ann. § 41-2002 and 41-1803 respectively. He was found guilty by a jury on both charges. Punishment was fixed at three years imprisonment for burglary and twenty years for rape. The sentences were directed to be consecutive. Appellant brings this appeal from the judgment and sentence imposed by the Pulaski County Circuit Court.

I.

Appellant made a statement to police after his arrest. A pretrial hearing was held and the trial court granted appellant's motion to suppress the statement on the grounds that (1) the state failed to have present at the hearing all of the witnesses who were present at the time the statement was made, and (2) that the appellant had requested his attorney be present at the time of the statement, and his attorney was not there. In accordance with the trial court's ruling, the prosecution was not permitted to introduce the statement as a part of its evidence in chief. Later during the trial when the defendant took the stand to testify in his own defense, and denied making the statement to police, another in-chambers hearing was conducted. The trial court then held that the state would be allowed to introduce evidence of the statement in question for the limited purpose of impeaching the credibility of the appellant. This was done, and appellant made no objection. However, appellant now urges that the trial court erred in failing to give a specific jury instruction as to the limited purpose for which the statement could be considered.

The record reflects that discussions concerning the nature and content of the jury instructions occurred at several intervals during the trial. The first such discussion took place after the state had rested, and before the defense had begun to put on its case. At that time, all of the instructions which had been submitted by both sides were reviewed, and the trial court told the attorneys which ones would be given. The only instruction with regard to credibility of witnesses which had been submitted at that time was adopted by the judge as Court's Instruction No. 5, which was the usual one on credibility of the witnesses, and of the weight that should be given to their testimony. Both sides approved this instruction. Later at the in-chambers hearing held during the presentation of the defense's case when the judge decided to allow the state to use the appellant's prior statement for the purpose of attacking his credibility, the following discussion occurred:

> MR. ACHOR: That's right. He says he didn't tell the policeman that. He says he told the policeman the same thing he told here. Now, you have already ruled that it's inadmissible as an involuntary statement.
>
> THE COURT: As to the merits of the statement but not as to his credibility.
>
> MR. ACHOR: I think with this we will need another instruction. We might as well get it straight right now.— that this was not for the purpose of proving the truth of this statement.

That is all that was said by counsel for appellant concerning the limited instruction. Nor was there ever any further attempt by appellant, either at the time the state offered the evidence in question, or at the time when the instructions were ready to the jury, to have a limiting instruction given. At the close of the case for the defense, and after both sides had rested, the record reveals the following:

> THE COURT: (in chambers) Are you ready to charge this jury and read instructions to them?

MR. HALL: Yes, your Honor.

THE COURT: Anything else, gentlemen?

MR. ACHOR: No, sir.

Immediately later in the courtroom, the following occurred:

THE COURT: Both sides rest?

MR. HALL: (for state) Yes, sir.

MR. PATTERSON: (for defense) Yes, your Honor.

THE COURT: Are you ready for me to instruct the jury?

MR. PATTERSON: Yes, your Honor:

MR. HALL: Yes, sir.

Appellant contends that the statement of defense counsel, quoted above, to the effect that I think we will need another instruction, etc., constituted an adequate offer of a limiting instruction. We do not agree. Rule XIII of the Uniform Rules for Circuit and Chancery Courts (251 Ark. 1117) provides:

> No party may assign as error the giving or the failure to give an instruction to a jury unless he objects thereto before or at the time the instruction is given, stating distinctly the matter to which he objects and the grounds of his objection.

Suffice to say that appellant made no objection to the instructions as given by the court, nor did he offer a proper limiting instruction. The purpose of requiring objections is to give the trial court an opportunity to correct any error or omission on its part. *Griffin* v. *State*, 248 Ark. 1223 at 1232, 455 S.W. 2d 882 (1970). Clearly no limiting instruction was ever submitted to the trial court by appellant; thus, under the circumstances here, there was no error in the trial court's

failure to give such an instruction. *Perry* v. *State,* 255 Ark. 378, at 384, 500 S.W. 2d 387.

II.

It is next contended the trial court should have granted appellant's motion for a mistrial when the prosecuting attorney allegedly allowed the "rap sheet" on the defendant to be seen by the jury. The record reveals that the prosecutor asked the defendant whether the one robbery conviction he had testified to was his only felony conviction and whether he had been to prison only one time. At that point, according to the record, the state's attorney approached the defense table, apparently to hand appellant's counsel a sheet of paper that was only later identified (after the jury had been removed), as a "rap sheet."

If any particular attention was called to this piece of paper, it was the result of the action of defense counsel. As the prosecutor approached the defense table to hand the public defender a copy of the sheet, the following occurred:

> MR. ACHOR: (Counsel for appellant) I don't want to see that. I see that certified copy you got there. I see you got something there with a seal on it.
>
> THE COURT: Gentlemen, if you are going to discuss something —
>
> MR. ACHOR: Judge, may we approach the bench?

At this point counsel for both sides approached the bench, and conferred with the court out of the hearing of the jury, as follows:

> MR. ACHOR: I would like to move for a mistrial, him flashing that before the jury.

The court had the jury taken out of the courtroom, and the matter was further discussed. The court then made the following statement:

> All right, gentlemen, the record is complete at this time. The court finds that the defense raised the question of his prior conviction. The court further finds that Mr. Bentley asked him and he admitted the robbery, as he did on direct. He asked him if that was all, if there were any others, and he said, "No." So far as the jury knows, that is all. There was some discussion, probably inaudible, from the defense counsel and from the prosecutor which was initiated by both counsel, and defense was as culpable in it as the prosecutor.
>
> I do not think that this jury has heard or seen anything that can be detrimental to this man's right to have a fair trial. I will overrule the motion for a mistrial.

There was a question of fact presented as to whether or not the sheet was seen by the jury, or the comments of counsel overheard. The trial judge resolved the issue against appellant. *Parrott* v. *Arkansas*, 497 F. 2d 1123 (8th Cir. 1974). The facts here are entirely different from those in *Shaddox* v. *State*, 243 Ark. 55, 418 S.W. 2d 780 (1967), and the other cases which appellant cites as authority for his contention that a mistrial should have been granted. We find no merit in appellant's point II.

III.

Appellant also claims that the trial court commented on the evidence, and his motion for a mistrial should have been granted. During the redirect examination of the prosecutrix, the following exchange occurred:

> BY MR. HALL, DEPUTY PROSECUTING ATTORNEY: How certain are you that the man sitting at the counsel table is the man who was with you that night?
>
> MR. ACHOR: Your Honor, this is not proper in the context of the trial. This would have been proper on direct but not now.
>
> MR. HALL: This is redirect.

THE COURT: Sustained.

MR. HALL: Your Honor, I would like to point out that they brought up the question of identification.

THE COURT: Mr. Hall, I'm not sustaining it for the reason Mr. Achor says. I'm sustaining it because the lady has identified the man sitting at the counsel table as the assailant.

Out of the hearing of the jury the public defender moved for a mistrial which was denied.

THE COURT: I just said what the witness has testified to, Mr. Achor. Overruled.

The remark of the trial court here was merely a restatement of the witness's testimony. Consequently, it did not constitute a comment on the evidence in violation of Article 7, Section 23 of the Arkansas Constitution, as appellant claims. See *Lisko* v. *Uhren*, 130 Ark. 111, 196 S.W. 816.

IV.

The issue raised by appellant in his final point for reversal concerns an incident which occurred at the beginning of the voir dire of the jury. After the jury panel was sworn, the court introduced the attorneys and the defendant to the prospective jurors. Then the judge had the witnesses to be identified by name, and asked the panel if any juror knew any of these witnesses. Two other rape victims were included by the state as possible witnesses. As it later developed, the court did not permit the state to use these two witnesses, and that matter is the subject of the cross appeal in this case. Appellant contends the introduction to the jury panel of the other two alleged rape victims, as possible witnesses, was error and that the court should have granted his motion to strike the whole jury panel.

The record does not indicate that the prospective jurors were ever informed as to what relationship the two had to the

case. They were introduced by name only, and then put under the rule. No prejudice to the defendant could have resulted from this incident, particularly when no final ruling had been made by the court on the eventual admissibility of their testimony. If appellant was prejudiced by what happened here, then conceivably every prosecutor would risk reversal when he attempts during voir dire to determine whether any member of the panel is acquainted with any of the potential witnesses before knowing whether their testimony will be necessary or admissible.

Appellant cites *Sharron* v. *State*, 262 Ark. 320, 556 S.W. 2d 438 (1977) as support for his argument that reversal on this point is required. The facts in *Sharron* were entirely different, and that case is clearly distinguishable from the one before us. Appellant's argument on this point lacks validity.

THE CROSS APPEAL

At the conclusion of the trial, the state sought to put the other alleged victims on in rebuttal to the defendant's claim of consent by the victim in the case being tried. The state made a proffer and the court excluded it as too prejudicial. This cross appeal is from the trial court's rejection of the proof of other crimes under U.R. Evid. 404(b). Since this case is being affirmed on direct appeal, little need be said about the cross appeal. The Arkansas Supreme Court has already ruled that evidence of other crimes is admissible for limited purposes. A decision on the cross appeal in this case is not necessary to the uniform administration of criminal law. It is clear that the admissibility of relevant evidence under Rule 404(b) of the Uniform Rules of Evidence may be decided on a case by case basis. *Rogers* v. *State*, 257 Ark. 144, 515 S.W. 2d 79 (1974) and *Rios* v. *State*, 262 Ark. 407, 557 S.W. 2d 198 (1977).

Finding no error, this case is affirmed on direct and cross appeal.

PENIX, J., concurs.

MARIAN F. PENIX, Judge, concurring. I concur with the majority in affirming the defendant's conviction, but I would grant the cross-appeal.

Rape is a crime unlike all others in that proof of consent is an absolute defense. Even where two consenting adults enter into a double suicide pact and they both willingly die, society rejects the consent and we call it a "murder-suicide".

Before our legislature wisely eliminated an attack on the character of the female victim as evidence, many rape trials consisted primarily of an effort to picture the female as a person whose wanton sexual activities of the past made her fair game for the male defendant, and, whatever ensued was of minor significance.

Except for attacks upon young male inmates of penitentiaries, rape almost exclusively is a problem of the female. Its victims may be eight years of age, or eighty, attractive or homely, brash or shy, and of all races, creeds and strata of society. Sadly, the occurrence of this crime continues to increase in Little Rock, in Arkansas, and over the nation.

The writer of this opinion dares not work in her office when the Justice Building is empty because she's unwilling to subject herself to the danger of rape. No male opinion writer is ever faced with this sinister problem.

In this case the female victim testified she was awakened by the defendant standing over her bed and threatening her with a knife if she didn't submit to his sexual assault upon her. Defendant testified the female had been lonely and invited him to her home and consented to the sexual relationship.

Here, a male defendant says the prosecuting witness, who alleges she was raped, actually consented.

> The fact to be established, non-consent, is crucial in a rape case . . . Often the more serious problem is proving non-consent . . . Absent a physical struggle resulting in

> bruises or lacerations, such resistance is often difficult to prove . . . Certainly, the fact that an individual commits a rape at one time has no bearing on whether another consented to intercourse at a later time. Here, however, the People did not offer the prior acts to prove prior rapes, or that the defendant is a bad man with criminal propensities. The People offered the prior acts to shown the scheme, plan or system employed by the defendant in raping the complainant . . . *People* v. *Oliphant*, 250 N.W. 2d 443 at 450 (Mich. 1976).

See also *Fisher* v. *State*, 57 Ala. App. 310, 328 So. 2d 311 (1976); *State* v. *Valdez*, 23 Ariz. App. 518, 534 P. 2d 449 (1975); *Pendleton* v. *State*, 348 So. 2d 1206 (Fla. 1977); *Dean* v. *State*, 277 So. 2d 13 (Fla. 1973). In this case three other females were willing to undergo embarrassment and humiliation and describe the details of sexual assaults upon them by this same defendant in the same eight-week period in the same neighborhood and in much the same manner. This indeed was relevant to the defendant's intent in the trial at hand. Such evidence should have been allowed after an adequate precautionary instruction limiting consideration of the evidence to show the defendant's motive, intent, knowledge, or absence of mistake. Ark. Stat. Ann. § 28-1001 (Supp. 1977) Rule 404(b). McCormick, Evidence § 190, at 448-51 (2d ed. 1972); *State* v. *Thomas*, 110 Ariz. 106, 515 P. 2d 851 (1973); *Carroll* v. *State*, 212 Tenn. 464, 370 S.W. 2d 523 (1963); *Turnbow* v. *State*, 451 P. 2d 387 (Okla. Crim. 1969); *Humphrey* v. *State*, 54 Ala. App. 62, 304 So. 2d 617 (1974); *People* v. *Therriault*, 42 Ill. App. 3d 876, 356 N.E. 2d 999 (1976). See Louisell & Mueller, Federal Evidence § 140 (1978); Annot., *Admissibility, in prosecution for sexual offense, of evidence of other similar offenses*, 77 A.L.R. 2d 841 (1961).

When Patty Hearst said she participated in a bank robbery only because she was under duress the court allowed evidence of her willing participation in a later robbery to rebut this female accused's claim of duress in the earlier robbery. *U.S.* v. *Hearst*, 563 Fed. 2d 1331 (1977)

> Appellant raised the defense of duress at trial and offered substantial evidence to support it. To convict

> appellant, therefore the government was required to show appellant was not acting under duress when she participated in the San Francisco robbery. The evidence of appellant's involvement in the Los Angeles activity was relevant to this issue because it tended to show appellant willingly engaged in other criminal activity with persons of the same group at a time not unduly remote. p. 1336.

It may well be that the ultimate precedent on this point should come from our Supreme Court under its Rule 29.

I would grant the cross-appeal and admit the excluded evidence of nearly identical assaults on other females which are close in time and location to the case being tried.

Nancy Moss WHARTON *v.*
Clementine MOSS, Executrix

CA 79-162 594 S.W. 2d 856

Opinion delivered November 7, 1979
Rehearing denied December 12, 1979
Review denied January 7, 1980
Released for publication March 17, 1980

Spitzberg, Mitchell & Gill, by: *John P. Gill* and *James E. McClain, Jr.*, for appellant.

Hurst Law Firm, by: *Q. Byrum Hurst, Jr.*, for appellee.

MARIAN F. PENIX, Judge. This case was appealed to the Arkansas Supreme Court and by that court assigned to the Arkansas Court of Appeals pursuant to Arkansas Supreme Court Rule 29(3).

The question in this case is whether there is sufficient evidence to rebut the presumption that a will in the possession of or accessible to the testator was revoked by the testator if the will cannot be produced at his death.

Lee Moss died in March 1977. His survivors include his widow, Clementine Moss, the defendant and appellee, and a daughter, Nancy Moss Wharton, the plaintiff and appellant. The widow seeks to establish that an unexecuted copy dated January 10, 1949, located in the office of decedent's attorney is proof the will was executed and not subsequently revoked. The daughter denies the unexecuted copy is the actual will and protests establishing it as a lost will. The probate judge ruled the document to be the decedent's will. The daughter appeals.

Ark. Stat. Ann. § 60-304 (1971) provides:

> No will of any testator shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the lifetime of the testator; nor unless its provisions be clearly and distinctly proved by at least two (2) witnesses, a correct copy or draft being deemed equivalent to one (1) witness.

In *Rose* v. *Hunnicutt*, 166 Ark. 134, 265 S.W. 651 (1924) the court held that non-production of a will raises a presumption of revocation. The court expressed the state of the law as follows:

> It will be presumed that a testator destroyed a will executed by him in his lifetime, with the intention of revoking same, if he retained custody thereof, or had access thereto, and if it could not be found after his death. *Rose*, supra.

The presumption a will is revoked is two-pronged. The first hurdle for the proponent of a lost will to scale is the actual execution of the will. The widow has presented proof of the actual execution in the testimony of two disinterested parties who witnessed the execution of the will; Q. Byrum Hurst Sr., the decedent's attorney who drew up the will and testimony of L. W. Ray who witnessed the execution of the will. We find this evidence sufficient to prove its execution. The daughter offered evidence the will copy was typed on a different typewriter from the one used by testator's attorney during the time period the will was allegedly drawn. In studying the record, however, we hold the widow's proof to be preponderant.

However, the second test for the proponent of a lost will to meet, by a preponderance of the evidence, is the will was not in fact revoked by the testator. The widow relies upon *Garrett* v. *Butler*, 229 Ark. 653, 317 S.W. 2d 283 (1958). There the court held the burden was on appellee to overcome presumption of revocation by a preponderance only. The facts in the *Garrett* case are distinguishable from this one. In the *Garrett* case there was evidence the will had been seen to be in existence in possession of the testator not long before death. Also in *Garrett* there was evidence a number of people had access to the testator's personal effects, which evidence was persuasive the will was fraudulently destroyed after death and not by the testator. In this case there is no evidence offered to suggest fraudulent destruction, nor did anyone actually see the will in the testator's possession. The widow made inferences about her son-in-law Joe Wharton, but no direct evidence was offered. It is just as logical to infer Lee Moss revoked his will as it is the son-in-law crept into the office while Mr. Moss was in Houston and destroyed it.

The record reflects no evidence the will might have been misplaced or destroyed by accident. There was ample evi-

dence Lee Moss, though visually impaired, was successful in business and was known to be meticulous in keeping his records.

We hold the evidence sufficient to prove the will was executed by Lee Moss, but the evidence insufficient to overcome the presumption Lee Moss had revoked the will.

Reversed.

HAYS, J. not participating.

James D. CATES *v.* STATE of Arkansas

CA CR 79-54 589 S.W. 2d 598

Opinion delivered November 7, 1979
Released for publication November 28, 1979

McArthur & Lassiter, P.A., by: *Jack T. Lassiter*, for appellant.

Steve Clark, Atty. Gen., by: *Robert J. De Gostin*, Asst. Atty. Gen., for appellee.

MARIAN F. PENIX, Judge. This case was appealed to the Arkansas Supreme Court and by that court assigned to the Arkansas Court of Appeals pursuant to Arkansas Supreme Court Rule 29(3).

This appeal is from a conviction on the charge of theft of property under Ark. Stat. Ann. § 41-2203(b). Defendant waived a jury and was sentenced to two years imprisonment.

The defendant contracted with Mr. and Mrs. Gary Apple on September 26, 1977 to build a house in Scott, Arkansas. The defendant agreed to build the house in ninety days for $32,000. An escrow account was set up at Twin City Bank in North Little Rock in the amount of $32,000 for construction costs. When defendant received a bill from subcontractors or materialmen he would take it to Apples to approve, then the bank would disburse money based on Apples' approval. Defendant worked off and on on the house until March 1978. He withdrew from the construction even though it was only 77% complete. Defendant had withdrawn $28,500 from the escrow account ostensibly to pay materialmen and laborers and to discharge liens. The defendant converted $4,000 to his own use instead of using it to discharge liens. A criminal information was filed on July 21, 1978 and defendant was tried on December 13, 1978.

The state called as a witness, Duke Dugan, former loan officer who had supervised the escrow account for the construction loan. He testified he no longer was employed at Twin City Bank but he had gone to work at Twin City in December, 1977. Over the objections of defendant Dugan testified as to what the bank records showed in October and November as to withdrawals from the escrow account. The

State contended the bank record was admissible as a record of regularly conducted business under Rule 803(6) of Arkansas Uniform Rules of Evidence. Under that Rule, seven factors must be present for the records to be admissible — 1) record other compilation 2) of acts or events 3) made at or near the time the act occurred 4) by a person with knowledge (or from information transmitted by such a person) 5) kept in the course of a regularly conducted business 6) which has a regular practice of recording such information 7) all as shown by the testimony of the custodian or other qualified witness. *Rogers* v. *Lyon*, 253 Ark. 856, 489 S.W. 2d 506 (1973); *Hale* v. *State*, 252 Ark. 1040, 483 S.W. 2d 228 (1972); *United States* v. *Morton*, 483 F. 2d 573 (8th Cir. 1973).

The State introduced bank records through Dugan because he was familiar with the bank's record keeping and was also familiar with the Apples' escrow account. The State submits Dugan's familiarity with the account, in addition to his prior employment at the bank, qualified him as a witness within the meaning of Rule 803(6) supra. The trial judge has the discretion to determine the qualification of witnesses and the admissibility of evidence. There is no showing of an abuse of discretion.

The defendant alleges the court erred in sustaining the State's objection to cross-examination of Dugan by defendant's attorney.

> Q. Mr. Dugan, do you think that Mr. Cates might have bid too low on this house?
>
> MR. WILLIAMS: Objection.
>
> THE COURT: Sustained.
>
> MR. LASSITER: Your Honor, I think he would be qualified to give that opinion if he is familiar with the house industry.
>
> THE COURT: I don't think he is. Save your exception.

The defendant's attorney hoped to produce responses

from Mr. Dugan indicating Mr. Cates had bid too low on the home. He contends the responses would have been directly relevant to whether defendant intended to commit theft when he entered the contract with the Apples. The State called Dugan to show the Apples set up an escrow account and he was authorized to disburse money from the account to defendant when Apples approved the disbursements for payment to subcontractors and materialmen. The court sustained the State's objection to the defendant's attorney's question for two reasons. One, the witness was not qualified to render an opinion as to whether defendant's bid was too low and secondly, the question wasn't relevant to a determination of the fact in issue. The court properly determined that whether defendant had bid too high or too low is not relevant to the issue of whether, five and one half months later, the defendant meant to deprive Apples of their money, when he withdrew it to pay lienholders and instead kept it for himself. Even if the testimony were relevant, it would be inadmissible as opinion evidence offered by a non-expert. Dugan was not called by defendant as his expert witness. In sustaining the objection the court did not abuse his discretion. *White* v. *Mitchell*, 263 Ark. 787, 568 S.W. 2d 216 (1978); *Harvey* v. *State*, 261 Ark. 47, 545 S.W. 2d 913 (1977).

The defendant alleges the evidence is insufficient to support a conviction of theft of property by deception.

Ark. Stat. Ann. § 41-2203: 1) A person commits theft of property if he: b. *knowingly* obtains the property of another person, by deception or by threat, with the purpose of depriving the owner thereof.

Ark. Stat. Ann. § 41-203(2) defines "knowingly":

> 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.

In reviewing the record and studying the testimony of

the witnesses, we find insufficient evidence to support the court's verdict of guilty of theft of property within the meaning of § 41-2201 supra. The statute states:

> Deception as to a person's intention to perform a promise shall not be inferred solely from the fact that he did not subsequently perform the promise.

The only evidence in this case to support the conclusion drawn by the trial court that Mr. Cates did not intend to pay off the liens, and, therefore, committed theft by deception, is inferred solely from the fact he didn't subsequently pay off the liens. The trial judge, sitting as a jury, indicates his misunderstanding of the requirements of the statute under which appellant was charged.

> MR. LASSITER: I believe you still have to have criminal intent whatever it is.
>
> THE COURT: Well, I guess you can presume that from the fact he didn't pay it . . .

The presumption taken by the court is one which the statute specifically states cannot be taken.

We hold there was insufficient evidence to convict appellant of theft of property by deception.

Reversed and remanded.

Randy BOCKSNICK *v.* STATE of Arkansas

CA CR 79-83 595 S.W. 2d 227

Opinion delivered November 7, 1979
Rehearing denied December 12, 1979
Affirmed by Supreme Court February 11, 1980
Released for publication March 17, 1980

Robert Irwin, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson*, Asst. Atty. Gen., for appellee.

GEORGE HOWARD, JR., Judge. The appellant was acquitted, by a jury, of aggravated robbery, but was found guilty of interfering with a law enforcement officer. Appellant received a five-year term to the Arkansas Department of Correction and a fine of $1,000.00.

For reversal, appellant claims his conviction is not supported by substantial evidence.

The facts are: Appellant was observed by Officer L. V. Collins, City Marshal of London, carrying a 30-30 rifle and refused to surrender the rifle to Officer Collins. Appellant directed Officer Collins to stand back or appellant would kill him. Appellant proceeded to a local grocery store and at-

tempted to obtain ammunition which served as the basis for the aggravated robbery charge.

Subsequently, two Pope County Deputy Sheriffs who had been summoned by Officer Collins to assist him were fired upon by appellant when the deputy sheriffs approached appellant and ordered him to surrender. The refusal of the appellant to submit either to the demands of Officer Collins as well as the deputy sheriffs constitutes the basis of the charge of interfering with a law enforcement officer.

It is undisputed that neither Officer Collins, nor the deputy sheriffs were seeking to serve any legal processes upon anyone, not even appellant, but their prime concern was to induce the appellant to surrender his rifle and to submit to arrest.

The applicable statute provides:

> A person commits the offense of interference with a law enforcement officer if he knowingly employs or threatens to employ physical force against a law enforcement officer engaged in performing his official duties.

We are persuaded that *Breakfield* v. *State*, 263 Ark. 398, 566 S.W. 2d 729 (1978) is dispositive of the issue before us. The Arkansas Supreme Court said in *Breakfield:*

> Criminal statutes must be strictly construed with doubts being resolved in favor of the defendant . . . Applying this standard to this case and considering the evidence, we do not find substantial evidence to support the conviction of Breakfield for interfering with a police officer in the performance of his duties. Breakfield should have been charged with resisting arrest, or disorderly conduct, or both. However, those charges are not before us.

Reversed and remanded.

WRIGHT, C. J., and HAYS, J., dissenting.

ERNIE E. WRIGHT, Chief Judge, dissenting. The majority have concluded *Breakfield* v. *State*, 263 Ark. 398, 566 S.W. 2d 729 (1978) mandates a reversal of the judgment convicting appellant of Ark. Stat. Ann. § 41-2804. I respectfully dis-

agree. In *Breakfield* the officer was attempting to arrest the accused after the officer requested the accused to leave his office and accused declined to leave. Thereafter, accused left and the officer pursued him outside and the accused threatened to kill the officer. After a scuffle the officer subdued and arrested the accused.

The only evidence that the accused interfered with the officer in the performance of his duties was the statement of the officer that, "I was just before attempting to interview the complainants. They were inside the office or were coming in." The court on appeal held this was not substantial evidence to support the conviction for interfering with a police officer engaged in performing his official duties.

In the present case the officer had information appellant had been involved in some trouble and started looking for him. Earlier in the day he had driven appellant home and appellant had the smell of alcohol. He saw appellant coming across the tracks with a 30-30 rifle in his hand. The officer approached appellant and said, "Randy, let me have the gun." Appellant put the gun to the officer's chest and said, "Back up . . . back up, I will kill you." The accused then ran and was later arrested with the help of other officers.

Under the circumstances here, the officer was engaged in performing his official duties in conserving the peace. Given the circumstances that appellant had been driven home smelling of alcohol, that the officer had received a report that he was involved in some kind of disturbance, and finding the appellant with the 30-30 rifle, the officer was acting properly in the discharge of his duties when he asked appellant to surrender the 30-30 rifle. The officer was justified in concluding appellant was involved in disorderly conduct under Ark. Stat. Ann. § 41-2908(1)(g) when he requested appellant to surrender his gun. This section provides the purposeful creation of a hazardous condition to cause alarm is disorderly conduct. The response to the officer's reasonable request in the line of duty was a threat to kill the officer.

Appellant did not deny officer's testimony.

I would affirm. I am authorized to say Judge Hays joins in this dissent.

M. M. COHN CO. et al *v.* Pauline HAILE

CA 79-59 589 S.W. 2d 600

Opinion delivered November 7, 1979
Released for publication November 28, 1979

Laser, Sharp, Haley, Young & Huckabay, P.A., for appellants.

Pickens, Boyce, McLarty & Watson, by: *James McLarty*, for appellee.

DAVID NEWBERN, Judge. In this workers' compensation case the appellants ask us to reverse the award to the claimant because it is not supported by substantial evidence. The

primary assertions of the appellants are (1) that the medical testimony proves the claimant's functional disability is no more than 20%, and (2) the claimant has chosen to withdrawn from the labor market because she has reached retirement age and is eligible for social security benefits.

The claimant was 62 years old when she fell as the result of slipping on an oily substance on the floor while she was at work as a salesperson for M. M. Cohn. Her shoulder was fractured, and after a long period of treatment, including surgery, one physician concluded her shoulder sustained functional disability of 10% and her right upper body was disabled 10%. Another doctor concluded she had a permanent partial impairment of 20% to the right upper extremity as a result of the injury, and that she would be unable to lift anything over head with that extremity "for a period of time" and "probably should not lift any weights over ten pounds with this extremity." He also recommended that if she performed limited work, she "might be allowed to sit for a period of time" in the event she developed pain on her right side.

The claimant consulted a vocational psychologist who concluded:

> "I . . . feel that due to her age [64 at the time of his evaluation] and disabilities, that it will be very difficult for her to locate competitive employment and while she states a strong desire to be suitably employed and to return to her former activites, my suggestions for this lady would be retirement."

The claimant was also evaluated by a clinic psychologist whose deferred diagnosis of her was "psychoneurosis with depression." He found she did not have an interest in going back to productive work and that in his opinion "she probably would manifest stress-related difficulties if she were involved in full-time work." His conclusions also included the following:

> This psychologist is of the opinion that the probability of Mrs. Haile going back to some productive work is very small. I do not feel that she is capable of full time

> employment given her age and physical problems. If she were younger in age and had the use of her arm, she could be expected to succeed in a rehabilitation program and secure employment suited to her abilities. Should her injury not [have] occurred, Mrs. Haile would have had numerous occupations from which to choose: . . .

We hold there is substantial evidence this claimant is totally disabled. The Arkansas Supreme Court long ago departed from the restrictive view that only anatomical or functional disability could be considered in determining disability to the body as a whole. The departure came in *Glass* v. *Edens*, 233 Ark. 786, 346 S.W. 2d 685 (1961), and since that case was decided we have been among the great majority of jurisdictions which allow consideration of several factors in determining not just functional bodily limitations, but loss of earning capacity as a predicate for workers' compensation. See, Wright, *Compensation for Loss of Earning Capacity*, 18 *Ark. L. Rev.* 269 (1965), and 2 Larson, *Workmen's Compensation Law*, §§ 57.51 and 57.61 (1976). Professor Larson suggests the principle and the factors as follows:

> If the evidence of degree of obvious physical impairment, coupled with other factors such as claimant's mental capacity, education, training, or age, places claimant *prima facie* in the odd-lot category, the burden should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant. [2 Larson, *supra*, § 57.61, pp. 10-136 and 10-137]

The odd lot doctrine refers to employees who are able to work only a small amount. The fact they can work some does not preclude them from being considered totally disabled if their overall job prospects are negligible. 2 Larson, *supra*, § 57-51, pp. 10-107, *et seq.*

In *Arkansas Best Freight Sys., Inc.* v. *Brooks*, 244 Ark. 191, 424 S.W. 2d 377 (1968), the Supreme Court sustained an award of compensation for total disability despite medical

evidence the claimant was only functionally disabled to the extent of 50%. The court said:

> "Loss of the use of the body as a whole" involves two factors. The first is the functional or anatomical loss. That percentage is fixed by medical evidence. Secondly, there is the wage-loss factor, that is, the degree to which the injury has affected claimant's ability to earn a livelihood . . . [T]he second element is to be determined by the Commission, based on medical evidence, age, education, experience and other matters reasonably expected to affect the earning power. [244 Ark. at 193]

In *Johnson County* v. *Timmons*, 249 Ark. 1106, 463 S.W. 2d 365 (1971), the Supreme Court sustained an award based on a finding of 70% disability to the body as a whole despite medical evidence which supported a finding of 10% functional disability. The claimant was 64 years old. The Court said:

> "Apparently the Commission was convinced that because of his age, limited education, lack of training, and physical disability, job opportunities for the claimant will now be scarce; and that he will never be in a position to earn a wage approaching more than thirty per cent of his prior average wage rate. There was substantial evidence to support those conclusions. [249 Ark. at 1110-1111]

The foregoing authorities permit the Commission to consider the age of the claimant and her overall condition and prospects for employment. The testimony of the physicians and the psychologists, when combined with that of the claimant as to her limited education and experience constitutes substantial evidence of her disability. It becomes even more substantial in view of her statement that she had applied to go back to work at Cohn's, but had not been rehired.

Neither *Ark. Stat. Ann.*, § 81-1310(c)(2) (Supp. 1979), which states exceptions to cases in which compensation will be paid, nor any other section we have found makes an

exception excluding compensation to persons who are eligible for or are drawing social security benefits. Apparently no such exception exists in Arkansas or elsewhere. See, Larson, *supra*, § 57.61, n. 25.

Affirmed.

Judge Penix dissents.

MARIAN F. PENIX, Judge, dissenting. I do not believe the record reflects substantial evidence to support the Commission's award. The only medical evidence introduced as to the claimant's percentage of disability was that of two orthopedists. Dr. Blankenship discharged claimant with a finding she had suffered a permanent partial impairment of 20% to her right upper extremity. Dr. Thomas discharged claimant with a rating of 10% permanent partial.

Certainly Mrs. Haile has suffered a compensable injury which has resulted in a permanent disability of 20% to her upper right extremity. But the compensable injury is not the only factor which prevents Mrs. Haile from returning to the job market. It is understandable a 64 year old woman who has worked in jobs which required long hours on her feet, such as sales clerking, is tired. It is also understandable she would not be motivated at this stage in her life to returning to full time employment. There is no doubt the claimant has restricted use of her right shoulder. But these facts standing alone are insufficient to prove total disability. I don't believe the purpose of benefits awarded under the Arkansas Workers' Compensation Law includes the situation we have here. The Workers' Compensation Law should not be expanded into another retirement program. The law was enacted to compensate members of the work force who suffer on-the-job injuries. Mrs. Haile suffered an on-the-job injury. The most medical evidence reflects 20% disability. The Commission's award should be reduced to that amount.

I respectfully dissent.

John UROSEVIC *v.* Tom HAYES and Donna HAYES, and William KEEL and Ruth KEEL

CA 79-146 590 S.W. 2d 77

Opinion delivered November 14, 1979
Released for publication December 5, 1979

Hobbs, Longinetti & Bosson, by: *Louis J. Longinetti, III*, for appellant.

Glover, Sanders, Parkerson & Hargraves, by: *Robert S. Hargraves*, for appellees and cross-appellants.

ERNIE E. WRIGHT, Chief Judge. The Appellant, John Urosevic, appeals from the decree of the Chancery Court of Garland County ordering that he and the appellees, his ad-

joining landowners, immediately cause a retaining wall providing lateral support to appellees' land to be restored with the cost to be shared equally between appellant and appellees. The appellees cross-appealed contending appellant should bear all the costs for restoring the retaining wall. The case has been assigned to the Court of Appeals pursuant to Rule 29 (3).

Appellant contends the court erred in ordering appellant's property restored to its prior condition and in requiring him to contribute one-half of the cost of repairs.

In the cross-appeal appellees contend the court erred in ordering appellees to contribute one-half the cost of restoring the retaining wall on appellant's property, and argue appellant should bear all the cost.

As the contentions are intertwined they will be jointly discussed.

The decree made the following findings:

> At some unknown time in the past, probably prior to 1913, the Defendant's predecessors in title excavated their property and built a brick building wall along the boundary line with the property owned by the Plaintiffs's predecessors in title.
>
> Subsequently, and probably in 1913, the building was destroyed and new improvements were constructed not covering the entire excavated area, thereby leaving the original building wall standing along the boundary line.
>
> At some time, also unknown, the Plaintiff's predecessors in title placed fill against the original brick wall thereby putting additional pressure on the wall.
>
> In May of 1978, the wall was struck by lightning and a portion of the wall collapsed causing the erosion of some of the Plaintiff's land. This was an Act of God and was not caused by the fault or negligence of any party.

> That in the interest of fairness and equity, the Court exercises its right to create an equitable remedy by requiring the wall to be restored to such a condition as to prevent further erosion of Plaintiff's property and that the cost of restoration shall be shared equally by the Plaintiffs and the Defendant.

Neither of the parties contend the court erred in its findings, but both appellant and appellees contend the court erred in the application of the law.

The Arkansas Supreme Court apparently has not had occasion to pass upon this type issue; however, it is a well settled common law doctrine that the owner of land has the right to the lateral support of his soil in the natural state, and the law provides recourse for violation of this right.

In 1 Am. Jur. 2d, *Adjoining Landowners*, § 37, the following language is found:

> The principle that the owner of land has the right to lateral support from the adjoining soil, and the adjacent proprietor may not remove the earth to such an extent as to withdraw the natural support of his neighbor's soil without being liable for the injury, may be regarded as a settled doctrine of the common law.

Numerous cases from various jurisdictions in support of this rule are to be found in 2 C.J.S., *Adjoining Landowners*, § 9.

Ownership of land is acquired and held subject to the rights and burdens arising from such conditions. *Sime* v. *Jensen*, 213 Minn. 476, 7 N.W. 2d 325 (1942.)

The rule does not preclude a landowner from excavating upon his land, but he owes a continuing duty to protect an adjoining landowner's property when the excavation removes lateral support. It is his duty to provide an artificial support if the conditions so require. 2 C.J.S. *Adjoining Landowners*, § 15. This duty extends to successive owners of the land that has been excavated. *Gorton* v. *Schofield*, 311

Mass. 352, 41 N.E. 2d 12 (1942); *Braun* v. *Hamack*, 206 Minn. 572, 289 N.W. 553 (1940); *Lyons* v. *Walsh*, 92 Conn. 18, 101 A. 488 (1917). The duty is absolute and is not predicated upon negligence. *Williams* v. *Southern Railway Co.*, 396 S.W. 2d 98 (Tenn. App. 1965); and *Levi* v. *Schwartz*, 201 Md. 575, 95 A. 2d 322 (1953).

In the present case it is undisputed that as a result of the collapse of the wall appellees' lands are subsiding and shifting upon appellant's land. Appellees each have a dwelling house upon their respective land and they will suffer continuing damages to their property unless lateral support to the land is restored.

It is apparent from the record that, while lightning struck the retaining wall on appellant's land which provided lateral support to appellees' land, the subsidence of appellees' lands would not have occurred but for the excavation that had previously been made upon appellant's land. However, the court found that additional pressure on the retaining wall was created by some fill having been placed adjacent to the wall on appellees' lands, and from the record we conclude that this was a contributing factor in bringing about the collapse of the wall and the resulting subsidence of appellees' lands. Under the circumstances of this case we conclude the Chancellor was warranted in balancing the equities by requiring the appellant to bear half the cost of restoring the wall and the appellees to bear half the cost. It appears restoration of the wall will be beneficial to the properties of both the appellant and appellees.

This proceeding was in equity and the court had the power and duty to devise a remedy appropriate to the peculiar circumstances of the case and we conclude the court's decree was equitable, appropriate and not contrary to a preponderance of the evidence. Am. J. 2d, *Equity*, § 103.

Affirmed.

Donald G. MIZE *v.* STATE of Arkansas

CA CR 79-90 590 S.W. 2d 75

Opinion delivered November 14, 1979
Released for publication December 5, 1979

Dan Stripling, for appellant.

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

ERNIE E. WRIGHT, Chief Judge. The Appellant, Donald G. Mize, was convicted by a jury of battery in the first degree in violation of Ark. Stat. Ann. § 41-1601 and sentenced to five years imprisonment. From the judgment of conviction he brings this appeal urging for reversal, that the court erred in denying appellant a hearing upon his motion to suppress the in-court identification of appellant.

Trial date had been set for June 26, 1979. On June 21, 1979 appellant filed a motion to suppress testimony by State's witnesses identifying the appellant contending the identification resulted from a "police show-up" while the defendant was in custody in a police car. The motion alleged that such "show-up" was improperly conducted and improperly suggestive so as to taint the in-court identification of appellant.

Counsel for appellant first presented the motion to the court on the day of trial. The State objected to the motion as being untimely filed only five days prior to trial date contrary to Criminal Rule 16.2 (b), and argued the prosecuting witness could identify the accused without regard to having seen the accused in custody in the police car. Appellant did not contend he had been pointed out to the prosecuting witness when the witness viewed and identified the appellant in the police car shortly after the shooting. The court overruled the motion without an evidentiary hearing. Appellant's abstract does not indicate any objection to the ruling of the court.

The prosecuting witness, a young black man, testified that while he was sitting in his stalled car on a store parking lot the appellant and another man, Ricky Jackson, drove up and after appellant had made some remarks to the prosecuting witness told the prosecuting witness he had to get out of town; appellant and his companion drove away and soon thereafter a black friend of the witness, Mr. Gaston, drove up and indicated he would stay with the witness until his mother could pick him up; the witness got in the friend's truck and appellant and his companion pulled up and appellant had a shotgun sticking out the car window; Gaston pulled his truck over in front of the store and the prosecuting witness and Gaston got out to go in the store; at that time they were both struck with shots from a shotgun blast; the prosecuting witness was struck in the legs, back, elbow and arm with about 50 shots; Gaston was also struck; they went to a doctor's office where they received medical attention and then "went outside to identify the occupants of the car".

At that point appellant renewed his motion to suppress any in-court identification. Out of the presence of the jury, the court instructed the prosecuting witness not to go into the fact that the witness made an out-of-court identification, and denied the motion to suppress. The witness testified the appellant, Mize, was the one who fired the shotgun.

The appellant took the stand and testified he and his companion, Jackson, the driver of the car, had been drinking and rabbit shooting; that they pulled up where the prosecut-

ing witness was parked and asked if he was having trouble; that the witness called him a name; appellant told him he had better get out of town and appellant and his companion left; appellant and his companion drove back in about thirty minutes and the prosecuting witness called him a name; appellant then put the barrel of his gun out the window and told the witness and his companion they had better get out of town; appellant and his companion started into the store and appellant shot them in a fit of anger. There was no evidence of threats or violence by the prosecuting witness.

For reversal, appellant relies on *Sims* v. *State*, 258 Ark. 940, 530 S.W. 2d 182 (1975), and contends the view of the appellant by the prosecuting witness, while appellant was in custody in a police car very soon after the crime, constituted a lineup procedure within the meaning of the *Sims* case, and the identification of appellant while in custody in the police car was improperly suggestive. It is contended the procedure tainted the in-court identification of appellant by the prosecuting witness, and for this reason the in-court identification should be suppressed. While there appears to be valid reason to believe Criminal Procedure Rule 16.2 requiring motions to suppress evidence to be filed not less than ten days before trial was intended to apply to any kind of evidence and not limited to things seized in a search, we find it unnecessary to resolve this question.

The *Sims* case involved an in-court identification of the accused by the prosecuting witness after the witness had viewed the accused in a post indictment lineup, at a time when the accused had counsel. His counsel was not notified of the lineup and was not present. In the present case the appellant had not been indicted and had no counsel. It was important as a practical law enforcement procedure for the police to make a judgment as to whether appellant was the person to be held. The view of appellant in the police car occurred very shortly after the assault and there is no contention by appellant that he was pointed out to the prosecuting witness by any one as the person making the assault. Also, the assault took place in daylight and the prosecuting witness, having been encountered by the appellant shortly prior to the final assault, had ample opportunity to view

appellant, thus having a basis to reliably identify the appellant without reference to the in-custody view of appellant. The in-custody view here complained of served primarily to enable the police to determine they had custody of the person who had committed the assault.

The circumstances of the present case are controlled by *Lindsey and Jackson* v. *State*, 264 Ark. 430, 572 S.W. 2d 145 (1978), rather than by *Sims*. In *Lindsey* appellants objected to their in-court identification by the robbery victim on the ground they had been subjected to an out-of-court identification which did not involve a proper lineup. Appellants contended the out-of-court identification, which consisted of a view of the appellants promptly after the robbery, was suggestive and impermissible. The court held that a confrontation between a victim and suspect that takes place at a show-up rather than a lineup does not, without more, constitute a violation of constitutional rights. The court cited *Manson* v. *Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243 (1977) which held that reliability is the linchpin in determining the admissibility of identification testimony based on confrontation and that if from the totality of the circumstances the confrontation did not give rise to a very substantial likehood of irreparable misidentification, the in-court identification is properly admitted.

We hold from the totality of circumstances here there is no reasonable basis for contending the view of appellant by the prosecuting witness very soon after the assault and while the appellant was in police custody created a substantial likelihood of irreparable misidentification.

In this case, even if it be said it was error for the court to refuse the appellant's motion for an evidentiary hearing on the motion to suppress an in-court identification of the appellant, reversal would not be required.

In *Motes* v. *U.S.*, 178 U.S. 458, 20 S. Ct. 993 (1899), a written out of court statement of a witness was admitted in evidence against appellant over objection. On appeal the court said the improper admission of the evidence violated appellant's constitutional rights to be confronted with wit-

nesses against him. However, the court held, as the appellant took the stand and gave testimony of his actions which were clearly a violation of the law involved, the jury had conclusive proof of appellant's guilt, and the improper admission of the incompetent evidence was of no consequence to appellant, and not prejudicial. This case was a forerunner of the modern rule set out in *Schneble* v. *Florida*, 405 U.S. 427, 92 S. Ct. 1056 (1972). There, even though the defendant did not take the stand, the court held the admission of certain incompetent evidence against the accused violated his constitutional rights, but that the error was harmless because the overwhelming properly admitted evidence of guilt was such that the mind of an average jury would not have found the State's case significantly less persuasive, if the court had excluded the incompetent evidence.

We affirm.

James RUTH and Selma RUTH, his wife *v.*
J. B. LITES and Virginia C. LITES, his wife

CA 79-141 590 S.W. 2d 322

Opinion delivered November 14, 1979
Rehearing denied December 12, 1979
Released for publication December 12, 1979

Eugene Hunt, for appellants.

Eilbott, Smith, Eilbott & Humphries, for appellees.

JAMES H. PILKINTON, Judge. On September 5, 1955, James Ruth and wife were the owners of the Northeast Quarter of the Northwest Quarter (NE ¼ NW ¼) of Section Twenty (20), Township Six (6) South, Range Twenty-Six (26) West, in Grant County, Arkansas, containing 40 acres,

more or less. On that date they borrowed $1,055.00 from Dr. L. Routen and wife. Mr. and Mrs. Ruth executed a warranty deed to the Routens conveying this land. However, the parties to that transaction also executed a Sales Agreement under which the Ruths would be permitted to repurchase the land; and in connection with this agreement, Mr. and Mrs. Ruth executed an installment note for $1,050.00 in favor of the Routens.

By November 4, 1960, the Ruths were in serious default under the terms of the note and repurchase agreement. Dr. and Mrs. Routen were demanding full payment of the principal and interest then due totaling $1,253.73 which the Ruths could not pay. They were threatened with eviction.

On January 12, 1961, J. B. Lites and wife paid $1,264.30, the amount then due by the Ruths, to Dr. and Mrs. Routen; and the Routens conveyed the forty acres to Mr. and Mrs. Lites, who were friends of Mr. and Mrs. Ruth and resided near them. In connection with transaction, Mr. and Mrs. Lites executed a Sales Agreement under which Mr. and Mrs. Ruth would be permitted to repurchase the land from them within a two year period on the terms and conditions set out in such instrument and in a promissory note, dated January 12, 1963. The Ruths continued to reside on the land. Mr. Lites recorded the deed, and paid the back taxes on the land. He also had the property transferred to his name on the tax books of Grant County, and has paid the taxes each year since 1961.

The Ruths made no payments on the note to Mr. and Mrs. Lites, and made no effort to repurchase the land prior to January 12, 1963. In fact they made no real effort to do anything about reacquiring title to the property until this suit was filed on September 12, 1973, a lapse of over ten years.

In bringing this suit, Mr. and Mrs. Ruth alleged they were indebted to Mr. and Mrs. Lites, and claimed that the deed they executed to the Lites in 1961 should be declared a mortgage. They seek to redeem the land by paying whatever amount is now due Mr. and Mrs. Lites. An answer was filed denying the allegations of the complaint. The answer also

alleged that any agreement of repurchase between the parties had expired on January 12, 1963, and that the Ruths were barred by laches from attempting to enforce the repurchase agreement at this late date. The Lites later filed an amended answer and requested that title to the land be quieted in them, and for a Writ of Possession inasmuch as the Ruths were still living on the land.

After an extensive trial, the Chancery Court ruled that the warranty deed executed by L. Routen and wife to J. B. Lites and Virginia C. Lites, his wife, dated January 12, 1961, was an absolute conveyance and not a mortgage; that the Ruths had failed to comply with the terms of a separate agreement to repurchase the land from the Lites; that Mr. and Mrs. Ruth have no right, title or interest in the property. The complaint was dismissed. The Ruths have appealed and this case has been assigned to the Arkansas Court of Appeals pursuant to Rule 29(3).

Two issues are presented on appeal, (1) whether the deed dated January 12, 1961, constitutes a mortgage, and (2) if it was in fact an equitable mortgage, whether appellants are barred by laches from redeeming the land.

The general doctrine prevails in this state that a grantor may show that a deed absolute on its face was intended only to be security for the payment of a debt and thus a mortgage. *Hill* v. *Day*, 231 Ark. 550, 331 S.W. 2d 38 (1960).

Whether any particular transaction does thus amount to a mortgage or a sale with a contract to repurchase must, to a large extent, depend upon its own circumstances. The question ultimately turns, in all cases, upon the real intention of the parties, as shown by the writings or as disclosed by extrinsic evidence. The rule is undisputed that to show a deed is not an absolute conveyance, but was intended to be a mortgage to secure a debt, the evidence must be clear, satisfactory and convincing. *Matthews* v. *Stevens*, 163 Ark. 157, 259 S.W. 736 (1924). In practice the line of demarcation between a mortgage and a sale with right of repurchase is shadowy, and it is frequently a matter of great difficulty to determine to which category a given transaction belongs. In

reviewing the decisions of courts of chancery on questions of this character, great weight should be given to the opinion of the trial court as the Chancellor may be apprised of the existence of circumstances which but dimly appear to us from an examination of the record alone. *Ehrlich* v. *Castleberry*, 227 Ark. 426 at 431, 299 S.W. 2d 38 (1957). The trial court had an intimate knowledge of this case and of the character and situation of the parties. The learned chancellor found that the instrument, in light of the attendant circumstances and the evidence adduced, was in fact an absolute deed of conveyance, and was not a mortgage. The trial court concluded that this was the intention of the parties, and we are unable to say, after a careful consideration of the record before us, that the chancery court has wrongly decided that issue. However, there is one modification wihch must be made in the decree of the trial court. The testimony is undisputed that Mr. and Mrs. Lites have permitted Mr. and Mrs. Ruth to continue to live in the house on the premises. In fact, Mr. Lites testified that they had agreed, many years ago, that Mr. and Mrs. Ruth might make their home there as long as they live and told them so. Mr. Lites expressed the agreement in the following words:

> "Q. You testified, that you made, "a gentleman's agreement", to let him live there.
>
> A. We did.
>
> Q. Why did you do that?
>
> A. Well, it's been brought out very vivid, that we have been friends all down through the years, and I didn't have malice in my heart to want to put him out of a home. And when we made this agreement, that was the agreement that he had the two years to pay it back and, if he didn't the property, in turn, would be mine. "If you do that and don't pay it off, you can have a home as long as you live there, and I will not put you off".

It is evident that Mr. and Mrs. Ruth relied on that understanding, and such agreement may explain why appel-

lants did not pay the note and comply with the agreement to repurchase. In any event, equity requires Mr. and Mrs. Lites to honor their agreement and permit Mr. and Mrs. Ruth to have a home on this land as long as either of them lives and desires to reside there. The statute of frauds was not raised as a defense to such agreement.

The decree of the chancery court is modified accordingly and, as so modified, is affirmed. The case is remanded for entry of a modified decree consistent with this opinion.

Supplemental Opinion on Denial of Rehearing
delivered December 12, 1979

The record in this case disclosed that appellees had promised appellants a home on the forty acres of land in question as long as appellants lived in event they could not repay the debt, and appellees retained the land. It was evident to this court on appeal that Mr. and Mrs. Ruth relied on that understanding, and the existence of such an agreement may explain why appellants did not pay the note and comply with the agreement for repurchase. In any event, in considering this appeal de novo, we held that equity required appellees, under the circumstances, to honor their agreement and permit Mr. and Mrs. Ruth to retain a home on this land as long as either of them lives and desire to reside there. As so modified, the decree of the Chancery Court was affirmed; and the case was remanded to the trial court for entry of a final decree not inconsistent with our opinion.

Appellees have now filed a petition for rehearing claiming that the original opinion of this court should be clarified to declare definitely that the rights of appellants to reside on the land is confined to the dwelling, and an appropriate small amount of land only immediately surrounding the house.

Appellees certainly know what they promised the appellants. If any dispute remains between the parties, or should arise later, the Chancellor would be in a better position to deal with such matters than this court, and the Chancery Court should do so first.

The present record before us does not fully disclose how much of this land is being used by appellants, whether the land is farm land, timber land, or both. The record is silent as to the exact location of the dwelling on the land, whether the dwelling has access, whether the home site is fenced, and many other details which a court would need in order to pass on the suggested items of possible future dispute which might arise.

We view our opinion as clear, and the mandate to be issued on it as sufficient in scope to enable the trial court to properly dispose of any issues which might arise between the parties in the future.

Rehearing denied.

ARKANSAS STATE HIGHWAY COMMISSION *v.*
M. F. CASH and Josephine CASH

CA 79-148 590 S.W. 2d 676

Opinion delivered November 14, 1979
Rehearing denied December 19, 1979
Released for publication December 19, 1979

Chris Parker, for appellant.

Jerry D. Pinson of *Pinson & Reeves,* for appellees.

JAMES H. PILKINTON, Judge. This is a highway condemnation case. M. F. Cash and wife were the owners of two parcels of land adjacent to Highway 62/65 north of Harrison, Arkansas. The first parcel was a triangular shape containing .20 acre fronting for approximately 190.9 feet on the highway. Of this parcel the Arkansas Highway Commission condemned and acquired .12 acre in fee simple, which is designated as Tract 52, leaving a residual of .08 acre. The second parcel was an irregular shaped piece of land containing .18 acre, with 229 feet of frontage on the same highway. Of this second parcel, the commission acquired .16 acre, designated as Tract 69, leaving a residual of .02 acre.

Mr. and Mrs. Cash own numerous billboards, some erected on their own land, and some located on property they lease from third parties. The two parcels involved in this case were purchased by them as locations upon which to erect billboards. At the time of taking, there were two billboards, containing three faces, located on Tract 52. There were two billboards, also containing three faces, located on Tract 69. In addition, there was a small building on Tract 69 which Mr. Cash rented. Both tracts were income producing.

Appellee Cash, as owner, and Mr. Gene Lair, a real estate appraiser, each valued Tracts 52 and 69 by capitalizing a "net" income figure which was derived from money produced from each piece of property. Mr. Cash estimated just compensation for the taking of Tract 52 to be $11,000.00 and estimated just compensation for the taking of Tract 69 to be $18,000.00. Mr. Lair estimated just compensation for the taking of Tract 52 to be $9,100.00 and estimated just compensation for the taking of Tract 69 to be $16,600.00.

Mr. Robert Palmer, a real estate appraiser, called by the commission, valued both tracts prior to condemnation by using the comparable sales approach as well as capitalizing

the rent payable under billboard leases from other sign companies at other locations. He estimated just compensation for Tract 52 to be $1,900.00 and just compensation for Tract 69 to be $4,700.00. The issue, as to each tract, was submitted to the jury under proper instructions. The jury returned a verdict of $5,500.00 as just compensation for Tract 52, and $10,000.00 as just compensation for Tract 69. The commission has appealed from the judgment entered on these verdicts. The case has been assigned to the Arkansas Court of Appeals pursuant to Rule 29(3).

1.

Appellant first argues that the trial court admitted, over the objection of the commission, evidence of the gross income derivable from the sale of advertising space on the billboard located on the subject property. We agree that the admission of testimony regarding business income or profits, and use of that income to compute market value in an eminent domain action, is reversible error. *Hot Springs County* v. *Bowman,* 229 Ark. 790, 318 S.W. 2d 603 (1958). However, we do not understand from this record that the trial judge admitted such evidence. It is well settled that capitalization of income is a recognized method of arriving at the fair market value of real estate used to produce rental income in determining just compensation in eminent domain cases. *Housing Authority of the City of Little Rock* v. *Rochelle,* 249 Ark. 524, 459 S.W. 2d 794. The Arkansas Supreme Court has also held evidence of rental value to be admissible as a factor to be considered in determining just compensation. *Desha* v. *Independence County Bridge District No. 1,* 176 Ark. 253, 3 S.W. 2d 969. See also *Housing Authority of the City of Little Rock* v. *Rochelle, supra.*

As we view the record, the rule that evidence of profits derived from a business located on the land is not admissible as a basis for computing the market value of such property in condemnation proceedings is not applicable to the situation under consideration. The commission fails to distinguish between income from the property and income from a business conducted upon the property. This distinction furnishes the criterion for the applicability of the rule. *NLR Urban*

Renewal v. *Van Bibber,* 252 Ark. 1248 at 1254, 483 S.W. 2d 223 (1972). Here we are dealing with net income from the property, something that would be the prime consideration of any prospective purchaser of income producing land. The evidence does not support the commission's contention that the income in this case is of the type derived from a business located on the land. We find no merit in the first point urged by appellant for reversal.

II.

Appellant next urges that the trial court erred in failing to strike the testimony of Gene Lair, an appraiser for the land owner. The claim is that Mr. Lair valued the property by capitalizing the income of a business conducted thereon. We do not so understand the evidence. Mr. Lair was qualified as an expert in real estate appraisals. He stated his opinion as to the just compensation for each tract involved. As a qualified expert, Mr. Lair needed only to have stated his bare opinion. *Ark. Highway Commission* v. *Hartsfield,* 248 Ark. 821, 454 S.W. 2d 82 (1970). However, as appellant points out, the testimony of such a witness should be struck if it is shown to lack a sound and reasonable basis. *Ark.-Mo. Power Co.* v. *Sain,* 262 Ark. 326, 556 S.W. 2d 441 (1977). In the case before us, we cannot say Mr. Lair's testimony lacked a sound and reasonable basis. He valued both tracts by capitalizing a "net" income figure derived from money produced from each piece of the property involved. He stated that the subject property was being used for the rental of sign locations and, in the case of Tract 69, also the rental of a commercial building. Mr. Lair said he considered such purposes to be the highest and best use of the tracts. He also testified that he considered the best approach to the true market value to be the income approach in view of the fact that both tracts were income property, and considering their shape and size. He explained the factor which he used, and the step by step method which he employed in the capitalization. He did not attribute all of the income from the signs on his property, but in his calculation subtracted $10.00 per month per sign to cover proper deductions. On cross-examination Mr. Lair said that he deducted the vacancy ratio and other factors in connection with the operation of the sign. He testified that, to his knowledge, he deducted all the cost of

maintaining the signs at their location. We are unwilling to say that appellant's cross-examination of this witness destroyed his opinion of any fair and reasonable basis. Therefore, the court properly refused to strike his testimony.

III.

The State Highway Commission also claims the trial court erred in failing to strike the testimony of M. F. Cash, one of the owners. Mr. Cash testified that the fair market value at the time of the taking of Tract 69 was $18,000, and the fair market value of Tract 52 was $11,000. He arrived at these figures by capitalizing a "net" income figure which was derived from the rents produced from each piece of property. According to Mr. Cash, the taking totally destroyed the use of the land for income purposes, and he gave no value at all to the small fractions which were left. He said they were not suitable for rental as a location for highway signs which he said was their highest, best and only use. Since Mr. Cash was in the sign business, the State Highway Commission argues he valued the property by capitalizing the income of a business conducted thereon. Appellant asserts that Mr. Cash's testimony does not constitute a fair and reasonable basis for the landowner's value estimate.

Appellant agrees that a landowner is a competent witness to testify as to the value of his land simply because he owns it. *Ark. Highway Commission* v. *Jones,* 256 Ark. 40, 505 S.W. 2d 210 (1974). However, as appellant points out, the landowner must relate a satisfactory explanation on cross examination to justify his value estimate. *Ark. Highway Commission* v. *Duff,* 246 Ark. 922, 440 S.W. 2d 563 (1969); *Ark. Highway Commission* v. *Darr,* 246 Ark. 204, 437 S.W. 2d 463 (1969). In the case at bar Mr. Cash valued the property in question by using a percentage formula under which he placed a value on the property at 10 times the net annual rental. As appellee points out, a similar method was employed by an appraiser in *Housing Authority of the City of Little Rock* v. *Rochelle,* supra. The Arkansas Supreme Court said this was a crude but practical application of the income approach to the market value. Mr. Cash testified that he had bought a lot of property in the Harrision area, and knew land values there.

Even if Mr. Cash's testimony be considered improper, reversal would not be required on this point because there is other sufficient evidence to sustain the verdict. It is evident that his testimony did not affect the verdict. *Ark. State Highway Commission* v. *Ormond,* 247 Ark. 867, 448 S.W. 2d 354 (1969). Any error in admitting the landowner's value testimony did not enhance the award. The verdict was for less than the amount for which there is substantial evidentiary support.

IV.

The final argument of appellant is that the court erred in not directing a verdict in the amount of $1,900.00 on Tract 52, and $4,700.00 on Tract 69. This point is argued on the premises that the appellees failed to develop any substantial testimony to support their claim for just compensation, even when viewed in the light most favorable to them. Appellant contends that Mr. Palmer, an appraiser for the commission, furnished the only substantial evidence as to just compensation. We do not agree. As already mentioned, we find other substantial evidence in the record. The trial court was correct in refusing to direct a verdict for the commission based upon the values set by the expert who testified for the commission.

Affirmed.

WRIGHT, C.J., not participating.

E. A. WELCH and Myrtis M. WELCH
v. Mary Syble BREWER

CA 79-142 590 S.W. 2d 325

Opinion delivered November 14, 1979
Rehearing denied December 12, 1979
Released for publication December 12, 1979

Gardner & Gardner, for appellants.

William R. Bullock, for appellee.

MARIAN F. PENIX, Judge. This case was appealed to the Arkansas Supreme Court and by that court assigned to the Arkansas Court of Appeals pursuant to Rule 29(3).

Mary Syble Brewer, 95 year old appellee, brought suit to rescind a warranty deed. The deed was executed August 30, 1972. It deeded property belonging to Ms. Brewer to E. A. Welch (now deceased) and Myrtis M. Welch, appellants. The deed recites a total consideration of Four Thousand Five Hundred Dollars ($4,500.00). Ms. Brewer is the aunt of Ms. Welch, age 73. In June, 1972 Ms. Brewer was a resident of Ola Nursing Home. Ms. Welch and her husband visited Ms. Brewer and agreed to buy Ms. Brewer's home property in Ola. The consideration was $4,500 plus the appellants agreed to care for Ms. Brewer for the rest of Ms. Brewer's life. The Welchs contend the agreement was for Ms. Brewer to make her home with them only for so long as she could take care of herself. The Welchs moved from their home in Brinkley to Ms. Brewer's home in Ola. Ms. Brewer moved from the nursing home and began living with the Welchs. The Welchs began extensive repairs and remodeling on the house. Ms. Brewer lived with them for 25 months. She fell

and cut her head and was taken to the doctor who placed her in the hospital. The doctor advised she go to the nursing home and Mr. Welch took her from the hospital to the nursing home. The Welchs have not paid any of Ms. Brewer's nursing home expense. Ms. Brewer has paid all of these expenses herself. She brought suit to rescind the deed and the court ordered rescission. In a subsequent hearing the court determined the value of improvements made by the Welchs to be $10,000.00. A judgment for $14,500.00 was awarded Ms. Welch bearing 8% interest from date of judgment, Jan. 5, 1979, and Ms. Welch was ordered to convey property to Ms. Brewer upon payment of judgment. The order provides if judgment be not satisfied within 30 days said property shall be sold upon application of either party. The order states the rental value due Ms. Brewer and the interest, taxes, insurance, and other repairs due Ms. Welch are offsetting when considering the care the Welchs provided to Ms. Brewer; thus no damages are awarded either party for said items.

The only issue on appeal is whether Ms. Brewer, the appellee, proved by clear, cogent and convincing evidence, the Welchs promised to care for her the rest of her life and, if they did promise this, that they neglected and refused to carry out the promise. The trial judge ordered rescission of the support deed and held Ms. Brewer met her burden of proof by clear, cogent and convincing evidence.

Both parties agree that even though the deed in this case doesn't contain any statement to the effect the Welchs were to support or to care for Ms. Brewer for any period of time the law is clear in allowing this to be shown by parol evidence. *Rebsamen Motors* v. *Moore,* 231 Ark. 249, 329 S.W. 2d 155 (1959). Here the parol evidence is not in agreement as to the exact provisions of support and maintenance. Several witnesses testified for Ms. Brewer — a banker, a neighbor friend and a nephew. Several witnesses testified for Ms. Welch — a manager of a Savings and Loan who is an appraiser, a carpenter, Ms. Welch's daughter and son-in-law, a retired minister, and a physician. Not one of the witnesses actually heard the terms or was present when the agreement was first made regarding the care which was to be afforded Ms. Brewer as part of the consideration by which she deeded

her property to the Welchs. Ms. Welch's witness, Dr. Pennington, testified he learned of the terms of the agreement from the Welchs who maintained the care given Ms. Brewer was *for only as long as they were able*. He testified Ms. Brewer understood the agreement to be she was to be cared for *the rest of her life*.

It isn't reasonable a woman already past 90 would make an agreement according to the terms the Welchs propose. For her to agree to such restrictions is not likely. The probability of her being able to care for herself up until the day of her death is diminished by her already advanced years. The purpose of a support deed is to provide security both physicial and mental, to a grantor approaching the time of life when dependence on others is highly likely. The evidence shows the Welchs to be in poor health. Mr. Welch is now deceased. Mr. Welch's death and Ms. Welch's failing health are indeed unfortunate. But these facts are irrelevant to the consideration of the support deed. The language used by Justice Jones in *Wood* v. *Swift, Trustee,* 244 Ark. 929, 428 S.W. 2d 77 (1968) is pertinent to this case.

> We agree . . . that support deeds are recognized in this state; that when a deed is executed in consideration of future support and maintenance and the grantee fails to fulfill the provisions of the deed, the grantor may sue at law for damages, or may sue in equity to cancel the deed for failure of consideration. . . . While reformation of a deed or contract for fraud or mistake is a proper matter for equitable jurisdiction, the burden of proving fraud, mistake or lack of consideration rests upon the one alleging it.

The grantees in the case at hand disagreed with the grantor as to the extent of care to be rendered by them to the grantor. Each party mistook what the other party understood to be a vital element of the consideration.

All of the evidence was oral testimony. The trial judge had to weigh the testimony, observe the demeanor of the witnesses, and judge the credibility of the witnesses. *May* v. *Alsobrook*, 221 Ark. 293, 253 S.W. 2d 29 (1952). The Welchs cared for Ms. Brewer for as long as they were able. But this falls short of the complete consideration constituting their

part of the agreement as the chancellor found it to be. Their agreement was to care for Ms. Brewer for life. This they did not do. From the record it is clear the chancellor had sufficient evidence from which he could conclude the Welchs failed to provide the complete consideration for the support deed.

Affirmed.

RECTOR-PHILLIPS-MORSE, INC. *v.*
HUNTSMAN FARMS, INC. et al

CA 79-132 590 S.W. 2d 317

Opinion delivered November 14, 1979
Released for publication December 5, 1979

James M. McHaney and *John C. Calhoun, Jr.*, for appellant.

Wright, Lindsey & Jennings, for appellees.

GEORGE HOWARD, JR., Judge. The central issue tendered for determination is whether the trial court committed error in denying appellant's claim to a commission purportedly earned as a consequence of producing a buyer who was ready, willing and able to purchase real estate from appellee pursuant to an agreement between the parties.

The pertinent facts are: Sometime during July, 1976, Robert Chowning, Executive Vice President of Rector-Phillips-Morse, Inc., hereinafter called Rector, Inc., was advised that Sidney Weniger was interested in buying the Riviera Apartments which are located on Old Cantrell Road in Little Rock. The apartments were purchased by Harold Huntsman and his wife in 1973 from Rector-Phillips-Morse Realty Fund, a limited partnership and a subsidiary of Rector, Inc., hereinafter referred to as Realty Fund; and Huntsman later conveyed the property to Huntsman's Farm, Inc. A third mortgage was executed, on the apartments, by Huntsman in favor of Realty Fund to secure a note for $584,000.00 which was to mature on September 15, 1976.[1]

On August 4, 1976, Andy Agar, a representative of Rector, Inc., confirmed Mr. Chowning's telephonic conversation with Mr. Huntsman by letter and the communication further stated: "Should a sale be made by you to Mr. Weniger, we feel you should not enter into direct negotia-

[1]Rector, Inc. managed the apartments for Mr. Huntsman under a five year contract.

tions with Mr. Weniger without our being involved. In any event, and should you sell the property to Mr. Weniger, this is to advise you that we will consider ourselves entitled to commission of 6% of the total sales price."

On September 16, 1976, Mr. Huntsman and Mr. Weniger entered into an offer and acceptance agreement which provided, among other things: (1) The total sales price would be the outstanding principal balance due on mortgages involving the apartment, plus $150,000.00 cash to the seller, and (2) the agreement is subject to a special condition on Weniger closing a satisfactory mortgage loan to be obtained from First Federal Savings & Loan Association of Pine Bluff, Arkansas. Finalization of the transaction was scheduled for October 31, 1976. The offer and acceptance agreement also specified that "Seller agrees to pay Rector-Phillips-Morse, Inc., agent, a commission pursuant to the agreement between them." While the offer and acceptance agreement was executed on a printed form of Rector, Inc., the agreement was executed by Mr. Weniger and Mr. Huntsman and no one from Rector, Inc. was present during the execution of the agreement.

A rider, dated the same date as the offer and acceptance agreement, was executed, by Huntsman and Weniger, and attached to the agreement. The rider, in material part, provides:

> 1. On or before December 31, 1976, if title has been acquired by Buyer to the Riviera Apartments, the Seller shall have the option upon 15 days notice to re-purchase said property by assuming any new mortgage financing arranged by the Buyer. (If satisfactory to lending institution) and any existing mortgages, which Buyer may have assumed at time of title, plus the payment to the Buyer of the following.
>
> . . .
>
> 3. In addition, Seller shall pay to Buyer, the sum of $45,000.00 plus a sum equal to one percent of the amount of new financing arranged by Buyer.

If said new mortgage financing does not exceed nine (9) percent interest, Seller shall pay Buyer an additional sum of one (1) percent of said mortgage.

If said new mortgage financing is more than a 25 year term, Buyer shall pay Seller an additional sum of one (1) percent of the mortgage.

4. It is the express interest of this option agreement, that if exercised by the Seller, the Buyer shall be reimbursed for any and all out-of-pocket costs incurred by Buyer (or nominee) in connection with or on behalf of the purchase, financing, and closing of title to the Riviera, its operation from date of title to date of repurchase, plus the sums referred to in paragraph 3 above.

On September 24, 1976, an addendum to the agreement was executed by Weniger and Huntsman which provides in relevant part:

1) As an alternative to assuming the new mortgage as set forth in paragraph 1 of the Rider, seller may pay the same in full, including any prepayment penalties.

. . .

3) In the event seller pays the mortgage held by RPM Realty Fund in full prior to closing date of this transaction and pays to buyer the sum of $45,000 plus all costs and expenses incurred on account of this transaction (including legal fees, appraisal fees, mortgage application fees, etc.) buyer agrees to void the offer and acceptance and Rider dated September 16, 1976[2] and to release seller from all obligations thereunder.

Mr. Weniger testified that he had made arrangements

[2]Rider 2 (addendum) was executed by Huntsman and Weniger purportedly on September 24, 1976, after Huntsman had consulted his attorney with reference to the offer and acceptance agreement and Rider 1. Huntsman was told by his attorney that "there were some things left out." Weniger was consulted and Rider 2 was executed.

with First Federal Savings & Loan Association of Pine Bluff, Arkansas, for financing the purchase of the apartments, but when First Federal became aware of the stipulation in the offer and acceptance agreement that Huntsman had the option of repurchasing the property and assuming the mortgage, First Federal refused to agree to the stipulation. Moreover, First Federal stated that it did not want Huntsman as a mortgagor under any circumstances. Consequently, Weniger's arrangements with First Federal for financing the purchase of Huntsman's apartments did not materialize.

On or about October 28, 1976, Huntsman deeded the apartments to Graceland College, an Illinois Institution sponsored by the Church of Jesus Christ of Latter Day Saints; and on October 31, 1976, Graceland College paid off the third mortgage held by Realty Fund. In November, Weniger filed his specific performance action against Huntsman and Graceland College. Rector, Inc. intervened in the action seeking to recover a commission of $75,000.00.

The trial court found that while Rector, Inc. was not afforded a general listing, Huntsman did agree to pay Rector, Inc. a commission, providing the apartments were sold to Sidney Weniger. The trial judge concluded the property was not sold to Weniger, therefore, Rector, Inc. did not produce a ready, willing and able buyer for the property. Consequently, the trial court dismissed appellant's complaint with prejudice.

Appellant's argument for reversal may be summarized as: That appellant has established, by a preponderance of the evidence, that Weniger and Huntsman were brought together by appellant; that this meeting culminated in an agreement acceptable to the seller, Huntsman. Hence, appellant earned its commission effective September 16, 1976, the date offer and acceptance agreement was executed; and that the ultimate outcome of the transaction cannot vitiate Rector, Inc.'s entitlement to the commission.

First, it is fitting that we set out the scope and range of our responsibility as an appellate court in reviewing a pro-

ceeding on appeal from a chancery court. Admittedly, such proceeding is tried *de novo*. However, it is clear that an appellate court will affirm the action of the trial court when that court's action is supported by a preponderance of the evidence. *Alley* v. *Martin,* 250 Ark. 74, 464 S.W. 2d 591 (1971); *Summers* v. *Hook,* 243 Ark. 368, 419 S.W. 2d 810 (1977). Moreover, where credibility as between interested parties in an action is pivotal, the appellate court's practice is to abide by the chancellor's judgment in the matter. *Souter* v. *Witt,* 87 Ark. 593, 113 S.W. 800 (1908).

Turning now to the issue to be resolved, we are persuaded that the universal rule provides that a broker is entitled to his commission when he produces a purchaser who is able, ready and willing to buy the property at a price and on terms designated by the seller, although no sale is made. However, this general rule is subject to exceptions. An exception, for example is where the agreement designates the person to whom the sale is to be made. 12 C.J.S., Brokers, Section 85, page 187.

In *El Dorado Real Estate* v. *Garrett,* 240 Ark. 483, 400 S.W. 2d 497 (1966), the Arkansas Supreme Court observed that one thread that seems to be woven in cases rendered by the Court between 1908 and 1963 relative to a broker's commission involving real estate — where a purchaser has been produced who is ready, willing and able to purchase the lands — it is not necessary that an enforceable contract be executed before the broker is entitled to his commission, unless the agreement between the seller and broker calls for an actual sale of the property.

In *Sarna* v. *Fairweather,* 248 Ark. 742, 453 S.W. 2d 715 (1970), the Supreme Court again re-emphasized that a broker earns his commission by producing a buyer ready, willing and able to take the property on the seller's terms, even if the contract were unenforceable, unless the agreement between the seller and agent required that the sale be actually consummated.

Appellant's letter of August 4, 1976, to Mr. Huntsman, which puts Huntsman on notice that appellant expected a

commission for its services provides:

> Should a sale be made by you to Mr. Weniger, we feel you should not enter into direct negotiation without our being involved. In any event, and should you sell the property to Mr. Weniger, this is to advise you that we will consider ourselves entitled to a commission of 6% of the total sales price.

Andy Agar, a representative of appellant, testified that the agreement was that his company would be entitled to a commission if a deal were made with Mr. Weniger.

Mrs. Patsy Akers and George Sisco, who were called as witnesses by appellant, testified that they had heard a conversation between Agar and Huntsman to the effect that appellant would receive a commission if a sale were made with Weniger. On the other hand, Huntsman denies that he agreed to pay a commission to appellant under any circumstances. The trial court, however, concluded that Huntsman did agree to pay a commission only if the property were sold to Weniger.

Appellant argues that Weniger never had an opportunity to consummate the sale inasmuch as Huntsman declared the agreement terminated by virtue of deeding the property to Graceland College. In other words, the failure on the part of Weniger to make a sale was due to the fault of Huntsman. Moreover, appellant argues that Huntsman may not shield himself or take refuge in the circumstances surrounding the failure of Weniger to obtain financing for the purchase of the property through First Federal Savings & Loan Association of Pine Bluff, Arkansas, inasmuch as it was never the obligation or responsiblity of Weniger to obtain a loan from any source; that Weniger had no obligation to arrange financing until expiration of Huntsman's right to terminate the agreement by paying off the third mortgage; that the "sole and only reason for the transaction not closing was the precipitous conduct of Huntsman."

On the other hand, Huntsman argues that the special condition contained in the offer and acceptance with refer-

ence to Weniger's closing a satisfactory mortgage loan from First Federal Savings & Loan Association of Pine Bluff, Arkansas, was not a condition tied to financing in general, but to a mortgage loan from a specific lending institution and this becomes most relevant and material to Huntsman when reference is made to paragraph 1 of the first rider which specifies that "On or before December 31, 1976, if title had been acquired by buyer to Riviera Apartments, the seller shall have the option upon 15 days notice to repurchase said property by assuming any new mortgage financing arranged by the buyer." By virtue of the rider, argues Huntsman, he had a vested right to assume the loan from First Federal Savings & Loan Association of Pine Bluff which Weniger intended to place on the apartments; and that this was vital to him because he was negotiating with Weniger for refinance money for the apartments.

It is clear from the record that prior to and during Huntsman's negotiation with Weniger, Huntsman was having financial problems and was faced with the maturity of a note due Realty Fund and which was secured by a third mortgage on the apartments.

Weniger could not acquire the financing from First Federal Savings & Loan Associatin of Pine Bluff since First Federal refused to permit Huntsman to assume the loan.

Given these circumstances, we are persuaded that Weniger's offer was a conditional one and, indeed, it seems clear until this condition was met, Huntsman had no duty to sell, nor Weniger a duty to purchase.

While the trial judge indulged, to a degree, in some mental exercise as to whether the condition relating to financing from First Federal could be waived by Weniger, the judge did not predicate his decision, in any way, on waiver, but concluded:

> . . . I do not believe that the mere filing of the Specific Performance suit, and its allegation of 'ready, willing and able' to perform is, standing alone, sufficient to consitute either a waiver or establish financial ability

> to perfect the purchase. Further, I cannot conclude that the mere fact that Mr. Weniger 'owns' other properties in the Little Rock area is sufficient to establish his financial ability.

In other words, the evidence was insufficient to find a waiver of the condition, or that Weniger was financially able to consummate the sale in absence of the funds to be derived from the loan.

We are also persuaded that the contract between Weniger and Huntsman constituted the offer and acceptance, the first and second riders. As a matter of fact, both Huntsman and Weniger testified that the three documents represented the agreement between them and that the second rider (addendum) was executed to simply clarify the terms of the transaction as contained in the offer and acceptance and the first rider.

Under paragraph 3 of the second rider, Huntsman had the right to pay off the mortgage held by Realty Fund and to pay Weniger $45,000.00 plus all cost and expenses incurred; and Weniger agreed to void the offer and acceptance agreement and to release the seller from all obligations. In selling the property to Graceland College, Huntsman exercised this option.

After carefully considering the record, we are unable to say that the trial court's holding is not supported by a preponderance of the evidence.

Affirmed.

HAYS, J., dissents.

M. STEELE HAYS, Judge. I earnestly disagree with the affirmance of this case. True, there was no written listing agreement between the owner and the broker, but a careful reading of the record convinces me that the owner (having indicated his willingness to the broker to sell "if the price is right") permitted the broker to bring him into contact with a prospective buyer and rather promptly thereafter entered

into a written offer and acceptance agreement with the buyer which included a provision plainly recognizing the broker's right to a commission. Under the holding in numerous decisions of the Supreme Court of this state, a broker has earned his commission when the seller accepts the buyer's offer. *Moore* v. *Irwin,* 89 Ark. 289 (1909); *Wales-Riggs Plantations* v. *Pumphrey,* 141 Ark. 565 (1920). The seller argues that this case is distinguishable from those decisions holding that the commission is earned when the broker produces a buyer ready, willing and able for the reason that *here* the terms of the verbal listing carried the special provision that a sale be actually consummated. This argument might be persuasive but for the fact that it was the seller, rather than the buyer, who aborted the closing. *Emerson* v. *Stout Farm Agency,* 161 Ark. 378 (1924); *Chambers* v. *Ester,* 159 Ark. 250 (1923).

I would reverse.

RAWHIDE FARMS, INC., Harlan THORNTON, Jr., and Phil CAPUTO *v.* W. E. DARBY (R. A. LILE and Louis ROSEN, Co-executors of the Estate of William E. DARBY)

CA 79-145 589 S.W. 2d 210

Opinion delivered November 14, 1979
Released for publication November 26, 1979

Jack D. Files, for appellants.

Eichenbaum, Scott, Miller, Crockett, Darr & Hawk, P.A., for appellees.

DAVID NEWBERN, Judge. This suit is for judgment on two promissory notes and foreclosure of a mortgage which secured the indebtedness evidenced by the notes. The chancellor found the appellants, who were the makers of the notes, were in default, and a foreclosure sale was ordered. The appellants appealed to the Arkansas Supreme Court, alleging the chancellor erred in failing to grant a continuance, in finding the appellants in default, and in allowing an inequitable acceleration pursuant to an acceleration clause in the

mortgage. The case was assigned to the Court of Appeals according to Rule 29(3). We reverse on the last of these points. Although not necessary to our decision, we consider the other points raised by the appellants worthy of discussion.

The appellants entered an agreement with Mr. Darby to purchase his farm. They gave him two promissory notes dated November 1, 1977; one in the amount of $532,500 and one for $167,500. The first payment on the larger note to become due October 31, 1978. Only interest was to be paid the first three years on that obligation. The smaller note, however, was to become due and payable in its entirety April 1, 1978.

The farm was conveyed to Rawhide Farms, Inc., which in turn mortgaged it back to Mr. Darby to secure payment of the two notes. The mortgage was signed by appellant Caputo as president of Rawhide Farms, Inc. The smaller note was signed by both appellants, individually. The larger note was signed by Caputo as president of Rawhide Farms, Inc., and by both Caputo and Thornton, individually. The chancellor found, and there was no serious dispute, the mortgage was given to secure both of the notes. The mortgage contained the following clause:

> If said indebtedness or any part thereof, principal or interest, shall not be promptly paid when due according to the tenor of said notes and of this mortgage . . . the whole indebtedness hereby secured, whether then due or not, shall immediately become due and payable for all purposes . . . at the option of the grantee . . . and this mortgage and security may be foreclosed by judicial proceedings . . .

The appellants paid a portion of the smaller note, but it is undisputed that it had not all been paid as of its due date, April 1, 1978. The chancellor found $67,648.42 outstanding on that note. Extensions were granted by Mr. Darby and by his agents, and the appellants made occasional small payments, one as late as July 20, 1978.

The foreclosure complaint was filed September 5, 1978. The appellants secured the services of an attorney, Guy Jones, Jr. The trial was set for January 3, 1979, after the case had been continued twice. On January 2, 1979, Mr. Jones informed the appellants it was necessary for him to be in Fort Smith at another hearing on January 3, and he could not appear with them in Perryville at the trial of this case. The appellants dismissed Mr. Jones as their counsel and hired Mr. Jack Files who appeared with them January 3. Mr. Files moved for a continuance to allow him to prepare for the hearing and because of surprise that Mr. Darby, who was then still living, was not at the trial. A continuance until January 5, 1979, was granted. On January 5, Mr. Files again moved for continuance, and after considerable discussion among counsel for both sides and the chancellor, the motion was denied.

I.

The first point raised for reversal is the chancellor's refusal to grant another continuance. The rule in Arkansas is that a motion to continue is addressed to the discretion of the trial judge, and his or her decision will not be overturned unless that discretion is manifestly abused. *McMorella* v. *Greer,* 211 Ark. 417, 200 S.W. 2d 974 (1947), and *Watts* v. *Cohn,* 40 Ark. 114 (1882). The appellants cite no Arkansas case dealing specifically with withdrawal or discharge of counsel. They cite a very distinguishable Texas decision, *Leija* v. *Concha,* 39 S.W. 2d 948 (Tex. Civ. App. 1931), in which counsel were forced to go to trial 30 minutes after being hired, and a Nevada case, *Benson* v. *Benson,* 66 Nev. 94, 204 P. 2d 316 (1949), in which the court said that the withdrawal on the eve of the trial of a party's attorney is not *ipso facto* a ground for continuance.

In this case, it is clear that one continuance was given the appellants after Mr. Files entered the case. Mr. Files argued he was, between January 2, and January 5, involved in another important case to which he had to devote his time, but the chancellor emphasized that Mr. Files had taken this case knowing the constraints on his time. The chancellor also made clear his conclusion that Mr. Files had presented

the case thoroughly and thus no prejudice had resulted to the appellants from the refusal to grant the continuance.

Although it was certainly not the fault of the appellants that they had to go to trial with a lawyer who was not very familiar with their case, the record shows the chancellor made every effort to see they had ample opportunity to present everything that could possibly have supported their defense. We cannot say the chancellor abused his discretion.

II.

The second point raised by the appellants is that the larger note was not due at the time the suit was filed and thus that obligation should not have been considered accelerated. The appellants do not contend the note did not represent an indebtedness secured by the mortgage. For the proposition the larger note should not have been accelerated, the appellants cite *Vandergriff* v. *Vandergriff,* 211 Ark. 848, 202 S.W. 2d 967 (1947). That case is not in point as there the only default was failure to pay interest on a note, and the mortgage did not provide for acceleration for failure to pay interest. The appellant's only other citation in support of this point is *Massey* v. *Tyra,* 217 Ark. 970, 234 S.W. 2d 957 (1950), which we do not find at all helpful.

The notes were subject to acceleration as they must be read together with the mortgage. *McCormick* v. *Daggett,* 162 Ark. 16, 257 S.W. 2d 358 (1924), and *Markel* v. *Fallin,* 161 Ark. 504, 256 S.W. 841 (1923). The chancellor did not err in his determination the larger note was accelerated in accordance with the mortgage clause.

III.

The third point of the appellants is that the finding the larger note was in default was against the preponderance of the evidence. Neither the appellants nor the appellees cite any authority with respect to this point, and thus we need not give consideration to it unless the argument presented by the appellant is otherwise convincing or it is apparent the point is well taken. *Hazen* v. *City of Booneville,* 260 Ark. 871, 545

S.W. 2d 614 (1977); *Dixon* v. *State,* 260 Ark. 857, 545 S.W. 2d 606 (1977). We need only say the acceleration clause contained in the note becomes irrelevant when read in conjunction with the mortgage, and the fact that the mortgage was signed by the appellants only as representatives of Rawhide Farms, Inc., is also unimportant. To find the appellants should not be held responsible for the terms of the mortgage would require us to say the indebtedness represented by the notes was not that which was secured by the mortgage. The appellants do not, and apparently could not, seriously make that argument.

IV.

The appellants' fourth point for reversal is that Mr. Darby waived the right to accelerate by accepting late, partial payments. Because they cite *Seay* v. *Davis,* 246 Ark. 201, 438 S.W. 2d 479 (1969), we may assume an assertion the acceleration was not made in good faith.

The appellants' testimony indicated they felt they had an arrangement with Mr. Darby pursuant to which he would go as far as possible to help them buy the farm and be lenient in demanding, or not demanding, strict compliance with the terms of their agreement. Mr. Darby's actions in accepting late, partial payments on the overdue note gives credence to their argument. But Mr. Darby's deposition makes it clear he did not intend to be forgiving beyond a point.

Seay v. *Davis, supra,* was an interpretation of *Ark. Stat. Ann.*, § 85-1-208 (Add. 1961), which provides:

> A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

Although that section seems designed to apply only to "acceleration at will" clauses, it was applied in the *Seay Case* where the mortgage clause was described by the Arkansas Supreme Court as providing for acceleration *in the event of default* at the option of the holder. The Supreme Court held it was not error for the chancellor to have found bad faith where the holders invoked an acceleration clause because of a late payment. The mortgagors tendered payment 48 hours late, and the mortgagees sought foreclosure. The chancellor found the mortgagees were trying to take advantage of the mortgagors and obtain their down payment — not in good faith.

The important distinguishing factor here is that, unlike the mortgagors in the *Seay Case,* there is no record that the appellants in the case before us have tendered the amount due. Rather than bad faith, Mr. Darby apparently did try to work with the appellants by extending and taking partial payments on the overdue amount.

This brings us to the question whether the acceptance of these payments was a waiver of the right to accelerate. The law on this question has developed out of cases involving mortgages securing notes to be paid in installments. The most recent expression of the Arkansas Supreme Court on the matter is *Philmon, et ux.* v. *Mid-State Homes, Inc.,* 245 Ark. 680, 434 S.W. 2d 84 (1968), in which Chief Justice Harris cited with approval language to the effect that, although acceptance of a late payment precludes acceleration because of the lateness of that payment, it is not a waiver of the right to accelerate when default occurs on a subsequent installment. The principle involves there is not applicable here if we confine ourselves to looking at the note which was due, according to its own terms without reference to the mortgage, at the date of the acceleration, as no installments were involved, the note having become due in a lump sum April 18, 1978.

However, in urging us to apply the acceleration clause found in the mortgage, the appellees ask us to view all three instruments together and declare the entire indebtedness due because of the default on the smaller note. When we do that, it becomes clear that the smaller note was designed to be a

"down payment" or first installment. We hold that acceptance of the late, partial payments of the smaller note waived the right to foreclose until a subsequent default.

The first interest payment on the larger note became due October 31, 1978 and the second one became due October 31, 1979. This suit was filed on September 5, 1978, and we assume the appellants have, with some justification, not tendered these payments. Thus, the amount due at the time this suit was filed and adjudicated below has grown substantially.

Under these circumstances, where the appellants are at fault for not paying and the appellees for giving them some reason to believe acceleration would not occur, we hold the appellants should, upon remand, be given a reasonable time to make the overdue payments. If the entire amount owed by the appellants to Mr. Darby's estate, that is, the entire amount of the smaller note plus interest and the payments due on the larger note in accordance with its terms plus interest, is not paid at the date to be prescribed by the chancellor, the foreclosure may proceed. This was the approach taken by the Arkansas Supreme Court in *Crone* v. *Johnson,* 240 Ark. 1029, 403 S.W. 2d 738 (1966), albeit far lesser sums were involved, and we think it fair. We note that, although we have said the chancellor will give the appellants a reasonable time to make their payments current, in no event will the appellees be precluded from acceleration and foreclosure on October 31, 1980, if the amount due then, including the payment which falls due on that date, has not been paid.

V.

The final point of the appellants has to do with computation of the judgment. The appellees respond with their own recalculation. In view of the result we reach, we deem it unnecessary to address the errors alleged in the manner of reaching the judgment, as the figures will undoubtedly be different in the event of a subsequent acceleration, judgment and foreclosure.

Reversed and remanded.

Lary FAUGHT *v.* Charles L. DANIELS,
Director of Labor, State of Arkansas

CA 79-203 590 S.W. 2d 79
November 14, 1979
Released for publication December 5, 1979

Appellant, *pro se.*

Herrn Northcutt, for appellee.

PER CURIAM

An agency determination held claimant ineligible for unemployment benefits under the provisions of Section 4(c) of the Arkansas Employment Security Law. The appeal tribunal affirmed the determination. On appeal to the Board of Review the appeal tribunal's decision was affirmed. Claimant appeals to this court.

Claimant is employed 180 days a year by the U.S. Forestry Service. He claims other forestry service 180-day employees have no trouble drawing unemployment compensation and thus he is the victim of discrimination. We can only evaluate employment security claims on an ad hoc basis. Our job is to determine whether the claimant has been denied compensation according to the law. We certainly would not approve any discriminatory practice, but we can review only the claims that come before us.

The claimant has worked 180 days a year for the past five years. The last 180 days worked were between October

2, 1978 and June 21, 1979. One of the pecularities of his job with the U.S. Forestry Service is the fact he is allowed only 180 work days per year. Because of the job location the claimant lives in a remote rural area of Deer, Arkansas. Deer is approximately forty miles from Harrison, Clarksville, and Russellville. He walks from his home to his Forestry Service job. His testimony indicates he wants very much to retain his 180 day job and work toward getting on Civil Service. His home is within 12 miles of his wife's place of employment at the present time. Claimant testifies he would move if he went to work at Harrison, Russellville or Clarksville. But he is conditional about whether he would accept work forty miles away. "I'm not placing any restrictions. If they will refer me to a job, I'll go or if I find one, I'll go talk to them about it. I can't say whether I'd take it until I do talk to the employer. I might not even be qualified. I've got to at least know what I'm getting into, know what I've got."

> Referee: But you say you're available for job out there if you could . . .
>
> Claimant: Yeah, *in the area*. I was reading a book here. If I can find the page, I've looked all the way through. I didn't know what I was going to get into really. Says, available for work and being ready to accept work at once and make a reasonable effort to find work. To me I think I've made a reasonable effort to find work. Actually there's not that much work, if any. If there are I haven't been able to find any. It says, all states require that a claimant be willing to accept suitable work in the locality in which residing. Well I don't know how far out this locality is gonna run and ah it said, also said, you can't move out of a locality which has work for you and draw unemployment. I've certainly not moved out of it, I've lived there all my life.
>
> Referee: Staying there aren't you.
>
> Claimant: Yeah.

We can certainly understand the dilemma in which the claimant finds himself. He wants and expects to return to his

Forestry Service job each year in October. He would accept a full time permanent job if he could find one in his neighborhood provided it paid something near the rate of pay he has been receiving for his service with the U.S. Forestry Service. In the remote rural area where he resides this is virtually impossible as there are practically no jobs available.

The appeal tribunal found the claimant is not making a reasonable effort to find employment other than of a very temporary nature as he plans to return each October to his Forestry Service job. It also found the claimant was not doing those things a reasonable prudent individual would be expected to do to secure work under the meaning of Section 4(c) of the Arkansas Employment Security Law. The Board of Review adopted the findings of the appeal tribunal.

We affirm.

Gary Dean STEVENS *v.* Lawrence SMALLMAN

CA 79-151 590 S.W. 2d 674

Opinion delivered November 28, 1979
Released for publication December 19, 1979

Hamilton, O'Hara & Hays, P.A., by: *James F. O'Hara,* for appellant.

Warren E. Dupwe, for appellee.

ERNIE E. WRIGHT, Chief Judge. The Appellant, Gary Dean Stevens, appeals from a judgment of the Craighead County Circuit Court awarding appellee $7500.00 for damages arising out of an injury sustained when the pick-up in which he was a passenger was struck by a vehicle driven by appellant. The judgment was pursuant to a jury verdict. The case has been assigned to the Court of Appeals pursuant to Rule 29 (3).

The appellant admitted the collision resulted from negligence on his part; but on appeal contends the court erred in allowing opinion testimony of a chiropractor as to permanent disability of appellee, and that the verdict was excessive.

The evidence shows that when the vehicle in which the appellee was riding as a passenger on May 27, 1977 was struck in the rear by a vehicle driven by appellant, the rear of the vehicle in which appellee was riding was substantially damaged; the appellee's head went back and hit the rear window glass; he experienced headaches and that night his wife took him to the hospital emergency room, X-rays were made and he was given pain and muscle relaxer medications. He continued to work thereafter, but experienced progressive stiffness in his neck. He went to a medical doctor and more muscle relaxers were prescribed; he had the prescriptions refilled a few times and later went to a chiropractor, Dr. Hailey, in December of 1977 because the pain did not leave but seemed to increase. The pain was in his neck and between the shoulder blades. He did not have these problems

before the accident, but continues to experience annoying pain in performing his work. He received some 33 or 34 treatments by Dr. Hailey that were helpful.

The evidence shows Dr. Hailey is a graduate of a chiropractic school, is licensed to practice his profession in Arkansas and some four other states, has practiced approximately twenty years and sees as many as fifty and more patients a day.

The doctor had occasion to examine the appellee, take a history of his complaints and treat him over a period of several months. He determined that he had and continues to have muscle spasms in the cervical area, some misalignment in the vertebral column, some limitation of motion in the cervical area and that he continues to complain of pain. He expressed the opinion that since the muscle spasms and pain had not cleared up in this substantial length of time the appellee, now age forty-one years, will probably have the pain when he is sixty-five, and that he has from five to seven per cent permanent disability to the body as a whole. The doctor testified appellee's physical problems were compatible with injuries sustained in rear end motor vehicle collisions such as described by the appellee.

We conclude the trial court did not abuse its discretion in permitting Dr. Hailey, a chiropractor, to express his opinion on the permanent disability of the appellee. The question of the competency of a witness to express an opinion is largely within the discretion of the trial court. *Ratton* v. *Busby,* 230 Ark. 667, 326 S.W. 2d 889 (1959), announced this rule and cites a number of cases. The case also points out that it is for the jury to determine the weight to be given to the particular expert testimony.

In *Badke, et al* v. *Barnett, et al,* 316 N.Y.S. 2d 177, 35 A.D. 2d 347 (1970), it was held a chiropractor was competent to testify as to permanent disability sustained by a passenger in an automobile when struck from the rear by another vehicle. The court said: "Chiropractors are extensively trained within the scope of the practice of chiropractic. By virtue of their training and skill, licensed chiropractors are

qualified to treat patients suffering from chiropractic ailment. A chiropractor should, therefore, be deemed competent to testify as an expert and express his opinion as to the nature of a chiropractic ailment and the probable cause and duration. The extent or degree of the witness' qualifications affects the weight of the testimony, not the admissibility". In *Corbin* v. *Hittle,* 34 Mich. App. 631, 192 N.W. 2d 38 (1971), the court held it was not error to permit a chiropractor to testify that plaintiff's injury was permanent, that he would never be free from pain and that he would have problems with his neck the rest of his life. The court stated: "The general rule is that a chiropractor is qualified to testify in a personal injury accident concerning matters within the scope of the profession or practice . . . In addition a chiropractor has been held competent to testify as to the permanency of an injury". The cases of *Daniels* v. *Bernard,* 270 S.C. 51, 240 S.W. 2d 518 (1978), and *Olivas* v. *Industrial Commission,* 16 Ariz. App. 543, 494 P. 2d 743 (1972), also support this rule.

Black's Law Dictionary, Fifth Edition, defines chiropractic as a method of detecting and correcting by manual or mechanical means structural imbalance, distortion of subluxations in the human body to remove nerve interferences where such is the result of or related to distortion, misalignment or subluxations of or in the vertebral column.

The evidence indicates appellee suffered and continues to suffer a great deal of pain arising from the injury sustained in the accident. While he has been able to perform his regular work and his direct medical bills have been less than $500.00, we do not find that the jury verdict of $7500.00 is so grossly excessive as to shock the conscience of the court or demonstrate the jurors were motivated by passion or prejudice. *Moses* v. *Kirtley,* 256 Ark. 721, 510 S.W. 2d 281 (1974). We therefore find no basis for reversal or ordering a remittitur.

Affirmed.

Winset STEWART *v.* KEY COMPANY, INC.

CA 79-152 590 S.W. 2d 872

Opinion delivered November 28, 1979
Released for publication December 19, 1979

Mike J. Etoch, Jr., for appellant.

Coleman, Gantt, Ramsay & Cox, by: *Martin G. Gilbert*, for appellee.

M. STEELE HAYS, Judge. This appeal was lodged in the Supreme Court of Arkansas and transferred to the Court of Appeals pursuant to Rule 29(3).

Appellant owns and operates a service station and fish market in conjunction with his home near Clarendon. He filed this suit to recover damages for the cost of repairing a gasoline pump and buildings housing the fish market which allegedly resulted from the negligent operation of a truck belonging to the defendant (appellee) and driven by defendant's employee, Mr. McKenzie.

The case was tried to a jury and resulted in a verdict for

the defendant, from which appellant appeals, assigning as error the trial court's refusal to instruct the jury in accordance with Ark. Stat. Ann. § 75-614(a), which reads:

> The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

Appellant argues on appeal that his "entire case was based on the proposition that the Defendant (driver) was following the car in front too closely, at a high rate of speed. . . ." and, therefore, the court should have given the requested instruction. We have searched the record in vain for some viable basis on which to confirm this assertion by appellant. The fact is, as appellee correctly argues, appellant's case was based upon the proposition that the defendant's driver was driving too fast and struck a parked car, which then struck the gas pump and buildings, rather than upon a theory of following too closely.

Appellant's case rested on the testimony of two eye witnesses to the incident — himself and his daughter, Mrs. Coburn. Mrs. Coburn testified that she saw the defendant's truck from her kitchen window as it approached, travelling at a very high rate of speed (70 to 80 mph) and on the wrong side of the road; that she could hear the horn, skidding and brakes being applied; that the truck was out of control and collided with an unoccupied automobile that had been parked for some time near the gas pump; that the impact caused the automobile to collide with the gas pump and buildings, resulting in the damage complained of.

Appellant's testimony was consistent with that of Mrs. Coburn with one exception — he did observe another vehicle, an automobile, going in the same direction as the truck; however, this vehicle, he says, did not stop but continued on its way (Tr. 113). Appellant's brief suggests that it was this moving vehicle which did not stop that appellant was referring to in part of his testimony, rather than the parked vehicle, but a study of the appellant's testimony in its entirety (very little of which is abstracted) simply will not support this

contention. On at least three separate instances in his testimony the appellant states that it was the *parked* vehicle that was struck and then collided with the gas pump and buildings (Tr. 67, 110 and 157). Unquestionably the testimony of appellant and Mrs. Coburn agree on this point.

In contrast, the defendant's driver, Mr. McKenzie, testified that he was proceeding at a speed of 40 to 45 mph, that he observed an automobile ahead approximately 100 yards distant, at a slightly slower speed; that he moved over into the passing lane when about 30 yards away and as he was proceeding to overtake the vehicle it suddenly turned sharply to the left and he was unable to avoid striking the left rear of the vehicle. Mr. McKenzie testified positively that it was this moving automobile that struck appellant's structures and *not* the parked vehicle; moreover, the names and addresses of the occupants of this vehicle were supplied the appellant's lawyer in response to interrogatories prior to trial. Whether Mr. McKenzie was otherwise negligent is not material to any issue on appeal, but one thing is clear — he could not have been found to be in violation of 75-614 on the basis of his own account of the collision, as appellant contends. If it were otherwise, it would be impossible to pass on the highways without risking a violation of this statute. Indeed, when the statute is examined in its entirely it becomes evident that the conduct of the defendant's driver was perfectly permissible under the statute, as the final sentence reads: "The provisions of this subdivision shall not be construed to prevent overtaking and passing. . . ."

Thus, a somewhat unusual conflict is presented — appellant contends that the *parked* vehicle was struck by the appellee's truck and caused appellant's damage; whereas, appellee contends it was the *moving* vehicle which was struck. Why this divergence occurred is not clear, but it is clear that the jury's verdict rendered the issue moot, and whatever may have been the jury's conclusion on the matter, its verdict discharged the defendant of negligence in connection with appellant's damage. We mention this simply by way of observing that it appears clearly from the record that the trial court fully instructed the jury in a manner consistent with the appellant's theory of the case and for it to have given

the instruction now complained of would, we believe, have gone far beyond any theory supported by either the pleadings or the evidence. The record does not disclose whether the trial court's refusal to give the instruction was because the issue of following too closely was not raised in the pleadings or because it was not supported by the evidence, or both; but we find that the decisions of this state would support him on either point. In *Dominion Textile Company, Ltd.* v. *Beck,* 188 Ark. 1090, it is said that in order to be submitted to the jury an issue must be raised in the pleadings. Further, the court was more than justified in refusing to so instruct from the standpoint of a total absence of evidence raising an issue of following too closely, as the law requires not merely evidence, but *substantial* evidence, in order to create a submissible issue for the jury's deliberation. Some of the numerous cases in support of this point are: *Hill* v. *Whitney,* 213 Ark. 368, *Kansas City & Southern Ry. Co.* v. *Diggs,* 205 Ark. 150, *St. Louis S.F. Ry. Co.* v. *Lane,* 156 Ark. 465, *Harkrider* v. *Cox,* 230 Ark. 155, and *State Bank* v. *McGuire,* 14 Ark. 530.

The judgment of the trial court is affirmed.

Betty Sue Budd DILLAHA et al *v.*
Henry Gresham TEMPLE, Jr. and
Mollie Jo TEMPLE

CA 79-153 590 S.W. 2d 331

Opinion delivered November 28, 1979
Released for publication December 19, 1979

Autrey, Weisenberger, Lingo, & Johnson, for appellants.

Smith, Stroud, McClerkin, Dunn & Nutter, for appellees.

M. Steele Hays, Judge. This case involves conflicting claims of certain real property along the Red River in Little River County, Arkansas. The dispute is between Mr. and Mrs. Temple, the appellees, and the successors in interest of Mr. Kelly Budd, the appellants.

Kelly Budd bought his farm along the Red River in 1951. The property was west of the river which ran along a high bank fence but subsequently the river moved to the east, creating accretions to the property of both Kelly Budd and the Temples. The Temples did not reside on their property but had leased their farmland during this time (from the early 1950's through 1977).

The property in dispute was controlled exclusively by the Budd family. Many of their farming activities were carried out on the property in dispute, i.e., building roads, erecting fences, and running cattle on the property.

Mr. Budd died in 1970, but the property continued to be exclusively controlled by his heirs. On January 30, 1978, the

Budd family filed a complaint in equity to quiet title to the disputed area in their name. The trial court found that although the disputed property was in the exclusive control of the Budd family and had been since the early 1950's, the appellant's claim of ownership by adverse possession was without merit because Mr. Budd had acknowledged the Temple's interest in the property and therefore lacked the required element of hostility for a valid claim of adverse possession. The appellants bring this appeal from the judgment.

The appellants allege three points for reversal, but, for purposes of this opinion, they may be combined into a single question. The central issue raised by this appeal is whether the appellants have acquired title to the disputed property through adverse possession. We concur in the trial court's decision on the issue and therefore hold that title did not vest in the appellants.

It is well settled that in order to acquire title by adverse possession, the possession must be hostile and adverse. *Utley* v. *Ruff,* 255 Ark. 824, 502 S.W. 2d 629 (1973); *Arkansas Commemorative Commission* v. *Little Rock,* 227 Ark. 1085, 303 S.W. 2d 569 (1957). If the possession is in subordination to the rights of the true owner, whenever asserted, then the statute of limitations will not begin to run. *Bayles* v. *Dougherty,* 77 Ark. 201, 91 S.W. 304 (1905).

3 Am. Jur. 2d *Adverse Possession* § 32 (1962) states:

> While occupancy of the premises, the payment of taxes, and the making of improvements are circumstances favorable to the claim of adverse possession, they do not in and of themselves establish title by adverse possession; in addition there must be a hostile title or claim. Thus title is not to be overcome by evidence of entry and occupation alone, but the hostile intent must be clearly demonstrated.

In a claim of adverse possession, the intention is the controlling factor. *Arkansas Commemorative Commission, supra.* The intention to hold must be clear, distinct and unequivocal.

In the instant case, there was testimony at trial which indicated that Mr. Kelly Budd had once told his son that he recognized some interest of the Temples in the disputed property. This occurred one afternoon when Kelly Budd and his son were walking along the high bank fence and Mr. Budd told his son that the Temples had some interest in the land above the area where they were standing, pointing in a southeasterly direction.

In *Sloan* v. *Ayres,* 209 Ark. 119, 189 S.W. 2d 653 (1945), a case with a similar fact situation, the plaintiff brought an ejectment action to determine ownership of approximately five acres of land which accreted to the west bank of the Little River. The defendant was an adjoining riparian landowner who had been in exclusive possession of the land. However, the plaintiff attacked his claim of adverse possession by offering evidence of a letter to him from the defendant which stated he would be glad to cooperate with the plaintiff as to boundary lines, roads, etc. This letter was written in response to a request by the plaintiff to leave open a road which the defendant was about to close. The jury returned a verdict for the defendant and plaintiff appealed. The Arkansas Supreme Court upheld the jury verdict, stating that the letter was not a conclusive admission. Such evidence is admissible on the question of whether claimant's possession was in fact hostile, but it is for the jury to consider along with all the other facts and circumstances. [See also *Shirey* v. *Whitlow,* 80 Ark. 444, 97 S.W. 444 (1906).]

Similarly, in *Sanders* v. *Baker,* 217 Ark. 521, 231 S.W. 2d 106 (1950), plaintiff brought an action to quiet title to a strip of land and to cancel a deed to the land in possession of the defendants. Plaintiff asserted ownership of the property in question by adverse possession. He had title to four lots which he had purchased. The disputed property concerns two other adjoining lots. The chancellor dismissed the complaint, stating that although he had told friends that he owned all the land, other testimony revealed that he had made an effort to purchase the disputed property from the defendant. On appeal, plaintiff contended that title by adverse possession had already vested when these negotiations took place. Hence, title could not be divested out of the plaintiff by

admission of a better title. *Stroud* v. *Snow,* 186 Ark. 550, 54 S.W. 2d 693 (1932).

The Arkansas Supreme Court rejected this argument, stating that although such testimony is inadmissible for the purpose of divesting title out of the adverse occupant, it is admissible for the purpose of showing that possession was not adverse. Hence, the court held that in light of this testimony, the chancellor's findings were not against the preponderance of the evidence.

In the case before us, the testimony of Joe Kelley Budd indicated that both he and his father had recognized the Temples' interest in the disputed property. It is clear from the cases cited above that mere possession is not enough to sustain a claim of adverse possession. Possession will not ordinarily be presumed to be adverse, but rather subservient to the true owner. Hence, there is every presumption that such possession is in subordination to the legal title. 3 Am. Jur. 2d *Adverse Possession* § 34 (1962). The intention to hold adversely must be clear, distinct and unequivocal. We believe the chancellor could reasonably find that this testimony was an indication that Mr. Budd lacked the hostile intent.

Although there was testimony that one of Mr. Budd's employees had once "run-off" some surveyors sent by Mr. Temple; Mr. Temple also testified that, subsquently, in telephone conversation between Mr. Budd and him, Mr. Budd had reaffirmed that they would work out their boundary line. This evidence again indicates a lack of hostile intent.

One other point should be mentioned. It is claimed by the appellants that if not the entire tract of the disputed property is determined to have been adversely possessed, then all of the property south of their north accretion line should be held to have been in adverse possession by the appellants. However, we find no substantial evidence on which to base this claim of adverse possession for a portion of the disputed property. We believe the chancellor's division of the land was reasonable under the facts and the applicable law of accretions. Moreover, Kelly Budd's statements, both to his son and to Mr. Temple, indicated that

he recognized the Temples' interest in the property. Hence, the chancellor's decision to divide the property according to its true boundary lines was not against a preponderance of the evidence.

Therefore, we affirm the decision of the lower court.

Roger KING *v.* FARMERS LIQUID FERTILIZER & RANGER INSURANCE COMPANY

CA 79-46 590 S.W. 2d 327

Opinion delivered November 28, 1979
Released for publication December 19, 1979

Phillip H. McMath, for appellant.

Laser, Sharp, Haley, Young & Huckabay, for appellees.

MARIAN F. PENIX, Judge. On May 12, 1973, claimant was injured on the job when a cable broke and caused him to

fall 20 feet. The administrative law judge awarded claimant permanent and total disability. The Workers' Compensation Commission reversed the award and reduced it to a rating of 60% permanent partial to the body as a whole. Claimant appeals the Commission determination.

The claimant contends the Commission had no substantial evidence to justify its modification of the administrative law judge's award.

After the first hearing the deposition of Dr. Charles McKenzie and reports from Dr. Thomas Fletcher and the Veterans Administration were made a part of the record before the full commission. These medical reports as to the claimant's condition are in conflict. Dr. Fletcher reported the claimant sustained a lower spinal injury which was a cauda equina compression injury of the lower cord and nerve root in association with a lumbar disc injury. Dr. Fletcher indicated the claimant has a residual pain problem and is disabled as far as performing work activity. As to claimant's anatomical disability Dr. Fletcher gave him permanent partial disability of 45% to the body as a whole. The VA report relates claimant has full function of his lower extremeties and is able to return to work. The respondents referred claimant to Dr. Charles McKenzie, an orthopedist. Dr. McKenzie reported he could find no objective evidence to support Dr. Fletcher's diagnosis of a cauda equina compression injury. The Commission concluded both Dr. Fletcher and Dr. McKenzie are qualified and one's opinion was no more convincing than the other. The Commission also concluded the doubt should be resolved in claimant's favor and in favor of the diagnosis of the treating physician, Dr. Fletcher. It is the opinion of the Commission when the economic factors are considered along with the physical impairment the claimant has sustained a 60% permanent partial disability to the body as a whole resulting from the injury.

After reviewing all the evidence the Commission determined the claimant is able to regularly and systematically engage in a variety of physical activities including fishing, hunting and housework. It also determined the claimant's income is now in excess of what he was making when

employed by the respondents and that his income is now tax free. It concluded claimant lacked financial motivation to return to the labor market. The claimant introduced a written report from a rehabilitation counselor which stated that based upon a telephone conversation with the claimant, the claimant would not be a candidate for vocational training. From this evidence the Commission concluded the claimant has voluntarily chosen not to return to the job market.

All this court is required to do is to determine if there was substantial evidence to support the Commission's finding. From the record we find there was substantial evidence the claimant is not 100% disabled from earning any wages in the same or any other employment within the meaning of the Workers' Compensation Act, Ark. Stat. Ann. § 81-1302(e).

It has repeatedly been held the decision of the Workers' Compensation Commission on fact questions carries the same force and effect as a jury verdict. *Superior Improvement Co.* v. *Hignight,* 254 Ark. 328, 493 S.W. 2d 424. Even though the evidence would support another conclusion, or if the preponderance of the evidence would indicate a different result, we still affirm the Commission if reasonable minds could reach the conclusion reached by the Commission. *Oak Lawn Farms* v. *Payne,* 251 Ark. 674, 474 S.W. 2d 408 (1971).

Affirmed.

Priscilla KILGORE *v.* FALLS CHURCH ANIMAL HOSPITAL and Charles DANIELS, Director, State Department of Labor

CA 79-74 590 S.W. 2d 671

Opinion delivered November 28, 1979
Released for publication December 19, 1979

Collins Kilgore, Jr., for appellant.

Thelma M. Lorenzo, for appellee Charles Daniels.

GEORGE HOWARD, JR., Judge. The question presented is whether the finding of the Agency — that appellant quit a permanent job for a temporary one was not for good cause connected with the job, hence, appellant was not entitled to unemployment benefits — is supported by substantial evidence.

Appellant, in August, 1977, accompanied her husband to Washington, D.C. where her husband would be enrolled in school, as a full time student, during the 1977-78 school term. The term was scheduled to end officially in May, 1978, at which time, appellant and her husband were scheduled to return to Little Rock where appellant's husband would occupy a position of employment awaiting his return. At the time appellant left Little Rock for Washington, D.C., she was unemployed and receiving unemployment benefits.

Upon arriving in Washington, appellant promptly obtained employment at the Falls Church Animal Hospital in

Falls Church, Virginia. Appellant advised her employer that her husband was attending school in Washington for the duration of the current term and that she would have to terminate her status as an employee in May, 1978, and return to Little Rock with her husband.

In January, 1978, appellant left the job at the animal hospital and accepted employment as a receptionist with Congressman Jim Guy Tucker in Washington, D.C. The new position afforded appellant a substantial salary increase — paying at least 50% more than what she was receiving at the animal hospital. The receptionist position was temporary since it would terminate in the middle of June, 1978.

In June, 1978, appellant returned to Little Rock and entered the labor market immediately in search of employment.

On June 28, 1978, appellant filed her claim for unemployment benefits. Appellant advised the Agency that she terminated her job at the animal hospital for the following reason:

> I was offered a higher paying job, also an offer of better experience for the future and more contacts for a job in Arkansas.

The Agency concluded, in relying upon Section 5 (a) of Ark. Stat. Ann. § 81-1106 (Repl. 1976):

> You quit your permanent job with the above employer [Falls Church Animal Hospital] to accept a temporary position with Congressman Jim Guy Tucker's office. Although you may have had good personal reasons for quitting, you have not shown good cause connected with the work.

Section 5(a) provides:

> . . . an individual shall be disqualified for benefits:
>
> (a) If he voluntarily and without good cause con-

nected with the work, left his last work. Such disqualification shall continue until, subsequent to filing his claim, he has had at least 30 days of paid work.

Appellant was disqualified for benefits until she had at least 30 days of covered employment.

The holding of the Agency was affirmed by the Appeals Tribunal, the Board of Review and the Circuit Court of Pulaski County.

We are persuaded that the finding of the appellee that appellant quit "a permanent job" with Falls Church Animal Hospital to accept a "temporary position with Congressman Jim Guy Tucker's office," is not supported by substantial evidence and consequently, we reverse.

Appellant testified that when she made application for employment at Falls Church Animal Hospital, she advised management that she would be in the Washington, D.C., area for the duration of the 1977-78 school term which would end in May, 1978; and that she would return to Little Rock, at that time, with her husband. She stated that her employer recognized that she was only a temporary employee. This testimony has not been contradicted.

We have searched this record carefully in an effort to determine the basis of appellee's finding that appellant's employment with Falls Church Animal Hospital was "permanent." While it is clear that the position that the appellant occupied may be characterized as permanent in scope and range, the work arrangement between appellant and her employer was temporary in all respects. Appellant testified that the job offer from Congressman Tucker was temporary. The Agency also found that the employment with Mr. Tucker was temporary in scope and range.

During oral argument, counsel for appellee conceded, in a hypothetical situation, that if appellant's employment with the animal hospital had been permanent and appellant quit the permanent position in order to accept another per-

manent position and later became unemployed, appellant would be eligible to receive benefits. In other words, if the position with Congresssman Tucker had been characterized as permanent, under the Agency's reasoning, appellant would have qualified for benefits because she left a permanent job in order to accept another permanent position.

While it is understandable, and, indeed, logical, why an employee who quits a permanent job in order to accept a temporary one is disentitled to benefits when the temporary employment ceases, we are not persuaded that the same qualifying rule is applicable when an employee leaves a temporary assignment to accept another temporary position which affords more pay.

We perceive that the posture taken by appellee would impose a penalty on an employee who desires to transfer to another job in order to improve his financial position and a premium extended to an employee who is satisfied with some degree of permanence in his employment status at less pay. We cannot visualize such a policy as being in harmony with the legislative purpose of the Employment Security Act as a means of protection against the hazards of economic life.

Appellee has cited *Harris* v. *Daniels, et al,* 263 Ark. 897, 567 S.W. 2d 954 (1978) in support of its posture in this proceeding. *Harris* has no application here. In *Harris,* the claimant accepted what started out as a temporary job, but ultimately became permanent and claimant quit his job in order to look for other employment.

Accordingly, we reverse the Circuit Court of Pulaski County with directions to enter an order reversing the Agency.

Reversed and remanded.

SILVER FOX, INC. *v.* PENFIELD REAL ESTATE, INC.

CA 79-143 590 S.W. 2d 869

Opinion delivered November 28, 1979
Released for publication December 19, 1979

James L. Sloan and *Gibson & Crow*, for appellant.

Garrett & Moudy and *Hall, Tucker, Lovell & Alsobrook*, for appellee.

GEORGE HOWARD, JR., Judge. This is an appeal from the dismissal of appellant's objection to the allowance of $19,000.00, from proceeds of a land foreclosure sale, pur-

portedly due appellee, as a commission, for obtaining a buyer who was ready, willing and able to purchase real property listed by appellant for sale.

In December, 1977, appellant listed with appellee property known as the Silver Fox Restaurant. An offer and acceptance was executed December 14, 1977, between appellant and Gifford Powell and Stevann D. Powell, his wife, as buyers. As consideration for the purchase, buyers agreed to assume an existing mortgage held by Benton Savings & Loan Association of Benton, Arkansas, with a balance of approximately $93,382.00, payable in monthly installments of $1,044.26; buyers further agreed to pay the appellant $2,700.00 in cash and to execute a note to appellant for $90,000.00, payable over a period of fifteen years, which would be secured by a second mortgage on the property; and agreed to assume an equipment lease with Worthen Bank & Trust Company of Little Rock which involved a balance of $60,000.00, payable at approximately $2,000.00 per month.

It is undisputed that appellee was authorized and empowered to negotiate the sale and work out all of the details with the purchasers. Appellee assured appellant that the Powells were financially able to purchase the property and could comply with the terms of the offer and acceptance inasmuch as the purchasers had solvent backers. In reliance upon this assurance, appellant executed a warranty deed to the Powells on February 6, 1978. The Powells in turn executed an assumption agreement with Benton Savings & Loan Association and a note and second mortgage to the appellant.

On April 10, 1978, appellant assigned to appellee, to the extent of $19,000.00 as appellee's commission, the note and second mortgage received from the Powells.

The Powells defaulted in making the May and June installments to the Association and the payments due appellant.

On July 5, 1978, the Association instituted foreclosure proceedings under the first mortgage securing its note. The

Association made both appellant and appellee parties to the action.

On August 23, 1978, appellant filed its cross-complaint against the Powells for foreclosure on its second mortgage. Appellant also readily acknowledged, in its pleading, that appellee had a vested interest in the foreclosure proceeding inasmuch as it had an interest to the extent of $19,000.00, as its commission, in the note executed by the Powells and secured by the second mortgage.

The trial court on September 7, 1978, entered its decree foreclosing the first and second mortgages; and found that appellee should realize from the proceeds of the foreclosure sale its commission of $19,000.00 after the Association had satisfied its claim.

Sometime either immediately before or after the trial court's foreclosure decree was actually entered, appellant learned that prior to the actual closing of the sale of the property to the Powells, appellee was notified that the financial backers for the Powells had withdrawn their support and commitment. Appellee did not disclose this information to appellant.

On November 29, 1978, approximately 83 days after the entry of the trial court's decree, appellant filed its objection to the trial court's order of distribution directing that $19,000.00 of the proceeds be paid to appellee. Appellee resisted appellant's action contending that appellant was precluded from raising this belated issue inasmuch as the matter had been fully resolved by the trial court's decree which was entered of record on September 7, 1978. Moreover, appellee argues, that appellant expressly admitted in its pleading that appellee had earned the commission.

Appellant testified, by proffer since the trial court ruled a substantial portion of the relevant testimony inadmissible, that when appellant discovered the undisclosed information, appellant immediately consulted appellee; and that appellee told appellant that in the event the Powells failed to finalize the sale; appellee would forego its commission; that the

property would be relisted for sale; and that appellee would not receive a commission until a new sale was concluded. Consequently, appellant testified, it did not object to the proposed distribution until appellee reneged on its promise and insisted on its commission.

On the 31st day of January, 1979, the trial court conducted a hearing on appellant's objection. At the conclusion of appellant's evidence, the trial court, in response to appellee's motion to dismiss, denied appellant's request for relief.

The thrust of appellee's argument for affirmance is that appellant having admitted that appellee was entitled to its commission, appellant is now precluded from taking an inconsistent stance with this admission. In reliance upon this argument, appellee cites *International Harvester Company* v. *Burks Motors, Inc.*, 252 Ark. 816, 481 S.W. 2d 351 (1972), where the Supreme Court stated that a litigant is precluded from assuming inconsistent positions on the same issue in the same case. In *Burks*, a party litigant, in a tort action, alleged initially that it was not liable in the action because its liability as a tortfeasor had not been established. However, the litigant later took the position it was entitled to contribution as a joint tort feasor in the same case. The Supreme Court, we submit, correctly concluded in *Burks* that the litigant was bound by his pleadings and statements before the court and could not maintain an inconsistent posture to his prior stance.

The position taken by appellee here fails to come to grips with the force of appellant's argument. By way of summary, the evidence, which stands uncontradicted, shows that while appellant readily acknowledged the validity and genuineness of appellee's claim for its commission, appellant was unaware, because of appellee's failure to disclose, that the purchasers' financial standing had materially changed after the offer and acceptance had been executed. It seems clear that had appellant been informed of the change, appellant would not have finalized the proposed sale with the Powells. Moreoever, it is plain that appellant learned of the material change immediately before or after

the trial court's decree had been entered. When appellant consulted appellee about the nondisclosure of the material change in the Powell's financial ability to perform, appellee agreed to forego its commission until a new sale was consummated. However, appellee later reneged on this promise.

Affording appellant's evidence its strongest probative force, on appellee's motion to dismiss, as we must, we are persuaded that appellant stated a cause for relief which would, indeed, survive a motion to dismiss, or a demurrer to the evidence.

A real estate broker who fails to disclose material and significant facts which will enable his principal to act advisedly in determining whether the buyer's proposal is satisfactory, forfeits his commission. *Green* v. *Pickens*, 251 Ark. 691, 473 S.W. 2d 862 (1971); *Carnahan* v. *Lyman Real Estate Co.*, 170 Ark. 519, 280 S.W. 2d 5 (1926).

We are persuaded that our Supreme Court stated the essence of the relationship that exists between a broker and his principal in *Taylor* v. *Godbold*, 76 Ark. 395, 88 S.W. 959 (1905):

> . . . 'Like other agents in whom trust and confidence are reposed, the broker owes to his principal the utmost good faith and loyalty to his interests.'

Ark. Stat. Ann. § 22-406.4 (Repl. 1962 and Supp. 1979), provides as follows:

> [A] decree or order may be modified, set aside or vacated within ninety (90) days from the filing thereof with the clerk of the court *or in pursuance to a motion made within such ninety (90) days*, wherever, under the law heretofore in force, it might be modified, set aside or vacated prior to the expiration of the term of court at which it was rendered or in pursuance of a motion made at that term.

Appellant having filed its objection within 83 days from the entry of the decree, it seems clear that the trial court had

jurisdiction to entertain appellant's request for relief.

We conclude that the trial court erred in sustaining appellee's motion to dismiss, and accordingly, reverse and remand to the trial court.

Reversed and remanded.

Dana WILLIAMS *v.*
ARKANSAS OAK FLOORING CO.
and LIBERTY MUTUAL INSURANCE COMPANY

CA 79-65 590 S.W. 2d 328

Opinion delivered November 28, 1979
Released for publication December 19, 1979

Brockman & Brockman, by: *E. W. Brockman, Jr.*, for appellant.

Coleman, Gantt, Ramsay & Cox, by: *Martin G. Gilbert*, for appellees.

DAVID NEWBERN, Judge. In this workers' compensation case, the Workers' Compensation Commission denied compensation for the claimed temporary total disability on the basis the claimant had failed to produce substantial evidence of his disability. Over the objection of the appellees, the commission permitted the appellant to recover costs of consultation with a chiropractor from whom he has recently begun to receive treatment. The appellees cross-appeal, contending these costs should be denied the claimant. We affirm the commission's decision.

The appellant was injured January 12, 1977, suffering a strained or sprained back while working for the appellee Arkansas Oak Flooring Co. He returned to work for the appellee January 17, 1977, and worked there until February 7, 1977, when he was discharged because of a dispute over his time card. He has held two jobs since he left the employ of the appellee. His claim is that pain from the injury was a reason for his losing at least one job. He claims temporary total disability for the following periods: February 7, 1977, through February 25, 1977; June 6, 1977, to June 26, 1977; and August 1, 1978 to the present. The commission concluded these dates were more representative of "time off between jobs . . . than recurring disability."

The appellant's first contention on appeal is that the commission made a "finding" that the report of a physician, Dr. Wilkins, who treated the appellant, was not in the record. Although there was some confusing language in the "conclusions" section of the commission's decision, it is clear the commission had before it a report by Dr. Wilkins who treated the claimant, apparently at the instance of the appellees, at the time of the injury. The commission's decision was, in fact, based on the failure of the appellant, with one exception, to seek treatment for the allegedly painful

condition he contends to have been the cause of his disability during the one and one half years between Dr. Wilkins' examination and one by a Dr. Bierman, who is a chiropractor. Thus, as the commission bases its decision, in part, upon a date established by Dr. Wilkins' examination, and makes reference to Dr. Wilkins' report in its "statement of the case," we cannot say there was a finding the report was not before the commission. The confusion evident in the commission's opinion is at most harmless error.

The second point raised by the appellant is that his claim should have been allowed because he proved his case. We affirm the commission if there is substantial evidence to support its action. *Ryan* v. *NAPA,* 266 Ark. 802, 586 S.W. 2d 6 (Ark. App. 1979). In cases in which the commission has denied a claim because of a failure to show entitlement by a preponderance of the evidence, this standard can be translated as follows: we will affirm if the commission's opinion displays a substantial basis for the denial of relief.

Here, the basis of the denial was that, despite his allegations of pain causing disability, the claimant admittedly saw only one physician between January 12, 1977, and August 28, 1978, the date he consulted Dr. Bierman. The one physician he saw in addition to Dr. Wilkins was an orthopedist, Dr. Logue, who found some "strain and sprain" but made no statement with respect to disability. Neither Dr. Wilkins nor Dr. Bierman, the chiropractor, stated any finding of disability. There was a substantial basis for the commission to deny the claim.

The appellee's cross-appeal urges the appellee be found not responsible for payment for the treatments by Dr. Bierman. Dr. Bierman has proposed a plan of treatment for the appellant which the appellant apparently wishes to pursue. The ground urged by the appellee (cross-appellant) is the appellant's failure to comply with Workers' Compensation Commission Rule 21. That rule provides:

> The employer and/or insurance carrier has the right and duty in the first instance to provide prompt medical care to injuried employees through physicians and hos-

pitals of the respondents' choice. A claimant, subsequently, may obtain a change in treating physicians to a physician of the claimant's choice, the costs of such treatment to be borne by the employer or the employer's insurance carrier, provided (1) the claimant's healing period shall not have ended; (2) the claimant is not seeking to change physicians from one of his own choice, previously selected by the claimant; (3) the physician to whom the claimant wishes to change is qualified in the particular field of medicine needed for claimant's particular difficulties; (4) the claimant files with the Commission a petition for a change in physicians, gives the name of the physician to whom he wishes to change and asserts that the physician to whom he wishes to change is competent to treat his particular ailment; (5) no unresolved issue exists over whether claimant is legally entitled to medical care at the expense of respondents.

. . .

We find no fault with the commission's determination. We assume the commission was aware of and operating pursuant to its own rule. It apparently found all the conditions permitting a change of doctors. We may regard their determination as satisfying the requirement of subsection (4) of Rule 21 to the effect that the permission of the commission must be obtained. We note the commission made no order that the appellee pay the bill for Dr. Logue's examination, and thus the disqualification of Rule 21 (2) should not apply. That subsection should apply only when the insurer or employer is paying a physician selected by the claimant who then seeks to change to another physician of his choice. Although there is some qustion whether a chiropractor qualifies as a "physician" under the Rule, that point has not been argued.

Affirmed.

Judges Howard and Penix did not participate.

Lonnie GILBOW & J. W. EOFF *v.*
Sandra ANDREWS

CA 79-150 590 S.W. 2d 673

Opinion delivered November 28, 1979
Released for publication December 19, 1979

Niblock & Odom, by: *Richard P. Osborne*, for appellants.

No brief for appellee.

DAVID NEWBERN, Judge. In this replevin action the appellee sought return of her pickup truck and some clothing in the truck she alleged had been taken by the appellants. She also sought damages of $1700.00 resulting from the alleged wrongful detention of and injury to her property. A jury verdict awarded the appellee possession of the property and damages of $2500.00. The damage award was reduced to $1700.00 to conform to the prayer in the complaint, and a judgment was entered upon the verdict.[1] The appellants' first point for reversal is "that the evidence was insufficient to support a finding by a preponderance of the evidence that appellant had wrongfully detained the property of appellee."

We assume the appellants realize we cannot reverse on the basis of our own determination of the preponderance of the evidence, as it was the prerogative of the jury to deter-

[1] The case was appealed to the Arkansas Supreme Court and assigned to us in accordance with Rule 29(3).

mine that. We will affirm if there was any substantial evidence in support of the verdict. *Boyd* v. *Reddick*, 264 Ark. 671, 573 S.W. 2d 634 (1978), and *Love, et al* v. *H. F. Construction Co.*, 261 Ark. 831, 552 S.W. 2d 15 (1977).

If we assume the appellants are not asking us to determine the preponderance of the evidence, their first point must be that the evidence was not sufficient to have been allowed to go to the jury. As Rule 50 (e) of the Arkansas Rules of Civil Procedure was not in effect at the time this case was tried, we will review the matter, reluctantly, although the abstract does not show that a motion was made for directed verdict, judgment n.o.v. or new trial. Our reluctance is heightened in that appellants' counsel does not cite one case which supports the notion that insufficiency of the evidence may be a basis of appeal or reversal in the circumstances presented here.

It is enough for us to say that the evidence in this case was in great conflict, but the appellee's testimony that she had left her truck on the appellant Eoff's property only three and 1/2 hours while assisting her mother, who was one of Eoff's tenants, was clearly sufficient to controvert the evidence presented by the appellants on their primary theory of the case, which was that the appellee had abandoned her truck and clothing for some 30 days on the appellant Eoff's property. The question clearly was for the jury to decide.

As his second point, appellants' counsel asserts that Gilbow, who was the agent of Eoff, allegedly acting upon Eoff's instruction, could not be liable in this matter because he was acting solely as the agent of Eoff. The appellants' counsel sought and was denied an instruction to that effect.

The trial court did not err in refusing the requested instruction. The only cases cited by the appellants are to the effect that a principal is not liable where an agent exceeds his authority. It is elementary agency law that the liability of a principal for his agent's act does not absolve the agent. *Burt* v. *Missouri Pac. R. Co.*, 294 F. 911 (E.D. Ark. 1924), Sell, *Law of Agency*, §§ 195 and 198 (1975), and Mechem, *Law of Agency*, §§ 1455 and 1456 (1914).

Affirmed.

Glen HAWTHORNE, d/b/a GLEN HAWTHORNE WHOLESALE MEAT (Reeder Meat Company) Uninsured Employer *v.* Gloria DAVIS, Widow of James DAVIS, Deceased Employee

CA 79-34 596 S.W. 2d 329

Opinion delivered November 28, 1979
Petition for Review granted January 7, 1980
Affirmed by Supreme Court February 25, 1980
Released for publication April 2, 1980

Wood, Smith, Schnipper & White, for appellant.

W. H. "Dub" Arnold, for appellee.

JAMES H. PILKINTON, Judge. This is a workers' compensation case. James Davis died in a traffic accident on June 15, 1978. He left appellee as his widow, and two minor children. The Workers' Compensation Commission allowed a claim for death benefits under the Arkansas Compensation Act. Appellant has appealed.

It is well settled that the burden is on the appellee claimant to establish the claim for compensation by a preponderance of the evidence before the Commission. *Crouch Funeral Home, Inc.* v. *Crouch*, 262 Ark. 417, 557 S.W. 2d 392 (1977). It is also well settled that this court on appeal reviews the evidence, and all reasonable inferences deducible therefrom, in the light most favorable to the findings of the Commission which, like those of a jury, will be upheld if there is any substantial evidence to support the action of the Commission. *Barksdale Lumber Co.* v. *McAnally*, 262 Ark. 379, 557 S.W. 2d 868 (1977).

Viewed in the light most favorable to the findings of the Commission, the record discloses the following facts. James Davis was employed by appellant on June 15, 1978, and was working at a slaughter house in Arkadelphia, Arkansas. This business was known locally as the Reeder Meat Company as it was previously owned by the Reeder family but was purchased by Glen Hawthorne in January of 1978. Mr. Glen

Hawthorne also had a meat plant at Hot Springs, and continued to reside in Hot Springs. His son, Howard Hawthorne, who was working for Union Carbide at Hot Springs when his father purchased the plant at Arkadelphia, went to work at the Arkadelphia business. While his father at times directed things over the phone from Hot Springs, Howard Hawthorne represented his father at the Arkadelphia plant and acted for him there. On June 15, 1978, James Davis was working at the slaughter house in Arkadelphia, under the supervision of Howard Hawthorne, and they finished the day's work at the business shortly before noon. Howard Hawthorne asked James Davis to drive him to a livestock auction barn in Glenwood, Arkansas. Hawthorne said he needed to look at some cattle to buy for the slaughter house. Glenwood is located approximately 35 miles northwest of Arkadelphia. James Davis owned a motorcycle and used it to go to work each day. Howard Hawthorne rode on the back of the motorcycle behind Davis from Arkadelphia to Glenwood. Upon arriving in Glenwood, James Davis drove directly to the livestock barn where the regular Thursday sale was in progress. Howard Hawthorne dismounted from the motorcycle and went into the auction barn. Davis drove his vehicle back onto the highway and was in the process of returning to Arkadelphia when his cycle collided with a log truck which turned left in front of him. Davis was killed on impact.

One of the witnesses, Bobby Sanders, testified that he is a practicing attorney in Arkadelphia and also the Municipal Judge; that on June 16, 1978, Gloria Davis (wife of the deceased) was in his office and Howard Hawthorne was called in to discuss the accident. At that time Mr. Sanders was making an investigation for a possible wrongful death action. Mr. Sanders testified as follows with reference to a statement that Howard Hawthorne made to him the day after the accident:

> Q. Did he advise you as to what happened that particular day of June 15th, as to why he and James Davis went to Glenwood?

A. Yes. As I recall he was very desirous of helping the Davis family, he was upset about the occurrence of the day before, he was trying to tell me everything that he knew about what occurred because I was investigating it for obvious legal purposes at the time.

Q. Would you relate as he related to you on that date what caused he and James to leave Arkadelphia and go up there?

A. Well, I asked him had they been working that day out at the slaughterhouse and he told me, as I recall, that he and James Davis had been there by themselves that afternoon and that the work was somewhat slow that afternoon and he made the decision, Howard Hawthorne made the decision to close down early, he said, why don't we just take off because I needed to go to Glenwood to look at some cattle at the sale barn. I asked him who was in charge of the plant that day or the slaughterhouse and he said he was. I remember asking him, was he James' supervisor and he said, well, yes, he worked for me, is the words he said.

Clarence Davis and Shirley Hawthorne were present when the above statement was made; and, Gloria Davis was there a part of the time.

Although there was testimony to the contrary, the Commission found that Howard Hawthorne was the supervisor of the employee Davis and the trip of June 15, 1978, was in part for Howard Hawthorne to look at cattle at the sale barn in Glenwood for his father's business. The Commission said:

Death has sealed the lips of James Davis and he cannot be heard on behalf of his widow and children. Respondent admits he was subject to the workers' compensation laws of Arkansas and with knowledge had not obtained coverage until after the death of James Davis.

With nothing more, the weight of the testimony might necessarily favor the respondent; but the testimony of

the only completely disinterested witness, Judge Bobby Sanders, cannot be explained; nor, is there any reason for the impeachment of the integrity of his testimony. Clarence Davis corroborated Bobby Sanders' testimony and Gloria Davis candidly admitted she did not hear Howard's statement to Bobby Sanders. It is incredible that neither Howard Hawthorne nor Shirley Hawthorne remembers Howard's statement to Bobby Sanders.

I.

Appellant first argues that the Commission erred in finding that decedent's death arose out of and in the course of his employment, such finding not being supported by any substantial evidence. In support of this point, appellant says the authority of an agent cannot be shown by his own declarations in the absence of the party to be affected by them, citing *Zullo* v. *Alcoatings, Inc.*, 237 Ark. 511, 374 S.W. 2d 188 (1964). That was not a workers' compensation case. Further, it is a well established rule of law as to principal and agent that the nature and extent of an agent's authority, where the evidence is in conflict, is a question for the fact finders. *Bradley Advertising, Inc.* v. *Froug Stores, Inc.*, 193 Ark. 639, 101 S.W. 2d 789 (1937). The Commission found that the testimony of Gloria Davis and Clarence Davis supported the testimony of Bobby Sanders, and tended to show that Howard Hawthorne was in fact the deceased's supervisor.

Section 27 of the Arkansas Workers' Compensation Act, Ark. Stat. Ann. § 81-1327(a) (Repl. 1976), provides:

> PROCEDURE BEFORE THE COMMISSION. (a) In making an investigation or inquiry, or conducting a hearing, the Commission shall not be bound by technical or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this Act, but may make such investigations or inquiry, or conduct the hearing in a manner as will best ascertain the rights of the parties . . .

100 C.J.S., Workmen's Compensation, § 535 at page 535:

> In a proceeding where compensation is sought for the death or disability of an employee, the testimony of the employer, or a person authorized to act for the employer, is generally admissible as to matters which are within the knowledge of the witness, such as the nature and scope of the employee's employment; and where the technical rules as to the admissibility of evidence are relaxed, a statement signed by the employer may be admitted in evidence . . .
>
> . . . .
>
> In a compensation proceeding evidence is admissible as to statements made by an employer or his representative where the statement constitutes a declaration or admission against the employer's interest; and an admission by an employer that workmen were injured in an accident arising out of and in the course of their employment may be admissible in evidence although the claim for compensation is being contested by the employer's insurance carrier.

We find no merit in the first point argued by the appellant.

II.

Appellant also argues that the Commission erred in finding that the widow of decedent is entitled to benefits. Appellant says there is no proof of dependency in the record as required by law. He cites Ark. Stat. Ann. § 81-1315(c) (Repl. 1976) and points out that in order for a widow to recover benefits under the act she must make some proof of dependency upon the deceased employee. That is true. However, in this case the parties stipulated below that the only fact issue to be presented was simply whether or not the circumstances surrounding the accident and death of Mr. James Davis arose out of and in the course of his employment within the meaning of the workers' compensation laws of the State of Arkansas. The record clearly shows that all

other fact questions, which might have been disputed, were stipulated and agreed to by both sides. Apart from such agreement, appellant did not raise this question below, and cannot raise it for the first time on appeal. *Jeffery Stone Co.* v. *Raulston*, 242 Ark. 13, at 17, 412 S.W. 2d 275 (1967).

III.

Appellant also argues that the Commission erred in basing its decision in favor of claimant solely on the hearsay testimony of Bobby Sanders. Thus the appellant finally zeros in on what could have been the most crucial issue in this case: Will hearsay evidence alone sustain an award under the Arkansas Workers' Compensation Act? See 3 Larson, *Workmen's Compensation Law*, §§ 79.00 — 79.42 (1952), and Davis, *Administrative Law*, § 14.10 at pp. 291-303 (1958). The residuum rule, discussed by *Larson* and *Davis*, requires a reviewing court to set aside an administrative finding based upon hearsay evidence unless the finding is also supported by other evidence which would be admissible in a jury trial. The residuum rule has been the subject of great controversy. Although the residuum rule actually originated in a workmen's compensation case decided in New York in 1916, *Carroll* v. *Knickerbocker Ice Co.*, 218 N.Y. 435, 113 N.E. 507 (1916), there has been no discussion of it in Arkansas workers' compensation appeals. See Ark. Stat. Ann. § 81-1327(a) (Repl. 1976) as to declarations of deceased employee concerning injury. Also § 81-1325(b)(4) which makes "insufficient competent evidence" a ground for reversal. But also see *Garrison Furniture Co.* v. *Butler*, 206 Ark. 702, 177 S.W. 2d 738 (1944), *Comer* v. *Pierce*, 227 Ark. 926, 302 S.W. 2d 547 (1957), *Holstein* v. *Quality Excelsior Coal Co.*, 230 Ark. 758, 324 S.W. 2d 529 (1959), Covington, Judicial Review of the Awards of the Arkansas Workmen's Compensation Commission, 2 Ark. L. Rev. 139 (1948), and Youngdahl, Rules of Evidence in Administrative Proceedings, 15 Ark. L. Rev. 138 (1960).

Although this point gives rise to a most interesting question, we do not reach it because appellant made no objection to the hearsay evidence of Bobby Sanders and Clarence Davis when it was presented below. An objection should have been made at the time the hearsay was offered before

the Commission. *Clark* v. *Peabody Testing Service,* 265 Ark. 489, at 506, 579 S.W. 2d 360 (1979). This issue cannot be raised for the first time on appeal. In dealing with a similar situation in *Jeffery Stone Co.* v. *Raulston, supra,* the Arkansas Supreme Court said:

> . . . the issue was not raised before the Commission and, under our well established procedural practice, it cannot be raised here. [242 Ark. at p. 17]

As the findings of the Commission are supported by substantial evidence, the judgment of the Commission must be affirmed.

Affirmed.

Marvin GEORGE and Laverne TEAS *v.*
Shirley Dean GEORGE et al

CA 79-165 591 S.W. 2d 655

Opinion delivered December 5, 1979
Released for publication January 9, 1980

Guy H. Jones, Phil Stratton, Guy Jones, Jr., and *Casey Jones*, by: *Guy H. Jones*, for appellants.

Brazil, Roberts & Courtney, for appellees.

ERNIE E. WRIGHT, Chief Judge. This appeal was filed in the Arkansas Supreme Court and transferred to the Court of Appeals pursuant to Rule 29 (3).

Shirley Dean George, a nominal appellee, was granted a decree of divorce in August, 1977 from Marvin George, who, along with his mother, Laverne Teas, are appellants from a decree rendered in December, 1978 cancelling a 99 year lease Marvin George had executed to Laverne Teas in August, 1976 for a recited rental consideration of $10.00 per year, plus payment of taxes.

Appellants contend the trial court erred in cancelling the lease.

The decree from which the appeal stems was pursuant to an intervention filed by Nathan E. Gentry and wife and by the trustees of the First Baptist Church of Mayflower, Arkansas, the respective purchasers of the two separate parcels of land sold at public auction as ordered in the divorce decree for the purpose of accomplishing the allocation of Mrs. George's statutory property rights upon divorce. At the commissioner's sale Mr. and Mrs. Gentry purchased the 10.3 acre tract of land and the trustees for the church, hereinafter referred to as "the church", purchased the 3 2/3rds acre tract of land.

Each of the two intervenors paid the respective purchase prices in full, the court confirmed the sale and the commissioner's deeds were issued to the respective purchasers. Mrs. George received from the clerk of the court her portion of the net proceeds awarded to her by the order of distribution dated November 22, 1977 and there was no appeal from that order.

The appellants have not accepted any of the funds arising from the sale and have refused to recognize the sale or surrender possession of the property to the purchasers. The purchasers filed interventions herein against Mr. George, made Mrs. Teas a third party defendant and sought cancellation of the lease as a cloud upon their titles.

Mr. George and his mother, Mrs. Teas, contend the lands were not subject to sale because of the 99 year lease Mr. George executed to his mother in August, 1976. The complaint of the intervenors alleged the lease was a fraudulent conveyance and a sham and should be decreed null and void.

It is true, the law does not preclude a husband from conveying in good faith, in absence of fraud, his interest in non-homestead real estate without the wife joining in the conveyance. However, where the wife does not join in the conveyance the grantee of such conveyance or lease takes title burdened with the dower interest of the wife. *Box* v. *Dudeck*, 265 Ark. 165, 578 S.W. 2d 567 (1979).

Chancery cases are tried *de novo* on appeal and if the decision is correct for any reason, we affirm. *Apple* v. *Cooper*, 263 Ark. 467, 565 S.W. 2d 436 (1978).

Following are some of the facts in evidence supporting the decree cancelling the lease:

(1) When Mr. George executed the 99 year lease to his mother in August, 1976, his wife did not join in the lease and had no knowledge of the transaction.

(2) The lease called for a consideration of only $10.00

per year for both tracts of land, plus pyament of taxes, and was signed by Mrs. Teas as lessee at the instance of her son.

(3) Prior to the execution of the lease in August, 1976 Mr. George had filed suit for divorce in June, 1976 and stated in the complaint there was no property to be settled. There had previously been one or more divorce actions filed by one of the parties against the other. Mrs. Teas was aware of the marital difficulties between the parties.

(4) The divorce was granted to Mrs. George pursuant to her complaint filed in May, 1977. She had no knowledge of the lease until after the court had ordered the land sold.

(5) The lease, although having a notary's signature and seal affixed and placed of record, was not acknowledged.

(6) The 3 2/3rds acre tract which had two rent houses and a mobile home thereon was the marital homestead of the parties. One of the houses rented for $45.00 per month and the other rented for $35.00 per month. Mr. and Mrs. George resided in the mobile home.

(7) The two tracts sold for a total sum of $12,550.00 at the commissioner's sale.

(8) Mr. George continued to look after the property and was living on the 3 2/3rds acre tract at the time of the trial of the interventions. He pays no rent to Mrs. Teas. Mrs. Teas does not reside upon either tract.

(9) Mrs. Teas in response to a question as to who has charge of the land testified, "I guess I have, if that lease is any good". She also testified she told Mr. Harris, one of the church trustees, after the commissioner's sale and conveyance, that all her son "had was that little bit of property and I was going to stand by him as long as I live and could stand by him".

(10) Mr. Harris, a trustee of the church, testified that after he obtained the commissioner's deed for the church and later learned about the lease he talked to Mrs. Teas and she told him she was keeping the land for her son, Marvin.

(11) The intervenors purchased the property at public auction for substantial considerations, without actual or constructive notice of the lease, and paid the purchase monies in full.

Under the facts and circumstances in this case the decree cancelling the lease was warranted. It is clear the purchasers did not have actual knowledge of the lease and they were also not charged with constructive notice. Ark. Stat. Ann. § 49-201 sets out the requirements of an acknowledgment of an instrument for the conveyance of an interest in land and Ark. Stat. Ann. § 49-211 requires an acknowledgment before an instrument can be admitted to record. *Moore* v. *Ollson*, 105 Ark. 241, 150 S.W. 1028 (1912) held that a mortgage that was notarized and recorded but not acknowledged was not enforceable against a subsequent grantee of the property. The court quoted with approval a prior case, holding "an unrecorded mortgage, however honestly made, is wholly invalid against. . . . subsequent purchasers, who take with full knowledge that they are defeating another's lien and who intended to do so".

Ark. Stat. Ann. § 68-1301 provides that a conveyance in trust to the use of the person making the conveyance is void against existing creditors and subsequent purchasers. In the case of *Hardy* v. *Hardy*, 228 Ark. 991, 311 S.W. 2d 761 (1958), the husband executed transfers of stocks and mortgaged certain personal property to his mother after his wife had filed suit for divorce. The husband's mother was then made a party to the suit and cancellation of the transfers were sought. The court on appeal held the transfers to the mother were for the purpose of defeating the wife's property rights and quoted with approval from the case of *Oles Envelope Corporation* v. *Oles*, 193 Md. 79, 65 Atl. 2d 899, as follows:

> A conveyance made by a husband before and in anticipation of his wife's suit for alimony, or pending such suit, or after a decree has been entered therein in the wife's favor, to prevent her from obtaining alimony, is fraudulent and may be set aside, unless the grantee took in good faith, without notice and for value. The grantee's knowledge of or participation in the fraud of the

> grantor must be gathered from the various facts composing the transactions and all the surrounding circumstances. . . .

In *Renn* v. *Renn*, 207 Ark. 147, 179 S.W. 2d 657 (1944), the husband contemplating a divorce suit by his wife permitted his land to sell for taxes. His brother bought the land from the state and the husband continued in possession. On divorce being granted the court ordered the land sold by commissioner with one-third of the proceeds to be paid to the wife. The brother holding the deed from the state sought to enjoin the commissioner's sale. The wife countered the brother's claim contending the forfeiture of the land for taxes and the state deed to the brother was a subterfuge and fraud to defeat her of her dower, that the brother acted as an agent for the husband in getting the state deed, and that the husband was the real owner of the land and the brother a mere trustee. The court dismissed the complaint of the brother.

In upholding the chancellor the court said equity would pierce the sham of a fraudulent conveyance even though Mrs. Renn was a subsequent creditor rather than an existing creditor. The court said:

> That this whole scheme was in the contemplation of Adolph Renn when he allowed the land to forfeit for taxes, may be reasonably inferred from the testimony of G. A. Renn that the husband and wife had been having marital difficulties for ten years and divorce suits had been filed and dismissed.

The Court also stated:

> A conveyance made by the husband in anticipation of the wife's libel for divorce, and to prevent her from recovering alimony is fraudulent and may be set aside unless the purchaser took without notice and for value. . . . To invalidate a conveyance of the husband's property, the grantee ordinarily must have had actual or constructive notice that the conveyance was for the purpose of defeating the wife's claim to alimony.

In *Rush* v. *Smith*; 239 Ark. 706, 394 S.W. 2d 613 (1965)

involving a suit to set aside as a fraudulent transaction the transfer of assets to the husband's sister, the court said:

> We think it almost too plain for argument that the supposed sale was in fact a sham that did not divest Paul Rush either of his ownership of the stock or of his control of it. A husband's colorable disposition of assets to defeat his wife's property rights in a pending or anticipated divorce suit may be found to be fraudulent. . . . It cannot be doubted that Paul Rush's ostensible sale to his sister was intended to hinder Virginia Rush in the assertion of her property rights.

While the chancellor merely held the lease to be void in the present case because the wife did not join in the execution of the lease, there is ample evidence in the record warranting the chancellor in inferring from the evidence that the lessee, Mrs. Teas, who entered into the lease for a nominal consideration, had knowledge that her son's purpose in executing the lease to her was to prevent his wife from realizing her statutory interest out of the land upon divorce. This being true, we affirm the decree, although not on the ground articulated by the chancellor. In *Moose* v. *Gregory*, 267 Ark. 86, 590 S.W. 2d 662 (1979), the Supreme Court stated the settled rule to be that on appeal a trial judge's decision will not be reversed if he reached the right result.

There is another reason for affirming the decree cancelling the lease to the 3 2/3rds acre tract of land. The undisputed evidence shows that it was the homestead of the parties. Mrs. George did not join in the execution of the lease. The land was not within an incorporated town or city and therefore the entire tract was the homestead regardless of value. The lease was void and subject to cancellation under the provision of Ark. Stat. Ann. § 50-415 which provides:

> No conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity except for taxes, laborers' and mechanics' liens, and the purchase money, unless his wife joins in the execution of such instrument and acknowledges the same.

The appellees as grantees under the commissioner's deeds acquired all of the rights and interests of Mr. and Mrs. George, and under the circumstances here have standing to seek cancellation of the lease.

Affirmed.

Jack L. GUSTAFSON, Sr. *v.* STATE of Arkansas

CA CR 79-48 593 S.W. 2d 187

Opinion delivered December 5, 1979
Released for publication January 23, 1980

Duncan & Davis, for appellant.

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

M. STEELE HAYS, Judge. The appellant was charged with burglary and theft of property. Prior to trial, a hearing was held on the appellant's motion to suppress. His motion was denied, and the case proceeded to trial where the appellant was acquitted on the burglary charge but found guilty of theft of property. The jury sentenced the appellant to ten years imprisonment and fined him $3,000. He appeals from the judgment.

Appellant's first contention is that the trial court erred in failing to suppress the evidence seized in a warrantless search and seizure. Testimony during the hearing reveals that officers went to appellant's apartment after an investigation concerning stolen CB equipment led to appellant's son's house. The officers and Mr. Jay Petray, the owner of the stolen equipment, were told by the appellant that he had no knowledge of his son's possession of the stolen equipment. However, Mr. Petray noticed an antenna on top of appellant's apartment. Consequently, the officers asked if the appellant had any CB equipment and also asked if they could search the apartment. Appellant told the officers that he had company and to come back later.

At this point, the officers decided to obtain a search warrant. One of the officers left to obtain the warrant while Sheriff Vaughn and Mr. Petray remained near the premises to keep the apartment under surveillance. The two then observed the appellant come out of the apartment. Sheriff Vaughn testified that he was carrying an armload of "stuff" and was running with it. They watched as appellant went through the garden located behind the apartment and into a wooded area where he placed the equipment. Sheriff Vaughn and Mr. Petray went to the area where the articles were hidden. Petray identified the articles as the CB equipment stolen from his store, and the appellant was arrested.

We cannot agree with the appellant's contention that this was an unreasonable search and seizure under the fourth amendment. *Coolidge* v. *New Hampshire*, 403 U.S. 442 (1971), requires that inferences which reasonable men draw from evidence should be drawn by a neutral and detached magistrate. This is required because one should feel secure

from governmental intrusion while in his dwelling or other places where he has a reasonable expectation of privacy.

The appellant cites *Sanders* v. *State*, 264 Ark. 433 (1978), as supporting authority for the rule that one's dwelling and curtilage have consistently been held to be areas that are considered free from governmental intrusion. A garden has been considered a part of one's curtilage. *Durham* v. *State*, 251 Ark. 164, 471 S.W. 2d 527 (1971); *Sanders, supra*. However, the facts in *Sanders* are clearly distinguishable from this case. In *Sanders*, the officers had gone to appellant's trailer house for the purpose of searching his dwelling pursuant to an invalid search warrant. Subsequently, they went behind his trailer, crossed a fence, and seized 50 marijuana plants they found in a garden.

In the instant case, the officers went to appellant's apartment merely to ask some questions. They became suspicious after seeing a CB antenna on his roof. They seized the equipment after they watched the appellant run out of his apartment and dump it *in a wooded area behind the garden*.

A search of open land without a warrant is permissible. *Hester* v. *United States*, 265 U.S. 57 (1924); Rules of Criminal Procedure, Rule 14.2 (1976). The Arkansas Supreme Court has held that wooded areas are open land, *Bedell* v. *State*, 257 Ark. 895, 521 S.W. 2d 200 (1975); even when the land in question belonged to the appellant, *Wyss* v. *State*, 262 Ark. 502, 558 S.W. 2d 141 (1977). We believe that the appellant had no reasonable expectation of privacy in the wooded area behind his apartment and this is not within the purview of one's "curtilage" as defined in *Sanders, supra*. Hence, the trial judge was correct in his denial of appellant's motion to suppress.

Appellant's second contention is that the trial court abused its discretion in denying appellant's motion for mistrial. The motion was made after the prosecuting attorney, in his closing argument, made statements to the jury which, appellant contends, were highly prejudicial. Previously, in the appellant's closing argument, the defense counsel had commented on the credibility of two of the State's witnesses. In response to this, the prosecutor stated:

> But, I think you ladies and gentlemen know, in matters of common expertise, that in the sewer of crime the good people don't go only the rats, and the rats talk to each other and the rats commit crimes together. (T. 193, 194)

Appellant also objected to the prosecuting attorney's closing argument in the sentencing proceeding. Prior to this time, defense counsel had attempted to rebut the State's evidence of prior convictions by stating that the date of the last conviction was 24 years ago and that "a lot of things have happened since 24 years ago." The prosecutor, in response to this statement, commented to the jury:

> I suggest to you that there has been a lot of things that happened since then, as evidenced by this trial, and others, and I leave it to your speculation as to what others may be, that we don't have here today. (T. 215)

The trial judge sustained both objections by appellant, instructed the jury to disregard the prosecutor's reference to certain persons as "rats," and instructed the prosecutor to stay inside the record. Appellant moved for a mistrial on both statements and was overruled.

We agree with the appellant that these statements by the prosecutor are highly improper. However, the granting of a motion for mistrial is an extreme remedy and has largely been within the province of the trial court. *Gammel and Spann* v. *State*, 259 Ark. 96, 531 S.W. 2d 474 (1976); *Hill* v. *State*, 255 Ark. 720, 502 S.W. 2d 649 (1973); *Johnson* v. *State* 254 Ark. 293, 493 S.W. 2d 115 (1973).

As was stated in *Simmons* v. *State*, 233 Ark. 616, 346 S.W. 2d 197 (1961):

> This court has repeatedly observed that the prosecuting attorney acts in a *quasi* judicial capacity and that it is his duty to use all fair, honorable, reasonable, and lawful means to secure a conviction of the guilty in a fair and impartial trial.

As a general rule, there are three types of improper state-

ments made by a prosecuting attorney: improper, prejudicial, and prejudicial per se. [See Hall, *The Bounds of Prosecutorial Summation in Arkansas*, 28 Ark. L. Rev. 55 (1974).] Improper statements do not lead to reversal but should be avoided on ethical grounds. Prejudicial statements will lead to reversal unless it is harmless error, and prejudicial per se statements invariably lead to reversal. The permissible bounds of prosecutorial summation will depend on the various facts and circumstances of each case. (For the general rule pertaining to prosecutorial summation see ABA Standards for Criminal Justice, *The Prosecuting Function* § 5.8 (1971).)

The general rule is that the prosecutor may not assert the defendant's character is questionable where there is no adequate justification in the evidence. However, where the prosecutor has improperly demeaned the defendant, an admonition by the trial court may be adequate. Hence, in *Henshaw* v. *State*, 67 Ark. 365, 55 S.W. 157 (1900), an admonition by the trial court to the jury when the prosecutor referred to the defendant as a "jailbird" was held sufficient. Also, in *Johnson* v. *State*, 254 Ark. 293, 493 S.W. 2d 115 (1973), the Supreme Court upheld a conviction of the appellant on counts of burglary and grand larceny, stating that an admonition by the trial judge was sufficient when the prosecuting attorney suggested that the defendant's plea of not guilty was an insult to the jury's intelligence as to warrant double punishment. The court stated that for a mistrial to be warranted, it must appear that justice can not be served by continuation of the trial.

In this case, we can not say that the prosecutor's statements were so highly prejudicial as to warrant a mistrial. We regard the prosecutor's statement as highly improper, but we conclude that the admonition by the trial court was adequate to offset the impropriety. We are confident that jurors will not take such unprecedented comments made by the prosecutor into consideration and would not be inflamed or prejudiced by such, particularly where the trial judge has expressed his disapproval. Moreover, where the opposing counsel has made credibility an issue, the bounds of permissible argument on that issue are considerably broader. *Tomlinson* v. *United States*, 93 F. 2d 952 (1937).

As to the second statement made by the prosecutor, we again do not approve such comments but hold that an admonition by the trial judge was sufficient. These comments were made during the sentencing proceedings after a guilty verdict had been rendered. It is a well settled rule in Arkansas that the trial judge has wide discretion in determining the prejudicial effect of counsel's closing arguments to the jury. *Murchison* v. *State*, 249 Ark. 861, 462 S.W. 2d 853 (1971); *Peters* v. *State*, 248 Ark. 134, 450 S.W. 2d 276 (1970); *Fisher* v. *State*, 241 Ark. 545, 408 S.W. 2d 894 (1966); *Head* v. *State*, 221 Ark. 213, 252 S.W. 2d 617 (1952). The trial court has the opportunity to observe its prejudicial impact upon the jury, and its decision will not be reversed unless there has been an abuse of discretion. We do not believe that the appellant was unduly prejudiced and therefore hold that the trial court properly denied appellant's motion for a mistrial.

Appellant's third point for reversal is that the trial court erred in unduly limiting appellant's closing argument. The contention is based on a denial by the trial judge to allow the appellant's counsel to argue that the testimony of a witness for the State, Officer Reynolds, was for impeachment purposes only and not as substantial evidence. However, appellant voiced no objection when the witness testified nor did he request that a limiting instruction be given to the jury. Only after the jury had rendered a guilty verdict and was deliberating on the sentence did he object. We believe that the objection was untimely and was properly overruled. *Golden* v. *State,* 265 Ark. 99, 576 S.W. 2d 955 (1979); Uniform Rules for Circuit and Chancery Courts, Rule 13.

Lastly, appellant argues that the trial court erred in allowing the prosecutor to question the State's witness, Mr. Alan Ophof, regarding the length of time an inmate must serve before becoming eligible for parole. We agree with appellant that ordinarily this is not an area which can be discussed either in argument or interrogation; however, appellant's citations do not reach the issue as presented in the context of this case, for here, counsel for appellant first broached the subject by the questions which he posed on cross-examination. At several points on cross-examination, counsel asked questions aimed at showing that the witness's

testimony was given in consideration of a promise of early parole. This was not improper cross-examination, but it does, to some extent, open the door to questions from the prosecution to refute the inference. *Allen* v. *State*, 260 Ark. 466, 541 S.W. 2d 675 (1976). Without retreating from the general rule in criminal cases that parole procedures are not proper areas of either comment or inquiry where the purpose is to influence the sentence, we find that the trial court did not err in permitting some counter interrogation by the prosecutor on re-direct examination. It can also be said that the objection failed to reach the character of the question which appellant now contends was offensive, that, its *prejudicial* influence upon the sentence. Yet the objection made was to its *relevancy*. This seems to be drawing a fine line and perhaps so; but it is settled law that for the trial court to have committed reversible error, it must be said that timely and accurate objection was made, so that the trial court was given the opportunity to correct such error. *West* v. *State*, 255 Ark. 668, 501 S.W. 2d 771 (1973); *Callaway* v. *State*, 258 Ark. 352, 524 S.W. 2d 617 (1975); *Ray* v. *Fletcher*, 244 Ark. 74, 423 S.W. 2d 865 (1969).

Affirmed.

HOWARD, J., dissents.

GEORGE HOWARD, JR., Judge, dissenting. Unlike the majority, I think there is merit to appellant's argument that the trial judge committed reversible error in permitting a State's witness, Allen Ophof, to testify about the mechanics of the Arkansas Parole System in general and the application of the rules, in particular, to Ophof's sentence to the Department of Correction. The following is the exchange that took place between the prosecuting attorney and Ophof, over the objections of the appellant:

By Mr. Farris:

Q. And you went down there and how long did you spend in the penitentiary?

A. Seven months and eight days.

Q. Isn't it pretty common knowledge that if you mind your manners when you go down there and stay on your P's and Q's. . . .

By Mr. Davis:

Objection, Your Honor, this is irrelevant to this proceeding.

By the Court:

I haven't heard the question yet, Mr. Davis. Don't answer Mr. Ophof, until I rule. You may continue.

By Mr. Farris:

What is the objection?

By Mr. Davis:

It is irrelevant, to this proceeding.

By Mr. Farris:

Well, the reason it is not irrelevant, Your Honor, is he tried to leave the inference with the jury that this man was paroled solely because he gave a statement to Sgt. Reynolds and I am trying to show that that is not the case.

By the Court:

You may continue.

By Mr. Farris:

Q. You have been down then at the penitentiary and seen just about how the parole law works, haven't you?

A. Yes, Sir.

Q. And don't you know that you end up, if you are good

and don't get in any fights and put in solitary or anything like that, you spend a sixth of your time if you are a first offender, is that right?

A. Yes, Sir.

Q. So if a jury gives you a sentence of say three years, you do six months.

Appellant argues, logically and persuasively, that the jury was told, in effect, that whatever sentence is imposed, appellant would be released upon serving a fractional part of the sentence and, therefore, in order for appellant to be confined to the penitentiary for any appreciable length of time, the jury should assess a stiff sentence. Appellant claims that he was prejudiced by this testimony.

The majority, while recognizing that the testimony was highly prejudicial, avoids the force of appellant's argument by concluding that appellant's counsel invited the testimony when counsel asked Ophof, the State's witness, on cross-examination if Officer Reynolds had promised him an early parole if he (Ophof) cooperated in the case pending against appellant.[1]

While the State was entitled, on redirect examination, to inquire of Ophof whether a deal had been offered Ophof, I submit the trial court abused its discretion in permitting Ophof to give a comprehensive analysis of the State's parole program, before appellant's jury, when such testimony was not relevant to any issue. Moreover, I do not agree that the testimony was invited by the line of inquiry made by appellant's counsel. Appellant's inquiry was proper on cross-examination; and the majority recognizes that it was proper.

For the sake of argument, assuming that appellant invited the extended excursion into the policies and practices of Arkansas' parole system, the action of the trial court in not sustaining appellant's objections is still a manifest abuse of its discretion.

[1] Ophof denied that he ever cooperated with the State in the prosecution of the charges against appellant.

Under Rule 403 of the Uniform Rules of Evidence, it is provided:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .

The trial court was duty bound to sustain the objections of appellant to the testimony upon finding that the prejudicial effect outweighed any probative value that might be derived from Ophof's testimony. The record is silent as to any compliance, on the part of the trial court, with the provisions of Rule 403. Aside from the majority's recognition of the prejudicial effect of such testimony, our Supreme Court, in *Thackston* v. *State,* 205 Ark. 493, 169 S.W. 2d 130 (1943), has indicated the prejudicial effect of testimony pertaining to the policies and practices of the parole system.

In *Thackston* v. *State*, supra, the prosecuting attorney argued to the jury that it ought to fix appellant's sentence at twenty-one years and stated: '. . . you must bear in mind that he is entitled to parole when he has served a third of his time . . . if he makes a good prisoner.'

The trial court immediately stated:

> 'The court will sustain the objection and say to you gentlemen that you mustn't consider that for any purpose in arriving at your verdict. That is something you are not concerned with and shouldn't be considered by you whatever.'

While our Supreme Court affirmed appellant's conviction, who had received the minimum punishment under the law, our court said:

> There can be no doubt that the effect, if any, of this argument was eliminated by the court's prompt, emphatic and vigorous admonition to the jury that it must not consider this remark for any purpose.

In the instant case, appellant received the maximum sentence on the charge for which he was found guilty. Moreover, the trial court gave no cautionary instructions to the jury.

It is plain, from a careful consideration of the testimony offered by Ophof detailing the parole system, the testimony was calculated to influence the jury against a recommendation of clemency. Appellant was prejudiced indeed. Accordingly, I dissent.

George W. MILLER et ux *v*
Leo HARDWICK et al

CA 79-166 591 S.W. 2d 659

Opinion delivered December 5, 1979
Released for publication January 9, 1980

George M. Callahan, for appellants.

David M. Glover and *G. Christopher Wolthall,* for appellees.

MARIAN F. PENIX, Judge. This case was appealed to the Supreme Court of Arkansas and by that Court assigned to the Arkansas Court of Appeals pursuant to Rule 29(3).

Appellees were granted summary judgment and from that judgment comes this appeal. The appellees do business as Hardwick Bros. Lumber Co. at Malvern. They sold home decoration articles and services to the appellants, the Millers, at Hot Springs. The Millers failed to pay the $4,392.11. Hardwick Bros. brought suit and attached to the complaint was an affidavit stating amount was owed. The Millers filed a general denial. Hardwick Bros. filed Interrogatories and Requests for Admission, which were answered. The Millers admitted there was a contract and did not dispute the contract price. However, the answers to the interrogatories did set out that not all of the goods received met the terms of the contract and there was at least partial lack of consideration. The affidavit of Miller specified those items which were not provided and those which were not satisfactory. From a pretrial hearing the court's order granted Millers "thirty days to amend their answer to assert affirmative defenses and to more responsively plead." Hardwick filed motion for Summary Judgment alleging no genuine issue as to any material fact. Millers filed a response to the motion for Summary Judgment in which they asserted their Responses to the Interrogatories and Requests for Admissions adequately outlined the defenses which would be relied on at trial; namely, lack of consideration. The affidavit attached to the Millers' response to Hardwick's motion for Summary Judgment specifically set out the items with which Millers were dissatisfied and which did not meet the terms of the contract. The court granted Hardwick's motion for Sum-

mary Judgment. The judgment reads " . . . the court considered the pleadings, the interrogatories, request for admissions, and answers thereto, the affidavits in support of and in response to the motion . . . "

Whether the court based its finding on its assessment of the insufficiency of the pleadings or on the review of all the documents in the file, we find the decision to be erroneous and must be reversed. A Summary Judgment is an extreme measure. Justice is better served when cases are tried on their merits. Pleadings are for the purpose of informing all the parties what the issues are. Where there is no surprise or substantial prejudice the court can always, and often does, treat the pleadings as amended, to conform to the proof. Defects in pleadings are to be disregarded unless they substantially affect the rights of the adverse party. A variance between the pleadings and proof is not material unless it has actually misled the adverse party to his prejudice. Ark. Stat. Ann. § 27-1155 and 27-1160 (Repl. 1962). While the general denial did not apprise Hardwick of the Millers' defense, the response to the interrogatories provided this notice. These responses, which become a part of the record without objection, were evidence to be considered by the judge. Once these became evidence, the pleadings are treated as amended to conform to the evidence. *Bonds* v. *Littrell,* 247 Ark. 577, 446 S.W. 2d 672 (1969).

> At the outset the appellees insist that Bonds cannot rely upon the asserted collateral agreement, because he failed to plead that defense in his answer. It is true that Bond's answer to the complaint was merely a general denial, plus special pleas not now relevant. But in response to the plaintiffs' requests for admissions of fact Bonds made this statement under oath: "Defendant admits that a written memorandum of said agreement was made and that a copy is attached to the complaint . . . Defendant states, however, that said agreement was contingent upon the defendant's obtaining the purchase money from the Houston Milk Producers Credit Union." In the face of that assertion, and without rebutting it, the plaintiffs filed their motion for summary judgment.

> Under the Federal Rules of Civil Procedure, from which our summary judgment statute (§ 29-211) was copied, the better view is that affirmative defenses may, at least in some situations, be raised by affidavit as well as by answer. We agree with Moore's statement of the two views: "There is authority that defenses not pleaded in defendant's answer may not be raised by affidavits on his motion for summary judgment. This is highly technical and illiberal. Either the answer should be deemed amended to conform to the proof offered by the affidavits or a formal amendment permitted, the affidavits considered, and the motion for summary judgment decided under the usual rule pertaining to the adjudication of summary judgment motions." 6 Moore's Federal Practice § 56.11[3] (1966)

See also *Warner* v. *Warner,* 221 Ark. 939, 256 S.W. 2d 734 (1953); *Smith* v. *Moschetti,* 213 Ark. 968, 214 S.W. 2d 73 (1958).

By the responses to the interrogatories as well as the counter-affidavit, the Millers raised the defenses of lack of consideration or breach of warranty.

Ark. Stat. Ann. § 29-211 provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. . . .

Upon consideration of the pleadings, the responses to the requests for interrogatories, together with the affidavits, we believe there to be a material issue of fact. *Hughey* v. *Bennett,* 264 Ark. 64, 568 S.W. 2d 46 (1978); *Purser* v. *Corpus Christi State National Bank,* 258 Ark. 54, 522 S.W. 2d 187 (1975); *Ashley* v. *Eisele,* 247 Ark. 281, 445 S.W. 2d 76 (1969); *Mid-South Insurance Co.* v. *First National Bank of Fort Smith,* 241 Ark. 935, 410 S.W. 2d 873 (1967).

Reversed and remanded.

NEWBERN and PILKINTON, JJ., concur.

DAVID NEWBERN, Judge, concurring. My concurrence in the result reached by the majority is reluctant. The majority opinion's statement of the facts is correct except that it omits to say the motion for summary judgment was filed after the 30 days given the defendants to amend had elapsed, and no amendment had been filed. I can conceive of a rationale that no material issue of fact remained to be decided, as this failure to amend was a waiver of defenses. I decline to go that far. However, I do wish to point out where I disagree with the majority in areas I feel to be important.

First, the issue here is not whether the defendants have raised a defense of lack of consideration or an affirmative defense of breach of warranty. Rather, it is whether they have denied the correctness of the verified account filed with the complaint. This is an action on account as contemplated by Ark. Stat. Ann. § 28-202 (Repl. 1979). Lack of consideration is not a defense as it might be when the action is on a contract. See *Cawood* v. *Pierce,* 232 Ark. 721, 339 S.W. 2d 861 (1960), and *McWater* v. *Ebone,* 234 Ark. 203, 350 S.W. 2d 905 (1961), for cases showing the nature of this action. It is apparent the only defense, aside from affirmative defenses and set-offs which would have to be pleaded, is incorrectness of the account as stated.

I would have agreed with the granting of the summary judgment but for one discovery response (which I assume was under oath) which denied that some minor items listed in the appellee's affidavit were actually supplied. That was just barely enough, in my view, to raise an issue of fact.

Secondly, I cannot concur, in the context of an opinion evaluating the granting of a summary judgment, in a statement that "justice is better served when cases are tried on their merits." Such a statement implies we look askance at the summary judgment procedure. That is not the case. When there is no disputed fact which is material, under the applicable law, there are no merits to be tried, and it is wholly proper for a trial judge to apply the law summarily in those circumstances.

It was not improper for the trial judge to invite the defendants to amend their answer so that it either raised a defense to an action on account, which a general, unverified[1] denial is not, or to plead affirmative defenses. The defendants here are just lucky the plaintiffs asked in their interrogatory whether the defendants denied the accuracy of the account.

Judge Pilkinton joins in this opinion.

Clara (Girardot) DERRYBERRY *v.* Russell SIMS et ux

CA 79-158 591 S.W. 2d 662

Opinion delivered December 5, 1979
Released for publication January 9, 1980

Gardner & Gardner, for appellants.

Bullock & McCormick, for appellees.

DAVID NEWBERN, Judge. In this quiet title suit, a rather complicated set of facts presents a simple question. Does the filing of a complaint to quiet title on the basis of adverse possession satisfy the requirement of actual notice of plaintiff's claim of exclusive ownership to persons claiming to be cotenants? The chancellor held it was sufficient, and we affirm.

[1]*McWater* v. *Ebone,* cited above, suggests that a verified denial might be sufficient, but the record here shows the answer to have been unverified.

A. C. Girardot owned the 40 acres in question here. He died intestate and was survived by four daughters and one son. Three of the daughters are the appellants here. The appellees are the successors to the title of the other daughter, Louise Standridge, who filed her complaint to quiet title against her sisters in 1955.

The son of A. C. Girardot, whose name was A. D. Girardot, purchased the land from the state in 1938, after it had been forfeited for delinquent taxes. A. C. Girardot had been dead for several years. Although there is a question whether this purchase by A. D. Girardot amounted to a redemption which would have been for the benefit of himself and the other heirs, as well, we need not answer it in view of our finding that Louise obtained title by adverse possession.

A. D. Girardot conveyed the land to Louise by warranty deed dated December 14, 1940. Louise had been in possession, for a time with her mother and at least one of her sisters, since 1932. The mother died and the sister who had lived on the land, but in a separate house from Louise, left for California in 1952. This left Louise in exclusive possession. The appellants claim her possession was with their permission.

The year before Louise filed her suit to quiet title, she mailed to at least two sisters deeds which would have conveyed their interest in the land to Louise. They refused to execute the deeds, and that apparently precipitated the complaint to quiet title. In her complaint, Louise recited her warranty deed from her brother and her continuous adverse possession for more than 20 years. The appellants filed a motion to require Louise to make her complaint more definite and certain, to which Louise filed a response. The appellants did not, however, answer the complaint or seek any affirmative relief in the case until 1976, some three years after Louise had conveyed the land to others who preceded the appellees in title.

Assuming, without deciding, that the purchase by A. D. Girardot from the state might be considered a redemption on behalf of all the heirs, and thus not sufficient to convey the

entire title to Louise, we are compelled to find Louise's possession from 1955 until 1973 more than sufficient to establish her claim, and thus to establish the claim of the appellees. We recognize that adverse possession claimed against one's cotenants must be based on clear notice to them. *Dodson* v. *Muldrew,* 239 Ark. 202, 388 S.W. 2d 90 (1965); *Staggs* v. *Story,* 220 Ark. 823, 250 S.W. 2d 125 (1952). However, we can think of no more unequivocal way of conveying notice than by filing a suit to quiet title. The filing, in 1955, of the motion to make more definite and certain confirmed that the appellants knew of the suit.

If we were evaluating a motion to dismiss the complaint for failure to prosecute the claim we would be confronted with a very different question from the one presented here. We must keep our attention focused on the fact that Louise was in exclusive possession at the time her complaint was filed. The appellants could have answered the complaint and sought affirmative relief anytime thereafter, but they did not do so until 1976. We have no hesitancy in saying Louise's claimed adverse possession came to fruition at least as early as seven years after her complaint was filed.

Affirmed.

Judges Howard and Penix dissent.

MARIAN F. PENIX, Judge, dissenting. I disagree with the majority decision. A further statement of the facts will aid in understanding the equities involved.

A. C. Girardot owned the land in question. He died in 1931 or 32. His widow and daughter Clara continued living on the homestead. Appellee, Louise Standridge, a widowed daughter, moved in with her mother and Clara. The property went delinquent for taxes. A. D. Girardot, brother of Clara and Louise, redeemed the property from the State of Arkansas. He and his wife deeded the property to Louise Standridge and such deed was recorded in 1944. A year later the mother of Clara, Louise, A.D. and two other daughters, Evelyn Brown and Rena Chilton, died. Clara moved from the property leaving Louise and Louise's children living on the property.

In 1955 Louise filed this action to quiet title. The defendants, three sisters of Louise, filed a Motion to make more Definite and Certain. In April 1955 a Response to that Motion was filed. From that date until 1973 neither the plaintiff nor defendants took any action. In November 1973, Louise deeded the property to Euel and Aileen Hill for $16,500.00. On December 11, 1973, the Hills sold the property to Kenneth and Bessie Childress for $21,000.00. On December 13, 1973, Kenneth and Bessie Childress conveyed the property to the actual purchasers, Russell Sims and Carol Sims, his wife. All of these parties were made party to this cause together with the Bank of Dover which held a mortgage executed by Russell Sims. On February 20, 1976, the appellants filed a Motion to File Pleading, To Add Parties and to Expedite Disposal of Case and also filed a Lis Pendens. On April 29, 1976, the original defendants, the three Girardot sisters, filed an answer and a cross-complaint stating Louise's possession has been at all times permissive and asking that the property be sold and proceeds divided one-fifth to each defendant and two-fifths to Louise — she having received her brother's interest in 1944. The case was tried December 22, 1978. The Court quieted title in the appellee Louise, the original plaintiff. The Court based its decision on adverse possession, and the bars of laches and estoppel.

I

The three sisters, appellants, allege the court erred in establishing Louise, appellee, as owner by adverse possession against them. When the brother redeemed the property from the state the interest in the property remained the same as before the property became delinquent. His interest remained one-fifth.

> It is also well settled that one tenant in common cannot add to, or strengthen, his title by purchasing title to the entire property at a tax sale, and that some purchases merely amount to a redemption which inures to the benefit of all the tenants and confers no right upon the tenant so purchasing except to demand contribution from his co-tenants. *Zackery* v. *Warmack,* 213 Ark. 808, 212 S.W. 2d 706 (1948) quoting *Spikes* v. *Beloate,*

206 Ark. 344, 175 S.W. 2d 579 (1943).

See also, *Crouch* v. *Crouch,* 241 Ark. 447, 408 S.W. 2d 495 (1966); *Vesper* v. *Woolsey,* 231 Ark. 782, 332 S.W. 2d 602; *Wright* v. *Curry,* 208 Ark. 816 at 821, 187 S.W. 2d 880 (1945); Jones, *Arkansas Titles* § 220.

When the brother deeded the redeemed property to Louise, she received no more than his one-fifth interest. Thereafter her interest remained two-fifths. There is no question but that Louise remained in possession of the property, but such possession was with the permission of her co-tenants. Before one co-tenant can acquire title by adverse possession from the others, knowledge of the claim must be *brought home* to the co-tenants. From the testimony it is apparent the appellants permitted Louise to live on the property because she was widowed with children, but that they believed her interest to be no more than that which she acquired as an heir. Furthermore, prior to filing suit to quiet title Louise requested her sisters sign deeds conveying their interest to her. The sisters refused. At this point Louise recognized her sisters as co-tenants. In *Dodson* v. *Muldrew,* 239 Ark. 202, 388 S.W. 2d 90 (1965), the court stated that notorious acts of an unequivocal nature were required to give notice to co-tenants of an adverse claim. Possession by one tenant in common is presumed to be the possesison of all and, further, that in view of the family relation stronger evidence of adverse possession is required. Because of the close family relationship of parties, stronger evidence of adverse possession was required than would otherwise be necessary. *Staggs* v. *Story,* 220 Ark. 823, 250 S.W. 2d 125 (1952).

I find no evidence of any notice or notorious acts which would "bring home" to the other co-tenants Louise's claim of ownership by adverse possession *prior* to her filing of the lawsuit in 1955 to quiet title in herself. Louise had no cause of action at the date of filing her 1955 lawsuit.

II

Appellants allege the court erred in finding the bars of

laches and estoppel are applicable in this case. In 1955, Louise Standridge gave notice to the world, including her sisters, she was claiming the property as her own. She brought the action to quiet title. The defendant sisters filed a motion to make more definite and certain. A response to that motion was filed. No further action of any kind was taken until February 1976. Rule 10 of the Circuit and Chancery Courts states:

> In all civil cases wherein there has been no action of record during the 12 months just past, the Court shall cause notice to be mailed to the attorneys of record that such case will be dismissed by the Court without prejudice for want of prosecution unless on a day set for that purpose application is made to the Court and good cause shown why it should be continued as a pending case. If such application is not made or good cause is not shown, the court may dismiss each case without prejudice.

The trial court should have dismissed this case. It was incumbent upon that court to make sure the case was either tried or dismissed. This, however, was not done. Filing a lawsuit tolls the Statute of Limitations.

> The actual commencement of a suit is sufficient to stop the running of the Statute of Limitations without any regard to, or dependence upon, any after diligence of the plaintiff in its prosecution. *King & Houston* v. *State Bank,* 13 Ark. 269 (1853).

> Unless a statute of limitation expressly provides otherwise, its operation is ordinarily tolled by the commencement of an action rather than by its prosecution to judgment. *General American Life Insurance Co.* v. *Cox,* 215 Ark. 860, 223 S.W. 2d 775 (1949).

If filing a lawsuit tolls the Statute of Limitations what is equitable or logical about allowing the filing of a lawsuit — which tolls the statute — to begin a new period of limitations?

The parties did not pursue the lawsuit. There was tes-

timony by the appellants they considered the lawsuit dropped. Neither party availed themselves of the remedies available. Now both are asking that equitable relief be provided.

> The doctrine of laches is founded on the equitable maxims that he who seeks equity must do equity and that equity aids the vigilant, and hence while there is a great variety of cases in which the equitable doctrine is invoked, each case must depend on its own particular circumstances, and courts of equity discourage laches and delay without cause. *Grimes* v. *Carroll,* 217 Ark. 210, 229 S.W. 2d 668 (1950).

Louise, the movant in the action to quiet title, should not be allowed to avail herself of the equitable defense of laches as she has not been vigilant. She did not pursue her lawsuit to its fruition. Furthermore, laches is not generally available to a plaintiff in a lawsuit.

> Laches is generally considered to be a shield of equitable defense rather than a sword for the investiture of legal title. *Meadows* v. *Hardcastle,* 219 Ark. 406, 242 S.W. 2d 710 (1951).

The court in this case has charged the appellants with the burden of carrying forward a suit which they did not initiate. The majority would have us reward Louise for her sisters' lack of diligence when in fact she herself was not diligent. I believe the parties should be left in the same position as they were in 1955. In 1955 Louise and her sisters were co-tenants. Equitable relief should not be granted to either party. Each had the opportunity to seek timely judicial determination of the issue. All parties slumbered on their rights. Equity will not step in to change a situation produced by the actions or inactions of the parties.

> The relationship between co-tenants is one of trust and confidence and it would be inequitable to permit one of them to do anything which prejudiced the interest of the other. *Johnson* v. *Johnson,* 250 Ark. 457, 465 S.W. 2d 309 (1971).

It is not equitable to allow one co-tenant to prejudice the rights of her co-tenants by filing a lawsuit which she never prosecuted to its conclusion. To allow her to establish her claim by adverse possession is unconscionable.

III

The appellants allege error in the court finding the appellees, Euel Hill and Aileen Hill, Kenneth Childress and Bessie Childress, John A. Sims, Russell Sims and Carol Yvonne Sims were innocent purchasers.

Louise Standridge sold the property to Euel Hill, a real estate broker, who had his attorney examine the abstract of title and render an opinion. Mr. Hill had been a real estate broker for 22 years. He testified he thought the land had gone for taxes but could not say who bought it. He also testified he had no idea there were any heirs. Both abstracts introduced into evidence indicate a tax forfeiture by A. C. Girardot and a subsequent redemption deed to A. D. Girardot. Certainly there is sufficient similarity in this unusual name to put a conscientious purchaser or a title examiner on notice of the possibility of other heirs and that the purchase by A. D. Girardot was nothing more than a redemption of the taxes due and inured to the benefit of all the co-tenants. Record title in A. D. Girardot constituted constructive notice to Euel Hill. A further inquiry would have brought to light the existence of the co-tenants. Mr. Sims, one of the appellees, received a phone call from one of the appellants, Mrs. Brown, telling him there were other heirs to the property.

I find there to have been sufficient notice and information available to the appellees to defeat the contention they were innocent purchasers.

It is my firm belief Louise Standridge did not acquire title by adverse possession but rather continued as a co-tenant. Therefore, in 1973 the only interest she had to convey was her two-fifths.

I would reverse. Therefore, I respectfully dissent.

HOWARD, J., authorizes me to state he joins me in this dissent.

Harvey L. ASHMORE et al *v.* George FORD, Special Personal Representative of the Estate of Grady T. LEE and ELECTROLUX CORP.

CA 79-161 591 S.W. 2d 666

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Released for publication January 9, 1980

Ray & Donovan, for appellants.

Penix, Penix & Mixon and *Reid, Burge & Prevallet,* by: *Dan M. Burge,* for appellees.

DAVID NEWBERN, Judge. This tort action arose from an accident involving Harvey L. Ashmore, Jr., who was the rider of a motorcycle, and Grady T. Lee, who was the driver of an automobile. The two vehicles were approaching each other from opposite directions on a busy street when the Lee vehicle turned left in front of the motorcycle. Harvey turned his motorcycle to the left to avoid colliding with the car, and his leg struck, or was struck by, the rear panel and bumper of Mr. Lee's car, causing serious injury to Harvey's leg. This action was brought by Harvey L. Ashmore, Sr., and his wife, Clara Sue Ashmore, individually and as next friends of Harvey L. Ashmore, Jr. The defendants were the estate of Mr. Lee and Electrolux Corporation. The allegation of liability of Electrolux was based on the contention that Mr. Lee was an employee of Electrolux acting in the scope of his employment at the time the accident occurred. The issues presented here have mostly to do with proof of that relationship.

A jury found the accident to have been caused by the negligence of Mr. Lee to the extent of 65% and of Harvey L. Ashmore, Jr., to the extent of 35%. Based on that finding and a finding of damages suffered by the plaintiffs, the judgment awarded $13,000.00 to the parents on their individual claims

and $13,000.00 to them on their son's behalf. The jury found Mr. Lee to have been an independent contractor rather than an employee of Electrolux, and thus all of the damages were against Mr. Lee's estate only. The judgment was appealed by the Ashmores to the Arkansas Supreme Court, and the case was assigned to us pursuant to Rule 29(3).

We find three of the appellant's four points are sufficient bases for reversal. We will discuss all four, as they may arise again upon retrial.

I.

The appellants' first point is that the court erred in refusing to compel Electrolux to produce a statement made by Mr. Lee to Electrolux or its insurer shortly after the accident. In its order, the court cited two cases, *Dritt* v. *Morris,* 235 Ark. 40, 357 S.W. 2d 13 (1962) and *Curbo* v. *Harlan,* 253 Ark. 816, 490 S.W. 2d 467 (1973). The *Dritt* case involved responses to interrogatories allegedly within the "work product of the attorney" privilege. There the Arkansas Supreme Court found it should compel answers to some of its interrogatories but not others, applying the well known "necessity" test established in *Hickman* v. *Taylor,* 329 U.S. 495, 67 S. Ct. 385 (1947). In *Curbo,* the Supreme Court approved the trial court's order compelling production of a statement obtained by an insurance investigator and subsequently given to an attorney. The trial court had ruled the statement was not part of an attorney's work product.

After citing those cases, and without discussion of them, the court said it would not compel production of the statement for three reasons: (1) the appellants had interviewed Mr. Lee after the accident, (2) agency or acting within the scope of employment cannot be proven by the admission of the alleged agent, and (3) the statement would not be admissible because of the "Dead Man's Statute." We will discuss these reasons in reverse order.

The "Dead Man's Statute," found in Section 2 of the Schedule of the Arkansas Constitution of 1874, was repealed

with the adoption of the Uniform Rules of Evidence in 1974. Ark. Stat. Ann. § 28-1001 (Supp. 1977). In *Davis* v. *Hare,* 262 Ark. 818, 561 S.W. 2d 321 (1978), it was held that this was a rule of evidence or a "procedural" change and thus the new rule was applicable because the trial, as opposed to the operative facts, occurred after the change in the law. That is the case here.

The second reason gives us equally little pause, as it went to admissibility rather than discoverability. Under the discovery statutes applicable at the time the order was entered, production of the statement could have been required regardless of its admissibility if the request appeared reasonably calculated to lead to the discovery of admissible evidence. Ark. Stat. Ann. §§ 28-356 and 28-348 (b) (Repl. 1962).

We might interpret the court's first reason for denying production as being there was no "good cause" for production of the statement.[1] Even if that had been the court's reason in referring to the pretrial interview of Mr. Lee, it would have been invalid. Harvey T. Ashmore, Sr., said in testimony proffered at the trial that Mr. Lee had told him he was on his way to call on an Electrolux customer in the statement sought, that evidence would have been valuable to the appellants on the question of scope of employment, and possibly the general issue of employment. An excellent discussion on the need for liberal interpretation of discovery rules in the light of circumstances of the case at hand appears in *Marrow* v. *State Farm Ins. Co.,* 264 Ark. 227, 570 S.W. 2d 607 (1978). There Judge Fogleman made it clear that when proof of a party's case depends largely on testimony of his adversary and documents kept by his adversary, "the scope of discovery permitted should be broader than otherwise and . . . [the seeking party] . . . should be allowed to inspect any writing in the files . . . [of the adversary] . . . which might lead to admissible evidence." (264 Ark. at 237)

[1]The statute which required a showing of good cause for production of documents, Ark. Stat. Ann. § 28-356 (Repl. 1962), was in effect at the time of this discovery request. The "good cause" requirement has been eliminated from the rule which has replaced the statute. See, A.R. Civ. P. 34.

The appellees contend the error, if any, was harmless, as the jury found Mr. Lee was an independent contractor. That argument is specious, as the statement sought could have produced or led to evidence upon which the jury could have reached the conclusion Mr. Lee was an employee of Electrolux acting in the scope of his employment.

II.

The appellants' second argument is that the trial court erred in not allowing Harvey L. Ashmore, Sr., to testify as to what Lea Vincent, an Electrolux office employee, told him about Mr. Lee's activities on the day of the accident. The court ruled the proffered testimony was hearsay. The appellants contend the testimony is excepted from the hearsay rule under Rule 801 (d) (2) of the Uniform Rules of Evidence. Ark. Stat. Ann. § 28-1001 (Repl. 1979).

We approve the trial court's action in excluding this testimony. The proffer was to the effect that Ms. Vincent, whose whereabouts at the time of the trial were unknown, told Mr. Ashmore that on the day of the trial Mr. Lee had been at the Electrolux office to "pick up his calls," and that he had returned to the office shortly after the accident. This testimony was relevant on the question of the employment relationship between Mr. Lee and Electrolux, but to be admissible under Rule 801 (d) (2), *supra*, it must constitute an admission.

We find no Arkansas cases containing specific definition of "admission." It is generally defined, however, as a concession or a statement by a party or his agent amounting to a prior acknowledgment of a fact the party denies. *In Re Brooklyn Bridge Southwest Urban Renewal Project*, 50 Misc. 2d 478, 270 N.Y.S. 703 (1966), and *Hartford Accident & Indemnity Co.* v. *McCardell*, 369 S.W. 2d 331 (Tex. 1963). At no time did Electrolux deny the facts sought to be asserted in Ms. Vincent's statement to Mr. Ashmore. At one point in a deposition the Electrolux district manager denied Mr. Lee was working "in the course of his employment" at the time of the accident, but the abstract before us does not show that he or any other Electrolux representative denied

that Mr. Lee was at their office on the day in question or that he had picked up his calls that day.

III.

The appellants' third argument is that the trial court erred in refusing to permit Mr. Ashmore, Sr., to testify that Ms. Vincent asked him to fill out an accident report for Electrolux's insurer. The appellants proffered Mr. Ashmore's testimony and offered an instruction taken directly, and altered only insignificantly, from *Delamar & Allison* v. *Ward,* 184 Ark. 82, 41 S.W. 2d 760 (1931). The instruction, which was approved in the *Delamar* case, makes clear evidence of insurance coverage of a vehicle is admissible on the issue whether the vehicle was being driven for the purposes of or under the control of the party carrying the insurance.

In their response to the appellants' argument, the appellees cite only *Hogan Co.* v. *Nichols et al,* 254 Ark. 771, 496 S.W. 2d 404 (1973), in which the Arkansas Supreme Court found evidence of an insurance agreement should not have been admitted to prove an employer-employee relationship. In that case, however, there was evidence that the alleged employer could not have purchased insurance covering vehicles hired but not owned by it, and covering them only when driven by an employee of the alleged employer. The *Delamar* case was distinguished in *Hogan* on the basis of proof in the latter that existence of the particular policy and its coverage was consistent with either independent contractor or employee status of the driver.

In the case before us, we have no evidence what the policy provided, nor do we have any evidence that Electrolux could not have purchased insurance covering its employees, no matter whose cars they drove. While we can distinguish this case from *Hogan,* we cannot distinguish it from *Delamar.*

The trial judge apparently made no discretionary determination under Rule 403, Ark. Stat. Ann. § 28-1001, *supra,* that any prejudice resulting from introduction of evidence of insurance would outweigh the probative value of

the evidence. At least, if he did so, it does not appear in the abstract. Thus, we find no justification for the court to have refused to permit the testimony or to have given the requested instruction, had the testimony been permitted.

IV.

The final point made by the appellants is that the court erred in refusing to give A.M.I. 614, an instruction saying that a person confronted with a "sudden emergency" is charged only with the duty of care reasonably expected under those circumstances. The instruction points out that it applies only to sudden emergencies which are not caused by the negligence of the party requesting the instruction.

Two lines of Arkansas Supreme Court cases have developed on the propriety of giving this instruction. Some say the language of the instruction pointing out that it applies only where the negligence of the party seeking the instruction did not cause the emergency is a sufficient safeguard, thus implying the instruction may be given even when there is some evidence of negligence on the part of the party seeking the instruction. See, *e.g.*, *Hooten* v. *DeJarnatt,* 237 Ark. 792, 376 S.W. 2d 272 (1964). Others say a party is not entitled to the instruction where his own negligence has created the emergency. See, *e.g.*, *Williams* v. *Carr, et al,* 263 Ark. 326, 565 S.W. 2d 400 (1978). These approaches are not inconsistent. When they are combined, the result is that the trial judge may give the instruction in cases where there is some negligence on the part of the party seeking the instruction, but the instruction should not be given where the evidence is very strong that the party requesting the instruction has "created" the emergency by his own negilgence.

In the case before us, we are not asked to say there was not substantial evidence to support the jury's finding of 35% negligence on the party of Harvey L. Ashmore, Jr., but we would have had difficulty finding that evidence had we been asked. At the very least, it is clear to us that there was no strong evidence that an emergency was created by negligence of Harvey. The instruction should have been given.

Reversed and remanded.

Judge Penix did not participate.

John F. TURNER, Jr. *v.* TRADE WINDS INN and HARTFORD INSURANCE COMPANY

CA 79-73 592 S.W. 2d 454

Opinion delivered December 12, 1979
Rehearing denied January 16, 1980
Released for publication January 16, 1980

Estes, Estes & Estes, for appellant.

Daily, West, Core, Coffman & Canfield, by: *Eldon F. Coffman,* for appellees.

ERNIE E. WRIGHT, Chief Judge. This is an appeal from a decision of the Workers' Compensation Commission denying appellant's claim for attorney fees and penalty

incident to hospitalization expenses appellant contends were controverted.

The appellant sustained a compensable injury to his right hip on January 19, 1976. The appellees accepted the injury as compensable, have periodically paid statutory benefits and have paid medical expenses in the amount of $75,140.95. The appellant is a hemophiliac and has been in the hospital and treated at the emergency room on a number of occasions since the injury. During some of these hospitalizations the appellant has incurred some expenses for treatment unrelated to the compensable injury.

The hospital bills here relevant were incurred at Sparks Medical Center in Fort Smith and are as follows:

May 9 to May 13, 1978, $4,403.55
June 12 to June 19, 1978, $9,590.70
July 20 to July 24, 1978, $5,949.40.

On May 31, 1978, the compensation carrier's claim supervisor wrote Sparks concerning the bill from May 9 to May 13, acknowledging receipt of the bill, stating some of the charges did not appear related to the injury, and requested a copy of the patient's chart for review in connection with the bill. The letter stated if there was no authorization on file for release of the information to please advise immediately. On June 5, 1978 the hospital accounts representative called the claim supervisor and advised she would require a signed medical release before she could release the requested information. On July 14, 1978 the claim supervisor wrote appellant's attorney of record stating the insurance carrier had received bills for the May and June hospitalization; that the bills did not contain sufficient information as to what the treatment was for, and enclosed an authorization for the signature of appellant with request that the executed release be returned. The letter also stated attorney for appellant would be furnished with copies of reports obtained.

The release was not returned, and on September 18, 1978 appellant's attorney requested a hearing with reference to the bills.

After the hearing it was agreed no compensation payments were in arrears and the matter proceeded to hearing on the issue as to whether the bills were controverted.

The judge found appellees had not expressly controverted the hospital bills, but the delay in paying the May hospital bill was such as to constitute controversion, allowed maximum attorney fees as to that item and denied appellant's claim for penalty under § 81-1319(e) and § 81-1319(f).

On appeal the Workers' Compensation Commission in a comprehensive opinion found respondents had never at any time denied liability for the bills, never filed any intention to controvert with the Commission as provided by Ark. Stat. Ann. § 81-1319 (d), but to the contrary found appellant admitted respondents told him to send them the bills and they would pay them, and that a claim for payment of the bills was never filed with the Commission. The Commission disallowed any attorney fee or penalty.

The claim supervisor for the carrier testified he made the decision to withhold payment of the three hospital bills until they could obtain clarification as to whether the bills were injury related. The appellant's attorney supplied the appellee insurance carrier with copies of hospital medical records on October 20, 1978, only three working days prior to the hearing, and delivered the appellant's medical information release to the appellee insurance carrier on the day of the hearing. Upon securing the medical information the appellee insurance carrier agreed to pay the three bills except for items totaling $121.00. Appellant's attorney never offered any explanation for ignoring the request of the compensation carrier to be furnished medical release authorization except to assert at the hearing a medical release had previously been provided. The prior release had been filed with the hospital some two years earlier; however, for some reason the hospital was not acting pursuant to that request in providing information as to these bills.

On appeal from the Commission the appellant contends the Commission erred in finding all three claims were not controverted and in failing to award attorney fees under

§ 81-1332 and a six per cent penalty under § 81-1319 (e).

The rule is well settled that the findings of the Workers' Compensation Commission will not be disturbed on appeal if supported by substantial evidence. In determining whether there is substantial evidence to support the findings of the Commission, we need only consider the evidence, even though contradicted in whole or part, which is most favorable to the appellee. *Stephens & Stephens, et al* v. *Logan, et al,* 260 Ark. 78, 538 S.W. 2d 516 (1976).

The evidence shows the hospital declined to provide hospital medical records to appellees without a new release authorization from appellant. Appellees were entitled to this information to determine whether the items in the bills were related to the compensable injury. The compensation carrier requested the release through appellant's attorney by letter dated July 14, 1978. A release was not provided until October 24, 1978, the date of the hearing. Appellant's attorney provided appellees with medical information on October 20, 1978 and appellees agreed to pay these bills with a few minor exceptions not here in issue.

There is substantial evidence to support the Commission's findings that appellees had not controverted any of the three hospital bills; that appellant failed to give a good account as to what action he took with reference to the bills; that attorney for appellant failed to cooperate with the appellees in providing the medical information release; and that the hospital failed to help facilitate processing of the bills.

The Commission held the circumstances in evidence placed the issues within the scope of the holding in *Horseshoe Bend Builders* v. *Sosa,* 259 Ark. 267, S.W. 2d 182 (1976), that mere failure of an employer to pay compensation benefits does not amount to controversion, and that this especially is true when the carrier accepts the injury as compensable and is attempting to determine the extent of disability. Here the carrier was attempting to determine the extent of its liability as to the items in the three hospital bills.

The Commission was correct in holding that the penalty

provision of § 81-1319 (e) applies only to disability benefits and has no application to medical bills, and there is substantial evidence to support the finding the bills were not controverted.

Affirmed.

HAYES, J., concurs.

HOWARD, J., dissents.

M. STEELE HAYS, Judge, concurring. Were it not for the finding by the Commission that appellant contributed to the delay, a point in dispute, I would join Judge Howard in dissenting, as I am persuaded that the Respondent controverted payment of the May, 1978, hospital bill by withholding payment. Certainly, the Respondent had every right to investigate the items charged by the hospital to satisfy itself that they were proper; however, a suspicion arises that Respondent withheld payment for reasons going beyond the reason stated, i.e., the lack of a current medical authorization. In view of *Clark* v. *Peabody Testing Service,* 265 Ark. 489 and *American Casualty Co.* v. *Jones,* 224 Ark. 731, I cannot justify a finding on my own that this is what occurred, in the face of a finding by the Commission to the contrary, although the testimony satisfies me that payment was withheld for other reasons.

For what it might be worth, Respondent could have clarified its position quite simply by writing promptly to either the Commission or to claimant's attorney, or both, to state the reason payment was withheld and avoided the delay and the fall-out by doing so.

GEORGE HOWARD JR., Judge, dissenting. I am persuaded that the evidence in this record supports the Administrative Law Judge's finding that the delay on the part of appellee, Hartford Insurance Company, in paying a hospital bill of $19,943.65 constituted controversion, thus, entitling claimant's attorney to a fee.

The majority in affirming this case and concluding that

there is substantial evidence to support the Full Commission's holding that the appellee did not controvert the hospital bills made the following observation:

> The claim supervisor for the carrier testified he made the decision to withhold payment of the three hospital bills until they could obtain clarification as to whether the bills were injury related. The appellant's attorney supplied the appellee insurance carrier with copies of hospital medical records on October 20, 1978, only three working days prior to the hearing, and delivered the appellant's medical information release to the appellee insurance carrier on the day of the hearing. Upon securing the medical information the appellee insurance carrier agreed to pay the three bills except for items totaling $121.00. Appellant's attorney never offered any explanation for ignoring the request of the compensation carrier to be furnished medical release authorization except to assert at the hearing a medical release had previously been provided. The prior release had been filed with the hospital some two years earlier; however, for some reason the hospital was not acting pursuant to that request in providing information as to these bills.
>
> . . .
>
> The evidence shows the hospital declined to provide hospital medical records to appellees without a new release authorization from appellant.

But a careful scrutiny of the record reflects the following:

The claim supervisor for the carrier testified:

> Q. Would it be a fair statement of fact to say that you are the person who is — makes the decision to pay or not to pay these bills?
>
> A. Yes, sir, that would be a fair statement.
>
> Q. Would it be a fair statement of fact to say that these

bills weren't paid as of September 18th, the date of requesting this hearing?

A. That's correct.

Q. Could it be a fair statement of fact to say that you made that decision not to pay them?

A. Yes, sir.

While the claim supervisor for the carrier stated that he had received a call from the hospital stating that the hospital did not have a medical authorization on file and that he had requested his attorney (Mr. Coffman) to communicate with claimants' attorney (Mr. Estes) for a medical authorization, the claim supervisor testified:

Q. Did you tell Mr. Coffman that you needed a medical authorization because you didn't have one the hospital would accept?

A. No.

Q. Did you tell Mr. Coffman that you needed a medical authorization because you didn't have an up-to-date medical authorization that the hospital would accept?

A. I believe that's more in line with what I told him, that's correct.

Q. But you did have a medical authorization, didn't you?

A. I had a two-year-old medical authorization, that's correct.

Q. And that medical authorization has been used by The Hartford as recent as May 9th of 1978, hadn't it?

A. Evidently, it has.

It is plain from the record that on March 2, 1976, follow-

ing claimant's injury on January 19, 1976, the claimant executed the following medical authorization on a form supplied by Hartford Insurance Company:

> To whom it may concern:
>
> I hereby request and authorize you to disclose, whenever requested to do so by THE HARTFORD INSURANCE GROUP or its representative, any and all information you may have concerning John F. Turner, Jr. with respect to any illness or injury, medical history, consultation, prescription or treatment, including x-ray plates, and copies of all hospital records. A photostatic copy of this authorization shall be considered as effective and valid as the original.

The claim supervisor testified further:

> Q. So, Mr. Scott, it'd be a fair statement of fact to say that you've had this medical release available to you, wouldn't it?
>
> A. Well, it's been maintained in our files, yes, sir.
>
> Q. You had it available to you, didn't you, just answer my question.
>
> A. Yes.
>
> Q. And you could have used that medical release to determine whatever you wanted to determine about these bills, couldn't you?
>
> A. I'm not sure if I could have or not.
>
> Q. Did you try — did you try to —
>
> A. I was advised by Sparks that I couldn't get the requested information without an authorization.
>
> Q. Did you have an authorization?

A. I had one dated probably over two years prior to the time I needed it.

Q. Did you take that medical authorization to Sparks?

A. No I did not.

Q. Did you provide them with a copy through the mail?

A. No I did not.

. . .

Q. Did you tell Mr. Coffman I don't have a medical release?

A. I don't recall exactly what I said specifically, I was asking.

Q. Let me ask you this what was your explanation to Mr. Coffman in requesting a medical release?

A. That I didn't have an authorization I felt that the hospital would accept.

Q. Okay. So, you told Mr. Coffman that you didn't have an authorization that the hospital would accept, is that right?

A. That's correct.

It is clear that the claim supervisor merely assumed that the medical authorization given by claimant on March 2, 1976, was unacceptable to the hospital for there is no evidence that the hospital refused to accept this authorization. Consequently, the claim supervisor persisted in requiring a new medical authorization not because the hospital wanted an up-to-date one as found by the majority, but, on the contrary, on the assumption of the claim supervisor that the hospital would not honor the authorization in his possession. Another parallel paradox in this matter is the claim supervisor's admission, in effect, that the hospital had honored the

medical authorization of March 2, 1976, as late as May 9, 1978.

Under these circumstances, I cannot support the posture taken by the majority in finding that the Commission's holding is supported by substantial evidence — evidence possessing substance and authenticity which reasonable minds might accept as adequate to support a conclusion — therefore, I dissent.

Howard Lee NASH *v.* STATE of Arkansas

CA CR 79-77 591 S.W. 2d 670

Opinion delivered December 12, 1979
Released for publication January 9, 1980

Kenneth C. Coffelt, for appellant.

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

ERNIE E. WRIGHT, Chief Judge. The appellant was charged with a felony for delivery of a controlled substance, heroin, in violation of Ark. Stat. Ann. § 82-2617. At the end of trial before the court, without a jury, he was found guilty as charged and punishment fixed at 10 years imprisonment with 7 years suspended and 5 of those years on probation.

For the first point of reversal appellant contends the court erred in admitting in evidence an envelope and contents which allegedly was the substance purchased from appellant by a narcotics detective, Mr. Hanna, of the Little Rock Police Department. Mr. Hanna testified in substance that he asked appellant on May 23, 1978 if he could supply him with some heroin. Appellant said he could supply him with two $50.00 packages. The appellant left and returned in a few minutes with two tinfoil packets containing a brown powder and the witness paid appellant $100.00. Upon returning to the office the witness "paramedically" [sic] sealed the substance in an envelope, and placed the date and his initials thereon. He recognized the envelope offered as State's Exhibit 1 as the same envelope. The envelope now contains a tinfoil packet and a glass bottle containing a brown powder substance.

Mr. Morris, a Federal narcotics officer, testified in substance that he saw Officer Hanna initial and seal the envelope and after also initialing it the witness mailed it the next day by registered mail, return receipt requested, to the Drug Enforcement Administration Analytical Laboratory, Miami, Florida, and the receipt was later returned; that he later received the envelope in a sealed condition by registered mail on March 9, 1979; that when returned, the envelope contained one foil packet and one bottle containing a brown powder substance; and that the envelope appeared

substantially in the same condition as when mailed. The witness brought the envelope marked State's Exhibit 1 to court.

Mr. Kisser, a chemist for the Drug Enforcement Administration testified in substance that he recognized State's Exhibit 1 and that his name and date appeared on the bottom of the envelope; that when he received the envelope on May 30, 1978 it was sealed and the seal did not appear to be disturbed; that it contained two tinfoil packets containing brown powder; he cut the packet open, removed and analyzed the substance; that when he finished he placed the powder in a bottle and put it and the remaining exhibit back into the envelope and put his seal thereon and heat sealed the envelope. That the powder consists of 1.0 percent heroin hydrochloride and other drugs. The witness returned the envelope to the evidence custodian and the envelope appears still intact. When mail comes into the office at Miami the evidence custodian generally takes charge of it, delivers the paper work to the witness' supervisor, the supervisor assigns the paper work to the witness and the witness obtains the evidence from the evidence custodian; the witness is the second one that takes custody of the evidence. The evidence custodian is Larry Robins, and he is not present in court.

Counsel for appellant moved to strike the evidence and contended a proper foundation had not been laid for receiving the evidence and that the witnesses were unable to testify as to a complete chain of custody. Appellant also moved for a directed verdict of acquittal.

From the evidence the trial judge was warranted in concluding there was little likelihood the exhibit had been tampered with and absent evidence indicating tampering the ruling of the trial judge should not be reversed. There was a complete absence of any evidence suggesting or indicating that the evidence had been tampered with. Minor uncertainties in the chain of custody of physical evidence do not render the evidence inadmissible as a matter of law. *Gardner* v. *State,* 263 Ark. 739, 569 S.W. 2d 74 (1978); *Wickliffe* v. *State,* 258 Ark. 544, 527 S.W. 2d 640 (1975).

After the judge had found the appellant guilty as

charged, sentencing was passed for ten days and appellant and the State were afforded opportunity to place whatever background information might be helpful in fixing the sentence. At sentencing, the judge announced he had received letters from the College Station Progressive League, the Urban League of Greater Little Rock, Leadership Roundtable Association, the E.O.A. and the Arkansas Black Caucus on behalf of appellant and that on the other hand he had received a memorandum from the Little Rock Police Department and one from the Department of Justice, both indicating files in their office showing information from confidential sources linking the appellant to distribution of heroin. The judge offered to show these reports to counsel for appellant and announced he was going to take into consideration the favorable reports on behalf of appellant, and stated he recognized the information from the Police Department and the Department of Justice as hearsay. No objection was made at sentencing to the consideration of the background information in connection with sentencing.

Several days after sentencing appellant filed a motion for a new trial and alleged error in admitting the testimony of the chemist and State's Exhibit 1, and error in the court considering background information furnished the trial judge by the Police Department and the Department of Justice incident to sentencing. The motion was overruled and on appeal appellant contends the trial court erred in failing to grant a new trial.

Ark. Stat. Ann. § 41-804 authorizes the trial court to order a pre-sentence investigation before imposing sentence and provides that the investigation may be conducted by a pre-sentence officer or other persons designated by the court and that the investigation should include an analysis of the circumstances surrounding the commission of the offense, the defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation, personal habits and any other matters that the investigator deems relevant to the court or the court directs to be included. See also Rule 36.4.

If the background information had been placed before

the trial court before the finding of guilty we would agree with appellant it would be serious error. However, as is indicated by § 41-804, it is proper for the court to consider numerous relevant factors incident to the fixing of punishment, and the record does not demonstrate appellant's constitutional rights are infringed by the background information placed before the court in connection with sentencing. It is pointed out in *A.B.A. Sentencing Alternatives and Procedure* 206, (approved Draft 1971) that a pre-sentence investigation report should be available to the judge before sentencing.

Before pronouncing the sentence, the court informed appellant, as required by Ark. Stat. Ann. § 41-804 (4), of the content of the information presented by the State. The appellant made no objection and did not request an opportunity to controvert the information. As is noted in the comment under § 41-804, the defendant does not have the right to confront the witnesses against him on matters incident to sentencing. See *Nolan* v. *State,* 265 Ark. 764, 580 S.W. 2d 957 (1979).

Finding no reversible error, we affirm.

DOYLE'S CONCRETE FINISHERS, et al *v.* Jo Ellen MOPPIN, Guardian, et al

CA 79-41 596 S.W. 2d 1

Opinion delivered December 12, 1979
Affirmed by Supreme Court March 3, 1980
Released for publication March 26, 1980

Laser, Sharp, Haley, Young & Huckabay, P.A., for appellants.

W. Q. Hall, for appellees.

M. STEELE HAYS, Judge. This is a Workers' Compensation case. The single issue presented is: whether a minor child of a deceased worker, whose death is the result of a work related injury, is entitled to the maximum compensation rate under the Workers' Compensation Act as a matter of law, or entitled only to the extent to which the minor child is actually dependent upon the deceased parent.

The facts are not in dispute: James H. Moppin and Jo Ellen married in 1967 and had one child, Brad Moppin, aged six years. In February of 1976 they were divorced and child support of $108 per month was ordered in the decree. In July of 1976, James Moppin was killed, and a claim for benefits under the Workers' Compensation Act was filed by Jo Ellen Moppin on behalf of Brad Moppin.

The contention of claimant was that Brad Moppin was entitled to the maximum benefits ($77 per week) as a matter of law. Respondent contends that claimant was entitled to no more than $108 per month on behalf of her minor son, that being the amount of child support decreed in the Moppin divorce case.

In the hearing below, claimant elected to stand on the contention of entitlement to the maximum benefits as a matter of law and offered no proof of dependency of the minor child. Respondent called Mrs. Moppin to the stand, and some information regarding her social security benefits, employment history, health, wage levels and earnings was provided. Mrs. Moppin testified that Mr. Moppin had, at different times, provided clothes, gifts, and some food and baby sitting in addition to the child support, and that he had given her money, paid medical expenses and had provided a horse to Brad and paid the expenses. By stipulation her 1975 & 1976 federal income tax returns were added to the record. Relying on the opinion of the Workers' Compensation Commission in the case of *Cole* v. *Roach Manufacturing Company,* W.C.C. No. C607399, filed on September 18, 1978, the Administrative Law Judge held that as a matter of law the dependent minor was entitled to the maximum benefits under the Act. The Full Commission affirmed in an opinion filed on June 28, 1979, and although it refrained from

couching the award of maximum benefits "as a matter of law" that conclusion is inescapable for the reason that it affirmed the decision of Administrative Law Judge "in its entirety." Respondent appeals to this court, alleging that the Commission erred in deciding that a minor child is dependent upon a deceased parent as a matter of law and not subject to the partial dependency provisions of the Workers' Compensation Act.

The dependency provision of the Act appears in Ark. Stat. Ann. § 81-1315. Prior to the adoption of Act 1227, Extended Session of 1976, the benefits were payable to persons "wholly dependent" upon the deceased employee. The statute reads as follows with the 1976 changes appearing in capital letters:

> (c) [Beneficiaries—Amounts.] Subject to the limitations as set out in Section 10 [§ 81-1310] of this Act, compensation for the death of an employer 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. The widow if there is no child, thirty-five per cent (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 per cent (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 per cent (15%) on account of each child.

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

Appellee relies largely on two decisions dealing with the cited section of the Act: *Holland Construction Company* v. *Sullivan,* 220 Ark. 895 (1952) and *Chicago Mill and Lumber Company* v. *Smith,* 228 Ark. 876 (1958). These decisions support the point the appellee asks us to uphold. In *Holland* a claim for benefits was brought on behalf of a minor son of a deceased father, whose death occurred after the minor son had been legally adopted by other parents. The deceased worker had been contributing nothing whatever to the minor. The Commission held that the minor was not entitled to any compensation based on a finding of fact that actual dependency did not exist at the time of death and concluded as a matter of law legal dependency did not exist at the time of death. The Circuit Court reversed the Commission as to the question of dependency as a matter of law, leaving undisturbed the finding of fact regarding actual dependency.

The circuit court's award of compensation was affirmed by the Arkansas Supreme Court and, thus, compensation was allowed a minor child adopted by other persons, not actually dependent upon the decedent. It seems inescapable that had the partial dependency section been applied to this factual situation the result would have been a determination of entitlement as a matter of law, but with the result that nothing was actually due under the language of the partial dependency provision.

In *Chicago Mill and Lumber Company* v. *Smith, supra,* a somewhat similar result was reached in that the decedent was contributing nothing to his widow, minor step child, minor natural child (by a previous marriage) and minor il-

legitimate child. Compensation was awarded to the three children by the Commission but not to the widow on the theory that she was not actually dependent. The Circuit Court affirmed. The employer appealed the allowance to the children, and the widow cross-appealed the denial of benefits to her. The Arkansas Supreme Court held that the widow as well as the children were entitled to compensation and affirmed as to the children and reversed as to the widow, saying:

> It would be possible to construe this provision of the Act [81-1315(c)] as depriving a widow or child of any compensation when, as here, the husband and father was completely void of any sense of his family obligation. But it is a rule that remedial legislation shall be liberally construed. We believe the legislature used the term "wholly dependent" in the sense of applying to those ordinarily recognized in law as dependents, and this would certainly include wife and children.

Hence, in the *Chicago Mill* case, as in the *Holland* case, minor children who were neither wholly nor actually dependent upon a deceased parent were held entitled to compensation, and clearly the benefits to which they were found to be entitled could not have come under the partial dependency provision, for the reasons stated.

This leads us to a consideration of the case of *Roach Manufacturing Company* v. *Cole,* 265 Ark. 607 (1979), on which the appellant must find footing for the position that the partial dependency provision applies.

We agree with appellant that under the language employed in the *Roach* case [and, for that matter, in a number of decisions by way of dictum prior to *Roach: Kelley* v. *Southern Pulpwood Company,* 239 Ark. 1074 (1965); *Sherwin-Williams Company* v. *Yeager,* 219 Ark. 20 (1951); *Smith* v. *Farm Service Cooperative,* 244 Ark. 119 (1968)], dependency is a question of fact rather than of law. Nor is it simply a matter of semantics, for appellant argues that the issue is one of fact, and it follows that the partial dependency provision of the Act, *supra,* applies. If there is support for this

argument, it must be found in the *Roach* decision, for, as we have stated, the rule prior to *Roach* was clearly contrary to what appellant argues. (See: *Holland, supra* and *Chicago Mills, supra.*) But the issue can not be resolved that simply, for the reason that *Roach* does not provide the answer. In *Roach,* while the court clearly states the issue of dependency to be one of *fact,* the *holding* of the case itself affirms the Commission's award of maximum benefit to a dependent minor who was receiving nothing from the deceased parent — it did so on a finding that there was substantial evidence to support the Commission's award of maximum benefits to the minor child, who was found to be "wholly and actually" dependent upon the decedent. Thus, in the case before us, a much stronger argument for "actual dependency" exists, inasmuch as the decedent was contributing at least $108 per month under the decree of divorce plus whatever value might be placed upon the additional contributions he was making.

Appellant's argument has the force of logic, as it would seem the reasoning in *Roach* leaves it irrefutable that the partial dependency provision must apply whenever a dependent is not totally supported by the deceased parent. But to reach this result would mean doing two things: (1) giving greater effect to the *Roach* decision than it gave its own result, and (2) concluding that the legislature, by adding the words "and actually," intended to alter the interpretation of § 81-1315 (c) as to minor dependents, that has prevailed since the inception of the Act, and thereby make a distinction between minor dependents residing with their parents as opposed to those who were not. This would read into the wording of Act 1227 an intent to place minor dependents not residing with the decedent under partial dependency provision. If that were the case, a very drastic change would come about, at least potentially, because the modest amount now provided under § 81-1315 (c), would be lessened substantially. The case before us provides the illustration: under § 81-1315 (c), Brad Moppin, would receive $77 per week, but under the partial dependency section, he would receive (we can only estimate as there are no findings in the record) something approximating one fourth of that amount. The impact of this result on dependent children of deceased

workers who are either divorced or merely separated at time of death is such that we are not willing for that end to come about simply by taking what might be said to be the logical follow-through of the *Roach* decision, particularly where we think that such a result is clearly not supported by either the legislative intent behind Act 1227 or consistent with the result as reached in the *Roach* decision.

We think it is entirely conceivable that in certain instances a minor child, whether residing with the parent or elsewhere, may have independent resources and therefore capable of being non-dependent upon a deceased parent for purposes of Workers' Compensation benefits, and it follows, therefore, that we may depart from the dependency as a matter of law standard and award compensation where the expectation and the need are real or "actual". It is said to be the "great weight of authority" that dependency is a question of fact as opposed to a question of law. *Wilson* v. *Hill,* 71 A. 2d 425 (Del. 1950); *Koepel* v. *E. I. Du Pont de Nemours and Company,* 183 A. 516.

It is clear that the court in *Roach* interpreted the language of Act 1227 as reflecting an intent by the legislature to require evidence of actual dependency by both a widow and a minor child, citing *Williams* v. *Edmondson,* 257 Ark. 837 (1975). But the court also made an important distinction as between the two (where neither was receiving any actual support) and that distinction is that a minor child continues to have an *expectancy of future support* which the court found lacking as respects the widow. The end result is this: in *Roach,* a minor child who was receiving no actual support at the time of injury was awarded maximum benefits under § 81-1315 (c) because of her expectancy of future support; in the light of that interpretation we are unwilling to say that a minor *actually dependent* and receiving support from the decedent is entitled to less than the benefits provided in § 81-1315 (c). Any other result would not be in keeping with the liberal and benevolent spirit of the Workers' Compensation Act. *Triebsch* v. *Athletic Mining and Smelting Company,* 218 Ark. 379 (1951); *Batesville White Lime Company* v. *Bell,* 212 Ark. 23 (1947).

We conclude that the decision of the Commission af-

firming the Administrative Law Judge's finding that the minor child of James H. Moppin should be affirmed, but such decision is modified by eliminating the words "as a matter of law", the award being on the basis of substantial evidence that Brad Moppin was actually dependent upon the decedent at the time of death.

Affirmed as modified.

John ELLIS *v.* CLAYTON SHOE COMPANY

CA 79-106 595 S.W. 2d 229

Opinion delivered December 12, 1979
Petition for Review denied January 14, 1980
Rehearing denied February 20, 1980
Released for publication March 17, 1980

Sam Boyce, for appellant.

Barber, McCaskill, Amsler, Jones & Hale, for appellees.

M. Steele Hays, Judge. This is a Workers' Compensation case. In April of 1977, claimant, John Ellis, suffered a compensable injury which resulted in the amputation of a part of the index finger of claimant's left hand between the base of the nail and end of the finger. Claimant was paid 8.75 weeks of permanent partial disability for the loss of one-fourth the index finger.

On May 16, 1979, a hearing was held by the Administrative Law Judge to determine whether claimant was entitled to additional permanent partial disability benefits. Claimant alleged that he should have been awarded fifty percent compensation for loss of use to the finger under Ark. Stat. Ann. § 81-1313 (c) (18). He also contended that payments by the respondent, Fireman's Fund Insurance Company, were controverted because of untimely payments.

The Administrative Law Judge held that (1) claimant was not entitled to any additional permanent disability bene-

fits, and (2) respondents had not controverted payment of any benefits. The claimant appealed the decision to the Full Commission, and the Commission affirmed the judgment. He now brings this appeal.

He first alleges that a preponderance of the evidence indicates a fifty per cent loss of use to the claimant's left index finger. The Arkansas Workers' Compensation Act provides for loss of the use of a finger as follows:

> Phalanges: Compensation for amputation of the first phalange shall be one-half of the compensation for the amputation of the entire digit . . . [Ark. Stat. Ann. § 81-1313 (c) (18)].

Ark. Stat. Ann. § 81-1313 (c) (22) provides:

> Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member shall be for the proportionate loss or loss of use of the member.

Claimant contends that under the law as stated above, he is entitled to fifty per cent compensation for loss of the entire index finger, citing *Anchor Construction Company* v. *Rice,* 252 Ark. 460, 479 S.W. 2d 473 (1972) and *Springdale Farms* v. *McGarrah,* 260 Ark. 483, 541 S.W. 2d 928 (1976) as supporting authority that the Commission must base its findings of permanent disability on medical testimony and cannot alter the percentage assessed because of wage loss considerations or personal observations.

We agree with this contention by the claimant but, nevertheless, believe the Administrative Law Judge and the Commission made their findings of fact consistent with the medical testimony. Findings of fact by the Commission will not be disturbed on appeal unless unsupported by substantial evidence. *Purdy* v. *Livingston,* 262 Ark. 575, 599 S.W. 2d 24 (1977); *Mass Merchandise* v. *Harp,* 259 Ark. 830, 536 S.W. 2d 729 (1976). In the instant case, the evidence supporting the Commission's finding included the diagram of a hand by Dr. Barbour showing the point of amputation to be mid-way

between the base of the fingernail and the end of the finger. Also, the claimant's own testimony in response to a direct question on the matter is consistent with this finding:

> Q. "That's your distal joint or end joint, so the amputation is somewhere between the base of your nail and the end of your finger, is it not?
>
> A. "Yes." (T. 35)

Appellant also contends that Commission Rule 12 is in conflict with Ark. Stat. Ann. § 81-1313 (c) (18) previously cited in this opinion. Rule 12 provides:

> Loss by amputation of half or less than half of the terminal phalange of a member shall be one-half of the loss of the phalange, or one-fourth of the digit. Loss of more than one-half of the terminal phalange of a member shall constitute loss of the phalange, or one-half of the finger . . . Ordinarily, the base of the nail may be used as a gauge of half of the phalange . . .

We believe that this rule is not in conflict with the provision in the Act, but simply amplifies it. As it applies to this case, it states that if the loss of use of the terminal phalange is less than one-half, as there is substantial evidence which indicates such, then only compensation for one-fourth of the "digit" will be allowed. This rule enlarges § 1313 (c) (22) which allows compensation for partial loss of a "member" proportionate to the loss actually suffered.

It appears from the record that the actual loss of that portion of the digit as well as the loss of use, to the extent that such losses can be measured, fell almost at the midpoint between entitlement to one-half of the loss under § 1313 (c) (22), as claimant contends, or one-fourth, as found by the Administrative Law Judge. Our own view would be to hold for the claimant in such cases under the rule that doubtful cases should be resolved in favor of the claimant, still, the Administrative Law Judge is in a better position than we to make judgments that are in part based on a visual impression of the affected member itself and we cannot say that his conclusion is not supported by substantial evidence.

Finally, claimant alleges that respondents controverted permanent partial disability benefits paid to the claimant. A medical examination was performed by Dr. M. R. Barbour in October of 1977 at the insurance company's request. When claimant returned to work, he asked for a payment of permanent partial disability which was not allowed until June of 1978 when the respondent finally received a report from Dr. Barbour.

Respondent explains the delay in part on the fact that Dr. Barbour, of Poplar Bluff, Missouri, discharged claimant in May of 1978 without permanent disability. As to whether Dr. Barbour was aware of the section of our Act dealing with scheduled injuries we need not speculate, as certainly the respondent was aware of that section and that the loss of a sufficient portion of the index finger carried a scheduled benefit.

Over the forty year life span of the Workers' Compensation Act, the legislature has repeatedly expressed the public policy in this state as being that claims of working men and women arising from work related injuries shall be handled expeditiously at every stage in the process. In the light of that avowed policy we are unwilling to countenance a delay of eight months in obtaining the simplest sort of evaluation from the treating physician. We reach that conclusion primarily because the physician was not selected independently by the claimant but at the referral of the employer, and presumably was, to some degree, answerable to the respondent. If he is unable or unwilling to give speedier attention to their medical affairs than was evidenced, the burden of that delay should rest upon the respondent and not upon the claimant.

Respondent argues that the lapse of time should be measured from February (when an A-7 was filed) rather than October, but that begs the question, inasmuch as the record fails to persuade us that the respondent even then showed any diligence in bearing down on Dr. Barbour for the awaited report. The law provides, as it should, that Workers' Compensation claims be given priority in the judicial process. That being so, is it fitting that a claim should lie

dormant for eight months awaiting the physician's completion of a standard form submitted to him for that purpose which could not have required more than ten minutes to complete? We think not. The Administrative Law Judge recognized the delay as unreasonably long, and the respondent acknowledged that the delay was regrettable. (T. p. 2). We find that the delay here justified the allowance of a fee to claimant's attorney as provided in the Act under Ark. Stat. Ann. § 81-1332 (Repl. 1976), and therefore hold that claimant's attorney is entitled to a fee of $200 for purposes of this appeal.

The award of the lower court is affirmed as modified.

Supplemental Opinion on Denial of Rehearing
delivered February 20, 1980

M. STEELE HAYS, Judge. Appellee's petition for rehearing asserts that without statutory or case law authority we have allowed a fee to claimant for legal services on the amount awarded by the Commission. Appellee argues that our decision is contrary to *Harber* v. *Shows,* 262 Ark. 161, and *Falden Ind. Wiring Co.* v. *Downs,* 255 Ark. 923. Where it was said that "a claim must exist before it can be controverted." But in *Falden,* it was the claimant who was in default, not the insurer, who acted with diligence. Additionally, there was a far greater element of uncertainty as to whether the claimant had sustained permanent partial disability. In *Harber,* the respondent notified the Commission immediately that the claim was accepted and the only reason a hearing was requested was to determine the dependency of the children.

We think the facts in the case before us are governed by

Aluminum Company of America v. *Henning*, 260 Ark. 699 and *Horseshoe Bend Builders* v. *Sosa*, 259 Ark. 267. In *Henning* the court held that a fee was allowable to claimant's attorney even though the insurer had advised the Commission within the time allowed that it accepted the claim, where the claimant had employed counsel as a result of an earlier denial by the insurer. Citing *Sosa, supra* and *International Paper Co.* v. *Remley*, 256 Ark. 7, the court rejected a mechanical approach in determining whether a claim was controverted and stated that controversion may be a question of fact:

> A principal, if not the primary, purpose of determining whether or not a claim is controverted is for the purpose of determining who is liable for the claimant's attorney's fees. Making an employer liable for the attorney's fees of the employee serves legitimate social purposes. Among them are discouraging oppressive delay in recognition of liability, deterring arbitrary or capricious denial of claims, and insuring the ability of necessitous claimants to obtain adequate and competent legal representation.

We pointed out in our initial opinion that we believe a delay of eight months occasioned by a physician chosen by the insurer ought to rest upon the insurer rather than the claimant. *Aluminum Company of America* v. *Henning, supra*. Rehearing denied.

James M. EUBANKS v. Charles L. DANIELS

CA 79-109 591 S.W. 2d 673

Opinion delivered December 12, 1979
Released for publication January 9, 1980

Pro Se, for appellant.

No brief for appellee.

M. STEELE HAYS, Judge. This is an appeal from a decision of the Board of Review which affirmed a ruling of the Appeal Tribunal denying claimant unemployment benefits from June 17 to July 18, 1979, because his availability for work was unduly restricted. Specifically, the Appeal Tribunal found that by limiting his search for an employer having a pension plan comparable to his previous employment and to a salary of not less than $235 per week failed to meet the test of what a "reasonably prudent individual would do to secure work", as defined by Section 4 (c) of the Act.

Claimant testified that he had called his union approximately twice a week, had made two direct contacts and several telephone contacts from May 22 to July 18 in his efforts to find work.

In light of the evidence in the record that claimant would not accept a salary of less than $235 per week and that he was limiting his efforts to secure work to employers with a pension program (T. p. 11), we are unable to state as a matter of law that the claimant was in compliance with 4 (c), or that there is an absence of substantial evidence in the record to support the decision of the Board of Review. *Haun* v. *Daniels, Director of Labor,* 266 Ark. 146 (Ct. App. 1979); *Terry Dairy Products Company, Inc.* v. *Cash, Commissioner of Labor,* 224 Ark. 576, 275 S.W. 2d 12 (1955).

We recognize the advantages to the claimant of remaining under a pension plan and we believe that he was justified for a reasonable period of time in giving preference to such a consideration; however, it seems clear that a reasonably prudent person would at some point lower his sights in seeking employment and inasmuch as claimant had over three months to find the type of work he wanted, at the desired salary of $235 per week, we must agree with the Board of Review's holding that after that length of time, i.e., thirteen weeks, claimant was unduly restricting his search for employment.

It should be added that we are troubled by the broad language of Section 4 (c) in defining the standard for seeking employment and believe that claimants are entitled to a higher degree of specific guidance in knowing what is expected of them in the way of efforts to secure employment, especially so since they risk the loss of eligibility. It would seem that some guidelines could be adopted so that a more objective test might be applied.

The decision of the Board of Review is AFFIRMED.

HOWARD and NEWBERN, JJ., dissent.

DAVID NEWBERN, Judge. I fully agree with Judge Hays' statement of the need for some sort of standards which could be readily explained to ESD claimants letting them know what factors will determine whether their efforts have been or will be considered to be reasonable. A person such as the appellant in this case who has a legitimate interest in preserving his pension rights in a program to which he has contributed for 20 years can clearly be expected to seek only employment where he may continue to do so. As it stands, he has no way of knowing just how much time will be considered "reasonable" to conduct such a search.

My primary reason for disagreement with the majority here, however, has to do with a procedural point which is not mentioned in their opinion. One of the bases for Mr. Eubanks' appeal in this case was that he had asked for but never been supplied a copy of the transcript of the hearing

held by the appeals tribunal. Mr. Eubanks appeared before us to argue his case pro se, and at that point he *still* had not received a copy of the transcript. He was invited by our chief judge to look at the copy which had been brought to the oral argument by the Labor Department Chief Counsel who argued for the Director. Thus while he was trying to listen to what his adversary had to say, he was being given his first look at the record:

If this spectacle did not present clear evidence of deprivation of administrative due process, then nothing could. I refer to, and incorporate by reference the general remarks in my dissenting opinion in *Teegarden* v. *Director, Arkansas Employment Security Division,* CA 79-28, which is being handed down today.

JUDGE HOWARD joins in this opinion.

Ernest Lee JACKSON *v.* STATE of Arkansas

CA CR 79-86 591 S.W. 2d 685

Opinion delivered December 12, 1979
Released for publication January 9, 1980

John W. Achor, Public Defender, by: *William H. Patterson, Jr.,* Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Neal Kirkpatrick,* Asst. Atty. Gen., for appellee.

M. Steele Hays, Judge. Appellant was charged by felony information with robbery and theft of property. On May 25, 1979, he was tried without a jury and convicted on both counts. He received a thirty year sentence on the charge of robbery and fifteen years on the charge of theft of property. He now brings this appeal.

Appellant first contends that the trial court erred in allowing certain testimony of the State's chief witness, Ms. Lillian Counts, on the basis that it was inadmissible as hearsay testimony. Specifically, he alleges that Ms. Counts's testimony concerning an unidentified woman who entered the store while the robbery was in progress was inadmissible for the reason that there was no evidence in the record that related the woman to the robbery. Defense counsel objected to this testimony. The prosecutor attempted to show that the evidence implicated the unidentified woman as a coconspirator and was therefore admissible under Rule 801 (d) (2) (v) of the Uniform Rules of Evidence. The trial court allowed the statement as a present sense impression which is an exception to the hearsay rule under Rule 803 (1) of the Uniform Rules of Evidence.

We believe that the evidence could have been allowed under either rule. It has been held that an accomplice's statements made during the alleged crime are admissible as statements of a coconspirator. *Foxworth* v. *State*, 263 Ark. 549, 566 S.W. 2d 151 (1978); Ark. Stat. Ann. § 28-1001, Rule 801 (2) (Repl. 1979). The proof of such conspiracy is a question which the court must decide from the facts of each case, and, if the evidence is sufficient, then all the acts and declarations of each conspirator made during the progress of the crime are admissible against a coconspirator. *Caton & Headley* v. *State*, 252 Ark. 420, 479 S.W. 2d 537 (1972); *Cantrell* v. *State*, 117 Ark. 233, 174 S.W. 521 (1915). In this case, the evidence strongly implicated the unidentified

woman as a coconspirator. Ms. Counts stated that she came in while the robbery was in progress, reached over the counter while the robber was tying Ms. Counts's hands, and took the money out of the cash register. We believe that this was *prima facie* evidence of the existence of a conspiracy and therefore hold that the trial judge properly overruled appellant's objection.

Appellant's second point is that the evidence at trial was insufficient to support appellant's conviction. Appellant alleges that the credibility of the witness is questionable due to the short time which she had to observe the robber and her testimony which stated that her assailant did not have a beard when, in fact, the appellant had a goatee at the time of the alleged incident. Hence, the appellant states that her positive identification of him as the robber is contradictory since the appellant did have a short beard at the time of the robbery. However, this question clearly addresses itself to the accuracy of identification of the defendant and the credibility of the witness which is solely within the province of the trier of fact. *Gray* v. *State,* 252 Ark. 404, 479 S.W. 2d 560 (1972); *Smith* v. *State,* 258 Ark. 601, 528 S.W. 2d 389 (1975). Hence, the trial judge's decision is, accordingly, affirmed.

Alma TEEGARDEN *v.* DIRECTOR,
Arkansas Employment Security Division

CA 79-28 591 S.W. 2d 675

Opinion delivered December 12, 1979
Released for publication January 9, 1980

Kenneth R. Smith, for appellant.

Herrn Northcutt, for appellee.

JAMES H. PILKINTON, Judge. This is an unemployment compensation case. The claimant has appealed the determination of the Arkansas Employment Security Board of Review holding her ineligible for benefits under the provisions of the Arkansas Employment Security Act. The agency had first determined that claimant was not considered unemployed. She was a school employee who did not normally work during the summer vacation, and expected to return to her job in the fall. On appeal, the Board of Review found that claimant was, in fact, unemployed within the meaning of the act, but was nevertheless ineligible for benefits under the provisions of Section 4 (c) of the Arkansas Employment Security Law. The Board specifically found that claimant was not doing those things that a reasonably prudent person would do to seek suitable work, as required by the statute.

Section 4 (c) of the Arkansas Employment Security Law provides that claimants will be eligible for benefits if they are unemployed, physically and mentally able to perform suitable work, available for such work, *and doing those things that a reasonably prudent individual would be expected to do to secure work.* (Emphasis added.)

In *Terry Dairy Products Company, Inc.* v. *Cash, Commissioner of Labor,* 224 Ark. 576, 275 S.W. 2d 12 (1955), the Arkansas Supreme Court held that the findings of fact made by the Board of Review in cases of this nature are conclusive on appeal if supported by substantial evidence. Therefore, the question here is whether there is substantial evidence to support the determination of the Board of Review. It is clear from a study of the record that there is such substantial evidence. The record reflects that claimant had worked for the same employer as a teacher's aide since about

1976. Since that time, the program has been suspended for the summer months only. The program was expected to resume again in early fall of 1979, and the claimant said that she planned and intended to return. However, she also testified that she was currently looking for and would accept other full time work. If she can find suitable work, she might not choose to return to this employer. But the evidence shows she has not worked during the past summers she has been off. It is a very close question, based on this record, as to whether claimant was, in fact, properly considered unemployed within the meaning of the act; however, the Board of Review resolved that issue in her favor, and claimant does not, of course, complain of that ruling. She does complain of the secondary finding of the Board that although "unemployed" she is still ineligible because of her lack of effort to find work. Claimant-Appellant is now represented by counsel who raises certain procedural points. It is claimed, for example, that appellant came before the hearing referee prepared to prove that she was, in fact, unemployed within the meaning of the act, which she did. Claimant says she understood this to be the only issue on appeal and had no idea the matter of her effort to seek work would also be reviewed. The notice of hearing which claimant received plainly stated, however, that "the hearing (before the referee) may involve any question having a bearing on the claimant's right to benefits up to time of the hearing". She had been previously advised of what effort she would be expected to make in seeking suitable employment. It should be noted, too, that claimant was only declared ineligible for benefits from April 30, 1979 up to and including the date of the hearing, June 12, 1979. If there was any misunderstanding about the matter in her mind, surely she was fully informed by the decision below so she could make the required effort, thereafter, if she was actively seeking employment.

If appellant was misled in any way by the notice of the setting of hearing before the examiner-referee, she still had an opportunity to raise the point before the Board of Review, which she did not do. She did, however, in her request for appeal to the Board of Review submit a detailed list of all contacts she had made since filing her application. In view of this list, which was before the Board of Review, the pro-

cedural error, if any, was harmless. Appellant placed before the Board of Review everything she then wished to have in the record. We are at a loss to know what additional evidence she could present on the point (of her efforts seeking work during the period involved) if this case was remanded. Appellant's counsel has not enlightened us as to what additional facts he seeks to present on remand. Under those circumstances, it would be useless to remand this case for further evidence as to appellant's effort seeking work during the period involved.

AFFIRMED.

NEWBERN, J., dissents.

DAVID NEWBERN, Judge, dissenting. The appellant was denied unemployment compensation by her local unemployment compensation division (ESD) agency because she was found to be "not unemployed" within the meaning of § 4 (c) of the Unemployment Compensation Act. Ark. Stat. Ann., 81-1105 (c) (Repl. 1976). She appealed that determination to the administrative appeals tribunal, and the notice to her of the appeal hearing was a printed ESD form which said, "[t]he primary issue involved is:" followed by a space in which was typed, in letters somewhat larger than the printing, "To determine if claimant is unemployed within the meaning of Section 4 (c) of the Arkansas Employment Security Law." The printed matter resumed at the bottom of the page, approximately one half inch below the typewritten insert: "You are notified that the hearing may involve any question having a bearing on the claimant's right to benefits up to the time of the hearing."

At the hearing some questions were asked the appellant by the appeals tribunal referee with respect to her efforts to obtain work during the period she alleged she was unemployed. The referee was the sole determiner of fact and law, there being no other members of the "tribunal." Without telling the appellant the reason he was asking about the appellant's efforts to obtain employment or otherwise indicating he was considering a question of the adequacy of her efforts, the referee concluded she was unemployed but had

not tried hard enough to find work. The decision of the agency denying compensation was thus effectively affirmed but on a basis entirely different from that invoked by the agency, and with utter lack of meaningful opportunity for the appellant to prepare to defend her claim on that basis.

The appellant thereafter appealed further to the board of review. She sent a handwritten list of places she had sought employment which ended, "and I've called other places."

On another printed, or otherwise mechanically reproduced, form the board of review simply affirmed the appeals tribunal. No mention was made in the board's decision or opinion of the appellant's handwritten submission partially listing places she had sought employment. Nor was any mention made of the switch of bases for denial by the appeal tribunal. We have no idea whether these matters were considered by the board which affirmed with a mechanical reference to "the written record and the previous testimony."

This appellant has suffered a flagrant denial of fundamental fairness in the assessment of her claim. The majority relies heavily on the "fine print" in the notice to her. Even had the notice to her not directed her most specifically to the issue whether or not she was "unemployed" within the meaning of the act, the notice would have been too vague and too broad. 1 Davis, *Administrative Law Treatise,* § 805, p. 530 (1958). *Cf., Anderson* v. *Industrial Commission,* 29 Colo. App. 263, 482 P. 2d 403 (1971). See also, *Lee* v. *Brown,* 148 So. 2d 321 (La. App. 1963).

Administrative due process requires either proper notice of the issues to be heard or a basis to find an intelligent waiver. *Lewis* v. *Hot Shoppes & Fla. Industrial Commission,* 211 So. 2d 20 (Fla. App. 1968). The Supreme Court of Vermont dealt with this question in *Kaufman* v. *Department of Employment Security,* 136 Vt. 72, 385 A. 2d 1080 (1978). The claimant had filed for compensation and was refused by a claims examiner and the appeals referee on the ground she had been discharged for misconduct. This was the reason cited by the referee in his notice to the claimant. Subsequently, the claimant appealed to the board of review

which determined she had not been discharged for misconduct but rather she left her job voluntarily and without good cause. In reversing the board, the court said:

> The hearing before the Board could encompass only the issues framed by the pleadings. The correctness of the claims examiner's and the appeals referee's findings that appellant had been discharged for misconduct was the only issue submitted to the Board for its determination. When the board departed from this issue and concluded that appellant's employment was terminated by voluntary quit without giving notice to the appellant that such a conclusion was being considered, it deprived appellant of the opportunity to make a countervailing argument. This was a denial of a fair hearing. [385 A. 2d at 1082]

Even cases which tend to deemphasize the notice requirement say the entire proceeding must be evaluated from the point of view of fairness to the claimant. *Kartsonis* v. *District Unemployment Compensation Board,* 289 A. 2d 370 (D.C. 1971). If the appellant before us was entitled to rely on the specific disqualification found by the agency and stated in the notice to her, the change of issues was unfair. If she was not so entitled, the notice was too broad. Either standard would require reversal in this case.

The majority also emphasizes the partial listing of places to which the appellant had applied for employment. They say this makes error, if any, harmless. We must bear in mind that this appellant, as most others, appeared at the hearing and throughout her quest until she came before the court, without counsel. She needed and was entitled to the assistance of the appeals referee to draw from her a complete presentation of her case. Instead, she received an inquiry with respect to an issue she had little if any reason to expect and a decision of her case outside her presence. Her handwritten missive to the form-prone board of review was a lame substitute for an open inquiry into her overall entitlement to compensation.

I intend this dissenting opinion to apply in several cases

other than this one in which I will make reference to it. I chose this case to express my dissatisfaction with these Arkansas ESD practices because it probably is the one case, among several currently before us, which is least objectionable, so the remarks here should apply at least with equal strength in the cases in which I incorporate them by reference.

It is apparently easy for an administrative agency to slip, unintentionally, into a high-handed and complicated procedure in administering the "governmental largess." Over ten years ago, Charles Reich made the point, with some erudition, that we must treat this form of wealth distribution as affecting and effecting property rights. Reich, The New Property, 73 *Yale L. J.* 733 (1964). We are hearing ESD appeals mostly in cases where citizens can afford to appeal pro se only. Lest the citizenry lose faith in the substance of the system and the procedures we use to administer it, we can ill afford to confront them with a government dominated by forms and mysterious rituals and then tell them they lose because they did not know how to play the game or should not have taken us at our word.

In 1937 Chief Justice Charles Evans Hughes said:

> The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play. [*Morgan* v. *United States*, 304 U.S. 1, 58 S. Ct. 999 (1937)]

Forty two years would seem enough to have learned this small lesson. This case should be remanded to the board for a further hearing with proper notice to the appellant of the questions to be considered.

Willis FULLER et ux *v.* William H. NORWOOD

CA 79-149 592 S.W. 2d 452

Opinion delivered December 12, 1979
Released for publication January 16, 1980

O. W. "Pete" Wiggins, for appellant.

Henry J. Osterloh and *John Lloyd Johnson, Jr.*, for appellee.

JAMES H. PILKINTON, Judge. This is essentially a suit for specific performance of an alleged contract. It is undisputed that Willis Fuller and wife listed their property for sale with J. M. Collins and Company. The realtor found a buyer for the property and William H. Norwood made a conditional offer for the Fuller property which was accepted. The purchaser was unable, however, to obtain a loan as required. The original offer and acceptance was then replaced by a counter offer made by the Fullers to Norwood on April 12, 1979.

The trial court found that the counter offer was accepted by the purchaser on April 13, 1977. Plaintiff Norwood fulfilled or offered to fulfill all conditions of the counter offer and has been ready, willing and able to close the transaction since April 1977. The court specifically found that defendants Willis Fuller and wife had failed to perform their part of

the contract without justification and, under the circumstances, Norwood was entitled to specific performance of the contract. The trial court also found Norwood was entitled to damages of $50.00 per month for loss of rents since June 10, 1977. A decree was entered on these findings and appellants Fullers then lodged this appeal in the Supreme Court of Arkansas. The case has been assigned by that court to the Arkansas Court of Appeals under Rule 29 (3).

1.

Appellant first contends the trial court erred in ordering specific performance. It is argued that this question was not raised below. We find no merit in this argument. At the conclusion of all the evidence, the following occurred:

> MR. PURTLE: Your Honor, we make a motion the pleadings be conformed to the truth.
>
> THE COURT: You are asking for specific performance?
>
> MR. PURTLE: Yes.
>
> THE COURT: That will be granted. . . .

The issue was certainly raised and passed on below.

2.

It is next claimed the court erred in finding the appellants had signed the counter offer. The Chancellor made a specific finding on this question, and we quote his exact words:

> Just glancing at them (the signatures) it is rather obvious that they are the signatures that all three of them — or that all three documents bear the signatures of Mr. and Mrs. Fuller. But there is proof — there is overwhelming proof here, beyond a preponderance of the evidence, that the Fullers did sign all of these documents; that is, the listing, the Offer and Acceptance, and the counter offer. And for whatever reason, at a later date, they

> obviously changed their minds and wished to get out of this contract. Consequently, plaintiffs' complaint for specific performance will be granted. The parties will go forward immediately with the closing of this transaction and I am going to allow damages of fifty dollars per month as the reasonable rental value of this property from the 10th day of June 1977 up until the time that this transaction is closed forthwith. . . .
>
> For the record, there is one other thing; there has been an allegation of forgery made in this, the pleadings in this case, and also on the witness stand. Obviously, somebody is not truthful under oath, and for whatever it is worth, I think it is something that perhaps should be turned over to the prosecuting attorney's office, because somebody is guilty of perjury in this case.

The learned Chancellor was correct. The evidence is more than sufficient to support the finding that Mr. and Mrs. Fuller both signed the counter offer. The Chancellor was also justified in his observation that perjury cannot be tolerated. Judges and lawyers of experience recognize that in most cases application of the law is not difficult *provided* the court can first determine what the *true facts* are in the case before them. Behind most miscarriages of justice, when such an unfortunate result does ensue, there are usually one or more lying witnesses who have prostituted the search for truth in that particular case. Fortunately for all concerned, including the public, most judges — like the Chancellor who tried the case now before us — can spot such untrue testimony when it pops up. Perhaps the bench and bar have been too lax, however, in condeming perjury; and in seeing that it is punished.

Appellants alleged forgery of their names on the counter offer as a defense. Therefore, they carried the burden of proof on this point. We are compelled to conclude, as the Chancellor did, that appellants did not sustain the burden of proving this allegation by a preponderance of the evidence. *Kennedy* v. *Couillard*, 237 Ark. 353, 372 S.W. 2d 825 (1963).

3.

Appellant argues several other points, all of which are simply variations of the two discussed above. Although we have considered each, we find no merit in any of them. What has been said in disposing of points one and two above applies to the other designated points listed in appellants' brief.

4.

In addition to the listed and designated points for reversal as contained in their briefs, appellants attempt to argue for the first time on appeal that the land description, contained in the counter offer, is too indefinite and uncertain to support specific performance. Appellants rely on *Turrentine* v. *Thompson*, 193 Ark. 253, 99 S.W. 2d 585 (1926), but completely disregard such other cases as *Branscum* v. *Drewery*, 232 Ark. 947 at 949, 341 S.W. 2d 6 (1960). Even if we were permitted to consider this after thorough argument, it contains no merit.

We hold the document of April 12, 1977, adequately described the property because it referred to the "Willis Fuller property Section 20, Township 2 South, Range 11 West". As the trial court was not faced with a question of the adequacy of the description, we would not reverse the decree unless we found the description to be one which could not furnish a "key" to location of the property. *Branscum* v. *Drewery, supra. Cf. James* v. *Medford*, 256 Ark. 1002, 512 S.W. 2d 545 (1974).

5.

We hear this case de novo; and it appears that one modification should be made in the trial court's decree. Appellants would be entitled to interest on the deferred balance of $8,000.00 from June 10, 1977, until closing at the rate of 9% per annum inasmuch as the Chancellor allowed monthly damages to appellee from June 10, 1977, the date the transaction should have been closed but was not closed. The difference between the interest due, and the accumulated

monthly damages, shall be taken into consideration and paid at closing at the same time the deed is delivered and the down payment made.

Except as noted above, the decree entered by the Pulaski County Chancery Court is fully supported by a preponderance of the evidence, and no error whatsoever being called to our attention, this case is affirmed as modified.

Affirmed.

Dee Leslie MATHIS, Jr. *v.* STATE of Arkansas

CA CR 79-9 591 S.W. 2d 279

Opinion delivered December 12, 1979
Released for publication January 9, 1980

Gene Worsham, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson*, Asst. Atty. Gen., for appellee.

MARIAN F. PENIX, Judge. Appellant, Dee Leslie Mathis, was charged with the crime of first degree murder in the slaying of his girlfriend, Patricia Holland. The appellant and Ms. Holland had lived together for approximately one and a half years before her death. Each had a child by a previous marriage living with them. At the time of the occurrence which led to Ms. Holland's death, both children were present as well as Ms. Holland's mother, Irma Dennis, and a mutual friend, Carl Eugene Freeman.

The incident occurred January 20, 1978 at the mobile home occupied by the parties. The testimony reflects that

Mr. Freeman arrived at the mobile home around 6:30. Ms. Dennis and Ms. Holland were home. The appellant arrived shortly thereafter. The four sat and talked for awhile. Ms. Holland and Mr. Freeman drank some whiskey; the appellant was drinking beer. The appellant was said to be in a good mood.

Ms. Holland decided to go to the grocery store. The road was icy and very slippery. The car became stuck in the driveway. Apparently, attempts to dislodge the car resulted in the transmission being damaged. Ms. Holland returned to the trailer. The appellant went into a bedroom to lie down. Sometime later, Mr. Freeman and Ms. Dennis decided to go to the store in his truck. They went outside. At that point, Ms. Dennis testified, her daughter called for her. She went back into the trailer to find the appellant slapping the deceased. The couple was arguing about the car. Mr. Freeman returned to the trailer. The testimony regarding the next few minutes is confusing.

Ms. Dennis testified the appellant ran to the kitchen and grabbed a gun. She placed herself between her daughter and the appellant. According to Ms. Dennis, the appellant reached around her and shot Ms. Holland. Ms. Dennis said in her opinion the shooting was not accidental. The appellant's 13 year old son and Mr. Freeman both testified the couple was arguing. They did not know who had the gun. There was a struggle involving the appellant, Ms. Holland, and Ms. Dennis. All three fell onto the couch. The gun went off at that point and fell to the floor. Both Mr. Freeman and the appellant's 13 year old son believed the shooting to be accidental.

Ms. Holland was shot in the neck. Mr. Freeman and the appellant attempted to transport her to the hospital in Mr. Freeman's truck. The truck ran out of gas. Ms. Holland died before an ambulance could reach her.

The appellant was found guilty of second degree murder. Due to appellant's two previous felony convictions, he was charged with being a habitual offender. He received a sentence of fifteen years in the state penitentiary. From that conviction, the appellant has appealed.

The first point argued for reversal is the trial court erred in allowing Irma Dennis to testify as to her opinion on whether or not the slaying was accidental. We do not find this to be error.

Previously, the law did not allow a witness to give an opinion on the ultimate issue to be decided by a jury. Two examples of the application of the old law are found in *Jones* v. *State*, 58 Ark. 390 (1894) and *George* v. *State*, 148 Ark. 638 (1921). These cases were decided prior to the effective date of the Uniform Rules of Evidence for Arkansas.

Uniform Rule of Evidence 701 permits lay witnesses to testify in the form of an opinion.

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Uniform Rule of Evidence 704 permits a witness to give his opinion on the ultimate issue to be determined.

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

No longer is opinion testimony viewed as "usurping the function of the trier-of-fact". The trier of fact considers the opinion along with the other evidence and determines the weight to be attached to the testimony.

The exclusion of opinion testimony has been sharply criticized for a long time. The Uniform Rules of Evidence reflect a response to the criticism and have made changes to correct the problems with former evidentiary rules. The Federal Rules of Evidence were the model for the Uniform Rules of Evidence for Arkansas. The Advisory Committee

Notes accompanying Rule 704 reflect the reason for making opinion testimony admissible.

> The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore § 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is aptly characterized as "empty rhetoric". 7 Wigmore § 1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standards. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of "might or could," rather than "did," though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

The appellant has argued that Uniform Rule of Evidence 704 applies only to testimony by experts. Therefore, the testimony of Ms. Dennis should have been excluded. The Advisory Committee Notes make it clear that Rule 804 applies to any witness — lay or expert.

Not all opinions are admissible. Guidelines for the admissibility of opinions are found in the rules. Rule 701 states the opinion must be helpful to the trier of fact. Under Rule 401, the evidence must be relevant. Rule 403 provides for the exclusion of any evidence which will only waste time. The notes accompanying Rule 704 state:

> These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oathhelpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria.

We do not find the testimony of Ms. Dennis to be objectionable for any of these reasons.

The appellant has argued that the opinion testimony of Ms. Dennis was not based on something she could rationally perceive. Only something which can be perceived by the senses is admissible under Rule 701, i.e., speed of a car, sounds she heard. In this instance, Ms. Dennis' opinion was on the issue of purpose or intent. She was in a position to observe the argument and the struggle. We do not find the appellant's interpretation of Rule 701 to be correct.

> The argument has been made that, because we cannot directly see, hear, or feel the state of another person's mind, therefore testimony as to another person's state of mind is based on merely conjectural and therefore inadequate data. This argument is finical enough; but it proves too much, for if valid it would forbid the jury to find a verdict upon the supposed state of a person's mind. 2 Wigmore, Evidence, § 661, (Third Edition, 1940).

There are no Arkansas cases which interpret Rule 701. *John Hancock Mutual Life Insurance Co.* v. *Dutton*, 585 F. 2d 1289 (5th Cir. 1978) was a civil suit which involved a similar issue. The suit involved the attempt to recover accidental death benefits on a life insurance policy. On appeal, John Hancock argued that this testimony should not have been admitted.

> Under John Hancock's construction, a witness could never testify to his views concerning the feelings of another person. . . . When, as here, the witness observes first hand the altercation in question, her opinions on the feelings of the parties are based on her

> personal knowledge and rational perceptions and are helpful to the jury. The Rules require nothing more for admission of the testimony. *John Hancock Mutual Life Insurance Co.* v. *Dutton*, supra, at 1294.

See also, *United States* v. *Scavo*, 593 F. 2d 837, 844 (8th Cir. 1979).

The evidence reflects there was evidence of a struggle. The witness was in a position to observe. Her observations were rationally perceived. It was helpful to the trier of fact to know whether this eye witness felt the shooting was accidental.

The appellant's second point argued for reversal is that the trial court erred in refusing to allow the defense to impeach the credibility of one of the state's witnesses by introducing evidence of her alleged "drug problem". On cross-examination, the appellant attempted to question Ms. Dennis about a drug problem. Ms. Dennis denied having a drug problem or using any type of drug that had not been prescribed by a doctor. The appellant then asked the judge for a subpoena duces tecum for hospital records. This was denied. The judge also refused to allow the appellant to cross-examine the witness on her drug history. The appellant contends this was reversible error. We do not find this to be error.

On cross-examination on collateral issues a cross-examiner is bound by the answers he receives from the witness and may not impeach his testimony by the introduction of contradictory evidence. *Powell* v. *State,* 260 Ark. 381, 540 S.W. 2d 1 (1976); *Odom* v. *State,* 259 Ark. 429, 533 S.W. 2d 514 (1976).

The questions asked of Ms. Dennis were collateral to the issue of the trial. The Arkansas Supreme Court set out the test for determining collateral issues in *McAlister* v. *State*, 99 Ark. 604, 139 S.W. 684 (1911). This was relied upon in *Randall* v. *State*, 239 Ark. 312, 389 S.W. 2d 229 (1965). This determination to be made is whether the cross-examining party would be entitled to prove the issue as part of his

case. The determination of whether Ms. Dennis was a drug addict was not an issue which would have been an integral part of the appellant's case. See also, *Brown* v. *State*, 259 Ark. 464, 534 S.W. 2d 207 (1976). We find no error in the second point.

Turning to the appellant's third point argued for reversal, we find some problems. This was a bifurcated trial. After the jury found the appellant guilty, evidence was then heard regarding his character. Testimony was received which indicated the appellant had two previous felony convictions. The appellant's employers testified as to his work record and the fact that he had become an assistant manager. The judge held that since the appellant had been convicted of two prior felonies and was considered a habitual offender pursuant to Ark. Stat. Ann. § 41-1001, the alternate fine provisions were not available as possible punishment.

The appellant was convicted of murder in the second degree. This is a class B felony. Ark. Stat. Ann. § 41-901 provides:

> (1) A Defendant convicted of a felony *may be* sentenced to a term of imprisonment: (b) not less than three (3) years nor more than twenty (20) years, if the conviction is of a class B felony.

Ark. Stat. Ann. § 41-1101 provides:

> (1) A Defendant convicted of a felony *may be* sentenced to pay a fine: (a) not exceeding $15,000, if the conviction is of a class A or B felony.

Ark. Stat. Ann. § 41-1001 provides:

> (1) A Defendant who is convicted of a felony and who has previously been convicted of more than one (1) but less than four (4) felonies, or who has been found guilty of more than one (1) but less than four (4) felonies, *may be* sentenced to an extended term of imprisonment as follows: (b) not less than five (5) years nor more than thirty (30) years, if the conviction is of a class B felony.

The Commentary to § 41-1001 indicates this section was designed to provide more flexibility in sentencing recidivists. The language does not, however, make a stiffer sentence mandatory. The options should have been made available to a jury. It was for the jury to determine whether to impose a sentence of confinement, a fine, or both.

We find no error in the jury verdict of guilty of second degree murder. This was, however, a bifurcated trial. Since we find error in the second stage, we must reverse and remand for a new trial. The appellant is entitled to have his sentence imposed by the same jury which determines his guilt or innocence. Ark. Stat. Ann. § 41-1005. This is not possible without a new trial. The appellant could, however, permit the presiding judge to consider both possible sentencing statutes and impose the punishment. This is the appellant's choice.

We therefore reverse and remand for proceedings not inconsistent with this opinion.

Sophocles LOVETT *v.* STATE of Arkansas

CA CR 79-22 591 S.W. 2d 683

Opinion delivered December 12, 1979
Released for publication January 9, 1980

Robert B. Gibson, for appellant.

Steve Clark, Atty. Gen., by: *Robert R. Ross*, Deputy Atty. Gen., for appellee.

George Howard, Jr., Judge. Appellant was convicted on April 5, 1979, by a jury, of criminal attempt to commit rape. The jury assessed a fine of $500.00.

Appellant asserts two points for reversal:

1. The trial court erred in not entering a judgment on the jury's verdict prior to July 30, 1979 — 116 days after appellant's conviction.

2. That the trial court erred in ruling that appellant could not introduce evidence relating to an abortion performed on the victim.

Appellant argues that although he was convicted of the charge filed against him on April 5, 1979, the trial court did not enter a judgement on the verdict until July 30, 1979; that appellant filed his notice of appeal on May 1, 1979, and that appellant, at the time, "was not aware that judgment had not been entered, until after the filing or lodging of the Transcript with the Arkansas Court of Appeals"; and that as a matter of law, there was no judgment from which an appeal could be properly taken. Therefore, argues appellant, the case should be reversed, dismissed and appellant reimbursed of his costs of $714.70.

Rules 36.4 of the Rules of Criminal Procedure provides:

> Upon the return of a verdict of guilty, if tried by a jury, or the finding of guilty if tried by a circuit court without a jury, sentence *may be* pronounced and the judgment of the court *may be* then and there entered, or sentencing and the entry of the judgment *may be* postponed to a date certain then fixed by the court, not more than thirty (30) days thereafter, . . . (Emphasis added.)

While Rule 36.4 makes it clear that the sentencing of a defendant and the entry of the judgment *may be* pronounced immediately, or postponed to a date certain fixed by the court, not more than thirty (30) days thereafter, there is no provision indicating that a failure to observe this stipulation in any way affects the validity of the proceedings resulting in the conviction of a defendant. Furthermore, the word "may" as used in the rule implies permissive or discretional, rather than mandatory, action; and it is construed in a permissive sense unless it can be said that when the provision of a statute is the essence of the thing required to be done, it is mandatory, otherwise, when it relates to form and manner, and where an act is incidental, after jurisdiction is acquired, it is directory merely. *Nathan* v. *State*, 235 Ark. 704, 361 S.W. 2d 637 (1962); *Dunn* v. *Dunn*, 222 Ark. 85, 257 S.W. 2d 283 (1953). It is plain that Rule 36.4 is directory rather than mandatory.

Moreover, appellant has not shown in any way how he has been inconvenienced or prejudiced by the belated entry

of the *nunc pro tunc* judgment. Inasmuch as appellant sought to appeal from his conviction to this Court, it was incumbent upon him to take the initiative to see that the trial record was complete in every respect in order to enable this Court to entertain jurisdiction and view the proceedings objectively. Without a judgment having been entered, appellant had no basis for an appeal unless it was demonstrated that the trial court has abused its discretion in refusing to enter a judgment. It is clear from this record that when the trial court was advised that judgment had not been entered on the jury's verdict, the court immediately entered a *nunc pro tunc* judgment.

In *Richardson* v. *State*, 169 Ark. 167, 273 S.W. 2d 367 (1925), our Supreme Court emphasized that it was within the sound discretion of the trial court to enter *nunc pro tunc* judgments to cause the record to speak the truth in criminal as well as in civil cases.

Finally, appellant argues that he should have been permitted to cross-examine the victim about a trip that she purportedly made to California for an abortion. Appellant stresses that that evidence relating to the abortion was relevant to the issue of consent and the victim's reputation.

The trial court, in excluding the evidence, stated that his ruling was based in part upon the fact that appellant testified that the child was not his and that appellant had further testified that he gave the victim money to make the trip to California.

The purported attempt to commit rape occurred on June 3, 1978, south of Warren on Highway 15, while the purported abortion occurred in September, 1977.

Under these circumstances, we are unable to say that the trial judge abused his discretion in excluding the offered testimony about the alleged abortion. *Brown* v. *State*, 264 Ark. 944, 581 S.W. 2d 549 (1979).

Affirmed.

William I. RILEY *v.* STATE of Arkansas

CA CR 79-35 593 S.W. 2d 45

Opinion delivered December 12, 1979
Released for publication January 23, 1980

Paul Petty and *John Patterson*, for appellant.

Steve Clark, Atty. Gen., by: *Dennis R. Molock*, Asst. Atty. Gen., for appellee.

DAVID NEWBERN, Judge. In his first and third points for reversal of his conviction of theft by receiving, the appellant complains of an unlawful search and insufficiency of evidence to show he knew the lawnmower he received was stolen. We hold the appellant gave valid consent to the search and the evidence of his knowledge was sufficient. In his second point, however, the appellant contends the evidence was not sufficient to show the value of the lawnmower to be over $100, and thus the charge should have been reduced from class C felony to class A misdemeanor. We agree and modify the sentence accordingly.

I.

Edgar Sharp testified he and the appellant had a conversation in the presence of customers at Smith's Grocery, where Sharp was employed, in which they discussed the appellant's desire to buy a riding lawnmower. The appellant told Sharp he wanted one and would pay $300 for a good one. No testimony showed the appellant asked Sharp to steal a mower or that Sharp said that was the manner in which he proposed to obtain one for the appellant. Sharp said he had a couple of boys who were "in the business" and thus could supply the mower. He further testified he asked David Jansen to steal a mower belonging to Mrs. Spoon and deliver it to the appellant's home place which he pointed out to Jansen.

Jansen's testimony confirmed that he was procured by Sharp to steal Mrs. Spoon's mower. He, in turn, invited his friend, Steve Shelton, to help. Sharp paid Jansen $100, and Jansen paid Shelton $50. Jansen testified that after he and Shelton took the mower from Mrs. Spoon's yard, they delivered it to the appellant's place, unloaded it beside the

appellant's barn and covered it with hay. Jansen testified the appellant's mobile home was situated about 50 yards from the barn. It was after dark when the delivery was made, but there was a light at the mobile home, and someone came out of it while they were unloading the mower. The apparent intention of the appellee in eliciting this testimony was to show the occupant of the mobile home knew the delivery was taking place.

Shelton also testified, confirming Jansen's story about the delivery and adding that there was a gate on the appellant's property through which they had to pass and that the gate was "down." Another witness said the appellant's gate was usually closed because he kept livestock inside the fence.

Our conclusion is that this evidence was sufficient to show the appellant knew the mower, of which he was later found in possession, was stolen property. We agree with the appellee's conclusion that the fact the lawnmower was covered with hay upon delivery would be sufficient to show the appellant knew he was not involved in a regular business transaction. This evidence was at least sufficient to make a jury question.

Mrs. Spoon reported her mower stolen on September 21, 1978. On October 11, 1978, Mrs. Spoon's mower was found at the appellant's property. Possession of recently stolen property, if not satisfactorily explained to the jury, is sufficient to sustain a conviction. *Patterson* v. *State*, 253 Ark. 393, 486 S.W. 2d 19 (1972). See also, *Paschal* v. *State*, 243 Ark. 329, 420 S.W. 2d 73 (1967). Although the appellant presented an explanation that he had purchased the mower from someone whose name he did not know, the jury apparently found the explanation unsatisfactory. It was the jury's responsibility, of course, to evaluate the credibility of the witnesses. *Smith* v. *State*, 258 Ark. 601, 528 S.W. 2d 389 (1975).

II.

The search of which the appellant complains occurred when a state police investigator and a deputy sheriff went to

the appellant's home. They had information from Jansen and Shelton that the mower had been left at a place meeting the description of the appellant's. The deputy said he recognized their description as being of the appellant's property. Upon their arrival, according to the investigator's testimony, they informed the appellant they were there "checking on a lawnmower," and the appellant explained how he had recently purchased a mower. He told them two conflicting stories, however, as to where he had purchased it. When he was asked if the investigator and the deputy could look at the mower, he readily assented and took them outside to see it. The appellant was not arrested at that time although the serial numbers on the mower were found to be the same as those on Mrs. Spoon's missing machine. No warnings were given to the appellant at any time during this visit, nor was he advised of his right to withhold his consent to the "search." The state police investigator testified he did not suspect the appellant at that time. The deputy, who admittedly knew less of the details of the case at that time, said at one point in his testimony that he suspected the appellant of a crime when he went to the appellant's place.

The appellant cites a number of cases dealing with the traditionally produced evidence of involuntariness of consent, *i.e.*, coercion by threat or promise. They need not be dealt with here, however, as there is no serious contention the consent was coerced. The contention, rather, is that the lack of a showing by the appellee that the appellant knew of his right to refuse to permit the warrantless search makes his consent other than "knowing and voluntary."

The appellant acknowledges that knowledge of the right to refuse has been held to be only one factor in determining voluntariness as required by the fourth and fourteenth amendments to the U.S. Constitution. *Watson* v. *U.S.*, 423 U.S. 411, 96 S. Ct. 820 (1976); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041 (1973). Those cases also hold proof by the prosecution of knowledge of the right to consent is not necessary to a showing of voluntary consent sufficient to satisfy the U.S. Constitutional requirements.

There certainly was no evidence here of any kind of oppression or promise which would cause us to hold the

consent to have been involuntary when combined with the lack of proof of knowledge. The appellant seems to admit there was no violation in the "traditional" sense of his rights under the fourth and fourteenth amendments, but on the other hand he seems to argue that there was some requirement he be advised of his right to refuse consent just as he could have asserted a right to be advised of his right to remain silent if he had been a suspect. Any such contention that the U.S. Constitution imposes that requirement, is laid soundly, logically and emphatically to rest in the *Schneckloth Case, supra*, in which the U.S. Supreme Court made it clear that the warning rights associated with confessions and trial safeguards may not be transferred to the context of consensual search.

The *Schneckloth Case* has been cited by the Arkansas Supreme Court on several occasions. In *Enzor* v. *State*, 262 Ark. 545, 559 S.W. 2d 148 (1978), Judge (then Justice) Howard cited it to show there was no requirement of a showing of knowledge of the right to refuse consent to search where there was a showing of consent. Earlier, in a dissenting opinion, Justice Byrd had mentioned that it held a "Miranda warning" was not required in such a case. *Byars* v. *State*, 259 Ark. 158 at p. 183, 533 S.W. 2d 175 at p. 188 (1976). Although the *Enzor Case* might be deemed sufficient to cover the matter, the Arkansas Supreme Court has not had occasion to decide whether it will go beyond the requirements of the fourth and fourteenth amendments and say some other rule or sense of fair play requires a person whose property is to be searched be told he need not consent. We are persuaded there should be no such requirement. In the *Schneckloth Case*, Mr. Justice Stewart's opinion, in addressing the suggestion that advice of the right to refuse be regarded as a prerequisite to consensual search, said the following:

> That, however, is a suggestion that has been almost universally repudiated by both federal and state courts, and, we think rightly so. For it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally

> occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial, where, assisted by counsel if he chooses, a defendant is informed of his trial rights. And, while surely a closer question, these situations are still immeasurably far removed from "custodial interrogation" where, in *Miranda* v. *Arizona*, we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation. [412 U.S. at 231-232, citations and footnotes omitted]

As we find this language and general approach highly persuasive, we approve the conduct of the officers in this case and find no violation of any constitutional right or fairness ethic resulted from the lack of advice as to the right to refuse to consent to the search.

III.

The appellant was convicted of a class C felony for violation of Ark. Stat. Ann., § 41-2206 (Repl. 1977). To prove a class C felony the state must show the value of the property to be in excess of $100. If the property is shown to have some value but less than $100, theft by receiving it becomes a class A misdemeanor.

The proof of value here included (1) Mrs. Spoon's testimony the lawnmower was inoperable and she considered selling it for $50 or $75; (2) Sharp's testimony that the appellant was to pay $300 for the mower; (3) a ledger sheet showing the mower was purchased for $537.90 some four years before it was stolen; and (4) testimony of a mower repairman that the mower could be worth more or less than $100, depending on its condition.

The burden was on the appellee to show the value of the mower to be in excess of $100. *Lee* v. *State*, 264 Ark. 384,

571 S.W. 2d 603 (1978); *Rogers* v. *State*, 248 Ark. 696, 453 S.W. 2d 393 (1970). Viewing the evidence most favorably to the appellee, we find it not sufficient to form a basis of a factual determination that the mower was worth more than $100. The 1974 price was too remote. *Cf., Cannon* v. *State*, 265 Ark. 270, 578 S.W. 2d 20 (1979), and *Williams* v. *State*, 252 Ark. 1289, 482 S.W. 2d 810 (1972). The price agreed to by the appellant for a mower he had neither seen nor even had described to him is not relevant to establishment of a market price, or cost of replacement. Ark. Stat. Ann., § 41-2201 (11) (a) and (b) (Repl. 1977). The testimony of the repairman became virtually worthless when, having testified on direct examination the mower was worth $100, he answered "possibly" to a question on cross examination whether the mower might be worth more or less than that amount.

The evidence supported conviction for theft by receiving of property of some value but less than $100. The error in overruling the appellant's motion at the end of the state's evidence to reduce the charge to a class A misdemeanor will be cured by reducing the sentence from confinement in the state penitentiary for three years to confinement of one year in a place to be determined by the circuit court and reduction of the fine from $3000 to $1000. *Cannon* v. *State, supra*.

Affirmed as modified, and remanded for determination of the place of confinement.

REVERE COPPER & BRASS, Inc., *v.*
Leonard BIRDSONG

CA 79-68 593 S.W. 2d 54

Opinion delivered December 19, 1979
Rehearing denied January 23, 1980
Released for publication January 23, 1980

Pickens, Boyce, McLarty & Watson, by: *James A. McLarty*, for appellant.

Sam Boyce, for appellee.

ERNIE E. WRIGHT, Judge. This is an appeal by the employer from a decision of the Workers' Compensation Commission finding claimant, Leonard Birdsong, totally and permanently disabled and awarding compensation accordingly.

Appellee was 62 years of age at the time of hearing and had been in the employ of appellant for some 17 years prior to the injury. He sustained a compensable injury in the course of his work on or about June 23, 1976 while moving some steel. He felt a sting in his shoulder and the next morning was unable to move his left arm. He consulted his physician, Dr.

John D. Ashley, and was referred to Dr. Richard M. Logue, an orthopedic surgeon. On March 8, 1977 Dr. Logue operated on his arm in an effort to correct the condition resulting from the injury. After the operation claimant convalesced until June 24, 1977 when he returned to work. The condition of his arm grew worse and after work on January 19, 1978 the claimant quit working because of the arm injury, combined with problems with his knees. He had previously sustained a compensable scheduled injury to his left knee in 1966 while working for the same employer, resulting in an award of twenty per cent partial disability to the left leg. He thereafter developed arthritis in both knees and was treated for this condition by Dr. Ashley.

The evidence before the commission includes the report of Dr. Logue, who assessed claimant's disability from the injury as thirty per cent loss of function to the arm due to the rupture of the biceps. Dr. Ashley testified he saw the claimant on June 24, 1976 and found the claimant had a marked weakness in his left upper arm, swelling in the mid portion of the arm, and that when the muscle would contract the arm would not move. It was his conclusion the claimant had a rupture of the head of the left bicep muscle. He had occasion to treat claimant for other conditions subsequent to the corrective surgery by Dr. Ashley, the last time being incident to hospitalization of claimant in April of 1978 for osteo-arthritic problems with his knees and other complaints. He observed the arm surgery had not been successful, and gave a written report in May, 1978, expressing the following opinion regardng the disability arising from the arm injury:

> He has previously suffered an industrial injury to the left leg and as a result of favoring this leg, he has developed arthritic symptoms in the right leg. As a result of this last injury to his arm and his previous leg injury interpreted in light of his over-all physical condition, I feel that Mr. Birdsong's last injury is perhaps "the straw that broke the camel's back" in creating a total disability situation.

Dr. Ashley testified in his opinion the claimant is permanently and totally disabled and the arm injury was the final factor in creating the total disability. Claimant testified he was unable to continue his employment after january, 1978.

The Workers' Compensation Act defines disability as incapacity because of injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury.

The evidence shows claimant has limited education, has worked only at manual labor, and has no training in other fields of work.

The case of *Glass* v. *Edens*, 233 Ark. 786, 346 S.W. 2d 685 (1961) rejects the theory that only clinical findings can be considered in determining disability, and points out that consideration should be given to a claimant's age, education, experience and other matters affecting wage loss in addition to medical evidence.

The evidence shows appellee was able to work after the 1966 scheduled knee injury, but there was medical evidence in addition to his own testimony that he became totally disabled to continue working after his last day of work on January 19, 1978, and that the precipitating cause was the arm injury.

In *Cooper Ind. Products* v. *Worth*, 256 Ark. 394, 508 S.W. 2d 59, (1974), the court held a scheduled injury may give rise to an award of compensation for total disability under Ark. Stat. Ann. § 81-1313 (a) where the scheduled injury proves to be totally and permanently disabling. The case also holds that on appeal we must give the findings of the commission the strongest probative force in favor of the Commission's decision.

Appellant argues the opinion of Dr. Ashley should be disregarded because it went beyond assigning functional impairment. Ark. Stat. Ann. 28-1001, Rule 704 permits opinion testimony embracing an ultimate issue to be decided by the trier of fact. The opinion of Dr. Ashley was received without objection and the factors upon which the opinion was predicated were detailed. It was proper for the commission to weigh Dr. Ashley's testimony, along with all other evidence.

The question of permanent total disability is an issue of fact and all relevant evidence bearing upon the issue should be considered.

We conclude there is substantial evidence to support the findings of the commission that claimant is totally and permanently disabled as a result of the arm injury sustained in the course of employment, when the condition of his arm is considered along with the scheduled permanent disability to his leg and other physical conditions. However, the undisputed evidence shows claimant actually worked during the period from June 24, 1977 through January 19, 1978, and the evidence does not support the commission's finding of permanent total disability as beginning prior to January 20, 1978.

The commission's award is modified to show the commencement date of permanent total disability as being January 20, 1978, and as so modified the decision of the commission is affirmed.

BUNNY BREAD and UNITED STATES FIDELITY AND GUARANTY CO. *v.* William E. SHIPMAN

CA 79-103 591 S.W. 2d 692

Opinion delivered December 19, 1979
Released for publication January 9, 1980

Frierson, Walker, Snellgrove & Laser, for appellants.

Warren E. Dupwe, for appellee.

JAMES H. PILKINTON, Judge. This is a workers' compensation case and is before the court on appeal from an award of the Arkansas Workers' Compensation Commission finding that claimant is entitled, among other things, to all statutory benefits relating to a compensable injury suffered on December 11, 1978.

It was stipulated that on the date of the injury, claimant was a regular employee of Bunny Bread Company, earning a wage sufficient to entitle him to the maximum compensation rate of $87.50 per week.

The Commission found that appellee was injured within the scope of his employment and is therefore entitled to

temporary total disability benefits and controverted attorney's fees.

The appellants contend there is no substantial evidence to support the award, and say the claimant's accident did not arise out of the normal course of his employment. Appellants contend appellee was injured during a deviation from his duties and, therefore, have controverted this claim in its entirety. The appellee, William E. Shipman, was the only witness who testified below, and the entire record is not long. Actually, there is no dispute over any material fact in this case. Mr. Shipman was a route salesman for the appellant, Bunny Bread Company. His route ran from Walnut Ridge to Hardy, Arkansas. On December 11, 1978, while traveling to Hardy to make his next delivery, appellee saw a car in the ditch and a lady standing beside the road. He recognized the lady and noticed she was attempting to flag him down. Mr. Shipman was unable to stop immediately because of ice on the road. He proceeded past the disabled vehicle, turned around and returned to the stranded motorist. Her car was off the road and in a ditch. He pulled his bread truck to the side of the road, and went over to see what assistance he could render. As Mr. Shipman prepared to drive the lady's vehicle out of the ditch, he observed that the bread truck was perhaps blocking the ultimate pathway; and therefore, appellee attempted to get out of the stranded vehicle so that he could move the bread truck. Another vehicle, coming over the hill, slid on the icy road and crashed against the car on the side where Mr. Shipman was exiting, crushing his leg against the vehicle.

The sole issue involved is whether or not appellee's "good samaritan" act was such a deviation from his normal business duties as to take him outside the scope of his employment at the time of the injury.

The Commission held that the injury in question did arise out of and in the course of appellee's employment within the meaning of the law; that appellee-claimant has been temporarily and totally disabled for the period beginning December 12, 1978, and continuing to a date yet to be determined. Therefore, claimant's healing period has not

ended and the issue of permanent partial disability is not before the court. That question has been specifically reserved for future determination as provided by law.

I.

It was the duty of the Commission to draw every legitimate inference possible in favor of the claimant and to give him the benefit of the doubt in making factual determinations. *Brower Manufacturing Co.* v. *Willis*, 252 Ark. 755, 480 S.W. 2d 950 (1972). Further, the Commission in considering a claim must follow a liberal approach and, as stated above, draw all reasonable inferences favorable to claimant. *Holland* v. *Malvern Sand and Gravel Co.*, 252 Ark. 755, 480 S.W. 2d 822 (1964). The same rules apply in determining whether the accident did, in fact, grow out of and occur in the course of the employment. *Cox Lumber Co.* v. *Jones,* 220 Ark. 431, 248 S.W. 2d 91 (1952); *Brooks* v. *Wage,* 242 Ark. 486, 414 S.W. 2d 100 (1967). See also *Tinsman Manufacturing Company, Inc.* v. *Sparks,* 211 Ark. 554, 201 S.W. 2d 573 (1947).

II.

On appeal this court's inquiry is limited to determining whether the decision of the Arkansas Workers' Compensation Commission is supported by substnatial evidence, and in so determining, we are required to view the evidence in the light most favorable to the decision of the Commission. *St. Michael Hospital* v. *Wright*, 250 Ark. 539, 465 S.W. 2d 904 (1971). Doubtful cases are resolved in favor of claimant. *Cooper Industrial Products, Inc.* v. *Worth*, 256 Ark. 394, 508 S.W. 2d 59 (1974). Thus, in disposing of this appeal, this court is only concerned with whether there is substantial evidence in the record to support the findings and award of the Commission. It is not within this court's province to determine the preponderance of the evidence. *Mounts* v. *Bechtel Corp.*, 256 Ark. 318, 507 S.W. 2d 99 (1974). Before we could reverse, this court would have to be convinced that fair-minded persons, with these facts before them, could not have reached the conclusion arrived at by the Commission. *Purdy* v. *Livingston*, 262 Ark. 575, 559 S.W. 2d 24 (1977).

III.

In considering the rules to be applied, it might also be mentioned that the burden of proof is on claimant-appellee to show that he sustained an accidental injury arising out of and during the course of his employment.

IV.

As stated in 1 Larson, *Workmen's Compensation Law*, § 19.00 (1952):

> An identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip, *unless the deviation is so small as to be disregarded as insubstantial*. In some jurisdictions, the course of employment is deemed resumed if, having completed his personal errand but without having regained the main business route, the employee at the time of the accident was proceeding in the direction of his business destination. (Emphasis supplied.)

Appellants take the position that under the circumstances of this case the appellee deviated from the business trip for personal reasons or a "good samaritan" act; and consequently, took himself out of the course of his employment until such time as he resumed the course of his employment by completing his personal errand or the "good samaritan" act. Appellants' contention is without merit.

Here the claimant's act and deviation, if it may be properly so termed, was not a personal errand, but rather a "good samaritan" act. The claimant was traveling his normal route, driving a vehicle furnished by the employer, when he saw a disabled vehicle. Also important was the fact that the claimant-employee had been instructed by his employer that every member of the general public was a potential customer and should always be treated with courtesy and consideration. If rendering assistance to a disabled motorist, under the circumstances of this case, may be considered a deviation from normal employment duties, the Commission

determined that such action was not in time and place a sufficient deviation to constitute taking the claimant outside the scope of his employment. *Tinsman Manufacturing Company, Inc.* v. *Sparks, supra*; and *Cox Brothers Lumber Co.* v. *Jones*, 220 Ark. 431, 248 S.W. 2d 91 (1952).

There is substantial evidence in this record to support the conclusion of the Commission that the claimant's deviation from his normal employment was so minor as to be regarded as an insubstantial deviation. Further, in view of the indoctrination of the claimant and his instructions concerning good public relations, we might question whether or not claimant's "good samaritan" act was even a deviation from his employment. The employer's bread truck which the motorist flagged down had the Bunny Bread sign clearly displayed. Surely, except for the unfortunate accident which occurred, it would be difficult to argue that the employer would have objected to the claimant's action in lending assistance to a disabled motorist.

The pages of 1A Larson, *Workmen's Compensation Law*, § 27.22 (1952), are replete with illustrations of the lengths to which employees may be expected to go in pursuit of public good will. A number of courts have gone to considerable lengths in upholding awards for injuries occurring in the course of miscellaneous good samaritan activities by employees, on the theory that the employer ultimately profited as a result of the good will thus created. In *Lewis* v. *Kentucky Cent. Life Insurance Co.*, 20 N.C. App. 267, 201 S.W. 2d 228 (1973), an insurance collector and salesman was struck by an out of control automobile, while entering his own car after aiding a policy-holder whose automobile had stalled. He was held to have been in the course of his employment at the time of the accident. The test as applied by the North Carolina court is whether the employee was acting for the benefit of his employer or for his own benefit. The court held in that case that specific personal relations essential in the industry were promoted, as was also general good will.

In *Carey* v. *Stadther*, 219 N.W. 2d 76 (Minn. 1974), the widow of the deceased employee sought to recover depen-

dency compensation benefits for the death of her husband, a feed salesman, who had died while trying to rescue a man from a cesspool. The Supreme Court of Minnesota reversed the Workmen's Compensation Commission denial of benefits, and held that, when the deceased's employer encouraged this type of community service Carey had done that day, and looked upon such activities as an essential sales technique, the salesman's death arose out of and in the course of his employment, and his dependents were entitled to dependency benefits under the Workmen's Compensation Act.

The good-will rule attained its ultimate expression in *Gross* v. *Davey Tree Expert Company,* 248 App. Div. 838, 290 N.Y. 168 (1936). In that case a tree trimmer who observed a lady in distress descended from his immediate duties to assist the lady in getting her car started. In so doing, he was injured. The court held he was entitled to benefits under his practice of helping those in distress and the policy of the employer to do everything possible to encourage good will.

The Commission in the case before us found appellee was entitled to benefits under the Arkansas Workers' Compensation Act.

We find there is substantial evidence to support this conclusion.

Affirmed.

Ronald LEWIS *v.* STATE of Arkansas

CA CR 79-63 591 S.W. 2d 687

Opinion delivered December 19, 1979
Released for publication January 9, 1980

Jones & Tiller, by: *Marquis E. Jones*, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson*, Asst. Atty. Gen., for appellee.

JAMES H. PILKINTON, Judge. Appellant was charged with second degree forgery in violation of Ark. Stat. Ann. § 41-2302 (Repl. 1977). The state specifically alleged that on April 2, 1977 Lewis uttered a check which was purported to have been drawn on one Don C. Clark, who had not authorized the appellant's act. After entering his plea of not guilty, and after numerous continuances were granted at the request of both sides, a jury trial was held on February 8, 1979. Lewis was found guilty as charged and sentenced to two years imprisonment.

I.

Appellant first contends the trial court erred in refusing to grant his motion for a directed verdict of not guilty. We find no merit in this argument. A directed verdict is proper only when no fact issue exists. On appeal this court reviews the evidence in the light most favorable to the appellee and will affirm if there is substantial evidence to support the verdict. *Balentine* v. *State*, 259 Ark. 590, 535 S.W. 2d 221 (1976); *Harris* v. *State*, 262 Ark. 680 at 682, 561 S.W. 2d 69 (1978). In the case before us, we cannot say that no factual issue existed. The trial court was correct in denying defendant's motion for a directed verdict.

II.

An employee of Brandon Furniture Company in Little Rock testified that on April 2, 1977, appellant made a purchase and gave her the check in question for $41.20 payable to Brandon Furniture Company. At the time, appellant purportedly held himself out to be Don C. Clark. The Brandon employees were suspicious at the time, but having no poisitive proof, took the check nevertheless. However, they did take special note of the appearance and description of the individual involved.

A little over a month later appellant appeared at the John Tucker Warehouse in Little Rock. Teresa Mukerjea, the employee at Brandon with whom appellant had dealt before, was then working for Brandon's at the Tucker warehouse. She recognized appellant, and called the police after he had left the warehouse. The police arrested appellant a short time later. He now claims on appeal that his trial was not fair because the state withheld certain original statements made by witnesses from appellant's discovery. We find no merit in this argument. It is undisputed that Brandon Furniture Company employees Teresa Mukerjea and Tommy Claussen gave written statements to the police with regard to the check in question. Each witness wrote out the statement in long hand. A police department secretary then typed copies of each statement. Appellant introduced both the handwritten statements, and the typed copies, into evi-

dence at the trial as Defendant's Exhibits 1 through 4.

During the discovery period, defense counsel received copies of the typewritten statements via the "open file" policy of the Pulaski County Prosecuting Attorney's office. The record is otherwise silent on the matter, but it was apparently only during the cross-examination of Officer Baer, who took the statements in the first place, that both the defense counsel and the state's attorney learned that the longhand originals of the statements existed. The typewritten copies of the statements are identical to the handwritten originals except for the fact that in the original statement of Ms. Mukerjea, some words were underlined by her, and this underlining was not shown on the typewritten version. Other than the underlineations, there are no differences whatsoever between the typed and handwritten documents. The wording is exactly the same. Thus no prejudice to the defendant could have occurred under the circumstances. The appellant's argument, on appeal, that what happened constituted a violation of Rule 17.1 of the Arkansas Rules of Criminal Procedure is without merit. Neither does this case fall under the holding in *Williamson* v. *State*, 263 Ark. 401, 565 S.W. 2d 415 (1978) as appellant claims.

III.

Appellant offered two proposed instructions concerning criminal simulation as defined by Ark. Stat. Ann. § 41-2311. His theory was that the crime of criminal simulation is a lesser offense including a charge of forgery. The language of the commentary which accompanies Ark. Stat. Ann. § 41-2311 (Repl. 1977) (Criminal Simulation) states:

> It [Section 41-2311] is designed to cover the fraudulent simulation of "objects" that are not written instruments within the definition of § 41-2301 (9). Such "objects" include antiques, paintings, and other objects d'art, as well as more common articles.

The commentary, although not legally binding, is highly persuasive in determining legislative intent. *Britt* v. *State*, 261 Ark. 488 at 495, 549 S.W. 2d 84 (1977).

Assuming without deciding that criminal simulation is in fact a lesser included offense of forgery, still appellant in this case would not be entitled to the instructions offered under the facts here. See *Caton & Headley* v. *State*, 252 Ark. 420, 479 S.W. 2d 537 (1972). The principle of law announced in *Caton* was codified in Arkansas Criminal Code, Ark. Stat. Ann. § 41-105 (3) (Repl. 1977) as follows:

> The Court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

See also *Frederick* v. *State*, 258 Ark. 553 at 557, 528 S.W. 2d 362 (1975). In the case before us the defendant-appellant was either guilty of the greater charge or nothing at all. The trial court was correct in refusing both offered instructions on criminal simulation.

IV.

Appellant's final argument is that he was denied a fair trial below due to his inability to discover the names of persons, or to view additional checks, which were involved in other alleged line-ups. We find no merit whatsoever in this contention. If there were other checks not the subject of the instant charge which appellant was supposed to have written, they were clearly unrelated with the case being tried. Consequently, we are unable to see how the appellant was prejudiced thereby, nor does he so inform us. And, as noted by the trial judge, these alleged "other" check(s) were never referred to by the prosecution, but rather were called to the attention of the jury by the defense on cross-examination. Any resulting prejudice, therefore, was invited, and cannot be raised as an error on appeal. *Strode* v. *State*, 259 Ark. 859, 537 S.W. 2d 162 (1976). Thus appellant is in no position here to argue that his rights under Rule 17.1 and under *Williamson* v. *State*, supra, were abridged.

V.

This court has carefully considered all points raised by

appellant, but finding no error the judgment of the Pulaski County Circuit Court must be affirmed, and the conviction upheld.

Affirmed.

HOWARD, J., and PENIX, J., dissent.

GEORGE HOWARD, JR., Judge, dissenting. I am unable to concur with the majority in affirming appellant's conviction for it is plain, from a review of the record, that the State failed to comply with Rule 17 of the Rules of Criminal Procedure and the pronouncement of the Arkansas Supreme Court in *Williamson* v. *State*, 263 Ark. 401, 565 S.W. 2d 415 (1978) which articulated the duty of a prosecuting attorney when a request for disclosure is made by a defendant.

On February 6, 1978, the defendant filed a rather detailed and comprehensive motion styled "MOTION FOR DISCOVERY, FOR BILL OF PARTICULARS, FOR PRODUCTION OF DOCUMENTS, AND FOR EXCULPATORY EVIDENCE". Among other things, defendant's Motion for Discovery provided:

> 10. The defendant requests the name of each person who has been interviewed by any agency but who the State does not intend to call at the trial of this matter and any statements written or oral given by such persons to any agent of any governmental agency.
>
> . . .
>
> 12. The defendant requests that each of the above be considered to be a continuing request and demand and that the State amend its answers to so include such later discovered answers, after the time or its initial response hereto, as may come within the possession, custody or control of the State or by the exercise of due diligence may come within its possession, custody or control.

Rule 17.1 provides:

> (d) . . . [T]he prosecuting attorney shall, promptly upon discovering the matter, disclose to defense counsel any material or information within his knowledge, possession or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor.

In *Williamson* v. *State*, supra, our Supreme Court in construing Rule 17.1 emphasized:

> 1. The State must disclose to defense counsel, promptly upon discovery thereof, any information which tends to negate the guilt of the defendant or that would reduce the punishment.
>
> 2. That such information which a party is entitled to must be disclosed in sufficient time to permit defense counsel to make beneficial use thereof.

I submit that an application of these rules to the relevant factual matters indicates a reversal of appellant's conviction. Rule 17.1 (d) and *Williamson* v. *State*, supra, incorporate the due process requirement that evidence favorable to a defendant on issues of guilt or punishment be disclosed by the State. Appellant's entitlement to disclosure may not be frustrated by what the State deems relevant or material to the issues in the proceedings. *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963); *Giles* v. *Maryland*, 386 U.S. 66, 87 S. Ct. 793 (1967); *Williamson* v. *State*, supra; *Smith* v. *Urban*, 245 Ark. 781, 434 S.W. 2d 283 (1968); *Murchison* v. *State*, 249 Ark. 861, 462 S.W. 2d 853 (1971).

The prosecuting attorney, in his opening remarks to the jury, made the following statement:

> "We also have a Detective Ken Baer, who is the individual who investigated this checking account. *He will tell you what he found out about the validity of the checking account*." (Emphasis added.)

However, when Officer Ken Baer was called as a wit-

ness by the State, only the following testimony was elicited pertaining to the extensive investigation the officer conducted regarding the account:

> Q. . . . [D]id you have occasion to investigate a checking account which was in the name of Don Carlton Clark at the First National Bank here in Little Rock, Arkansas?
>
> A. Yes, sir, I did.
>
> Q. All right. I hand you what is marked State's Exhibit No. 1. Did you investigate that particular check?
>
> A. Yes, sir, I did.
>
> Q. Did you have occasion to check out the information given there on the account holder?
>
> A. Yes, sir.
>
> Q. All right. Did you check out the address?
>
> A. Yes, sir.
>
> Q. What did you discover?
>
> A. The address of 4201 West Twenty-ninth is a vacant lot.
>
> Q. Was there any indication that a house had ever been there?
>
> A. No, sir.
>
> Q. All right. Did you check out the UALR identification number on there?
>
> A. Yes, sir.
>
> Q. What was the result of that?

A. I don't remember the individual's name it was listed to at this time.

Q. Was it male or female?

A. I believe it was female.

Q. Was it not Don Carlton Clark's?

A. It was not Don Carlton Clark, no, sir.

Q. How about the State's driver's license number on there? Did you check that out?

A. Yes, sir. It listed to Don Carlton Clark.

Q. And where did you determine Don Carlton Clark to live?

A. He lives in Southern Arkansas. I'm not —

Q. He does not live in Little Rock?

A. He does not live in Little Rock.

Q. Did your investigation reveal any other Don Carlton Clarks except the one from Southern Arkansas?

A. No, sir, it did not.

On cross-examination, Officer Baer gave the following testimony which was relevant and crucial to appellant's claim of innocence and, according to counsel for appellant, disclosed for the first time:

Q. Detective Baer, did during your investigation you check with the First National Bank herein concerning Don C. Clark's account?

A. Yes, sir.

Q. Did you find such an account?

A. Yes, sir.

Q. Was that the account as stated on the check as you see it there?

A. Yes, sir. We investigated numerous checks on this account.

Q. Now, were all of the checks on that number account?

A. On this specific account?

Q. Yes.

A. Yes, sir. We investigated — I don't know how many. There were checks all over the city on this account.

Q. Okay. Did you see an account in the name of Don Clayton Clark?

A. Yes, sir, I believe there were checks in that account also.

Q. Okay. Did you see an account in the name of Donald C. Clark?

A. I don't recall, sir. This has been a long time ago.

Q. Did you check any other banks?

A. I could have at the time. I just don't recall, sir.

Q. Okay. Based on your investigation, did you find that there were other accounts of Donald C. Clark, of Don C. Clark?

A. There may have been, sir. Like I say, there were so many of these checks. There were two or three law enforcement agencies investigating them at the same time.[1]

---

[1] On June 8, 1977, Detective Ken Baer received the following communication from the Arkansas State Police which has been designated as defendant's exhibit number 6:

The testimony of Officer Baer relating to the numerous checks "all over the city" and other bank accounts in the names of "Donald C. Clark", "Don C. Clark" and "Donald Clayton Clark" was not only relevant and beneficial in enabling appellant in locating other signatures from checks and bank records that would have been helpful to the State Police in seeking to compare and verify appellant's handwriting on the forged check, but this information could have been equally as beneficial in assisting appellant in securing witnesses to see if they could identify appellant as the party who uttered the checks they received. These persons might have been in a position to offer a description of the person or persons whom they dealt with. Moreover, appellant could have taken advantage of the discoveries made by other law enforcement agencies that were investigating the same check scheme. Appellant was denied this information because the State failed to disclose this information although appellant's motion was filed approximately one year preceding appellant's trial.

Appellant's counsel emphasized in his motion for a new trial that the prosecuting attorney's office, on February 6, 1979, at approximately 9:00 p.m., only advised him of the name of the police officer who had investigated the "numerous checks". However, appellant's trial was already scheduled for February 7, 1979.

It is unlikely that Officer Baer concealed from the prosecuting attorney's office the discoveries he made relating to the several bank accounts, the numerous checks and the fact that other law enforcement agencies were involved. Moreover, appellant's motion for disclosure sought information which the State could supply by "the exercise of due diligence."

Dear Sir:

E-1 is a check of Don Carlton Clark, #282.

I am unable to make a positive identification with the handwriting on the check marked E-1 with the handwriting submitted of Ronald Lewis.

I am unable to compare the printing on the face of E-1 with the script submitted of Ronald Lewis.

I am returning the questioned and known material at this time.

For the reasons herein discussed, I respectfully dissent.

I have been authorized to state that PENIX, J., joins in this dissent.

GREAT PLAINS BAG CORPORATION
v. Charles BATY

CA 79-170 593 S.W. 2d 51

Opinion delivered December 19, 1979
Released for publication January 23, 1980

Southern & James, by: *Byron S. Southern*, for appellant.

Rice, Batton & Vaughan, P.A., by: *Ben E. Rice*, for appellee.

MARIAN F. PENIX, Judge. Claimant was injured in 1968 at the age of 36. He alleged the injury was suffered in the course of his employment by U.S. Holdercraft and filed for Workers' Compensation benefits. Benefits were denied on the basis of the testimony of his ex-wife who said he had actually hurt his back in 1968 while lifting a boat, an activity unconnected with U.S. Holdercraft. However incurred, the first back injury led to two surgeries and his total retirement from the work force. Under the Social Security Act claimant was determined to be totally and permanently disabled and began drawing benefits. In 1976, with the consent of the Social Security Administration, the claimant began working on a trial basis[1] with Great Plains Bag Corporation. After two months on the job, claimant was injured. Dr. Lester testified claimant's disability from the 1968 injury amounted to 20 to 25% to the body as a whole. Dr. Lester added an additional 5% arising from the 1976 injury. Dr. Adametz rated claimant's disability as two and a half per cent affecting the body as a whole as an addition to his previous disability. The appellant controverted all permanent partial disability benefits in excess of two and one half per cent to the body as a whole. The Administrative Law Judge requested the parties investigate the possibility of successful rehabilitation and subsequently held the claimant to be a suitable candidate for rehabilitation. The judge also awarded 35% anatomical permanent partial disability to the body as a whole. He gave no consideration to wage loss nor to loss of future earning capacity.

[1]The Social Security Administration has a program whereby a person who is drawing disability benefits may begin working on a trial basis. This trial lasts for nine months. During this time he continues to draw disability benefits. If after nine months, it is determined the person is able to hold a job the disability benefits are discontinued. Charles Baty was at the time of his injury still drawing these disability benefits.

Claimant did not appeal the judge's finding of 35% of anatomical permanent partial but rather argued his finding regarding rehabilitation should be set aside so a wage loss rating can be assigned to claimant in addition to the 35% physical impairment rating. The claimant asked the commission to award 95% permanent partial disability award under the rationale of *Glass* v. *Edens*, 233 Ark. 786, 346 S.W. 2d 685 (1961). The respondents argued that 30% is attributable to the claimant's prior injury. The respondents argued for apportionment of the disabilities between the 1968 and 1976 injuries.

The 2-to-1 opinion of the Workers' Compensation Commission states it finds the 35% anatomical disability to the body as a whole to be "rather liberal". However, the Commission adopted the finding and apparently translated Baty's total disability to 95% to the body as a whole, of which 65% was found to have been caused by the Great Plains employment. The Commission acknowledged it was hard put to do this within the guidelines of *Glass* v. *Edens*, 233 Ark. 786, 346 S.W. 2d 685 (1961). This was particularly true since Baty had been unemployed and drawing total disability payments from Social Security since 1972. However, the Commission opinion apparently finds that Baty's economic loss was the loss of his "trial" job of two months with Great Plains.

Assuming Great Plains knew of Baty's prior back problems — and there is some dispute about this in the testimony — it was a commendable act by Great Plains to employ Charles Baty. Obviously this entailed substantial financial risk. Arkansas' legislature wisely has tried to encourage employers, such as Great Plains Bag Corporation, to risk employing workers with previous disabilities. Of course, in such an employment, there is high risk of further injuries, and increased insurance premiums. Although this statute has been amended several times, the present law pertaining to Baty's subsequent injury is set out in Ark. Stat. Ann. § 81-1313 (2) (Repl. 1976). This has been interpreted by our Supreme Court in *Davis* v. *Stearns-Rogers Construction Co.*, 248 Ark. 344, 451 S.W. 2d 469 (1970). This fixes Baty's compensation from Great Plains to be ". . . for the degree of disability that would have resulted from the subsequent in-

jury if the previous disability had not existed."

According to the Arkansas Workers' Compensation Act, "disability" is the incapacity because of injury, to earn, in the same or some other employment, the wages, which the employee was receiving at the time of injury. Ark. Stat. Ann. § 81-1302 (e).

In *Glass* v. *Edens*, 233 Ark. 786, 346 S.W. 2d 685 (1961), the Arkansas Supreme Court held that the Workers' Compensation Commission may in its discretion consider certain non-medical factors in determining the degree of permanent disability sustained by an employee. As stated in *Glass* v. *Edens*, supra, disability means not merely functional disability but also loss of the use of the body to earn substantial wages. The court quoted extensively from Larson.

> The key to the understanding of this problem is the recognition, at the outset, that the disability concept is a blend of two ingredients, whose recurrence in different proportions gives rise to most controversial disability questions: The first ingredient is disability in the medical or physical sense, as evidenced by obvious loss of members or by medical testimony that the claimant simply cannot make the necessary muscular movements and exertions; the second ingredient is defacto inability to earn wages, as evidenced by proof that claimant has not in fact earned anything. 2 Larson, Workmen's Compensation Law, § 57.10, p. 10-4, as quoted in *Glass* v. *Edens*, supra, at p. 787.

We are limited by statute law and a long series of cases, none of which need to be cited, to the propositions: first, that awards of the Workers' Compensation Commission will not be disturbed on appeal if there is any substantial evidence to support them; and second, that all inferences will be resolved in favor of the worker. This is true even though the two Workers' Compensation Commissioners who rendered the opinion now on appeal obviously had only the cold typed record of the trial to read, as do we. The Administrative Law Judge's findings from live testimony are swept aside by the de novo hearing before the three commissioners. We are precluded by the statutes from considering the findings of the Workers' Compensation Commission Administrative Judge

who alone heard and observed live witnesses in the trial of this claim. *Parker Stave Co. et al* v. *Hines*, 209 Ark. 438, 190 S.W. 2d 620 (1945); *Lane Poultry Farms* v. *Wagoner*, 248 Ark. 661, 453 S.W. 2d 43 (1970); *Burks* v. *Blanchard*, 259 Ark. 76, 531 S.W. 2d 465 (1976).

Even when viewing the evidence in the light most favorable to the claimant, however, we cannot find there to be substantial evidence to support the Commission's award of permanent disability in excess of his anatomical rating. We are well aware the Commission's finding carries the same weight as a jury finding and it is with great reluctance we overturn a decision made by the Commission. The undisputed fact is claimant had already been permanently and totally disabled. He had not worked in private employment for over eight years. His employment with Great Plains Bag Corporation was under a temporary permit from the Social Security Administration as a totally disabled person. His employment with this employer was strictly on a trial basis to determine if he was able to work. After a very short trial period, events proved he could not perform due to his back. There is simply no substantial evidence to support a finding of loss of future earning capacity.

This court is apprised of the fact that not everyone who is at one time determined completely disabled will remain so.

> The capacities of a human being cannot be arbitrarily and finally divided and written off by percentages. The fact that a man has once received compensation as for 50 percent of total disability does not mean that ever after he is in the eyes of compensation law but half a man, so that he can never again receive a compensation award going beyond the other 50 percent of total. After having received his prior payments, he may, in future years, be able to resume gainful employment. In the words of the Colorado court, he may have resumed employment as a "working unit." 2 Larson, Workmen's Compensation Law, § 59.42, at p. 10-352, 353.

The facts with regard to Charles Baty just do not show that he had returned to the work force as a "working unit". He

was not able to resume gainful employment.

The economic plight of Charles Baty concerns us. We have compassion for a man who has attempted to once again become a part of the work force. This attempt to re-enter, however, is simply not enough to support the award of 65% additional disability under *Glass* v. *Edens*, supra. As Professor Larson has written,

> Workmen's compensation is a mechanism for providing cash-wage benefits and medical care to victims of work-connected injuries, and for placing the cost of these injuries ultimately on the consumer, through the medium of insurance whose premiums are passed on in the cost of the product. Larson, Workmen's Compensation Law, § 1.00, p. 1.

Sustaining an award such as this, however, stretches this concept too far. Furthermore, this award would defeat the purpose and intent of the legislature as evidenced by the second injury statute and work to discourage rather than encourage employers to hire persons with any degree of disability.

The decision of the Workers' Compensation Commission is reversed with directions to limit the rating of Charles Baty to the 35% anatomical figure. Of this 35%, Great Plains Bag Corporation is responsible for 5% permanent partial disability to the body as a whole. The attorney for the claimant is awarded the maximum attorney's fee on the amount controverted in excess of two and one-half percent.

Reversed and remanded.

William Glen CARLTON, Administrator *v.* Barbara Ann BAKER, BANK OF NORTHEAST ARKANSAS

CA 79-181 591 S.W. 2d 696

Opinion delivered December 19, 1979
Released for publication January 9, 1980

Warren E. Dupwe, for appellant.

Seay & Bristow, by: *Bill W. Bristow*, and *Parker, Henry & Walden*, for appellees.

MARIAN F. PENIX, Judge. This case was appealed to the Arkansas Supreme Court and by that Court assigned to the Arkansas Court of Appeals pursuant to Rule 29 (3).

William Glen Carlton, Administrator of the Estate of Rebecca C. Self, appellant, petitioned the probate court to have six certificates of deposit declared to be the property of decedent's estate rather than the property of Barbara Ann Baker, appellee, and niece of decedent. Barbara Ann Baker, Bank of Northeast Arkansas, and The Caraway Bank were all made respondents and the case was transferred to the chancery court.

After a hearing on the matter the court found the three certificates purchased at Bank of Caraway were the property of the estate. There is no appeal from this finding.

The court further found the three certificates purchased from the Bank of Northeast Arkansas to be the property of Barbara Ann Baker. The Administrator, Carlton, brings this appeal.

The decedent, Rebecca C. Self, purchased a $5,000 certificate of deposit No. A1960 on October 14, 1975. She designated it was to be in the name of Rebecca Self or Barbara Ann Baker, either or the survivor of either. At the time of purchase she affixed her signature to a receipt for the certificate. On September 15, 1976 Ms. Self purchased another $5,000 certificate No. A1446 with the same designation as No. A1960 but she signed no document of any kind. She signed no receipt, signature card, nor tickler. On January 12, 1977, Marie Bertrand, acting as Ms. Self's agent, purchased certificate No. A2069. Ms. Bertrand signed a receipt and a tickler. No. A2069 was also for $5,000 and had the same designation as the other two.

We believe Rebecca C. Self intended for the three certificates of deposit to go to her niece Barbara Ann Baker. However, Ark. Stat. Ann. § 67-552 (Repl. 1966) specifically provides the procedure whereby a right of survivorship can be created in a certificate of deposit.

> (a) If the person opening such account, or purchasing such certificate of deposit, designates in writing to the banking insitution that the account or the certificate of deposit is to be held in "joint tenancy" or in "joint tenancy with right of survivorship," or that the account or certificates of deposit shall be payable to the survivor or survivors of the persons named in such account or certificate of deposit, then such account or certificate of deposit and all additions thereto shall be the property of such persons as joint tenants with right of survivorship. . . .

More is required than intent.

In interpreting § 67-552 our Supreme Court has held there must be substantial compliance with the designation in writing requirement of the statute. *Cook* v. *Bevill*, 246 Ark. 805, 440 S.W. 2d 570 (1969); *Willey* v. *Murphy*, 247 Ark. 839, 448 S.W. 2d 341 (1969); Note, 24 Ark. L. Rev. 361 (1970-71). Again in *Justice* v. *Ringold,* 254 Ark. 11, 491 S.W. 2d 383 (1973) the Supreme Court restated the rule that no survivorship interest is created where the decedent does not affix his signature to an instrument complying with the statutory requirement. The above cases appear to require a) some writing, b) signed by purchaser, c) indication of intention in order to *substantially comply*.

Certificate No. A1960 has a copy of a receipt bearing Ms. Self's signature. Certificate No. A1446 is unsigned and nothing appears in the record to be Ms. Self's signature nor that of her agent. In the case of Certificate No. A2069 there appears the signature of Marie Bertrand, Ms. Self's agent, on two different documents — a copy of a receipt and a maturity tickler.

After hearing all the testimony and viewing the evidence the trial court held there to be sufficient evidence of an intention on the part of Ms. Self the three certificates were to pass to Barbara Ann Baker upon Ms. Self's death.

We find the trial court's decision to be correct in regard to Certificates No. A1960 and No. A2069. However, we find the court erred in its view of No. A1446. There is not substantial designation in writing for No. A1446 to comply with the statutory requirement. Intention of the purchaser is not sufficient in light of the specific requirement that there be a designation in writing. Therefore we find certificate No. A1446 to be the property of the estate.

Reversed in part and remanded.

NEWBERN, WRIGHT AND PILKINTON, JJ., concur.

DAVID NEWBERN, Judge, concurring. I reluctantly agree with the result in this case. The statute, Ark. Stat. Ann. § 67-552 (Repl. 1966), quoted in the majority opinion is sub-

ject to an interpretation which would permit a "designation in writing" to be construed as the writing on the certificate itself which, if accepted by the purchaser, could be interpreted readily as his designation. The analogy to a deed conveying land in joint tenancy would be strong. In the case of a deed, the grantee need sign nothing for the conveyance to be effected in that way.

Because of the decision in *Willey* v. *Murphy*, 247 Ark. 839, 448 S.W. 2d 341 (1969), we are permitted no interpretation of the statute other than the one expressed in the majority opinion. I believe we should make clear, however, that neither *Cook* v. *Bevill*, 246 Ark. 805, 440 S.W. 2d 570 (1969), nor *Justice* v. *Ringold*, 254 Ark. 11, 491 S.W. 2d 383 (1973), would require the holding we reach here, as in those cases the certificates themselves contained no right of survivorship designation.

CHIEF JUDGE WRIGHT and JUDGE PILKINTON join in this concurring opinion.

Darrell ELMORE *v.* STATE of Arkansas

CA CR 79-91 592 S.W. 2d 124

Opinion delivered December 19, 1979
Released for publication January 9, 1980

John W. Achor, Public Defender, by: *William H. Patterson, Jr.*, Chief Appellate Attorney, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson*, Asst. Atty. Gen., for appellee.

MARIAN F. PENIX, Judge. Defendant was charged with Burglary and Theft of Property in violation of Ark. Stat. Ann. §§ 41-2002 and 41-2203, respectively. Allegations were on November 4, 1978 the defendant and two companions broke into Couch's Exxon Station in North Little Rock and took tools valued over $100.00. Also alleged was the defendant had previously been convicted of more than one but less than four other felonies, and his sentence should be made greater, accordingly. Defendant pleaded not guilty. Defendant was tried by a jury, found guilty, sentenced to fifteen years on the burglary charge and five years on the theft charge, the terms to run consecutively.

Before trial, a Denno hearing was held on the defendant's motion to suppress an in-custody statement which he made. The court allowed the statement introduced into evidence. From this ruling, the defendant appeals.

From the record we find State Police Investigator Lynn Chachere interviewed the Defendant at the Prairie County jail on November 9, 1978 at 11:30 p.m. Present was Chief Deputy Sheriff of Prairie County, Bruce Roe. Prior to the interview of the defendant, Trooper Chachere interviewed two other defendants, Mills and Edwards, who were the defendant Elmore's accomplices in several burglaries and had been arrested with Elmore. Trooper Chachere took down a lengthy statement from defendant Elmore. However, Elmore refused to sign the statement. Both Chachere

and Roe testified Elmore's statement was freely given. They also testified Chachere read Elmore his rights from the State Police standard rights waiver form and Elmore initialed each separate right and signed the form. The defendant Elmore testified in his own behalf. He denied having made the statement. He also stated his requests for an attorney were refused and alleged the officers threatened to "bust his head" if he didn't talk. The defendant also denied ever having read the statement.

At the conclusion of the Denno Hearing, the trial court found the defendant's statements to have been voluntary and that he had been advised of his rights. The defendant was 23 years old. The trial judge had the opportunity to personally observe him during the Denno Hearing and also at the time of his testimony during the trial.

There are several factors to be considered by the trial court in determining whether a defendant's confession was voluntarily given. These include the age of the accused, lack of education, low intelligence, lack of advice as to his constitutional rights, length of detention, repeated and prolonged nature of questioning, and the use of physical punishment. *Perkins* v. *State*, 258 Ark. 201, 523 S.W. 2d 191 (1975); *Watson* v. *State*, 255 Ark. 631, 501 S.W. 2d 609 (1973).

There is conflicting testimony as to what occurred at the time Trooper Chachere interviewed the defendant. The defendant testified he was threatened into making a statement, and also was denied the opportunity of calling an attorney. Both Trooper Chachere and Deputy Sheriff Roe testified the defendant was informed of his rights, that defendant voluntarily waived his rights, and that the defendant gave the statement to Trooper Chachere even though he wouldn't sign it.

This court must uphold the finding of the lower court unless such finding is clearly against the preponderance of the evidence. *Degler* v. *State*, 257 Ark. 388, 518 S.W. 2d 515 (1975); *Rouw* v. *State*, 265 Ark. 797, 581 S.W. 2d 313 (1979).

The fact the statement was unsigned does not render it inadmissible where the defendant is shown to have understood the substance of the statement. *Wong Sun* v. *U.S.*, 371 U.S. 471. See also, *Scott* v. *State*, 249 Ark. 967, 463 S.W. 2d 404 (1971).

Affirmed.

HAYS, J., dissents.

M. STEELE HAYS, Judge, dissenting. I am unable to join in the affirmance of this case for the reason that the trial court, as I view it, should not have admitted the purported confession of appellant into evidence. 23 C.J.S. *Criminal Law* § 833, pp. 237-238 states:

> If a statement purporting to be a confession is given by accused, and is reduced to writing by another person, before the written instrument will be deemed admissible as the written confession of accused, he must in some manner have indicated his acquiescence in the correctness of the writing itself. If the transcribed statement is not read by or to accused, and is not signed by accused, or in some other manner, approved or its correctness acknowledged, the instrument is not legally, or per se, the confession of the accused; and it is not admissible in evidence as the written confession of accused.

[See also Annot., 23 A.L.R. 2d 919 (1952).]

The majority cites *Wong Sun* v. *United States*, 371 U.S. 471, for the rule that an unsigned statement is not rendered inadmissible where the defendant is shown to have understood the substance of the statement. However, I believe the facts in this case call for a different result. In *Wong Sun*, the United States Supreme Court specifically stated in regard to the unsigned statement:

> The petitioner has never suggested any impropriety in the interrogation itself which would require the exclusion of this statement.

In this case, the appellant emphatically rejected the contents of the written statement at the *Denno* hearing. The written confession was an extrajudicial statement offered by the state for the truth of its contents. As such, it required proper authentication by the defendant. *State* v. *Rosa*, 170 Conn. 417, 365 A. 2d 1135 (1976); *Marshall* v. *State,* 339 So. 2d 723 (Fla. App. 1976); *People* v. *Lebron,* 360 N.Y.S. 2d 468 (1974).

In instances where any doubt exists as to whether a purported confession is given free of duress, the court could well require a tape recording of the interview to insure its authenticity. [See *State* v. *Goodwin*, 223 Kan. 257, 573 P. 2d 999 (1977).]

For the reasons stated above, I respectfully dissent.

Johnny HOLLAND *v.* STATE of Arkansas

CA CR 79-8 591 S.W. 2d 698

Opinion delivered December 19, 1979
Released for publication January 9, 1980

Robert E. Irwin, for appellant.

Steve Clark, Atty. Gen., by: *Dennis R. Molock*, Asst. Atty. Gen., for appellee.

GEORGE HOWARD, JR., Judge. This is an appeal from the imposition of a one year sentence to the Department of Correction pursuant to a suspension of four years of an original sentence of five years where appellant was required originally to serve one year in the penitentiary.

Appellant contends:

> The revocation of the suspended portion of appellant's original sentence was not authorized by the sentencing provisions of the Arkansas Criminal Code provided by Ark. Stat. Ann. § 41-803(4).

The pertinent facts are: On August 19, 1976, appellant entered pleas of guilty to two counts of theft of property. The trial court fixed appellant's punishment at five years in the Department of Correction, on each count, "with four (4) years suspended." The sentences were to run concurrently.

Appellant was released from the penitentiary in December, 1976.

On March 9, 1978, the State filed a petition for the revocation of appellant's suspended sentence.

Between September 13, 1977, and February 14, 1978, appellant was convicted of nine misdemeanor charges, including two counts of driving while under the influence of intoxicating liquor and one count of minor in possession. In addition to paying fines, appellant was confined to the county jail for ten days on two of the charges. Because of

appellant's failure to pay an installment due on a fine, appellant was taken into custody by officers, but escaped and fled to Crescent City, California. Arkansas police officers were required to make a trip to California in order to return appellant to Arkansas.

On November 28, 1978, the trial court found that appellant had "inexcusably fail[ed] to comply with the conditions of his suspension . . . and he hereby is directed to serve a period of one (1) year in the Arkansas State Penitentiary."

The force of appellant's argument for reversal may be briefly summarized as: The trial court was without authority to revoke any part of that portion of the suspension under appellant's original sentence, and that the original judgment did not set forth any conditions for suspension of the remaining four years of the original five year sentence.

Ark. Stat. Ann. § 41-803 (4) (Repl. 1977) provides in material part:

> If a defendant pleads or is found guilty of an offense other than capital murder, . . . [t]he court *may* sentence the defendant to a term of imprisonment and *suspend imposition of sentence* as to an additional term of imprisonment, . . . (Emphasis added.)

The original judgment of the trial court, as emphasized by appellant, does not contain any expressed conditions relating to the suspension given appellant. However, the presentence report of the probation officer of the trial court, which is a part of the record, does shed some light on the matter. The report, in relevant part, provides:

> "After a plea of guilty to two counts of Theft of Property in Circuit Court on August 19, 1976, Mr. Holland was given a five year prison term with four years suspended. *Upon his release from prison, he was to work steadily and stay out of any and all trouble for the next four years.*[1] *(Emphasis supplied.)*

[1] The original trial transcript was not made an exhibit to the revocation proceeding.

It is plain that the trial court obviously advised appellant from the bench that as a condition to the suspension afforded him, appellant was required to work steadily and stay out of any and all trouble for the next four years. Moreover, it is equally plain that the conditions were to become operative upon appellant's release from prison. Appellant does not challenge the accuracy of the pre-sentence report in any way.

In *Thornton* v. *State*, 267 Ark. 675, 590 S.W. 2d 57 (Ark. App. 1979), this Court held that there was substantial compliance with the statutory requirement that a defendant is entitled to a written list of the conditions governing his suspension where appellant was advised explicitly by the trial judge of the conditions. *Cain* v. *McGregor*, 182 Ark. 633, 32 S.W. 2d 319.

In *Matthews* v. *State*, 265 Ark. 298, 578 S.W. 2d 30 (1979), our Supreme Court has made it clear that a suspended sentence commences at the time a defendant is released from active confinement by the Department of Correction.

While the original judgment speaks in terms of four years of appellant's five year sentence as "suspended", the sum and substance of the trial court's action in making the conditions operative upon appellant's release from prison and the imposition of a one year sentence to the penitentiary at the close of the revocation hearing, the trial court, indeed, regarded its action as "a suspension of the imposition" of an additional four years to the original one year sentence to the Department of Correction.

We are persuaded that this record dictates a conclusion that the trial court suspended pronouncement of sentence of the additional four years articulated in the trial court's judgment of August 19, 1976.

Finally, appellant's challenge of the trial court's authority to revoke his suspended sentence is asserted for the first time on appeal. *Hughes* v. *State*, 264 Ark. 723, 574 S.W. 2d 888 (1978).

Affirmed.

WRIGHT, C.J. and NEWBERN, J., dissent.

ERNIE E. WRIGHT, Judge, dissenting. I would reverse the judgment of the court entered August 16, 1978, imposing a one year sentence upon appellant on the stated finding, "The defendant has inexcusably failed to comply with the conditions of his suspended sentence." The judgment then enumerates certain actions of the defendant constituting misdemeanor offenses.

My dissent is not on the basis appellant's conduct does not warrant additional punishment, but rather is on the grounds the original sentence, as to the suspended portion, was not authorized by law, and therefore not a valid basis upon which to predicate further sentence.

Ark. Stat. Ann. § 41-803, a part of the new Criminal Code adopted in 1975, details the only sentences authorized and specifies no defendant convicted of an offense shall be sentenced otherwise than as authorized by the Criminal Code. § 41-803(4) provides if a defendant pleads or is found guilty of an offense other than capital murder, the court may sentence the defendant to pay a fine and suspend imposition of sentence as to imprisonment or place him on probation, or sentence the defendant to a term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment. The section expressly prohibits sentencing a defendant to imprisonment in the penitentiary and placing him on probation except as authorized by § 41-1204. The latter section does not authorize sentencing a defendant to confinement in the penitentiary and also providing for probation.

In this case the court sentenced appellant to five years in prison and suspended four years. There was an imposition of a five year sentence and an authorized provision suspending four years, rather than a sentence of one year and reserving jurisdiction for imposition of an additional sentence as authorized by § 41-803.

The original judgment imposing sentence dated August

16, 1976 did not set out any conditions imposed upon the defendant as mandated by § 41-1203 in the case of suspension of imposition of sentence or probation; and the record is silent on any conditions attached to the suspended sentence other than a statement in the report of the probation officer dated after the judgment imposing the additional one year of confinement stating, "Upon his release from prison he was to work steadily and stay out of any and all trouble for the next few years."

The cases cited in the majority opinion either involve sentencing prior to the date of the new Criminal Code or do not address the question here raised of a sentence not authorized by law.

In my view the judgment of August 16, 1978 sentencing appellant to one year in prison is unauthorized by law. It is based upon a suspended sentence not authorized by present law. I am unable to equate suspended sentence with suspension of imposition of sentence.

I am authorized to say NEWBERN, J., concurs in this dissent.

Ches WILLIAMS *v.* Frank W. FLETCHER

CA 79-231 593 S.W. 2d 48

Opinion delivered December 19, 1979
Released for publication January 23, 1980

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

Nance; Nance, Fleming & Wood, for appellee.

DAVID NEWBERN, Judge. The appellee, an accountant, brought suit for beach of an oral, contingent fee contract for accounting services. The services were performed for the appellant with the object of seeking a reduction of a U.S. government claim for delinquent taxes which accrued over a four year period. The appellee alleged the appellant had agreed to pay one fourth of the difference between what the appellant would ultimately be required to pay and what the government claimed to be due. The appellee was awarded a judgment of $12,229.26, and the appellant appealed to the Arkansas Supreme Court, mainly alleging the appellee's evidence was not sufficient to have gone to the jury. The case was assigned to us pursuant to Rule 29 (3), and we affirm the judgment.

The appellant has asked us to consider three alleged errors. In his third point he contends the trial judge improperly refused to give an instruction that the appellee was required to prove by a preponderance of the evidence and with reasonable certainty the amount of the tax deficiency stated by the U.S. Internal Revenue Service (IRS) and the deficiency ultimately determined to exist. The appellant did not furnish an abstract of the instructions given by the court, and thus we decline to consider this point. It has long been the rule that an appellant in a civil case who complains of failure to give a proffered instruction must set out or abstract the instructions given. See *Ellis* v. *State*, 267 Ark. 960, 590 S.W. 2d 309 (Ark. App. 1979), in which this court discussed the rule as it has been applied in civil cases and misdemeanor criminal cases and held that it applied even to felony conviction appeals. See also, Rule 9 (d) of the Arkansas Supreme Court and Court of Appeals.

Before discussing the appellant's first two points, we

must state these additional facts. The appellant was, in 1973, under investigation for federal income tax evasion. In a meeting between IRS officials and the appellant, his lawyer and the appellee, who had been hired as appellant's accountant in 1972, IRS officials stated the appellant owed additional taxes of $198,623.43 for the years in question, according to the appellee's testimony.

The appellee testified that after the criminal aspects of the case had been disposed of, he met with the appellant and they agreed that, in addition to the standard hourly rate the appellee had been paid, he would be entitled to one fourth of the amount he was able to "save" for the appellant. The appellee's testimony at the trial was that he had with him in March of 1975, and on the day the alleged agreement was reached, a copy of a worksheet upon which he had calculated the IRS claim to be $189,828.29. That figure was, according to the appellee, based on a report which had been filed by Treasury Department agents in the criminal proceedings and was the "latest" estimate of the government's claim. The appellee testified the figure was provided to the appellant at the time they agreed on the contingent fee.

In his first point, the appellant contends a verdict should have been directed in his favor because the entire evidence of the original claim, or "starting figure," of the IRS from which the "savings" were to be determined was the testimony of the appellee which was contradicted by the previously taken deposition of the appellee. For this proposition, the appellant cites a number of Tennessee cases, the most recent of which is *Gambill* v. *Hogan*, 30 Tenn. App. 465, 207 S.W. 2d 356 (1947). The statement of the law the appellant asks us to apply from that case is, ". . . when a witness both affirms and denies a proposition, without explanation, the fact as to which he testifies remains unproven. [207 S.W. 2d at 361]."

We have no quarrel with that statement of the law, but it does not apply here. The appellee's testimony in his deposition was revealed at the trial when the appellant's counsel had the appellee read certain parts of it for the purpose of impeaching his trial testimony. At the trial, the appellee's

testimony was that upon his deposition he had said from the outset he had presented to the appellant the figure $189,-828.29 as the claim of the IRS, as of the time of the alleged agreement, and that it was based on preliminary IRS agent reports. The appellee freely admitted in his deposition he did not know at that time how much of that money he could "save" the appellant. At one point in his deposition he said the figure was not the basis of the law suit. At the trial, the appellee said that if he had made such a statement in his deposition it was a mistake, as the suit was based on that figure from its outset.

Unlike the cases cited by the appellant, this is not one where the witness was vague and uncertain or where he made two diametrically opposed and irreconcilable sworn statements at different times. Here the appellee had one lapse in his deposition testimony which must be regarded as insignificant when viewed in the context of the other testimony in the deposition. Although the deposition was not introduced in evidence, enough of it was read by the appellee in the appellant's attempt to impeach his trial testimony to make it clear the appellee was firm in both his statements that both he and the appellant knew the figure upon which their agreement was based. We hold that if the appellant's misstatement could be regarded as sufficient to invoke the rule the appellant would have us apply, it was "explained" when viewed in the context of all the testimony we have examined.

Contingent fee contracts such as this one between an accountant and a client under attack by the IRS have not been the subject of cases decided by us or by our supreme court. Other jurisdictions have dealt with them, however, and have found them inoffensive, even where a fiduciary relationship existed between accountant and client, *Jorge* v. *Rosen*, 208 So. 2d 644 (Fla. App. 1968), or where the actual work done by the accountant seemed grossly insufficient in relation to the fee to be determined in this manner. *Gladding* v. *Langrall, Muir & Noppinger*, 401 A. 2d 602 (Md. App. 1979). Such an agreement is sufficiently definite as to the price of services, as the amount can be determined by the court without any new expression by the parties. 1 Corbin, *Contracts*, § 98, p. 433 (1963).

The other point raised by the appellant is that the verdict is not supported by substantial evidence. We assume this argument is based on a supposition we would find the testimony of the appellee worthless. To the contrary, we find the appellee's testimony constitutes substantial evidence, and we find no reason to disturb the jury's verdict or the judgment.

Affirmed.

Supplemental opinion on Denial of Rehearing
delivered January 23, 1980

PER CURIAM

In his motion for rehearing, the appellant has correctly pointed out that Rule 9 does not require an appellant to abstract all the instructions given by the court as a predicate to objection on appeal to failure by the trial court to give an instruction proffered by the appellant. *Guaranty Trust Life Insurance Company of Chicago, Illinois* v. *Koenig,* 240 Ark. 650, 401 S.W. 2d 216 (1966); *Forest Park Canning Company* v. *Coler*, 226 Ark. 64, 287 S.W. 2d 889 (1956).

We cited *Ellis* v. *State,* 267 Ark. 960, 590 S.W. 2d 309 (Ark. App. 1979), as a case in which the majority opinion explained the history of the abstracting requirement, not as a precedent binding on the parties in this case. Our historical discussion in *Ellis* was incomplete, however, as it left out the *Guaranty Trust* and *Forest Park* cases cited above.

We will not, however, depart from a requirement that an appellant abstract at least the instruction proffered where the basis of appeal is failure of the trial court to have given it. We regard that requirement as fairly set out in Rule 9 (d). The rationale for the rule and the requirement as we apply it here will be found in *Bank of Ozark* v. *Isaacs, et al,* 263 Ark. 113, 563 S.W. 2d 707 (1978).

Nor will we consider the failure to abstract cured by mention of the omitted matter in the brief of the appellee where no supplemental abstract is filed. Rule 9 (e); Smith, *Abstracting the Record*, 31 Ark. L. Rev. 359, 368 (1977).

Here neither party abstracted any instruction given or proffered. The appellent did set out the proffered instruction in the argument portion of his brief, and the appellee set out in the argument portion of his brief the comparable instruction that was given by the court. As stated, that does not comply with the abstracting requirement.

In view of this failure, we persist in our refusal to give formal and full consideration to the appellant's point. However, we can assure the appellant that even in our origianl consideration of the case we did not completely ignore the point although we decided to base our decision on the abstracting lapse. To the extent we were able to consider the point, it was apparent to us the court correctly instructed the jury it was the appellee's burden to prove the terms of the contract and it was not necessary for the court to have used the word "price" or to have specifically instructed the jury in the manner the appellant's argument suggests was requested at the trial.

Rehearing denied.

Jerry YOUNG et al *v.* Everett H. YOUNG
and Maggie YOUNG

CA 79-183 593 S.W. 2d 72

Opinion delivered January 9, 1980
Released for publication January 30, 1980

Franklin Wilder, for appellants.

N. D. Edwards, for appellees.

ERNIE E. WRIGHT, Chief Judge. Appellants seek reversal of the decree of the trial court dismissing their complaint for partition of forty acres of land and confirming title solely in appellees.

Various points for reversal are urged by appellants. However, as we conclude the decree should be affirmed on the restoration of a lost deed it is unnecessary to discuss the other points raised by appellants.

Henry Young acquired title to the SW 1/4 of the SE 1/4 of Section 7, Township 11 North, Range 30 West in Crawford County, Arkansas in 1905. Appellants and appellees all claim title through Henry as the common source. In 1918 he mortgaged the 40 acres along with 160 acres of adjoining land to the Federal Land Bank. In 1925 his son, Edward Young, purchased the 160 acres from Henry Young and wife, and

the deed was duly recorded. Appellees, Everett Young and his wife Maggie Young, alleged in their counterclaim that Edward Young also obtained a deed from Henry Young to the forty acres but that it had been lost or destroyed without recording. After hearing extensive testimony the Chancellor found the appellees had proven by the clearest, most conclusive and satisfactory proof that Henry Young and his wife executed and declined a conveyance of the forty acres to Edward Young in 1926, reserving a life estate in themselves, and that the deed had been lost or destroyed and should be restored. Henry Young died in the mid 1930s and his widow died in the early 1950s.

Edward Young and his wife Lucy took possession of the forty acres and exercised exclusive control over it along with the 160 acres after the death of Henry Young's widow. Edward Young died in 1957 and in 1967, Lucy Young executed a deed to the forty acres to Everett Young; and in April 1978 she joined in a deed with the children of her and Edward Young conveying the land to the son, Everett Young.

Everett Young and his wife, Maggie, have exercised exclusive control over the forty acres since 1967 and, while they have not lived upon the land, they have utilized it in various ways, claimed ownership and paid the taxes. The Court found title in appellees was also established by adverse possession.

It is undisputed that appellees have record title to at least a one-half interest in the forty acres, and appellants would have an inherited interest as decedents of Henry Young only if appellees failed to establish a deed was executed and delivered by Henry Young and his wife to Edward Young or failed to establish ownership by adverse possession.

We look then to the evidence before the court supporting the decree finding that a deed conveying the forty acres was in fact executed and delivered in 1926 by Henry Young and his wife to Edward Young.

Lucy Young, widow of Edward Young, age 85, testified

she and her husband bought 160 acres from his father, Henry Young, in 1925 and that in October, 1926, Henry Young and his wife made and delivered a deed to the forty acres in dispute to Edward at Mountainburg and Edward brought the deed home. Edward took over the mortgage payments on the land. Henry and his wife reserved the right to live on the forty until they died. Henry died in 1935 and Cordelia died in 1951. Lucy kept the deed at home. While she was away someone entered the home, tore things up and the deed and box it was in was missing. The deed was sent to the Federal Land Bank and returned when the loan was paid off. Edward made the mortgage payments until 1926 and until the mortgage was paid off in 1948. Numerous receipts from the Federal Land Bank evidencing loan payments by Edward Young were received in evidence, along with a letter from the Bank's affiliate office in Fort Smith dated September 18, 1948, to Edward calling attention that taxes had not been paid on the forty acres and referring to the land as belonging to Edward. At that time Cordelia was still living upon the forty. Edward's brothers and sisters all knew about the deed. She doesn't know why they failed to record the deed. She and her husband took possession of the forty acres after Cordelia Young died, claimed to own it and utilized it with the rest of the farm. The 200 acres was under one fence.

Harrison Young, a brother of Everett, testified his grandfather and grandmother lived on the forty acres until they died, and they recognized his father, Edward Young, and wife as being the owners of the land. His mother had possession of the forty acres after the death of his grandfather and grandmother and it was just part of the one farm. In 1965 he saw the deed for the forty that had been executed by his grandparents to his dad and mother. The deed was in the old home place. He looked for the deed after the house was ransacked but did not find it.

Mrs. Dutton testified she is a sister of Everett Young and that her father, Edward Young, claimed ownership of the forty as far back as she remembers. She worked like a man on the forty to help pay off the mortgage. The mortgage was paid off in 1948 or 49. Her father, Edward Young, had possession of the whole farm including the forty and after

his death her mother had possession. In 1963 her mother showed the deed to the forty acres to her and her husband.

Appellee Everett Young testified he was born on the 160 acres and ownership of the forty by his father had been discussed by family members through the years. In 1975 Jerry Young commented to Everett that he knew he had bought the whole place from his mother and Everett confirmed that he had. Jerry asked if there would be a chance to buy 5 or 10 acres, and gave him a card with his phone number on it. The card was received in evidence. His father and mother and he had paid taxes on the forty acres for many years. He saw the deed in 1953. His dad got the papers out and showed them to him. The deed was stolen or taken by someone. He knew where it was kept in his mother's home. Someone ransacked the place while she was away in Texas. They could not find the papers after that. He has paid the taxes on the forty since 1966, has put up most of the fencing, he and his sons cleared about ten acres nine years ago, he has fruit trees on it, and has been raising corn and vegetables on it. When he bought the land from his mother he did not know the deed from his grandparents to this father had not been recorded until after he had paid for the land.

Katherine Stewart, one of the appellants, testified she took Edward Young's widow, Lucy, to the welfare office in the late 60s or early 70s and she had to have her deeds. They found evidence from the papers this forty acres was in her name. They put it down that she owned the forty acres, and she told them she owned it.

It is well settled the chancellor's findings of fact will not be reversed unless clearly against the preponderance of the evidence. *Gibson* v. *Heiman,* 261 Ark. 236, 547 S.W. 2d 111 (1977).

The testimony as to the execution and delivery of the deed of Henry Young and wife to Edward Young, supported by testimony of various witnesses that they had seen the deed, the long exclusive possession of the land and payment of taxes by Edward Young, his widow and the appellees are sufficient to support the finding of the chancellor that the execution and delivery of the deed and the loss of same was

established by clear, conclusive and satisfactory evidence. *Isgrig* v. *Thomas,* 219 Ark. 167, 240 S.W. 2d 870 (1951); *Carpenter* v. *Jones,* 76 Ark. 163, 88 S.W. 871 (1905).

Affirmed.

TRAVELERS INSURANCE COMPANY
v. Steve HEIDELBERGER

CA 79-60 593 S.W. 2d 70

Opinion delivered January 9, 1980
Released for publication January 30, 1980

Southern & James, for appellant.

Mike J. Etoch, Jr., for appellee.

M. STEELE HAYS, Judge. This is an appeal of a worker's compensation case. The Administrative Law Judge awarded benefits for medical expenses and temporary total disability for a period of ninety days while claimant was recuperating from an ulcer condition. On appeal to the Full Commission, the opinion of the Administrative Law Judge was affirmed with one Commissioner dissenting. The respondent-carrier appeals from the award of the Full Commission.

The claimant is 47 years old and has been employed by Mohawk Rubber Company at Helena for some 19 or 20 years as a bead insulator operator. His stomach trouble was recognized about the middle of March of 1978. Claimant was hospitalized for approximately two weeks and was off an additional three weeks before returning to work. Claimant returned to work feeling well, but the condition flared up again, and he returned to the doctor for treatment in July. Believing his job was affecting him, claimant took three weeks of earned vacation time and felt better but when he returned to work, "job related tension" caused the ulcer to flare up. Claimant testified that the job was not the cause of his ulcer but that it did cause the condition to flare up.

Claimant's job as a bead operator was described by him as one requiring very exacting performance using a complicated machine that was often inoperative. Additionally, the entire plant was dependent on the successful operation of the machine. Claimant's testimony was that his family life was happy and content and that aside from the plant, he knew of nothing that caused him irritation and stress.

Appellant contends on appeal that there is no substantial evidence to support the award and that claimant failed to prove causation of an injury arising from the employment.

As to the substantial evidence argument, we agree with appellant that the evidence that claimant's condition was caused by his employment is very nearly lacking in substantiality. However, while we agree with appellant and the dissenting commissioner that claimant's testimony is of no probative value as to causation, his testimony regarding the stress and pressures of his job and its effect upon him is relevant and is of evidentiary value. Taken alone, it would

fall far short of meeting the quantum of proof required, even in the worker's compensation cases, but it is not alone, for there is the testimony of Dr. James R. Rasch, a physician selected by the appellant solely for the purpose of examining the claimant, and it supplies the degree of medical opinion to support the award.

Appellant argues that Dr. Rasch's testimony fails to state that claimant's condition was work related to a "reasonable medical certainty," but it is clear from a careful reading of Dr. Rasch's testimony in its entirety that he attributes claimant's condition to his employment. Dr. Rasch is a specialist in internal medicine and obviously familiar with peptic ulcer disease and its etiology. Speaking generally of ulcer disease, Dr. Rasch stated: "There are a number of factors that undoubtedly contribute to ulcer diseases, certainly stress is a significant factor. We know there is a definite association between the emotional center and the gastrointestinal tract in particular, peptic ulcer disease. (Portion omitted) . . . but we feel that this is a big relationship between environmental factors and stress and this is something that is difficult to determine objectively. *But, it is definite.*"

Speaking specifically of claimant, Dr. Rasch stated:

Q. Doctor, in your reports you give a possibility of several causes. It's not your opinion that the work is the only cause, is it.

A. That would be the only cause that I could put my finger on. Obviously there was something in the work situation, that caused him enough emotional strain that his ulcer reactivated. If there were other factors, we couldn't identify them, as I specifically tried to identify circumstances and his family ties, his family life circumstances with respect to his finances, anything I might be able to put my finger on, that would be contributory and I couldn't get any leads. I think it also was, that I mentioned when his physician recommended that he stay off from work, that he healed up.

Later, Dr. Rasch stated:

> Q. I believe you said that job related stress and strain is a very definite causal connection . . . in peptic ulcers. Is that not true. Is that the way I interpret it to be correct.
>
> A. Right, I believe there is.
>
> Q. Speaking in this specific case, is this your feeling that the stress and the strain that you found him to relate to his job was a causal connection with regard to the ulcers that he had.
>
> A. As I wrote in the comments, most likely.

Additionally, Dr. Rasch's viewpoint is supported by another medical opinion, as the record contains a written report from Dr. J. H. Barrow of Helena dated July 13, 1978, which, though brief, reflects an opinion on his part that claimant had a partial obstruction due to an ulcer which was the result of work related tension.

We find this evidence to be sufficient. It might be added that if there were unresolved doubts as to causation, it seems clear that the evidence present in this record would suffice as a matter of aggravation. It has been said repeatedly in the decisions of this state that the law does not require that a claimant be compelled to offer proof to a mathematical certainty. *Herron Lumber Company* v. *Neal,* 205 Ark. 1098 (1943). In *Neal* the court said:

> The rule as to the quantum of proof necessary to sustain an award in a case of this kind is thus expressed in 71 C.J.S. 1087: In determining the sufficiency of evidence, doubts should be resolved in favor of claimant, and the evidence should be reasonably and liberally construed in his favor.

That approach to worker's compensation cases is firmly established in this state. *Hixson Coal Company* v. *Furstenberg,* 225 Ark. 568, 284 S.W. 2d 120 (1955); *American Casualty Company* v. *Jones,* 224 Ark. 731, 276 S.W. 2d 41 (1955).

Appellant argues that there is an absence here of a specific traumatic incident to which claimant's ulcerated condition could have been found as related in a natural and continuous sequence of events. It is true that a number of jurisdictions have held that to be compensable, an injury must have occurred either with suddenness, or as a result of an isolated episode or trauma, and there is a lack of uniformity in decisions dealing with this issue. 99 C.J.S. *Workmen's Compensation* 165, et seq. However, Arkansas has taken the more liberal route in this regard, *Murch-Jarvis Company Inc.* v. *Townsend,* 209 Ark. 956, 193 S.W. 2d 310 (1946), and has adhered to it faithfully in the cases following *Murch-Jarvis* [See *Batesville White Lime Company* v. *Bell,* 212 Ark. 12 (1947); *Triebisch* v. *Athletic Mining & Smelting Compnay,* 218 Ark. 379 (1951); *Scobey, Adm.* v. *Southern Lumber Company,* 218 Ark. 671 (1951); *Stanhouse & Sons, Inc.* v. *Simms,* 224 Ark. 861 (1954).]

In *Murch-Jarvis,* the claim arose from the gradual inhalation of dust and fumes with resulting bronchial problems. The respondent argued that claimant did not suffer an accidental injury because no definite date or occasion could be fixed as to when the aggravation occurred, citing Professor Schneider, Vol. 4, Perm. Ed., p. 387 ("Diversity of opinion exists as to what constitutes the customarily required definite time and place of an accident. On this question expressions of the courts may vary from the statement that accidents do not happen all day to decisions to the effect that it may require as much as six months for an accident to culminate in an injury. A reasonably definite time is all that is required.") The court held that the condition was accidental within the Arkansas Workers' Compensation Act.

In *Batesville White Lumber Company,* the claimant was upheld based on breathing in dust over a period of years. The opinion quoted with favor the case of *McNuley* v. *Carolina Asbetos Company,* 206 N.C. 568; 174 S.E. 509, in which

pulmonary diseases followed five months exposure to asbestos dust.

In *Scobey, supra,* the claimant's death was shown to be the result of carcinoma of the lungs attributable, according to some testimony, to breathing in emery dust. The court said that because it took the cancer a year and a half to kill claimant does not make it any less an accident.

Finally, in *Stanhouse, supra,* claimant suffered from emphysema of the chest, gradually acquired from work conditions. In upholding an award of compensation, the court commented:

> In construing the Workmen's Compensation Act, our cases are precise to the point that in this jurisdiction we do not require an injured workman to point specifically to a single incident before he can be heard before the Commission or our Courts. We have long adhered to the rule that an accidental injury may stem not only form a specific incident or a single impact, but also may result by a continuation of irritation upon some part of the body.

For the reasons stated above we find that there is substantial evidence that claimant sustained an accidental injury and, therefore, we affirm the Commission's holding.

Lloyd L. LEWALLEN and Betty LEWALLEN
v. Delta L. BETHUNE, Administratrix of
the Estate of Thema LEWALLEN, Deceased

CA 79-167 593 S.W. 2d 64

Opinion delivered January 9, 1980
Released for publication January 30, 1980

Wilson & Grider, for appellants.

Simpson & Riffel, for appellees.

JAMES H. PILKINTON, Judge. On January 25, 1971, and during the lifetime of the late Thema Lewallen, a suit was filed in the Randolph Chancery Court by the present appellee, Delta L. Bethune, against the present appellants, Lloyd L. Lewallen and Betty Lewallen, involving practically all of the issues in the present case. Sometime after the filing of the original case, Mrs. Thema Lewallen died, and on October 19, 1972, an order of revivor was entered. No action was taken by either of the parties through the greater part of 1975. On November 19, 1975, the case was dismissed. Then on November 17, 1976, just two days before the action would

have been barred by the statute of limitations, Lloyd Lewallen and Betty Lewallen filed this suit, using their original counsel. Thereafter, original counsel withdrew from the case, and by motion of the plaintiffs, present counsel for appellees was substituted and took over the case. Also, Mr. George Rawlings of Louisville, Kentucky, was noted as co-counsel for plaintiffs-appellees.

The plaintiffs took no action to prosecute their case, and the court noted by docket entry dated November 15, 1978, that the cause would be subject to dismissal for want of prosecution unless set for trial promptly. It was finally set for December 20, 1978 for a trial on the merits.

During the afternoon of December 18, 1978, defendants below, who are appellants here, filed a motion asking the regular Chancellor to disqualify himself or to withdraw from hearing the case. The matter of disqualification of the presiding Chancellor was heard at 9:30 a.m. the next day, December 19, 1978, but this proceeding was not reported by the court reporter, and the Chancellor did not act upon the motion for disqualification at that time. The cause came on for further hearing the following day, December 20, which was the date previously set for trial on the merits.

On December 20, 1978, when the parties and attorneys for the respective sides appeared, the Chancellor on his own motion took note of the large number of witnesses who had been subpoenaed, and were present in the courtroom, to testify in the case in chief. Also, the court took note of the out-of-county parties, and out-of-state witnesses who were present to testify, and the presence of the out-of-state attorney, Mr. George Rawlings, of Louisville, Kentucky, who was there as co-counsel for plaintiffs below (appellees here). The trial court made the following statements:

> I want the record to reflect that on this 20th day of December, 1978, this cause comes on the Court's own motion in the case of Bethune Administratrix vs. Lloyd Lewallen and Betty Lewallen, Number E-76-134. Mr. Jarboe and Mr. Throesch on behalf of Lloyd Lewallen and Betty S. Lewallen have filed a motion asking this Court to recuse for a number of reasons. Mainly that

this Court when practicing law prepared some of the instruments and allegedly represented one of the parties. Now, of course, if that were true, the Court would welcome it, and if it were timely filed, the Court would welcome it because the Court does not know the facts in the cases. This has caused the Court to conduct a review of the files and finds that this case was originally filed on January 25, 1971, as Randolph County Chancery Case Number 2201, and no action was taken on the case by the attorneys for either party through 1975. In 1975 this Court caused notice to be given to the plaintiffs that the case would be dismissed if no action was taken. No action was taken by the plaintiffs and on November 19, 1975 the case was dismissed.

Then on November 17, 1976, just two days before the running of the Statute of Limitations the plaintiff again filed this suit. An answer was filed on December 2, 1976 which is more than two years ago. The attorneys in the case were warned that if the case was not tried this year, it would be dismissed, and the case was set for today December 20, 1978.

Even though the issues have been joined, and the case is seven years old, at 1:30 on the afternoon of December the 18th, the attorneys for the defendants, Mr. Jarboe and Mr. Throesch, filed a motion as stated asking this Court to recuse for the reason that nine years ago the court had allegedly prepared one of the instruments involved. The motion is untimely filed, and the Court has servious concerns about it. As a matter of fact it causes the Court to have serious questions about the applicable conduct of the two attorneys in the manner this is handled.

The Court heard the motion yesterday morning at 9:30, and the defendant put on no proof whatsoever. They did offer the statement of one attorney, Mr. Throesch. From statements of the attorneys of the plaintiff, it is obvious that a number of witnesses have been subpoenaed here, and this could have been known by the attorneys. One of the attorneys for the plaintiffs has traveled from some point in Kentucky to here.

They have spent some good amount of time here preparing for the case. A number of subpoenas have been issued and served by the sheriff and yet the attorneys wait until a day and a half before Court to file such a motion. Even assuming the motion was absolutely correct, it would be improper and this Court wouldn't have to consider it under Rule Two for there is no time for the plaintiffs to properly answer. Certainly they don't have their ten days.

Now the motion states, "Documents will be introduced into evidence which were prepared by his Honor." Upon questioning, counsel states that it's a power of attorney. The Court has examined the files and finds the power of attorney prepared by John Burris.

Upon questioning, the statement of counsel is that their reason for waiting to file the motion is because their clients weren't sure they wanted to pay them until they knew the case was going to trial and so they didn't get ready in time which is a disgusting state of events.

The motion further states that the law firm in which this Judge was formerly a partner previously represented plaintiff, no such proof was offered. The Court notes that the prior case was filed after this Court went on the bench. The Court has examined in complete detail all other possible comparable files and finds case Number 2086 Lloyd Lewallen vs. Delta Bethune in which the law firm this Court had been in represented one of the parties but it was as a matter of fact after this particular Judge had ceased the civil practice of law.

The third allegation is that the Court Reporter will be called as a witness by the other side. No proof was offered, no transcript to the best knowledge of the Court has been ordered, and that as a ground for a Judge to recuse himself appears to be credulous.

Now the Court is going to grant the motion, not right now, but I'm going to grant it because you have chosen to file this motion one and one half days before Court. It would not be fair to allow you to get away with

such reprehensible actions, nor your client if he is a part of it.

As stated the motion is filed one and one half days before the trial is scheduled. As stated some two years after all of the pleadings are settled and the issues joined. And as stated after at least one attorney the Court knows from yesterday's hearing has come from Kentucky for the case and numerous witnesses have been subpoenaed here. Now to simply allow the motion to be granted it appears to this Court would be greatly unjust and unfair. By the same token under the circumstances I don't think it is proper for the Court to hear the case because there is an appearance of impropriety certainly in the way you have handled it with your reckless statements.

Therefore, the defendants will be assessed the complete costs of all witnesses including the service costs on those witnesses, their mileage, the same with the parties, if any of the parties have been here and spent the night, you are going to be assessed their hotel or motel bill, their feed, their lodging. The defendants will be assessed the costs of the attorneys in preparing their case and time devoted to research and so forth which is wasted.

That is, I'm intending to assess that part of it against you that is a needless waste as well as the meals, lodging and transportation of the attorney who has come here from Kentucky for the case. In other words I intend for the defendants to pay every penny of every bit of costs that are run up by your improper dilatory late motion.

Now I don't know what other action I'm going to take because I don't want to do anything when I'm mad. But we are going to have a hearing right now on the amount of costs.

Now the Court is aware that this is short notice, and I've considered that. But, of course, your notice is very short. You filed your motion a day and a half ago.

> These people are here that are subpoenaed here, and they are going to be paid their costs. As you can tell without going into it the statement that the motion is not filed for the purpose of delay is deemed credulous by the Court.
>
> All right, will you Gentlemen, are you ready to testify as to the expenses?

After making the above statement, the Chancellor then heard testimony relative to the court costs incurred up to that junction in the proceedings, and also took testimony as to the applicable attorneys' fees and expenses. Also, evidence was taken as to the out-of-state and out-of-county witnesses and parties and of their expenses incurred, and loss of earnings, because of their attendance in court for a trial of the case on its merits pursuant to the definite setting previously made. At the conclusion of this hearing the trial court made the following findings:

> All right, in addition, the defendant shall be assessed costs, witness fees of $5.00 for Junior Wooldridge, and a service fee of $2.00 to the Sheriff's office, a $5.00 witness fee for Arlo Tyler plus $2.00 sheriff's costs, a $5.00 witness fee for Thelma Bates plus $2.00 service costs, a $5.00 witness fee for Lavon Pogue plus $2.00 sheriff's costs, a $5.00 witness fee for Doris Tanner plus the cost of service, a $5.00 witness fee for Peggy Long plus $2.00 on the service, a $5.00 witness fee for Dale Long plus the service, one of those services is $3.20 rather than $2.00, a $5.00 witness fee to Reba Hyde plus the $2.00 costs, a $5.00 witness fee to Pearl Brewer plus the costs, a $5.00 witness fee to Dr. DeClerk, plus service costs. Is there any other proof before the Court makes its findings?
>
> No, Sir. (By Mr. Simpson)
>
> All right, Gentlemen, because you have been so dilatory and improper in filing your motion at this time, the Court grants judgment against your client in the amounts that will be announced in just a moment. Now

to all of you that are subpoenaed here, I apologize to you. I'm sorry that this many of you were subpoenaed here, and these attorneys chose day before yesterday to file such a motion as this. It's going to cost them. They and their client are going to pay for every penny of it. And the Court may take further action. The Court assesses costs against Lloyd Lewallen and Betty Lewallen as follows:

$1,365.08 to George Rawlings. To H. G. Lewallen the sum of $135.00 plus $24.72, plus $36.00, plus $79.00. To Francis Lewallen the sum of $79.00. To Herschell Lewallen $79.00 expenses plus $96.00 lost wages. To Delta Bethune $79.00 for meals and lodging, plus $45.00 travel, plus lost wages of $96.00. To Harrell A. Simpson, Jr. the sum of $629.70. To Junior Wooldridge the sum of $5.00, to Arlo Tyer the sum of $5.00, to Thelma Bates the sum of $5.00, to Lavon Pogue the sum of $5.00, to Doris Tanner the sum of $5.00, to Peggy Long the sum of $5.00, to Dale Long $5.00, to Reba Hyde $5.00, to Pearl Brewer $5.00, to Dr. DeClerk $5.00, to plaintiff's attorneys for Sheriff's costs on service of process for this date which is now worthless $21.30. Mr. Rawlings and Mr. Simpson, the Court requests that you prepare the precedent, submit it to the other attorneys for approval as to form, the judgment will be entered against the defendants for those amounts.

To those of you that are subpoenaed here, you are free to leave, I apologize that you have been inconvenienced this greatly on the case that was set for today.

No objections were made by appellants to the hearing or to any ruling or finding of the court at any stage or phase, or to the court's findings or order allowing attorneys' fees, lost wages and expenses of out-of-state witnesses who were present and ready to testify, but who were not under subpoena. Judgment was entered for the amounts shown; the defendants-appellants have appealed to the Supreme Court of Arkansas. The case has been assigned by that court to the Arkansas Court of Appeals pursuant to Rule 29(3).

I.

The first issue presented is whether the order in question is appealable. Appellee says it is not as the case is still pending, and no final judgment has been rendered on the merits. Appellee has moved that the appeal be dismissed as premature.

The general rule is that until final judgment of the case on its merits, any order assessing costs is not appealable, but the matter may be reviewed on appeal from the order or judgment disposing of the case on its merits.

However, that rule does not apply when the *power* or *right* of the court to assess certain items is in dispute. *Hill* v. *Whitlock Oil Services, Inc.*, 450 F. 2d 170, 14 ALR Fed. 895.

Appellants here question the power of the lower court to assess the following items:

1. Judgment for or ordering payment of attorneys' fees; and

2. Judgment for lost wages and expenses of witnesses who were not subpoenaed to testify.

These items total $2,743.50 and are apparently all that is questioned by appellants in this appeal. That part of the court's order finding that appellants must pay the fees of all witnesses, including the sheriff's costs, who were subpoenaed and appeared is not questioned.

We hold that the lower court's action in awarding judgment for the items totaling $2,743.50 was appealable under the rule that judgment granting or denying costs is appealable when the *power* of the court to assess certain items of cost is at issue. *Temple* v. *Lawson*, 19 Ark. 148 (1857). See also 54 ALR 2d 927, Sec. 5.

II.

The lower court appears to have determined that appellants acted in bad faith in filing their motion asking the

presiding Chancellor to disqualify himself. Certainly the court held that the motion was tardy under the circumstances, and was not timely filed. Appellee says a court has the power to punish for contempt, and views the $2,743.50 extraction as a punishment for contempt. However, the hearing below falls short of a contempt proceedings. No citation was issued or referred to, and appellants were given no opportunity to respond. While testimony was taken, it was limited to the amount of certain items to be assessed against the appellants. The court in its first statement, quoted above, had already determined the basic issue against appellants. Therefore, we hold that these items cannot be sustained on the contempt of court theory. 17 C.J.S. *Contempt* § 86(3); 43 ALR 3d 793.

III.

Arkansas recognizes the general rule that extraordinary costs, such as attorney's fees and special cost items, are distinguishable from ordinary costs. *Temple* v. *Lawson, supra*. Our Supreme Court in a very early case announced the rule in regard to costs at law to be in general conformity with the law of England, and in this country, that "the entire law of costs and fees is in substance statutory." The common law did not allow any. Judgment against the vanquished party was his only punishment at common law. *Thorn* v. *Clendenin,* 12 Ark. 60. Also *Jones* v. *Adkins,* 170 Ark. 298 at 314, 280 S.W. 2d 389 (1926).

At the time of *Thorn* v. *Clendenin, supra,* the Revised Statutes, c. 34, § 12 (the forerunner of later statutes on the subject) provided:

> If the plaintiff recover judgment he shall have judgment for costs against the defendant.

But, notwithstanding this provision of the statute and the decision in *Thorn* v. *Clendenin, supra,* our court in the case of *Temple* v. *Lawson, supra,* announced the rule on costs in equity cases by saying that "the giving of costs in equity is entirely discretionary." Some later cases state the rule as "costs in equity cases are apportioned according to what the

court regards as the applicable equitable principle." *Paving District No. 5* v. *Fernandez,* 144 Ark. 550, 223 S.W. 24 (1920).[1] Costs in equity, as used in these cases, refer to statutory costs.

The term "costs" or "expenses" as used (even in a statute) is *not* understood ordinarily to include attorneys' fees. 20 Am. Jur. 2d *Costs* § 72, p. 59. And the right to recover attorney's fees from one's opponent in litigation as a part of the costs thereof does not exist at common law. 20 Am. Jur. 2d *Costs* § 72. Such an item of expense is not allowable in the absence of a statute or rule of the court, or some agreement expressly authorizing the taxing of attorneys' fees in addition to the ordinary statutory court costs. No Arkansas case has been cited which would modify this rule and allow the imposition of extra expenses or attorneys' fees of the nature imposed in the case before us. It was long the view of the Arkansas Supreme Court that even a provision in a promissory note permitting the holder to recover his attorney's fees was contrary to good public policy. That rule was changed by Act 350 of 1951. While the limits of allowance of attorney's fees on a "recognized ground of equity" are not clearly defined in Arkansas, we know of no cases which permit the allowance of expenses and attorneys' fees of the nature, and under the circumstances, present in the case before us.[2] We have concluded that the judgment of the trial court must be reversed and remanded with directions to eliminate the items of special costs at issue totaling $2,743.50, but without prejudice to the rights of the parties to have all proper costs allowed and taxed at the conclusion of the litigation.

Reversed and remanded.

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[1]Effective July 1, 1979, Rule 54 of the Arkansas Rules of Civil Procedure provides that except where express provision thereof is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. This rule superseded Ark. Stat. Ann. §§ 27-2308, 27-2310 and 27-2312 (Repl.).

[2]The law of Arkansas generally on this subject is that each litigant must pay his own attorneys' fees. *Jacobson* v. *Poindexter,* 42 Ark. 97; *White River L. & W. Ry. Co.* v. *Star R. & L. Co.,* 77 Ark. 128, 91 S.W. 14 (1905). See also Light, *Taxability of Attorneys' Fees as Costs,* 9 Ark. L. Rev. 70 (1955).

SALANT AND SALANT, INC. and AETNA INSURANCE COMPANY *v.* Peggy WILLIAMS

CA 79-206 593 S.W. 2d 63

Opinion delivered January 9, 1980
Released for publication January 30, 1980

Rieves, Rieves & Shelton, by: *David C. Shelton,* for appellants.

Youngdahl, Larrison & Agee, for appellee.

JAMES H. PILKINTON, Judge. This is a workers' compensation case, and the issue here is whether a claim for additional medical expenses incurred by appellee-claimant should be paid by appellants or by appellee.

A hearing was held on January 31, 1979, to determine if appellee was entitled to such additional compensation benefits. At this hearing it was stipulated that appellee had sustained a compensable injury on November 15, 1972. The appellee contended that the claim was initially accepted as compensable and appellants paid benefits through August 11, 1977; that appellee incurred additional medical expenses within one year with the knowledge and consent of the appellant-employer in May 1978. Appellee contended that appellants should pay for the additional medical treatment. The appellants contended that the claim was barred by the statute of limitations.

Subsequent to the hearing the law judge filed an opinion dated March 30, 1979, and this opinion was adopted by the full commission by an opinion rendered August 2, 1979. It is

from the decision of the Arkansas Workers' Compensation Commission rejecting appellant's argument that this appeal is taken. The commission held that appellee was entitled to the additional compensation benefits under the law and facts of this case.

The question on appeal is whether there is substantial evidence to support the decision of the commission, resolving all inferences and doubts in favor of the claimant. *Aluminum Company of America* v. *Henning,* 260 Ark. 699, 543 S.W. 2d 480; *Jacob Hartz Seed Co.* v. *Thomas,* 253 Ark. 176, 485 S.W. 2d 200; *Southwestern Bell Telephone Company* v. *Brown,* 256 Ark. 54, 505 S.W. 2d 207.

The claimant-appellee introduced two statements from Dr. G. P. Schoettle. These verify that the claimant was seen in the doctor's office on June 1, 1977 and May 26, 1978. There was also in evidence a doctor's report form dated September 20, 1978, indicating that claimant had a myofacial strain of the back; that the *treatment* was heat, rest and medication; and that the patient was *not discharged.*

The claimant testified that she had not experienced any injuries to her back other than the compensable injury in 1972. She also stated that Dr. Schoettle had been her doctor during the entire period of time, and that there was no year that she had not seen Dr. Schoettle at least once during the year for treatment. Claimant further testified that the appellant-employer was aware that she was going to the doctor because it was a requirement that she report to the employer each time before she actually went to the doctor, and that she did so report. On the particular occasion in May 1978, claimant testified she contacted the Personnel Manager, Ms. Charlsey Garrison, and advised her that she was going to the doctor. This testimony is not contradicted.

The record also shows that appellee-claimant testified that Dr. Schoettle treated her with rest, medication and advised her to apply heat to her back. She stated that she carried out his instructions and applied the heat treatment at her home, and took prescription medication given by the doctor.

Appellants have cited no case in point to support their contention that the statute of limitations would run in a case such as we have before us. The appellant company furnished appellee medical treatment in May 1978, as it had done since 1972. Clearly this was within one year from the date of last treatment which was in June 1977. Therefore, this case is governed by the holding in *Reynolds Metal Co.* v. *Brumley,* 226 Ark. 388, 290 S.W. 2d 211. See also *Heflin* v. *Pepsi Cola Bottling Co.,* 244 Ark. 195, 424 S.W. 2d 365. The commission found that the medical treatment afforded claimant in June 1977 and again in May 1978 effectively tolled the running of the statute of limitation under the facts of this case. We hold that there is substantial evidence to support the findings and decision of the commission. Therefore we affirm.

Robert L. BLOUNT, d/b/a AIRE-WAY REAL ESTATE AGENCY *v.* Janice McCURDY et al

CA 79-168 593 S.W. 2d 468

Opinion delivered January 9, 1980
Released for publication February 13, 1980

Paul Petty, for appellant.

Lightle, Beebe & Raney, by: *J. E. Lightle, Jr.* and *A. Watson Bell* and *Hoyt Thomas,* for appellees.

MARIAN F. PENIX, Judge. This case was appealed to the Arkansas Supreme Court and by that court assigned to the Arkansas Court of Appeals pursuant to Rule 29(3).

Appellant, Robert L. Blount, d/b/a Aire-way Real Estate Agency, sold certain real property, including a house and its contents, to appellee Janice McCurdy. Blount had previously owned the property and had sold same to Terry and Holly Roberson on a contract of sale. When Blount acted as agent for the Robersons in selling to McCurdy he did not reveal he still had an interest in the property in that Robersons still owed him $1,000 on the sales price. Robersons were not present September 23, 1977, the closing date. The contract had been signed by the Robersons who had moved to Texas. On September 23 McCurdy made a down payment of $1,850 and signed the contract. The contract provided the buyer was to assume sellers' insurance payments. At the closing, Pat Wolters, Blount's agent, handed McCurdy an envelope containing an insurance policy, and stated she thought it was paid up. The term on the policy was from October 21, 1977 to October 21, 1978. The face amount was $8,000 on the house and $3,000 on its contents. In December 1977 Blount received notice in the mail the policy was being cancelled for non-payment of premiums. Blount testified he made an attempt to notify McCurdy by telephoning McCurdy's ex-husband, Doug Merritt. Merritt denied ever having received notice from Blount the policy was being

cancelled. Blount testified he sold the property to the Robersons as an individual and not for his real estate firm. He also stated he was given notice of the lapse of the insurance policy because he was the mortgagee, and such notice indicated it had also been mailed to Robersons.

In February, 1978, McCurdy's house burned. She discovered there was no insurance coverage. Because of this fire loss she defaulted on her payments to the Robersons.

McCurdy sued Blount and the Robersons alleging she was damaged in the amount of $8,000 loss of improvements and $3,000 loss of contents, because of her detrimental reliance in respect to insurance coverage and the failure of each of the defendants to notify her of cancellation of the insurance. McCurdy asks that the Robersons be enjoined and restrained from declaring a default in McCurdy's contract of sale and from dispossessing her from the property, in order to avoid irreparable harm and damage to McCurdy. The Robersons filed a counterclaim against McCurdy for non-payment of the installment contract. Also they filed a cross-complaint against Blount alleging damages suffered because of their reliance upon Blount's representations the insurance policy was paid or would be paid by McCurdy.

After hearing all the testimony and weighing all the evidence the trial judge entered a decree awarding judgment for damages to McCurdy and to the Robersons against Blount for the sum of $8,000 reduced by $1,000 still owing Blount from the Robersons under their original contract and an additional sum of $2,000 against Blount in favor of McCurdy for the unscheduled personal property lost in the fire.

I.

Blount contends the court erred in permitting parol evidence on behalf of McCurdy to modify the essential terms of a written contract. The terms being ". . . and buyer agrees to assume seller's insurance payments from date as above written and be responsible for the property as of same date." The dates on the policy were "from October 21, 1977 to October 21, 1978."

It is well recognized parol evidence cannot be introduced to change or alter a contract in writing. However, our Supreme Court has stated many times oral testimony is competent when ambiguity and uncertainty exist in the contract for the purpose of resolving confusion. *Kyser* v. *T. M. Bragg & Sons,* 228 Ark. 578, 309 S.W. 2d 198 (1958). The testimony may relate to the circumstances attendant to the execution of the written contract, the relationship of the parties, and evidence of conversations. *Jefferson Square Inc.,* v. *Hart Shoes Inc.,* 239 Ark. 129, 388 S.W. 2d 902 (1965); *Peevy* v. *Bell,* 255 Ark. 663, 501 S.W. 2d 767 (1973); *Kerby* v. *Field,* 183 Ark. 714, 38 S.W. 2d 308 (1931).

The contract is silent on the matter of at what period of time the buyer's obligation to make insurance payment began — was it October 21, 1977 or October 21, 1978? McCurdy's testimony reveals she understood perfectly she was to assume the insurance payments but she also understood the payments would not begin until the policy dated October 21, 1977 through October 21, 1978 expired. Exactly when she was to begin the insurance payments is not covered in the contract. The parol evidence rule was not violated because any testimony related to when she was to begin payments is obviously concerned with a collateral, independent fact, or with an ambiguity about which the contract is uncertain. The testimony concerning the obligation to assume sellers' insurance premiums clause of the contract was not introduced to vary or contradict the written document but was concerned with matters not embraced within the language of the convenant and to explain uncertainties in the document. *Lane* v. *Pfeifer,* 264 Ark. 162, 568 S.W. 2d 212 (1978).

Initially Blount's agent misled McCurdy into believing the insurance was paid up until October 1978. McCurdy relied upon Blount's agent's statement the insurance was paid up. This reliance was certainly to her detriment. The rule of detrimental reliance applies not only to brokers but to laymen, and all members of society who deal in commercial transactions with their fellowmen. When it was discovered it was not paid past October 1977 no attempt was made to be certain McCurdy knew such fact.

McCurdy was entitled to rely upon the representation the insurance was in force until October 21, 1978 and the premiums had been paid for such period. McCurdy and the Robersons are entitled to the amount of their loss that would have been paid under the policy of insurance, this sum being $8,000 upon the residence, reduced however, by the sum of $1,000 which is the amount due Blount upon his contract of sale to the Robersons, or a net amount of $7,000 to be allocated $5,750 to the Robersons and $1,250 to McCurdy. He also correctly found the value of McCurdy's unscheduled personal property was $2,000 which amount McCurdy was entitled to recover from Blount. The Chancellor further ordered Blount to execute and deliver a warranty deed to the Robersons and the Robersons to execute and deliver a warranty deed to McCurdy.

II

Blount contends the court erred in its determination of damages. The court found as a matter of law McCurdy and the Robersons were entitled to the amount which would have been paid under the policy. The house was insured for $8,000. It was totally destroyed. $8,000 is the correct amount under the Arkansas Valued Policy Law, Ark. Stat. Ann. § 66-3901 (Repl. 1966); *Hensely* v. *Farm Bureau Mutual Ins. Co.,* 243 Ark. 408, 420 S.W. 2d 76 (1967). This statute applies only to an insurance company. However, the policy amount, which would have been owed to the loss payee, is evidence of the property's value. McCurdy lost the amount of the policy due to her reliance upon the agent's misrepresentations.

It was disputed the amount owed Blount on his contract with the Robersons was $1,000. McCurdy owed Robersons $5,570. The chancellor correctly determined $5,570 was to be paid to the Robersons and $1,250 to McCurdy.

As to the issue of damages for destruction of the contents of the house it is necessary to prove the value of the personal property destroyed. Ms. Roberson testified *without objection* the value was at least $3,000. Ms. McCurdy testified as to the contents and that she had put in a new

refrigerator and a complete new livingroom suite. Mr. Blount testified the contents were worth $1,000. Neither of the witnesses' testimony as to value was objected to. Ms. Roberson was qualified to express an opinion. The court certainly had a right to base its judgment on the testimony before it. The court found the value of the contents to be $2,000.

If this case is based upon damages by reason of detrimental evidence, upon whom did McCurdy and the Robersons rely? Blount and his agents. Their detriment was the amount lost as a result of the policy not being in force. Blount did not object to the value testimony in the lower court. He may not do so, for the first time, on appeal.

Affirmed.

WRIGHT, C.J., and NEWBERN, J., dissent.

ERNIE E. WRIGHT, Chief Judge, dissenting. I disagree with the majority opinion upholding the decree of the trial court awarding judgment against appellant for the fire loss. The real estate had been sold to appellee McCurdy through appellant as broker for the sellers. The contract of sale clearly stated, "Buyer agrees to assume seller's insurance payments from date as above written and be responsible for the property as of same date." The date of the contract referred to was September 20, 1977.

At closing on September 23, 1977 a sales agent for the broker handed the buyer an insurance policy. She testified she told the buyer, "This is your insurance policy. — I told the lady I thought the insurance was paid up." The policy carried the names of the sellers as the insured with a mortgage clause in favor of the broker who held a mortgage against the property. The buyer's name did not appear in the policy and the policy term was from October 21, 1977 to October 21, 1978.

The house burned in February, 1978, and the policy had been cancelled prior to the loss for non payment of premium.

In my view the buyer had a contractual duty to see that insurance coverage was in effect on the property from the

date of closing. She did not contact the local insurance agent who issued the policy. She did not check to see if her name appeared in the policy and she was provided no receipt or documentary evidence showing the premium had been paid on the policy that was to take effect some weeks subsequent to closing.

The record does not reveal any deliberate attempt on the part of any one to deceive the appellee as to the insurance. The appellee failed to act in a reasonably prudent way to see that insurance was in effect and the insurance requirement met.

There is no ambiguity in the provision in the contract requiring the buyer to pay the insurance premium and be responsible for the property as of the contract date, September 20, 1977.

The trial court held as a matter of law the appellant broker had a fiduciary duty to the appellee buyer. It is undisputed appellant was agent for the seller and there is no evidence he charged appellee McCurdy for servies either as a broker or attorney. I see no basis for the conclusion appellant had a fiduciary duty to appellee. He was only required to deal fairly with appellee, and there is no evidence he did otherwise.

I would reverse, and am authorized to state that NEWBERN, J., joins in this dissent.

John SMELSER *v.* S.H.&J. DRILLING CORPORATION and TRI-STATE INSURANCE COMPANY

CA 79-223 593 S.W. 2d 61

Opinion delivered January 9, 1980
Released for publication January 30, 1980

Thomason, Thomason & Timmons, by: *Bryon Thomason*, for appellant.

Shackleford, Shackleford & Phillips, P.A., for appellees.

MARIAN F. PENIX, Judge. Claimant, John Smelser, sustained an injury to his left arm and to his back arising out of and in the course of his employment with S.H.&J. Drilling Corporation. The injury occurred October 6, 1975. The administrative judge awarded a 70% permanent partial dis-

ability rating to the body as a whole considering economic factors. He found claimant anatomically had received 45% permanent partial physical impairment to the body as a whole. Claimant appealed to the Commission contending he is permanently and totally disabled. S.H.&J. cross-appealed contending claimant had 45% permanent partial physical disability to the body as a whole. In a 2-1 decision the Commission awarded 45% permanent partial disability which did not include an award for loss of earning capacity. Claimant appeals contending he is permanently and totally disabled, or in the alternative, has a higher rating of disability than claimed by S.H.&J.

The record reveals claimant had been farming for several years and had worked at other jobs, including truck driving and oil field work. After the injury occurred the claimant was renting 100 acres, and running 30 head of cattle, had hired 2 employees to operate haybaling equipment along with his teen-age son.

His accident on a derrick resulted in severe injury to his arm. An operation and skin grafts were necessary. Dr. Norris Knight, an orthopedic surgeon, ascribed 45% anatomical disability to the whole body — 40% attributable to the arm injury and 5% to the back. Dr. Knight wrote "He can't do any manual labor because his arm and back won't let him, so he's going to have to do something in the mental manner that doesn't require fine use of his left arm. I think he could do something like a dry watchman job which requires being on the premises for 12 hour periods where he could be seated or standing."

Nine months after the accident the claimant worked 72 hours one week dry watching a rig for appellee S.H.&J. He said he declined to continue because of pain and muscle spasms. The claimant has refused to enter any program for rehabilitative training.

I

The claimant contends the Commission denied benefits in excess of his 45% physical impairment because he did not pursue vocational rehabilitation. The Commission stated:

> We do not feel that the evidence shows that the Claimant has sustained disability in excess of his rating of physical impairment as the Claimant did not pursue vocational rehabilitation, notwithstanding directions of this Commission to do so. The Claimant refused rehabilitation evaluation for reasons best known to himself.

The Claimant contends the Commission erred in penalizing him for failure to submit to a program of vocational rehabilitation. Claimant argues if Ark. Stat. Ann. § 81-1310(F) Rehabilitation is procedural then the 1979 Amendment became effective on March 2, 1979 and the Commission's opinion penalizing the claimant for failure to accept vocational rehabilitation was filed July 3, 1979, and is without the power of the Commission. The claimant further contends if the statute be construed to be substantive, then the original Ark. Stat. Ann. § 81-1310(F) Rehabilitation is controlling since it was not amended until 1976. Claimant contends neither statute is susceptible of a construction that would deny the claimant benefits for failure to accept rehabilitation.

We find the claimant has misconstrued the meaning of the rehabilitation section of the Workers' Compensation law. It makes no difference whether we consider Section 10(F) before or after the amendment. The amendment provides that an employee shall not be *required* to enter any program of vocational rehabilitation against his consent. Whether or not an injured employee can be retrained is a pertinent factor for the Commission to consider in determining the amount, if any, of wage earning loss. If no rehabilitative evaluation is made the Commission has no way of knowing whether the employee could have been retrained. By analogy if certain proven surgical procedures are available and there is indication the employee's disability could be diminished by same, and the employee declines to submit to such procedures, certainly the Commission has the right to consider this in determining the employee's disability. It has long been held in Arkansas that rehabilitation potential is an important factor in determining loss of wage-earning capac-

ity, *Arkansas Best Freight, Inc.* v. *Brooks,* 244 Ark. 191, 424 S.W. 2d 377 (1968).

II

Claimant contends the record lacks sufficient evidence upon which the Commission could have made such an award.

The claimant has received a GED diploma, which is the equivalent of a high school education. He has proven himself to be a businessman, overseeing the operation of a cattle farm, doing custom haybaling with equipment which he owns. He has been gainfully employed overseeing the farm's operation and the custom haybaling, all since his injury.

Our task is to determine whether there was substantial evidence upon which the Commission made its finding. We cannot say the evidence was insubstantial. Therefore we must affirm the Commission. We have reviewed the evidence and made all reasonable inferences deducible therefrom in the light most favorable to the Commission's finding which, like those of a jury, will be upheld if there is any substantial evidence to support the Commission's action. *Northwestern National Insurance Co. and Bearden Enterprises* v. *Weast,* 253 Ark. 710, 488 S.W. 2d 332 (1972).

Affirmed.

Laura COKER *v.* Charles L. DANIELS, Director of Labor and STAPLETON LADDERS COMPANY

CA 79-296 593 S.W. 2d 59

Opinion delivered January 9, 1980
Released for publication January 30, 1980

GEORGE HOWARD, JR., Judge. Appellant challenges the action of the Board of Review in affirming the denial of unemployment benefits under Section 5(b)(1) of the Employment Security Law which provides:

> . . . [A]n individual shall be disqualified for benefits:
>
> . . .
>
> If he is discharged from his last work for misconduct in connection with the work . . .

Appellant testified that her status as an employee with Stapleton Ladders, Respondent, began in February, 1979; that she, her husband and brother, who were also employed by respondent, did not report to work on May 21st and 22nd because her husband's automobile broke down and she had no means of transportation to work; that on May 23rd she did not report to work because she was ill. Appellant also testified that she was absent from her job on at least two other occasions because her daughter was ill necessitating appellant's presence at home.

It is undisputed that appellant advised her employer, by telephone, that due to the lack of transportation she was unable to report to work on May 21st and 22nd. It is further undisputed that appellant's husband and brother on May 23rd advised the respondent, when they reported for work, that appellant was ill and would not report to work, whereupon appellant, her husband and brother were fired.

It is clear that respondent is a small enterprise employing only a few people in the manufacture of ladders. Appellant's assignment on respondent's assembly line consisted of placing "braclets and things on steps for the ladders." Appellant's assignment was vital to the continuity and smooth operation of respondent's production schedule. It is undisputed that appellant's absence has interfered materially with respondent's assembly line production.

The force of appellant's argument for reversal seems to be that respondent — in a conversation between respondent and appellant's husband — terminated appellant on May 21st rather than May 23rd; therefore, the reason for her termination was because of the lack of transportation which was the result of an emergency which appellant had no control over and was in fact an unavoidable situation. Thus,

argues appellant, respondent's action is not based upon good cause.

Respondent, on the other hand, testified that the termination occurred on May 23rd and that appellant had a rather lengthy absentee record during her relatively short period with its firm.

It is crystal clear that during appellant's twelve weeks of employment, she had been absent at least six times either because of illness in the family or the lack of transportation. The question relative to when appellant was actually terminated presented a fact question for the Agency's determination. Credibility is a matter to be evaluated and resolved by the administrative tribunal while our responsibility is to determine essentially whether the finding of the Agency is supported by substantial evidence.

While it is generally recognized that an employer has certain obligations and responsibilities to his employees in providing suitable working conditions and hours, it goes without saying that an employer generally has neither an affirmative duty to provide transportation to an employee to and from his place of employment, nor is required to tolerate a mode of conduct pertaining to an employee's ability or the lack thereof to provide transportation to and from his place of employment which has the effect of reducing the efficiency of the employer's operations and, if continued, the complete destruction of the employer's business before the employer can take preventive measures as was done in the instant case.

We are convinced that the holding of the Agency is indeed supported by substantial evidence.

Affirmed.

Holland Ray EDWARDS and Wife, Bonnie EDWARDS *v.* Jerry L. HALL and Wife, Roberta HALL

CA 79-172 593 S.W. 2d 465

Opinion delivered January 9, 1980
Released for publication February 13, 1980

Clark & McNeil, for appellants.

Jack M. Lewis, for appellees.

DAVID NEWBERN, Judge. This suit was brought to cancel a tax deed and a subsequent lease from the tax deed grantee and to remove the deed and the lease as clouds from the title asserted by the appellants. The chancellor, in part, denied the relief sought, and an appeal was taken to the Arkansas Supreme Court which transferred the case to us pursuant to Rule 29(3). The issues are (1) whether a separate assessment of the mineral interests was proper and (2) whether a tax deed grantee's interest is limited to the interest of the person in whose name the property was assessed and subsequently forfeited to the state.

In July, 1953, J. E. Linn conveyed to T. J. Weigel "an undivided one half interest in and to all of the oil royalty, gas royalty, and royalty in casinghead gas, gasoline, and royalty in other minerals" in certain land. The grant was to run "twenty five years from date hereof and as long thereafter as

oil, gas or other minerals, or either of them, is produced or mined from the lands described."

In 1955, Linn conveyed this same land to the appellants by warranty deed, subject to the royalty conveyance. In 1961, the mineral interests in the land were assessed separately from the surface interests, and the taxes on the mineral interests were not paid for that year. In 1962, the appellees Hall purchased at a tax sale the mineral interests which had been forfeited. In 1965, a clerk's deed was issued conveying the mineral interests in the land to the Halls. In September, 1978, the appellants filed suit to cancel the deed and a lease which the Halls had subsequently executed to the appellee Union Oil Co.

The appellants argue that if the separate tax assessment on the mineral interests was proper, it could not result in a forfeiture or sale of any interest greater than that which had been conveyed to Weigel by Linn and, as admittedly there had been no production on the land, that interest terminated by its own terms twenty five years after its creation.

The chancellor held that the tax deed to the separate mineral interests was not a derivative title conveying only Weigel's interest but rather was a new, complete and independent title which extinguished all prior interests in that which it purported to convey. Excepted from the effect of this holding were certain parts of the land in question as to which the chancellor found the tax deed void for lack of a proper description. The essence of the chancellor's decision was thus that a valid tax deed to mineral rights cannot be successfully challenged on the basis that it resulted from a separate assessment caused by a conveyance of less than all of the mineral interests in the land. Neither the chancellor's opinion nor the appellee's brief cites any Arkansas statute saying or case holding this proposition to be the law.

The closest thing to Arkansas authority cited by the chancellor is dictum from *Champion* v. *Williams,* 165 Ark. 328, 264 S.W. 972 (1924). In that case, the Supreme Court dealt with the power of a remainderman to redeem after a life tenant had permitted land to be forfeited for taxes. In that

case, the court found the tax deed to have been void, but said:

> The tax sale, if valid, would have barred the right of all interested parties, those holding remainder interests as well as the life tenant, for the sale operated *in rem,* and all parties were bound by it; . . . [165 Ark. at 335]

The question first to be considered is whether the assessment was valid, and thus whether it was a basis for a valid sale. In *Brizzolara* v. *Powell,* 214 Ark. 870, 218 S.W. 2d 728 (1949), our Supreme Court said Ark. Stat. Ann. § 84-208 (Repl. 1960), permits separate assessment of mineral interests "only which had been separated from the surface ownership." (214 Ark. at 872) The Supreme Court in effect held that regardless that a tax sale might have purported to convey the entire mineral interest, it did not have that effect unless the separate assessment was valid. The theory asserted by the court was that a tax deed was void if the taxes had in fact been paid. If there had been no valid severance of the surface and mineral interests, then the surface owner, by paying the taxes on "the land" had paid all the taxes due. That case was remanded for a determination whether there had in fact been a reservation, and thus a separation, of the mineral interests.

Thus, we must look to the question whether the conveyance of the "royalty" interest constituted a severance or separation of the mineral interests sufficient to permit a separate assessment. Our statute permitting separate assessment has been interpreted broadly, and there is no requirement that there be a conveyance of the minerals in place in order to effect a sufficient severance to invoke the separate assessment statute. *State ex rel. Attorney General* v. *Arkansas Fuel Oil Co.,* 179 Ark. 848, 18 S.W. 2d 906 (1929). Although the appellants' brief raises the question of the propriety of the assessment, at one point it concedes, "[t]he apparent intent of the statute was to require *all* mineral interests, whether royalty, in-place, or otherwise to be separately assessed." We cannot quarrel with that statement.

Given the validity of the assessment, and absent any other attack on the validity of the tax deed, we come face to

face with the chancellor's conclusion that a valid tax deed conveys that which it purports to convey, regardless what may have been the extent of the interest of the person in whose name the property was assessed and forfeited for failure to pay taxes.

We believe the dictum quoted above from the *Champion* case correctly indicates that our tax scheme contemplates the kind of new, comprehensive title to be conveyed by a tax deed as was held by the chancellor in this case to have been conveyed. If, as indicated by that dictum, a valid tax deed conveys the entire fee and extinguishes a remainder following a life estate, then no different rule should prevail where the owner of a determinable mineral interest is put in the place of the life tenant who failed to pay taxes and the holder of the reversionary interest is substituted for the remainderman. Our faith in the notion that the drafters of our property tax statutes would approve is bolstered by Ark. Stat. Ann. § 84-108 (Repl. 1960), which says:

> It shall not be necessary to the validity of an assessment or of a sale of land for taxes, that it be assessed to its true owner, but the taxes shall be a charge upon the real and personal property taxed, and when sold, shall vest the title in the purchaser without regard to who owned the land or other property when assessed or when sold, and the personal property of any deceased person shall be liable in the hands of any executor or administrator for any tax due on the same by any testator or intestate.

In the case before us, the entire mineral interest was assessed and taxed separately from the surface. It does not matter that Weigel was not the owner of the entire mineral interest, as the tax was a charge on the land sold, and vested title in the purchaser regardless who may have owned other aspects of the mineral interests which were separately taxed.

Affirmed.

Supplemental opinion on denial of rehearing
delivered February 13, 1980

DAVID NEWBERN, Judge. The first point in the appellants' petition for rehearing is that our opinion should be clarified to show that we are saying that only a 1/2 interest in the mineral rights to the property in question was conveyed by the tax deed. We find that point well taken. In our opinion, we used the term "entire" mineral interest. We meant only to say it included the future interest as well as any present interest in what the tax deed purported to convey. That was, of course, responsive to the issue raised below and on this appeal. We did not mean to say that the tax deed conveyed more than it purported to convey, and as abstracted by the appellants, it is clear the deed purported to convey only a 1/2 interest in the mineral rights. Our point was, and is, that the tax deed left outstanding no future interest in the 1/2 interest it purported to convey.

Since our initial opinion in this case, two Arkansas Supreme Court decisions which we should have addressed have come to our attention. The parties did not cite them to us in their briefs or with respect to the petition for rehearing. However, this response to the petition for rehearing presents an opportunity for us to discuss them. They are, *Laney* v. *Monsanto Chemical Co.,* 233 Ark. 645, 348 S.W. 2d 826 (1961), and *Claybrooke* v. *Barnes,* 180 Ark. 678, 22 S.W. 2d 390 (1929).

In *Laney,* the court held a party holding a severed

mineral interest was not affected by the payment of taxes by another "for [his] mineral interest had already been severed and is therefore not deemed to have been included in the description under which the tax payments were made. [233 Ark. at 649]." For that proposition, the *Claybrooke* case is cited as authority. In *Claybrooke,* it was held that adverse possession, apparently consisting of surface possession only, does not run against severed mineral interests. At first blush, these cases seem theoretically inconsistent with our decision, despite the obvious factual distinctions.

We do not regard our decision here as inconsistent with them, however, once the distinctions are properly analyzed. There is no statutory provision for separate assessment of a future interest in the minerals, and thus a valid tax title to the mineral interests conveys all or whatever "horizontal" fraction it purports to convey. That is consistent with the dictum in the *Champion* case cited in our initial opinion which indicates a general tax title conveys the entire surface (and unsevered mineral) interest even though there may have been an outstanding future interest. Here again, we use the term "entire" to indicate inclusion of any future interest, and not to say the tax deed conveys more than purported.

The *Laney* and *Claybrooke* cases apply only in the situation where one takes title to land by tax deed thinking it applies to both the surface and the mineral interests. They hold that the tax deed will not convey the minerals if they have been separated earlier by deed. In view of our tax scheme's provision for separate assessment and taxing of surface and minerals, a tax purchaser of a described surface should be on notice his deed may not be a conveyance of the mineral interests. Where the tax deed purports to convey the mineral interests only, however, nothing supports the notion that a purchaser should be held to take less than that which is described.

Rehearing denied.

Billy G. SANDERS *v.* ARKANSAS-MISSOURI POWER COMPANY

CA 79-173 593 S.W. 2d 56

Opinion delivered January 9, 1980
Released for publication January 30, 1980

Duncan & Davis, for appellant.

Reid, Burge & Prevallet, for appellee.

DAVID NEWBERN, Judge. The appellant was seriously injured when he came in contact with a "hot" electric line while working as a lineman for the appellee. In his complaint the appellant alleged the appellee's agents promised he would receive full pay and benefits until he could return to work in exchange for his promise to return to work when able. He further alleged that in reliance on the appellee's promise and their performance of it for some eighteen

months he built a new home with special wheelchair accommodations. In addition he alleged he was entitled to recover on theories of gift and contract implied in fact. These were alleged as alternative theories to his allegation of breach of the express agreement. In his prayer for relief, the appellant alleged he was totally and permanently disabled and thus was entitled to $675,000, presumably the present value of payments he could expect to receive from the appellee for the remainder of his "working life."

The circuit court sustained a demurrer and dismissed the complaint. The findings stated in the dismissal order were:

> 1. The Workers' Compensation Act or claim is not plaintiff's exclusive remedy and therefore not a bar to this action.
>
> 2. The allegations of the Complaint do not establish valid consideration for a binding or enforceable contract; said allegations do not establish a third party beneficiary relationship; nor do they constitute a valid enforceable gift.
>
> 3. Plaintiff's Complaint, therefore, does not state facts sufficient to constitute a cause of action; therefore, Defendant's Demurrer and Motion To Dismiss should be granted.

Although there had been some discovery activity which became part of the record in this case, the court's order clearly was based on the inadequacy of the complaint, and we limit our decision to the propriety of that order.

1. Gift

The complaint was not sufficient to state a cause of action based upon a gift theory. Although it states there was a "delivery," such a statement is conclusory only. No facts are stated showing a delivery of that which the appellant claims. A complaint which does not state facts constituting

every element of a cause of action is demurrable.[1] *Vandevier* v. *Chapman,* 255 Ark. 1039, 505 S.W. 2d 495 (1974); *Wood* v. *Drainage Dist. No. 2 of Conway County,* 110 Ark. 416, 161 S.W. 1057 (1913).

2. Contract Implied in Fact

We find no need to discuss at length the paragraph of the complaint which alleges a contract implied in fact, as the allegations of express contract deal with the same exchange of promises we presume the appellant would have us infer from the conduct of the parties.

3. Mutual Promises

In evaluating the complaint, we must assume, as alleged by the appellant, that agents of the appellee promised the appellant he would be paid his full salary and company benefits until he was medically able to return to work. In exchange for that promise, the appellant alleges he promised to resume "a position of employment as soon as medically possible." We recognize that a promise to hold oneself available to resume work has been held sufficient to constitute consideration for an agreement to pay a monthly salary for life. *Abbott* v. *Arkansas Utilities Co.,* 165 F. 2d 339 (8th Cir. 1948). We agree with the holding in that case, although it was one based on the "general law" because no Arkansas Supreme Court case on the point could be found by the Court of Appeals. There, however, the complaint being evaluated contained no indication the plaintiff-employee was incapacitated in any way from performing should the need arise. He had retired from regular employment with the defendant and had agreed to be available for work on call in exchange for a regular reduced salary.

In the case before us, however, the appellant has pleaded total and permanent disability, and it becomes obvious he has made a promise it is impossible for him to perform. We cannot say this complaint states a cause of action

[1]The order dismissing this complaint was filed before the new Arkansas Rules of Civil Procedure, supplanting Ark. Stat. Ann. §§ 27-1113 and 27-1115 (Repl. 1962), came into effect.

for breach of contract based on mutual promises where it alleges one of the promises is impossible of performance. We cannot countenance the appellant's statement he is "holding himself ready" to perform when in the next breath he alleges his inability to do so. These statements cancel each other and make the appellant's alleged promise illusory at best.

At the time the alleged promise to pay was made by the appellee and the alleged promise to go back to work when able was made by the appellant, there may have been some doubt as to the appellant's prospective ability to work. The complaint says the appellee paid the appellant's salary for approximately eighteen months and then ceased. The employer was under no obligation to continue this employment agreement when it became clear the appellant would not be able to work again, as admitted in the complaint before us. See, 6 Williston, *Contracts,* § 877, pp. 350-357 (3d Ed. 1962).

4. Detrimental Reliance or Promissory Estoppel

Perhaps the broadest statement of the doctrine of detrimental reliance or promissory estoppel is that found in 1 Corbin, *Contracts,* § 119, p. 515 (1963):

> . . . [I]f a promisee acts in such reasonable reliance upon a promise, that promise may be held enforceable even though the promisor did not in fact know of such action and so did not regard it as consideration or as anything else. Even the promisee who acts in reliance may not regard his action as any reason for enforcing the promise; he may perform the action because he believes the promise will be kept without the necessity of any enforcement.

That language seems to indicate that as long as the action in reliance on a promise is reasonable it matters not that the action taken was not directly induced by the promise sought to be enforced. We recognize this, however, as a problem of semantics. We prefer to state the problem as one of applying an objective standard in determining the reasonableness of an act in reliance.

We do not propose here to enter, other than lightly, the further semantic struggle between the doctrines of detrimental reliance and promissory estoppel. The Arkansas Supreme Court examined the history and the broad bases of the promissory estoppel doctrine in *Peoples National Bank of Little Rock* v. *Linebarger Construction Co.,* 219 Ark. 11, 240 S.W. 2d 12 (1951). There the plaintiff had loaned money, at the behest of a contractor, to one of the latter's subcontractors in reliance upon a promise of the contractor to repay the amount of the loan. This was part of a continuing arrangement whereby each week the contractor would tell the Bank the approximate amount of the subcontractor's payroll, and the Bank would make that amount available to the subcontractor with the contractor's guarantee of repayment. The amount thus loaned on the occasion which gave rise to the lawsuit was $16,000. The contractor was held liable to repay the bank, but only to the extent of $11,996.07. The court said, "[i]f special circumstances had not indicated a particular purpose for the use of the money, then the estoppel might well have extended to the full amount stated in the representation. [219 Ark. at 19]" Thus, the court held the contractor was not "estopped" with respect to his entire promise although he might have been but for the "special circumstances." At least the case makes it clear that some such doctrine has been applied, and apparently consistently so, in Arkansas over the years. We tend to agree with the author of the note on that case at 30 Texas L. Rev. 903 (1952), that the term "estoppel" is not very accurately used there, although we cannot say whether there would have been a different result or even different considerations had the concept of detrimental reliance sufficient to warrant enforcement been used instead.

We hold the complaint before us stated facts sufficient to state a cause of action in that the appellant alleged he had built a new home especially equipped for a wheelchair user in reliance on the promise of the appellee. Of course, the appellant will have to prove to the trier of fact that his action was indeed based upon that reliance and that it was reasonable, but we find it sufficiently stated.

Although we recognize we should not apply the new

rules of pleading, recently adopted in Arkansas, we find even the old, more formal pleading code must be applied with some reference to the reasons behind it. Here there is no doubt the complaint is sufficient to let the court and the appellee know the precise nature of the appellant's claim of an enforceable promise based on detrimental reliance. The defendant-appellee will have no trouble drafting an answer which sufficiently defines issues for the court's resolution.

Reversed and remanded.

HAYS, J., dissents.

ARTEX HYDROPHONICS, INC. and
GREAT AMERICAN INSURANCE CO.
v. Arvel PIPPIN, Employee

CA 79-198 593 S.W. 2d 473

Opinion delivered January 16, 1980
Released for publication February 6, 1980

Laser, Sharp, Haley, Young & Huckabay, P.A., for appellant.

Stoker & Keeter, by: *Bob Keeter*, for appellees.

ERNIE E. WRIGHT, Chief Judge. This is an appeal from a

decision of the Workers' Compensation Commission holding appellant responsible for certain medical expenses.

The appellee sustained a compensable injury on May 24, 1977, while working for appellant, Artex Hydrophonics. The accident resulted in compression fractures to some four or five vertebrae. When claimant continued to suffer pain after two weeks hospitalization his orthopedic surgeon, Dr. Hathcock, referred him to Dr. Fecher, a specialist in hematology and oncology. Tests revealed he had multiple myeloma which predated the injury. The myeloma had weakened his bones predisposing him to the compression fractures sustained in the accidental injury. He responded well to the myeloma treatment which was necessary not only to halt the disease but served to stabilize the bones and thereby help heal the fractures. The medical evidence shows the fractures had healed no later than December 19, 1977, when Dr. Hathcock last saw claimant, and new problems with the fractures are not anticipated in the near future.

The issue before the Commission was whether appellants are liable for medical expenses incident to the treatment of the myeloma which preceded the injury, was not aggravated by the injury and was discovered incident to treating the fractures arising from the injury. The fractures simply resulted in earlier discovery of the myeloma.

While the myeloma would have been treated upon discovery in any event, it was necessary to treat the myeloma to stabilize the bone structure to accomplish healing of the fractures.

On appeal appellants concede responsibility for medical expenses in the initial diagnosis and treatment of the myeloma as this was necessary to promote healing of the fractures. They deny responsibility for the continuing treatment of the myeloma on the ground such treatment is not a medical expense stemming from the injury.

The Commission held the preponderance of evidence showed treatment of claimant's preexisting myeloma was, at least through October 27, 1978, proper and necessary medical treatment incident to the compensable injury sustained in

May 1977 for which appellants are responsible.

The treatment for the myeloma appears to have consisted of cobalt, chemotherapy and repeated blood tests made necessary because of the chemotherapy. The cobalt treatment has been given primarily for residual pain incident to the fractures although it has beneficial effects on the myeloma. The chemotherapy is to stop or retard the myeloma. Dr. Fecher testified, in a deposition on August 25, 1978, "If I remember right, within a couple months after being out of the hospital, he was probably in as good a shape as far as how he, you know, his back pain, as he is today, so, I don't think any change has really taken place clinically, you know, say in the last ten months." Claimant was discharged from the hospital on August 8, 1977. Dr. Hathcock testified claimant should have healed enough by the time he last saw him in December 1977, that after that point treatment would be only for the myeloma.

Ark Stat. Ann. § 81-1311 makes it the obligation of the employer to provide medical services reasonably necessary for the treatment of the injury received by the employee. The law does not require the employer to pay for medical expenses for the treatment of a preexisting disease not aggravated by the injury except to the extent it may be necessary to accomplish treatment of the injury.

There is substantial evidence to support the holding of the Commission that appellants are responsible for all of the medical expenses in question through December 19, 1977, when Dr. Hathcock last saw claimant. However, the record appears to be incomplete as to what medical expenses were incurred after that date and the purpose of the expenses.

We modify the decision of the Commission to hold respondents responsible for the medical expenses in question incurred through December 19, 1977, but remand the case for further trial as to expenses incurred after December 19, 1977 and a determination of what part of such expenses were reasonably necessary for the treatment of the injury.

Affirmed in part as modified, and remanded in part.

Alonzo Clay REED *v.* STATE of Arkansas

CA CR 79-102 593 S.W. 2d 472

Opinion delivered January 16, 1980
Released for publication February 6, 1980

Paul Johnson and *William H. Craig,* for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

ERNIE E. WRIGHT, Chief Judge. The appellant was convicted by a jury of two felony counts of theft of property in violation of Ark. Stat. Ann. § 41-2203, and a misdemeanor count of drawing and uttering an insufficient fund check with intent to defraud in violation of § 67-720. After he was found guilty on the above mentioned counts the jury found appellant had been previously convicted of two or more felonies as charged. He was sentenced to three years imprisonment on each of the two felony convictions, with the sentences to run concurrently, and a fine of $20.00 on the misdemeanor conviction.

From the judgment the appellant brings this appeal contending the court erred in denying appellant's motion for a directed verdict of acquittal and in admitting into evidence the testimony of the bank's officer and microfilm copies of bank records.

The evidence shows an account was opened in the

Union National Bank in Little Rock on December 2, 1976 in the name of Master A. C. Reed Enterprises, Inc. in the amount of $5.00. No other deposits have been made in that account. On December 26, 1976, A. C. Reed drew a check in the amount of $347.00 on that account payable to A. C. Reed and deposited it in his personal account. The check was charged back to the business account as there were no funds in the business account to clear the check. The bank suffered a loss of $238.89 in the accounts incident to the $347.00 bad check. On December 28, 1976 A. C. Reed issued a check on his personal account for $35.00 to the Country Cobbler for a pair of boots and payment by the bank was refused because of insufficient funds in the account. On March 12, 1977 A. C. Reed issued a check on the business account to A. C. Reed and this was cashed by him at a Kroger store in Little Rock. The manager of the store who cashed the check testified the appellant present at trial was the individual for whom he cashed the check. Payment of the check was refused by the bank as there were no funds in the account. The appellant contacted the bank and Kroger store prior to trial and expressed a desire to make restitution, but tendered no funds.

A sales clerk from the Country Cobbler testified A. C. Reed, the appellant, present in the courtroom, gave him the $35.00 check for a pair of boots and the check came back from the bank unpaid. The check has not been paid.

Microfilm copies of bank records incident to the two accounts were received in evidence upon the testimony of the manager of the accounts services department of the bank. He testified the microfilm records he identified were kept in the normal course of business. His department processed all records for checking and saving accounts, the transactions are microfilmed daily, and that while he does not keep the microfilm in his immediate personal possession, requests for copies are handled through his department. He admitted he did not have personal knowledge as to whether the checks were actually written by A. C. Reed.

Appellant argues that the state did not establish by direct evidence that appellant wrote or presented the checks involved in the prosecution, and that his signature on the

checks was not identified. He also argues the circumstantial evidence was not sufficient to support a conviction.

The manager of a Little Rock Kroger Store testified he cashed a check for appellant dated March 12, 1977 in the amount of $165.00. The check was returned by the bank with the notation the account was closed. The check has not been paid and the appellant in the courtroom is known to him as A. C. Reed, the person for whom he cashed the check. The check was received in evidence.

No evidence was introduced disputing the bank records or the state's evidence.

The microfilm copies of bank records identified by the bank's officer as being copies of records kept in the normal course of business were competent evidence, and it was not error to admit the records in evidence. Ark. Stat. Ann. § 28-932 expressly provides for the admissibility of such records, and the records were adequately identified by the bank's officer. Under Rule 803(6) of the Uniform Rules of Evidence the testimony of the witness was competent.

The testimony of two witnesses identifying appellant as the person passing the two bad checks coupled with the testimony as to appellant expressing a desire to the bank and to Kroger store to make the losses good, combined with the documentary evidence was sufficient to warrant the court in submitting the issues to the jury.

On appeal the court affirms if there is substantial evidence to support the verdict, and we find ample substantial evidence to support the jury's verdict. *Milburn* v. *State*, 269 Ark. 267, 555 S.W. 2d 446 (1977).

After the verdict of guilty and prior to the jury determining the sentence, appellant took the stand and admitted he was guilty of the charges, and expressed his intention of making restitution.

Affirmed.

Betty JACOBS *v.* Ebrahim LEILABADI
d/b/a NORTH GREGG APARTMENTS

CA 79-176 593 S.W. 2d 479

Opinion delivered January 16, 1980
Released for publication February 6, 1980

W. Asa Hutchinson, for appellant.

Murphy & Carlisle, for appellee.

M. STEELE HAYS, Judge. Appellant entered into a written lease agreement with appellee, plaintiff below, on August 1, 1978, leasing an apartment unit in Fayetteville for one year at $235 per month. Appellant took possession around August 15 and paid $470 to cover two months rent plus $100 as a deposit against damage. In December, appellant told appellee that the rental costs in Fayetteville were too high for her earnings and that she was forced to give up the apartment. Appellee informed appellant that he would hold her to the lease term. Around the 20th of December, appellant paid a month's rent and notified appellee in writing that she would

be vacating the apartment no later than January 1 and would not expect a return of her deposit of $100.

On December 27, appellee filed a suit to recover the full amount due under the lease, less the rental payments made by appellant and trial was set for January 26, 1979. The facts are not disputed: appellee testified that the first two rent payments of $235 each were to apply to the first month and last month under the lease (although no provision to that effect appears in the lease); that he had advertised regularly from December on to obtain another tenant and was unable to rent the apartment during the lease term; that appellant's notice that she was vacating was left on his door sometime during December (he could not say just when); that no damage to the premises had occurred; that appellant had begun occupancy on August 15 and he only charged her for one-half of that month. By stipulation, it was agreed that appellant had paid a total of $1292.50 plus the $100 deposit, all of which were to be credited to the total rent for the lease period.

At the close of plaintiff's case, the appellant-defendant moved for a directed verdict upon the ground that appellant was entitled to peaceful possession until January 30, 1978 because her payments of $1292.50 brought the rent current to that date, whereas suit was filed prematurely on December 27, 1977.

Appellant's motion was overruled, and her testimony was in agreement with that of appellee's. She stated that she "evidently" vacated the premises on or about December 27 and moved to Rogers, Arkansas.

The trial court's findings were that appellant had paid $1292.50 in rent commencing on August 15; that a total of $2702.50 in rent was due, leaving appellant indebted to appellee for $1,410.00 less the $100 deposit, or a balance of $1,310.00, for which judgment and costs were granted to appellee. The judgment was filed on February 13, and on February 9 appellant filed a motion to vacate and reverse judgment, asserting that appellee's suit was commenced on December 27, prior to the accruing of any cause of action, inasmuch as it was undisputed that appellant's rent was paid

at least through January 15.

Appellee filed a response to the motion on March 1, asserting that $235 of rent was to be applied to the last month of the lease (July 1978) and consequently appellant's rent was current only through the month of December, 1977, that rent for January of 1978 was due in advance under the lease when suit was filed on December 27, and that the cause of action had arisen at time suit was filed.

On April 3 the motion was heard, and an order entered on April 17 denying the motion upon the ground the judgment had been entered in the term of court commencing on January 1 and not acted upon during such term (a new term having commenced on April 1) and, therefore, the court had no authority to act upon the motion except upon grounds set out in Ark. Stat. Ann. § 29-506, none of which were alleged in the motion.

On April 5, appellant filed notice of appeal from the order and judgment and argues that no cause of action existed when suit was filed and that it was error to deny appellant's motion to vacate.

For reversal appellant contends that the trial court erred in denying the motion to vacate; however, appellee insists that notice of appeal was not timely filed, and, if that is correct, we could not reach the appeal on its merit. Therefore, we consider that point first, as it is jurisdictional to this appeal. *Davis* v. *Ralston Purina Company,* 248 Ark. 14, 449 S.W. 2d 709 (1970).

The sequence of filings pertinent to the issue are set out for clarity:

January 26 — Trial by court and findings announced.

February 9 — Motion to vacate and reverse judgment filed.

February 13 — Judgment filed.

March 1 — Response to motion filed.

March 22 — Docket entry setting a hearing on motion to vacate.

April 5 — Notice of appeal filed.

April 17 — Order denying motion to vacate filed.

Act 123 of 1963, in four sections (Ark. Stat. Ann. 27-2106.3 — 2106.6) was intended to clarify the time for filing notice of appeal in those instances in which a losing party had filed a motion for a new trial, or similar motion affecting the judgment. The decision of Justice Brown in *Old American Life Insurance Company* v. *Lewis,* 246 Ark. 322, 438 S.W. 2d 22 (1969) provides this explanation:

> We discussed Act 123 in *St. Louis S.W. Ry.* v. *Farrell,* 241 Ark. 707 (1966). "Act 123 was evidently intended to remedy an awkward situation created by Act 555 of 1953." Act 555 required a notice of appeal to be filed within thirty days after entry of judgment by the trial court. That requirement had to be abandoned for the benefit of a losing party who might have good reason to file a post-judgment pleading, such as a motion for a new trial, or one of the several motions enumerated in Act 123. Consequently, Act 123 established a procedure whereby the time for filing notice of appeal could be postponed pending the determination of such a post-judgment pleading.

In *St. Louis Southwest Railway Company* v. *Farrell,* the requirements of Section 2 of Act 123 are stated succinctly:

> Section 2 of Act 123 requires the party to present the motion to the trial court within thirty days after its filing. If the matter cannot be heard within that period of thirty days the party must, within that period, request the court either to take the motion under advisement or set a definite date for the motion to be heard. If neither of those steps is taken within thirty days it shall be deemed that the motion has been finally disposed of at the expiration of the thirty days, and the time for filing a notice of appeal begins to run.

Section 3 of Act 123 provides:

> If the said motion shall be denied by the trial court or shall be deemed to have been disposed of at the expiration of thirty days as provided in the preceding section, any party desiring to appeal from the judgment, decree or order originally entered shall have ten days from the entry of the order denying the said motion, or from the date of its disposition as herein provided, except that any party shall have not less than thirty days from the original entry of the judgment, decree, or order, within which to give notice of appeal, and this act shall not be deemed to reduce or shorten the time now provided by law in any instance for filing notice of appeal to less than thirty days from date of entry of original judgment, decree or order by reason of a party having filed a motion for new trial or other motion herein mentioned.

No question is raised with respect to the timeliness of appellant's motion to vacate, so we need only consider what followed.

Excluding appellee's response to the motion to vacate filed on March 1, it is clear that nothing appears from the record to have occurred relative to any of the steps discussed in Section 2 of Act 123 from the filing of the motion until the docket entry of March 22 (setting a hearing on April 3), a lapse of forty one days.

Thus, within the time allowed (thirty days) the appellant's motion was not presented to the court, nor did the appellant ask the court to set the matter for a hearing, nor was the motion taken under advisement by the court, either on its own or at the request of appellant. It is clear that one of the foregoing must occur, otherwise the motion is deemed to be disposed of at the expiration of thirty days, just as if the court had actually denied it upon its merits. The decision in *St. Louis Southwest Railway Company, supra,* interprets the act accordingly.

We note, too, that while the decision in *St. Louis S.W. Ry. Co.*, the court merely commended the procedure followed in that case of having the court write a letter that he

was taking the motion under advisement, thereby avoiding "the uncertainty of oral testimony" to show compliance with Section 2; it did not state that such record entry was mandatory. However, that requirement was provided by the case of *Jones* v. *Benton County Circuit Court*, 260 Ark. 893, 545 S.W. 2d 621 (1977). In *Jones*, appellant filed a motion N.O.V. within the fifteen days ordinarily required for post-judgment pleadings, but nothing else transpired within the thirty days provided in Section 2, nor was notice of appeal filed in the time allowed. The court denied the appeal stating:

> . . . We are unable to find any evidence in the record either written or oral that the motion was either presented to the trial court or that the matter was taken under advisement by the trial court within the time required by Ark. Stat. Ann. § 27-2106.4, supra.

Section 3 provides that where, as here, the motion is deemed to have been disposed of at the expiration of thirty days, a party desiring to appeal shall have ten days in which to file notice of appeal. The appellant, consequently, would have had ten days from March 11, or until March 21, in which to give timely notice of appeal. Obviously, notice of appeal was not filed within the time provided under Act 123 of 1963, and this court has no jurisdiction to hear the case on its merits. *Davis* v. *Ralston Purina Company, supra*.

It might be helpful to observe, in passing, that appellant is correct in arguing that suit was filed prematurely (before the cause of action accrued); however, the end result would have meant simply the dismissal and refiling of the suit, as it is abundantly clear that the appellant is indebted to the appellee in exactly the amount awarded by the trial court under the lease.

Affirmed.

Judges Howard and Newbern dissent.

David Newbern, Judge, dissenting. The trial judge gave a reason for his decision which I believe was erroneous. The statute providing time limits on notice of appeal after a motion to vacate unequivocally states that the expiration of a

"term of court" is irrelevant. Ark. Stat. Ann. § 27-2106.4 (Repl. 1979).

The appellant contends the trial court set the hearing on the motion to vacate within 30 days of the day it was filed. The appellee contends it was not set until 41 days after it was filed. Neither party asserts whether within the 30 day period after it was filed the appellant *sought* its disposition as required by the statute. We are left without knowledge why the trial judge set the hearing for April 3, 1979.

I could concur in the result reached by the majority if the trial judge had denied the motion for failure to pursue it in accordance with the statutory requirement. But as he did not, and as we do not know the extent to which the appellant pursued her motion, I believe we should give the trial judge an opportunity to focus on the correct issue. It may be that the trial judge would be able to say the appellant did or did not ask that the motion be set for hearing within 30 days of its filing. If she did ask, then she had ten days from the denial of her motion to file her notice of appeal. Ark. Stat. Ann. § 27-2106.5 (Repl. 1979).

While I agree with the majority's passing remark about the probable, although not inevitable, final result of this litigation, I cannot help but conclude a litigant must not be denied relief, such as an appeal might provide, on the basis of a technical failure unless we are sure such a failure has occurred or that the litigant has failed to carry her burden of showing no such failure. Here, we cannot say either of those, because the trail court ignored the applicable statute and thus failed to consider whether the appellant had pursued her motion as required by the statute.

I am also very reluctant to concur in that part of the opinion citing *Jones* v. *Benton County Circuit Court*, 260 Ark. 893, 545 S.W. 2d 621 (1977), as the opinion in that case seems to be based on expiration of "term time" despite the clear wording of the statute, as explained above. This case seems to give some support to the action of the trial judge in the case before us now. And yet it purports to apply the provisions of Ark. Stat. Ann. § 27-2106.4 (Repl. 1979). Just

as in the case before us, the application of the "term time" rule was without explanation or reference to the statute which makes it inapplicable. I find the case just as mysterious as the action of the judge here, but regardless of that, I believe we should not say the appellant has not complied with the statute until we have some evidence one way or the other.

I would reverse and remand for a determination whether the appellant did or did not comply with the provisions of the statute.

Judge HOWARD joins in this dissent.

Willie ROSS *v.* STATE of Arkansas

CA CR 79-70 593 S.W. 2d 475

Opinion delivered January 16, 1980
Released for publication February 6, 1980

James E. Davis, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson,* Asst. Atty. Gen., for appellee.

M. STEELE HAYS, Judge. This is an appeal from an order revoking a suspended sentence. On December 3, 1976, ap-

pellant was convicted of burglary and sentenced to five years, the sentence to be suspended during good behavior, upon payment of a fine of $500 and costs within 120 days and upon non-use of alcohol.

On April 20, 1979, the State of Arkansas filed a petition to revoke the suspended sentence upon the grounds that appellant had been found guilty of third degree battery, had not reported to his probation officers, had not notified them of his present employment, had not reported a change of address and had not paid the fine and costs.

On May 11 a hearing was begun on the petition to revoke. Counsel for appellant moved for a continuance, referring to the appellant's limited education and to the fact that the allegation that appellant was convicted of third degree battery was found to be in error. The motion for continuance was denied by the court at the outset, but during the hearing was later continued to May 15. On May 11, after the continuance, an amended petition to revoke appellant's suspended sentence was filed alleging that appellant was convicted of gambling on May 2, 1978, public intoxication on August 8, 1978, third degree battery on September 8, 1978, public intoxication on September 8, 1978, and drunk in public on April 13, 1978, in addition to the previous grounds. During the proceedings on May 11, counsel for appellant asked the court to recuse itself, which motion was overruled. The hearing was reconvened on May 15 at the completion of which appellant's suspended sentence was set aside and a sentence of five years was imposed.

The appellant brings this appeal, alleging as a single point for reversal, that appellant was denied due process under the Fourteenth Amendment by the trial judge's refusal to recuse himself for consideration of the petition to revoke.

In view of the type of error asserted, i.e., a refusal to recuse, we deem it necessary to set forth pertinent portions of the proceedings in some detail:

> BY THE COURT: And didn't you tell him that every time you had gotten into trouble it was because of liquor, that you had been drinking?

BY THE DEFENDANT: Yes, sir.

BY THE COURT: And do you remember what that judge told you about liquor?

BY THE DEFENDANT: He told me to leave it alone.

BY THE COURT: That's exactly right. Now, do you know who that judge was?

BY THE DEFENDANT: No, sir, but I think it was you, though.

BY THE COURT: I know it was me, and there is my writing and that's right there on the book. (showing)

BY THE DEFENDANT: Yes, sir.

BY THE COURT: Where I told you to leave alcohol alone.

BY THE DEFENDANT: Yes, sir.

BY THE COURT: Just pure and simple. Leave it alone.

BY THE DEFENDANT: Yes, sir.

BY THE COURT: Mr. Davis, you can call what witnesses you want, but I cannot sanction this type of conduct and try to maintain a probation department and provisions with the hope of rehabilitation when one of the things that has come up is public drunkenness. If this gentleman has a problem with liquor — I don't remember all these cases until I come back with this one.

During cross-examination of appellant's mother by the prosecutor, Mr. Johnson, the following occurred:

Q: Have you seen Willie drinking at your house, Mrs. Ross?

A: It's quite natural if his momma drink a little beer, he might drink a little, too.

THE COURT: Ma'am, he didn't ask you what he might do. Now, you answer his question, whether he has come in there drunk.

THE WITNESS: No, sir, he don't come in there drunk.

THE COURT: Have you seen him drinking?

THE WITNESS: I've seen him drink one can of beer.

THE COURT: Now —

THE WITNESS: One can of beer at the time. And that's all I can remember, and can tell you the truth on that. He drank one can of beer.

THE COURT: We are fixing to have a witness that's fixing to go upstairs.

THE WITNESS: No, sir, don't put me up, please.

MR. DAVIS: Now, your Honor —

THE COURT: Now, she's trying to play games with this court.

THE WITNESS: No, sir, I'm not —

THE COURT: Now, and this court's not going to — just a minute, and you can instruct her if you want to, but I'm not — just a minute. But I'm not fixing to put up with this for one minute.

MR. DAVIS: Your Honor, I would like for the record to reflect that I object to the court.

THE COURT: You make the record; you put in there whatever you want to, but when a witness gets on the stand, "I ain't saying whether I've been seeing drinking or not," and works around to one beer, this court is not putting up with that. Put in there anything you want to Mr. Davis.

THE WITNESS: I want to —

THE COURT: You just be quiet and sit down.

THE WITNESS: Okay.

THE COURT: Go ahead and make your record.

THE WITNESS: Please don't —

MR. DAVIS: Your Honor, my objection is that I feel that the court is trying to intimidate the witness and to take over cross examining her concerning her testimony, and in doing so is becoming more of an advocate rather than a judicial officer in the proceedings.

I feel that it is improper for the court to take this attitude towards the witness and threatening her with going to jail concerning some remarks she made in her testimony.

THE WITNESS: I'm sorry.

MR. DAVIS: I would ask the court if perhaps I might suggest, obviously the witness has caused the court to become angry; maybe that anger is justifiable. I'm not saying that it's not. I simply suggest that the court perhaps it recuse itself from further consideration of this case.

THE COURT: That motion will be overruled right now.

THE WITNESS: Please don't lock me up. I didn't mean no harm.

THE COURT: Go ahead. Finish.

MR. DAVIS: That's all I believe I care to say at this time.

THE COURT: Mr. Davis, let me make a statement, and I want the record to reflect on this. This is not my first day in court. This is not the first day I know any-

> thing about the facts of law. This is not the first day I've had any experience in trial work. The court feels a strong obligation to maintain order, decorum, and to require a witness when testifying not to be evasive, and not to commit, in a sense, perjury.
>
> Now, the questions which the deputy prosecuting attorney asked this witness, and the witness's manner and demeanor on the stand, "I ain't said how many times he's been drunk. I ain't said how many times he's been drinking. He drinks beer with me when I want to," and then come back and tell me she has seen him drink one beer, is in the opinion of this court an affront to this court. And if I'm to sit here and hold any type of dignity of this court, then I will not permit a witness to try to flim flam an attorney who is asking questions, nor the record in this court.
>
> I am not angry, but I am firm in my beliefs in this regard.

We conclude that appellant is correct in urging that the trial court took an overly active part in these proceedings from the side of the prosecution and when that occurs the trial judge loses at least the appearance of impartiality which is essential under our system. Clearly, the trial judge became impatient and irritated with the somewhat equivocal answers of appellant's mother, but to suggest on such slender grounds that she was just about to be put in jail resulted in an intimidation of the witness to no discernible purpose. We think she could have been admonished to answer truthfully and responsively without the unveiled threat of being taken "upstairs." Still, this interchange in the record might not be enough on its own to lead us to the result reached, but when the other segment is examined, there is enough to sway the balance. That portion of the quoted section reflects that even though the State's petition for revocation (prior to the amendments) said nothing about use of alcohol, the court on its own interrogation went into the matter in depth. But the telling point is the comment by the court:

> BY THE COURT: Mr. Davis, you can call all the witnesses you want, but I cannot sanction this type of

> conduct and try to maintain a probation department and provisions with the hope of rehabilitation when one of the things that has come up is public drunkenness. (T. p. 8)

It seems clear that when a trial judge, at the outset of a hearing for any purpose, states to either side words to the effect — "you may call all the witnesses you want, but — ", that a set of mind is present which cannot be reconciled with the proposition that the trial court is committed to hear all relevant, credible evidence weighing it and arriving at a judicious result.

We find this observation to be very closely related to the comment in *Burrows* v. *Forrest City*, 260 Ark. 712, 543 S.W. 2d 488 (1976) cited by the appellant. In *Burrows*, the appellant filed a motion for the trial judge to recuse himself from hearing on the motion for revocation on the ground that the judge had told an attorney that appellant should "bring his toothbrush with him," implying that he would go to jail if found guilty. The trial court denied the motion. In reversing the denial of the motion, the Arkansas Supreme Court quoted language from an earlier case, *Farley* v. *Jester*, 257 Ark. 686, 520 S.W. 2d 200 (1975):

> However, court proceedings must not only be fair and impartial — they must also appear to be fair and impartial.

We think this language is clearly applicable to the case at bar. Although we do not make any retrospective judgments on the impartiality of the trial court itself and keeping in mind the rule of law that suspended sentences and also their revocation are within the sound judicial discretion of the trial court [Ark. Stat. Ann. §§ 43-2314 and 43-2326 (Repl. 1977); *Gross* v. *State*, 240 Ark. 926, 403 S.W. 2d 75 (1966)], we think that the trial court's own cross-examination of the witness and its demonstrated impatience and irritation in response to the witness' statements gave the "appearance" of bias. Thus, where the trial judge sits as a finder of fact, the

appearance of fairness in trial proceedings becomes even more important. *Burrows, supra.*

We are troubled too, with the matter of fact way that the appellant's drinking problem was treated as if it were easily controllable. Certainly, the trial judge was striving to relieve the community as well as the appellant of the problems resulting from the appellant's use of alcohol, a commendable objective, but he seems to have ignored the fact that chronic alcoholism is compulsive or even disease-based, according to respectable authority, and thus to simply say to an individual under a suspended sentence, if alcoholism is the problem, "if you drink you may be sent to the penitentiary" is an over simplification of cause and effect; a better method, we believe, where facilities are available, is to direct the defendant to attend an alcohol abuse program with reasonable consequences if he disobeys the conditions.

We have reached the conclusion that the trial judge should have recused himself, in part in the belief that the reinstatement of the entire five year original sentence under the totality of the facts and circumstances of this case was severe. Understandably, the trial court may have felt personally affronted by the appellant's failure to comply with the conditions of his suspension, but the end result is that the record suggests that the appearance of fairness is lacking.

Reversed and remanded with instructions to recuse.

Dorothy Deloris PARSONS *v.* Raymond Carpenter PARSONS

CA 79-97 593 S.W. 2d 483

Opinion delivered January 16, 1980
Released for publication February 6, 1980

Faber D. Jenkins, for appellant.

No brief for appellee.

JAMES H. PILKINTON, Judge. This appeal is from an order of the Chancery court overruling a motion to dismiss a petition against an out-of-state defendant for lack of personal jurisdiction, and questioning the validity of certain modifications made thereafter in a divorce decree.

On December 31, 1977, a decree of divorce was entered in favor of appellee against appellant based on constructive service. The appellant was a resident of Texas at that time. There were two children of the marriage. The son was in the custody of the father-appellee, and the daughter was in the custody of the mother-appellant. Each was found to be a proper person to retain such custody, and the father was ordered to pay child support for the minor daughter in the sum of $150 per month, plus usual medical expenses.

On April 7, 1978, the father filed a petition to modify the original divorce decree seeking definite periods of visitation with his daughter. The mother responded by filing an answer pro se. She also asked for affirmative relief and sought to have the original decree modified to increase the amount of monthly support for the daughter. On May 17, 1978, a hearing was held on the respective pleadings then before the court and, with both parties present, an order was entered fixing the visitation rights of the father, and increasing the child support to $170 per month.

On January 26, 1979, appellee filed what he called "An Amended Petition to Modify Decree of Divorce", and had a summons issued for appellant directed to the Sheriff of Harris County, Texas. This summons was served on February 7, 1979 and return filed. On January 26, 1979, a second summons was issued to William Lee Fergus, attorney at law, Osceola, Arkansas, (counsel for appellee) directing him to summon appellant to answer within 20 days. This document is not dated, and was not signed by the clerk. However, the record shows that counsel for appellee wrote a letter, dated January 24, 1979, addressed to appellant at her address in Houston, Texas, and sent it to her by certified mail, return receipt requested. This letter contained a copy of the amended petition. On February 23, 1979, appellant filed a special appearance, and moved the Chancery Court to set aside and quash the two purported summonses. Appellee filed a response to this pleading; and, on February 26, 1979, without notice to appellant or her counsel, the Honorable Henry Wilson, Chancellor, issued an order denying the motion to quash, and allowing appellant to file a response within ten days.

On March 8, 1979, appellant filed a response to appellee's petition to modify, denying the continuing jurisdiction of the court over her person and seeking dismissal of the petition to modify for want of jurisdiction. On March 13, 1979, the Chancery court with Honorable Howard Templeton, Chancellor, presiding, declined to rule further on the jurisdictional question. It was the view of the court that the prior order, made by Judge Wilson on February 26 and filed February 28, settled that issue. Judge Templeton ruled that such order gave his court jurisdiction over both the cause of action *and of the parties*. The Chancery court on March 13, 1979, modified the decree further, as requested by appellee. Appellant has appealed from the order dated March 13, 1979 which was signed by the judge on May 25, 1979, but not entered until June 7, 1979.

For reversal, appellant has asserted four points which she contends require a reversal of the trial court's order of March 13, 1979.

I.

Appellant first says the Chancery court erred in finding that the court had jurisdiction of her person, although admitting that the Mississippi Chancery Court had jurisdiction of the subject matter. Appellant overlooks the fact that she had entered her appearance in this case generally on April 20, 1978, when she filed an answer to appellee's first petition to modify the decree, and asked for affirmative relief. She was also present in person, and by counsel, at the first hearing to modify, held on May 17, 1978, and she received an increase in support for the daughter from $150 to $170 per month. She submitted herself to the jurisdiction of the Mississippi County Chancery Court at that time as to the matters pertaining to visitation of the daughter and of the daughter's proper support. The court has continuing jurisdiction in these matters; and, at any later time, on proper motion and due notice to the other parent, may make such order as the circumstances require.

II.

Appellant argues that a new or original personal service

or process on her was required. We find no merit in this argument under the circumstances here.

Where modification is considered a continuation of an original matter before the court, the issuance of a new or original process, or new personal service, is not required. 27B C.J.S. *Divorce* § 317 (4). However, proper notice of the application for modification, and an opportunity to be heard should be given whether or not required by statute. *Seaton* v. *Seaton*, 221 Ark. 778, 255 S.W. 2d 954 (1953); *Schley* v. *Dodge, Chancellor*, 206 Ark. 1151, at 1154, 178 S.W. 2d 851 (1944).

It is conceded by appellant that she did receive actual notice of the filing of the petition that is in question. She received notice in several ways, one of which was by being mailed a copy of the amended petition by certified mail, return receipt requested, as required by Ark. Stat. Ann. § 27-362(b) (Repl. 1979). Appellant claims that section of the statute did not apply. She would be correct if appellant had not previously entered her appearance in this case, and if an original personal service or summons had been required. However, as already noted, only notice was necessary. The argument of appellant fails to take into consideration the difference between the service required in an original action, and *notice* required in a matter where the court already has personal jurisdiction of the parties.

III.

Appellant also complains that on February 26, 1979, the Chancery Court, without notice to appellant, issued an order denying the motion to quash, and allowed appellant ten days in which to file a response. Appellant did not file any motion or pleading on her part seeking to have this particular order vacated, but instead filed an answer or response. The error, if any, was harmless under the circumstances. Appellant made her argument at the March 13, 1979, hearing and it was rejected by the trial court.

IV.

As her fourth point, appellant claims the court erred in

refusing to rule further concerning personal jurisdiction over the defendant. As stated above, she renewed her objection to the jurisdiction of the court at the March 13, 1979 hearing. However, the import of her argument was that new or personal service of process on her was required. The Chancellor was correct in rejecting this argument. Appellant has argued on appeal that the court was wrong in its reasoning that the personal jurisdiction question was not still before the court at the time of the hearing on March 13, 1979. Be that as it may, and regardless of the reason given for its action, the opinion of the court was correct. Appellant had previously entered her appearance, and the court had continuing jurisdiction to deal with the matters of child custody and visitation under the circumstances.

As a side matter appellant complains of repeated efforts of appellee for modification of the original decree. She claims this places an undue burden on her to resist his various petitions. It is true that repeated efforts for modification of a decree are looked on with disfavor by the courts; and there should be an end to the constant changes and modifications of orders having to do with the custody or visitation of a child. *Saltonstall* v. *Saltonstall*, 148 Cal. App. 2d 109, 306 P. 2d 492 (1957). However, this is a matter which must be first dealt with on the trial court level. It is not properly before us in this appeal.

Finding no error, the order of the Chancery Court is affirmed.

Fletcher WASHINGTON, Zachery WARD,
Herman HAMPTON *v.* STATE of Arkansas

CA CR 79-58 594 S.W. 2d 29

Opinion delivered January 16, 1980
Released for publication February 6, 1980

Jimmy R. Burton, for appellants.

Steve Clark, Atty. Gen., by: *Robert J. DeGostin, Jr.*, Asst. Atty. Gen., for appellee.

JAMES H. PILKINTON, Judge. Appellants are charged with the crime of rape of Sheila McKinney, a 14 year old girl, on the grounds of the Jonesboro High School.

On September 29, 1978, Sheila went to a football game in Jonesboro. During the half-time intermission, appellant Zachery Ward approached Sheila. She says he told her that her brother had come to take her home. In any event, the two left the stadium, walked out the front gate, went toward the front of the gym and other buildings on the campus to a point, according to the girl, where her brother was supposed to be waiting. Fletcher (Pete) Washington and Herman Hampton followed them. Washington and Hampton caught up with the girl and Ward and joined them. Then, according to Sheila, the three young men grabbed her and forced her under a stair well of a building. The state's claim is that Washington, Ward and Hampton forcibly raped Sheila McKinney under the stair well.

On the morning of October 9, 1978, and before any charges had been filed or arrests made, the three young men accompanied by their parents, went to the office of Robert Nelms, a juvenile officer, in the Craighead County Courthouse. They asked Nelms to assist them in having a polygraph examination administered. In the presence of Deputy Sheriff George Stewart, Mr. Nelms says he read the Miranda warning to the young men and to their parents. Ac-

cording to Nelms, after receiving assurances that appellants and their parents fully understood their constitutional rights, Nelms allowed each appellant, along with a parent of each, to sign the consent forms for the polygraph examination.

Each young man then individually went upstairs, in the same building, to the office of Deputy Sheriff George Stewart. There they made statements incriminating themselves in the rape of Sheila McKinney.

On October 17, 1978, an Information was filed charging each appellant with Rape in violation of Ark. Stat. Ann. § 41-1803 (Repl. 1977). Prior to the trial, preliminary motions were heard and the court ruled that the results of the polygraph examination, or any reference thereto, would not be admissible. Motions for severance were denied.

On February 8, 1979, appellants were tried before a jury in Craighead County Circuit Court. The state produced evidence that Fletcher (Pete) Washington, Zachery Ward and Herman Hampton forcibly raped Sheila McKinney. The defendants introduced evidence that they tried to have sexual intercourse with the girl, but not by force.

After instructions, argument and jury deliberations, the jury returned a verdict finding defendants guilty as charged and fixing a punishment of 15 years for each. Judgment was entered on the verdict and the trial court sentenced each appellant to 15 years in the Department of Corrections.

On appeal from their convictions, appellants have raised four issues seeking reversal. Each defendant had a separate attorney. Some of the points are raised by all appellants, and we have carefully considered each argument. However, in order to prevent repetition, we will discuss each point only once in this opinion.

I.

Appellants Washington, Ward and Hampton each claim on appeal that the trial court committed error by failing to suppress incriminating statements made by them to Deputy Sheriff George Stewart in preparation for and during a

polygraph examination. We find no merit in this argument. Appellants all voluntarily requested the examination. It was only the *result* of the test that was inadmissible. Statements made prior to, and in preparation for, a polygraph test, which the accused has voluntarily agreed to take, would not be involuntary for that reason, if otherwise voluntary. The fact that the statements were so made would only be one factor to be considered on the question of voluntariness. *Gardner* v. *State*, 263 Ark. 739, 569 S.W. 2d 74 (1978).

In each case we make an independent determination based upon the totality of the circumstances, and the trial court's finding of voluntariness will not be set aside unless it is clearly against the preponderance of the evidence. *Degler* v. *State*, 257 Ark. 388, 517 S.W. 2d 515 (1975). Appellants say that the statements they gave were confessions and, under *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the state bears the burden of showing that the confessions were made after a voluntary, knowing and intelligent waiver of the right to remain silent, before they can be admitted into evidence. Even so, after an examination of all the circumstances surrounding the appellants' statements in this case, we cannot say that the trial court's finding of voluntariness is clearly against the preponderance of the evidence.

The interrogation in this case was not custodial. Here the appellants voluntarily appeared to make the statements. Prior to that time, no charge had been filed against them, and they were free to come and go as they pleased. Their parents were present with them at the courthouse. Statements which do not result from in-custody interrogation are not barred. *Johnson* v. *State*, 252 Ark. 1113, 482 S.W. 2d 600 (1972). In any event, appellants and their parents were adequately placed on notice when the *Miranda* rights were explained to them. The evidence reflects no coercive interrogation of the appellants. The record shows that Washington and Hampton were sixteen, and Ward was fifteen. Although the youth of the maker is an important factor to be considered, our courts have never held that youth alone is a sufficient basis for exclusion of an incriminating statement, even when given without the advice of parent or counsel. *Little* v. *State*, 261

Ark. 859, 554 S.W. 2d 312 (1977). In the case before us all appellants and their parents were given an explanation of constitutional rights; and appellants had ample opportunity to confer with parents concerning their constitutional rights and concerning the decision to waive those rights. Only then did the appellants and their parents sign the rights waiver forms, and the consent to polygraph forms.

The Arkansas Supreme Court has held that neither limited education, nor diminished mental capacity will negate a voluntary confession. *Callaway* v. *State*, 258 Ark. 352, 524 S.W. 2d 617 (1975), *Sheppard* v. *State*, 239 Ark. 785, 394 S.W. 2d 624 (1965), cert. denied 387 U.S. 923. In the case before us, the evidence reflects that appellants were tenth grade students of average intelligence who were capable of knowing, understanding and appreciating their rights. At the close of the *Denno* hearing, the trial court made the following specific findings:

> I very carefully observed each of these defendants throughout the course of this two-day hearing, both on the stand and off the stand. They appear, each of them, to be normally intelligent, reasonably informed for minors of their age.

II.

Appellant Washington, in his point II, alleges reversible error in the trial court's questioning of witness Stewart. Appellants Ward and Hampton, in their point II, claim error in the court's questioning of witnesses McKinney, Turnage and Stewart. However, appellants, in their brief, merely show that the trial court questioned some of these witnesses. There is no showing of how or in what manner that questioning acted as a comment on the evidence.

It is well established that a trial court may, in the interest of justice, direct questions to a witness calculated to elicit the truth about subject matter being investigated, provided they are carefully framed in a manner not indicating any opinion on the merits of the controversy. The trial court has some discretion in examining witnesses to clarify their testimony, and when no prejudice appears there is no abuse of that

discretion. *Miller* v. *State*, 250 Ark. 199, 464 S.W. 2d 594; *Clubb* v. *State*, 230 Ark. 688, 326 S.W. 2d 816; *New* v. *State*, 99 Ark. 142, 137 S.W. 2d 564.

The record before us does not indicate that the trial court abused its discretion in questioning the witnesses. It appears to have been done in order to clarify their testimony. The questioning by the trial court here did not constitute a comment on the evidence, and did not reflect on the credibility of the witnesses concerned. We fail to see how appellants could have been prejudiced in any way by the action of the court in this regard. Therefore, we find no merit in this argument.

III.

Appellants Washington and Hampton, in their point III, contend the trial court committed reversible error in denying their motions for mistrial. Appellant Ward did not move for mistrial and his attorney does not raise this issue on appeal. The court had carefully ordered the state's attorneys, and all the three defense attorneys, to admonish all witnesses and clients not to make any reference to the fact that a polygraph test was given to Sheila McKinney, Fletcher Washington, Zachery Ward or Herman Hampton, or to mention in any way the results of any polygraph test. The defendant Zachary Ward, having been called to testify in his own behalf, was asked on cross-examination, "You did talk to Mr. George Stewart, make a statement to Mr. George Stewart?" The witness responded that he didn't know, "Who was George Stewart?" The prosecutor replied in essence that Stewart was the witness who testified this morning in this matter, to which Ward then responded, "Yes, that is the man that gave the polygraph test." Washington and Hampton then moved for a mistrial. They claimed below, and renew their contention on appeal, that they had nothing to do with appellant Ward's voluntary statement concerning the polygraph examination and that they, therefore, were entitled to a mistrial because of co-defendant's remark. The *results* of the polygraph examination were not mentioned. The one remark by Ward was the only time anything was said about the polygraph examina-

tion before the jury. Following that incident, and in the absence of the jury, Ward's attorney requested and obtained permission to again admonish his client to make no further reference, and did so. After the court denied the motion for mistrial, the attorney for Ward made a Motion in Limine which was granted. All counsel, both for the state and defense were instructed by the court not to make any reference by way of argument, statements, questions, side remarks, or in any other way make reference to the statement made by witness Zachary Ward referring to a polygraph.

Zachary Ward did not indicate that appellants Washington and Hampton had in fact taken a polygraph test or the results of any such examination. Washington and Hampton were not prejudiced by Ward's remark. The trial court offered to admonish the jury which offer was refused. An admonition would certainly have removed any prejudice which may have existed. *Limber* v. *State*, 264 Ark. 479, 572 S.W. 2d 402 (1978); *Scott* v. *State*, 263 Ark. 669, 566 S.W. 2d 737 (1978). Declaring a mistrial is an extreme and drastic remedy which should be resorted to only where there has been an error so prejudicial that justice could not be served by continuing the trial. *Chaviers* v. *State*, 267 Ark. 6, at 11, 588 S.W. 2d 434 (1979). The circumstances in the case before us do not afford any basis for our saying that the trial judge abused his discretion in denying this motion for mistrial.

IV.

Appellant Washington contends he was entitled to a separate trial, and that the trial court erred in failing to sever his trial from that of his co-defendants.

Although conceding that the trial court complied with Rule 22.3(a)(ii) of the Arkansas Rules of Criminal Procedure, Washington argues that the nature of the evidence presented at the trial was such as to preclude any inference other than that one of the unidentified persons in the confession of Ward and Hampton was in fact Washington.

A matter of severance is one within the sound discretion of the trial judge to grant or deny. We will not reverse such a

decision unless that discretion is abused. *Hallman & Martin* v. *State*, 264 Ark. 900, 575 S.W. 2d 688 (1979). *Legg* v. *State*, 262 Ark. 583, 559 S.W. 2d 22 (1977). We find no such abuse. The trial court denied appellant Washington's motion for severance, ruling that each confession would be allowed into evidence only against the defendant giving the statement and that any reference to the other defendants by name would be excluded. The trial court also warned that failure to exclude those references would result in "an almost automatic mistrial." The instructions of the court were followed.

The defense of these appellants was not antagonistic. All of the defendants testified and cross-examination was permitted the appellant Washington to refute any adverse testimony to his cause. *Bell and Walker* v. *State*, 258 Ark. 976, 530 S.W. 2d 662 (1975).

It should be noted also that Washington did not renew his pretrial motion for severance at the trial.

Affirmed.

Greta E. FOSHEE *v.* James S. MURPHY and Grethe S. MURPHY et al

CA 79-178 593 S.W. 2d 486

Opinion delivered January 16, 1980
Released for publication February 6, 1980

Dan McCraw, for appellant.

Wootton, Land & Matthews, for appellees.

MARIAN F. PENIX, Judge. This case was appealed to the Arkansas Supreme Court and by that court assigned to the Arkansas Court of Appeals pursuant to Rule 29(3).

The appellees, Murphys, brought an action for specific performance of a contract to purchase certain real property. The Court decreed specific performance and held the appellant Ms. Foshee was bound by the terms contained in the mortgage and note prepared by her attorney, delivered to Murphys for execution and tender at closing. Ms. Foshee appeals.

On March 22, 1978, the Murphys made an offer to Foshees to buy real estate for $100,000 with $20,000 in cash and $80,000 payable over 25 years at seven and one-half percent. The Foshees rejected the offer and extended a counter-offer of $110,000 with $25,000 in cash and $85,000 payable over 25 years at eight and one-half percent interest and incorporated by reference all other terms of the Murphys' original offer. The Murphys accepted the counter-offer. The Foshees' listing agent prepared a "clean-up" offer and acceptance which the Murphys signed. On March 23, the Foshees refused to sign because of dissatisfaction with the size of the monthly payment which a 25 year amortization would generate. The Murphys agreed to amortize the note over a 20 year period rather than a 25 year period and initialed such provision which was inserted into the "clean-up" offer and acceptance document. Ms. Foshee readily signed. Mr. Foshee refused to sign, saying the monthly payments were still too small. On March 27, Mr. Foshee related to his son, Wayne, they had sold the property. On April 16, Mr. Foshee died. Ms. Foshee delivered the abstract of the property to her agent for recertification and her attorney prepared a note, mortgage and deed and set the closing date for May 18, 1978. Ms. Foshee refused to consummate the transaction because she discovered certain lots

contained in the description which she contends she did not intend to sell. On June 7, the Murphys filed suit asking for specific performance and for correction of a mutual mistake within the contract. In her July 6 answer, Ms. Foshee alleged she was not bound to the contract because of the death of Mr. Foshee.

I

Ms. Foshee contends there is error in the court's finding a contract existed between the parties. The property was held as an Estate by the Entirety by the Foshees. Ms. Foshee contends the March 23rd Offer and Acceptance with the amendment changing the time of amortization which was initialed by the Murphys constituted a new offer which effectively set aside the counter-offer of March 22. She contends this is a substantial change in the terms of the March 22nd counter-offer, especially to elderly persons who must depend upon the monthly payment for living expenses. She also contends the initialed offer and acceptance required it be accepted by the Foshees within one day. Mr. Foshee did not accept the offer within the required one day. She contends only one party owning the estate by the entirety signed the offer and acceptance and cites the general rule found in 91 C.J.S., Vendor and Purchaser, § 29(b)(2) pp. 879-880.

> Where a conveyance of certain property can be made only by the concurrence of two or more persons an offer to purchase must be accepted by each of them.

Ms. Foshee contends the offer lapsed March 25, 1978 and could not have been enforced against Mr. Foshee had he lived.

The Murphys contend Mr. Foshee would have been bound to his contract had he not died. They contend the Foshees' counter-offer was accepted by the Murphys and Mr. Foshee was obliged to sign the "clean-up" document which was drawn up to accommodate the Foshees. The Murphys also contend an owner of less than complete or good title to land may enforce his contract for sale if he is able to give good title on performance date. The case on which

the Murphys rely is *Hood* v. *Hunt*, 232 Ark. 591, 339 S.W. 2d 97 (1960). In that case, Mr. Hunt, the seller, signed the offer and acceptance, but Ms. Hunt did not. Later the Hunts both signed the deed which was tendered to the buyers, but refused to go through with the transaction. The court, in granting specific performance, held:

> Based upon these facts, we are bound by our rule it was sufficient that Hunt was able to make a good conveyance any time before the decree for specific performance was rendered.

Even if Mr. Foshee could not have been bound by the contract, Ms. Foshee can be bound. She signed the contract and was the sole owner of the property at his death. She was able to make a good conveyance before the court decreed specific performance. Either spouse owning property by the entirety may transfer his or her interest, although it cannot thus affect the interest of the other. At the closing date, Ms. Foshee was obliged to convey all of her interest as she had agreed. This would have been the case whether Mr. Foshee was then living or not. Since Mr. Foshee died April 18, 1978, Ms. Foshee was the sole owner as survivor of an estate by the entirety and had complete ownership to convey.

We find a contract did exist between the parties.

II

Ms. Foshee contends the court erred in refusing to rescind the contract for a unilateral mistake.

The initial offer and acceptance, the counter-offer, and the "clean-up" offer all listed unimproved lots which Ms. Foshee now claims she and her husband were unaware of being included in the contract to sell. A unilateral mistake is a subjective matter and the rule in Arkansas is a court will not reform or rescind a contract involving a unilateral mistake except where fraud is involved. *Gall* v. *Union National Bank of Little Rock*, 203 Ark. 1000, 159 S.W. 2d 757 (1942). The Murphys were shown the unimproved lots by the Foshees' listing agent and it was represented to them that

they were included with the improved lots being offered for sale. The lots were listed in all of the documents which passed between the Murphys and the Foshees. Ms. Foshee's own attorney caused them to be listed in the mortgage and deed which he prepared. Ms. Foshee admits not having read the documents she signed, although she admits having the opportunity to do so. Ms. Foshee would have us apply the exception to the Unilateral Mistake Rule. Such exception being in the instance when an agreement is oppressive or unconscionable. We do not find elements of unconscionableness in the particular circumstances of this case.

We find no error in the court's refusing to rescind the contract for a unilateral mistake.

III

Ms. Foshee alleges the court erred in expanding the contract to include the terms of the proposed mortgage and note.

Ms. Foshee's attorney prepared a mortgage and promissory note and caused them to be mailed to the Murphys for their execution. The Murphys executed them and they were tendered at the May 18 closing. Mr. Murphy had some questions concerning these documents and Ms. Foshee's attorney called him to discuss the matter. After the telephone call, Mr. Murphy was satisfied and proceeded to execute the mortgage and note. Ms. Foshee's son insisted the closing be held immediately.

Quite obviously the Chancery Court had the necessity and the power to require Ms. Foshee to accept the terms of the note and mortgage which were prepared by her own attorney. Without this provision, there would not be a complete settlement of the transaction. This would invite circuity of actions and multiplicity of litigation which equity abhors. *Fidelity Deposit Co. of Maryland* v. *Cowan*, 184 Ark. 75, 41 S.W. 2d 748 (1931).

Affirmed.

NEWBERN, J., concurs.

DAVID NEWBERN, Judge, concurring. I agree Arkansas law permits a tenant by the entireties to convey her share of the estate. *Franks* v. *Wood,* 217 Ark. 10, 228 S.W. 2d 480 (1950). That does not mean that in every case in which a tenant by the entireties signs an agreement to sell the agreement is subject to specific performance. It must be clear, as in the case before us, that it was her intent to agree to convey the property regardless whether her spouse agreed or not. The acts of Greta Foshee subsequent to the signing of the contract indicate that was her intent. Had it, on the other hand, been clear that she intended to sell only in the event her husband joined in the contract, specific performance would not have been appropriate. Although I find no Arkansas case squarely addressing that point, see Annot., 154 A.L.R. 767, 777-778 (1945). See also, *Roulston* v. *Hall*, 66 Ark. 305, 50 S.W. 690 (1899), where the court stated the "doctrine of inurement" as follows:

> Neither tenant by entirety can convey his or her interest so as to affect the right of survivorship in the other. The alienation by the husband of a moiety will not defeat the wife's title to that moiety if she survive him; but, if he survives the conveyance becomes as effective to pass the whole estate as it would had he been sole seized at the time of the conveyance.

That doctrine does not strictly apply here, as there has been no "conveyance," at least in the sense of execution of a deed, by Greta Foshee.

For that reason I would also distinguish *Hood* v. *Hunt*, 232 Ark. 591, 339 S.W. 2d 97 (1960), which is cited by the majority. Unlike this case, there both husband and wife had signed a deed, and in applying the doctrine of mutuality, it was held that both of them had obligated themselves to convey, regardless of failure of one of them to be bound on the contract to sell. In the case before us, Greta Foshee's deceased husband had signed no deed and had not signed the contract.

I also find part three of the majority opinion objectionable, as it implies that a party must execute a document or be

bound to it without having signed it just because it was prepared by her attorney. I know of no authority for such a proposition.

My reason for agreeing with the result here is that Greta Foshee purported to convey her interest in the property in question, and that would include any right to which she might succeed as a survivor of her husband. Her intent appears from her conduct subsequent to the date of the contract. I believe the "doctrine of inurement" thus applies, but I want it clarified I could not acquiesce in specific performance had it appeared she intended to convey only if her husband signed the contract too.

Earl CALDWELL *v.* STATE of Arkansas

CA CR 79-85 594 S.W. 2d 24

Opinion delivered January 16, 1980
Released for publication February 13, 1980

Robert L. Lowery and *Patton, Brown, Leslie & Davidson*, by: *Robert B. Leslie*, for appellant.

Steve Clark, Atty. Gen., by: *Dennis R. Molock*, Asst. Atty. Gen., for appellee.

MARIAN F. PENIX, Judge. This case was appealed to the Arkansas Supreme Court and by that court assigned to the Arkansas Court of Appeals pursuant to Rule 29(3).

Earl Caldwell was charged by felony information with the rape of Linda Skidmore on May 11, 1978. The victim reported to police she had been raped by a man who forced his way into her home at about 1:30 a.m. She stated a man

had broken through her back door, tied her hands and forced her into the living room. The man held a flashlight in her face most of the time he was in the house. The man forced her to lie down on a couch and proceeded to rape her. The victim called the police at 2 a.m. Officer Herbert of the Little Rock Police Department went to Ms. Skidmore's home. He observed that the kitchen door had been kicked open. Ms. Skidmore described her assailant as a white male, approximately 40 years old, and very large. She estimated him to be 6′4″, 250 pounds, with reddish brown hair. She stated the man had worn a black cap, red sweater, and black work gloves.

David Garner, a Little Rock police officer, arrived at Ms. Skidmore's home about 7:30 a.m. where he held a mug shot identification session. The photographs consisted of line-up photos, and polaroid and regular police photos. Ms. Skidmore positively identified an 8 x 10 line-up photo of Earl Caldwell as a picture of the man who had raped her. Caldwell's picture was the third photo which Ms. Skidmore viewed.

Later the same day, Ms. Skidmore witnessed a physical line-up at the police station. There were six white males in the line-up, four of whom were FBI agents. Earl Caldwell was also in the line-up. All six men were dressed in blue coveralls. Ms. Skidmore identified Earl Caldwell as the man who had raped her.

Earl Caldwell was arrested for the rape of Ms. Skidmore. Police records reveal he is a 26 year old white male with bushy reddish brown hair. He is 5′10″ and weighs 200 pounds.

Caldwell was tried before a jury and found guilty of rape. The jury fixed his sentence at 18 years in the state penitentiary. From this conviction, Caldwell has appealed. The appellant bases his argument for reversal on four separate points.

I

Defendant contends there was error in permitting the State to inquire about the previous conviction of the defend-

ant and permitting the state to go beyond evidence of the conviction per se. The defendant argues the prosecutor's questioning and use of the prior conviction was so prejudicial that its probative value was outweighed.

Prior to the trial, defendant filed a Motion in Limine requesting the state be precluded from mentioning his previous charge of rape and his conviction for the crime of sexual abuse.

At the trial the defendant took the stand. His attorney asked him whether he had been convicted of sexual abuse. The scope of cross-examination includes matters developed on direct examination. When the defendant produced five character witnesses the trial court ruled it proper for the prosecutor to cross-examine the witnesses by asking whether their opinions as to the defendant's reputation would be altered by knowing of the defendant's prior conviction. This was proper pursuant to Ark. Stat. Ann. § 28-1001, Rule 405(a) (Repl. 1979). The prosecutor inquired of one of the character witnesses whether the fact the defendant and defendant's wife had testified inconsistently in regard to defendant's whereabouts on a particular date would have any effect upon the witnesses' opinion of the defendant's truthfulness. The prosecutor phrased the question in terms of a hypothetical. Rule 607 of the Arkansas Uniform Rules of Evidence provides a witness' credibility may be attacked by any party. The scope of the examination is largely within the discretion of the trial court. *Dillard* v. *State*, 260 Ark. 743, 543 S.W. 2d 925 (1976). Opinions of character witnesses were the means by which defendant chose to prove his reputation for truthfulness. It is logical to allow the cross-examiner to explore the basis of the witnesses' opinion, i.e., whether the witness had heard all the facts about the defendant on which to base his opinion. *Lowe* v. *State*, 264 Ark. 205, 570 S.W. 2d 253 (1978). We find no abuse in the court's allowing the prosecutor to cross-examine the character witnesses as to the basis of their opinion.

II

Defendant contends the court erred in commenting upon the weight of the evidence in the presence of the jury.

The court, in the presence of the jury, stated the defense counsel had asked the prosecuting witness a certain question "about six times at least. Go ahead. One more time."

> The court continued: Come on Mr. Leslie, ask the questions. Let's move this case along.
>
> Mr. Leslie: Your Honor, well these are important issues.
>
> The Court: I realize how important they are and it's important to move this case along, Mr. Leslie. We're having way too much repeating of questions in this case. This jury is not stupid. Now they can hear these answers. Let's move along."

Again while arguing the relevance of a witness' testimony the defense counsel stated the issue was very important.

> The Court: Well, it may be to you. It doesn't seem to be to me, but go ahead. I'll let you explore it for whatever it's worth.

The defense counsel made no objection to either judicial comment. Further, there was no error present.

The first alleged improper comment was made because defense counsel was hounding and badgering the witness with repetitious picayune cross examination as the specific height, to the quarter of an inch, of herself and her assailant. The judge asked the defense counsel to move on. The judge was attempting to move the trial forward. Certainly curtailment of repetitious questions is not an abuse of the trial court's discretion where the witness' answers are only a reiteration of earlier testimony. *Nelson* v. *State*, 257 Ark. 1, 513 S.W. 2d 496 (1974).

The second alleged improper comment was made to end a lengthy debate by counsel over relevance of testimony of a defense witness. It is the trial court's duty to determine relevancy. *Tucker* v. *State*, 264 Ark. 890, 575 S.W. 2d 684 (1979).

The court instructed the jury:

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

We find the court's remarks not improper.

III

The defendant alleges error in permitting in-court identification of him by the victim.

On the same day as the rape, a live line-up was held and a mug shot line-up was conducted. In both instances, the prosecuting witness positively identified the defendant without hesitation or reservation. There are several factors to consider in determining the reliability and admissibility of the identification testimony. The Arkansas Supreme Court has set these factors out: time between the commission of the crime and the identification; attentiveness and opportunity of the victim to view the assailant at the time of the crime; level of certainty at the confrontation; and accuracy of the description of the accused. See *Lindsey* v. *Jackson*, 264 Ark. 430, 572 S.W. 2d 145 (1978).

The defendant alleges there is too great a discrepancy between the victim's description of her assailant's height, weight and age and the actual size of the assailant. The factors in dispute are very deceptive. Officer Herbert testified as to the description given him by the victim: ". . . he looked very large when he came through the door. She guessed 6'4"." The victim stated she concentrated on the defendant's face.

We find the defendant has failed to meet his burden of demonstrating that when the totality of the circumstances are considered there was a "very substantial likelihood of

irreparable misidentification." *Pollard* v. *State*, 258 Ark. 512, 514, 522 S.W. 2d 627 (1975).

At no time was the victim unsure of her identification. She testified she did not learn of defendant's prior rape charges until the day following her positive identification of him.

We find the in-court identifications were based upon observations of the prosecuting witness sufficiently independent of any line-up procedure and the trial court properly admitted this testimony into evidence. The defendant did not object at the trial to the in-court identification.

IV

Defendant alleges error in the court's prohibiting the expert testimony of a psychologist concerning eye witness identification.

The testimony of a qualified expert in the field of human perception was offered for the purpose of aiding the jury in understanding how human perception works mechanically and what factors influence the perception, and the ability of an individual to later recall that perception. Secondly, the testimony was offered for the purpose of an opinion as to the reliability of the victim's perception and recall under the circumstances, and what effect outside influence may have had on her recall. The Court refused to allow such proffered testimony. The qualifications of the expert witness are not in issue. Rather the issue is the scope of the testimony of the expert. The actual testimony would be invading the purview of the duties of the jury. The credibility of witnesses and the weight accorded to their testimony is solely within the province of the jury. *Smith* v. *State*, 258 Ark. 601, 528 S.W. 2d 389 (1975).

The defendant demanded a trial by a jury of his peers. He received such a jury. Defendant contends he should be permitted to assist the trier of fact with the offered psychologist testimony.

> Parties to a trial have the right to take the opinion of experts upon questions involved in cases which can only be answered by those who have expert knowledge of the subject; . . .

However, in *Hinton* v. *Stanton*, 121 Ark. 626, 183 S.W. 2d 765 (1916), our Supreme Court held "Where the subject matter could be understood by a jury of average intelligence, the court below did not err in excluding expert testimony."

The science of human perception testimony is new. In the federal case of *U.S.* v. *Fosher*, 590 F. 2d 381 (1st Cir. 1979), the trial court refused proffered expert testimony relating to perception and memory of the eyewitnesses. The Appellate Court upheld the trial court and stated the testimony would not assist the jury in determining the fact in issue and that the jury was fully capable of assessing the eyewitnesses' ability to perceive and remember, given the help of cross-examination and cautionary instructions, without the aid of an expert; that the expert testimony would raise a substantial danger of unfair prejudice, given the aura of reliability that surrounds scientific evidence; and that the limited probative value of the proof offered was outweighed by its potential for prejudice.

No proffer was made in the present case as to the basis of the knowledge gained by the expert. The field of perception and memory is alleged to be a science. Here in Arkansas, our Supreme Court has consistently held certain scientific analysis testimony inadmissible based upon its unreliable nature, to-wit: polygraph tests, voice stress analyzers. *Gardner* v. *State*, 263 Ark. 739, 756, 569 S.W. 2d 74 (1978).

The defendant was in no way harmed by the denial of the expert's testimony. The defendant was given ample opportunity to cross-examine the victim in order to emphasize the same areas for possible mistakes as the expert would have testified to, without the possible undue influence and prejudice.

The general test regarding the admissibility of expert testimony is whether the jury can receive "appreciable

help" from such testimony. 7 Wigmore, Evidence, § 1923 (3d ed., 1940); *Jenkins* v. *U.S.*, 113 U.S. App. D.C. 300, 307 F. 2d 637 (1962). The balancing of the probative value of the tendered expert testimony evidence against its prejudicial effect is committed to the "broad discretion" of the trial judge and his action will not be disturbed unless manifestly erroneous. *Ray* v. *Fletcher*, 244 Ark. 74, 423 S.W. 2d 865 (1968); *Ark-La Gas Co.* v. *Maxey*, 245 Ark. 15, 430 S.W. 2d 566 (1968).

We find the expert testimony was properly excluded as an invasion into the province of the trier of fact.

From the record we find no reversible error.

Affirmed.

WRIGHT, C.J., and NEWBERN, J., concur.

DAVID NEWBERN, Judge, concurring. Although I concur in the result reached, I cannot agree with that part of the majority opinion which characterizes the defense counsel's cross examination of the prosecuting witness as "hounding and badgering" and "picayune."

Chief Judge WRIGHT joins in this concurring opinion.

GENERAL MORTGAGE CORPORATION *v.* H. K. PEACOCK et al

CA 79-169 594 S.W. 2d 35

Opinion delivered January 16, 1980
Rehearing denied February 20, 1980
Released for publication February 20, 1980

Lightle, Beebe & Raney and *Roscopf & Epes, P.A.*, by *Charles B. Roscopf*, for appellant.

Paul Petty, for appellees.

GEORGE HOWARD, JR., Judge. This is an appeal from a judgment rendered by the trial court, without the aid of a jury, denying both appellant and appellees damages in a breach of contract action involving a contract for sale of land.

While the trial court made no definite findings, the court held that "neither party met the burden of proof on the issue of damages". However, appellant was permitted to recover the $10,000.00 earnest money that it deposited with the escrow agent.

The force of appellant's argument for reversal is: the trial court committed error in holding that appellant did not meet the burden of proof on the issue of damages.

It is widely accepted that the findings of a trial judge sitting as a jury deserve the same weight and consideration as the findings of a jury when his findings are supported by substantial evidence. Substantial evidence means legal, credible and persuasive evidence sufficient to support the action of the court.

We now turn to the record before us in order to determine whether the evidence is sufficient to support the holding of the trial judge.

On November 24, 1972, appellant, as purchaser, and appellees, as sellers, executed an offer and acceptance to purchase 3800 acres of land in White County for $532,000.00 — a fixed rate of $140.00 per acre. Appellant paid $10,000.00 as earnest money, to Standard Abstract and Title Company, escrow agent, which was to be applied ultimately to the purchase price. Appellant agreed to pay $75,000.00 at the closing of the transaction and to assume a first mortgage held by Northwestern Mutual Life Insurance Company securing an indebtedness of $188,000.00, payable in annual install-

ments of $22,500.00, consisting of principal and interest. The offer and acceptance specified that appellant was to pay the next annual installment becoming due January 1, 1973. Appellant also agreed to assume a second mortgage in favor of Agristor securing a debt for $25,000.00. The balance of the purchase price, $244,000.00, was to be paid in ten annual installments with interest at the rate of 6% per annum.

On January 10, 1973, appellant's attorney sent the following communication to appellees' attorney:

> Dear Mr. Peacock:
>
> I received the abstracts today. We need your directions as to where and to whom General Mortgage should direct payment due pursuant to terms of the Earnest Money Contract.
>
> General Mortgage is prepared to forward the 'preclosing payment', as provided in the contract upon receipt of your directions.

On January 16, 1973, appellees' attorney submitted the following letter to appellant's counsel:

> Dear Mr. Knight:
>
> Payment on the Mortgage of the Peacock Ranch should be made to Northwestern Mutual Life Insurance Company, Box 50521, Milwaukee, Wisconsin 53201. The loan number is F323007 and the principal due as of January 1, 1973, is $7,500.00 along with interest of $15,000.00 making a total of $22,500.00.
>
> Please mail me a copy of a financial statement on your client, General Mortgage Corporation and a corporate resolution authorizing Paul Chambers to execute the referenced land purchase contract.

On January 31, 1973, appellant advised appellees that appellant was unwilling to accept title of the property as reflected by abstracts delivered to appellant on January 10th and, as a consequence, appellant would require title insurance coverage.[1]

[1]The offer and acceptance does not designate a definite date for finalizing the transaction. A stipulation in the offer and acceptance that refers to closing simply provides: "Interest will commence on the day of closing or on January 15, 1973, whichever is first, i.e. on unpaid balance on assumed notes."

On March 1, 1973, a title insurance commitment was issued to appellant containing approximately eighteen exceptions which included, among other things, six unsatisfied mortgages in favor of White River Production Credit Association and a requirement that patents be obtained from the United States Government.

On April 4, 1973, appellees advised appellant, by letter, that the contract was terminated and, therefore, regarded the earnest money in escrow forfeited because appellant had failed to perform the conditions contained in the offer and acceptance agreement.

On April 5, 1973, appellant informed appellees, by letter, that appellant would not assume the mortgages in favor of White County Production Credit Association, as previously requested by appellees, since the offer and acceptance did not provide for the assumption of these mortgages; that appellant stood willing and ready to proceed with finalizing the sale at such time as appellees were prepared to deliver a valid title to the property and close the sale in accordance with the terms of the agreement. In addition, appellant's letter closed by tendering the following proposal:

> . . . However, in an effort to settle this matter, and to terminate the difficulties prior to further dispute and litigation, General Mortgage offers to pay $100.00 per acre cash for the Peacock Ranch and fee simple title thereto. This offer is made solely in the nature of settlement of the disputes which have arisen and is not in any manner whatsoever to be deemed to waive the rights of General Mortgage contained in the above referenced contract, which General Mortgage stands ready to perform and insists that you perform.

On April 9, 1973, appellant again informed appellees, by letter, it desired to finalize the transaction providing title to the property had been cleared and the terms of the agreement are followed. Appellant also advised appellees that appellant had advised the escrow agent to retain the earnest money since appellant was of the opinion that appellees had breached the agreement while appellant had not.

On April 13, 1973, appellees advised appellant:

. . .

In reference to your letter of April 5, 1973, concerning your counter offer of $100.00 cash per acre or approximately total cash offer of $380,000.00, we will not accept this counter offer as it is totally unacceptable and we are still considering General Mortgage bound to the original contract and expect them to complete said contract or consider themselves in breach thereof. I am sure you are aware that we have done everything possible in order to close this sale and if General Mortgage is standing ready to perform, then I suggest this be done immediately and that they pay on the contract as originally agreed.

On April 18, 1973, appellant informed appellees by letter:

. . . If it will be of assistance, I will gladly forward a Xerox copy of the title report supplied by American Title Insurance Company through Standard Abstract and Title Company, Little Rock, Arkansas. On second thought, please find same enclosed, which indicates that title to this property is by no means in the condition your letter indicates.

. . . In addition, we reiterate that General Mortgage Corporation is prepared to consummate this transaction at a time when the Peacocks are prepared to close upon the terms and conditions expressed in the contract. If you will notify me in writing that General Mortgage is no longer expected to assume the indebtedness at Production Credit and that all of the objections set out in this title report and exceptions thereto, will be eliminated and removed at closing, we will proceed to arrange for a closing time.[2]

[2] Appellant at no time supplied appellees with a copy of a title opinion regarding the condition of the land as determined by appellant's attorney from an examination of the abstracts supplied by appellees. As previously indicated, the title insurance commitment containing the exceptions was issued to appellant on March 1, 1973.

On April 2, 1973, appellees entered into an agreement with Franklin Collier to sell the lands for $510,000.00 and the sale was finalized on May 14, 1973.

On April 30, 1973, Franklin Collier entered into an agreement with Irving H. Brauer to sell the lands for $725,000.00 and this transaction was closed on May 22, 1973.

Appellant instituted its action on September 14, 1974, seeking damages for $168,000.00 for breach of the offer and acceptance agreement. Appellees filed their answer and counterclaim claiming damages against appellant for breach of contract.

In 91 C.J.S., Vendors & Purchasers, § 124, at page 1052, it is provided:

> If one party fails to perform or tender performance within a reasonable time, and the other fails within a reasonable time to default the first party by tendering his own performance, rescission of the contract by mutual consent may be presumed.

The Arkansas Supreme Court in *Hicks* v. *Woodruff*, 238 Ark. 481, 382 S.W. 2d 586 (1964), emphasized that a contract may be rescinded by conduct which indicates intention to abandon contractual rights. The Supreme Court in articulating this view adopted the following comment from Restatement, Contracts, § 406, comment b (1932):

> 'b. The agreement to rescind need not be expressed in words. Mutual assent to abandon a contract, like mutual assent to form one, may be manifested in other ways than by words. Therefore, if either party even wrongfully expresses a wish or intention to abandon performance of the contract, and the other party fails to object, there may be sometimes circumstances justifying the inference that he assents. If so there is rescission by mutual assent; but mere failure to object to repudiation is not a manifestation of assent to a rescission. Sometimes even circumstances of a negative

character, such as the failure by both sides to take any steps looking towards the enforcement or performance of a contract, may amount to a manifestation of mutual assent to rescind it.' [3]

We are of the opinion that paragraph 13 of the offer and acceptance agreement between the parties is the pivotal point in resolving this controversy. Paragraph 13 provides:

> Payment of principal and interest due Northwestern Mut. Ins. Co. on Jan. 1, 1973, will be paid by buyer. Said interest to be applied against unpaid balance of principal owed to sellers.

We are persuaded that General Mortgage Corporation breached the agreement by not paying Northwestern Mutual, or tending to the escrow agent, $22,500.00 on January 1, 1973, as it had agreed. Appellant was fully aware of its obligation to pay Northwestern Mutual for appellant advised appellees on January 10, 1973, "We need your directions as to where and to whom General Mortgage should direct payment due pursuant to terms of the Earnest Money Contract". Furthermore, appellant stated "General Mortgage is prepare to forward the pre-closing payment as provided in the contract, upon receipt of your directions." Appellees immediately forwarded to General Mortgage Corporation the name, address and the amount due, but appellant failed to make this payment. Northwestern Mutual held a first mortgage on the property involved and while the payment due in January, 1973, was only $33,500.00, the total indebtedness owed Northwestern Mutual was $188,000.00; therefore, it is plain that the failure of appellant to perform, as it had agreed, involved a matter which was vital to the existence of the agreement between appellant and appellees.

On the other hand, appellees, while recognizing that appellant had agreed to pay the annual installment due Northwestern Mutual acquiesced in appellant's conduct. The conduct of both appellant and appellees clearly evidences a rescission of the agreement.

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[3] Our Supreme Court in *Wallace* v. *Johnson*, 217 Ark. 878, 243 S.W. 2d 49 (1950), recognized that the terms abandonment and rescission are words quite often used indiscriminately.

Whether the conduct of a vendor and purchaser amounts to an abandonment of a land contract is ordinarily a question of fact; however, it may become a matter of law where the acts and conduct are clear and unambiguous as in the instant case. *Wallace* v. *Johnson*, 217 Ark. 878, 234 S.W. 2d 49 (1950); 77 Am. Jur. 2d, Vendor and Purchaser, § 543, at page 671; 91 C.J.S., Vendor and Purchaser, § 121.

While the record reflects that the parties continued to communicate with each other after appellant defaulted in paying Northwestern Mutual, appellant, upon learning that appellees were negotiating an agreement to sell the lands to a third party, offered appellees $100.00 per acre cash for the property which was rejected. We do not perceive a waiver by appellees by advising appellant that if appellant proceeded immediately to comply with the original terms of the agreement, appellees were willing, after all, to sell the property to appellant. The fact remains that appellant took no steps to pay Northwestern Mutual or make a tender; appellant was not in possession of the property and knew that appellees were negotiating a sale with Franklin Collier.[4]

In *Hargis* v. *Edrington*, 113 Ark. 433, 168 S.W. 1095 (1914), our Supreme Court stated that a vendee has a duty to assert promptly his intention to perform his contract of purchase when he is aware that the vendor is treating the agreement as having been rescinded.

Although the trial court did not articulate any findings, it is plain that the trial judge recognized that the parties had abandoned the contract or there was evidence of mutual breaches and concluded that the parties should be restored to the status quo. We are persuaded that the action of the trial court is supported by substantial evidence.

Affirmed.

WRIGHT, C.J., and HAYS, J., dissent.

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[4] Appellant was also aware that Franklin Collier sold the property to Irving H. Brauer for $725,000.00 on May 22, 1973.

M. STEELE HAYS, Judge, dissenting. I am unable to comprehend how the majority could arrive at the conclusion that there is substantial evidence that the offer and acceptance agreement was rescinded by mutual consent. Neither party urges this point on appeal, and nothing in the language of the trial court provides a foundation for such a contention.

Each side argues strenuously the opposing party breached the contract and the trial court's finding that neither side met the burden of proof as to damages cannot be reconciled with the evidence.

The real issue is, as I see it, which party failed to meet the obligations of the offer and acceptance agreement. A careful reading of this record leads me to the conclusion that it was the Sellers who breached the contract by failing to provide evidence of merchantable title as required by the agreement.

The appellant offered substantial evidence as to damages, and the appellees offered rebuttal evidence on damages. The court should have made a finding based on the preponderance of the evidence as to the party responsible for breach of the contract and the amount of damages, if any, sustained by reason of the breach.

I concede the Buyers equivocated on the January 1 payment to Northwestern Mutual Life Insurance Company, but this was not fatal to the agreement. If it was fatal breach, when did it become so, on January 2, or February 1, or March 1? Time was not of the essence and as I read the provision, it was simply that Buyers were responsible for that payment in connection with the closing together with any interest accruing by reason of late payment. It is clear the parties contemplated closing by the end of the year when they executed the offer and acceptance agreement on November 24. However, the abstracts which Sellers contracted to furnish were not delivered to the Buyers until January 10 and Buyers had a reasonable time from that point to examine the abstracts. To hold the Buyers breached this provision by failing to pay the January 1 payment when they did not even receive the abstracts until January 10 is going further than I am able to go in upholding the trial court. Moreover, how

could it be said the Buyers should have risked payment of $22,500.00 in the face of abstracts containing as many clouds and encumbrances as were admittedly present here? In short, I interpret this provision as contemplating the Buyers would make the payment as soon as the transaction was closed.

If Sellers had moved with greater punctuality or had shown greater interest in moving to a closing, this January 1 mortgage payment would not have been a stumbling block as Sellers later contended. Sellers never made categorical demand that the payment be made. Sellers say they considered Buyers to have forfeited by the latter part of January because of the non-payment, but their actions belie that attitude. In February they accepted the return of the abstracts for the issuance of title insurance, and after March 1, they forwarded to Sellers a title commitment reflecting numerous encumbrances on the title and no evidence of patents for some of the lands. Even Seller's letter of April 4, raising the suggestion of a breach by the Buyers (written after Sellers had contracted with another buyer), makes no mention of the alleged breach by failure to pay the January 1 payment. Moreover, when Sellers wrote Buyers on April 13, well after Sellers had contracted to sell to Collier, Sellers wrote the Buyers as though the contract was still in effect saying: "and we are still considering General Mortgage bound to the original contract and expect them to complete said contract . . ."

The real stumbling block in this transaction, as I see it, was Seller's failure to provide evidence of certain patents and to remove numerous encumbrances in favor of White River Production Credit Association. It is undisputed these encumbrances were outstanding and totaled in excess of $400,000.00, but Seller's only explanation for their failure to remove or to satisfy them was that, "we also agreed at the same time that PCA would either be assumed (by the Buyers) or be paid off but that wasn't part of the written contract." However, they were not included in the agreement and Buyers had every right to stand upon the agreement as signed.

I would reverse the case and remand to the trial court for

a new trial. *De Vagier* v. *Whit Davis Lumber Company*, 257 Ark. 371; *Hinton* v. *Bryant*, 232 Ark. 688.

I am authorized to say that WRIGHT, C.J., concurs in this dissent.

Dorcas F. PATTERSON, Floyd RAGSDALE, Mae FERGUSON, Tommy RAGSDALE, Martha Jo KINSLOW and Katherine KELLAM, Individually and as Guardian of Ethel HAMMONS *v.* Burl HARRIS, Executor

CA 79-179 593 S.W. 2d 489

Opinion delivered January 16, 1980
Released for publication February 6, 1980

Eichenbaum, Scott, Miller, Crockett, Darr & Hawk, P.A., by: *Leonard L. Scott* and *Ronald G. Harris*, for appellants.

Gardner & Gardner, for appellee.

GEORGE HOWARD, JR., Judge. This appeal involves the construction of Article IX of the Last Will and Testament of the late Mrs. Hazel Ferguson providing for the compensation to be paid the executor for services rendered in connection with the administration of her estate.

Article IX, in relevant part, provides:

> The appointment of my said Executor and Trustee, and the power and authority vested in him shall include also the right to receive reasonable compensation of ten per cent (10%) of the total gross estate as finally determined for federal estate tax purposes for his services and expenses as shall be deemed by the Probate Court to be just and equitable, . . .

The trial court, pursuant to a petition filed by the executor for construction of the pertinent part of Article IX held:

> The will is construed to provide or direct the payment of ten percent of the gross estate for estate tax purposes. . . . It is ten percent of the amount claimed there, which includes expenses, for which no claim was made for that matter. . . .

The Federal Estate Tax Return computes the total gross estate at $624,253.44.[1] A fee of $62,425.34 was allowed

[1] The bulk of decedent's estate consisted of real estate located in Oklahoma. The executor was directed to reduce all assets — both real and personal property — to cash within two years. However, a parcel of land, 56 feet by 120 feet together with all buildings located on the property in Russellville, was specifically devised to two nieces.

Appellants are the heirs of the testatrix's husband, A. H. Ferguson, who predeceased the testatrix. In addition, appellants' interest in the estate is approximately 26.8%.

the executor which was claimed as a deductible item on the estate tax return.

In *Mills' Heirs* v. *Wylie*, 250 Ark. 703, 466 S.W. 2d 937 (1971), our Supreme Court made the following pertinent observation:

> . . . [T]he purpose of construction is to arrive at the intention of the testator; *but that intention is not that which existed in the mind of the testator, but that which is expressed in the language of the will.*

Our Supreme Court has also emphasized that words and sentences used in a will are to be construed in their primary or ordinary sense so as to arrive at the real intention of the testator. *Morris* v. *Dosch*, 194 Ark. 153, 106 S.W. 2d 159 (1937); *Morgan* v. *Green*, 263 Ark. 125, 562 S.W. 2d 612 (1978). Moreover, in interpreting a will, it is the duty of the court to apply its best judgment consistent with applicable rules of construction. *Morgan* v. *Green*, supra.

Giving the following relevant words a construction in their usual and customary meaning:

> The appointment of my said Executor and Trustee, and the power and authority vested in him shall include also the right to receive reasonable compensation of ten per cent (10%) of the total gross as finally determined for federal estate tax purposes for his services and expenses as shall be deemed by the Probate Court to be just and equitable, . . .

we are persuaded the testatrix intended that the executor shall receive ten percent (10%) of the gross estate as finally determined for federal estate tax purposes as a fee which she deemed to be reasonable compensation for services to be rendered by the executor in the administration of her estate. We are further persuaded that the words "as shall be deemed by the Probate Court to be just and equitable" modify the word "expenses" and were not meant to confer any discretionary authority on the Probate Court in setting the executor's fees.

We believe that the construction rendered by the trial court was correct as well as reasonable. Accordingly, we affirm.

Affirmed.

Larry Eugene SONGER *v.* Deborah Dee SONGER

CA 79-180 594 S.W. 2d 33

Opinion delivered January 16, 1980
Released for publication February 6, 1980

Virginia (Ginger) Atkinson, for appellant.

No brief for appellee.

DAVID NEWBERN, Judge. In this case the issue is whether the alimony portion of a divorce decree is also the subject of an independent contract and thus not subject to modification.

In a modification hearing initiated by a petition filed by the appellant, the chancellor recited the circumstances surrounding the issuance of the decree. The uncontested divorce was taken on deposition. The decree provided alimony, child support and a detailed division of property. When presented to the chancellor, it had been signed by the

parties and their respective attorneys who thereby purported to approve the suggested decree "as to form and substance."

After the hearing on the appellant's petition to modify, the chancellor held the alimony part of the decree was not subject to modification because, in his words, "I had nothing to do with the division of property" and "it was strictly the parties' dealings." Yet in his order, the chancellor relieved the appellant of his obligation under the decree to pay for insurance for the appellee's car and for her gasoline purchases.

To us, it seems highly inconsistent that the chancellor would say the decree was "contractual" and thus not subject to modification with respect to one aspect of support for the appellee but not as to another. More importantly, however, we find no evidence in the record to show the decree should be regarded as an independent contract which would make the decree unmodifiable.

A leading Arkansas case on this question is *Seaton* v. *Seaton*, 221 Ark. 778, 255 S.W. 2d 954 (1953). There the court said:

> Our decisions have recognized two different types of agreement for the payment of alimony. One is an independent contract, usually in writing, by which the husband, in contemplation of the divorce, binds himself to pay a fixed amount or fixed installments for his wife's support. Even though such a contract is approved by the chancellor and incorporated in the decree, as in the *Bachus* case [216 Ark. 802, 227 S.W. 2d 439 (1950)], it does not merge into the court's award of alimony, and consequently, as we pointed out in that opinion, the wife has a remedy at law on the contract in the event the chancellor has reason not to enforce his decretal award by contempt proceedings.
>
> The second type of agreement is that by which the parties, without making a contract that is meant to confer upon the wife an independent cause of action, merely agree upon "the amount the court by its decree should

> fix as alimony." *Pryor* v. *Pryor*, 88 Ark. 302, 114 S.W. 700 [1908] . . . construed an agreement of the first type, and *Holmes* v. *Holmes*, 186 Ark. 251, 53 S.W. 2d 226, involving an agreement of the second type. See also 3 Ark. L. Rev. 98. A contract of the latter character is usually less formal than an independent property settlement; it may be intended merely as a means of dispensing with proof upon an issue not in dispute, and by its nature it merges in the divorce decree. In the *Holmes* case we held that the second type of contract does not prevent the court from later modifying its decree. [221 Ark. at 780]

It seems clear in this case the parties were agreeing to the contents of the suggested decree when they signed it and presented it to the chancellor. The decree did not mention any separate agreement, and there is nothing, written or otherwise, showing intent that any agreement be enforceable separately from the decree.

In the *Pryor* case, cited in the excerpt above, our supreme court held the alimony portion of the divorce decree could not be modified where it was a recitation only of a separate contract which was intended by the parties to be enforceable independently of the decree. The court said that under those circumstances modification of the decree would amount to modification of the contract itself. Whether or not we are persuaded by the logic of that statement, we find no need to apply it here. The burden of showing the intent of the parties to have an independently enforceable contract is upon the party asserting it. *Law* v. *Law*, 248 Ark. 894, 455 S.W. 2d 854 (1970). We find nothing in the record on this matter other than the recitation by the chancellor that the matter was "contractual." We can see no basis for finding an independent contract. The mere fact that the parties had agreed on a suggestion to the chancellor of the contents of the decree is not enough.

Reversed and remanded for further determination whether the alimony portion of the decree should be modified.

Roy VAIL, James VAIL and
Ronald ADCOCK *v.* STATE of Arkansas

CA CR 79-99 593 S.W. 2d 491

Opinion delivered January 16, 1980
Released for publication February 6, 1980

A. James Linder, for appellants.

Steve Clark, Atty. Gen., by: *Dennis R. Molock*, Asst. Atty. Gen., for appellee.

DAVID NEWBERN, Judge. The appellants were charged with first degree battery and were found guilty of the lesser included offense of third degree battery, a class A misdemeanor. Ark. Stat. Ann. § 41-1603 (Repl. 1977). In points one, two and four of their brief, the appellants argue insufficiency of the evidence as a basis for conviction, error by the court in failure to instruct a verdict and error in failure of the court to enter a judgment of not guilty despite the jury's verdict of guilty. We will address these points together as they all deal essentially with sufficiency of the evidence, and we find the evidence was sufficient to make a jury question. We decline to consider the appellants' third point which urges reversal for failure to consider and failure to give instruction proffered by the appellants. The appellants did not abstract any of the instructions proffered or any instruc-

tions given by the court. See *Ellis* v. *State*, 267 Ark. 690, 590 S.W. 2d 309 (Ark. App. 1979), in which this court discusses the history of the requirement that instructions be abstracted. See also, Rule 9 (d) of the Arkansas Supreme Court and Court of Appeals, and *Williams* v. *Fletcher*, 267 Ark. 961, 593 S.W. 2d 48 (Ark. App. 1979). Another reason we decline to consider this point is that no case or other authority is cited in the appellants' brief, and no argument is made from which we might evaluate whether the appellants were prejudiced in any way by the court's handling of their proffered instructions. *Dixon* v. *State*, 260 Ark. 857, 545 S.W. 2d 606 (1977).

George Pugh kept beer in returnable bottles in a cooler in a structure adjacent to his home. He kept a close watch on the beer, placing exactly eight bottles in his ice box at a time. He suspected the beer was being pilfered, and on one occasion previous to the night of the event giving rise to this case, he chased an intruder from his yard and fired a shot, apparently for the purpose of frigtening the intruder.

On the evening of November 26, 1977, Mr. Pugh observed some of his beer was missing. He also observed a car moving slowly up and down a road behind the wooden fence at the rear of his property. Mr. Pugh obtained his loaded .22 caliber pistol from his kitchen and walked into his back yard. It was dark and although his outdoor night light was on, he saw no one. He testified that he simultaneously heard and felt a gunshot and received a wound in his face. He then ran for cover and fired his own weapon several times in various directions. He was not firing at a target, as he still saw no one. He was not seriously injured by the bullet, and he thereafter got in his car and drove it on the road behind his house where the car he had seen earlier was parked. He observed appellant Adcock in the parked car. Without getting out of his car, he returned to his home. The sheriff's office was notified, and Mr. Pugh accompanied Deputy Bates in the sheriff's vehicle.

They first sought to investigate the occupants of a pick up truck moving on a street near Mr. Pugh's house, but on seeing the truck's occupants, a young couple, decided they could not have been involved in the incident. They then

drove up to the parked car earlier referred to and found it occupied by the appellants. The appellants professed not to know what was going on. They apparently were just sitting in the car drinking beer. They cooperatively accompanied the deputy and Mr. Pugh to the "station." A later search of the car revealed several fire arms, none of which was capable of firing a .22 caliber projectile. One of the weapons was a 16 gauge shotgun. Along with other ammunition, one .22 caliber bullet was found in the car. Neither the briefs nor the record makes it clear whether it was a spent casing or an unfired bullet. In addition, a 16 gauge shotgun shell was found the following morning in the yard near where the beer was stored. A full bottle of beer was found in the yard near to where the shotgun shell was found, and several empty beer bottles of the same returnable type were found near the place where the car occupied by the appellants had been parked the previous night. The investigation also revealed the fence had two fresh bullet holes which had been made by firing through the fence from outside the yard toward the interior of the yard. There was testimony that the holes could have been made by either a .22 caliber bullet or a heavy shotgun pellet.

The bullet removed from Mr. Pugh's jaw was a .22 caliber.[1] The appellants argue no evidence whatever connects them with the crime because no .22 caliber weapon was found in the car or otherwise in their possession.

We concur in the appellee's position that it was not necessary that such a weapon be found if the other circumstantial evidence in the case was sufficient to go to the jury and thus constitute a basis for conviction.

As no one saw any of the appellants shoot Mr. Pugh, the evidence recited above is circumstantial. That does not make the evidence insubstantial. *Williams* v. *State*, 258 Ark. 207, 523 S.W. 2d 377 (1975); *Upton* v. *State*, 257 Ark. 424, 516 S.W. 2d 904 (1974). We hold the evidence found in Mr. Pugh's yard, *i.e.*, the shotgun shell and full beer

[1] A crime laboratory report entered as a joint exhibit said the four bullet fragments removed from Mr. Pugh's jaw were from a bullet which is of .22 caliber size, rather than from a bullet "appearing" to be .22 caliber as stated in the appellee's brief.

bottle, and the evidence found in the car occupied by the appellants and about the ground where it had been parked, *i.e.*, the guns and ammunition as well as the beer bottles of the same peculiar kind as those kept by Mr. Pugh, when combined with the fresh holes in the fence which could have been made by a .22 bullet, were sufficient to exclude, in the minds of the jurors, other reasonable hypotheses showing how Mr. Pugh was shot. Thus, we regard the evidence as sufficiently substantial to support the conviction.

Affirmed.

Jerry TATE *v.* DIRECTOR, ARKANSAS EMPLOYMENT SECURITY DIVISION et al

CA 79-61 593 S.W. 2d 501

Opinion delivered January 23, 1980
Released for publication February 13, 1980

Kenneth R. Smith, for appellant.

Herrn Northcutt, for appellees.

ERNIE E. WRIGHT, Chief Judge. This is an appeal from the denial of a claim of unemployment benefits.

The appellant last worked for her employer, Ozark Op-

portunities, in the school head start program on May 25, 1979. She has been employed in the program for the past few years, and works eight and one-half months each year. She expects to return to work with the resumption of school in the fall. She filed her claim for unemployment benefits on May 29, 1979. The local Employment Security Office determined her ineligible for benefits on the ground she was on leave and had not been terminated.

She appealed for the stated reason, "My boss told me to file as I could draw unemployment." After hearing on June 27, 1979, the appeals referee held that although the claimant was unemployed, she has limited her availability, was not doing those things a reasonably prudent individual would do to become reemployed, was not making a serious effort to find another job, and was ineligible for benefits through June 27, 1979.

The evidence shows claimant had not been working during prior school vacation periods since she has been in the head start program. She lives at Flippin and applied for work only at two grocery stores and at a boat factory and plastic factory all in Flippin.

On appeal the Board of Review on July 27, 1979, affirmed the decision of the appeals referee. In her petition for appeal to the Board of Review the claimant requested a review of all records and testimony previously given and offered no further evidence.

Section 4(c) of the Arkansas Employment Security Law provides a claimant is eligible for benefits only if he is unemployed and doing those things a reasonably prudent person would be expected to do to secure work.

As claimant's testimony shows she made no effort to secure work outside the Flippin community and had applied for work at only four places, we cannot say the finding and decision of the Board of Review is not supported by substantial evidence. *Terry Dairy Products Company, Inc.* v. *Cash et al*, 224 Ark. 576, 275 S.W. 2d 12 (1955).

We would point out this and other recent similar cases before this court indicate local Employment Security Offices and perhaps appeals referees may not be adequately informing claimants of benefit eligibility requirements of Section 4(c) of the Employment Security Law. Although this is regrettable and hopefully will be remedied, this circumstance does not relieve a claimant of his burden of establishing his eligibility for benefits by meeting all of the requirements of the law.

Affirmed.

NEWBERN, J., dissents.

DAVID NEWBERN, Judge, dissenting. I respectfully dissent for the reasons stated in my dissenting opinion in *Teegarden* v. *Director, Arkansas Employment Security Division,* 267 Ark. 893, 591 S.W. 2d 675 (Ark. App. 1979). Although some of the facts in this case with respect to the validity of the claim may be different from those in *Teegarden,* the problem about the fairness of the notice, or lack of it, is the same.

Betty KIRKENDOLL, Individually and as Mother and Next Friend of Jerry S. KIRKENDOLL, a minor *v.* Troy HOGAN

CA 79-184 593 S.W. 2d 498

Opinion delivered January 23, 1980
Released for publication February 13, 1980

Guy H. Jones, Phil Stratton, Guy Jones, Jr., and *Casey Jones*, by: *Phil Stratton*, for appellant.

Wright, Lindsey & Jennings, for appellee.

ERNIE E. WRIGHT, Chief Judge. This appeal was filed in the Arkansas Supreme Court and transferred to the Court of Appeals pursuant to Rule 29(3).

Appellant brought suit on her own behalf for recovery of property damage and damages for personal injuries on behalf of her minor son sustained when a motorcycle operated by the son and owned by appellant, Betty Kirkendoll, collided with a truck owned and operated by appellee. The complaint was filed February 16, 1977, and answer was timely filed March 18, 1977. On May 26, 1977, appellee filed a counterclaim seeking property damages arising out of the accident. On May 27, 1977, appellant filed a motion to strike the counterclaim on the ground it was not timely filed. The record indicates appellant sought no ruling on the motion until after the jury was sworn to try the case and the motion was overruled.

The case was tried to a jury on March 13, 1979, and the jury returned a verdict apportioning the negligence 50/50 between the parties. For reversal of the judgment entered pursuant to the verdict appellant asserts two grounds: (1) that the court erred in refusing to strike the counterclaim and

(2) that the court erred in reading part of the instructions to the jury before testimony was adduced, particularly appellee's modified version of AMI 208.

It was within the court's discretion to refuse to strike appellee's counterclaim filed a little more than two months after the answer was filed. In *Huffman* v. *City of Hot Springs*, 237 Ark. 756, 375 S.W. 2d 795 (1964), the court reversed the trial court in striking a cross-complaint filed two months after the answer was filed, and stated:

> The filing of an answer meets the requirement of the statute and there is no sound reason why a party should not be permitted to amend his pleading thereafter, provided, of course, his pleading is filed within a reasonable time.

In 1975, Ark. Stat. Ann. § 27-1160 was amended to include the following provision:

> Any party required by existing law to assert a counterclaim in any pending cause of action shall be entitled to amend a pleading in such a manner as to assert such a counterclaim, subject to the same requirements and under the same conditions as apply to any other amendment which may be offered to pleadings, and the court shall have the same discretion to permit amendment to assert a counterclaim as exists to permit any other amendment.

In *Bates* v. *Simmons*, 259 Ark. 657, 536 S.W. 2d 292 (1976), the court said, "We will not reverse the trial court's action on requests for amendment of pleadings at the trial unless there has been a manifest abuse of discretion and material prejudice to the adverse party." The counterclaim in the present case was filed approximately two years before trial, and we find no basis for saying the appellant was prejudiced.

We hold the trial court did not abuse its discretion in refusing to dismiss the counterclaim.

As to the asserted error in the giving of part of the instructions before the introduction of evidence, Ark. Stat. Ann. § 27-1727 specifies the order of the steps in the trial of a case, but allows the trial court to alter the order for special reasons. The trial court saw fit to give the following standard instructions from AMI, 101, 102, 103, 104, 202, 204, 206 and 208 after the jury was sworn and prior to the introduction of evidence. Counsel for appellant made no objection to this procedure, but objected to instruction 208 as given on the ground it was not a correct statement of the law. That instruction reads:

> At the time of the occurrence Betty Kirkendoll and Jerry S. Kirkendoll were mother and son. Therefore, any negligence on the part of Jerry S. Kirkendoll is charged to Betty Kirkendoll with respect to the claims of Betty Kirkendoll.

After the above mentioned instructions were given, counsel for appellant moved for a mistrial on the ground the court read the above instructions to the jury before the opening statements and before any evidence had been heard.

Instruction 208 as given was a correct statement of the law. First, because after the close of the evidence the court gave among other instructions the following:

> Betty Kirkendoll signed the application of Jerry S. Kirkendoll, a minor, for an operator's license. If you find that Jerry S. Kirkendoll was negligent, then his negligence is charged to Betty Kirkendoll.

We must assume the evidence warranted the instruction as none of the evidence is contained in the record on appeal and appellee made no objection to the instruction. Ark. Stat. Ann. § 75-315(b) provides:

> Any negligence or wilful misconduct of a minor under the age of eighteen (18) years when driving a motor vehicle upon a highway shall be imputed to the person who has signed the application of such minor for a permit or license, which person shall be jointly and

> severally liable with such minor for any damages caused by such negligence or wilful misconduct.

Second, the case of *Welter* v. *Curry*, 260 Ark. 287, 539 S.W. 2d 264 (1976) makes it clear that in the case of a parent who sues for damages on his own behalf and on behalf of a minor child in a cause of action arising out of the same negligent act, the child's contributory negligence may be asserted against the parent even though the negligence is not imputed to the parent. The parent's cause of action is deemed to be derivative and subject to the comparative negligence of the child.

We hold the court did not err in giving instruction 208 and did not abuse its discretion in giving part of the instructions before the evidence was presented, although we believe it to be the better practice to instruct the jury after the evidence is closed, except possibly for very general type of instructions. We are not persuaded the jury would likely have been confused by the order in which the instructions were given.

Affirmed.

Lola SPEED *v.* CITY of Jonesboro, Arkansas

CA CR 79-95 594 S.W. 2d 44

Opinion delivered January 23, 1980
Released for publication February 13, 1980

Warren E. Dupwe, for appellant.

Steve Clark, Atty. Gen., by: *Dennis R. Molock*, Asst. Atty. Gen., for appellee.

M. Steele Hays, Judge. Appellant was tried on charges of public intoxication and possession of marijuana. The jury returned a verdict of acquittal on the charge of public intoxication and of guilty on the charge of possession, recommending a sentence of one year with two months suspended and a fine of $500. The testimony by the State was: On September 19, 1977, Officer Danny Walker of the Jonesboro Police Department attempted to serve a warrant for the arrest of appellant for the theft of a bicycle. After reading the warrant to appellant and discussing it with her, Mr. Walker concluded that she was under the influence of alcohol and informed appellant that he was arresting her for public intoxication. With the assistance of another officer, Mr. Mashburn, appellant was placed in jail and the two officers proceeded to take an inventory of the appellant's purse. Mr. Walker testified that the purse contained a steak knife, electrical alligator clip and an opened package of cigarettes

in which he found a partially smoked cigarette which he believed to be marijuana. The officer stated that he had no search warrant and that appellant had not consented to the search. He stated that her purse had been searched earlier for weapons and the partially smoked cigarette was discovered during a second search, the purpose of which was to protect her property by preserving a list of contents and also to search for drugs.

Captain H. W. Walker testified that he received from Sergeant Walker "a brown paper bag containing a knife, green vegetable material, cigarettes and a cigarette butt, et cetera" which he packaged and gave to his secretary to mail. He completed a form for Sergeant Walker to be forwarded to the Department of Health. He believed that he had the package mailed by certified mail and that normally he would initial the envelope though he could not recall specifically doing so. He did not personally mail the package, but did hand it to his secretary to mail, although he did not see her actually mail the package. Over objection of defense counsel, a copy of Captain Walker's inventory of the contents of the package was received in evidence.

Mr. Don Wise of the State Drug Laboratory testified that he received a certified manila envelope containing a brown sack enclosing a steak knife, an alligator clip, partially smoked cigarette, three cigarettes, along with a drug laboratory work sheet. He tested the materials and found that the cigarette butt contained 1.1 grams of marijuana. Mr. Wise identified the items received and stated that they had not been altered in any fashion except as required by the examination and tests. He explained that after the tests were performed on October 21 the package was kept in locked storage vault where it remained until he picked it up to appear at the trial. The envelope was sealed and unbroken until presented as evidence.

The introduction of the contents of the package was offered and received in evidence as Exhibit #6 over objection based on improper foundation and chain of custody.

Mr. Walker was recalled to testify that the items received in evidence as Exhibit #6 were the same items removed by him from the appellant and which he and Captain Walker had had sent to the Department of Health. Captain Walker was recalled for the same purpose.

At the close of the State's case the appellant moved to strike all evidence relating to marijuana or any items taken from her purse in the absence of a search warrant or consent by the appellant. Again, at the close of the entire case, appellant moved to suppress the evidence based upon an illegal search and seizure and lack of chain of custody, which motions were overruled.

Appellant argues two points for reversal, that the court erred in not excluding the testimony and evidence obtained in the search of appellant's purse and in finding a proper chain of custody of the evidence.

I

With respect to the chain of custody, we disagree with appellant that the court erred in finding that the chain of custody was sufficient. The thrust of the argument is that Captain Walker's secretary was not called to testify regarding the actual mailing of the envelope containing the items and that there was an unexplained lapse of thirty days from the date the items were placed in the envelope for mailing and the date the envelope was actually mailed.

The purpose of the rule requiring proof of chain of custody is to guard against the introduction of evidence which is not authentic. *Gardner* v. *State*, 263 Ark. 739, 569 S.W. 2d 74 (1978). Such questions must fall largely within the discretion of the trial court and the rule does not require that every possibility of tampering be eliminated by the testimony, but simply that the trial court is satisfied that in reasonable probability, the integrity of the evidence has not been impaired. *Gardner, supra*. Minor uncertainties of the sort present in this case are to be argued by counsel and weighed by the jury but are not of such degree as to render evidence inadmissible as a matter of law. *Rogers* v. *State*, 258 Ark. 314, 524 S.W. 2d 227 (1975); *Wickiffe and Scott* v.

State, 258 Ark. 544, 527 S.W. 2d 640 (1975). In the case before us, there was no intimation that the evidence had been tampered with or was altered. In fact, several witnesses positively identified the articles as those mailed and received and as being in the same, unaltered form. We find no abuse by the trial court in admitting the evidence over appellant's objection.

Appellant relies upon *Watts* v. *State*, 222 Ark. 427, 261 S.W. 2d 402 (1953), for the proposition that the failure by the State to produce Captain Walker's secretary creates a presumption that her testimony would be unfavorable to the State. But *Watts* v. *State* is readily distinguishable from the present case, for in *Watts* the trial court had refused to permit the defense to argue the point to the jury, which was held to be error. Here, there is no contention that appellant was not permitted to present such arguments to the jury as counsel thought were warranted by the chain of custody.

II

As to appellant's motion to strike or to suppress the evidence upon which the State's case was founded, it must be observed that Rule 16.2 is clear and unequivocal in its requirement that motions to exclude evidence must be made ten days prior to trial, in the absence of good cause.

There is no suggestion that appellant was not aware of the circumstances which led to the discovery of the evidence used against her and nothing in the way of good cause was offered or even intimated. The constitutionality and the reasonableness of Rule 16.2 have been considered and upheld in *Parham* v. *State*, 262 Ark. 241, 555 S.W. 2d 943 (1977), where it was observed that a motion not filed until a day or two before trial was "correctly denied as having been filed too late." The ten day requirement was held to be a reasonable one. It has been expressly observed by our Supreme Court that the Rules of Criminal Procedure were adopted as "important guidelines to protect the fundamental rights of the individual while preserving the public interest, and we take a critical view of any failure to comply with the rules." *Brothers* v. *State*, 261 Ark. 64, 546 S.W. 2d 715 (1977).

Conceding that there may be instances in which the time requirements of Rule 16.2 ought to be liberalized, it does not follow that defendants can expect to wait until the very close of the State's case to move for the first time to exclude evidence, and, absent good cause, expect the trial court to consider the motion on its merit.

Nor can we agree with appellant that there was any sort of waiver by the prosecution. The prosecution was not put in the position of waiving or not waiving, as the appellant simply moved, at the close of the State's case, to strike all evidence obtained by the search, which the court denied without comment. The same was true of the motion appellant made at the close of the entire case (which this time was termed "motion to suppress"). But in neither instance was the State obligated to voice opposition, as the trial court acted immediately to deny the motion.

It may also be noted that appellant's motions relative to unlawful search were not offered until considerably after the evidence had already been received over objections from appellant on other grounds (i.e., chain of custody, lack of foundation, relevancy and materiality) and irrespective of Rule 16.2 when evidence is objected to which has already been received in evidence, its retention or exclusion is within the discretion of the trial court. *Haight* v. *State*, 259 Ark. 478, 533 S.W. 2d 510 (1976); *Warren* v. *State*, 103 Ark. 165 (1912).

Finding no error, the judgment of the trial court is affirmed.

STAGECOACH MOTEL *v.* Maevaughn KRAUSE and Commissioner of Labor, State of Arkansas

CA 79-105 593 S.W. 2d 495

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Released for publication February 13, 1980

M. Morrell Gathright, for appellant.

Thelma M. Lorenzo, for appellees.

JAMES H. PILKINTON, Judge. This is an unemployment compensation case. Appellee worked for the Stagecoach Motel on a permanent, full-time basis from November 1977 until August 1978 when she was discharged. Following her discharge, appellee accepted temporary employment during the Christmas season at K-Mart and at the race track for the duration of the racing season. She filed a claim for unemployment benefits on May 2, 1979, stating that she had been discharged by appellant Stagecoach Motel for failing to collect room rent in advance from a guest who left without

paying. While employed by Stagecoach, appellee was the afternoon shift desk clerk. All of the desk clerks were to obtain payment from guests for their room in advance when registering. In the case of guests staying over for another day, the afternoon desk clerk had the primary responsibility of contacting the guest and obtaining payment in advance of their staying over. If the afternoon desk clerk was unable to contact the guest or obtain payment, the manager was to be contacted.

The incident triggering appellee's discharge involved a motel guest named Woodall who paid for one night's rent when he checked in on Sunday. He stated then that he did not know how long he would be staying. Each day of that week thereafter, he paid for one night in advance until Friday. Appellee tried unsuccessfully to contact Woodall on Friday. Ms. Krause claims she told the manager, Richard Sampo, on either Friday or Saturday that she had not been able to contact Woodall to obtain payment. In any event, appellee as well as the morning shift clerk continued to try to contact Woodall, but without success. On Sunday, after again trying to contact Woodall, Ms. Krause attempted to telephone the manager at his home to report the continuing problem. She testified that she repeatedly telephoned him at one-half hour intervals, but got no response. Ms. Krause also says that she drove to the manager's house when she got off from work at 10:30 p.m. on Sunday to apprise him of the situation, but did not stop because there were no lights in the house and she thought the manager had retired for the night. Appellee called the manager early Monday morning at the motel office, and advised him of the situation, but by that time Woodall had left the motel without paying for Friday, Saturday and Sunday. Ms. Krause was discharged the same day for failure to follow the policy of the employer.

The Employment Security Division denied compensation. The agency held that "failure to follow the policy of the employer is an act against the employer's best interest." Ms. Krause appealed the denial, and the Appeals Tribunal reversed, the Referee holding that there was not a sufficient showing of deliberate conduct against the employer's best interest. The Board of Review adopted the decision of the

Appeals Referee as the decision of the Board, and affirmed the allowance of compensation. The employer has appealed to this court from the decision of the Board of Review.

I.

Appellant first claims that the decision of the Board of Review is based upon a misstatement and misapplication of the law. It is argued that under Ark. Stat. Ann. § 81-1106(b)(1) disqualification attaches if an individual is discharged from his last work for misconduct in connection with the work, and that a showing of *deliberate* misconduct is not required.

The general rule is that misconduct (within the meaning of the Unemployment Compensation Act excluding from its benefits an employee discharged for misconduct) must be an act of wanton or wilful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of the standard of behavior which the employer has a right to expect of his employees. 76 Am. Jur. 2d, *Unemployment Compensation,* § 52. 26 ALR 3d 1356. See also *Parker* v. *Ramada Inn,* 264 Ark. 472, 572 S.W. 2d 409 (1978); *Harris* v. *Daniels,* 263 Ark. 897, 567 S.W. 2d 954 (1978). Consequently, in the case before us we cannot say that appellee's action did, as a matter of law, constitute misconduct within the meaning of the statute. A question of fact was presented to the Board of Review on which it could have found either way.

II.

Appellant next points out that the Appeals Referee refers to some matters as *undisputed* when they were in fact disputed, and appellant also complains about the manner in which the Appeals Referee conducted this hearing and made his findings. It is clear from the record that the Referee did ask a great number of very leading questions, and in some instances he came close to placing words in the mouth of the claimant while she was testifying. Appellant points out that the Board of Review carried such matters forward when it adopted the findings and decision of the Appeals Referee as its own.

With respect to procedure, the Employment Security Act, Ark. Stat. Ann. § 81-1107(d)(4) (Repl. 1976) provides:

> The Board of Review, appeal tribunals and special examiners shall not be bound by the common law or statutory rules of evidence or by technical rules of procedure, but any hearing or appeal before such tribunals shall be conducted in such a manner as to ascertain the substantial rights of the parties . . .

Under the statute, unless the hearing is conducted in such a way as to make it impossible to ascertain the substantial rights of the parties, we cannot properly reverse on procedure. The actions complained of did not go that far in this case.

III.

Appellant next argues that subsequent to her discharge, appellee worked for K-Mart during the Christmas season and at the race track during the racing season and, therefore, her last employment was not with appellant. The evidence shows that the K-Mart and race track jobs were temporary, and cannot be considered appellee's last employment for unemployment purposes. There is substantial evidence in the record to support the finding of the Board of Review that appellee's last employment for unemployment benefit purposes was with Stagecoach Motel.

IV.

All points considered, the main question on this appeal is whether there was substantial evidence to support the decision of the Board of Review that appellee was entitled to unemployment benefits under the Arkansas Employment Security Act. Even though there is evidence in this record upon which the Board of Review might have reached a different result, the scope of our judicial review is limited. *Harris* v. *Daniels, supra*. A reviewing court is not privileged to substitute its findings for those of the Board of Review even though the court might reach a different conclusion if it had made the original determination upon the same evidence

considered by the board. *Harris* v. *Daniels, supra.,* and *Parker* v. *Ramada Inn et ux, supra.*

Since we find substantial evidence to support the board's action, the judgment is affirmed.

Affirmed.

John BYERS *v.* STATE of Arkansas

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Rehearing denied February 27, 1980
Released for publication February 27, 1980

William H. Craig, for appellant.

Steve Clark, Atty. Gen., by: *Robert J. DeGostin, Jr.,* Asst. Atty. Gen., for appellee.

JAMES H. PILKINTON, Judge. In the early morning hours of January 4, 1977, Detectives Hardester and Moomey of the Little Rock Police Department vice squad arrested appellant and transported him to the Little Rock Police Department Detention Center. While conducting a "strip search" of appellant, the detectives found three foil packets which were seized and stored.

Officer Moomey ran a field test on one of the packets and the test result was positive for cocaine. Moomey, without opening all the packets, assumed the others also contained cocaine. He turned all three packets over to Officer Sylvester of the Narcotics Division, telling him that they were three packets of cocaine. Sylvester opened one of the packets, observed a white powdery substance, and assuming that all three packets contained cocaine, logged them in and stored them in the narcotic safe. Appellant had been jailed on a charge of possession of cocaine with intent to deliver.

The three packets were subsequently taken to the crime lab of the State Health Department for analysis. Michael S. Keller, a chemist there, tested the substances in the three foil packets, and found that two of them contained white powder which tested positive for cocaine. The third packet, which was smaller, contained a brown powder and tested positively for heroin.

When the lab report was received on or about February 2, 1977, appellant was arrested and charged with possession of heroin. The cocaine charges were not pursued.

On trial for the heroin charge, appellant admitted that he knowingly possessed the two packets of cocaine, but denied having the heroin in question.

The trial court denied appellant's motion to suppress introduction of the brown powder, and it was admitted into evidence. A jury found the appellant guilty of possession of heroin, and fixed his punishment at two years imprisonment. Judgment was entered on the verdict, and appellant has appealed.

Appellant first argues that the trial court erred in denying his motion to suppress the brown powder, found to be heroin, and in admitting into evidence the foil packet containing the brown substance.

The record shows that Officer Moomey seized three tin foil packets from appellant. Moomey field tested one of the packets and that showed a positive reaction for cocaine. At least one of the remaining packets was never opened by Moomey. Based on his field test of the one packet, the initial arrest report was filled out to the effect that "three (3) tinfoil packets of a white powdery substance believed to be cocaine" were seized from appellant. One of the packets subsequently turned out to contain brown powder which was heroin. Appellant claims he and his attorney were led to believe, from the information provided through discovery, that the officers had seized only white powder from appellant's person; and that, according to the officers' own reports, it had been tested and found to be cocaine. In response to appellant's motion for discovery, the state provided copies of all documents it had including the chemist's report. This report clearly indicated that only two packets contained white powder (cocaine), and the third contained brown powder found to be heroin. It seems inconceivable that appellant or his counsel could have been misled in any way because they were furnished with a copy of the lab report. Here the officers seized the heroin in question, but it was not identified as heroin until a chemical analysis was run on the substance at the lab by a chemist. Appellant has offered no authority for the proposition that officers must correctly identify drugs at the time they are seized. Certainly officers are not prevented from lodging a controlled substance offense if they are mistaken in their initial identification of the substance. Officers on the street are not required to be expert chemists. Here the issue of whether the brown powder packet should have been admitted depends upon the credibility of the witnesses. In such circumstances, we defer to the superior position of the trial court. *Whitmore* v. *State,* 263 Ark. 419, 565 S.W. 2d 133 (1978). The appellant cites *Williamson* v. *State,* 263 Ark. 401, 565 S.W. 2d 415 (1978), but that case is not in point and is clearly distinguishable from the one before us. Here all the materials and documents

in the state's possession, including the lab report, were provided to the appellant far in advance of trial. We hold that the trial court properly denied appellant's motion to suppress.

II.

Appellant also argues in his brief that the trial court erred in denying his motion for a directed verdict of acquittal. This point, appellant concedes, is directly related to Point I in that the motion for a directed verdict was premised upon the suppression of the brown powder. Once the packet containing the brown powder is suppressed, appellant says, there is no substantial evidence upon which to sustain a conviction. Since we have held that the trial court properly admitted the evidence in question, no further discussion of Point II need be made.

III.

Appellant finally argues that the trial court erred in instructing the jury on presumption of innocence, reasonable doubt, and circumstantial evidence, and in refusing appellant's offered instructions on these subjects.

Appellant's abstract of the instruction proffered, and of the instructions given of which he complains, do not comply with the requirements of Rule 9(d) of the Rules of the Supreme Court and Court of Appeals. Here only excerpts from certain instructions or proposed instructions are included in the briefs filed. We are at a disadvantage in attempting to follow the argument made by appellant in Point III. However, based upon the information before us, it appears that the trial court properly instructed the jury on the law relative to the charge. Where the subject matter of a requested instruction has been sufficiently covered by the instruction given, there is no error in the court's refusal to give the requested instruction. *Cobb* v. *State,* 265 Ark. 527, 579 S.W. 2d 612 (1979).

A trial court is not required to instruct the jury on the law in every possible manner even though a correct statement of it may be prepared by the defense counsel. *Butler* v. *State,* 261 Ark. 369, 549 S.W. 2d 65 (1977). The best we can tell from the abstract before us, the instructions in question

given by the court differed somewhat from the wording of the instructions offered by appellant. But, be that as it may, the instructions used by the court were proper statements of the law. Instructions which are cumulative are not necessary.

Affirmed.

Betty WADE *v.* STATE of Arkansas

CA CR 79-110 594 S.W. 2d 43

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Rehearing denied February 20, 1980
Released for publication February 20, 1980

John W. Achor, by: *William H. Patterson, Jr.,* Chief Appellate Attorney, for appellant.

Steve Clark, Atty. Gen., by: *Victor L. Fewell,* Asst. Atty. Gen., for appellee.

MARIAN F. PENIX, Judge. On April 19, 1979, Appellant Wade was tried by a jury and found guilty of possession of heroin. She was sentenced to five years. From this sentence Wade appeals.

On August 1, 1978, a warrant was obtained for the search of a residence on Mabelvale Pike. During the search by Little Rock police officers Wade was seen to drop to the floor a syringe, a tinfoil packet, and a cotton ball. The syringe and cotton ball contained heroin.

Wade alleges there was insufficient evidence to support the verdict. Richard Fulks, of the Narcotics Division of the Little Rock Police Department, testified he had just told one of the occupants of the residence she was to be searched by a female detective. As he turned to talk to Wade he saw three articles fall to the floor — the syringe, tinfoil packet and cotton ball. He stated he did not see them in her hands but did see them fall to the floor beside her. He testified Wade was standing alone not close to any furniture nor any other of the occupants. He also stated Wade was the only occupant who was standing. Another officer Lowery testified he saw the packet and syringe on the floor close to Wade. He further stated all other suspects were seven or eight feet from Wade and there was plenty of light in the house. An expert witness from the Arkansas State Crime Laboratory testified the dropped articles contained heroin.

Johnny Trimble testified for Wade and Wade took the stand herself. Trimble testified the packet was on the floor when he and Wade first arrived at the residence. Wade testified she had never seen nor had the syringe and the packet. She also testified it was getting dusky dark and the only light that was on was in the bathroom.

The Arkansas Supreme Court has held that, in cases involving possession of controlled substances, actual or physical possession is not required.

. . . possession may be imputed when the contraband is

> found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control . . . *Cary* v. *State,* 259 Ark. 510, 534 S.W. 2d 230 (1976).

Two officers testified the contraband was very near Wade. One testified he actually saw the contraband drop from Wade's hands. Their testimony is sufficient to constitute substantial evidence to support the jury verdict. We need not consider the testimony of the defense witnesses which conflicts with the testimony of the officers. The officers' testimony constitutes substantial evidence.

> In pointing out the pertinent testimony on the question of sufficiency of the evidence, we will view the evidence in the light most favorable to the state, considering only that testimony that lends support to the jury verdict and disregarding any conflicting testimony which could have been rejected by the jury on the basis of credibility. *Chaviers* v. *State,* 267 Ark. 7, 588 S.W. 2d 434 [No. CR 79-148 (filed October 29, 1979)]

We hold the evidence sufficient to support the jury verdict.

Affirmed.

Chester D. PHILLIPS *v.* BEN M. HOGAN COMPANY, INC. and THE TRAVELERS INDEMNITY COMPANY

CA 79-114 594 S.W. 2d 39

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Cearley, Gitchel, Bogard, Mitchell & Bryant, P.A., for appellant.

Friday, Eldredge & Clark, by: *John Dewey Watson,* for appellees.

GEORGE HOWARD, JR., Judge. This appeal is from a judgment of the trial court, sitting without a jury, finding:

1. The liquidated damages provision in a contract for the construction of a land subdivision project, providing that the contractor shall pay the sum of $100.00 for each working day of delay until the work is completed, was valid.

2. While the project was not completed on the scheduled date, November 6, 1977, the job was substantially completed on December 7, 1977.

3. The retainage held by the appellant, in accordance with the contract, of $4,320.00 shall be charged with $2,600.00 (as liquidated damages) and a judgment rendered in favor of the contractor for $1,720.00, including interest from the date of the contractor's counterclaim at the rate of 6% per annum until the date of judgment and from the date of judgment until paid at the rate of 10% per annum.

While the facts are essentially undisputed, the following is a summary of the relevant facts for an understanding of the issues tendered for resolution:

On August 1, 1977, appellant, the owner, and appellee, as contractor, entered into a contract whereby appellant agreed to pay appellee $108,005.95 for work on a parcel of land that appellant was developing as Normanwood Subdivision. The work included, among other things, grading, asphalting, drainage, water and sewer improvements.[1]

Under the terms of the contract, the project was to be completed ninety calendar days after construction began. Appellee commenced work on August 9, 1977, and, con-

[1] Appellant is a professional engineer. He prepared the plans, specifications and contract. Appellee was the lowest bidder and was awarded the contract for the job.

sequently, the scheduled completion date was November 6, 1977.

The contract contained a liquidated damages clause which provided that the contractor shall pay the owner $100.00 for each working day of delay until the work was completed or accepted.

Appellant contends that the project was not finally accepted until April 24, 1978, aggregating a total of 144 working days of delay and, accordingly, instituted his action for damages of $14,400.00.

Appellee claimed in its response that while the project was completed and accepted in accordance with the terms of the contract, appellant has refused to make the final payment of $4,320.00, and accordingly, requested judgment against the appellent for the retainage.

For reversal, appellant asserts a novel argument. Quoting from appellant's brief, appellant's contention is:

> It is appellant's position that the Court erred in so limiting the award of damages to only the sum accumulated up to December 7, 1977, because where there is a valid provision in a contract specifying liquidated damages, along with a breach of contract which triggers the accumulation of those liquidated damages, the date of 'substantial performance', if there is 'substantial performance', is irrelevant to the accumulation of those liquidated damages. [According to Appellee's own records 18.9% of the total man hours occurred after the agreed time for completion and 4.8%occured after December 7, 1977.]

Appellee, on the other hand, in pressing its cross-appeal from the judgment of the trial court, contends that the trial court erred in holding the liquidated damages provision valid; that the provision for payment of $100.00 for each working day of delay is void as a matter of law inasmuch as the stipulated figure is disproportionate to any actual damages sustained by the appellant.

It is settled in this State that where the damages for breach of a contract are by their nature uncertain and difficult to determine, the amount to be paid, in the event there is a breach, may be stipulated to by the parties. However, the stipulated sum will be regarded as a penalty if the sum agreed to exceeds the measure of just compensation and the actual damages sustained are capable of proof. Moreover, the question whether the damages are difficult of proof is one to be determined from a consideration of the status of the parties at the time the contract is executed and not at the time of the breach. *Nilson* v. *Jonesboro,* 57 Ark. 168, 20 S.W. 1093 (1893); *Blackwood* v. *Liebke,* 87 Ark. 545, 113 S.W. 210 (1908); *Hall* v. *Weeks,* 214 Ark. 703, 217 S.W. 2d 828 (1949); *Smith* v. *Dixon,* 238 Ark. 1018, 386 S.W. 2d 244 (1965).

In *Hall* v. *Weeks,* supra, our Supreme Court stated:

> The general rule governing liquidated damages is that an agreement in advance of breach will be enforced if the sum named is a reasonable forecast of just compensation for the injury, if the harm is difficult or incapable of accurate estimation.

A valid provision for liquidated damages for a delay in performance of the contract will be enforced where the performance under the contract has not been completed on time. However, where a construction contract is substantially performed within the time limit, delay in the completion of minor details which does not cause material damage to the project will not subject the builder to liquidated damages. 25 C.J.S. § 115 Damages, page 1093; *Roseburr* v. *McDaniel,* 147 Ark. 203, 227 S.W. 397 (1921).

In *Roseburr* v. *McDaniel,* supra, the Court said:

> The rule established by decisions of this court is that where a building contract is substantially performed, even though there are omissions and deviations therefrom, if such defects do not impair the structure as a whole and are remediable 'without doing material damage to other parts of the building in tearing down and reconstructing, and may without injustice be compensated by deductions from the contract price,' there

may be a recovery for the amount found due after making such deductions.

In *Osborne* v. *Sutter,* 143 Ark. 297, 22 S.W. 481 (1920), the contract provided that the work should be completed within 150 working days; and liquidated damages was stipulated to the extent of $10.00 per day for that time in excess of the scheduled completion date. The contractor consumed 390 days in the construction of the project. The trial court found that the delay resulted from causes beyond the contractor's control which were not within the contemplation of the parties. The court held that the contractor should not be charged with the damages claimed by the owner.

The Arkansas Supreme Court in affirming the trial court's conclusion that the liquidating damages clause was inoperative inasmuch as the project was substantially completed, held that the trial court's holding was supported by a preponderance of the evidence.

Whether a construction project has been substantially completed presents a question of fact to be resolved by the fact finders. *Osborne* v. *Sutter,* supra.

We believe that the liquidated damages provision contained in the contract is not a penalty. The uncertainty of the risk taken by appellant in commencing construction of his land development project in late summer, which obviously would extend into the fall months, justifies a conclusion that each party recognized the possibility that the owner would sustain a substantial loss in the event the project was not completed before winter. The variation and uncertainty of the impact of inflation as an element in the cost of construction affords a basis for finding that there is a reasonable relationship between the stipulated damages of $100.00 per day and the overall cost of the project. We do not consider the stipulated figure as extravagant or disproportionate to the construction cost.

Appellant, during oral argument, admitted that the project was substantially completed on December 7, 1977, and

argues strenuously that his case was not predicated on omissions, but was one essentially for damages for delay. Appellant has not cited any Arkansas authority in support of the argument, nor have we found any.

The rule "substantial performance", which the trial court invoked in resolving this controversy, permits an equitable solution to a controversy where the contractor has tried in good faith to follow the terms of the contract, but is prevented from doing so because of conditions occurring beyond his control or not contemplated by the parties. An owner who has realized special damages after the project has been substantially completed is not precluded from seeking relief even though he may be entitled to stipulated damages. *Smith* v. *Dixon,* 238 Ark. 1019, 386 S.W. 2d 244 (1965). Appellant in the instant case did not seek special damages.

Appellant testified that the force of his complaint, relating to the noncompletion of the project, was that a drainage ditch was not constructed according to the grade that is shown on the plans, but did not prevent him from selling lots in full view of the ditch; that as late as April, 1978, appellee was required to patch the asphalt streets and finish the headwalls — a concrete structure designed to prevent erosion of the foundation supporting drainage pipes.

However, the record discloses that 18.9% of the total man hours expended on the project occurred after the scheduled completion date and 4.8% occurred after December 7, 1977; that the Engineering Department of the City of Little Rock inspected and approved the project on December 7, 1977. Appellant also testified that on December 30, 1977, he signed an offer and acceptance for the sale of a lot containing the following provision:

> Seller warrants that all utilities are installed to each lot line and are adequate. Seller warrants that subdivision has been approved by FHA and/or VA, and that the City of Little Rock has accepted all utilities.

We are convinced that the holding of the trial court is supported by substantial evidence.

Affirmed.

HAYS, J., not participating.

PENIX, J., dissents.

MARIAN F. PENIX, Judge, dissenting. It is my belief the trial court altered the terms of the contract by limiting the award of liquidated damages to a date before full completion of the terms of the contract. This is error.

The court found the liquidated damages provision to be a valid one. This being the case the court's arbitrary finding that the liquidated damages of $100 per day ceased to accumulate December 7, 1977, was nothing less than an alteration of the contract. These parties bargained and knowingly entered into an agreement, the terms of which were clear and unambiguous. One of the bargained-for terms was that the work would be *fully* completed within 90 days. Testimony indicates the need for this 90 day term was to insure the work would be completed before the winter rains.

Liquidated damages are enforceable when they are provided for to compensate for damages which will be difficult to ascertain if the contract is breached, and thereby prevent a controversy between the parties as to the amount.

This liquidated damages clause was triggered not by lack of substantial performance, but rather by the failure to *complete* the work within the agreed upon time frame.

The doctrine of substantial completion is applicable in situations where the contractor fails too finish the job. It is used as a means to determine damages. In this case the contract was fully performed, but in an untimely manner. Performance was completed but not by the agreed upon date. It was not completed *within 90 days*. The parties had provided the measure to be used to determine compensation due the appellant in the event the appellee failed to perform within 90 days.

I see no reason for the court to alter the terms of a

contract which were agreed to by knowledgeable, experienced business persons.

Therefore, I respectfully dissent.

Derrick HODGES *v.* STATE of Arkansas

CA CR 79-112 593 S.W. 2d 494

Opinion delivered January 23, 1980
Released for publication February 13, 1980

John W. Achor, Public Defender, by: *Howard W. Koopman*, Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Dennis R. Molock*, Asst. Atty. Gen., for appellee.

GEORGE HOWARD, JR., Judge. Appellant was convicted of robbery by the trial court sitting as a jury and was sentenced to the Department of Correction for five years, with

two years suspended. Appellant's request for credit for the time spent in the county jail was denied.

Following appellant's release from jail, after executing bond, on January 25, 1978, appellant failed to appear at a scheduled hearing on January 3, 1979. Pursuant to an alias warrant, appellant was arrested and confined to jail on a "no bond" status on January 5, 1979, and remained incarcerated until the date of his conviction on March 30, 1979. Hence, appellant spent eighty-five (85) days in jail from the date of his arrest on the alias warrant to the date of his conviction.

The State argues that appellant is not entitled to credit since appellant's confinement was due to his failure to appear and not because of indigency. In other words, appellant, in effect, was a fugitive from justice and that the facts in the instant case are functionally equivalent to those in *Hughes* v. *State,* 260 Ark. 399-A, 540 S.W. 2d 592 (1976), where our Supreme Court held that appellant was not entitled to credit for the period spent in Alaska as a fugitive from justice awaiting transportation back to Arkansas.

Ark. Stat. Ann. § 41-904 (Repl. 1977) provides:

> If a defendant is held in custody for conduct that results in a sentence to imprisonment, the court shall credit the time spent in custody against the sentence.

It is clear that no charge was lodged against appellant for failure to appear.[1]

While appellant's confinement on January 5th was pursuant to an alias warrant, it is plain he was held under the robbery charge pending final disposition of that charge. We are persuaded that appellant is entitled to credit for the period dating from January 5th to March 30th, aggregating a total of eighty-five (85) days.

The judgment, as so modified, is affirmed.

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[1] Ark. Stat. Ann. § 41-2820 (Repl. 1977) provides in pertinent part:

(1) A person commits the offense of failure to appear if subsequent to having been:

Stottie PENDERGIST *v.* Jessie PENDERGIST

CA 79-182 593 S.W. 2d 502

Opinion delivered January 23, 1980
Released for publication February 13, 1980

E. Winton McInnis, III, for appellant.

Joe Peacock, for appellee.

DAVID NEWBERN, Judge. The appellant sought a nonsuit to her divorce action. The chancellor refused to grant the nonsuit because he regarded the divorce decree as having been rendered from the bench at the divorce hearing, although he recognized that the appellant's request in her

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. . .

(b) lawfully set at liberty upon condition that he appear at a specified time, place, and court; he fails to appear without reasonable excuse.

(2) Failure to appear is a class C felony if the required appearance was to answer a charge of felony or for disposition of any such charge either before or after a determination of guilt of the charge.

divorce complaint that the court adjudicate property rights had been taken under submission as of the date of the divorce hearing. In his memorandum opinion denying the nonsuit, the chancellor held the divorce had been granted but that he could take no action with respect to the property rights of the parties because the husband-defendant had died after the property aspects of the case were submitted but before they were finally decided.

On the day of the divorce hearing, the chancellor wrote the following docket notation:

> 6-5-78 On oral of parties — Burl Simmons, et al. — Submitted.

On December 22, 1978, the chancellor entered a formal decree *nunc pro tunc* July 5, 1978, the date of the hearing. The decree, in addition to describing the previous rendition of the divorce, said the following with respect to the parties' property:

> 4. That all items of personal property held in the entireties will be governed by the statutes pertaining thereto and that all property held in the name of the Defendant only will abate as the date of his death, and the Court will make no further actions regarding such property.

The appellant asks us to decide either that she is entitled to her nonsuit or that this action abated upon the death of a party. We hold the latter.

The parties appeared at the divorce hearing on July 5, 1978. The appellant put on her testimony and corroboration. The appellee and his counsel were present, not to contest the taking of the divorce, but to protect his interest in an equitable property distribution. The chancellor's memorandum decision denying the appellant's nonsuit motion recites he had been forewarned one of the parties had a serious heart condition which was affected by emotional stress, and in view of the "unusual bitterness" between the parties, he wanted to prevent emotional outbursts in the courtroom.

The memorandum says that after the plaintiff had presented the evidence on the issue whether the marriage should be dissolved:

> The court then heard all of the evidence concerning property rights. When both parties had rested and at the suggestion of counsel the Chancellor in open court declared that the plaintiff's prayer for divorce was granted and the marriage of the parties dissolved, reserving for further consideration all other issues.
>
> . . .
>
> Upon departure of the parties, the court having already reached a determination on each and every issue, outlined to counsel what was thought and intended to be a full determination of all issues, permitting counsel, as I usually do, to vary the terms if they could by agreement make a happier solution in the final and formal decree.

We agree that when a chancellor has rendered a decree in open court the decree is effective as of that time even if not entered of record. That is the express holding in *Parker* v. *Parker,* 227 Ark. 898, 302 S.W. 2d 533 (1957). But the *Parker* case did not involve a docket notation of any kind, whereas in this case we find a docket notation inconsistent with the later finding by the chancellor that a decree had been rendered.

In the case of *McConnell* v. *Bourland,* 175 Ark. 253, 299 S.W. 44 (1927), the court reviewed authorities from several jurisdictions and reached the following holding:

> There are authorities to the contrary but we hold that when a decision has been reached, announced by the court, *and sufficient memorandum* [*is placed*] *on the chancery docket to show a final settlement of the case,* it is a final judgment, although it has not been spread in full on the record. [Emphasis added. 175 Ark. at 263]

Although in that case there had been a docket entry of the judgment the supreme court found extant, and thus the lack of one or an inconsistent entry was not the question, we are persuaded by the language quoted because it was the court's

synthesis of the cases cited at the end of a long discussion of the nature of a final judgment.

Not only are we guided by the language and holding of the *McConnell* case, *supra,* but we are persuaded by dictum in *Stickland* v. *Strickland,* 80 Ark. 451, 97 S.W. 659 (1906). There, the supreme court was presented with a case in which the trial court had rendered a divorce decree, and one party had appealed. The supreme court had taken the case under submission, but the appellee died before the appeal was decided. In the course of deciding it had the power to render its appellate decision despite the death of a party, the supreme court said:

> Of course, death terminates a divorce suit; but where property rights depend on the correctness of a divorce decree, and an appeal has been taken from it, it is the duty of the appellate court to review the decree in order to settle the property rights. [Citations] The rule is otherwise where the cause has been submitted to the trial court, and one party dies before decree. No decree can be entered after death of a party to such a suit. [80 Ark. at 452]

Were we to uphold the chancellor's *nunc pro tunc* order as the appellee asks us to here, we would be leaving the parties divorced but with no accompanying property adjudication despite the fact that the appellant had sought it in her complaint. Following the quoted statement from the *Strickland* case, we cannot now order the chancellor to enter a supplemental decree declaring the property rights of the parties. Thus, the appellant would have had part of her lawsuit decided and part left undecided. The problem is that without any decision on the property part of the suit, the parties' rights are affected in a manner not intended by them or by the court. There is nothing in the record to indicate the appellant consented to a piecemeal resolution of the case. For the court to say now the divorce was rendered and the property held by the entireties will be governed by a statute covering the property rights of divorced persons [Ark. Stat. Ann. § 34-1215 (Supp. 1979)]effectively denies the appellant an adjudication of her property rights to which she would

have been entitled under Ark. Stat. Ann. § 34-1214 (Repl. 1962), which was in effect at the time her suit was brought. That would not be a fair resolution of the case, and as stated earlier, we believe it would not be correct, as the docket indicated no final action whatever.

As the appellant points out, this problem will not occur in cases brought after July 1, 1979, because of Ark. R. Civ. P. 58 and 79 which make it clear that a judgment in a case such as this will not be effective until it has been at least entered on the court's docket.

We hold that although the appellant was not entitled to a nonsuit, this case had been taken under submission and not finally decided by the trial court when the death of a party caused the action to abate, thus the *nunc pro tunc* order is of no effect.

Reversed and dismissed.

SOUTHEAST ARKANSAS FARMERS ASSOCIATION *v.* Cliff WALTON

CA 79-261 597 S.W. 2d 603

Opinion delivered January 23, 1980
Released for publication February 13, 1980

Samuel N. Bird, of *Williamson, Ball & Bird,* for appellant.

Jerry E. Mazzanti, of *Drew & Mazzanti,* for appellee.

DAVID NEWBERN, Judge. In this workers' compensation case, the appellant contends there was not substantial evidence for the commission's finding of the time of termination of a healing period and lack of substantial evidence to support a finding of permanent, partial disability of fifteen per cent to the body as a whole. We affirm the Commission's decision.

Mr. Walton sustained an indisputably compensable injury while working for the appellant in May, 1976. He fell to a concrete floor from an overturning tractor, and the seat of the tractor fell on top of him. Since the accident he has complained continuously of severe back pain.

The appellee was first examined by Dr. Burge shortly after the accident. In a report dated August 16, 1976, Dr. Burge stated he had diagnosed "possible soft tissue injuries (sprains and strains)" and that the accident was the only cause of the condition he diagnosed. He stated the injury would "result in no permanent defect." The report stated Mr. Walton was able to resume regular work June 14, 1976, but that he would require additional treatment for an undetermined period. The report also said the claimant had been referred to a neurologist, Dr. Frothingham.

In a report dated September 20, 1976, Dr. Frothingham said, "there is great sparcity of clincial evidence to support an organic basis for his complaints." This report was based on an examination conducted September 17, 1976. The commission used September 17, 1976, as the date for the termination of the healing period, presumably on the basis of this examination which found no organic cause of the appellee's complaints. Dr. Frothingham's report makes it fairly clear he considered the appellee to be a malingerer, although he did not rule out or address the possibility of traumatic neurosis.

A third physician, Dr. Flanigan, filed two separate reports after examining Mr. Walker. One report was dated November 3, 1976, and one was dated February 23, 1978. In

his initial report, Dr. Flanigan found some muscular asymmetry and movement restriction. In his second report, which was made a part of the record after the hearing, Dr. Flanigan concluded as follows:

> I suspect he is facing a permanent partial limitation in his functional capabilities as a consequence of a musculo-skeletal disorder. I would consider that reasonably set at ten percent.

The appellee's testimony was of very severe back pain and consequent employment and other personal problems. His testimony was supported by that of his estranged wife and a fellow employee at one of the jobs he has held since the accident. We regard the evidence in this case as sufficiently substantial to support the commission's finding of permanent, partial disability of fifteen per cent to the body as a whole. We also find there is substantial evidence the healing period ended September 16, 1976, rather than June 14, 1976, as Dr. Burge's report specifically said further treatment would be required, and the later examination by Dr. Frothingham found the claimant needed no further treatment.

We are somewhat persuaded by the appellant's argument that in view of the nature of Dr. Frothingham's conclusions the use of the date of his examination as the point of termination of the healing period is a little questionable. But for the testimony of the claimant's wife and fellow employee, we would also be hard pressed to agree there was substantial evidence of permanent disability in excess of the ten per cent assessed by Dr. Flanigan. However, doubtful workers' compensation cases are resolved in favor of the claimant. *Cummings* v. *United Motor Exchange,* 236 Ark. 735, 368 S.W. 2d 82 (1963), is a case which applied that well known "liberal interpretation" concept to the determination of the duration of a healing period. In addition, we will view the evidence in the light most favorable to the commission's findings. *Purdy* v. *Livingston,* 262 Ark. 54, 559 S.W. 2d 54 (1977); *Barksdale Lumber Co.* v. *McAnally,* 262 Ark. 379, 557 S.W. 2d 868 (1977).

Affirmed.

HAYS, J., dissents.

Leroy PHILMON *v.* STATE of Arkansas

CA CR 79-80 593 S.W. 2d 504

Opinion delivered January 23, 1980
Released for publication February 13, 1980

Napper, Wood, Hardin & Grace, P.A., by: *Henry A. Allen,* for appellant.

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

DAVID NEWBERN, Judge. The appellant was convicted of possession of heroin and sentenced to ten years confinement and a fine of $10,000. He has raised five points for reversal

which we will consider seriatim. We will set out the basic facts at first and then add facts as may be necessary with respect to the discussion of each of the appellant's points. Our ultimate conclusion is the conviction must be affirmed, but the sentence reduced to the minimum which could have been given because of errors which might have affected the jury's decision on the sentence but which did not go to the question of guilt or innocence.

The appellant and a companion were driving into Garland County when their vehicle was stopped by officers who had a warrant, issued by the North Little Rock Municipal Court, for the appellant's arrest. After the appellant got out of the car, he was asked to acknowledge he understood the rights which had been read to him. When he did not speak, it became apparent he had something in his mouth which he was chewing. He and the police officers scuffled briefly, and ultimately he was talked into spitting out several plastic bags which were then field tested and found to contain heroin.

On the side of the car where the appellant's companion was riding, a loaded .45 caliber pistol was found.

After the appellant had been arrested, he was taken to a hospital where a physician gave him a lavage which caused the appellant to disgorge the contents of his stomach which were placed in a container and later determined to contain heroin. There is no evidence that appellant consented to this procedure, but the record makes it clear no corporal force was used, and the doctor testified he considered the procedure necessary to protect the appellant from injury or possible death due to heroin overdose, given the circumstances.

1. The Arrest Warrant

The prosecutor asked his first witness, Detective Mack, how he "became involved" in the matter. Detective Mack said the day before the arrest he obtained a copy of an arrest warrant for the appellant from the police department at North Little Rock. At that point, Mr. Coffelt, the appellant's trial defense counsel, made this statement:

> Now, I object to that, if the court please, and ask for a mistrial. They charged him with another case not involved here and I object to it, and it's clearly grounds for a mistrial.

The appellant argues the mention of the warrant was inadmissible because of the general provisions of Ark. Stat. Ann. § 28-1001, Rule 404(b) (Repl. 1979), which says evidence of other crimes is not admissible except under certain circumstances. That argument assumes the jury would somehow have known the warrant was for a different offense because it was picked up in North Little Rock (Pulaski County) and the accused was being tried in Garland County. At that point, no mention had been made of the court or authority issuing the warrant.

Yet, the appellant has not shown how the fact that a warrant was obtained in one county means necessarily it was not issued in the county where the accused is being tried. In short, although we agree with the appellant's counsel's statement on oral argument before us that jurors are usually astute in these matters, we are not convinced even the most knowing juror would or could have concluded the warrant was for a different offense until the appellant's trial counsel told them.

We hold that, to whatever extent the knowledge that the appellant had been accused of a different offense from the one for which he was being tried may have prejudiced the appellant, it was invited or created by him and should not be a basis for relief on appeal. *Stovall* v. *State,* 233 Ark. 597, 346 S.W. 2d 212 (1961).

2. Refusal of Proffer

After denying the mistrial motion the trial judge admonished the jury not to consider the warrant as evidence of guilt or innocence. Later, in his cross examination of Detective Mack, trial defense counsel returned to the subject of the warrant and asked if it was one the Circuit Court of Pulaski County had held void. The prosecutor objected, and colloquy among the prosecutor, the defense counsel and the court ensued, terminating as follows:

THE COURT: What are you going to ask?
MR. COFFELT: I'm going to ask if he has personal knowledge of the fact that the warrant he's talking about on direct examination was held to be void by the Pulaski Circuit Court. You see, here's what happened, Judge—
THE COURT: Overruled.
MR. COFFELT: If he has personal knowledge, it wouldn't be —
THE COURT: You're overruled and that's the end of it.

The appellant argues the defense counsel was attempting to proffer evidence that the appellant was acquitted of the charge which was the basis of the arrest warrant. We cannot know what the defense counsel wanted to tell the court, but that is not the point.

If the state had introduced the evidence of a different offense having been charged against the accused, the accused would have been entitled to show he was acquitted of that charge. There is authority to the contrary in older cases. Annot., 86 A.L.R. 2d 1133, § 4 pp. 1144-1146 (1962). However, most recent cases would clearly require he be permitted to produce the evidence of acquittal. *State* v. *Smith,* 271 Or. 294, 532 P. 2d 9 (1975); *Womble* v. *State,* 8 Md. App. 119, 258 A. 2d 786 (1969); *People* v. *Griffin,* 66 Cal. 2d 459, 58 Cal Rptr. 107, 426 P. 2d 507 (1967); *State* v. *Calloway,* 268 N.C. 359, 150 S.E. 2d 517 (1966).

The court should have permitted the proffer so that we could have had a complete record on appeal. We cannot say the appellant's defense counsel did not honestly believe the state had demonstrated to the jury a charge on a different offense. We had to study the record well before coming to the conclusion that the error, if any, was invited or produced by the defense counsel. It certainly was questionable at the time of the trial, and the judge should have permitted the proffer. We would so hold even had it been clear at the trial that the defendant had been the first to signal the jury with respect to the different offense to which the warrant related. It was the prosecution's witness who first mentioned the warrant and stimulated the discussion, thus it seems certain

the appellant was not trying independently to get his previous acquittal before the jury.

3. The Pistol

The appellant contends the testimony about the weapon was inadmissible because it was not relevant to the offense of possession of heroin and was prejudicial. The appellee argues that the court should not consider this matter as it is being raised for the first time on appeal, citing *Pace* v. *State,* 265 Ark. 712, 580 S.W. 2d 689 (1979).

Trial defense counsel objected at the trial to the testimony of the officer who found the weapon in the car. The objection was first phrased in terms of lack of foundation to permit a search for a weapon. Later objection was phrased in general terms. *Pace* v. *State, supra,* holds that where the specific objection to the evidence is raised for the first time on appeal, it will not be considered, citing Ark. Stat. Ann. § 28-1001, Rule 103 (a) (1) (Repl. 1979). That rule says specific, timely objection must be made "if the specific ground was not apparent from the context; . . ."

It should have been apparent to the court that the pistol was not relevant and should not have been discussed before the jury. Although the objection was at first made on a different ground, we regard the later general objection as sufficient, "in the context" of this trial.

The appellee cites several cases holding a weapon may be introduced where "narcotics transactions" are involved, because it may be relevant to show intent. *E. G., Freeman et al* v. *State,* 258 Ark. 496, 527 S.W. 2d 623 (1975). All of the cases cited, however, dealt with offenses where intent was a factor, unlike this case where possession is the only charge.

The objection should have been sustained.

4. The Stomach Contents

The appellant argues the prosecution should not have been allowed to introduce the container with the fluid obtained from his stomach. An objection was made at the trial on the ground it was obtained by an illegal search. The trial

judge held the objection was not timely as no motion to suppress had been made in accordance with Ark. R. Crim. P. 16.2.

The appellant appears to recognize the correctness of this ruling, but asks to consider the matter "in spite of Rule 16.2" because he feels he was denied the effective assistance of counsel at the trial.

Ark. R. Crim. P. 37 provides a means of raising the question of competency of counsel in the trial court. We will not entertain an initial consideration of it on appeal. *Houston* v. *State,* 266 Ark. 257, 582 S.W. 2d 958 (1979); *Halfacre* v. *State,* 265 Ark. 378, 578 S.W. 2d 237 (1979); *Hilliard* v. *State,* 259 Ark. 81, 531 S.W. 2d 463 (1976).

5. Discovery

The appellant argues the trial judge refused his proffer of evidence that the prosecution had not compiled with Ark. R. Crim. P. 17 in permitting him access to the prosecution file. The objection at the trial came in the form of a statement by the defense counsel that he did not recall the statement of a particular witness as having been in the file.

The objection was overruled, apparently with some brusqueness by the judge. The defense counsel then said, "I understand but I still have to make my record, Judge," to which the judge replied, "and, your motion [to suppress] is overruled. Can't you understand that?"

Although the appellant couches the point in terms of refusal of a proffer, a reading of the record leaves no doubt that no proffer was intended and in referring to "making a record," the defense counsel was merely explaining his objection or giving a reason for having made it. We find no error.

Conclusion

We thus find two errors: first the refusal to allow the proffer of evidence of acquittal on the charge to which the warrant pertained; and second, admission of testimony with respect to discovery of the weapon. Given the overwhelm-

ing evidence, which was undisputed, that the appellant was in possession of heroin when he was arrested, we find these errors harmless to the extent that they could not have influenced the jury on the question whether the appellant was in fact in possession of heroin. If error is harmless and the evidence of guilt is overwhelming, reversal is not warranted. *Pace* v. *State,* 265 Ark. 712, 580 S.W. 2d 689 (1979); *Harrington* v. *California,* 395 U.S. 250, 89 S. Ct. 1726 (1969).

However, these errors (particularly the testimony on the pistol) could have improperly influenced the jury in its setting of the sentence. Because of this possible prejudice in the imposition of sentence, we affirm the conviction but reduce the sentence to the minimum the jury could have given for the offense of which the appellant was convicted. *Rogers* v. *State,* 260 Ark. 232, 538 S.W. 2d 300 (1976); *Osborne* v. *State,* 237 Ark. 170, 371 S.W. 2d 518 (1963); *Simmons* v. *State,* 227 Ark. 1109, 305 S.W. 2d 119 (1957). The sentence is thus reduced to two years confinement. See, Ark. Stat. Ann. § 82-2617 (Supp. 1979), and Ark. Stat. Ann. §§ 41-901 and 1101 (Repl. 1977).

Affirmed as modified.

PENIX, J., dissents.

MARIAN F. PENIX, Judge, dissenting. I disagree with the majority. It is not within our authority to reduce the sentence.

In *Osborne* v. *State,* 237 Ark. 5, 371 S.W. 2d 518 (1963) the Supreme Court holds:

> If testimony supports conviction for offense in question and if the sentence is within the limits set by the legislature, we are not at liberty to reduce even though we may think it to be unduly harsh.

In a supplemental opinion on Rehearing the Court holds:

> When the erroneous ruling has nothing to do with the issue of guilt or innocence and relates only to punishment, it may be corrected by reducing the sentence to minimum provided by law.

In 1971 the legislature enacted Ark. Stat. Ann. § 43-2725.2 which empowered the Court to reduce a sentence if the court deemed it excessive. This act was held to be unconstitutional in 1974 in *Hooper* v. *State,* 257 Ark. 103, 514 S.W. 2d 394 (1974) where it was determined:

> The right to exercise clemency is, however, vested not in the courts but in the chief executive . . . If the testimony supports the conviction for the offense in question and if the sentence is within the limits set by the legislature, we are not at liberty to reduce it even though we may think it to be unduly harsh.

Then in *Collins* v. *State,* 261 Ark. 195, 548 S.W. 2d 106 (1977), cert. denied 434 U.S. 878, Justice Hickman dissents:

> If this language were not enough, it was made perfectly clear in the Hooper case that this court would not reduce a sentence because it was excessive, or was based on passion and prejudice . . . I believe the decisions of this court in the Osborne and Hooper cases were wrong and should be overruled. It is not a matter of clemency to correct an injustice; it is simply the law at work.

The *Collins* case prohibits our reducing Philmon's sentence.

Again in *Stout* v. *State,* 263 Ark. 355, 565 S.W. 2d 23 (1978) Justice Hickman concurs with the majority in refusing to reduce the sentence, but states:

> The majority uses our decision in *Collins* v. *State,* (supra) as authority that we retain the power to reduce an excessive sentence caused by passion or prejudice. It may be that we retain the power but I know of no instance where we have exercised it. We have reduced sentences only because of some legal error.

The legal errors referred to in these cases pertain to the sentence itself i.e. where the sentence imposed is greater than the provision under which the criminal charge is brought, or where a legal error has resulted in a misinterpretation of a statutory punishment.

In the case of *Rogers* v. *State,* 260 Ark. 233, 538 S.W.

2d 300 (1976) the error was the admission of a prior conviction which made the defendant a habitual offender. One of his previous convictions was as a juvenile and therefore could not be considered. This legal error led to an excessive sentence which was subsequently reduced.

In the instant case we have no evidence the jury verdict and sentence resulted from prejudice and passion. Nor was there an erroneous instruction as to the potential sentence or an erroneous sentence imposed. The sentence was within statutory limits.

I agree with my colleagues there was error committed in the trial court. I do not find these to be harmless. We can only conjecture as to what affected the jury's deliberation and consideration. There is no way appellate court judges, limited to the record, can determine those factors which influenced the jury's determination of guilt and those which determined the punishment. To insure this defendant genuine due process, this court should reverse and remand for a new trial.

Therefore, I respectfully dissent.

John ALEXANDER *v.* WALNUT FORK DESIGN et al

CA 79-69 593 S.W. 2d 493

January 23, 1980
Released for publication February 13, 1980

Forrest E. Dunaway, for appellant.

Herrn Northcutt, for appellees.

PER CURIAM

This is an appeal from a decision by the Board of Review of the Department of Employment Security. Claimant is the president of the corporate employer, Walnut Fork Design, Builders and Woodworking Company, Inc., but

also serves in the company as an hourly wage earner. As president, claimant is one of four stockholders in the company, each holding a 25% interest.

On April 10, 1979, the corporation ran out of work, and the four owners, including the claimant, decided to lay claimant off until June 5, 1979, when two other jobs were to begin.

Claimant contends that his being laid off from his work as an hourly wage earner in the company entitles him to unemployment compensation benefits within the meaning of Section 4 (c) of the Arkansas Employment Security Act. The Agency had determined that claimant was ineligible for benefits under the provisions of Section 5(a) of the Arkansas Employment Security Law, but the Appeals Referee modified the Agency determination by finding that claimant was not unemployed within the meaning of Section 4(c). The Board of Review upheld the decision of the Appeals Referee, stating that the claimant's interest and commitment to the Corporation "precludes his entering the local labor market in search of other employment . . ." Claimant now brings this appeal alleging that there is no substantial evidence to support the Board of Review's decision.

On the contrary, we find substantial evidence to support the decision of the Board of Review and, accordingly, must affirm its holding on appeal. *Terry Dairy Products Company, Inc.* v. *Cash, Commissioner of Labor,* 224 Ark. 576, 275 S.W. 2d 12 (1955). Under Section 4(c), in order to qualify for benefits, the claimant must be available for work and willing to accept it. He must be doing those things which a "reasonable prudent individual" would be expected to do to secure work. Claimant, at one point in the proceedings, stated:

> We have two jobs lined up, but can't start either of them now. I will not be seeking work on my own right now because of the jobs we have lined up. (T. p. 12)

It is clear from claimant's statement that he was not available for other employment and not doing those things

one would normally do in order to find employment; which are required under Section 4(c) in order to be eligible for benefits. From the facts before us, we must affirm the decision of the Board of Review.

VAC-PAC, INC. and MARYLAND CASUALTY COMPANY *v.* Vernon P. SIMPSON and SOUTHERN FARMER'S ASSOCIATION et al

CA 79-42 595 S.W. 2d 690

Opinion delivered January 30, 1980
Petition for Review denied March 3, 1980
Released for publication March 17, 1980

Mays & Murray, by: *Walter A. Murray,* for appellants.

Barron, Coleman & Barket, by: *Gary P. Barket* and *Laser, Sharp, Haley, Young & Huckabay, P.A.,* for appellees.

ERNIE E. WRIGHT, Chief Judge. Vac-Pac, Inc., and its insurer bring this appeal from an order of the Workers' Compensation Commission awarding appellee Vernon P. Simpson 30% permanent partial disability to the body as a whole and necessary and reasonable medical expenses. The award allocated responsibility for 20% of the permanent disability incident to claimant's two back injuries occurring in 1975 and 1976, together with reasonable medical expenses, against Southern Farmer's Association, and responsibility for 10% of the permanent partial disability was awarded against the appellant Vac-Pac, claimant's subsequent employer, along with reasonable and necessary medical expenses incurred as a result of what the Commission found was an aggravation of a prior injury suffered on June 20, 1977 in the course of claimant's employment by Vac-Pac. The Administrative Law Judge found no additional permanent partial disability incident to the June 20, 1977 injury at Vac-Pac.

The decision from which the appeal stems also remanded the case to the Administrative Law Judge for further determination of appellee's claim filed in February 1979, in which he alleges that subsequent to the award of the Administrative Law Judge on September 29, 1978, he became further unable to work, has incurred further medical expenses and claims the following additional benefits:

> Temporary total disability, permanent partial disability, medical expenses, replacement of back brace, and attorney fees.

Southern Farmers Association, one of the appellees, announced at the hearing before the Administrative Law Judge it accepted liability for 20% permanent disability to the body as a whole and medical expenses incident to the 1975 and 1976 back injuries sustained by claimant in the course of employment by Southern Farmer's and for which he had surgery, and was fitted with a back brace. Claimant testified at the hearing on June 2, 1978, that on June 20, 1977 while working for Vac-Pac he felt a sharp pain in his back when he "reached to move" a steel mold a quarter of an inch. At the time of the alleged third injury, he was still under the care of

Dr. Adametz for his 1975 and 1976 injuries and was being seen by the doctor every four to six weeks. Claimant continued working after the June 20, 1977 incident. The doctor was unable to find any clinical evidence of injury resulting from the June 20, 1977 incident. He was laid off soon after the incident and next went to work for Freshour, a contractor. He further testified that around Labor Day 1977 he sat down in a recliner at home and when he got up he went down to the floor with pain in his back and legs. He was hospitalized in December 1977 and was placed in a body cast for a few days. He testified he had experienced pain in his lower back and legs continually since November, 1975 after his first injury and the pain was greater after the second injury. He has taken muscle relaxers ever since the second injury, and stated his condition was essentially the same at the time of the hearing as it was prior to the incident at Vac-Pac.

Vac-Pac contends the incident on June 20, 1977, while claimant was in its employ, was a recurrence of the prior injuries claimant sustained and that there were other intervening causes associated with his present complaints.

Claimant had been working fifty to seventy hours per week for Freshour some ten weeks at the time of the hearing before the Law Judge on June 2, 1978.

Appellant Vac-Pac and its insurer assert the following points for reversal:

I.

The facts found by the Commission do not support the order or award.

II.

There is not sufficient, competent evidence in the record to warrant the making of the order or award.

III.

The Commission acted without or in excess of its powers.

We find the following facts in the record require a reversal of the Commission's decision and that these issues are adequately raised by the points asserted for reversal.

There is no medical evidence in the record indicating claimant has more than 20% permanent partial disability to the body as a whole, the report by the clinical psychologist dated August 31, 1977 gives the history of claimant's 1975 and 1976 injuries, but makes no mention of any injury of claimant while in the employ of Vac-Pac, and the claimant admitted at the hearing his condition was essentially the same as it was prior to the incident he described as occurring at Vac-Pac on June 20, 1977. The appellee's supplemental claim filed in February, 1979, after the decision of the Law Judge, alleges he became further unable to work and seeks an increased award. Without a further evidentiary hearing, the Commission on April 10, 1979, through its executive director, wrote respective counsel the "Commission preferred to consider the new petition before or simultaneous with its decision on appeal and the new petition would be treated as a petition to remand." Thereafter on June 1, 1979, the Commission issued its opinion making the award above indicated and also remanding the claim for a consideration of the merits of the new request for benefits.

In view of the pendency of the supplemental claim seeking broad increased benefits and the decision of the Commission to remand the case for consideration of the supplemental claim on the merits, and the lack of objective medical findings of additional disability of claimant arising out of the June 20, 1977 incident or injury sustained while claimant was in the employ of Vac-Pac, we hold it was error in the state of the record for the Commission to make a final determination and award of permanent partial disability to the body as a whole in excess of the 20% accepted by Southern Farmer's and to award attorney fees on the additional award. In view of the remand for further hearing, which we think was proper, the determination of whether the incident resulted in additional disability of the claimant, and if so, the extent thereof, which medical expenses incurred on or after June 20, 1977 were treatment for his new injury and which were a result of his two prior injuries, and all other relevant factors

should be determined after further evidence is taken on remand.

We reverse the decision and award of the Commission with instructions the entire case be remanded to the Law Judge for a determination of all issues after the completion of further evidence.

PENIX, J., dissents.

MARIAN F. PENIX, Judge, dissenting. The majority opinion is contrary to the concept and spirit of the Arkansas Workers' Compensation Act and its interpretation by the courts from its beginnings in 1940 to the present.

The legislature intended speedy relief for deserving workers with job-related injuries and has directed this court give appeals from Workers' Compensation cases precedence over all other civil cases. Ark. Stat. Ann. § 81-1325(b).

Here, the claimant Vernon P. Simpson, has been plagued with job-related back injuries dating back to 1975 when he was employed by appellee Southern Farmers' Association. After treatment he returned to work for Southern but was reinjured and did not again work for Southern. He was unable to work again until released by his neurosurgeon, Dr. John Adametz, who examined claimant on April 8, 1977 and fixed his permanent residual disability at 20% to the body as a whole and instructed the claimant to continue to use his back brace indefinitely. The claimant did not return to his employment with Southern Farmers, but went to work for appellant Vac-Pac in June 1977. A short time later, while working for Vac-Pac, his back again disabled him June 20, 1977, and there is substantial evidence for the finding of the Workers' Compensation Commission that this was a reinjury chargeable to Vac-Pac and not a recurrence chargeable to Southern Farmer's.

Approximately four years after claimant's first injury at Southern Farmer's, an opinion of the Workers' Compensation Commission on June 1, 1979 ordered Southern Farmer's to pay claimant medical expense for the early back injuries while claimant worked for Southern Farmer's plus 20% permanent partial disability to the body as a whole. Vac-Pac

was ordered to pay an additional 10% for the latest injuries incurred while claimant worked for Vac-Pac.

During the pendency of appeal the claimant's attorney had filed a petition for a change of physicians (to which claimant could be entitled *only* if his healing period had not ended. Rule 21 of the Workers' Compensation Commission), and for continuation of temporary total disability. There was no new evidence of continued temporary total disability. A letter from Dr. Wilbur Giles, an associate of Dr. Adametz, discharged claimant as of September 7, 1977, although there were subsequent reports of continued back problems.

Although there was no new evidence, the Commission, in its opinion, remanded the claim for continued temporary total disability and a change of physicians to the administrative judge for consideration.

Vac-Pac and Maryland Casualty ingeniously have argued that the remand nullifies the Commission's opinion of June 1, 1979 because Ark. Stat. Ann. § 81-1323(b) requires that the Commission had to receive and consider the administrative judge's findings regarding the change of physicians and additional temporary total disability *before* any decision or award "in such case".

"In such case" obviously refers to the change of physicians and additional temporary total disability. It does not direct further delay of *any* award on the pending claim.

The majority opinion needlessly now will require the Commission to re-write its opinion of June 1, 1979, inserting therein what it deems relevant from the administrative judge's new findings.

Workers' Compensation claims remain ongoing until barred by limitations. Ark. Stat. Ann. § 81-1326 permits modification of awards because of a change in the physical condition of a claimant.

The Supreme Court reversed us only two weeks ago for trying to impose strict rules of law upon the Workers' Compensation Commission.

> First, the compensation law provides that the Commission is not bound by technical rules of evidence or *procedure,* but may "conduct the hearing in a manner as will best ascertain the rights of the parties." *St. Paul Ins. Co. and American Burger Systems, Inc.* v. *Deborah Touzin,* 267 Ark. 539, 592 S.W. 2d 447 (1980).

To me, the majority opinion is violative of the *Touzin* mandate. I would affirm the decision of the Workers' Compensation Commission.

Carl Don SMITH *v.* STATE of Arkansas

CA CR 79-105 594 S.W. 2d 255

Opinion delivered January 30, 1980
Released for publication February 20, 1980

Wayne Mooney, for appellant.

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

M. STEELE HAYS, Judge. Carl Don Smith was tried and convicted of possession of merchandise stolen from the grocery store of Gerald Mason. The jury imposed a sentence of two years imprisonment.

For reversal, appellant urges that his motion to suppress certain evidence should have been upheld as having been seized by a private citizen acting as an agent of the police and conducting a search without a warrant.

Testimony at the hearing on the motion established that Gerald Mason discovered that his grocery store had been broken into when he arrived to open for business. White plastic trash bags were strewn around, and Mr. Mason found that shotgun shells, rifle cartridges, cigarette cartons, meats and other merchandise were missing. The sheriff's office investigated and the deputy gave the names of several possible suspects to Mason, including Carl Don Smith and Vernon Hightower. Mason was instructed to call the sheriff's office if he discovered any leads or heard anything. Mason and a cousin undertook their own investigation later that day and watched Smith's trailer from a distant point. As they watched, Smith and Hightower came out of the trailer carrying plastic trash bags and placed them in the back of an automobile parked in appellant's driveway. Mason and his companion confronted appellant and through an open door of the automobile could see some of the contents of the bags, which Mason recognized as his own goods. Mason held Smith at gun point and took him to the grocery store in the automobile, at which point Smith and the goods were delivered over to the sheriff.

On this proof, Smith contends that the search was instigated at the suggestion of the deputy sheriff and, therefore, the seizure of the articles was in violation of Fourth Amendment guarantees.

It is recognized that the search-and-seizure clauses of the federal and state constitutions are restraints upon the

government and its agents and not upon private individuals. *Walker* v. *State,* 224 Ark. 1150 (1968); *United States* v. *Harvey,* 540 F. 2d 1345 (1976). The rule, however, differs where such searches and seizures are instigated or encouraged by the police and in such instances the restraints do apply, "as the construction to be attached to the Fourth Amendment does not permit of evasion by circuitous means. The protection thus afforded may be violated just as effectively through the intervening agency of one not a policeman." *People* v. *Evans,* 49 Cal. Rep. 501 (1966). The legal principals need not be considered except in passing, as appellee agrees with the asserted law, considered at some length in 36 A.L.R. 3d 350, but argues that the facts do not bring the principal into play in the case before us and we agree. The deputy did not accompany Mason in the surveillance of Smith's trailer; he did not participate in the activities at the trailer and so far as the record reflects, he was not even aware that Mason was planning any action of this type. The sum and substance of the deputy's role in the events was to instruct Mason to get back in touch with him if he had any leads or heard anything. We are unwilling to go to the extent of inferring from this slender evidence that the deputy instigated the search and seizure, or even suggested it. It is clear to us that the activity challenged by the motion to suppress was the product of an independent foray by Mr. Mason as a private citizen, rather than as an instrument of the sheriff's office. We find no case, nor has appellant provided one, in which the rule of law stated above has been applied to facts similar to those of this case. Indeed, it would strain logic to the breaking point to hold that a police officer could instruct the victim of a theft to get back in touch with him if he had any leads or heard anything and by so doing invoke an agency by which the police were bound, in whatever fashion the private citizen subsequently chose to act.

Finally, while our decision on the first point obviates the need to consider the second, we do observe that had the facts and the law met in this case, that is, assuming that Mason was an agent for the sheriff. Nevertheless, his conduct in the matter does not constitute an unlawful search and seizure. Mason and his companion observed Smith and Hightower carrying the trash bags from the trailer to the automobile,

and, upon going on to the yard or driveway, they saw the stolen goods through an open door of the vehicle. We could not justifiably hold on this evidence that the Fourth Amendment had been violated.

Affirmed.

Ides William HARRIS, Individually and as Administrator of the Estate of Carrie HARRIS *v.* Gail W. DAMRON

CA 79-186 594 S.W. 2d 256

Opinion delivered January 30, 1980
Released for publication February 20, 1980

Owens & Fikes, for appellant.

Bridges, Young, Matthews, Holmes & Drake, for appellee.

JAMES H. PILKINTON, Judge. The decedent, Carrie Harris, was struck and killed by an automobile being driven by Mrs. Gail Damron. The accident happened at approxi-

mately 8:45 a.m. on March 23, 1977, as Mrs. Harris was attempting to cross U.S. Highway 270 in front of her house.

The allegations of negligence were that Mrs. Damron was speeding in that she was traveling in excess of 55 miles per hour in a 45 mile per hour speed zone; and, that she failed to exercise reasonable care under the circumstances. Recovery was sought for funeral expenses of the decedent, and for mental anguish on behalf of the surviving adult children of the deceased.

The defendant filed an answer admitting that Carrie Harris was struck by an automobile driven by her on the highway in question, but Mrs. Damron denied all other material allegations of the complaint. In addition, Mrs. Damron claimed that the death of Carrie Harris was solely and proximately caused by the negligence of Carrie Harris.

The issues were tried before a jury. A verdict was returned for the plaintiff and the jury awarded damages of $850.00 to the estate of Carrie Harris, but no damages were awarded to her adult children for mental anguish. The plaintiff below appealed to the Arkansas Supreme Court and the case has been assigned to the Arkansas Court of Appeals under Rule 29(3).

I.

Appellant first contends that the trial court erred in refusing to admit plaintiff's offered exhibits No. 7, 8, 9, 10 and 11.

The evidence shows that Mrs. Harris was 80 years old, but in good health for a person that age. She lived on the south side of Highway 270. At the time of the occurrence, Mrs. Harris was leaving her house and going across the highway to a relative's house. The Harris home was the first house east of the Highway 270 and Highway 104 junction and is surrounded by trees. The state trooper who investigated the accident testified that if a person was not looking for a house, or did not glance in that direction, you might miss the Harris house and not know it was there.

No one knows whether Mrs. Harris was attempting to walk or run across the highway. The accident occurred before the Highway 65 four lane was opened in Jefferson County, and there was a lot of extra Highway 65 traffic on Highway 270 at the time. The area of impact was established by debris which was approximately 500 feet east of the Highway 104 junction. Mrs. Damron testified she was going between 55 and 60 miles per hour when she went through the 104 junction. She did not see Mrs. Harris, and the Damron car struck Mrs. Harris killing her instantly.

The body of Carrie Harris was found in the northbound shoulder of Highway 270 approximately 94 feet and 4 inches from the area of impact. A severed limb from her body was found 166 feet and 1 inch from the area of impact.

The court admitted plaintiff's Exhibits 1 through 6, inclusive. Plaintiff's Exhibit 1 was a diagram of the accident scene. Plaintiff's Exhibit 2 depicts the front view of Mrs. Damron's vehicle, after the impact, as parked on the eastbound shoulder of the highway. Plaintiff's Exhibit 3 is a photograph showing the eastbound view of the highway indicating where the body of Mrs. Harris came to rest. This photograph also shows some debris. Plaintiff's Exhibit 4 shows a close up front view of the Damron vehicle and indicates the damage done to the vehicle because of the impact. Plaintiff's Exhibit 5 is a westbound view showing the position of Mrs. Harris' body on the north shoulder of the highway. Exhibit No. 5 also shows the terrain along Highway 270 in the area of the accident. Plaintiff's Exhibit 6 is a statement of the funeral bill totaling $1699.45.

In addition, appellant had offered Plaintiff's Exhibits 7, 8, 9, 10 and 11. The trial court refused to permit the introduction of these photographs on the basis that the prejudicial effects of them would outweigh any evidentiary value that these photographs might have. Appellant has not reproduced and made a part of his abstract the photographs which were offered as Exhibits 7 through 11, which the court refused to admit. This court would be justified in refusing to consider appellant's argument under Point I because of the failure to comply with Rule 9(d) of the Supreme Court and

Court of Appeals of the State of Arkansas. Obviously the court is handicapped in passing on the admissibility of photographs it can see only by searching them out in the transcript. Be that as it may, from the transcript it appears that the trial court was correct in excluding the photographs in question. None of the offered photographs which the court refused to admit tended to prove anything in dispute. Appellant's Exhibit 7 shows the severed limb of the decedent covered by some articles of clothing. Exhibits 8, 9, 10, and 11 are somewhat gruesome pictures taken by the Coroner, showing a severed limb and decedent's body in the morgue. The investigating officer testified fully and at length about the accident scene. Appellee admitted that her car struck and killed Mrs. Harris. The evidence established without dispute that one of the decedent's limbs was severed in the accident. In view of the other evidence introduced, including the exhibits which were admitted, the court was correct in excluding these photographs on the basis that the prejudicial effects of them would outweigh any evidentiary value that the excluded photographs might have. Ark. Stat. Ann. § 28-1001, Rule 403 (Repl. 1979).

The admissibility of such photographs addresses itself to the sound discretion of the trial court. We do not disturb the ruling of the trial court unless there is an abuse of discretion. *Wheeler, Adm'x* v. *Delco Ben,* 237 Ark. 55, 371 S.W. 2d 130 (1963); *McGeorge Contracting Company* v. *Mizell,* 216 Ark. 509, 226 S.W. 2d 566 (1950).

II.

Appellant next argues that the judgment on the jury verdict is contrary to the law and evidence of the case. Appellant says there is no substantial evidence to support the verdict. We find no merit in this argument. The case was fully tried and the issues were submitted to the jury under instructions that are not questioned. The jury found for appellant and, by general verdict, placed a greater part of the negligence on Mrs. Damron. The verdict for the estate in the amount of $850.00 damages, instead of the full amount of the funeral bill, indicates that the jury also found Mrs. Harris

guilty of some negligence. No argument is made that the jury was in any way improperly instructed on the measure of damages, or on any other issue. Certainly there is substantial evidence to sustain this jury verdict, and no grounds exist to disturb it on appeal. *McWilliams* v. *R & T Transport, Inc.*, 245 Ark. 882, 435 S.W. 2d 98 (1968). See also *Love* v. *H. F. Construction,* 261 Ark. 831, 552 S.W. 2d 15 (1977).

III.

Appellant argues finally that the failure by the jury to award damages for mental anguish to the adult children was contrary to the evidence and the law in this case. The jury was properly instructed on the issue of mental anguish as specified in AMI 2215. Based on this record, the jury was entitled to find that none of the adults had suffered more than the usual and normal grief attendant upon the loss of a loved one. *Eisele, Adm'r* v. *Beaudoin,* 240 Ark. 227 at 231, 398 S.W. 2d 676 (1966). See *St. Louis S.W. Ry. Co.* v. *Pennington,* 261 Ark. 650 at pp. 670-683, 553 S.W. 2d 436 (1977), for a complete discussion of the issue of mental anguish in Arkansas.

Affirmed.

Dennis Earl CAGLE *v.* STATE of Arkansas

CA CR 79-109 594 S.W. 2d 573

Opinion delivered January 30, 1980
Petition for Review denied March 3, 1980
Petition for Rehearing denied March 5, 1980
Released for publication March 5, 1980

Michael E. Surguine, for appellant.

Steve Clark, Atty. Gen., by: *Robert J. DeGostin,* Asst. Atty. Gen., for appellee.

JAMES H. PILKINTON, Judge. Appellant Dennis Earl Cagle and another person were charged by information with the offense of Criminal Attempt to Commit Burglary and Theft, on or about the 12th day of December, 1978, by cutting the screen and partially opening a window of a house belonging to Harry McAdams, Jr., in Newport, Arkansas. Appellant requested, and the court granted, a separate trial.

Cagle also filed a motion to suppress any statements taken from him while in custody. Pursuant to *Jackson* v. *Denno,* 378 U.S. 368 (1964), an in-chambers hearing was held on that motion before appellant's trial began. The court denied appellant's motion to suppress.

A trial by jury was held. In addition to other testimony, the State introduced into evidence a confession made by the defendant three days after his arrest. The jury returned a verdict finding Cagle guilty as charged. He was sentenced to six years imprisonment. He appeals contending that the trial court erred in admitting his confession into evidence.

On the afternoon of December 12, 1978, Roger Brand returned to his home, looked across the street at the McAdams house and noticed two people trying the windows and door of the house. Brand then saw the two running through the McAdams back yard, and then through a graveyard beyond. Moments later, Brand and McAdams confronted Cagle and Ronnie Gates in the graveyard. Police officers arrived and arrested the two suspects. The officers then returned to the McAdams house where they discovered the screens on one of the windows had been cut, the window was partially opened, and there were some puncture holes on the insulation surrounding the window. Appellant Cagle had a large "Buck" knife in his possession at the time of his arrest.

At the *Denno* hearing, the State had the burden of showing that appellant's confession was made after a voluntary, knowing and intelligent waiver of the right to remain silent. *Miranda* v. *Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The proof offered by the State at the hearing revealed that appellant was arrested on December 12, 1978. Immediately upon his arrest, Officer Jerry Long read to appellant his constitutional rights from a so-called Miranda Warning Card, which the officers kept for that purpose. When the officer and appellant arrived at the station house at approximately 5:20 p.m. on the same day, Officer Long advised appellant of his constitutional rights a second time. Appellant declined to make any statement at that particular time.

Appellant was placed in jail, and three days later Officer William Cardwell removed appellant from his cell and took him to the officer's office. Cardwell advised appellant of his rights, and then asked if he wished to make a statement. Appellant said that he did, and the statement was taped. After the tape was replayed for appellant, a transcript of the statement was typed. Officers Long and Cardwell were present when the statement was made. Chief Wilson was in an adjoining office.

The issue on appeal is whether the trial court properly found, based on the totality of the circumstances, that appellant's confession was voluntary and hence admissible into evidence. *Degler* v. *State,* 257 Ark. 388, 517 S.W. 2d 515 (1974).

In the case before us appellant's confession was given without counsel. Therefore, the proper test is whether appellant was effectively warned of his rights and knowingly and willingly decided to waive them. *United States* v. *Harden,* 480 F. 2d 649 (8th Cir. 1973). The trial court found that appellant did so waive his rights. He was under no disability. Appellant testified at trial that his rights were explained to him before the confession was given, and the transcript of the confession bears this out. There was no contention at trial, nor is it argued on appeal, that appellant was not advised of his rights or that he failed to understand these rights although appellant did not sign a written waiver form. However desirable it is to obtain a written waiver of rights, failure to do so does not invalidate a voluntary confession where there is no contention that the rights were not explained or understood.

Relying on his own testimony at trial, appellant contends that the Newport Police officials used psychological coercion to wring the confession from him. Whether such psychological coercion exists is determined by weighing all the circumstances surrounding the confession to resolve whether the circumstances of pressure overbears the power of resistance of the accused. *Matthews* v. *State,* 261 Ark. 532, 549 S.W. 2d 492 (1977).

The evidence presented revealed that appellant was 18 years old and had completed the eighth grade with passing marks. A review of appellant's testimony at the *Denno* hearing and at the trial gives no indication that appellant suffered from any mental disability, and none is claimed. The testimony shows that appellant is of average intelligence and has a good command of the English language. The record also reveals that appellant was no stranger to the criminal justice system, having been convicted of a prior felony offense. It is clear to us that appellant had the mental capacity and experience to understand, appreciate and intelligently waive his constitutional rights. But appellant contends his will was overborne by alleged attacks on his accomplice and threats to file a possession of marijuana charge against him, and by an alleged threat that the officers would see that he received a twenty year sentence on the present charge. Officers Caldwell and Wilson specifically denied that any such threats were made or that coercion was present. Mr. Ralph Black, who was appellant's probation officer, testified that no such threats occurred while he was present. The confession itself reveals that no threats or promises were made.

The testimony of appellant that the officers used coercion is not entitled to more weight than the testimony of the officers that they did not. *Smith* v. *State,* 256 Ark. 67, 505 S.W. 2d 504 (1974). See also *Decker* v. *State,* 255 Ark. 138, 499 S.W. 2d 612 (1973). In such cases the trial court determines the credibility of the witnesses. *Gardner* v. *State,* 263 Ark. 739, 569 S.W. 2d 74 (1978).

Custody alone is not sufficient to render invalid an otherwise voluntary confession. The record shows that on the third day of his incarceration, appellant was advised of his *Miranda* rights a third time, and was confronted with a .45 caliber pistol which had been stolen. At that time appellant voluntarily made the confession which was subsequently admitted into evidence at his trial. The trial court found that he was not acting under fear or coercion.

We have considered the nature of the questioning, the length of interrogation, the manner in which the warnings were given, and all testimony, factors, and circumstances

which would have any bearing on appellant's allegation of deception, coercion or inducement. In other words, we have carefully reviewed the total circumstances surrounding the confession of appellant and have concluded that the trial court's finding of voluntariness is not against the preponderance of the evidence. *Degler* v. *State, supra.*

Appellant also contends that all material witnesses to the confession were not present at the *Denno* hearing. The evidence presented at this hearing reveals there were four material witnesses to appellant's confession. These were Jerry Long, William Cardwell, Gary Wilson and Ralph Black. Except for the appellant, no other persons were present during the taking of the confession or immediately prior thereto. However, appellant says that another person was a material witness. He testified that two days before making his confession, an unidentified jailer "jumped on" Ronnie Gates, his accomplice. Appellant further testified that Officer Gary Wilson threatened appellant after the unidentified jailer's attack on Gates. As already noted, Wilson was presented and testified at the *Denno* hearing and denied that any threats were made.

In *Bushong* v. *State,* 267 Ark. 113, 589 S.W. 2d 559 (1979), the Arkansas Supreme Court said:

> [T]here must be some connection between the witness and the alleged acts of coercion or an opportunity to observe the alleged coercion.

There is insufficient evidence in this record to connect the alleged acts of the unidentified jailer to the confession which occurred two days later. We are persuaded that all material witnesses to appellant's confession were present at the *Denno* hearing as required by law. *Bushong* v. *State, supra.*

Finding no error, the judgment of the circuit court is affirmed.

HOWARD, NEWBERN and HAYS, JJ., dissent.

GEORGE HOWARD, JR., Judge, dissenting. I am unable to join the majority in affirming appellant's conviction because

I am persuaded that the trial court erred in finding appellant's purported confession free and voluntary. The State's evidence falls short of establishing the voluntariness of the statement by a preponderance of the evidence.

During the *Denno* hearing, appellant was requested to relate those things that happened, while he was in jail, that "made you feel like you had to make a statement, that you had to confess?"

In reply, appellant said:

A. A couple of days before I made them statements, Ronnie Wayne Gates got jumped on by the jailer, and Wilson said if I am going to have to let one of the guilty ones go to get you, Cagle, I will. He said myself, I think you was hired to come to my town and ransack it.[1]

Q. Was there anything that made you feel like that you had to confess, that you were in such a fix that you had better make a statement?

A. Yes, Sir. I found a bag of dope over there in the cell. Before I turned it in they found it, and they used that on me. They said if you confess, I will drop this dope charge, and they said if you don't I'll see that they give you twenty years.

On cross-examination, appellant testified:

Q. You said Ronnie Gates got jumped on?

A. Right.

Q. But nobody jumped on you?

A. No. He had threatened me.

Q. Well, Ronnie Gates had threatened you?

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[1]Ronnie Wayne Gates is an associate and co-defendant of appellant who was also in jail. Wilson is Chief of Police Gary Wilson of Newport.

A. No, the jailer had. He said you will be next if you don't settle down, and I wasn't doing nothing but laying on my bunk.

Q. Okay, but that didn't have anything to do with you giving a statement or confession, did it?

BY MR. SURGUINE:

Objection, Your Honor, I think it does, I think it is very relevant.

BY THE COURT:

Overruled. You may answer.

Q. That didn't have anything to do with you giving — they were just saying settle down, they weren't saying we are jumping on you to make you confess?

A. I didn't know that.

Q. Well, he never did say anything about a confession, did he?

A. Well, I am saying I didn't know that. I didn't know what he was jumping on me for.

Q. Well, he said to settle down, didn't he; isn't that your own words?

A. Yes, but I wasn't doing nothing.

Q. Okay, he said to settle down, you weren't doing nothing, he didn't ask you to make a statement, did he?

A. When did he ask me that, when I was laying on my bunk.

Appellant acknowledged, on cross-examination, that he had not informed the jailer about discovering the marijuana in his cell and explained:

"A. No, I was thinking about turning it in because they were pretty tee'd off at me for not confessing."

Ralph Black, parole officer and a rebuttal witness called by the State, testified about an incident that took place when he interviewed appellant, prior to the purported confession. Mr. Black had taken appellant from the jail cell and, during the interview, the Chief of Police confronted appellant with the marijuana allegedly found in appellant's cell. Mr. Black was asked by the State:

Q. Do you recall Chief Wilson coming in on that date during the interview with a can of marijuana or sack of marijuana?

A. I remember the Chief coming in and mentioning that he had some marijuana that had been found in Cagle's possession.

Q. And then what occurred?

A. I asked Cagle if this marijuana was his and he said that he had had it in his possession, he found the marijuana, and the Chief said they were going to run fingerprints on it and it would determine, and I asked Cagle about it and Cagle said he had had it in his possession. *I thought perhaps the material had been smuggled into the jail as contraband and I asked him where he had got it and he said he had found it there in the jail, and I asked him what he intended to do with it and he said well, he was going to use it for his later purposes at a later time.* (Emphasis added)

Appellant also testified:

Q. Dennis, when you were taken into custody and taken down to the police station, was there any point that first day when you asked them to give you a lawyer, that you wanted a lawyer?

A. After they had locked me up.

Q. That was the first day?

A. Right.

The undisputed evidence shows that appellant, a white youth, 18 years of age, (1) has completed eight years of schooling, (2) had been in jail for three days before he agreed to confess while rejecting all previous requests for a statement, (3) was not afforded an attorney although a request for an attorney was made on his first day of incarceration — this testimony was not refuted by the State when the State presented rebuttal testimony, (4) a can or sack or marijuana mysteriously appeared in appellant's jail cell and, according to appellant's testimony, was told, by a police officer, that if he confessed "I will drop this dope charge, and . . . if you don't I'll see that they give you twenty years.", (5) during the interrogation of appellant on December 15, 1978, which resulted in the purported confession, appellant was seated at a desk where a .45 caliber gun had been placed, (6) appellant was told by the Chief of Police "if I am going to have to let one of the guilty ones go to get you, Cagle, I will. . . . I think you were hired to come to my town and ransack it.", and (7) appellant's co-defendant, Ronnie Wayne Gates, was assaulted by a jailer and the same jailer threatened appellant, according to appellant, without cause or provocation — this testimony has not been refuted by the State. Moreover, the State did not call the jailer to testify in seeking to establish the voluntariness of the confession. The failure to call the jailer, as a witness, was fatal to the State's case. The jailer was a material witness; the unprovoked threats of physical violence, as related by appellant, stand uncontroverted. To argue that the jailer was not a material witness because he was not present when appellant gave the confession does not come to grips with the issue. For example, the State called Chief of Police Gary Wilson, as a witness, although he was not present when appellant gave the purported confession. In articulating the reason for calling the Chief of Police, the prosecuting attorney said: "I have called you in order to comply with the law that we should have everybody here that had anything to do with these statements. . . ."

The Chief of Police was in an adjacent room while appellant was making the confession, but had talked to appellant prior to December 15th, just as the jailer had done on

the occasion the purported threat was made to appellant. It is plain that the trial judge regarded appellant's testimony, relating to the assault of Ronnie Wayne Gates by the jailer, and the threats the jailer made to appellant as material and relevant to the *Denno* hearing for the trial court directed appellant, over objections, to answer the following question, on cross-examination, regarding the threats purportedly made by the jailer: "Q. Okay, but that didn't have anything to do with you giving a statement or confession did it?" The failure to call the jailer alone dictates a reversal in this case.

An in-custody confession is presumed to be involuntary and the burden is on the State to show that the statement was voluntarily made. Furthermore, the State has the burden to produce all material witnesses who were connected with the controverted confession or give adequate information for their absence. *Smith* v. *State,* 254 Ark. 538, 494 S.W. 2d 489 (1973).

The circumstances in this case, prior to and during the purported confession, are classic examples of those techniques that psychological coercion is grounded upon in order to destroy the will power through fear. Torture of the mental processes can be just as devastating as force upon the body.

In *Payne* v. *State of Arkansas,* 356 U.S. 560 (1958), the United States Supreme Court in reversing the appellant's conviction which was based upon a confession made the following observation:

> The use in a state criminal trial of a defendant's confession obtained by coercion — whether physical or mental — is forbidden by the Fourteenth Amendment.

I have been authorized to state that HAYS and NEWBERN, JJ., join in this dissent.

Yvonne WILLIAMS *v.* EMPLOYMENT SECURITY DIVISION, Arkansas Department of Labor, Henry L. McHENRY, Administrator and GENERAL TELEPHONE COMPANY OF THE SOUTHWEST

CA 79-24 594 S.W. 2d 52

Opinion delivered January 30, 1980
Released for publication February 20, 1980

Jones & Tiller, by: *Marquis E. Jones,* for appellant.

Thelma M. Lorenzo, for appellees.

MARIAN F. PENIX, Judge. The Appeal Tribunal modified an Agency determination and denied the claimant unemployment benefits under the provisions of Section 5(b)(2) of the Arkansas Employment Security Law. On appeal to the Board of Review the Appeal Tribunal's decision was affirmed but was modified from disqualification under 5(b)(1) to show disqualification within the meaning of Section 5 (b)(2). Claimant appeals to this court.

The claimant worked for General Telephone Company in Jacksonville, Arkansas, from June 1976 until her discharge in April 1979. The reason given for discharge by the employer was the claimant had attempted to take certain charges off her personal telephone bills. The employer's representative testified the claimant had been warned about the same conduct previously. The claimant had submitted a

number of adjustment forms to her employer in an attempt to take off her phone bill, certain installation and long distance charges. The claimant contended all these were submitted in good faith because she contended there had been malfunctions in the equipment which caused the charges to appear on her personal bill. The employer's representative stated the employer's investigation of the charges clearly indicated the claimant was attempting to defraud the employer by trying to avoid the payment of legitimate charges.

Section 5(b)(1) of the Arkansas Employment Security Law provides for disqualification "If he is discharged from his last work for misconduct in connection with the work." Section 5(b)(2) provides for disqualification "If he is discharged from his last work for misconduct in connection with the work on account of dishonesty, drinking on the job . . ."

The claimant alleges she was denied due process when she was not properly notified of the charges upon which the Appeals Referee's decision was based. The claimant asserts she was denied proper notice upon which to prepare her defense. We find no absence of procedural due process. Both disqualifications are couched in terms of "misconduct at work". Section 5(b)(2) specifies the misconduct at work involves dishonesty. There is no evidence the claimant was surprised at the specific misconduct in connection with her work. The evidence presented before the Appeals Referee was the same as that presented before the Agency. Therefore we find the claimant was in no way harmed by the modification made by the Appeals Referee.

The testimony of the claimant and the testimony of the employer's representative were somewhat contradictory as to the claimant's intent to defraud the employer. The credibility of witnesses is solely within the province of the trier of facts. The Tribunal made a finding the preponderance of the evidence shows the claimant wrongfully submitted the adjustment forms with the intent to defraud her employer. There is substantial evidence to support the decision.

We find no reason to disturb the finding of the Appeals Tribunal as upheld by the Board of Review.

Affirmed.

HOWARD and NEWBERN, JJ., dissent.

HAYS, J., not participating.

DAVID NEWBERN, Judge, dissenting. This is another case in which the notice to the employee to appear before the appeals tribunal specified a particular section pursuant to which the claimant had been found by the agency to be disqualified, and the referee upheld the disqualification based on a different section. I continue to believe this misleading kind of notice is insufficient to afford the claimant administrative due process, and I dissent for the reasons stated in my dissenting opinion in *Teegarden* v. *Director, Arkansas Employment Security Division,* 267 Ark. 893, 591 S.W. 2d 675 (Ark. App. 1979).

My dissatisfaction is increased by the apparent ease with which this problem could be solved. The notice, in my view, would be adequate if the hearing before the appeals tribunal were billed as a de novo determination of the claimant's right to unemployment compensation. In the *Teegarden* case, I said the notice would have to be considered too broad if no issue were specified. I continue to hold that view if the job of the appeals referee is to review the agency determination. But if, as seems to be the case, the appeals referee is authorized to make an independent determination, without respect to the agency determination, and if the claimant is notified his or her entitlement will be determined as if no prior determination had been made, the notice would be adequate.

Judge Howard joins in this dissenting opinion.

James Lee DAVIS *v.* STATE of Arkansas

CA CR 79-115 594 S.W. 2d 47

Opinion delivered January 30, 1980
Released for publication February 20, 1980

Edwin A. Keaton, for appellant.

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

MARIAN F. PENIX, Judge. Appellant Davis appeals from a jury conviction on Aggravated Robbery and a sentence of 25 years. He appeals also from a sentence of an additional two years upon the revocation of probation.

Davis was charged with the robbery of the First Na-

tional Bank Main Branch of Camden, Arkansas which occurred April 23, 1979. On January 31, 1979, Davis pled guilty to a charge of Criminal Use of a Prohibited Weapon. He was fined $100 and placed on five year probation. A Petition for Revocation of Probation was filed and scheduled to be heard April 25, 1979. Davis' court appointed counsel moved for a continuance and it was granted. On May 4, 1979, Davis' attorney filed a Notice of Defense stating he intended to raise a defense to the bank robbery charge and to the alleged violations of conditions of probation, his lack of capacity as a result of mental disease or defect, to conform his conduct to the requirement of law and to appreciate the criminality of his conduct. On May 4, the trial court ordered Davis committed to the Arkansas State Hospital for observation and examination. On May 22, Davis filed a Motion for Continuance to enable his counsel to acquire medical information and records relative to Davis' prior commitment in a mental institution in Buffalo, New York in January, 1978, and because no report had yet been issued by the Arkansas State Hospital. Before trial, Davis received the State Hospital report. On June 22, 1979, Davis was convicted.

I

Davis contends there was error in the court's denial of the Motion for Continuance to secure the medical records from New York and to secure records of Davis' military service.

Davis contends he was forced to trial without proper preparation. Not guilty by reason of mental disease or defect must be proven by a preponderance of the evidence. Davis' attorney received a discharge diagnosis summary from New York which described Davis' "acute schizophrenic episode". It noted that Davis had been brought to the New York Medical Center following his appearance at a TV station where he posed as an FBI agent. It noted that Davis did this because voices told him to do so. It also pointed out Davis' thought content was delusional and he complained of hearing voices and seeing things. The New York doctors were the only ones who examined and treated Davis for a condition where Davis complained of committing an unlaw-

ful act upon the command of voices. Davis' attorney sought to obtain the New York hospital's supporting data and basis for its diagnosis as noted in the discharge summary. Because of certain required procedures Davis' attorney had not yet received the data and records. The trial court refused to allow a continuance, finding the reports of the Arkansas doctors were sufficient for a determination by the jury. The Arkansas doctors' testimony was that Davis was without psychosis. Also, the court found whatever the New York reports contained would be *added* evidence only to that already introduced and were unnecessary to Davis' defense.

The court noted that on the issue of insanity Davis had the State Hospital report of May 24, 1979 which indicated he was without psychosis, able to assist in his defense and probably sane at the time of the offense. Further, Davis had the reports from the South Arkansas Mental Health Center stating on August 19, 1977 and December 15, 1978, Davis was without psychosis and able to assist in his defense. With the additional discharge summary from New York, the trial court concluded there was adequate medical information on the issue of insanity and therefore denied the motion for continuance.

Factors which must be considered by trial courts in exercising their discretion in granting or denying a motion for continuance are the probable effect of the testimony or evidence, the likelihood of procuring the evidence, and its relevancy. *Worley* v. *State*, 259 Ark. 433, 533 S.W. 2d 502 (1976). There was no showing if the evidence did exist and was obtained that it would be relevant to the issue of Davis' sanity at the time of the offense and at trial.

Davis relies on *Westbrook* v. *State*, 265 Ark. 736, 580 S.W. 2d 702 (1979). However, in the instant case, Davis was not denied crucial evidence. In *Westbrook*, the defendant had asked for records from the State Hospital relative to two prior commitments. He had been granted the same on paper but had not received the records at the time of trial. Davis had in his possession all the state medical records pertinent to his mental condition. He was not denied evidence which was crucial to his defense. Here there is no showing that

there was additional material evidence obtainable. We cannot say the trial court abused its wide discretion in refusing a further continuance.

II

Davis contends the court erred in denying Davis' challenges for cause against two prospective jurors.

The prosecuting attorney was questioning the prospective juror Willie Arnold. Mr. Arnold stated in reference to finding Davis guilty or innocent he (Arnold) would "go along with the bunch". Davis contends that under the rationale of *McCree* v. *State*, 266 Ark. 465, 585 S.W. 2d 938 (1979), Mr. Arnold should have been excused. In *McCree*, the Supreme Court held it was proper for the trial court to excuse for cause a prospective juror who indicated he was unequivocally opposed to the death penalty. In that case the state was seeking the death penalty.

In reviewing the entire exchange during voir dire it appears Mr. Arnold misunderstood what was required of him as a juror. The court explained to him what his duty was and determined Arnold would in fact stick by what he felt was right regardless of what the other jurors thought.

In questioning the prospective juror Sylvia Nutt, Ms. Nutt stated she could not definitely say she would not be biased because she herself had been a victim of a theft. In response to the trial court's questions, she did indicate she would try her best to be fair and impartial to both the State and to Davis, and there was no indication she had already made up her mind as to Davis' guilt or innocence. There is no evidence she had made a pre-judgment.

Our Supreme Court has allowed large discretion in the trial court's determination of a prospective juror's bias or prejudice as affecting his qualifications to serve. The question of the impartiality of the jury is a judicial question of fact within the sound discretion of the trial court. *Strode* v. *State*, 257 Ark. 480, 517 S.W. 2d 954 (1975).

III

Davis alleges error in the court's answer to the jury on its query during deliberations.

Prior to rendering a verdict the jury returned and asked:

> The jury is concerned that if by chance the young man is incarcerated, is it possible he will receive some form of psychiatric help while he is in prison?

The court's response was:

> All right, now, ladies and gentlemen, the only way I can possibly answer that question is that the Department of Corrections is operated by a Board of Corrections, which is a part of the executive branch of government. The judicial branch of the government, or the Courts, have no control over the Department of Corrections.
>
> The Department of Corrections of course has the authority to administer such medical or mental services as they may be deemed the inmates might need. That's as far as I'm permitted by law to answer that question, because I could give you no guarantee one way or the other, certainly.

We find nothing in the court's response which could be construed as erroneously invading the province of the jury. See *Moore* v. *State*, 231 Ark. 672, 331 S.W. 2d 841 (1960).

Finding no reversible error, we affirm.

Affirmed.

HOWARD and NEWBERN, JJ., dissent.

GEORGE HOWARD, JR., Judge, dissenting. I dissent inasmuch as I am of the view that the trial court erred in not excusing Mrs. Sylvia Jo Nutt for cause, over the objections of appellant's attorney, which required the defendant to

exercise one of his peremptory challenges in order to excuse Mrs. Nutt from serving as a juror.

During voir dire, the following exchange took place between the attorney for appellant and Mrs. Nutt:

> MR. KEATON: Have either of you been either the victim of a robbery or had one of your friends or relatives, loved ones, who have been the victim of a crime, robbery or any type of crime?
>
> MRS. NUTT: We had a robbery. We had a robbery last year. Our property was returned to us quickly.
>
> . . .
>
> MR. KEATON: Okay, do you think that's going to cause you any I guess, somewhat sympathetic feeling toward another victim who is the victim I guess of — what appears to be the victim of a crime.
>
> MRS. NUTT: I hope not.
>
> MR. KEATON: You think it might cause a few problems?
>
> MRS. NUTT: Well I hope that it wouldn't. But I can't say definitely that it would.
>
> MR. KEATON: Okay, I guess what you're really saying is that it might?
>
> MRS. NUTT: There's a far out chance that it might.
>
> MR. KEATON: Okay. Even though like you already heard the Court instruct you as to what the law is and you know, what your duties are, and even after considering that, you still I guess in your mind, would be saying a slight reservation that it might cause you some problems to be somewhat sympathetic to I guess First National Bank.

MRS. NUTT: I'd make every effort for it not to be.

The following exchange took place between the Court and Mrs. Nutt:

THE COURT: Mrs. Nutt, if you were selected to serve on this jury, could you go into the jury box and be both fair and impartial to both the State of Arkansas and this defendant?

MRS. NUTT: I would hope so. I would try my best to.

THE COURT: Okay. In other words, now we're here to listen to the witnesses tell us what happened.

MRS. NUTT: That's right.

THE COURT: Because something happened last month, last year, ten years ago to you, is not going to affect you in determining the innocence or guilt of this defendant, would it? It could have no bearing, could it?

MRS. NUTT: It had no bearing on what happened to me. I hope that I'd be able to separate that from my own personal experience.

THE COURT: So you keep saying 'hope,' and 'try' and all that, and what — I guess I'm at a loss to understand how it could affect what the facts in this case are.

MRS. NUTT: I'm a real bad person at being able to see both sides.

THE COURT: You want to see both sides, and that's what both of them want you to see, and if you go in the jury box, will you listen to what the witnesses say, and determine guilt or innocence, solely on the basis of what you hear from the witness stand?

MRS. NUTT: I think I could. I can't be any more

definite than that.

THE COURT: I realize — I say it's just like my wife, I think. Will you? Let me put it that way.

MRS. NUTT: I will.

THE COURT: All right. I think that she's being as honest as she can be, and I think we sometimes nitpick as I call it with jurors when they are trying to be honest and say, 'I really think I can,' and I believe you can, and having known you for a long time, I believe you can. Your challenge is denied and your exceptions is saved.

Inasmuch as it is plain from the record that appellant ultimately exhausted all of his challenges, the ruling of the trial court may not be characterized as harmless error.

In *Glover* v. *State*, 248 Ark. 1260, 455 S.W. 2d 670, our Supreme Court made it clear that every accused is entitled to a fair trial by a panel of impartial and indifferent jurors. A failure to accord an accused this right violates the standards of due process.

DAVID NEWBERN, Judge, dissenting.

DAVID NEWBERN, Judge, dissenting. I believe the trial court's abuse of discretion in denying the appellant a continuance for the purpose of attempting to obtain additional medical evidence from New York was patent. I can, in no meaningful way, distinguish this case from *Westbrook* v. *State*, 265 Ark. 756, 580 S.W. 2d 702 (1979), and the majority opinion certainly does not do so.

In *Westbrook*, the accused sought medical notes which Arkansas hospital diagnoses were based upon. The supreme court held refusal to grant a continuance to permit the defendant to obtain them was error.

I do not know what the trial judge meant by "added evidence." If he meant "cumulative evidence," I think he was wrong. A discharge summary showing a "schizophrenic episode" is hardly the kind of powerful evidence the detailed medical notes leading to that diagnosis might have been. The

appellant needed that evidence because it, unlike the local reports, was indicative of his condition prior to the alleged offense. It apparently would have been as diametrically opposed as possible to the reports of the Arkansas agencies with respect to the probable condition of the appellant at the time the offense was committed. Thus, I cannot agree that it would in any way have been cumulative. For the very reason that it would have been "added evidence," I believe it was necessary to grant the continuance.

Nor does it matter that the appellant did not know for certain he could obtain the reports he sought. Note the language of the opinion in the *Westbrook* case:

> 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. . . . It may be that something in these records would have enabled appellant to furnish stronger proof on his behalf. [580 S.W. 2d at 707. Emphasis supplied.]

For this reason, I dissent.

Ocie JUSTICE *v.* James H. EUBANKS and Virginia EUBANKS, Husband and Wife, and Bill BATES and Ms. Bill BATES, Husband and Wife

CA 79-175 594 S.W. 2d 55

Opinion delivered January 30, 1980
Released for publication February 20, 1980

[redacted]

Richard L. Peel, for appellant.

Priddy & Hardin, for appellees.

GEORGE HOWARD, JR., Judge. This is an appeal from a decree quieting title to a 40 acre tract of land in James and Virginia Eubanks, on the theory that Bill Bates and Ocie Bates, former title holders, made an oral property settlement prior to their divorce in 1951, whereby Bill would receive the lands in question free of any claim of Ocie.

On February 19, 1945, Bill Bates, an appellee, and Ocie Bates (now Ocie Justice, appellant), received, as husband and wife, a warranty deed to a 40 acre tract of land from the widow and heirs of R. L. Bates, deceased father of Bill Bates. Bill and Ocie were divorced on March 8, 1951. The divorce decree made no reference to the lands held by the parties as an estate by the entirety. However, Bill testified that he received the property under an oral property settlement before the divorce. Ocie denies that there was ever any discussion about the property and says that it was her understanding that she and Bill still owned the lands.

On March 22, 1952, Bill Bates conveyed the lands to Charley and Mary Shuffield, husband and wife, by warranty deed. It is undisputed that appellant never executed a conveyance disposing of her interest.

On May 26, 1956, the Shuffields conveyed the lands to James H. Eubanks by warranty deed.

Between March 22, 1952, and May 26, 1956, the Shuffields paid the Ad Valorem Taxes on the property, fenced the property and cultivated one acre in cucumbers while the remainder of the open land was used as a pasture for cattle.

From 1956 to November 20, 1978, the date appellant instituted her action for partition, James Eubanks mortgaged the property three times to the Bank of Dover to secure

personal loans, cut the hardwood, placed the lands in the Soil Conservation Program and paid the taxes.

Appellant admitted that she has never paid any taxes on the property and was personally aware that both the Shuffields and James Eubanks were in possession of the property making extensive improvements, i.e., Shuffield built a home on the property.

Possession under color of title for seven consecutive years confers title in lands by limitation. *Parsons* v. *Sharpe*, 102 Ark. 611, 145 S.W. 537 (1912); *Vick* v. *Berg*, 251 Ark. 573, 473 S.W. 2d 585 (1971). *See Also: Reynolds* v. *Snyder,* 121 Ark. 33, 180 S.W. 752, 183 S.W. 979 (1915).

We are persuaded that a preponderance of the evidence in this case, upon a trial *de novo*, establishes title to the property in James E. Eubanks and Virginia Eubanks in meeting the requirements of adverse possession under color of title for more than the statutory period of seven years. *Harrison* v. *Collins, et al,* 247 Ark. 210, 444 S.W. 2d 861 (1969).

Affirmed.

Frank ANDERSON *v.* STATE of Arkansas

CA CR 79-118 594 S.W. 2d 54

Opinion delivered January 30, 1980
Released for publication February 20, 1980

John W. Achor, Public Defender, by: *Jeffrey M. Rosenzweig*, Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Dennis R. Molock*, Asst. Atty. Gen., for appellee.

GEORGE HOWARD, JR., Judge. Appellant was charged with first degree murder. The jury found him guilty of murder in the second degree and fixed his punishment at twenty (20) years in the Department of Correction.

The relevant facts are: On October 13, 1978, Willie O'Neal, Jr. was killed by a gunshot while participating in a "crap game" at a private residence. Appellant was immediately taken into custody by police officers who advised him of his rights. Appellant was placed in the rear compartment of the police vehicle of Officer Thomas Johnson. While enroute to the police station, appellant purportedly said:

> "I shot the son-of-a-bitch. I wish I had shot him sooner."

During the *Denno* hearing conducted by the trial judge (a hearing conducted in chambers to determine the voluntariness of the statement), appellant admitted that he was advised of his constitutional rights, but denied making any statements in the police car.

The trial court found that appellant voluntarily made the statement and, consequently, the statement was admitted into evidence.

Appellant argues that the evidence not only fails to support a finding that the statement was voluntary, but falls short of showing that the statement was actually made.

It is settled law that appellate courts, in reviewing a finding of voluntariness of a purported admission, make an independent determination based upon the totality of the circumstances and the trial judge's finding will not be disturbed unless it is clearly against the preponderance of the evidence. *Degler* v. *State*, 257 Ark. 388, 517 S.W. 2d 515 (1974).

Moreover, the State has the burden of proving that an in-custodial statement is free and voluntary. *Rutledge* v. *State,* 263 Ark. 781, 567 S.W. 2d 283 (1978).

Officer Johnson testified that appellant, on his own volition, admitted shooting the decedent. It is clear that, when the statement was allegedly made, appellant was occupying the rear compartment of the police vehicle while Officer Johnson occupied the front compartment. A metal screen separated the two compartments. Only these two individuals occupied the vehicle. Appellant admitted firing a weapon five or six times in order to "warn or scare" the decedent, but did not "mean to kill him."

Dr. Fahmy Malak, State Medical Examiner, testified that he performed an autopsy on the remains of the decedent and found two bullet wounds, one of the head and one of the abdomen; that the shot to the head was from back to front and was fatal.

The conflicting testimony of appellant and Officer Johnson, regarding the alleged admission of the appellant, presented a fact question. As the fact finder, it was the responsibility of the trial court to resolve the conflict. Credibility of the witnesses was also a matter to be considered and determined by the trial judge. *Bell & Walker* v. *State*, 258 Ark. 976, 530 S.W. 2d 662 (1978); *Gardner* v. *State*, 263 Ark. 739, 569 S.W. 2d 74 (1978).

We are unable to say that the trial court's finding is not supported by a preponderance of the evidence and, accordingly, we affirm.

Leza PRICE, Jr. *v.* STATE of Arkansas

CA CR 79-72 599 S.W. 2d 394

Opinion delivered January 30, 1980
Affirmed by Supreme Court April 28, 1980
Released for publication May 21, 1980

Givens & Buzbee, by: *Art Givens*, for appellant.

Steve Clark, Atty. Gen., by: *Joseph H. Purvis*, Deputy Atty. Gen., for appellee.

DAVID NEWBERN, Judge. The appellant was convicted of theft of an automobile of a value in excess of $2500 and sentenced to 20 years confinement and a fine of $15,000. His appeal raises the question whether evidence of previous offenses should have been admitted and whether the prosecutor's closing remarks were so calculated to inflame the jury as to be a ground for mistrial. We affirm the conviction.

Billy Reno, a co-defendant who decided to plead guilty apparently shortly before the trial, testified that he and the appellant had been working together stealing cars. He said on the day the offense charged was committed he and the appellant drove to Benton and to a used car lot there with the intent to steal a car. While the appellant distracted the salesman, Reno took the keys to a Cadillac from the top of the hood of the car and replaced them with other keys. That night, after the business had closed for the day, the appellant brought Reno back to the lot where he started the car and began driving it away.

In the meantime, the substitution of the keys had been noticed by the employees and owner of the car lot, and a policeman was waiting in the car lot office after closing time. As Reno attempted to drive the car from the lot, he was shot by the policeman and arrested.

In corroboration of Reno's testimony, the appellee played for a jury the recording of a telephone conversation

between the appellant and Passmore, a police informant. In the conversation the appellant complained of the "stake out" where his buddy had about been "blown away." He referred to having gotten a truck to which he was afraid to return, to having "gotten" two other cars, to arranging for fake drivers' licenses and bills of lading for vehicles, and to setting up an alibi for some event, apparently the one charged here, by saying he was at Memphis or West Memphis.

The appellant objected to both the testimony of Reno and the tape on the basis that they contained evidence of other offenses committed by the appellant. With respect to the tape recording, the appellee alleges the appellant could have had access to it before the trial, presumably by a discovery motion pursuant to Ark. R. Crim. P. 17.1 (a) (ii), and that his failure to move to suppress the tape before the trial in accordance with Rule 16.2 waived any objection.

Whether this recorded statement falls within the purview of Rule 16.2 is a question the answer to which we will save for another day. We have at least some doubt whether a rule which is phrased in terms of suppression of things "seized" applies to a statement obtained in the manner described. To answer in the affirmative we would be required to find it fits the definition of "seizure" in Rule 10.1 (b) as ". . . the obtaining of information by an officer . . . under . . . color of authority."

We need not reach all the questions such a determination would require, as both the recorded statement of the appellant and Reno's testimony raise the same issue. Reno's testimony would not be left uncorroborated by exclusion of the tape recording, as the owner of the car lot testified that the appellant had been on the lot the day in question, that the green and white truck he and Reno had been driving earlier was seen driving past the lot shortly before Reno attemted to take the car, and the appellant was seen driving the truck past the lot an hour after the event. In addition, the appellant admitted having been on the lot with Reno earlier in the day. The corroboration of an accomplice's testimony required by our statute, Ark. Stat. Ann. § 43-2116 (Repl. 1977), is only

that which tends in "some degree" to connect the accused with the crime. *Gardner* v. *State*, 263 Ark. 739, 569 S.W. 2d 74 (1978); *Underwood* v. *State*, 205 Ark. 864, 171 S.W. 2d 304 (1943). Unlike *Pollard* v. *State*, 264 Ark. 753, 574 S.W. 2d 656 (1978), we have here evidence other than the testimony of an accomplice directly connecting the appellant to the offense, *i.e.*, the testimony of a car lot employee that the appellant had diverted his attention from the car to be stolen while Reno exchanged the keys. The employee testified the appellant asked to look at a truck on the other side of the lot from the place where the Cadillac was parked. He was not, however, sufficiently distracted to miss seeing Reno remove the keys which had been atop the hood of the Cadillac and then walk behind the truck the appellant and Reno had been driving and then return to the Cadillac and place on it a set of keys which turned out to be different ones. It was this act of picking up and putting down keys that aroused the car lot personnel to suspect the appellant and Reno.

Thus, we come to the question whether the evidence tending to show other offenses was admissible. The applicable evidence rule is Ark. Stat. Ann. § 28-1001, Rule 404 (b) (Repl. 1979), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This is one of the rules of evidence which is most difficult to apply. It codifies the rule which was in existence before it was adopted, and it has been the subject of numerous decisions in the Arkansas Supreme Court and other appellate courts. Although much similar language is found in the cases, the decisions seem to have been pretty much ad hoc. As long as the purpose of the rule is kept in mind, however, ad hoc application of it may be in order.

The most helpful of the Arkansas decisions is *Alford* v. *State*, 223 Ark. 330, 266 S.W. 2d 804 (1954), in which Justice George Rose Smith discussed the rule and identified the

problem in its application as being whether one of the "so-called" exceptions, in that case, evidence of another crime tending to prove "intent," was present. This suggests a fairly mechanical approach to the rule which apparently was not the intent of its modern version drafters. Our rule is drawn from the federal rule, and a discussion of the intent of the drafters is found in *The Federal Rules of Evidence: A Symposium,* 71 Nw. U.L.R. 634 (1976). In that article, the authors suggest two possible approaches to the "other offenses" problem. One would emphasize admissibility by viewing the words "such as" in the rule as indicating the list following to be exemplary only. The other would admit the evidence only if it fell strictly within one of the categories.

In our view, the rule should be interpreted to exclude evidence of other offenses when its only purpose is to show the accused's character or some general propensity he might have to commit the particular sort of crime in question. It should not be interpeted to exclude evidence of other offenses when that evidence is probative of the accused's participation in the particular crime charged. If it is probative of his participation the only remaining question should be whether it is so prejudicial that it should be excluded because the prejudice brought about by exposition of other offenses is not sufficiently balanced by the probative value of the evidence on the facts sought to be proved. See, Rule 403.

Although Rule 403 was not specifically in issue at the trial and has not been cited by the appellant here, we think it must be included in the ultimate determination of admissibility. This is the approach applied in *U.S.* v. *Dansker*, 537 F. 2d 40 (3rd Cir. 1976), and suggested in the article cited above.

A good example of the approach is the decision in *U.S.* v. *Coppola*, 526 F. 2d 764 (10th Cir. 1975). The court said:

> As to the evidence that the government offered, it is to be noted that inasmuch as Molina was admittedly the actual killer, it was relevant to introduce evidence of Coppola's heroin traffic so as to demonstrate his motive for and connection with the murder. After all, the gov-

> ernment was seeking to show that Coppola was trying to maintain his position as the principal narcotics distributor at Leavenworth. Herman's testimony supported this, and so the government's evidence in this area had probative value and was thus properly admitted. [Citations.]
>
> From a careful examination of the record, we are convinced that the government organized and presented its evidence in an effort to validly utilize this evidence and not to exploit it as a means in and of itself to convict the defendant. [526 F. 2d at 772]

Note that the court used one of the terms from the "exceptions" part of the rule, that is, "motive," but did not limit itself to that, as it added, "and connection with" the offense. The balancing came at the end of the quotation where the court assured itself the evidence was not being used "as a means in and of itself to convict the defendant."

In this case, the evidence of other offenses showed a strong connection between the appellant and Reno. The appellant took the stand to deny any intent to participate in the theft. He said he had gone to the lot with Reno to act as co-signer on a note in the event Reno found a car he wanted to buy. We believe the question of his intent with respect to some of his conduct was raised in this case by him, and the evidence had a "true relation to the issue of intent" and thus it would be admissible under the standard stated by Justice Smith in the *Alford* case, 223 Ark. at 338.

In conclusion on this point, we apply the standard of the *Alford* case with an elaboration, somewhat as stated by the Eighth Circuit Court of Appeals in *U.S.* v. *Conley*, 523 F. 2d 650 (8th Cir. 1975), *cert. den.*, 424 U.S. 920 (1976). First, an issue must be raised as to which the "other offenses" evidence relates. Second, the proffered evidence must be clear and convincing, and third, the probative value of the evidence must outweigh its unwarranted prejudicial effect.

In this case we find the evidence related to the intent or motive of the appellant — an issue his denial and explanation clearly raised. The "other offenses" evidence was very

clear and convincing that he and Reno were conducting a car stealing operation, and tended to refute the appellant's explanation of his conduct. The probative value of the evidence thus was strong, and it outweighed any possibly undue prejudice to the appellant.

The other point raised by the appellant was the failure of the trial court to grant a mistrial when the prosecutor, in describing the acts of the appellant, made what he called an analogy to a "dope trafficker" who used others to commit offenses for his benefit. This reference was made in a way which left no doubt the prosecutor was not describing the appellant as a "dope trafficker," and no mistrial was warranted. We see nothing inflammatory in the remark.

Affirmed.

Robert Lee CURRIE *v.* STATE of Arkansas

CA CR 79-116 594 S.W. 2d 56

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P. A. Hollingsworth and *Janet L. Pulliam*, for appellant.

Steve Clark, Atty. Gen., by: *Catherine Anderson*, Asst. Atty. Gen., for appellee.

DAVID NEWBERN, Judge. The question here is whether a motion for new trial was filed in time. The appellant was convicted of second degree battery by the court sitting without a jury at a trial held April 10, 1979. On that same date, and at the time the verdict was announced, the trial judge announced a sentence of five years confinement with two years suspended. A judgment including that sentence was signed April 11, 1979. Then the appellant moved to be allowed to present matters in mitigation, and the court held a mitigation hearing on May 8, 1979. A document referring to the mitigation hearing appears in the record, and it concludes as follows: "Sentence imposed as previously stated at the Court Trial on April 10, 1979."

Notice of appeal was filed May 8, 1979, and a motion for new trial was filed May 25, 1979. Thus, the motion was filed within 30 days after the mitigation hearing but not within 30 days of the first pronouncement. Ark. R. Crim. P. 36.22 provides, in part:

> A person convicted . . . may file a motion for new trial . . . but [it] . . . must be filed prior to the time fixed to file a notice of appeal.

. . .

Although in this case the notice of appeal has been filed, that is irrelevant, as the rule gives the appellant the "time fixed to file a notice of appeal" to file his motion for new trial. The "time fixed" for filing notice of appeal is 30 days "from the date of the sentence and entry of judgment by the trial judge." Ark. R. Crim. P. 36.9.

On October 11, 1979, the trial judge entered an order

denying the motion for new trial, and reciting that it had not been timely filed in accordance with Rule 36.22.

The appellee concurs in the appellant's position that the order was incorrect, as the ultimate pronouncement of sentence occurred May 8, 1979, and the time for filing notice of appeal and thus for moving for new trial commenced that date rather than the earlier one. We agree with the parties.

The appellant is thus entitled to a hearing on the merits of his motion for a new trial, and the case is remanded to the trial court for that purpose.

The appellant has raised two other points for reversal with which we do not deal in view of the necessity of remanding for the hearing on the motion for new trial. If the trial court denies the motion for a new trial, after a hearing, we will resume jurisdiction of this case to rule on the appellant's other two grounds for reversal. In that case, the appellant will give written notice to the appellee of the trial court's ruling, and the appellee will have 21 days from receipt of such notice to file a brief responding to the appellant's points II and III.

Any such resumption of jurisdiction to consider those points will, of course, be without prejudice to any appeal the appellant may perfect as a result of the trial court's ruling on his motion for new trial.

Reversed and remanded.

[redacted]

[redacted]

[redacted]

[redacted]