

FOREMAN *v.* DICKINSON.

Opinion delivered May 7, 1928.

1. EVIDENCE—DATE OF BIRTH.—The date of a person's birth may be testified to by himself or by members of his family.
2. INFANTS—RIGHT TO DISAFFIRM CONTRACT.—An infant is not estopped by his misrepresentations as to his age to avail himself of the right to disaffirm his contract.
3. INFANTS—SUFFICIENCY OF EVIDENCE AS TO MINORITY.—A preponderance of the evidence *held* to establish that defendant was an infant when he disaffirmed a contract for the purchase of an automobile.
4. APPEAL AND ERROR—SERVICE OF SUMMONS.—Where an appeal from a decree was taken on the day before the time for appeal expired, but no summons was issued or served until two months thereafter, the appeal will be dismissed.
5. APPEAL AND ERROR—APPEARANCE.—The fact that an attorney, who was defendant in the suit below, appeared for another of the defendants on plaintiff's appeal did not enter such attorney's appearance; he not having been summoned within time.

Appeal from Pulaski Chancery Court; *Frank H. Dodge*, Chancellor; reversed.

STATEMENT OF FACTS.

J. A. Dickinson, trading as Gulf Refining Company, filed an amended complaint in the chancery court against Herbert Foreman, Frank Strangways and W. F. Strangways, to recover a balance due on a note in the sum of \$352.60, and asked that the same be declared a lien on an automobile sold to Herbert Foreman. The defendants filed an answer in which they disaffirmed the contract for the purchase of the automobile on the ground that Herbert Foreman is a minor, and they ask that the Little Rock Motor Car Company, from which the auto-

mobile was purchased, be made a party defendant to the action, and that Herbert Foreman have judgment against it for the cash payment made when the automobile was purchased. They offered to tender the car back to the seller, and the record shows that the car is now in the hands of the plaintiff, J. A. Dickinson, for the purpose of being sold and the proceeds applied to the satisfaction of the balance of the purchase money.

The record shows that on June 7, 1926, H. F. Foreman made what is called a purchaser's statement to the Little Rock Motor Car Company in writing at its address in Little Rock, Arkansas. In his statement he represented himself to be twenty years old, and W. F. Strangways, his grandfather, as his nearest living relative. The statement also represented that the purchase price of the automobile and the terms of purchase were on the basis described in the promissory note attached. The statement is signed as follows: "Herbert Foreman, Frank Strangways (as indorser), W. F. Strangways, guardian, signs to legalize Herbert Foreman's signature, and is in no way responsible for carrying out the contract and is not responsible for any payment." The cash payment was \$367.65. A note dated June 7, 1926, was given for \$551.48, the balance of the purchase price. In the note appears the following: "Herbert Foreman's schedule of payments. Birthday, October 11, 1926, and twenty-one years old then." The note recites that the title to the automobile shall remain in the Little Rock Motor Car Company or assigns until the note and interest are fully paid. It further provides that, in event any installment is not paid when due, all of the installments shall at once become due and payable and that the seller of the automobile or the holder of the note may at once retake possession of the automobile and sell it at public or private sale without any legal procedure whatever. The note is signed, "Herbert Foreman, Frank Strangways (as indorser)." The note was duly assigned to J. A. Dickinson. Several payments were made by H. F. Foreman on the note. These payments amounted

to \$198.88 and left a balance due on November 24, 1926, of \$352.60.

An employee of the Little Rock Motor Car Company testified that she made the sale of the car to Herbert Foreman, and that he represented that he would be twenty-one years of age in October, 1926. An application for credit to another company signed by Herbert Foreman was also introduced in evidence, and in it he represented that he was twenty-one years of age on August 24, 1925.

The trial of the case was had before the chancellor on the 24th day of June, 1927. Herbert Foreman was a witness. He admitted making the representations about his age as they appeared in the statements above referred to, but testified that he was born in St. Francis County, Arkansas, on October 10, 1906. He said that he made the false representations about his age at the instance of the dealers. He stated that he knew his age because he had looked in the family Bible where it was recorded and because he had been so told by his grandfather, Dr. W. F. Strangways, who attended his mother at his birth.

Dr. W. F. Strangways, grandfather of Herbert Foreman, was also a witness. According to his testimony Herbert Foreman was born October 10, 1906, at St. Francis, Arkansas. He was practicing medicine there at the time and attended his daughter at the time she gave birth to Herbert Foreman. He made the entry of Herbert's birth in the family Bible. Herbert Foreman has been partly brought up by him, and he has a recollection of the date of his birth. He signed the contract for the purchase of the automobile at the request of the seller, and it was definitely understood that he was in no way responsible for carrying out the contract.

Frank Strangways is an uncle of Herbert Foreman, and lived at St. Francis, Arkansas, at the time Herbert Foreman was born. The witness recollects that Herbert was born October 10, 1906. He signed the note as

indorser, and it was not intended by the seller that he should be bound by the contract.

The chancellor found that Herbert Foreman was a minor, twenty years of age, when he executed the contract for the purchase of the automobile, but that he attained his majority on the 10th day of October, 1926, and after that time ratified the contract by making payments on the purchase price of the automobile and retaining it in his possession. It was therefore adjudged and decreed that J. A. Dickinson recover from Herbert Foreman the sum of \$360.38 with accrued interest, and that the same should be declared a lien on the automobile in question. The decree provided that, if the amount adjudged should not be paid within ten days, the commissioner of the court should sell the automobile and apply the proceeds towards the payment of the amount found due. It was further decreed that the ratification of the contract by Herbert Foreman was not binding on the indorser, Frank Strangways, and that J. A. Dickinson should take nothing against the defendants, Frank Strangways and W. F. Strangways. Herbert Foreman alone has prosecuted an appeal to this court.

J. F. Wills and *Frank Strangways*, for appellant.

E. R. Parham, for appellee.

HART, C. J., (after stating the facts). The decree of the chancery court was in favor of Frank Strangways and W. F. Strangways, and the record shows that they refused to join in this appeal, which is prosecuted alone by Herbert Foreman. Herbert Foreman, in his answer, which was filed on December 29, 1926, disaffirmed his contract for the purchase of the automobile. His disaffirmance is placed on the ground that he was a minor at the time the contract was executed on the 7th day of June, 1926, and that he was still a minor at the time the answer was filed on December 29, 1926.

The decree of the chancery court is based upon the theory that Herbert Foreman became of age on the 10th day of October, 1926. There is no testimony in the record to warrant such a finding except the negative tes-

timony in the statements made by Herbert Foreman in his purchaser's statement and in the representation he made to the salesman of the Little Rock Motor Car Company at the time he made application to purchase the car and in another statement he made to another business firm with a view to purchasing goods from it. All the positive testimony in the record shows that Herbert Foreman was born October 10, 1906, and did not become of age until October 10, 1927. Herbert Foreman testified that this was the date of his birth and that he had seen it recorded in the family Bible. His grandfather, who was the physician who attended his mother at the time of his birth, testified that Foreman was born October 10, 1906, and that he recollected the date of his birth and that after his daughter's death he set down the age of her child in the family Bible. An uncle testified that he recollected that Herbert Foreman was born October 10, 1906.

The date of a person's birth may be testified to by himself or by members of his family. This falls within the rule admitting parol evidence in matters of pedigree, which includes birth, marriage and death. *Lincoln Reserve Life Ins. Co. v. Morgan*, 126 Ark. 615, 191 S. W. 236.

This court has also held that an infant is not estopped by his misrepresentations as to age to avail himself of the right to disaffirm his contract. *Arkansas Reo Motor Co. v. Goodlett*, 163 Ark. 35, 258 S. W. 975. In this case it was also stated that an infant was entitled to recover the price paid for an automobile purchased by her on returning the car although she had misrepresented her age to the seller, such article not constituting a "necessary" for an infant.

The chancellor was not justified in holding that the positive testimony of the witnesses in the record as to the age of Herbert Foreman was overcome by his misrepresentations as to his age. A preponderance of the evidence clearly shows that Herbert Foreman did not become of age until October 10, 1927, and that before this

time he had disaffirmed his contract for the purchase of the automobile. Indeed, the decree of the chancery court was rendered against him before he became of age.

It follows that the decree must be reversed, and the cause will be remanded with directions to the chancery court to render a decree dismissing the complaint of J. A. Dickinson against Herbert Foreman, and for further proceedings in accordance with the principles of equity, and not inconsistent with this opinion. It is so ordered.

OPINION ON REHEARING.

HART, C. J. We cannot grant the request of counsel for appellees to consider the liability of Frank Strangways as indorser of the note of Herbert Foreman, for the following reasons: The decree in favor of Frank Strangways was entered of record in the chancery court on July 6, 1927. No appeal was taken from the decree in his favor by the Little Rock Motor Car Company until January 5, 1928. The time for appeal expired on the next day. No summons was issued until March 15, 1928. Summons was served Frank Strangways on that day; and on April 30, 1928, he filed a motion to dismiss the appeal against him. There was an unreasonably delay in the issuance and service of summons. Summons should have been issued immediately and served within a reasonable time. Therefore we must dismiss the appeal of the Little Rock Motor Car Company so far as Frank Strangways is concerned. *Claiborne v. Leonard*, 88 Ark. 391, 114 S. W. 917, and *Birmingham v. Rice*, 90 Ark. 306, 118 S. W. 1017.

The fact that Frank Strangways appeared as attorney for Herbert Foreman did not enter his own appearance to the appeal. It follows that the motion for a rehearing must be denied.