

7455

Quinn Mackburn

VS.

L. C. Huley

JURY LIST - DECEMBER 4, 1967 TERM - BALDWIN COUNTY

- ~~1. Anderson, Evar, Civil Service, Elberta~~
- ~~2. Aylin, E. Mack, International Paper, Bay Minette~~
- ~~3. Booth, Robert E., Laborer, Fairhope~~
- ~~4. Cowline, W. B., Farmer, Robertsdale~~
- ~~5. Dvork, Joseph, Jr., Salesman, Belforest~~
- ~~6. Dyer, Ted, Mechanic, Fairhope~~
- ~~7. Ellison, W. V., Farmer, Robertsdale~~
- ~~8. Fackler, Paul W., Mechanic, Loxley~~
- ~~9. Frank, George, Farmer, Elberta~~
- ~~10. Gibbs, Floyd, Grocery Store, Bay Minette~~
- ~~11. Godwin, Dewey C., Mechanic, Bay Minette~~
- ~~12. Good, John, Jr., Farmer, Elberta~~
- ~~13. Hawkins, Ernest B., Public Accountant, Foley~~
- ~~14. Hodges, Willie Lee, Sawmill, Bay Minette~~
- ~~15. Hoffman, Winfred G., Court Emp., Bay Minette~~
- ~~16. Kelly, W. Marvin, Bank, Bay Minette~~
- ~~17. King, Vernon, Farmer, Robertsdale~~
- ~~18. Lager, J. E., Salesman, Foley~~
- ~~19. Lehman, Harold, Farmer, Summerdale~~
- ~~20. Lindsey, Walter M., Abstractor, Bay Minette~~
- ~~21. Lipscomb, Wilmer, Farmer, Magnolia Springs~~
- ~~22. Manning, Wesley W., Civil Service, Foley~~
- ~~23. Meszaros, Michael A., Retired, Elberta~~
- ~~24. Morse, Wilson W., Civil Service, Foley~~
- ~~25. Oswell, Charles, Timber & Oil, Spanish Fort - Daphne~~
- ~~26. Palmer, James J., Farmer, Robertsdale~~
- ~~27. Peterson, Morris Sidney, Farmer, Gateswood~~
- ~~28. Roberts, Howard, Civil Service, Stapleton~~
- ~~29. Salac, Tommy, Farmer, Robertsdale~~
- ~~30. Schroeder, Walter, Painter, Elberta~~
- ~~31. Smith, Orrie, Sr., Brookley Field, Daphne~~
- ~~32. Steele, Clyde Madison, Merchant, Bay Minette~~
- ~~33. Stephens, W. Henry, Millman, Stockton~~
- ~~34. Survant, Ray H., Civil Service, Lillian~~
- ~~35. Trawick, Emma D., Stapleton~~
- ~~36. Williamson, Huston, Civil Service, Elberta~~
- ~~37. Wright, Justice D., Forester, Stapleton~~
38. Capps, Curtis,
- ~~39. [unclear], [unclear]~~
- ~~40. Dean, Earl~~
- ~~41. Powell, Berley~~

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P XXXXX XX

D XXXXX X

GAINES E. MASHBURN,)	
Plaintiff,)	IN THE CIRCUIT COURT OF
vs.)	
L. C. HENLEY,)	BALDWIN COUNTY, ALABAMA
Defendant.	)	LAW SIDE. NO. 7455.
)	

ORDER:

This cause coming on to be heard on the motion to produce filed by the Plaintiff, pursuant to Title 7, Section 426, wherein the Plaintiff seeks the production by the Defendant of certain cancelled checks, closing statements and all other written documents and instruments arising from and evidencing that certain transaction wherein the parties to this cause and their respective wives, conveyed to A. A. Smith certain lands in Baldwin County, Alabama, and the Plaintiff having attached thereto an affidavit in such form as is required by law in which it is alleged that said cancelled checks, closing statements and other written documents and instruments are necessary and material and contain legal evidence bearing on the outcome of the issues involved in this cause;

And it further appearing to the Court that notice of this motion was served upon Wilters & Brantley, Attorneys at Law, Bay Minette, Alabama, Attorneys for the Defendant, by placing a copy of said motion in the United States Mail, properly addressed with postage prepaid on August 28, 1967;

And it further appearing to the Court that no exceptions or objections have been taken to the said motion or the affidavit presented to this Court; it is, therefore,

ORDERED, ADJUDGED AND DECREED by the Court that said motion to produce be, and the same is hereby granted and that the Defendant in this cause is hereby ordered and directed to produce for the inspection of the Plaintiff within ten (10) days from the date of this order, all cancelled checks, closing statements and all other

written documents and instruments evidencing that certain transaction wherein the parties to this cause conveyed certain lands in Baldwin County, Alabama, to A. A. Smith, by deed dated August 20, 1965, and recorded in Deed Book 360 at pages 232-33, Baldwin County, Alabama Records, in the Office of the Circuit Clerk of Baldwin County, Alabama.

DONE at Bay Minette, Baldwin County, Alabama, this 12th day of September, 1967.

John J. Madhewell
Judge.

FILED

SEP 4 1967

ALICE J. DICK CLERK
REGISTER

GAINES E. MASHBURN,	)	IN THE CIRCUIT COURT OF
Plaintiff,)	
vs.	)	BALDWIN COUNTY, ALABAMA
L. C. HENLEY,)	
Defendant.	)	LAW SIDE. NO. 7455.

MOTION TO PRODUCE UNDER TITLE 7, SECTION 426

Now comes the Plaintiff in the above styled cause, by and through his attorneys of record, and moves the Court to compel by order, the Defendant to produce at the trial of the above styled cause on December 6, 1967, the following papers or documents in his possession or power, which are necessary and material to the trial of said cause, containing evidence pertinent to the issues of said cause, to-wit:

1. Statement of Sale between Gaines E. Mashburn and L. C. Henley to A. A. Smith and Willie Mae Smith for the sale of that certain property described in the Bill of Complaint in said cause, which sets forth the sales price as \$50,000.00;
2. Statement of Sale between Gaines E. Mashburn and L. C. Henley to A. A. Smith and Willie Mae Smith for the sale of that certain property described in the Bill of Complaint in said cause, which sets forth the sales prices as \$60,000.00
3. Original check numbered 126, in the amount of \$687.76, dated August 27, 1965, drawn by L. C. Henley on "L.C. Henley Special" account, and payable to Gaines E. Mashburn.
4. Original check numbered 129, in the amount of \$500.00 dated September 8, 1965, drawn by E. Tew on "L. C. Henley Special" account, and payable to Gaines E. Mashburn.

OWENS AND PATTON
 By: *James Owens, Jr.*
 Attorneys for Plaintiff.

FILED

NOV 22 1967

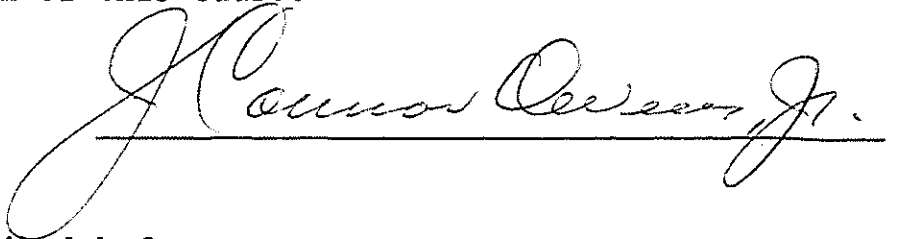
739

ALICE J. DUCK CLERK
 REGISTER

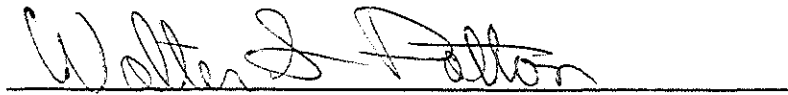
STATE OF ALABAMA

BALDWIN COUNTY

Before me, the undersigned authority, within and for said State and County, personally appeared J. Connor Owens, Jr., known to me and who being duly sworn, deposes and says that he is of counsel for the plaintiff in the foregoing cause, and as such has knowledge of the facts set out in the foregoing motion; that the documents therein described contain evidence pertinent to the issues in this cause and that they are necessary and material to a proper disposition of this cause.

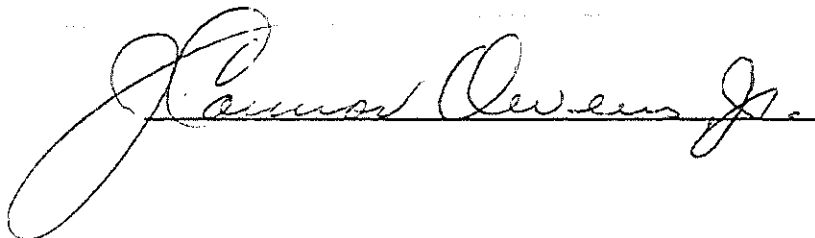


Sworn to and subscribed before me
this 22nd day of November, 1967.



Notary Public, Baldwin County, Alabama.

I, the undersigned, one of the attorneys of record for the plaintiff in the foregoing cause, do hereby certify that I have served a copy of the foregoing motion on Wilters & Brantley, the attorneys of record for the Defendant in said cause by United States Mail, properly addressed, with postage prepaid, this 22nd day of November, 1967.



GAINES E. MASHBURN,

Plaintiff,

vs.

L. C. HENLEY,

Defendant.

X

IN THE CIRCUIT COURT OF

X

BALDWIN COUNTY, ALABAMA

X

AT LAW

X

CASE NO. 7455

X

DEMURRER

Comes now the Defendant in the above styled cause and files these his demurrers to the Plaintiff's Bill of Complaint and for each court thereof separately and severally, says:

1.

That it does not state a cause of action.

2.

Each count describes the real property, which was the subject of the sale set out in the Bill of Complaint, but fails to allege what personal property was sold.

MOONEYHAM & MOONEYHAM
ATTORNEYS FOR DEFENDANT

BY: 

WILTERS & BRANTLEY
ATTORNEYS FOR DEFENDANT

BY: 

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 8th day of May 1967 served a copy of the foregoing pleading on counsel to parties to this proceeding by mailing the same by United States Mail, properly addressed, and first class postage prepaid.

WILTERS & BRANTLEY

By: 

FILED

MAY 9 1967

ALICE I. WALKER, CLERK
REGISTER

GAINES E. MASHBURN,)	
	)	IN THE CIRCUIT COURT OF
Plaintiff,)	
vs.	)	BALDWIN COUNTY, ALABAMA
L. C. HENLEY,)	
	)	LAW SIDE. NO. 7455
Defendant.)	

MOTION TO PRODUCE

Comes the Plaintiff and respectfully moves this Honorable Court to enter an order directed to the Defendant, L. C. Henley, directing him to produce before the trial of this cause and within ten days from the granting of this motion, all cancelled checks, closing statements and all other written documents and instruments arising from and evidencing that certain transaction wherein Gaines Mashburn and L. C. Henley, and their respective wives, conveyed to A. A. Smith a certain parcel of land lying in Baldwin County, Alabama, and being more particularly described in that certain deed from the parties to this cause to A. A. Smith, dated August 20, 1965, and recorded in Deed Book 360 at pages 232-33, Baldwin County, Alabama Records, and Plaintiff avers that he is informed and believes and upon such information and belief, avers that said materials, instruments, documents and checks are in the possession and under the control of the Defendant.

Plaintiff alleges that there is attached hereto marked Exhibit "A" and incorporated herein by reference, the affidavit of necessity and materiality of the said cancelled checks and other written instruments and documents requested to be produced by said Defendant and which contain legal evidence bearing on the issues involved in this cause.

WHEREFORE, THE PREMISES CONSIDERED, the Plaintiff prays that this Honorable Court will be pleased to issue an order directed to the Defendant, L. C. Henley, requiring him to produce the said cancelled checks, closing statements and all other written documents and instruments and all other related matter to the transaction hereinabove mentioned within ten (10) days from the granting of

this motion.

OWENS AND PATTON

By:

Richard Owens, Jr.
Attorneys for Plaintiff.

I, the undersigned, one of the attorneys of record for the Plaintiff in this cause, do hereby certify that I have served a copy of the foregoing motion on Wilters & Brantley, Attorneys of Record for the Defendant, by placing a copy of the same in the United States Mail, properly addressed, with postage prepaid, this 18th day of August, 1967.

Richard Owens, Jr.

FILED

AUG 28 1967

ALICE J. DUCK

CLERK
REGISTER

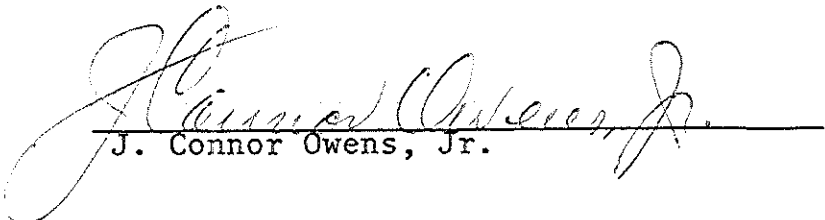
EXHIBIT "A"

STATE OF ALABAMA

BALDWIN COUNTY

Before me, the undersigned authority within and for said State and County, personally appeared J. Connor Owens, Jr., who is known to me and who, being first duly sworn, deposes and says on oath as follows:

This litigation involves an action for fraud and deceit arising from the sale of certain property by the Plaintiff and the Defendant, in which litigation the Plaintiff alleges that a certain sum of money was received by the Defendant over and above that represented by the Defendant to the Plaintiff that had been received from the said of said property situated in Baldwin County, Alabama. Affiant is informed and believes and upon such information and belief avers that Defendant has in his possession and under his control certain documents, cancelled checks, and instruments in writing evidencing the settlement of the transaction mentioned hereinabove in an amount substantially in excess of that represented by the Defendant to the Plaintiff and affiant further alleges that such documents, cancelled checks and other written instruments, including closing statements contain material evidence for the Plaintiff in the trial of this cause and affiant further alleges that it is necessary that these documents and instruments be produced prior to the trial of this cause in order that the Plaintiff may adequately present and prepare for such trial.


J. Connor Owens, Jr.

Sworn to and subscribed before
me this 28 day of August, 1967.



Notary Public, Baldwin County, Alabama.

FILED

AUG 28 1967

ALICE J. DUCK
CLERK
REGISTER

GAINES E. MASHBURN,)	
	)	IN THE CIRCUIT COURT OF
Plaintiff,)	
vs.	)	BALDWIN COUNTY, ALABAMA
L. C. HENLEY,)	
	)	LAW SIDE.
Defendant.	)	7455

COUNT ONE:

The Plaintiff claims of the Defendant the sum of THIRTY THOUSAND DOLLARS (\$30,000.00) as damages for deceit, arising from the sale of certain personal property and real property situated in Baldwin County, Alabama, described as follows:

Lots 3, 4, 5, 6, 45 and the South one-third of Lot 7, Block 2, Gulf Pines Unit of Gulf Shores; said lots being shown on a plat of survey of Blocks 1 to 14, inclusive, Division 2 of Gulf Pines, Gulf Shores, Baldwin County Alabama. Said land lying in Section 8, Township 9 South, Range 4 East, as recorded May 18, 1953, in the Office of the Judge of Probate, Baldwin County, Alabama. Also described as: Beginning at a point of the Southwest corner of Third Avenue (now West Twenty-second Avenue), and Alabama Highway No. 3 (now Alabama Highway No. 59) as shown on a map of Southport Unit of Gulf Shores, Alabama, recorded in Map Book 1 at page 151, in the Office of the Judge of Probate of Baldwin County, Alabama, running thence South 100 feet along the West boundary of Alabama Highway No. 3 (now Alabama Highway No. 59) for a point of beginning for the property herein described; running thence South 200 feet along the same boundary line of Alabama Highway No. 3 (now Alabama Highway No. 59); running thence West 200 feet along a line parallel with and 300 feet South of the South boundary line of Third Avenue (now Twenty-second Avenue); running thence North 200 feet on a line parallel with and 200 feet West of the West boundary line of Alabama Highway No. 3 to a point 100 feet South of Third Avenue; running thence East on a line parallel with and 100 feet South of the South line of Third Avenue for a distance of 200 feet to the West boundary line of Alabama Highway No. 3, the point of beginning.

The Plaintiff and Defendant were tenants-in-common and partners in the operation of a certain motor court located on said property in Gulf Shores, Alabama, known as Koonce Motor Lodge for a period beginning March 4, 1963, until the matter complained of herein; that sometimes in July, 1965, the exact date thereof being unknown to Plaintiff, the Plaintiff and Defendant orally agreed that said property should be sold and said Defendant undertook to

find a purchaser for said property; that said Defendant represented to the Plaintiff that he had located a purchaser, one A. A. Smith, for said property, willing and able to pay to the Plaintiff and the Defendant the sum of Fifty Thousand Dollars (\$50,000.00); that the Defendant represented to the Plaintiff that said sum so offered was the best price possible for said property; that as a result of such representations of the Defendant to the Plaintiff, the Plaintiff, on August 20, 1965, in Baldwin County, Alabama, executed a deed to the said purchaser and his wife, and delivered the same to the Defendant in Baldwin County, Alabama, said transaction to be finally closed by the Defendant in behalf of the Plaintiff; the Plaintiff, having trust and confidence in the integrity of the Defendant, relied on the Defendant to close said transaction and Plaintiff further alleges that without his consent or knowledge, the Defendant sold said property to said purchaser for the sum of Sixty Thousand Dollars (\$60,000.00) instead of Fifty Thousand Dollars (\$50,000.00) as represented to him; Plaintiff further alleges that Defendant knew at the time said representations were made to Plaintiff and at the time said transaction was concluded that the said purchaser would pay the sum of Sixty Thousand Dollars (\$60,000.00) for said property and he did not inform the Plaintiff of such, but on the contrary, furnished him with a statement indicating a purchase price of Fifty Thousand Dollars (\$50,000.00); Plaintiff further alleges that discovery of the wrong complained of was not made by him until March 19th, 1967, when he borrowed from the purchaser his copy of the closing statement and ascertained the fact that said property was sold in excess of the sum represented to him by Defendant, hence this suit.

COUNT TWO:

The Plaintiff claims of the Defendant the sum of THIRTY THOUSAND DOLLARS (\$30,000.00) as damages for fraud, arising from the sale of certain personal property and real property situated in Baldwin County, Alabama, described as follows:

Lots 3, 4, 5, 6, 45 and the South one-third of Lot 7, Block 2, Gulf Pines Unit of Gulf Shores; said lots being shown on a plat of survey of Blocks 1 to 14, inclusive, Division 2 of Gulf Pines, Gulf Shores, Baldwin County, Alabama. Said land lying in Section 8, Township 9 South, Range 4 East, as recorded May 18, 1953, in the Office of the Judge of Probate, Baldwin County, Alabama. Also described as: Beginning at a point of the Southwest corner of Third Avenue (now West Twenty-second Avenue), and Alabama Highway No. 3 (now Alabama Highway No. 59) as shown on a map of Southport Unit of Gulf Shores, Alabama, recorded in Map Book 1 at page 151, in the Office of the Judge of Probate of Baldwin County, Alabama, running thence South 100 feet along the West boundary of Alabama Highway No. 3 (now Alabama Highway No. 59), for a point of beginning for the property herein described; running thence South 200 feet along the same boundary line of Alabama Highway No. 3 (now Alabama Highway No. 59); running thence West 200 feet along a line parallel with and 300 feet South of the South boundary line of Third Avenue (now Twenty second Avenue); running thence North 200 feet on a line parallel with and 200 feet West of the West boundary line of Alabama Highway No. 3 to a point 100 feet South of Third Avenue; running thence East on a line parallel with and 100 feet South of the South line of Third Avenue for a distance of 200 feet to the West boundary line of Alabama Highway No. 3, the point of beginning.

The Plaintiff and Defendant were tenants-in-common and partners in the operation of a certain motor court located on said property in Gulf Shores, Alabama, known as Koonce Motor Lodge for a period beginning March 4, 1963, until the matter complained of herein; that sometimes in July, 1965, the exact date thereof being unknown to Plaintiff, the Plaintiff and Defendant orally agreed that said property should be sold and said Defendant undertook to find a purchaser for said property; that said Defendant represented to the Plaintiff that he had located a purchaser, one A. A. Smith, for said property, willing and able to pay to the Plaintiff and the Defendant the sum of Fifty Thousand Dollars (\$50,000.00); that the Defendant represented to the Plaintiff that said sum so offered was the best price possible for said property; that as a result of such representations of the Defendant to the Plaintiff, the Plaintiff, on August 20, 1965, in Baldwin County, Alabama, executed a deed to the said purchaser and his wife, and delivered the same to the Defendant in Baldwin County, Alabama, said transaction to be finally closed by the Defendant in behalf of the

Plaintiff; the Plaintiff, having trust and confidence in the integrity of the Defendant, relied on the Defendant to close said transaction and Plaintiff further alleges that without his consent or knowledge, the Defendant sold said property to said purchaser for the sum of Sixty Thousand Dollars (\$60,000.00) instead of Fifty Thousand Dollars (\$50,000.00) as represented to him; Plaintiff further alleges that Defendant knew at the time said representations were made to Plaintiff and at the time said transaction was concluded that the said purchaser would pay the sum of Sixty Thousand Dollars (\$60,000.00) for said property and he did not inform the Plaintiff of such, but on the contrary, furnished him with a statement indicating a purchase price of Fifty Thousand Dollars (\$50,000.00); Plaintiff further alleges that discovery of the wrong complained of was not made by him until March 19th, 1967, when he borrowed from the purchaser his copy of the closing statement and ascertained the fact that said property was sold in excess of the sum represented to him by Defendant, hence this suit.

OWENS AND PATTON

By: *James Owens, Jr.*
Attorneys for Plaintiff.

Plaintiff demands a trial of this
cause by Jury.

James Owens, Jr.
Attorneys for Plaintiff.

FILED
APR 7 1967
ALICE L. JACK, CLERK
REGISTER

WE-THE-JURY
FIND-FOR-THE
DEFENDANT

FOREMAN

Charles E.
Osmell

SUMMONS AND COMPLAINT

MOORE PRINTING CO., BAY MINETTE, ALA.

STATE OF ALABAMA

Baldwin County

Circuit Court, Baldwin County

No.

.....TERM, 19.....

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You Are Hereby Commanded to Summon L. C. HENLEY
..... c/o L. C. Henley Memorial Company
..... Mount Meigs Road
..... Montgomery, Alabama
.....
.....

to appear and plead, answer or demur, within thirty days from the service hereof, to the complaint

filed in the Circuit Court of Baldwin County, State of Alabama, at Bay Minette, against.....

..... L. C. HENLEY Defendant.....

by GAINES E. MASHBURN
.....

....., Plaintiff.....

Witness my hand this 7th day of April 19 67.

..... 64-4-10-67 Alice D. Duck Clerk

No. 7455

Page.....

STATE OF ALABAMA

Baldwin County

CIRCUIT COURT

GAINES E. MASHBURN

Plaintiffs

vs.

L. C. HENLEY

Defendants

SUMMONS AND COMPLAINT

Filed APRIL 7 19 67

Clerk

M. S. Butler, Sheriff of Montgomery

County, Alabama, Claim \$1.50 each* for

1 process(es) and \$1.00

travel expense on each of 1

process(es) or a total of \$2.50

OWENS AND PATTON

Plaintiff's Attorney

Defendant's Attorney

Defendant lives at

Mount Meigs Road

Montgomery

Received In Office

APR 10 1967

M. S. BUTLER, Sheriff

19.....

Sheriff

I have executed this summons

this 4-10 19 67

by leaving a copy with

L. C. Henley

Deputy Sheriff

Sheriff

Deputy Sheriff

GAINES E. MASHBURN,
Plaintiff,

vs.

L. C. HENLEY,
Defendant.

X

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

X

X

AT LAW

X

CASE NO. 7455

X

Comes now the Defendant in the above styled cause
and amends his answer to the Complainants Bill of Complaint
and particularly to Counts 1 and 2 thereof, by adding the
following plea:

2.

That said cause of action set out in Counts 1 and
2 is barred by the statute of limitations of one year.

WILTERS & BRANTLEY

BY: 

Attorneys for the Defendant

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 1st December,
1967 served a copy of the foregoing pleading on all for all
parties to this proceeding by mailing the same by United State
Mail, properly addressed, and first class postage prepaid.

WILTERS & BRANTLEY

By: 

FILED

DEC 1 1967

ALICE J. DUCK CLERK
REGISTER

GAINES E. MASHBURN,)	
Plaintiff,	)	IN THE CIRCUIT COURT OF
vs.)	
L. C. HENLEY,	)	BALDWIN COUNTY, ALABAMA
Defendant.	)	LAW SIDE. NO. 7455.

ORDER TO PRODUCE:

This cause coming on to be heard on the motion to produce filed by the Plaintiff in this cause, wherein the Plaintiff seeks the production at the trial of said cause, certain documents, checks and instruments more fully described in the verified motion of the Plaintiff; and it appearing to the Court that said motion was duly served upon Wilters and Brantley, Attorneys at Law, Bay Minette, Alabama, the attorneys of record for the Defendant in said cause, by placing a copy of the same in the United States Mail, properly addressed with postage prepaid on the 22nd day of November, 1967, and it further appearing to the Court that no exceptions or objections have been taken to the said motion, it is, therefore,

ORDERED, ADJUDGED AND DECREED by the Court that said motion to produce be, and the same is hereby granted and the Defendant herein is hereby ordered to produce at the trial of said cause on December 6, 1967, the following instruments:

1. Statement of Sale between Gaines E. Mashburn and L. C. Henley to A. A. Smith and Willie Mae Smith for the sale of certain property described in the Bill of Complaint in this cause which sets forth the sales price as \$50,000.00;
2. Statement of Sale between Gaines E. Mashburn and L. C. Henley to A. A. Smith and Willie Mae Smith for the sale of certain property described in the Bill of Complaint in this cause, which sets forth the sales price as \$60,000.00;
3. Original check numbered 126, in the amount of \$687.76, dated August 27, 1965, drawn by L. C. Henley on "L. C. Henley Special" account, and payable to Gaines E. Mashburn.

4. Original check numbered 129, in the amount of \$500.00 dated September 8, 1965, drawn by E. Tew on "L. C. Henley Special" account, and payable to Gaines E. Mashburn.

DONE this 29th day of November, 1967.

Gaines E. Mashburn
Circuit Judge.

FILED

NOV 29 1967

ALICE J. DUCK CLERK
REGISTER

.2632 After carrier has proved services contracted for were actually performed, shipper cannot successfully contend that exclusive-use-of-vehicle service does not materially differ from truckload service since the former is advantageous and may be more expedited. Thus, exclusive-use tariff applies in preference to truckload tariff even though vehicle is loaded to capacity.

Garrett Freightlines v. U. S. ('64), 236 F. Supp. 594 (DC-Ida.), 16 FED. CAR. CASES ¶ 81,697.

.27 The question of a precedence of the exclusive-use-of-vehicle rule over classification ratings is considered and discussed.

A. G. F. Brill v. Super Service, 54 M. C. C. 721, 9 FED. CAR. CASES ¶ 32,557.

Broderick & Bascom Rope, 302 I. C. C. 347, 12 FED. CAR. CASES ¶ 34,181.

.29 Latherless (brushless) shaving cream.

—The ratings on "toilet preparations, N. O. I.", rather than on "soap, N. O. I." are applicable, since brushless shaving cream is not actually a soap.

Classifications—Shaving Creams, 48 M. C. C. 317, 6 FED. CAR. CASES ¶ 31,457.

.32 Less-than-truckload shipments occupying entire vehicle.—Where the consignor loaded the trailer to full capacity, the Commission held "that the l.t.l. rate still applies. 'In the absence of any tariff provision providing for the application of the truckload ratings and minima on less-than-truckload shipments occupying most, if not all, of the loading space in a vehicle, the carrier may not assess the higher charges based on the truckload rate and minimum.'"

Freight Transportation v. I. R. C. & D., 54 M. C. C. 470, 9 FED. CAR. CASES ¶ 32,452.

.321 Generally speaking, charges on a less-than-truckload shipment accorded the exclusive use of the vehicle should not exceed the charges applicable on a truckload shipment of the same commodity at the applicable truckload rate and minimum weight.

Broderick & Bascom Rope, 302 I. C. C. 347, 12 FED. CAR. CASES ¶ 34,181.

.322 Where a shipper requests exclusive use of a vehicle, where the bill of lading is so noted, where the entire shipment is loaded on a single vehicle, and where all tariff requirements for that service are performed, then there is no foundation for holding that the charges provided for such service are inapplicable because

Federal Carriers Reports

the shipment occupies the full capacity of the vehicle.

Applicability of Rates & Charges—M. R. & It., No. 34147, Apr. 10, 1963, 15 FED. CAR. CASES ¶ 35,603.

.34 Misquotation of rates.—The classifications and rates named in a carrier's duly approved and published tariff are binding by statute upon both the carrier and the shipper, and no conduct of the carrier or its agents or the shipper's ignorance of such rates will estop or prevent the carrier from collecting or relieve the shipper from liability for the proper published rate of which he is presumed to have knowledge. Further, when the controversy merely involves the question of whether or not the carrier has exacted the rate prescribed in its tariffs, courts have jurisdiction of the subject matter since there is no question affecting the power or administrative discretion or judgment of the Interstate Commerce Commission.

Union Transfer v. Renstrom ('49) 37 N. W. (2d) 383 (Neb. Sup.), 7 FED. CAR. CASES ¶ 80,554.

.341 Although ambiguity is resolved in favor of the shipper, the doubt must be a reasonable one and the language should not be subjected to a strained construction.

Bolin Drive-A-Way ('60), 283 F. 2d 697 (Cl. Ct.), 14 FED. CAR. CASES ¶ 81,344.

.35 An interstate motor carrier is legally bound to collect the rate charged for transportation based upon the applicable tariffs on file. The fact that the carrier misrepresents the weight of the goods or the total rate to be charged in making an estimate does not alter the legal obligation of the carrier to collect the rates as fixed by the applicable tariffs.

Horwitz v. Bekins, June 5, 1950 (DC-Cal.), 7 FED. CAR. CASES ¶ 80,612.

.36 A shipper cannot recover for the fraudulent representations of one soliciting business for a carrier or for breach of warranty, since the shipper is conclusively presumed to have knowledge of the lawful rates filed with the Commission. Consequently, he cannot claim that he relied on the rates quoted, and he was induced to ship the goods by misrepresentation of the legal rate. Moreover, he cannot claim that he was unaware of the lack of authority on the part of the one soliciting the shipment to quote an illegal rate.

Kelleher Car-Loading v. Muller ('54) 134 N. Y. S. (2d) 659 (N. Y. Sup. App. Div.), 10 FED. CAR. CASES ¶ 80,973.

¶ 183.35