SUPPLEMENTAL OPINION ON DENIAL OF REHEARING JUNE 6, 1988

750 S.W.2d 411

ESTOPPEL — DEEDS — GRANTOR NOT ESTOPPED TO ASSERT INVALIDITY. — When a deed is invalid because it is contrary to public policy, and therefore void, the grantor is not estopped to assert its invalidity.

ROBERT H. DUDLEY, Justice. [1] On rehearing, the petitioner contends that the respondent, Otter Creek Development Company, received payments under the terms of an option, and therefore, should not be allowed to assert that the option violated the rule against perpetuities. The contention is without merit. After the respondent refused to accept an option payment, the petitioner filed a suit seeking a judgment declaring that the option

was valid. The respondent answered that the option was void because it violated the rule against perpetuities. The respondent may properly assert such a defense. When a deed is invalid because it is contrary to public policy, and therefore void, the grantor is not estopped to assert its invalidity. *Chase* v. *Cartwright*, 53 Ark. 358, 14 S.W. 90 (1890); 28 Am. Jur. 2d *Estoppel and Waiver* § 7 (1966).

Petition denied.

PURTLE, J., not participating.

HICKMAN and HAYS, JJ., would grant.

DARRELL HICKMAN, Justice, dissenting. This case was not about the rule against perpetuities. It was about the conduct of one of the partners and whether he could bind the other partners by his actions.

As a "throw away" argument, the appellant said the agreement violated the rule against perpetuities. Both parties treated this argument perfunctorily in their briefs. However, the majority found the technical legal argument appealing and went off down a false path, ignoring what this case was really about.

The trial court quickly saw through this legal smoke screen and held that the appellants were estopped to void this document, as they should be, having accepted the benefits from it.

The majority did not deal with the estoppel question in its first opinion and does so only indirectly on rehearing. We cannot reverse this trial court's finding regarding estoppel unless we find it was clearly wrong, because it entailed factual findings. *See* 31 C.J.S. *Estoppel* § 163 (1964); *Ray Dodge, Inc.* v. *Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972); *Jones* v. *Burks*, 110 Ark. 108, 161 S.W. 177 (1913); *Lary* v. *Young*, 13 Ark. 401 (1853); *see also* A.R.C.P. Rule 52(a).

The case of *Chase* v. *Cartwright*, 53 Ark. 358, 14 S.W. 90 (1890), cited in the majority opinion on rehearing, is not on point or controlling.

This case was incorrectly decided and I would grant the rehearing.