

EMMA S. DRATH,

Complainant.

versus

PHILIP G. ARMSTRONG,

Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY,

ALABAMA.

IN EQUITY.

NUMBER 852.

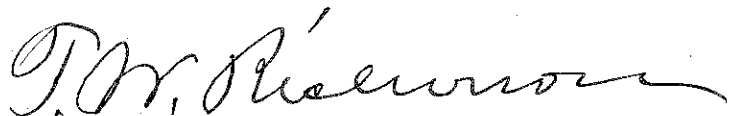
NOTE OF EVIDENCE.

At the hearing of this cause the following note of evidence was taken, to-wit:

FOR COMPLAINANT:

1. Original bill of complaint and all exhibits attached thereto.
2. Deposition of Mrs. Viola Carman.
3. Deposition of Mrs. Emma S. Drath and all exhibits attached thereto.
4. Deposition of Mrs. Marie Schaaf.
5. Deposition of Mrs. Lawrence Allen and all exhibits attached thereto.
6. Agreement between counsel as to consolidation of case of Emma S. Drath versus Josephine Johnson, et als., with case of Emma S. Drath versus Philip G. Armstrong.
7. Agreement between counsel as to submission.

ATTEST:



REGISTER OF THE CIRCUIT COURT OF BALDWIN  
COUNTY, ALABAMA.

EMMA S. DRATH,

COMPLAINANT,

vs.

PHILIP G. ARMSTRONG,

RESPONDENT,

IN THE CIRCUIT COURT OF BALDWIN  
COUNTY, ALABAMA, SITTING IN EQUITY.

No.

Comes the respondent, Philip G. Armstrong, and  
for answer to the bill of complaint says:-

TO THE FIRST PARAGRAPH. Respondent has no  
personal knowledge of the matters alleged in said paragraph, but  
on information and belief says that the property described, be-  
longed to Harry S. Boutell, who died leaving a widow, Mary L.  
Boutell, and two children, Sadie Boutell Tubbs and E. Linnie  
Boutell, and that there were some negotiations between said heirs,  
or some of them, and the complainant, for the purchase of said pro-  
perty under which Oscar Johnson paid said parties \$450.00 for  
said property, taking title to same in respondent's name, intend-  
ing to have the respondent transfer the property to Mrs. Drath  
when she should have repaid the said Johnson the amount so paid  
by him, with interest, including taxes and cost of abstract.

Respondent was the son-in-law of said Johnson  
and it was his custom to occasionally adopt this plan, but re-  
spondent did not learn of this transaction until after Mr. Johnson's  
death.

TO THE SECOND PARAGRAPH, Respondent says that  
his said father-in-law, Oscar Johnson, was not only the soul of  
honor, but big-hearted, and frequently did acts of kindness for  
others, and has many written acknowledgments to that effect from  
the complainant, and whatever was done for her in connection with  
the purchase of this property was done with her full knowledge  
and consent and at her request, and merely as an accomodation.

Respondent denies that the complainant furnished

the money to buy this property, but on the contrary says that Mr. Johnson, from time to time, loaned her money and in addition to paying for this property, also paid out a large amount in connection with property from Lawrence Allen, and while complainant did make some remittances to the said Johnson, no direction was given as to the application of same, and there is a large amount due from the complainant to the Estate of Oscar Johnson, by reason of such transaction.

TO THE THIRD PARAGRAPH. Respondent denies that there was any maneuvering done by him as therein alleged, but on the contrary knew nothing of this matter until after the death of the said Johnson, and stands ready and willing to convey to the said complainant, by quit claim, any interest he may appear to have in said property, upon the complainant paying to the Estate of said Oscar Johnson, whatever may be due from her.

TO THE FOURTH PARAGRAPH, Respondent says same is covered by his answers to preceding paragraphs.

  
SOLICITORS FOR RESPONDENT.

TO THE HONORABLE CIRCUIT COURT OF BALDWIN COUNTY,

ALABAMA, SITTING IN EQUITY:

Now comes your oratrix, Emma S. Drath, who is over the age of twenty-one years, and who resides in Baldwin County, Alabama, and brings this her bill of complaint against Philip G. Armstrong, who is also over the age of twenty-one years and resides in Baldwin County, Alabama, and shows unto Your Honor:

FIRST: Your oratrix shows unto Your Honor that Mary L. Boutell, being then the owner of:

"Lots Seven (7) and Eight (8) in Block Fifteen (15) and the south half of Lots Four (4) and Five (5) and Lot Six (6) in Block Fourteen (14); also Lot or Block Twenty-one (21) of Magnolia Beach Addition to Fairhope, Baldwin County, Alabama"

contracted to sell and convey the same to your oratrix for the sum of Five Hundred and no/100 (\$500.00) Dollars.

SECOND: Your oratrix further shows unto Your Honor that Oscar Johnson, who was then a resident of Baldwin County, Alabama, but who has since died, so ingratiated himself in your oratrix's confidence as to induce her to give him her general power of attorney and to entrust to him the management of all of her business affairs, and in this way he persuaded her to entrust to him the carrying out of this purchase, and your oratrix shows unto Your Honor that she provided the said Oscar Johnson, deceased, with the money with which to pay the purchase price of said lands for her, and that he did make said payments out of the moneys so provided by her.

THIRD: Your oratrix further shows unto Your Honor that owing to the said confidential relation between herself

and the said Oscar Johnson, deceased, the said Oscar Johnson persuaded your oratrix that as it was necessary to adjust certain tax sales, or other difficulties with the title, that it would be wiser for her to have said property conveyed to him, in order to enable him, as he claimed, to straighten out the title, and explained to her that he would then convey the same to her, and, in this way, the said Oscar Johnson, deceased, persuaded your oratrix to instruct the seller, Mary L. Boutell, to convey said property to the said Oscar Johnson, deceased, with the understanding that he would subsequently convey to her, but instead of carrying out this understanding the said Oscar Johnson, deceased, being unfaithful to his trust, and the said Philip G. Armstrong, who had no other connection with the matter, so maneuvered as to obtain a conveyance from the seller to the said Philip G. Armstrong, and the said seller did accordingly convey said property to the said Philip G. Armstrong, and he recorded his deed and now claims the property thereunder.

FOURTH: Your oratrix does not know and can not, therefore, state how the said Oscar Johnson and the said Philip G. Armstrong so imposed upon the seller, Mary L. Boutell, as to obtain a conveyance from her to this property, further than the fact that the said Oscar Johnson had induced the complainant to instruct the seller, Mary L. Boutell, to deed the property to Oscar Johnson, under the understanding already alleged, and the said Oscar Johnson and Philip G. Armstrong obtained said conveyance from the said Mary L. Boutell by some misrepresentation or trick, which the complainant can not explain further than the fact that this conveyance was obtained from the said Mary L. Boutell by leading her to believe that she was thereby performing her contract with the complainant, and that in executing said conveyance she was dealing with the complainant's representatives and acting in accordance with the complainant's wishes, all of which was entirely false. However, this conveyance was obtained; it was

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executed by Mary L. Boutell solely for the purpose of performing her contract to sell and convey the same to the complainant, and Philip G. Armstrong took the title in trust for the complainant under a deed a copy of which is hereto attached marked "EXHIBIT A", made a part hereof and now referred to.

PRAYER FOR PROCESS.

To the end, therefore, that equity may be done in the premises, your oratrix prays that the said Philip G. Armstrong may be made a party respondent to this your oratrix's bill of complaint, and that due process of subpoena be issued to and served upon him in accordance with the course and practice of this Honorable Court.

PRAYER FOR RELIEF.

Your oratrix further prays that upon the hearing of this cause this Honorable Court will ascertain and determine that your oratrix did provide the moneys with which the said Oscar Johnson, deceased, paid such purchase price; that he acted in said transaction entirely as her representative, and that the said Philip G. Armstrong may be decreed to hold said title as trustee for the complainant, and that he, the said Philip G. Armstrong, may be ordered and decreed to convey said property to your oratrix, or that the legal title thereto may be otherwise vested in your oratrix by the decree of this Honorable Court, and the said Philip G. Armstrong enjoined from further claiming any title or right to said lands, and that your oratrix may have such other and further relief as she may be entitled to receive, the premises considered, as in duty bound she will ever pray.

Harry Smith Rapp  
SOLICITORS FOR COMPLAINANT.

FOOT NOTE:-

The defendant, Philip G. Armstrong, is required to answer each and every allegation of the above and foregoing bill of complaint, from paragraph First to paragraph Fourth, both inclusive, but not under oath, oath as to such answer being hereby expressly waived.

*Harry Smith & Co.*  
\_\_\_\_\_  
SOLICITORS FOR COMPLAINANT.

"EXHIBIT A"

QUIT CLAIM DEED.

THIS DEED made the 25th day of April, 1927, between Mrs. Mary L. Boutell, widow of Harry S. Boutell, deceased, Miss E. Linnie Boutell (single) and Mrs. Sadie Boutell Tubbs, her two daughters, and Mr. W. G. Tubbs, her husband, of the first part, P. G. Armstrong, of the second part, WITNESSETH, That the party of the first part, in consideration of Five Hundred Dollars, to us in hand paid by the party of the second part, the receipt of which is hereby acknowledged, has remised, released and quit-claimed and by these presents do remise, release and forever quit-claim unto the said party of the second part his heirs and assigns forever, all the real property in Baldwin County, Alabama, described as follows, to-wit:

Lots Seven and Eight ( 7 & 8) Block Fifteen (15), and south-half of Lots Four and Five (4 & 5) and Lot Six (6) Block Fourteen (14); also Lot or Block Twenty-one (21) of Magnolia Beach Addition to Fairhope, Baldwin County, Alabama.

To have and to hold the said released premises unto the said party of the second part, his heirs and assigns forever: So that neither the said party of the first part heirs or assigns, nor any other person in trust for them or in their name shall or will, can or may, by any ways or means whatsoever, hereafter have or claim any right or title thereto; But That the said party of the first part his heirs and assigns, each and every one of them from all estate, right, title, interest or claim, and demand whatsoever, in or to the said premises, or any part thereof, are, is, and shall be, by these presents, Forever Excluded and Debarred.

In Witness Whereof, the party of the first part has here- unto set their hand and seal the day and year first above writ- ten.

Signed, sealed and de-  
livered in the presence  
of  
Chas. G. Shaffer,  
G. H. Marks

Mary L. Boutell (seal)  
E. Linnie Boutell (seal)  
Sadie Boutell Tubbs (seal)  
W. G. Tubbs (seal)



State of Florida,     }  
Brevard County.       }

I, Chas. G. Shaffer, a notary public in and for said county and State, hereby certify that Mrs. Mary L. Boutell, widow of Harry S. Boutell, deceased, Miss E. Linnie Boutell (single) and Mrs. Sadie Boutell Tubbs and W. G. Tubbs, her husband, whose names signed to the foregoing conveyance, and who known to me, acknowledged before me on this day that being informed of the contents of the conveyance they executed the same voluntarily on the day the same bears date.

Given under my hand this 25th day of April, 1927.

(Seal)

Chas. G. Shaffer, Notary Public.  
My Commission expires Dec.5, 1923.

State of Alabama,     }  
Baldwin County.       }

I, G. W. Humphries, Judge of Probate, for said county, hereby certify that the following privilege tax has been paid on the within instrument as required by Acts 1926 \$   cts 50.

G.W.Humphries, Judge of Probate,  
By J. L. Kessler, Clerk.

Filed for record May 3, 1927 at 1:00 P. M.

Recorded May 3, 1927.

G. W. Humphries, Judge of Probate.

JAN 21 1932

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1931-32.

1 Div. 666.

Emma S. Brath

v.

Phillip G. Armstrong, et al.,

Appeal from Baldwin Circuit Court,  
In Equity.

THOMAS, J.

The suits were to declare resulting trusts in lands and for general relief. The two cases were consolidated, by agreement, for convenience. One is styled the "Boutell Case" and the other the "Allen Case."

The appellant filed the two bills of complaint, and as consolidated by agreement, were so considered by the Court. One bill was against Phillip G. Armstrong individually, and the other against Josephine Johnson, Elvera C. Armstrong and Agnes

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E. Utter, who were the heirs of Oscar Johnson, deceased, and against Phillip G. Armstrong, as the Executor of his estate. In each case the appellant sought to enforce a trust, the first, upon certain property which she had purchased from Mrs. Mary L. Bontell, and the second, upon property which she had purchased from Mrs. Lawrence Allen.

It is alleged that Oscar Johnson acted as complainant's representative in carrying out these purchases, in the first of which Johnson took the title in his own name, and in the second, the name of his son-in-law, Phillip G. Armstrong.

It is the theory of these bills, that the complainant contracted to purchase the property, employed Oscar Johnson as her representative in each of these matters, and Johnson took the title to the Allen property in his own name, and that to the Bontell property in the name of his son-in-law Phillip G. Armstrong, as a method of securing that portion of the purchase price of the respective properties which he (Johnson) claimed he advanced for complainant.

The answer to the bill against Phillip G. Armstrong sets up that Oscar Johnson had advanced \$450.00 for the complainant on account of the purchase money of this property, and that he had taken the title to the property in the name of his son-in-law Phillip G. Armstrong, "intending to have the respondent transfer the property to Mrs. Drath (the complainant) when she should have repaid the said Johnson the amount so paid by him, with interest, including taxes and cost of abstract;" that <sup>at</sup> "Respondent was the son-in-law of said Johnson and it was his custom to occasionally adopt this plan, but respondent did not learn of this transaction

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until after Mr. Johnson's death;" that \* \* \* "Respondent says that his said father-in-law, Oscar Johnson, was not only the soul of honor, but big-hearted, and frequently did acts of kindness for others, and has many written acknowledgments to that effect from the complainant, and whatever was done for her in connection with the purchase of this property was done with her full knowledge and consent and at her request, and merely as an accommodation;" that "Respondent denies that the complainant furnished the money to buy this property, but on the contrary says that Mr. Johnson, from time to time, loaned her money and in addition to paying for this property, also paid out a large amount in connection with property from Laurence Allen, and while complainant did make some remittances to the said Johnson, no direction was given as to the application of same, and there is a large amount due from the complainant to the Estate of Oscar Johnson, by reason of such transaction."

The answer thus admits that the title was taken in the name of Armstrong for the purpose of securing the amounts advanced by Johnson on account of the purchase price of the property conveyed; yet, as we have indicated above, the offer to reconvey is conditioned upon the repayment of the money advanced on account of this purchase price, and upon the complainant's paying her indebtedness to Oscar Johnson, whether falling within the terms of this security or not. Notwithstanding the admission that the conveyance was made as a security for the repayment of this particular advance, the trial court concludes upon the whole evidence, that it was made with the understanding that this

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conveyance should stand as security for all debts existing or created of whatever character between the parties. That is to say, admits that the respective conveyances had been taken merely as security for advancements made on account of the purchase price of the property conveyed; that Johnson "not only assisted her in this instance, but also in the purchase of the Boutell property, and from time to time made loans to her, and though she did make some remittances to him, there was no direction as to whether same should be applied to the payment of said loans, or the balance due on said properties, and there is still a large amount due to the estate of Oscar Johnson in this connection, and upon the payment of same, respondents stand willing to make complainant proper conveyance."

The trial court expresses the opinion from the pleading indicated and the evidence, that the conveyances had been taken not only to secure the advancements on account of the purchase price of the respective properties, but that it was the further intent of the parties that it was to secure the payments of all indebtednesses of the complainant to Mr. Oscar Johnson, whether existing at the time the conveyances were executed or subsequently created per their agreement.

In the answer to the second bill of complaint, which we have quoted above, respondents, the heirs, representatives and administrator of the estate of Oscar Johnson, deceased, admitted that the conveyance of the Allen property to Oscar Johnson was executed and delivered to secure the balance of the purchase price advanced by Oscar Johnson on account of this property, and expressed the willingness of the respondents to reconvey upon such payment, when this and the other moneys so advanced were fully paid. That is, it was further averred in



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this answer that numerous payments had been made by the complainant to Oscar Johnson without any specific application thereof, and it appearing that Oscar Johnson had made some advancements on account of the purchase price of each piece of property, as well as other advancements that had no connection with either piece of property, and that the complainant had made a number of payments to Oscar Johnson without specific application thereof to any particular advancement, it was manifest that the consolidation of these causes was necessary, in order that both Armstrong, who held the Boutell property, and the heirs, the beneficiaries, and the administrator of the estate of Johnson, who held the Allan property, should all be heard upon proper application of each payment made by complainant. To meet this difficulty or confusion of advancements and payments, solicitors of record entered into an agreement for the consolidation of the causes, which was acted upon, ratified and adopted in the final decree of the court.

When the complainant seeks to "establish a resulting trust in land and for general relief," and the grantee in each conveyance admits that it was executed to secure advancements which had been made by a third person on account of the purchase price, and offers a conveyance to the complainant upon the payment of such advancements or proper application of payments made, we are impressed that an order of reference should be made to ascertain the amount of the indebtedness secured, to the end that the complainant might be permitted to pay off the debt and equitable liens required to clear the property and to redeem her property, -- all proper parties being before the court.

5.

This seems to us to be the necessary result of the allegations of the bill and the admissions in the answer, notwithstanding the agreement between the parties, as to the understanding with which the conveyances were taken in the name of Oscar Johnson and his son-in-law Phillip G. Armstrong, and notwithstanding the willingness of the defendants expressed in the respective answers to reconvey the property upon repayment of proper advancements made by Johnson and those on proper charges on said properties. And if any balance is found due on reference or equitable charge due by the complainant to Oscar Johnson or to his estate upon these properties, redemption should be allowed upon the payment by the complainant of the sum or sums so found to be due by her to said Johnson at the time of his death.

The bills of complaint, their considerations, and the respective answers invoked the court to adjust the rights and equities of the parties, in which an agent intrusted to look after the details of purchases has taken in his own name, or that of his son-in-law, the title to the respective properties which had been purchased by his principal, and this done for the purpose of securing a part of the purchase price, which he claimed to have advanced; and where the principals called for a reference and statement of the accounts, the enforcement of the respective rights to pay off the advancements and redeem the property (all

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necessary parties being before the court) without dismissal of the bills. Any other course or decree would permit Johnson to retain and keep the property without the ascertainment of whether or not the debt secured had been paid; and, if not, what balance remained thereon as affecting the respective lands.

To further illustrate the necessity for such accounting, the effect of the decree dismissing these bills would leave the title of the land in question, in one instance, in the heirs of Johnson, and in the other instance in Armstrong, who has no interest in the matter whatever. The complainant purchased the land, but the land was not conveyed to her, but to another to secure advancements by Johnson; thus an accounting is necessary that the complainant's indebtedness secured by the conveyance be ascertained and permitted of payment, as sought by the parties before the court. It is necessary that a judicial ascertain be had as to the amount of money the complainant should be required to pay in order to redeem either piece of her property, and it is only in this way that an agreement and understanding by the parties, as set forth in the bill and in the answer, may be had, -- an agreement as to whether she was required to repay only the sums advanced in the purchase, or to pay the larger balance, including all of her indebtedness to Mr. Johnson at the time of his death.

The right of the complainant to maintain a bill for an accounting, in order to redeem her property from a mortgage or trust to secure payment, is not dependent upon the disallowance of an item of credit against her, which item could only increase the amount of the balance due by her, and could not deprive her



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of the right of paying whatever balance might be found due and to be paid on redeeming her property.

We may say upon the pleading that a court of equity regards beneficiaries of a trust as necessary parties in a bill to establish respective interests (Hodge v. Joy, 207 Ala. 193, 204; Laback v. Ft. Payne Bank, 115 Ala. 447, 458; Drake v. Sprague, 221 Ala. 150, 153; Town of Carbon Hill v. Harris, 204 Ala. 522), and that the trustee under such a trust is a person necessary as a party. - American Insurance Co. v. Newberry, 215 Ala. 587; Rice v. Rice, 106 Ala. 636; Alabama City, G. & A. Ry. Co. v. Ayie, 202 Ala. 552.

The court will not render a final decree in the absence of necessary parties. - Garner v. Empire Land Co., 217 Ala. 529; Whithead v. Boutwell, 215 Ala. 100; Exall v. First Nat. Bank of Russellville, *Id.* 452; Pate v. Hall, 230 Ala. 411.

In Gilbert v. Daniel, 32 Ala. 314 [332], Mr. Justice Walker observed that,

"The court, for the mere nonjoinder of parties defendant, should not have dismissed unqualifiedly without affording an opportunity to amend. - Gibbs v. Labuan v. Frost & Dickinson, 4 Ala. 720; Lucas v. Bank of Darien, 2 St. 326; Hugely v. Robinson, 10 Ala. 703; Alderson v. Harris, 12 Ala. 586; Toulmin v. Hamilton, 7 Ala. 369; Grimes & Brown v. Walker, 12 Ala. 107; Bloodgood v. Hartley, 16 Ala. 253."

And Mr. Chief Justice Brickell thus states the general rule in Prout v. Hoge, 57 Ala. 28 [30]:

"The general rule in a court of equity is, that all persons having a material interest, legal or equitable, in the subject matter of a suit, must be made parties, either as plaintiffs or defendants. The rule proceeds on the principle that no man's rights should be controverted in a court of justice, unless he has full opportunity to appear and vindicate them; and further, that complete justice may be done and future litigation avoided, the performance of the decree being safe, because of the presence in court of all who have an interest in its subject matter. - 2 Story's Eq. Pl. §72."

9.

In Marshall v. A. Shiff & Son, 130 Ala. 545, [1945], the court said:

"Though the cause had been submitted for final decree, the court had power to set aside the submission and refuse to proceed until necessary parties had been brought before it, and that would have been the proper course. - Frost v. Hays, 57 Ala. 30. A bill which has not been objected to for nonjoinder of parties, should not for such nonjoinder alone, be dismissed without affording opportunity for amending the bill so as to cure the defect after the necessity therefor has been indicated by the court. - Colbert v. Daniel, 32 Ala. 314; Gibbs & Lebrun v. Frost & Dickinson, 4 Ala. 720; Tominlin v. Hamilton, 7 Ala. 382; Andrews v. Hobson, 23 Ala. 219; 18 Ency. Pl. & Pr. 690."

We shall see that all necessary parties and the whole title were before the court in the consolidated cause. In the first bill Phillip C. Armstrong, the trustee, was the only respondent; in the second bill the respondents were Josephine Johnson, Elvera C. Armstrong, Agnew E. Utter and Phillip C. Armstrong, as the executor of the Estate of Oscar Johnson, deceased, all of whom are over the age of twenty-one years. That is, Mr. Johnson's executor and the several distributees of his estate were all made parties respondent and duly served with process, to enforce the trust in the property conveyed to Johnson, and who appeared by answer. The consolidation of the causes by agreement of the parties in interest afforded an opportunity, that was full ample and sufficient as to all parties in interest, the trustee, the personal representative, and cestui que trustent, and distributees, to be heard upon all questions presented and involved; the whole title was before the court (Hodge v. Joy, supra) in the consolidated cause.

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No objection by demurrer or answer was made thereto for want of necessary parties, and under the rule that obtains in chancery, the bill or consolidated cause should not have been dismissed. All proper parties were before the court in the consolidated cause in which the decree was rendered.

The cause is reversed and remanded for a reference and accounting as to the full indebtedness between Mrs. Drath and the Johnson estate and the heirs at law and next of kin of the said Oscar Johnson, deceased. It is apparent from the evidence, and course of dealings of the parties, that the lands be held as security, in a court of equity, for all sums advanced by Johnson to Mrs. Drath, although the same were not used in the purchase of the specific properties.

Reversed and Remanded.

Anderson, C.J., Gouldin and Brown, JJ., concur.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

1 Div., No. 666,  
Emma S. Drath, Appellant,  
vs.  
Phillip G. Armstrong et al, Appellee,  
From Baldwin Circuit Court.

The State of Alabama, }  
City and County of Montgomery. }

I, Robert F. Ligon, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to 10 inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, Robert F. Ligon, Clerk of the Supreme  
Court of Alabama, at the Capitol, this the

22 day of January, 1932

Robert F. Ligon  
Clerk of the Supreme Court of Alabama.

**The State of Alabama**  
Baldwin County

IN THE CHANCERY COURT OF BALDWIN COUNTY

To Phillip G. Armstrong, Josephine Johnson, Elvera C. Armstrong, Agnes E. Utter and Phillip G. Armstrong, as the executor of the estate of Oscar Johnson, deceased and Phillip G. Armstrong,  
Or To Webb & Sheppard, Solicitors of record.

Whereas, on the 7th day of May, 1931,

Emma S. Drath, the Complainant

took an appeal from the decree rendered on the 14th day of March,

1931, by the Circuit Court of said county, in the cause of No. 854 Emma S. Drath vs Phillip G. Armstrong, Josephine Johnson, Elvera C. Armstrong, Agnes E. Utter and Phillip G. Armstrong, as executor of the Estate of Oscar Johnson, deceased, and

No. 852. Emma S. Drath, Complainant

Phillip G. Armstrong et al. versus

Now, therefore, you are cited to appear as required by law, before the Supreme Court of Alabama, to defend on said appeal, if you think proper so to do.

Witness my hand this 11th day of May 1931

  
Register in Chancery.



# CHANCERY EXECUTION

## BILL OF COSTS

No. 54

Vs.

Plaintiff

Defendant

FEES OF REGISTER		Dollars	Cents	Brought Forward	
Filing each bill and other papers	\$ 10	70		For Receiving, keeping and paying out or distributing money, etc.; 1st \$1,000, 1%, all over \$1,000, and not over \$5,000, 3-4 of 1%; all over \$5,000 and not exceeding \$10,000, 1-2 of 1%, all over \$10,000 1-4 of 1%.	
Issuing each subpoena	50	1	00	Receiving, keeping and paying out money paid into court, etc., 1-2 of 1% of amount received.	
Issuing each copy thereof	40	1	00	Each notice sent by mail to creditor	15
Entering each return thereof	15	1	00	Filing, receipting for and docketing each claim, etc.	25
For each order of publication	1 00	1	00	For all entries on subpoena docket, etc.	50
Issuing writ of injunction	1 50	1	00	For all entries on commission docket, etc.	50
For each copy thereof	50	1	00	Making final record, per 100 words	15
Entering each return thereof	15	1	00	Certified copy of decree	1 00
Issuing Writ of Attachment	1 00	1	00	Report of divorce to State Health Office (Acts 1915)	50
Entering each return thereof	15	1	00	Total Fees of Register	47 50
Docketing each case	1 00	1	00	FEES OF SHERIFF	
Entering each appearance	25	1	00	Serving and returning subpoena on deft.	\$1 50
Issuing each decree pro confesso on per. ser.	1 00	1	00	Serving and returning subpoena for witness	65
Issuing each decree pro confesso on publica.	1 00	1	00	Levying attachment	3 00
Each order appointing guardian	1 00	1	00	Entering and returning same	25
Any other order by Register	50	1	00	Selling property attached	75
Issuing commission to take testimony	50	1	00	Impaneling Jury	75
Receiving and filing	10	1	00	Executing writ of possession	2 50
Endorsing each package	10	1	00	Collecting execution for costs	1 50
Entering order submitting cause	50	1	00	Serving and returning sci. fa., each	65
Entering any other order of court	25	1	00	Serving and returning notice	65
Noting all testimony	50	1	00	Serving and returning writ of injunction	1 50
Abstract of cause, etc.	1 00	1	00	Serving and returning writ of exeat	1 50
Entering each decree	75	1	00	Taking and approving bonds, each	75
For every 100 words over 500	15	1	00	Collecting money on execution	2 50
Taking account, etc.	3 00	1	00	Making deed	2 50
Taking testimony, etc.	15	1	00	Serving and returning application, etc.	1 00
Each report, 500 words or less	2 50	1	00	Serving attachment, contempt of court	1 50
For every 100 words over 500	15	1	00	Total Fees of Sheriff	7 75
Amount claimed less than \$500, etc.	2 00	1	00	RECAPITULATION	
Issuing each subpoena	25	1	00	Register's Fees	
Witness certificate, each	25	1	00	Sheriff's Fees	
Issuing execution, each	75	1	00	Commissioner's Fees	
Entering each return	15	1	00	Solicitor's Fees	
Taking and approving bond, each	1 00	1	00	Witness Fees	
Making copy of bill, etc.	15	1	00	Guardian Ad Litem	
Each notice not otherwise provided for	50	1	00	Printer's Fees	
Each certificate or affidavit, with seal	50	1	00	Trial Tax	3 00
Each certificate or affidavit, no seal	25	1	00	Recording Decree in Probate Court	
Hearing and passing on application, etc.	3 00	1	00	Total	95 60
Each settlement with receiver, etc.	3 00	1	00		
Examining each voucher of Receiver, etc.	10	1	00		
Examining each answer, etc.	3 00	1	00		
Recording resignation, etc.	75	1	00		
Entering each certificate to Supreme Court	50	1	00		
Taking questions and answers, etc.	25	1	00		
For all other ser relating to such proceedings	1 00	1	00		
For services in proceeding to relieve minors, etc.. same fee as in similar cases.		1	00		
Commission on sales, etc: 1st \$100, 2 per ct.; all over \$100 and not exceeding \$1,000, 1 1-2 per ct: all over \$1,000, and not exceeding \$20,000, 1 per ct.; all over \$20,000, 1-4 of 1 per ct.		1	00		
Sub Total Carried Forward		9	05		

The State of Alabama,

No. 54

Baldwin County.

Circuit Court, In Equity

Term, 193

To Any Sheriff of the State of Alabama—GREETING:

You are hereby commanded, That of the goods and chattels, lands and tenements of

Defendant

you cause to be made the sum of

which

recovered of

on the

day of

193

by the judgment of our Circuit Court, held for the county of Baldwin, besides the sum of

Dollars,

costs of suit, and have the same to render to the said and make return of this Writ and the execution thereof, according to law.

Interest from 193 to date of collection.

Witness my hand, this day of

193

Register.

IN EQUITY.  
Emma D. Keller

**VS.**

PLAINTIFF

DEFENDANT

### Bill of Costs

Received payment this \_\_\_\_\_ day of \_\_\_\_\_ 193\_\_\_\_\_

1931

Received & recommended  
 by: Prothonotary Court

Register.

EMMA S. DRATH,

Plaintiff.

-vs-

PHILIP G. ARMSTRONG, et als.,

Defendants.

AND

EMMA S. DRATH,

Plaintiff.

-vs-

STATE BANK OF SILVERHILL,

Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY,

ALABAMA.

~~AT LAW.~~

*In Equity*

IT IS HEREBY AGREED by and between the solicitors of record in the above entitled cause that these two cases are so related to each other that justice can best be accomplished by their consolidation, and it is therefore further agreed that the two cases be consolidated and submitted together, and disposed of just as if they had been joined in one bill in the first instance.

Made this the 7 day of May, 1930.

*Harry Smith & Co.*  
ATTORNEYS FOR PLAINTIFF.

*W. B. T. Shepard*  
ATTORNEYS FOR DEFENDANTS.



The State of Alabama,  
Baldwin County.

Circuit Court of Baldwin County, In Equity,

To any Sheriff of the State of Alabama—GREETING:

WE COMMAND YOU, That you summon Phillip G. Armstrong,

Baldwin  
of Baldwin County, to be and appear before the Judge of the Circuit Court  
of Baldwin County, exercising Chancery jurisdiction, within thirty days after the service of Sum-  
mons, and there to answer, plead or demur, without oath, to a Bill of Complaint lately exhibited by  
Emma Drath

against said Phillip G. Armstrong,

and further to do and perform what said Judge shall order and direct in that behalf. And this the  
said Defendant shall in no wise omit, under penalty, etc. And we further command that you return  
this writ with your endorsement thereon, to our said Court immediately upon the execution thereof.

WITNESS, T. W. Richerson, Register of said Circuit Court, this 19th day of  
November 1929.

T. W. Richerson Register

N. B.—Any party defendant is entitled to a copy of the bill upon application to the Register.

December 16th, 1932.

Mr. Phillip C. Armstrong,  
Silver Hill, Alabama.

Dear Mr. Armstrong:-

Your letter just received. As you have heretofore been advised, the Supreme Court on the 22nd., of last January rendered a decision reversing Judge Hare, but holding that Mr. Smith was wrong in his contention that all payments made by Mrs. Drath must be applied towards the land and not to any other indebtedness to Mr. Johnston. This was a great disappointment to him, and he made a motion and filed a brief in the Supreme Court asking for a rehearing, which in due time was overruled. He has taken no other move since then, and probably will not, as I do not suppose his client can raise the money to make the necessary payment.

Where one is successful on appeal, the cost in the case is adjudged against the other party, which would include the Clerk's fee for making up the transcript necessary on appeal, as well as the cost of the Clerk of the Supreme Court. It is usual to send such bill of costs for the o.k. of the attorney of the losing party, but I do not recall Mr. Richerson having done this. I do remember that on one occasion when I was in Bay Kinetie, he said he was going to get in touch with you concerning the cost bill, but I think I told him that would not be in order until the Supreme Court had passed on the motion for a rehearing. I am sending him a copy of this letter and he will probably send such bill for my examination, but I do not doubt that the amount named by the Sheriff is correct, as the transcript in this case was very voluminous.

Yours sincerely,

(s) J. H. Webb.

JHW/E.  
C.C. to Mr. T. W. Richerson.

1725-  
Jan 11 - 1932  
Ex 13 to Jan 11

*Original*  
SERVE ON.....

Circuit Court of Baldwin County  
In Equity.

No. ....

SUMMONS

Emma S? Drath

vs.

Phillip G. Armstrong.

Harry T. Smith & Caffey

Solicitor for Complainant

Recorded in Vol. .... Page .....

**RECORDED**  
THE STATE OF ALABAMA,  
BALDWIN COUNTY

Received in office this... 19th

day of November... 1929

Sheriff.

Executed this... 21st ... day of

November 1929

by leaving a copy of the within Summons with

*Phillip G. Armstrong*

Defendant.

*C. Irwin*

Sheriff.

By .....

Deputy Sheriff.

**RECORDED**

# Agreement

Signed May 15 1936  
 J. W. Williams  
 Register

At the County of ... State of ...  
 I, the undersigned, do hereby certify that the foregoing is a true and correct copy of the original as the same appears of record in my office.

Notary Public for the State of ...

Witness my hand and seal this ... day of ... 1936.

Notary Public for the State of ...

**Circuit Court, Baldwin County, Ala.  
In Equity.**

No. \_\_\_\_\_

VS.

## **Cost Bill**

Paid \_\_\_\_\_ 193 \_\_\_\_\_

Register.

Moore Printing Co. Bay Minette

No. \_\_\_\_\_

**The State of Alabama,**  
Baldwin County.

**Circuit Court, In Equity.**

vs.

**CHANCERY EXECUTION**  
**Fi. Fa.**

\$ \_\_\_\_\_

Total - - - \$ \_\_\_\_\_

Fee Book \_\_\_\_\_ Page \_\_\_\_\_

Execution Docket \_\_\_\_\_ Page \_\_\_\_\_

Complainant's Solicitor.

**The State of Alabama,**  
Baldwin County.

ha \_\_\_\_\_ duly waived \_\_\_\_\_ right  
to the exemption of personal property as to  
the collection of the debt for which this execu-  
tion is issued.

Register.

Received in office this \_\_\_\_\_  
day of \_\_\_\_\_ 193 \_\_\_\_\_

Sheriff

Execution Docket \_\_\_\_\_ Page \_\_\_\_\_

MOORE PRINTING CO., BAY MINETTE, ALA.

**The State of Alabama,**  
Baldwin County.

By virtue of the within execution I have levied \_\_\_\_\_

*Original*  
*transcript*  
Nos. 854 & 852.  
Emma S. Drath, et al

Complainant

vs.  
Josephine Johnson Et al and  
Phillip G. Armstrong, Et al

Respondent

# CITATION OF APPEAL

IN EQUITY

*Serve Copy on*  
*Webb & Shepard*  
*Mobile*  
*Ala*

Issued 11 day of May 1931

Moore Ptg. Co., Bay Minette

Received 11 Day of May 1931  
and on 18 Day of July 1931  
I served a copy of the within citation  
on *Webb & Shepard*

by service on *Shepard*

as counsel of *Emma*  
W. H. HOLCOMBE JR., SHERIFF.

BY *Wm. H. Holcombe Jr.* D. S.

862785-4

The Supreme Court of Alabama

October Term, 1931-2

1st Div., No. 666

Emma S. Drath

Appellant,

VS.

Phillip G. Armstrong  
et al.

Appellee.

From Baldwin Circuit Court.  
In Eq.

COPY OF OPINION

BROWN PRINTING CO., MONTGOMERY, 1929

Filed January 20th/1932  
J. W. McCremon  
Clerk



3-

Not of Evidence

Filed 2/9/31  
F. W. Hare  
Judge

CERTIFICATE OF APPEAL.

- - - - -

I, T. W. Richardson, Register in Chancery for the Chancery Court of

Madison County, Alabama, do hereby certify that the Complainant,

in the case of Emma C. Pratt versus Josephine Johnson et al,

and Emma C. Pratt versus Phillip C. Armstrong, in said Court

of Chancery has taken an appeal from the decree in said

cause to the Supreme Court, and I further certify that the said

appeal was taken on the 7th day of May, 1931.

Witness my hand this 11th day of May, 1931.

T. W. Richardson

As- Register Chancery Court Madison County,  
Alabama.