

# COURT NEWS

NEWSLETTER OF THE ALABAMA JUDICIAL SYSTEM

Volume 5/Number 5

May, 1981

## LAW DAY, MAY 1: DAY FOR HONORING 'PLACE OF LAW' IN AMERICA

Bar Associations, members of the judiciary and citizens across the state of Alabama joined the rest of the Nation in celebrating Law Day, Friday, May 1.

Law Day U.S.A. is set aside on May 1 each year by joint resolution of Congress and presidential proclamation as a "special day of celebration by the American people in appreciation of their liberties" and as an occasion for "rededication to the ideals of equality and justice under law." The theme for the 1981 observance was "Law--The Language of Liberty."

The nationwide event is an occasion for honoring the place of law in the American society, for learning how the law and the legal system operate and for examining how the law can better serve the American people and Nation.

As stated by the Congress, Law Day was established "to foster respect for law and understanding of its essential role in the life of every citizen in the United States."

In his Law Day message, Chief Justice C.C. "Bo" Torbert Jr. said that the growing incidence of violent crime in our cities, towns and communities, exemplified by the recent assassination attempt on President Reagan, should give cause for all citizens to join in the observance of Law Day.

Torbert said that the Nation's expanding problem with crime is as great a threat to the national secur-

ity as is the threat of international conflict.

"We must strengthen our efforts to solve this growing threat of law-breaking and violent crime in this country and develop a vigilant concern about it. If the present pace of violent crime is not halted, the next conflict this country sees may

be in the streets of our major cities. It is a problem we must face now," Torbert said.

"The first thing we must do," he said, "is to re-establish the priorities of those who founded this country by rededicating ourselves to a genuine respect for the rule of law and a lawful society."

"The law," Torbert said, "is not a perfect science. Sometimes there are abuses and sometimes justice does not seem to be served, but our democracy and our freedoms rest on the proposition that those injustices and abuses are infrequent and each of us must work to ensure that our system of law and justice serves to strengthen our Nation."

The chief justice urged all adults, especially parents, to ensure that children grow up with a respect for the law--from the policeman on the beat to the judge on the bench. "The best way to make this happen is for parents to set the example," he said.

"Let's teach our children that while the system is not perfect, it's the best in this world and it will be

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LAW--  
the  
Language  
of Liberty



LAW  
DAY  
USA  
May 1

## LAW DAY, MAY 1: DAY FOR HONORING 'PLACE OF LAW' IN AMERICAN LIVES

(Continued From Page 1)

their job as future leaders to maintain and improve it," he added.

"Solutions," he said, "may not be popular, but the violent offender, the professional criminal and the habitual law-breaker must be dealt with severely. This will require greater public support for the criminal justice community." Torbert lauded the Alabama legislature for its recognition of the needs in the criminal justice area, saying that we are fortunate in this state to have a legislature sensitive to these problems.

"I realize that solutions are not simple either--the complexity of crime and punishment, their theories and cures, has been with us for centuries. But until the threat of punishment for crime becomes real, swift and certain, the criminal element will continue its disregard for the law and the rules of society."

### BAR ASSOCIATIONS, SUPREME COURT JUSTICES PARTICIPATE IN LAW DAY

Bar Associations in the larger metropolitan areas of the state celebrated Law Day with banquets and speakers. Chief Justice C.C. Torbert Jr. joined the Tuscaloosa County Bar Association at its annual Law Day banquet.

The Birmingham Bar Association, in conjunction with Birmingham and the University of Alabama in Birmingham, sponsored a conference, "The Media and the Movement; The Role of the Press in a Changing Society," in which Supreme Court Justice T. Eric Embry participated. The conference dealt with the media's coverage and its role in the civil rights movement in Birmingham in the early 1960s. The conference featured Harrison Salisbury who was the New York Times reporter assigned to cover the movement. Justice Embry, as an attorney, represented the New York Times in subsequent libel suits which grew out of Salisbury's reporting. The conference was held April 14 and 15 in Birmingham.

Supreme Court Justice Richard L. Jones

coordinated his annual "Distinguished Lecturer Series" at Cumberland School of Law in Birmingham, culminating the series with a lecture by former U.S. Senator Sam Ervin during Cumberland's Law Day celebration April 2.

Sen. Ervin taped an interview sponsored by the State Bar Association which aired on Alabama Public Television May 1. The interview, conducted by J. Mark White, a Birmingham attorney and chairman of the Bar Association's Law Day Committee, and Skip Hinton of Public Television, dealt with such issues as lawyers, the McCarthy era, civil rights, the Constitution and Watergate and the role of lawyers in Watergate.

Supreme Court Justice Sam Beatty addressed the Anniston Civitan Club on April 27 at the invitation of Presiding Circuit Judge Robert M. Parker. Beatty's address dealt with crime in the United States and how it affects American citizens.

Supreme Court Justice Janie Shores spoke to the 6th Annual Convention of Alabama Impact on April 29.

In addition to its "Media and the Movement" conference, the Birmingham Bar Association also sponsored a "Separation of Church and State Seminar" Tuesday, April 28; and a three-day program on "Law Day for the Elderly." This series of programs, held April 14, 16 and 20, dealt with crime prevention, the need for a will and estate planning and insurance. Parts of this series were co-sponsored by the Birmingham Police Department and Positive Maturity.

### CERTIFICATION SCHEDULED FOR DUI COURT REFERRAL SCHOOL INSTRUCTORS

The first program to certify new instructors for the DUI Court Referral Schools has been scheduled for June 25-28 at the Criminal Justice Training Center, Craig Field, Selma.

The program is designed to insure the continuing quality of instruction available to the individual referred to the DUI Court Referral Schools. The committee to develop the Instructor Certification Program has worked diligently in its efforts to provide a worthwhile training program for the new DUI Court Referral School instructors.

## STATEWIDE JUDICIAL INFORMATION SYSTEM ADVISORY COMMITTEE NAMED

Administrative Director of Courts Allen L. Tapley recently announced the formation of the Statewide Judicial Information System Advisory Committee on trial court computerization for the purpose of determining the basic applications and formats for computer operations at the trial court level.

In appointing the committee, Tapley noted "A whole new range of possibilities is opening for the trial courts and I am excited about the future of the project. The work of the committee is crucial to charting the proper use of computers in the courts."

Circuit Clerk Billy Harbin of Madison County has agreed to serve as chairman of the committee. Other members appointed include: Presiding Circuit Judges Joseph M. Hocklander of the 13th Judicial Circuit and Jerry M. White of the 20th Judicial Circuit; Circuit Judge William R. Gordon of the 15th Judicial Circuit; District Judge Dominick J. Matranga of Mobile County; Circuit Clerk Julia Trant of

Houston County; District Clerk Elizabeth Hamner of Tuscaloosa County; Register Elsworth Haughton, Mobile County; Court Administrators Glenn Singleton of the 23rd Judicial Circuit and Robert W. Merrill of the 15th Judicial Circuit; and Frank W. Gregory of the Administrative Office of Courts.

The initial funding for the computerization of trial courts was obtained through the Law Enforcement Assistance Administration Court Delay Reduction Program presently underway in Alabama. The use of automated data processing is only one technique for reducing delay that is being investigated under the grant. Expanded application of computers will be considered only after careful consideration and evaluation by the advisory committee and AOC project staff.

New computer hardware currently being installed will allow the Judicial Data Center (housed at AOC) to offer services to trial courts heretofore unavailable. For the first time, small computers located in courts around the state will be able to communicate via telephone lines with the central computer in Montgomery.

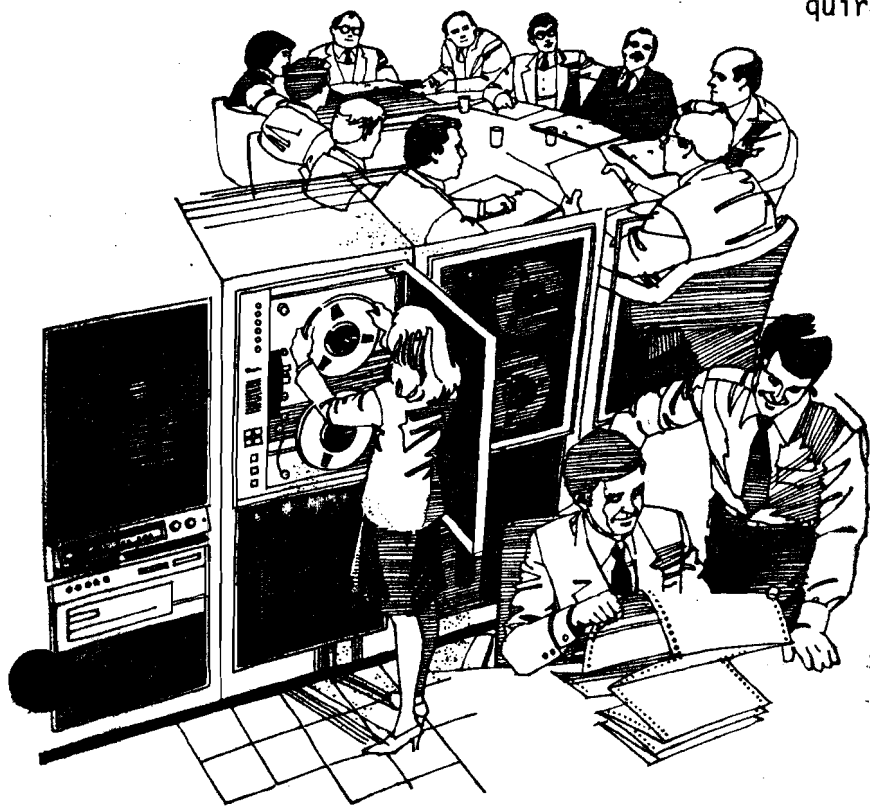
The advisory committee will work to define the various user needs and requirements necessary to enable standard systems to be developed. SJIS Project Manager Jan Shultz, AOC Information Systems Officer, will then translate those needs and requirements into a viable, cost effective system which will be implemented by the AOC Information Systems staff.

The advisory committee members will meet May 8 in Montgomery.

## AUDIT SUMMARY OF EMPLOYEE LEAVE ACCOUNTING CARDS

The Personnel Division has just completed the audit of the 1980 leave accounts of court support employees all over the state. A summary listing of errors and/or irregularities is given below for information in the interest of improving leave accounting through-

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## NEWS FROM THE JUDICIAL COLLEGE



### CLERKS, REGISTERS AND EMPLOYEES IN JUDICIAL COLLEGE LONG-RANGE PLANS

The Alabama Judicial College will offer its Orientation for New Employees in Clerks and Registers Offices for the third year. Previous programs were well-received and considered very beneficial by the participants. These sessions are scheduled at Farrah Hall in Tuscaloosa on Aug. 20-21. To be included in the seminars are an overview of the Judicial System, procedures of civil and criminal cases and personnel policies. Employees who have joined the Judicial System since August of 1980 will be eligible to be recommended by their clerk or register to attend.

The Clerks and Registers Long-Range Curriculum Committee chaired by Clerk Bobby Branum of Butler County has outlined the specialty conferences for the 1981-82 fiscal year. In addition to the regularly-scheduled Mid-Winter Conference in February and the Annual Conference in June, the committee proposed two seminars dealing with financial management and bookkeeping. Clerks and registers will be invited to bring two or three employees whose job responsibilities include these areas.

While these specialty seminars are still in the planning stages, some of the topics being considered for inclusion are Equipment Inventory and Purchasing, Bookkeeping, Transmittals, Trust Accounts, Fees and Charges and Budgeting.

### MUNICIPAL JUDGES MEETING SCHEDULED

The annual meeting of the Alabama Municipal Judges Association is scheduled for May 16 at the Montgomery Civic Center. Sponsored by the Alabama Judicial College in conjunction with the Alabama League of Municipalities, this will be a one-day meeting with registration beginning at 8 a.m.

The meeting will begin with a review of attorney general opinions issued over the past year. Circuit Judge Joe Barnard of the 10th Judicial Circuit will address the Association on Disorderly Conduct Cases followed by a discussion of the

"Good Time Law" by Carol Jean Smith of the Attorney General's Office. Circuit Judge James S. Garrett of the 10th Judicial Circuit and former president of the Municipal Judges Association will speak on "Probation, Probation Revocation and Restitution." Both Garrett and Barnard are former municipal judges.

The subject of Indigent Incarceration will be discussed by Delores Boyd of Mandell and Boyd law firm, followed by Judge Tennant Smallwood of the Birmingham Municipal Court with a discussion on Problems of the Municipal Judge in Indigent Incarceration. A "puff and pout" session will then allow judges an opportunity to discuss other items of concern as well as successes that they have had in handling certain municipal court cases.

Municipal Judge Jerry Batts of Athens and president of the Association will preside over the General Business session at 4:30 p.m. In addition to other association business, Batts will report on a questionnaire which he mailed to all judges.

Judges who plan to attend are requested to pre-register as soon as possible to ensure the availability of sufficient material. The \$35 registration fee is reimbursable for judges by the Alabama Judicial College.

### SEMINARS COMPLETED FOR MUNICIPAL COURT CLERKS AND MAGISTRATES

The Municipal Court Division of the Administrative Office of Courts has successfully completed six two-day regional training seminars for municipal court clerks and magistrates. Many courts throughout the state were well-represented.

The seminar discussions focused on warrant issuance, uniform traffic ticket availability and records management in municipal courts. The overall evaluations of the seminars indicated that the attendees were receptive to the information and ideas that were introduced and that the discussion of those ideas formed the bases for improvements within their own courts.

Speakers for the seminars included municipal court judges and clerks as well

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## SEMINARS COMPLETED FOR MUNICIPAL COURT CLERKS AND MAGISTRATES

*(Continued From Page 4)*

as personnel from the Department of Public Safety and Administrative Office of Courts. The participants were complimentary of the program and the manner in which the information was presented. Each clerk and magistrate identified goals for court improvement to be accomplished during the next year.

The attendees suggested that similar training seminars be conducted in conjunction with judges and law enforcement personnel to improve communication between courts and other agencies.

### RULES OF ROAD ACT

#### COPIES AVAILABLE THROUGH DPS

The Administrative Office of Courts has received several requests from police agencies across the state for copies of the codified Rules of the Road Act. The Department of Public Safety's Accident Records Unit has copies available for sale at \$3.50 per copy.

For further information, contact the Accident Records Unit, P.O. Box 1511, Montgomery, AL 36192.

### COURT CLERK WRITTEN TEST SCHEDULE POSTED; LIMITS ON TESTING CITED

Clerks and registers who are anticipating vacancies or promotions in the office should have those persons interested in being hired or promoted make application with the Administrative Office of Courts' Personnel Division at least three weeks prior to the date that the written test is scheduled to be given.

Written tests for the month of May will be administered on the following dates:

May 2--Tuscaloosa; May 9--Dothan, Florence and Huntsville; May 23--Birmingham, Mobile and Montgomery.

Applicants who have taken and failed any of the court clerk tests must wait one year before being eligible to take that test again.

Applicants who have taken and passed

any of the court clerk tests must wait two years from the previous test date before being allowed to re-take the test.

## NATIONAL CENTER STUDIES PROCEDURES OF INVOLUNTARY CIVIL COMMITMENT

Lawmakers are in a bind when it comes to creating civil commitment law; procedures must be elastic enough to ensure that treatment is available to mentally ill individuals who may not be able to seek it themselves, and at the same time ensure that individual civil rights are scrupulously protected. Although many states have written or are in the process of rewriting their procedures, some studies have suggested that even revised procedures are ineffective in meeting the objectives of the reform or create additional problems, often not foreseen by the courts and lawmakers.

A new project at the National Center for State Courts will develop model court rules and procedures for the involuntary civil commitment of mentally ill persons. The 12-month, \$170,000 project is being funded by the MacArthur Foundation and community foundations in several cities. Project members will look at commitment procedures in New York City; Chicago; Columbus, Ohio; Winston-Salem, N.C.; and several other areas. Staff members will analyze civil commitment statutes in each area, evaluate their effectiveness and make recommendations for their improvement. Studies in the individual sites will be funded by the Chicago Community Trust, the Columbus Foundation, the New York Community Trust and the Winston-Salem Community Foundation.

In addition to developing a set of model procedures, project members will prepare a series of papers on some of these issues for use by judges and other court personnel. The major paper of the series, which will be written as a handbook or benchbook, will be on the protection of the mentally ill individual's rights. Legal issues surrounding the civil commitment process and treatment of mentally disabled people will be discussed in detail.

Another paper will focus on the definition of mental illness. Related topics will be discussed in other papers.

# PEOPLE \* PEOPLE

**R**etired Birmingham Circuit Judge *George Lewis Bailes Sr.* died in April at the age of 94.

A 1915 graduate of the University of Alabama Law School, he began his law practice shortly afterward. He was assistant city attorney from 1919 to 1922 and became a circuit solicitor for the 10th Judicial Circuit in 1928.

He served as solicitor until 1941 when he was named county judge. He served as county and circuit judge until his retirement. He served as an active judge after his retirement as recently as 1978.

While politicking for his judgeship, Judge Bailes passed out cards that said "A man is only half himself; his friends are the other half." He was a deeply religious man and was popularly known throughout Jefferson County for his Sunday School classes taught at the First Baptist Church, his "International Sunday School Lesson" published in the Shades Valley Sun and his Sunday School lessons broadcast over WBRC radio for many years.

Judge Bailes is survived by his son, George Lewis Bailes Jr., former chairman of the state Democratic Party, four grandchildren and 12 great-grandchildren.

**T**he University of Alabama Law School has a new dean, *Allen E. Smith*, dean of the law school of the University of Missouri at Columbia. He will assume the deanship at Alabama June 15.

Smith will replace present Dean Thomas W. Christopher who will continue to teach and head the University's Center for Public Law and Service.

**B**ill Herndon, special liaison to state court leadership of the Law Enforcement Assistance Administration of Atlanta, retired his position May 1.

Herndon worked very closely with the Alabama Judicial System during implementation of many LEAA-sponsored projects.

During his service with LEAA since 1973, the involvement of state court systems in LEAA programs increased fourfold,

due in part to the 1976 amendments to the Omnibus Crime and Safe Streets Act which gave the courts a greater voice in LEAA funding.

**C**ircuit Clerk *Morris Moatts* was named Chilton County Chamber of Commerce's Member of the Year recently at the group's annual dinner meeting.

Moatts, a former chamber president, was selected to receive the first member of the year award for his long service to the organization and to the people of Chilton County.

An editorial which appeared in the Independent Advertiser newspaper of Clanton stated "it is fitting and just that Morris Moatts was named to receive the first... award. The purpose of the honor is to recognize a member of the chamber of commerce who has devoted time and efforts to make Chilton County a better place to live.

"Moatts fits this criteria well and has for many years, not just 1980.

"Moatts' position as circuit clerk makes him one of the busiest elected officials in the county. Yet, he accepts difficult tasks in professional, civic and church areas and makes the tasks look easy.

"Chilton County is fortunate to have a civic-minded person like Morris Moatts. He deserves the chamber honor and we add our appreciation to him for his many years of service to this county."

**R**osemary Lackey, daughter of Tuscaloosa Circuit Judge and Mrs. Louis Lackey, died April 14 in Birmingham. Miss Lackey was an elementary school teacher in Birmingham and died at her school at the age of 22.

In addition to her parents, she is survived by one brother, Trey.

**S**tate Finance Director *Sid McDonald* of Arab will resign his position June 15. McDonald was appointed finance director in March of 1980.

# PEOPLE \* PEOPLE

**E**towah County Circuit Judge *James B. Waid* retired his position May 3. He has been a circuit judge for the 16th Judicial Circuit since July of 1966 and has served as presiding judge since January of 1977.



JUDGE WAID

Prior to his appointment as circuit judge, he practiced law in Gadsden for 18 years. He was the first full-time city attorney for the city of Gadsden and also served at one time as assistant district attorney for Etowah County.

A native of Boaz, Waid is a graduate of Snead College and the University of Alabama Law School. He taught school in Arab for three years and worked with the Tennessee Valley Authority for one year before service as a Captain in the U.S. Air Force during World War II.

He is a past president of the Etowah County Bar Association, past president of Gadsden Civitan Club and past governor of Civitan International, Alabama North District. He holds the Civitan District Honor Key. He is also a member and past chairman of the Salvation Army Advisory Board. In 1977, he received the Gadsden Legal Secretaries Boss of the Year Award.

Waid is a member of the First United Methodist Church. He and his wife, LuVerna McKenna Waid, have four children.

**A** Gadsden attorney, *William W. Cardwell Jr.* has been appointed to the judgeship vacated by retiring Circuit Judge James B. Waid. Cardwell's appointment was effective April 27.

**R**obert Burleson, a retired attorney from Haleyville has been appointed to the Winston County district judgeship vacated by the retirement of Judge Elwood Rutledge in March. Burleson, a former city attorney and city judge for Haleyville,

was commissioned April 14.

He served as county solicitor for Winston County and was appointed county judge in 1952.

He is a graduate of the University of Alabama School of Law and is a member of the United Methodist Church.

He and his wife, the former Julia Rose Howell, have two children.

**C**ircuit Judge *W.G. Hawkins* of the 9th Judicial Circuit announced his intentions to retire effective May 1. He has been circuit judge since January, 1971.

**S**tate Budget Officer *James R. Raiford* died of an apparent heart attack on April 29.

The Ashland native had been budget officer since 1976, holding the position on an acting basis for four months before officially assuming it. He had been employed in state finances since 1960.

Raiford had been working on budget proposals which are presently moving through the state legislature.

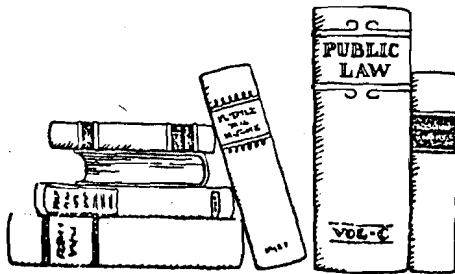
Services were held May 1 in Ashland.



**TAKING OATH OF OFFICE...** Chief Justice C.C. "Bo" Torbert Jr. (left) administers the oath of office to newly-appointed Madison County District Judge Lynwood Smith as Smith's wife, Helen, holds the Bible. The investiture was held April 20.

Photo Courtesy Glenn Basske, Huntsville News

## LEGAL NOTES



## ATTORNEY GENERAL OPINIONS

Mileage Expenses of Jurors

In a recently released opinion, the attorney general has ruled that Section 12-19-210, Code of Alabama 1975, should be construed so as to authorize the payment to jurors of \$.05 (5¢) per mile for each mile traveled in going to and returning from the court and that this section does not limit mileage expenses paid to one round trip only as has been common practice. Subsequent contact with the Attorney General's Office has confirmed, however, that this opinion should not be construed to authorize payment for more than one round trip per day.

State Liability for Costs In  
Vehicle Condemnation Cases

In an opinion dated March 5, the attorney general has opined that Section 28-4-291, Code of Alabama 1975, provides that when the state is successful in a vehicle condemnation case under the ABC statutes, the costs of the proceeding should be paid by the state from the proceeds of the sale. The opinion further provides that costs would only be paid to the extent that such proceeds cover the amount of the costs.

The second part of this opinion is equally important in that it provides that the state is liable for costs in successful condemnation cases only if the specific statute(s) in question provides for the state's liability, as is the case

with Section 28-4-291, *supra*.

County Commission May Not ImposeResidency Requirement UponClerical Employee of Probate Court

The attorney general has ruled that the Dale County Commission cannot, by resolution, impose a residency requirement upon clerical employees of the probate court when such employees are hired by the probate judge pursuant to the provisions of a local act which grants the hiring and firing authority to the judge. The opinion was dated March 11, 1981.

## SUPREME COURT CLERK OPINIONS

In Opinion No. 33, issued March 4, 1981, the clerk of the Supreme Court determined that when no action is pending, the filing of an award in arbitration in the circuit court pursuant to Article 1, Chapter 6 of Title 6, Code of Alabama 1975, is a filing which requires the payment of a docket fee pursuant to Rule 7, Alabama Rules of Judicial Administration.

In Opinion No. 34, issued April 2, 1981, the clerk of the Supreme Court determined that the fees provided in Rule 40(A) of the Alabama Rules of Judicial Administration govern all court reporters. The opinion specifically concluded that Rule 40, *supra*, authorized the court reporter to charge a fee of \$1.65 for the preparation of the original impression for each page of the reporter's transcript and \$.10 (10¢) per page for each copy thereof in proceedings on appeal to the Court of Civil Appeals, the Court of Criminal Appeals and the Supreme Court.

## MISCELLANEOUS LEGAL NOTES

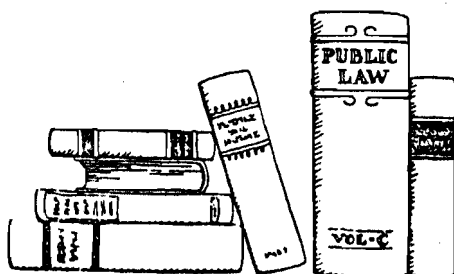
Rule 12 of TemporaryCriminal Rules Suspended

Effective April 6, 1981, Temporary Rule 12, Rules of Criminal Procedure, has been suspended until further orders of the court.

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## LEGAL NOTES



## MISCELLANEOUS LEGAL NOTES

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Oral Argument to be Allowed in

The Discretion of the Appellate Court

Effective in all cases submitted for decision in an appellate court subsequent to Oct. 2, 1981, Rule 34 (a) of the Alabama Rules of Appellate Procedure shall be amended to read as follows:

(a) IN GENERAL: Oral argument shall be allowed in all cases unless it be determined by the court to which the appeal is taken from examination of the briefs and record that oral argument is unnecessary.

Oral argument will be allowed unless the court, or the panel to which the case is assigned, unanimously agrees that:

(1) the appeal is frivolous; or  
(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Any party to an appeal who desires oral argument shall so request on the last page of his brief and shall place the words "ORAL ARGUMENT REQUESTED" conspicuously on the front cover of that brief. Any party so requesting oral argument shall file a statement with his brief setting forth reasons why, in the opinion of that party, oral argument should be heard.

Participation in the Clerks' and  
Registers' Supernumerary Fund

Is Mandatory

On March 16, 1981, the Montgomery County Circuit Court ruled that Act No. 80-676 is unconstitutional under Section 105 of the Alabama Constitution.

Act 80-676 attempted to exempt a circuit clerk from participation in the Clerks' and Registers' Supernumerary Fund and permit him to transfer all of his credible service to the Employees' Retirement System and participate therein. The court determined that because this act purported to address matters provided for and covered by general law codified in Alabama Code, Section 12-17-145, et seq, the act was in derogation of Section 105 of the Alabama Constitution of 1901. (cv-80-1515-p)

Release and Discretionary

Bond Schedule Amended

Effective April 6, 1981, Subsection D of Rule 2 of the Alabama Rules of Judicial Administration has been suspended until further orders of the court.

**ALABAMA JUDICIAL INQUIRY COMMISSION  
SYNOPSIS OF ADVISORY OPINIONS**

Below are synopses Nos. CII through CIV issued in the month of April by the Alabama Judicial Inquiry Commission.

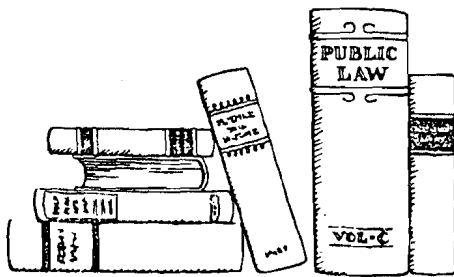
SYNOPSIS CII--May a retired judge on active or inactive status hold office in the Alabama Legislature?

OPINION--The Canons do not apply to inactive retired judges (Section D, Compliance with the Canons); however, Canon 7A(2) would prohibit retired judges on active status from being a member of the Alabama Legislature.

SYNOPSIS CIII--Should a judge recuse himself when the local school system has filed a lawsuit for declaratory judgment in connection with certain orders of pro-roration and the judge's daughter's salary

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## LEGAL NOTES



## ALABAMA JUDICIAL INQUIRY COMMISSION SYNOPSIS OF ADVISORY OPINIONS

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as a teacher in the local school system would be affected by the outcome of the proceedings?

OPINION--Yes, recusal in this instance would be required under Canon 3C(1)(d)(ii). Since proration of state appropriations for local education agencies would, under the issues of the lawsuit, affect the judge's daughter, the daughter is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

SYNOPSIS CIV--May a recently appointed judge remain as administrator of an estate or have partial settlement and have someone else appointed administrator of this estate?

OPINION--Under Canon 5D, a judge may serve as the administrator of an estate so long as such service will not interfere with the proper performance of the judge's judicial duties. However, should the judge continue to serve as administrator of the estate for a fee, payment of his fee should be made separate and apart from any payment made to his old law firm for acting as attorney for the administrator.

### NOTES FROM THE APPELLATE BENCH

The following issues were argued before the Supreme Court of Alabama in April.

**FREE PRESS--PUBLIC RECORDS**--Was newspaper reporter entitled to see financial record of a university corporation formed "to promote the public relations of Jacksonville State University?"

At issue is whether the records were "public writings" within the purview of Code 1975, Section 36-12-40, and whether the information sought was available to the public generally. (80-211, Ernest Stone v. Consolidated Publishing Co.)

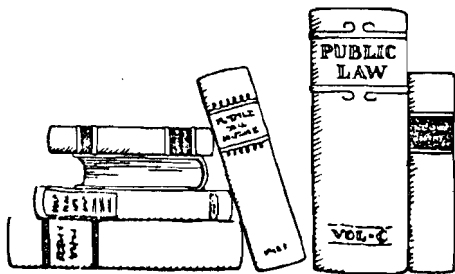
**FORFEITURE--BOAT OWNED BY CORPORATION**--Shrimp boat owned by corporation seized under Code 1975, Section 20-2-93, and forfeited because of its use as a conveyance of contraband (marijuana). Questions presented include whether initial warrantless entry of vessel was "unreasonable," whether post-seizure delay in filing the petition for forfeiture and condemnation was reasonable and whether two individuals who owned 50 percent each of stock of subchapter S corporation which owned the vessel established that the use of the vessel for transporting a controlled substance took place without their knowledge or consent. (80-12, Nicaud v. State)

**"HOLD HARMLESS" AGREEMENT--WORKMEN'S COMPENSATION**--Whether a "hold harmless" agreement executed by contractor and owner could indemnify owner who was sued by employee of contractor for injuries allegedly caused by fall when ladder, which injured employee claimed owner knew or should have known was unsafe, broke. Employee was paid workmen's compensation benefits by his employer's workmen's compensation carrier. Whether the "hold harmless" agreement could be enforced to indemnify a person against his own negligence. Whether negligent tortfeasor, who has been sued by an injured workman, has the right, under Alabama law, to bring a third-party action against the workman's employer, based on a hold harmless agreement entered into between the tortfeasor and the employer. (80-47, Stauffer Chemical Company v. McIntyre Electric Service)

**PARTNERSHIP--GENERAL CONTRACTORS**--Whether a partnership, which does not hold a valid general contractor's license under Code 1975, Sections 34-8-1 et seq., may recover under a construction contract. (79-830,

*(Continued On Page 11)*

## LEGAL NOTES



## NOTES FROM THE APPELLATE BENCH

*(Continued From Page 10)*

Twickenham Station, Inc. v. Jim Larry Beddingfield, et al.)

COMMERCIAL TRANSACTION--CONFLICT OF LAWS--Whether Georgia creditor, which was required to rebate unearned interest pursuant to Alabama Mini-Code provisions was entitled to have a Georgia law apply. Sub issues: Whether the assignee of a conditional sales contract is governed by a different choice of laws than its assignor; whether the UCC Article Nine choice of law rule, "where the chattel is located," should apply irrespective of where the contract was made or performed; whether it contravenes Alabama policy to permit a foreign credit seller to escape the mandates of the Mini-Code when the credit buyer and the goods are located in Alabama? (79-861, Simmons Machinery Co. v. M & M Brokerage, 79-889, M & M Brokerage, Inc. v. Credit Alliance Corp., 79-891, Credit Alliance Corp. v. M & M Brokerage, Inc.)

INTOXICATING LIQUORS--LOCAL ACT--Whether Act 689 (1977) which requires beer manufacturers to name a wholesaler and territory (alleged to assist Jefferson County in collecting its tax on beer) violates Sections 104 and 105 of Alabama Constitution, and the due process, equal protection and commerce clauses of the Federal Constitution. (79-956, Jefferson County, Ala. v. Wayne Braswell, et al.)

HOMESTEAD--GENDER CLASSIFICATION--Whether Code of Alabama 1940 (Recompiled 1958), Title 7, Section 663 (authorizing a widow to set apart a homestead) is violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution because of its gender-based classification. (80-137, Ransom, et al. v. Ransom)

HOSPITAL INSURANCE--"MEDICALLY NECESSARY"--Whether "medically necessary" exclusion in hospital policy was applicable, as a matter of law, in view of testimony of doctor who had admitted patient to the hospital that, in his opinion, it was not "medically necessary" that the patient be hospitalized. (80-68, Blue Cross-Blue Shield v. Haggard)



## AUDIT SUMMARY OF EMPLOYEE LEAVE ACCOUNTING CARDS

*(Continued From Page 3)*

out the state Judicial System.

A number of administrators did not submit copies of leave request and approval forms along with the leave accounting cards as required.

Numerous instances were noted of failure to enter the leave taken in the date blocks of the calendar section of the cards.

Many cards with entries in the calendar section did not have the type of leave properly coded. The most glaring deficiency was the failure to use the codes for personal sick leave (SP) and sick other (SO).

Many cards had incorrect balances brought forward from the 1979 accounting cards. There were numerous instances of errors in addition and subtraction.

Letters to individual administrators were prepared reporting errors so corrections could be made to the balances carried forward to the 1981 leave accounting cards of affected employees.

While the audit was satisfactorily completed, improvements in the reporting are needed. Administrators, when necessary, are encouraged to improve leave accounting procedures and to ensure that the leave privilege is not abused. There is a joint responsibility for proper leave accounting shared by the individual employee and his administrator. However, the primary responsibility is that of the administrator. If an administrator does not insist that every absence be properly documented at the time using an approved leave request and approval form, proper accounting is difficult. Since money is involved, the same scrupulous attention given to accounting for state money should be given to leave accounting for employees.

## STATEWIDE JUROR COSTS REDUCED

A recent analysis of juror fees expended during fiscal year 1979-1980 reveals a 4.4 percent decrease in costs over the previous year. Total juror fees expended for the year was \$1,734,858 for a net de-

crease of \$75,473 from the previous year. Juror expenses have decreased each fiscal year since statewide fiscal records have been maintained.

Chief Justice C.C. Torbert commented, "I'm pleased that the trial judges of the state have consistently saved money in juror expenses while caseloads have increased an average of nine percent yearly. It is evident that many of our judges have become aware of the expense of the jury system and have implemented measures to reduce costs."

Certain judges are to be particularly complimented for their achievements in this area. Presiding Circuit Judge Carlton Mayhall and Circuit Judge Bobby Aderholt of the 25th Judicial Circuit posted the greatest percentage reduction with a 43 percent decrease. The 6th Judicial Circuit realized the greatest dollar savings at \$11,000. Circuit Judges are Claude Harris, presiding, Jerome B. Baird, Joseph A. Colquitt, Louis Lackey and Fred W. Nichol. Other circuit courts following closely in the \$10,000 savings range were the 10th Judicial Circuit, Birmingham Division, the 29th Judicial Circuit and the 14th Judicial Circuit. The circuit expending the least amount in juror fees was the 24th Judicial Circuit composed of Fayette, Pickens and Lamar Counties with Circuit Judge Clatus K. Junkin, presiding.

Following is a listing of all counties in descending order according to costs expended in juror fees (mileage included):

Jefferson/Birmingham, Mobile, Montgomery, Etowah, Madison, Tuscaloosa, Jefferson/Bessemer, Calhoun, Morgan, Walker, Lee, Colbert, Russell, Shelby, Marshall, Baldwin, Cullman, Talladega, Lawrence, Covington, DeKalb, Houston, Limestone, Coffee, Lauderdale, Jackson, Macon, St. Clair, Blount, Clarke, Marion, Dallas, Escambia, Pike, Tallapoosa, Franklin, Chambers, Elmore, Washington, Monroe, Coosa, Choctaw, Dale, Chilton, Conecuh, Randolph, Marengo, Barbour, Cherokee, Autauga, Wilcox, Henry, Clay, Butler, Cleburne, Geneva, Bibb, Crenshaw, Greene, Hale, Lowndes, Winston, Pickens, Perry, Sumter, Bullock, Fayette and Lamar.

The 31st (Colbert) and 39th (Limestone) Judicial Circuits are the latest courts selected to participate in the Juror Utilization/Management Incentive Program.

# Court strikes down 'tender years presumption'

From Staff, Wire Reports

**MONTGOMERY** — A Calhoun County child custody case has led the Alabama Supreme Court to rule that certain legal presumptions favoring women in custody suits are unconstitutional because they discriminate against men.

The ruling, issued Friday, strikes down a long-held standard in Alabama law that "all things being equal, the mother is presumed to be best fitted to guide and care for children of tender years."

The court declared that this "tender years presumption" "represents an 'unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex.'"

IN AN opinion written by Associate Justice Hugh Maddox, the court said, "By requiring fathers to carry the difficult burden of affirmatively proving the unfitness of the mother, the presumption may have the effect of depriving some loving fathers of the custody of their children, while enabling

some alienated mothers to arbitrarily obtain temporary custody."

The court's ruling reverses a lower court's decision granting Alice Beth Clark Devine of Golden Springs, a Fort McClellan employee, the custody of her two sons, 8-year-old Patrick and 5-year-old Timothy.

Then-Calhoun County District Judge Sam Monk awarded custody of the children to Mrs. Devine on July 6, 1979 while acknowledging that either she or her estranged husband, Jacksonville State University faculty member Christopher P. Devine, would be "a fit and proper person" to be vested with the children's care.

BUT IN granting custody to Mrs. Devine, Monk noted that "there exists in Alabama law a presumption that when dealing with children of tender years, the natural mother is presumed, in absence of evidence to the contrary, to be the proper person to be vested with custody of such children."

Monk's decision, issued for the family division of county circuit court, was upheld

March 5, 1980 by the Alabama Court of Civil Appeals.

Friday's 7-1 decision by the Supreme Court sets Monk's decision aside and orders the appeals court to reconsider its ruling.

The "tender years" presumption has had the effect of meaning children generally were awarded to the mother when the father was equally fit to have parental custody. The father, in such cases, has had to prove the mother was not as fit a parent as he was.

THE COURT'S ruling had not been read by attorneys for either of the Devines late Friday. But both agreed it could have an impact on future child custody cases statewide.

Henry Agee of Anniston, Devine's attorney, said, "It (the ruling) puts both persons on equal footing so that the court, in determining custody, can look to the best interests of the children. Neither parent will be put in the position of having to show the other is an unfit person."

"I THINK the tender years doctrine is

something that should be taken under consideration along with several other factors in custody cases," said J. Todd Caldwell of Anniston, Mrs. Devine's attorney. "I think it will tend to give the fathers a better chance at getting children. Whether that's good or bad I can't say. Some fathers could do quite well as a single parent."

Caldwell noted the Supreme Court had told him Friday it had issued a long list of guidelines for use in future custody cases. "I'm satisfied that if the trial court tries the Devine case again and follows those directives, they will reach the same decision (giving the children to Mrs. Devine.)"

Monk, now a circuit court judge, said Friday, "I think the decision is probably a landmark decision from an academic and a constitutional standpoint, but not from a practical standpoint. It (the 'tender years presumption') had gotten so weak in the latter years, that I don't think it tilted the scales that much."

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THE ANNISTON STAR

## Closer view

The job of divorce judge in Alabama became a little harder last week and not just due to rising case loads. A perceptive child-custody decision written by Associate Justice Hugh Maddox returned to them a responsibility from which they had largely escaped.

Until then, we were among 22 states in which young children normally go to the mother after a divorce. A judge might reverse that ordinary state of affairs, but he needn't even consider it unless she were unfit.

In practice, the father usually had to go on the attack and convince the court the woman was a menace to the children and that he, on the other hand, could save them. If he did nothing, she got them.

The state Supreme Court ruled with only one dissent that this time-honored system violates the U.S. Constitution in that it discriminates against fathers. Instead, trial judges must, from now on, decide every time what's best for the child without what was often a mere sexist crutch.

If that word, sexist, raises hackles, consider the results. Divorce was tragic even when it was less common, and most of us over the years have run across a helpless father watching from a distance what he believed to be damage to his children.

As sometimes happens when an political operative settles into the judicial life, Justice Maddox brings a practical world view to the inevitable scholarship. He notes we have gone from one extreme to the other: when the country was young, the father usually got children.

The child's age was irrelevant (there were always wet nurses for hire); the mother who left the household in which she belonged left alone because no foster father would be expected to care for a child's wellbeing with diligence equal to the real father's.

This fact was so obvious to all that she'd not be likely even to ask for custody unless the father was a scoundrel of the most public sort.

It wasn't until the last century that judges began to question whether "to hold nature in contempt, and snatch helpless, pulling infancy from the bosom of an affectionate mother, and place it in the coarse hands of the father."

Eventually, the pendulum swing carried us to laws like one in Alabama which assumed with hardly a question that children belong with the mother until they are at least seven.

That was the sort of case before the court. Both parents were well educated, responsible and in every way qualified to take the children. So the judge gave them to the mother for no reason other than their age.

Now he has it back with instructions to "consider ... the needs of each child ... home environments offered ... the interpersonal relationships ... etc."

He may decide the same way after all the evidence is weighed, but the decision won't be locked to the blind attitudes at either lofty extreme of that pendulum swing. Justice Maddox just nudged it back to the center.

The view from the bottom may lack clarity, but it's a lot closer to the real world.

## Bo Torbert makes sense

Chief Justice C.C. (Bo) Torbert of the Alabama Supreme Court feels that the public often wrongly interprets media reports on violence and crime as a lack of concern on the part of the judicial system.

He emphasized that point during a recent talk before members of the Press Club of Mobile. The chief justice agreed however that "all is not perfect in the court system of the state and nation." He made a great deal of sense when he suggested that one solution to reducing crime in the future was to educate students at

an early age on the state's laws and courts.

This is an idea whose time has come and the state is already experimenting with such a program in some schools. Torbert, to his credit, would like to see the program significantly expanded.

The system may be better than it was, as he claims, but Alabama still needs more state prisons and more criminals in them instead of running loose. Even Chief Justice Torbert must admit that the criminal justice system in this country is not containing the crime rampage.

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