

WEBSTER *v.* HORTON.

4-3297

Opinion delivered January 22, 1934.

1. JUDGMENT—FINALITY.—A decree became conclusive and binding on all the parties after six months where no appeal was taken.
2. GUARDIAN AND WARD—AUTHORITY TO MAKE ADMISSIONS.—Neither a guardian nor his attorney has authority to make agreements or admissions to the prejudice of a ward's interest.
3. INFANTS—REPRESENTATION BY ATTORNEY.—Where, by paying off their ancestor's first mortgage on their homestead, minors were entitled to be subrogated thereto, their guardian's attorney had no authority to consent to a decree subordinating their rights to a second mortgage.
4. SUBROGATION—PAYMENT OF INCUMBRANCE.—Minors discharging their ancestor's first mortgage on their homestead are entitled to be subrogated thereto as against his second mortgage.
5. SUBROGATION—BASIS OF DOCTRINE.—The doctrine of subrogation is an equitable one, having for its basis the doing of complete and perfect justice between the parties without regard to form, and its purpose and object is the prevention of injustice.

Appeal from Jefferson Chancery Court; *Harvey R. Lucas*, Chancellor; affirmed.

STATEMENT BY THE COURT.

To secure an indebtedness of \$500, W. P. McAdams and wife executed a mortgage in favor of C. H. Triplett Company covering the west half of the southeast quarter of section 34, township 5 south, range 10 west, Jefferson

County. This mortgage was dated February 8, 1927. Thereafter, on March 1, 1928, W. P. McAdams was, by the chancery court of Jefferson County, granted an absolute divorce from his wife, and the three children issue of the marriage, viz: Mildred, J. P. and Jean McAdams, then and now minors, were awarded to his care. Thereafter, on November 15, 1928, and while the said W. P. McAdams was single and unmarried, he executed an additional mortgage on the lands, theretofore mortgaged to C. H. Triplett Company, to his brother, Curtis K. McAdams, to secure an indebtedness of \$425, due five years after date. Thereafter, on December 24, 1928, W. P. McAdams married his second wife, Lucile. The lands mortgaged as aforesaid were the homestead of W. P. McAdams and Lucile McAdams and the three minor children until the death of W. P. McAdams, which occurred on June 15, 1929. Lucile McAdams resided on the homestead for several months after her husband's death, when she moved to Pine Bluff. About October 20, 1929, Lucile McAdams married R. W. Webster, one of the appellants herein.

Immediately after the death of W. P. McAdams, Mrs. Emma Horton, the grandmother of the three minor children of W. P. McAdams, took possession of said children, and was appointed their legal guardian. Sometime after Lucile McAdams' marriage to R. W. Webster, the dwelling house on the homestead of the minors being then vacant, Mrs. Emma Horton, guardian of the minors, took possession thereof for the use and benefit of the minors. Thereafter, in June, 1931, Lucile Webster and her then husband, R. W. Webster, ascertaining that the W. P. McAdams homestead was vacant, moved into the house. During 1931 C. H. Musgrove was cultivating the land on the homestead under contract with the guardian.

On December 12, 1929, C. H. Triplett Company instituted foreclosure proceedings against the minor children of W. P. McAdams on its mortgage, and Curtis K. McAdams, the second mortgagee, was made a party thereto. Mrs. Lucile Webster was not made a party.

On January 15, 1930, a decree was entered, foreclosing the Triplett Company mortgage, and same was

declared a first lien against the homestead. Before the sale was effected, however, the minors appeared by counsel and requested the court to allow them to pay off the Triplett Company mortgage with money which they had received as the proceeds of life insurance held by W. P. McAdams at the time of his death. The Curtis K. McAdams mortgage, at that time, was not due, and would not have matured until November 15, 1933. Thereupon, it was agreed between Curtis K. McAdams and the attorney for the guardian of the minors that McAdams would knock off the accrued interest on his indebtedness in consideration of his mortgage being advanced to a first lien against the homestead. A supplemental decree was entered January 21, 1930, evidencing this agreement of the parties. Thus matters stood on June 18, 1931, when Mrs. Horton, as guardian, notified Lucile and R. W. Webster to vacate said homestead and surrender possession thereof. The notice to vacate, not being complied with, an unlawful detainer suit was instituted by the guardian against the Websters seeking possession. Thereafter, the guardian amended her complaint by alleging many of the facts herein set out, and especially claiming the right of subrogation in the minors to the rights of C. H. Triplett Company under its mortgage. The suit was transferred to equity, and, upon trial February 27, 1932, a decree was entered subrogating the children of W. P. McAdams to all the rights of C. H. Triplett Company under its mortgage, and directing the sale of the homestead and mortgaged land to satisfy said decree. Curtis K. McAdams was not a party to this proceeding on February 27, 1932, but thereafter, on March 7, 1932, filed his intervention therein. In the intervention, filed by C. K. McAdams, it was asserted that, by virtue of the supplemental decree of January 21, 1930, his mortgage was the first and paramount lien against said homestead.

The trial court refused to arrest proceedings under the decree of February 27, 1932; the sale was effected as directed, and the lands were purchased by the guardian of the minors for an amount less than the sum due under the C. H. Triplett Company mortgage. After the sale and

approval thereof, the guardian was put in possession of the property by writ of assistance. Thereafter, on May 10, 1933, the court entered a decree on the intervention of Curtis K. McAdams, and dismissed the same for want of equity, and this appeal is prosecuted to reverse this decree.

Arthur D. Chavis, for appellant.

E. W. Brockman, for appellee.

JOHNSON, C. J., (after stating the facts). The decree of February 27, 1932, became conclusive and binding upon all parties thereto at the expiration of six months after its rendition, no appeal having been prosecuted therefrom. Section 2140, Crawford & Moses' Digest. *Stephens v. Williams*, 122 Ark. 255, 183 S. W. 527; *Newall v. Valley Farming Company*, 133 Ark. 456, 202 S. W. 838. Therefore all asserted claims and rights of the Websters are precluded thereby.

The rights of appellant, Curtis K. McAdams, under and by virtue of his intervention were expressly reserved by the court for future determination; therefore his rights are not precluded as the other appellants are.

Appellant Curtis K. McAdams asserts superior rights under and by reason of the supplemental decree entered by the chancery court of Jefferson County on January 21, 1930, in the then pending case of C. H. Triplett Company against appellees, the effect of which supplemental decree was to advance his mortgage from a second to a first lien against the minors' homestead. This supplemental decree was void; because the attorney representing the minors had no authority in law or in fact to make such an agreement. This court has many times held that neither a guardian nor the attorney representing such guardian has any authority to make agreements or admissions to the prejudice of the ward's interest. *Frazier v. Frazier*, 137 Ark. 57, 207 S. W. 215. In the case of *Rankin v. Schofield*, 70 Ark. 83, 66 S. W. 197, we said: "In the absence of authority given by statute, the general rule, says Mr. Rodgers, is that a guardian cannot agree to any compromise or settlement by which the property interests of his ward are affected without the

concurring sanction of the court, to which he must look for authority to bind his ward. Rodgers, Domestic Relations, 859. The recitals of the record, *supra*, show affirmatively that the chancellor performed no judicial act of investigation into the merits of the controversy, before entering the decree. On the contrary, that was purposely avoided, out of considerations of mere expediency, 'to put an end to tedious litigation, and as an amicable settlement and adjustment of a family affair.' Such added dignity to the compromise of the guardian did not make it any the less his compromise. In the face of such a record, we cannot indulge the maxim, '*Omnia praesumuntur rite et solemniter esse acta.*'

"It was plainly not the compromise of the court. There was nothing to show that it was for the benefit of the infant. The facts shown by this record do not bring the appellant within the maxim of *consensus tollit errorem* and bar her right of appeal."

As was said by this court in the Rankin case, *supra*, this agreement was plainly not the compromise of the court. There was nothing to show that it was for the benefit of the minors. The effect of the supplemental decree was to use the minor's insurance money for the sole and only purpose of advancing the second mortgage of Curtis K. McAdams to a first lien against their homestead. Moreover, it must be remembered that Curtis K. McAdams was an uncle of the minors, and they were entitled to his best advice and honest judgment. The trial court concluded, and we concur therein, that the effect of this supplemental decree was to advance the interests of Curtis K. McAdams, to the prejudice and detriment to the right of the minors.

It is next contended that the trial court erred in rendering the decree of February 27, 1932, subrogating the guardian and wards to all the rights of the C. H. Triplett Company under and by virtue of its mortgage. Neither can we agree with this contention. In *Southern Cotton Oil Co. v. Napoleon Hill Cotton Co.*, 108 Ark. 555, 158 S. W. 1052, the rule in reference to subrogation was stated as follows: "The doctrine of subrogation is an

equitable one, having for its basis the doing of complete and perfect justice between the parties, without regard to form, and its purpose and object is the prevention of injustice.”

The decree granting subrogation in the instant case pronounced exact justice and equity between the parties. Appellant, Curtis K. McAdams, knew when he accepted his mortgage against this homestead that it was a second lien thereon, and second to the C. H. Triplett Company mortgage; he knew that the C. H. Triplett Company mortgage must be paid and satisfied prior to his mortgage. Therefore the decree of subrogation places him in no worse position than he was when he accepted his mortgage. On the other hand, refusal to grant subrogation in the instant case would cause the minors not only to lose their homestead but the insurance money which was applied on the C. H. Triplett Company mortgage. Exact justice and equity can be effected only by granting the right of subrogation to these minors.

Since the trial court's decision conforms to the views here expressed, the same must be affirmed.
