ARKANSAS BAR EXAMINATION

FEBRUARY, 1999

2 Pages

30 Minutes

CRIMINAL LAW AND PROCEDURE

Jim Sellers is suspected of being a drug dealer at the Arkansas Department of Corrections. Guard overhears Sellers tell inmate Tom Byers that he can get him an ounce of "crank" for $2,500, and hears Byers say: "I want it. My girlfriend will pay your girlfriend for it on the outside, and then you get it in to me."

Guard tells the warden, who tells the prosecutor, who charges Sellers and Byers for "Conspiracy to Deliver Methamphetamine."

Out in the exercise yard, a month after you and F. Lee Bailey were appointed to represent Sellers and Byers, Chuck E. Fromage, the prison "rat," overheard Sellers and Byers talking. "My lawyer tells me that the stupid prosecutor forgot to charge us with an overt act. My lawyer says we'll go to court and walk on this one," Sellers tells Byers.

Fromage snitches to the warden. The prosecutor tells Fromage: "See if you can learn anything more about these guys."

The next day, Fromage overhears Byers say: "It's a good thing the cops didn't check my girlfriend's savings account. They would have found a $2,500 withdrawal and that would really put us in the grease."

The prosecutor filed an amended information adding an overt act, viz. "That in furtherance of the above conspiracy, Byers had his girlfriend, Trayla Parke, withdraw $2,500 from her savings account to pay for the methamphetamine." The prosecutor explains the circumstances under which he came to learn of the defect in his case, and adds Chuck E. Fromage to his witness list. The judge turns to you and says "Counselor, just like the bar examiners I'll give you 30 minutes to think of a response to this new information. If you passed the criminal law part of the bar exam, you should be able to tell me:

(a) why even this amended complaint, adding the overt act, does not charge a substantive offense; and

(b) why, even if it did, I should suppress the evidence of Fromage, which the prosecutor says is the only evidence of any overt act that he has.

Give the judge his answer. Whatever you do, don't argue that there's some kind of Miranda

violation arising out of Chuck E. Fromage's evidence, because neither the judge nor the bar examiner thinks there is. But if you're really stumped about how to argue to suppress the evidence with Miranda tied behind your back, then consider answering this alternate question:

(c) Assuming that there are no problems with proving an overt act, could the prosecutor get a conviction against Sellers and Byers if instead of charging them with "Conspiracy to Deliver Methamphetamine," he had charged them with "Conspiracy to Introduce Contraband Into a Correctional Facility?"

State clearly whether you are answering (a) and (b) or (a) and (c).

ANSWER

CRIMINAL LAW AND PROCEDURE

February, 1999

1. Conspiracy

At common law, conspiracy is defined as

1. An agreement between 2 or more persons

(plurality requirement)

2. With the intent to achieve a criminal objective.

Common law does not require an overt act for conspiracy, although some jurisdictions do require an overt act modernly.

Validity of the Substantive Offense Charged

"Conspiracy to deliver methamphetamine" requires an agreement to "deliver" drugs, which means that at least 2 persons would have to agree to deliver "crank." Here, only Sellers agreed to deliver the drugs. Byers did not agree to deliver, rather he agreed to receive the "crank," upon payment by his girlfriend. Therefore, the plurality requirement for the crime charged is not satisfied, even if an overt act is added in the complaint.

This argument is akin to, but not exactly the same as, the Wharton rule where, for conspiracies to commit certain crimes (such as dueling, bigamy, adultery), which require at least 2

participants, one more additional person is necessary in order for there to be a conspiracy.

Had the charge been "conspiracy to introduce contraband into a correctional facility, then the plurality element could arguably be satisfied.

b) Miranda was meant to protect against interrogation in an inherently-coercive police-dominated environment, not to protect against statements made to other inmates which happen to be overheard. Furthermore, custodial interrogation is required - Miranda does not apply to volunteered statements.

6th Amendment Right to Counsel

6th Amend. right to counsel attaches once formal charges have been filed. The facts tell us Byers & Sellers had been charged with conspiracy.

Waiver of 6th Amend. Right to Counsel required an actual waiver - i.e., the intentional relinquishment of a known right.

Fromage was acting as a government agent at the time he overheard Byers speak of the $2,500 withdrawal. The statement Byers made should be suppressed because it violates the 6th Amend. right to counsel under Massiah and represents an invalid waiver.

ARKANSAS BAR EXAMINATION

FEBRUARY, 1999

1 Page

30 Minutes

TORTS

Jim was on his way to the lake for a day of fishing. En route, he stopped at "Lunkers" Market for supplies. Jim slipped and fell on a wet spot beside the fruit stand and injured his back. A witness to the fall told Jim that he had been in the market each day for the past two days and heard other customers complain to the owner about this same wet spot.

Jim gathered himself and thought he felt well enough to continue on his fishing trip. Jim was driving his 1983 Foxworthy truck with two gas tanks which were placed outside the perimeter of the steel frame of the vehicle by the manufacturer. Jim was enjoying the scenery and wasn't watching his driving that closely. Rufus, traveling at a slow rate of speed, slowly veered across the center line and hit Jim causing the Foxworthy truck's gas tanks to explode and destroy the

truck. Jim suffered a broken leg and severe burns. Jim was hospitalized for one month and was not able to return to his job for five months.

Official documents revealed that in 1980, employees of Foxworthy Motors Corporation, acting within the scope of their employment, had warned Foxworthy Motors Corporation, designer and manufacturer of said vehicle, of the hazard presented by the location of the gasoline tanks outside the perimeter of the frame.

Jim has contacted you for advice concerning his legal rights and possible remedies against "Lunkers" Market, Rufus and Foxworthy Motors Corporation. Please discuss the issues and how you would advise Jim.

ANSWER

TORTS

February, 1999

Jim v. Lunkers

Jim has a possible personal injury action against Lunkers based upon negligence. Negligence requires the following elements to be established: (1) duty, (2) breach, (3) causation (But for and proximate) and (4) damage.

Duty?

Here Lunkers (as a business) owes its customers a duty due to all business invitees which requires Lunkers to provide a reasonably safe location, warn of possible dangers and inspect the premises for defect on a reasonable basis. So, Lunkers has a duty to Jim.

Breach?

Here, Jim slipped and fell on a wet spot. The issue becomes whether the fact the wet spot was present constitutes a breach. No place must provide an absolute safe environment but the premises must be reasonably safe so a jury question is present. The fact Jim was told for "2 days" other customers complained about the "same" wet spot will be very strong evidence that the store breached its duty by not cleaning up a known hazard or inspecting with regular frequently to discover such.

Causation?

- But for - here, "but for" the wet spot Jim would not have fell and injured his back, thus, but for established.

- proximate - here, Jim must establish that the wet spot was the closely temporal connected reason he suffered his back injury. I believe this is possible because of the almost

instantaneously cause and effect illustrated here.

Damages?

Unlike intentional torts damages for negligence are not assumed. Therefore, Jim must establish by a preponderance of the evidence (just like which is necessary for all the other elements) the extent of his injuries. If done, Jim could receive pain and suffering, medicals, lost wages, and punitive if Lunkers conduct was malicious. Of course, Lunkers will argue that all of Jim's injuries ware caused by the accident with Rufus.

Jim V. Rufus

Again, a negligence action against Rufus lies and the elements are the same as previously discussed.

Duty?

Rufus owes a duty of reasonable care to other roadway travelers.

Breach?

Rufus breached this duty when he veered across the center line and struck Jim.

Causation?

But for - but for the veer no accident would have occurred is pretty clearly established.

Proximate - the temporal connection is also here so still established as well.

However, this is where the Foxworthy suit may come in. Rufus may argue that he was not the proximate cause because he was traveling very slowly and that the intervening cause was the shoty engineering which resulted in a design defect by Foxworthy. Rufus may also assert comparative fault (Jim not paying attention) reduce by %.

Damages?

Jim, if successful in proving above elements, could receive pain, suffering, medicals, future medicals, lost wages, and his wife, if married may sue for loss of consortium.

Jim v. Foxworthy

Products defect suit against Foxworthy probably lies. Foxworthy as a manufacture has a duty not to put on the market inherently dangerous products (design defect which makes defective) without adequate warning of such. Here, Foxworthy knew about the design defect. Also, Foxworthy is imputed with foresight knowledge as to defects and this is easily established because of the Foxworthy internal memorandum of warning. Once the product (truck) is declared defective (wrong place to put gas tanks), Jim is entitled to damages. These would include: medicals (past and future), lost wages, pain and suffering, permanent scaring (i.e. burns) and punitives. Here, punitives are available if Jim can establish by a preponderance of the evidence that Foxworthy acted malicious in putting the car on the road. This seems easily done when the memo is taken into account.

One more thing, back to the comparative fault analysis in Jim v. Rufus - in Arkansas, comparative fault is an affirmative defense which Rufus must assert as such and if he is successful in showing Jim was partially at fault then Jim's recovery against Rufus will be reduced by the % of Jim's own negligence for failure to keep a careful look-out.

ARKANSAS BAR EXAMINATION

FEBRUARY, 1999

1 Page

30 Minutes

CONTRACTS

Sam ran an ad in the local newspaper: "222 Main Street: House and lot for sale, 3 bedrooms, 2 baths - $40,000; Sofa and chairs for sale - $450." Call 222/222-2222. A called Sam and said: "I know the house and lot and accept your offer on the house and lot and on the sofa and chairs." Sam said: "We have a deal."

The next day, B, soon to be eighteen years old, called Sam and asked about the items for sale. When he was told that A had already bought them, B said: "I'll pay you $41,000 for the house and lot and $550 for the sofa and chairs." Sam said: "We have a deal." B brought Sam a check for $500. On the check is written: "Earnest money - house and furniture." Sam said he would bring a written agreement for B to sign as soon as he could get it prepared. Sam deposited the check in the bank.

B told C that he had bought the property and the terms of the transactions. The next day C came to Sam's house with a written contract wherein he agreed to pay $42,000 for the house and lot and $600 for the sofa and two chairs. C expressed concern about the quality of the chairs and Sam told C he would throw in an additional chair at no additional cost. As the contract was being signed, C had second thoughts again and told Sam that he wanted out of the deal unless Sam would include a refrigerator in the sale. C agreed. C and Sam signed the contract reflecting two chairs. Sam accepted an earnest money check. An hour later C called Sam and again said he had changed his mind. Sam said he would include the bedroom furniture as well. C agreed.

A and B maintain that they have each bought the property as advertised. C maintains that he has bought the house and lot, a sofa and three chairs, a refrigerator and the bedroom furniture. As attorney for each of them, what issues do you see, against whom would you file suit, and what relief would you seek?

ANSWER

CONTRACTS

February, 1999

In order to have a valid, enforceable contract, we must have an offer, an acceptance, a concurrence of offer and acceptance, valid consideration, and no adequate defenses.

The general rule is that an advertisement is not an offer but an invitation for an offer, unless it addresses with particularity who may accept. This does not, so the offer occurred when A called Sam. A valid acceptance was made by Sam. It was backed by valid consideration (a promise to pay), but one problem - there is a defense. Since this is a contract for the sale of real property, it falls within the Statute of Frauds and must be in writing and signed by the party charged (the defendant). No exceptions are available because A never took possession of the property, made improvements, or paid a substantial part of the sales price. His interest only goes so for as the chairs, because they are personal property, that contract is valid and not within the Statute of Frauds.

As to B, contracts made by minors are voidable by them, but they cannot be voided by the other party. The contract with B appears to be more valid because, although it is oral also, B has partially tendered performance by giving a check for $500. However, he has not taken possession of the realty, and his interest does not go to the personalty which has already been contracted validly to A. Besides, the contract for the furniture had to be in writing because the UCC applies to the conveyance of goods, and the Statute of Frauds in the UCC applies when those goods are sold for more than $500, as here.

C has a better chance of prevailing, because his contract was in writing. The only issue here is whether the parties validly rescinded their contract, entered in again, and whether the final written document is a fully integrated document that reflects all the terms in the contract. The Parol Evidence Rule says that evidence of other oral agreements (side agreements) is inadmissible when it is nowhere found in a fully integrated agreement unless they would not normally be found there. These items of furniture do, and should be there.

But, if the parties have a partially integrated agreement, then parol evidence is admissible if it is consistent with the terms. Since they seem to be adding items to the purchase, the Parol Evidence Rule would probably not keep this evidence out. It may be a valid modification.

In close, a valid contract exists between A and Sam for the sale of the sofa and chairs for $450. And a valid contract exists between C and Sam for the property, bedroom furniture, refrigerator, and all that they discussed. C would be a better client because his only problem would be whether he gets the sofa and chairs, which he doesn't even think are that nice. Moreover separate consideration not required for modifying UCC contracts.

ARKANSAS BAR EXAMINATION

FEBRUARY, 1999

2 Pages

30 Minutes

EVIDENCE

Donna Danner has sued Henry Hunter and the World Wide Data Corporation ("WWDC") for battery arising out of an alleged incident of sexual harassment.

Donna Danner alleges that on July 1, 1998, on her first day of work at WWDC as a temporary receptionist, Henry Hunter, the chief executive officer for WWDC, stopped at her desk and introduced himself.

According to Ms. Danner, a few minutes later Mr. Hunter summoned her to his private office. Ms. Danner further alleges that Mr. Hunter told her that he was the man in charge, and that if anyone at that company wanted to advance, they had to get his approval. Ms. Danner further alleges that Mr. Hunter complimented her on how good she looked and suddenly put his arms around her and kissed her. Ms. Danner alleges that she pushed Mr. Hunter away, and returned to her desk.

Ms. Danner's law suit has been filed in an appropriate circuit court in the State of Arkansas. All events occurred in the State of Arkansas. In order to prevail on her claim of battery, assume that Ms. Danner must prove the following: (1) that Mr. Hunter touched Ms. Danner in a harmful or offensive manner; (2) that Mr. Hunter was acting within the scope of his authority as the chief executive officer for WWDC at the time of the occurrence; (3) that WWDC knew or should have known of Mr. Hunter's propensity to make unwelcome sexual advances upon female employees; and (4) that Ms. Danner suffered injuries and damages as a result of Mr. Hunter's actions. Mr. Hunter has denied all allegations and contends that Ms. Danner's claim is a fabrication. Only Ms. Danner and Mr. Hunter know for certain what, if anything, happened between them.

Through office gossip, Ms. Danner heard that Mr. Hunter was reported to have undergone psychological treatment for alleged uncontrollable impulses to have sex with his female employees. The psychologist was reported to be Dr. Joyce, and the treatment was rumored to have ended about two months before Ms. Danner's alleged encounter with Mr. Hunter. Due to a European tour, Dr. Joyce was not available for a pre-trial deposition. Mr. Hunter has acknowledged that Dr. Joyce has been his treating psychologist, but Mr. Hunter denies that his treatment had anything to do with his alleged uncontrollable sexual impulses. Mr. Hunter contends that he only saw Dr. Joyce for marital counseling.

The case is now at trial. You have been retained to represent Mr. Hunter. The plaintiff has subpoenaed Dr. Joyce to the trial and plans to call Dr. Joyce as her next witness. The plaintiff wants to elicit Dr. Joyce's testimony as to the reasons for which Mr. Hunter sought treatment. If it develops that Mr. Hunter sought treatment for uncontrollable impulses to have sex with female employees, then the plaintiff intends to elicit statements that Mr. Hunter may have made to Dr. Joyce during his treatment as to unwelcome sexual advances that he may have made against other female employees. The purpose of the testimony would be to show that Mr. Hunter has a pattern of making unwelcome sexual advances against female employees. The plaintiff hopes that such testimony will buttress her claim that Mr. Hunter made unwelcome advances against her as alleged. As counsel for Mr. Hunter, what evidentiary objections would you make to prevent the testimony of Dr. Joyce? State the legal and factual bases for your objections.

ANSWER

EVIDENCE

February, 1999

As counsel for Mr. Hunter there are several evidentiary objections I would make to attempt to prevent the admission of the testimony of Dr. Joyce, including: privileged communication, Rule 403 unfair prejudice, and objections relating to Dr. Joyce's status as a possible expert witness.

I would first assert that any communications made by Mr. Hunter to Dr. Joyce were privileged communications. This is my strongest objection. Although the Federal Rules of Evidence don't expressly recognize any privileges, they do permit states to adopt them; and Arkansas does recognize the doctor/patient privilege. The general rule is that communications made by a patient to a doctor are privileged and may not be testified to if they were made during the course of or in furtherance of medical treatment, if the doctor relied on them for treatment of the patient, and if the privilege has not been waived. This doctor-patient privilege extends to include the psychotherapist-patient relationship.

Mr. Hunter's treatment by Dr. Joyce would fulfill all of these requirements, whether he was treated for marital counseling or uncontrollable urges. Any communications Mr. Hunter made to Dr. Joyce were made during and in furtherance of his treatment, and Dr. Joyce's treatment was based on those communications, and under the facts provided the privilege has not been waived. While there are several exceptions to this privilege: communications to a doctor not for treatment purposes but for evaluation only; seeking treatment to aid a crime; if the patient has put his medical condition into issue; or if the litigation is between the doctor and patient. But none of these exceptions apply here.

I would try to use this exception to prevent all of Dr. Joyce's testimony: instances of Mr. Hunter's past behavior, and his reason for seeking counseling, if the reason was his uncontrollable urges. If he truly only was seeking marital counseling I would want to have that testimony admitted. I would probably be successful in keeping the specific incidents evidence out but the reason for the counseling may be admitted.

The second objection I would make is a Rule 403 unfair prejudice objection. While all relevant evidence is generally admissible, Rule 403 says that some relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issue, or needless presentation of cumulative evidence.

Under the facts presented I would argue that the danger of unfairly prejudicing the jury would be very high if this evidence were admitted. A jury would be possibly misled as to the significance of Dr. Joyce's testimony of Mr. Hunter's prior sexual misconduct. And even if her testimony related only to marital problems, that would reflect negatively and unfairly on my client. In contrast the probativeness of Dr. Joyce's testimony is relatively low. Even if she testifies that Mr. Hunter has made advances in the past, it is not relevant to his conduct toward Ms. Danner, which is the true issue. Of course plaintiff's attorney would argue the opposite: that establishing a pattern of behavior is very relevant.

The final possible objection I would make would deal with Joyce's status as an expert witness. I could only raise them if plaintiff intended to elicit an opinion from Dr. Joyce about Hunter's psychological problems. If they did, I would voir dire Dr. Joyce as to her qualifications and

object if I felt she weren't qualified as an expert. I could not object that her testimony would go to the ultimate question of the case. This is only impermissible in criminal trials where the expert opinion involves the mental state of a defendant at the time of the crime.

ARKANSAS BAR EXAMINATION

FEBRUARY, 1999

1 Page

30 Minutes

CONSTITUTIONAL LAW

House Bill 1077 (HB1077) will be voted on this legislative session. It reads as follows:

A person commits disorderly conduct when that person knowingly:

Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session is concluded, provided, that this act does not prohibit peaceful picketing of any school involved in a labor dispute.

You are counsel for a high profile legislator who is known for her expertise as a constitutional scholar. She intends to run for governor in the future and it will be a political disaster for her to vote for a bill that a court might later find to be unconstitutional. HB 1077 is being railroaded through the legislature and will be voted on at 11:00 a.m. today. At 10:00 a.m., your boss asks you to write a short memo stating: (1) whether this bill will withstand a constitutional challenge; and (2) explaining the reasons for your conclusion. Your boss needs a focused memo - one that she can understand easily, so that she can defend the position she takes, and retain her reputation as a constitutional scholar.

ANSWER

CONSTITUTIONAL LAW

February, 1999

1. This bill will not be constitutional because it has a content based restriction of speech in it.

The First Amendment guarantees us the freedom of speech. However there are situations in which speech can be regulated through legislation. There are two kinds of restrictions that can be placed on speech. Content-neutral restrictions and content-based restrictions.

Content neutral restrictions are restrictions placed on speech not because of the substantive nature of the speech, but because of the time, place, and manner the speech is being given. The test to determine whether a content neutral statute is constitutional is intermediate scrutiny. Law must be substantially related to an important government interest.

Here, in the problem, we have a public place, so state has a right to regulate here.

The state has a substantial relation to the important issue of educating our children. The speech isn't being banned, it is just being limited to the time, ½ hour before and ½ hour after the school opens and closes. Based on this alone, I would say the bill was constitutional.

HOWEVER:

There is a content-based element to the statute. Peaceful picketing regarding labor issues is permitted here, if the speech does not regard labor, it is banned. For a content-based statute to be constitutional, the government has to have a necessary relation to a compelling interest. The burden is on the state to give a compelling reason. Here, if they can allow peaceful labor pickets, then they should allow peaceful pickets by the P.T.A., etc.

ALSO:

There is also a 14th amendment equal protection problem. Here, you are denying speech to anyone not involved in a labor dispute. The 14th amendment provides equal protection under the law. Other groups cannot be denied access here.

If I was the legislator, I would either amend the bill to allow peaceful picketing for everyone, or delete the picketing by the labor groups. If none of those work, scrap it all.

ARKANSAS BAR EXAMINATION

FEBRUARY, 1999

2 Pages

30 Minutes

PROPERTY

James Madison purchased lands in 1935 from George and Martha Washington. The land was located in Small County, Arkansas. James married Dolly in 1943 and in 1944 they conveyed one acre to the Rural Chapel and Ima Preacher for the following purposes:

That a church be built on said property and that all Christian denominations or organizations have free use of said building for such purposes. If said building is not erected within five years after the cessation of World War II, the one acre of land described herein shall revert to the Grantors, their heirs, executors, administrators and assigns.

Dolly relinquished all of her interest and dower rights in the property. The conveyance was recorded.

Nothing was ever constructed on the acre except for a foundation for a building. The property then grew up in weeds, brush and trees and has been abandoned for well over 30 years.

On September 1, 1945, James executed and recorded a Deed to his wife, Dolly, to convey the lands obtained from the Washingtons including the land conveyed to Rural Chapel and Ima Preacher. This Deed contained a defective legal description. In 1946, two weeks before he

celebrated his third wedding anniversary with Dolly, James died intestate and without issue.

Dolly subsequently delivered a Deed to the property to Thomas Jefferson. However, this Deed does not appear in the record.

Dolly died testate in September of 1997. The only family Dolly had was four nephews by marriage (James' nephews) - Joe, Jack, Bobby and Teddy. In her Will Dolly left the land in question to the home for Wayward Presidents, LLC.

On January 15, 1999, Rural Chapel applied for a building permit to construct a church house on the land described in James Madison's Deed to Rural Chapel and Ima Preacher back in 1944.

Rural Chapel, Thomas Jefferson, the Home for Wayward Presidents, LLC, and Joe, Jack, Bobby and Teddy all end up in litigation alleging that, in fact, they are the true owners of this land.

Who wins and Why? Discuss your answer thoroughly.

ANSWER

PROPERTY

February, 1999

James Madison gave Mr. Chapel and Mrs. Preacher a fee simple and reserved in himself a reverter interest. In this situation, a condition is set by the grantor and if that condition is not met, the title automatically reverts back to the original grantor. Here because the condition was not met, (no church had been built by the end of the war) the land automatically reverted back to Mr. Madison. Reverter interest are fully vested and are not subject to the rules against perpetuities. Madison has the property.

Next, James Madison's transfer to wife Dolly. To have an effective deed, it has to have a valid legal description of the property. If the description cannot readily ascertain the piece of property, it's void for vagueness. Here, the deed is probably void.

Thus, when James Madison died intestate, the land was distributed according to the intestacy statute. Dolly under intestacy statutes would get (since they apparently have no children) ½ of the real property in F.S.A. and ½ of all personal property (her dower share). Since the marriage of Dolly and James was for less than three years Dolly is not entitled to all of the remaining intestate share. James' nephews, Joe, Jack, Bobby and Ted would each take according to a per stirpes by representation. They will only get half of the remaining share, Dolly gets the other half. So, all in all, in effect, Dolly owns 3/4's (½ dower + 1/4) and the nephews in aggregate own 1/4 of the real estate.

Dolly delivered to Thomas Jefferson a deed to the property. However, this deed was defective and Thomas didn't record it. Also Dolly could only have transferred 3/4ths of the property at this time. Dolly then died testate, leaving her interest in the land to the Wayward Presidents. This is valid. They take her 3/4th interest in the land as tenants in common with the four nephews.

Rural Chapel has nothing. Thomas Jefferson has nothing.

NOTES:

1. There is no mention of a recording statute, so I assumed that the last person to take without notice has a superior right to all others. From the question neither Thomas Jefferson or the Wayward Presidents gave value for the land, so I held the Wayward Presidents the winner.

2. Also, if at the beginning, if James only had a right of re-entry and not a reverter interest, Chapel would win because James never exercised right.