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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 7301

In the
Supreme Court of Appeals of Virginia
at Richmond

ARTHUR H. ROCKWELL

v.

KERMIT E. ALLMAN, ADMR.,
ETC., ET AL.

Only Allman is represented by counsel

FROM THE CIRCUIT COURT OF THE CITY OF ROANOKE

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7301

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 14th day of October, 1969.

ARTHUR H. ROCKWELL, Plaintiff in error,

against

KERMIT E. ALLMAN, ADMINISTRATOR OF THE ESTATE OF JACIE ARBELL UNDERWOOD SHOTWELL, DECEASED; AND CORLDEEN FRANCES BERRY AND BARBARA JEAN HIGGINS, ADMINISTRATRICES OF THE ESTATE OF JACIE UNDERWOOD SHOTWELL, DECEASED, Defendants in error.

From the Circuit Court of the City of Roanoke
Frederick L. Hoback, Judge

Upon the petition of Arthur H. Rockwell a writ of error is awarded him to a judgment rendered by the Circuit Court of the City of Roanoke on the 7th day of March, 1969, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Kermit E. Allman, Administrator of the estate of Jacie Arbell Underwood Shotwell, deceased, was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said court below in the penalty of $300, with condition as the law directs.

RECORD

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page 1 }

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MOTION FOR JUDGMENT

* * * * *

1. The undersigned, Arthur H. Rockwell, plaintiff herein, hereby moves the Circuit Court of the City of Roanoke, Virginia, for judgment against Kermit E. Allman, Administrator of the Estate of Jacie Arbell Underwood Shotwell, deceased, in the sum of Thirty Five Thousand Dollars ($35,000.00) for this, to-wit:

2. That on December 15, 1964 the plaintiff was driving a truck along U. S. Highway 460 near Rt. 758 in the County of Roanoke, Virginia, in an easterly direction, when the defendant's decedent, at the time and place then and there drove her automobile in a negligent and careless manner, without keeping proper control thereof and failing to keep a proper lookout, and did cross over into the plaintiff's lane of traffic going in the opposite direction, and by reason of said careless and negligent conduct in the operation of said automobile caused a collision with the truck driven by the plaintiff; the force of said collision was so great that the said plaintiff was seriously and permanently injured, all to the damage of plaintiff in the sum of Thirty Five Thousand Dollars ($35,000.00).

Wherefore the plaintiff brings this action.

Arthur H. Rockwell

By W. M. Gravatt, Jr.
Counsel

Filed in the Clerk's Office the 14th day of Nov., 1966.

Teste:

Walker R. Carter, Jr. Clerk
Patsy Testerman, D. C.

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RESPONSIVE PLEADING OF DEFENDANT

Comes now the defendant, Kermit E. Allman, Administrator of the Estate of Jacie Arbell Underwood Shotwell, deceased, and for his responsive pleading to the Motion for Judgment filed against him, says:

1. The allegations of paragraphs numbered 1 and 2 of said Motion for Judgment, in so far as said paragraphs allege or infer any act of negligence or fault on the part of defendant's decedent, are hereby denied and strict proof thereof is hereby called for.

2. The allegations of said Motion for Judgment wherein it is stated that the plaintiff was seriously and permanently injured are denied and strict proof thereof is hereby called for.

3. As a further defense to said Motion for Judgment, the defendant alleges that the plaintiff was himself guilty of negligence which was either the sole or a proximate contributing cause to the happening of the accident on December 15, 1964, of which the plaintiff complains and, page 7 } therefore, cannot recover against the defendant herein.

And now having fully answered said Motion for Judgment, the defendant prays to be hence dismissed with his proper costs in this behalf expended.

Respectfully submitted

KERMIT E. ALLMAN, Administrator
of the Estate of Jacie Arbell
Underwood Shotwell, deceased

By W. H. Jolly
Of Counsel

Received Dec 1 1968 and filed.

Ruth Dillard, Deputy Clerk

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INTERROGATORIES

* * * * *

The *planitiff*, Arthur H. Rockwell, by counsel, pursuant to Rule 4:8 of the Supreme Court of Appeals of Virginia, hereby serves the following interrogatories upon the defendant to be answered within fourteen days after the service hereof:

1. State the name of the individual or corporation initially employing W. H. Jolly or his firm to file pleadings in this case.

2. The name and address of any insurance company carrying a policy of liability insurance upon the automobile or operator of the car driven by Jacie Arbell Underwood Shotwell on December 15, 1964, the date of the accident in question.

3. If such an insurance policy was in force, the filing of a copy in the records of this case is requested.

4. Did the insurance carrier referred to above and believed to be Aetna Casualty and Surety Company, or any of its agents or employees, know the identity of the personal representative or representatives appointed by any court for the qualification on the Estate of Jacie Arbell Underwood Shotwell?

5. If so, give the names and addresses of such persons.

6. Did the carrier of the liability insurance on the Shotwell automobile deliver a check or draft in the amount of $81.77, or other sum, to the administrator or the administratrices, or either of them, of the Estate of Jacie Arbell Underwood Shotwell?

7. If any such check was delivered, was it for refund on automobile insurance, and a copy of both sides of said check is requested?

page 15 } 8. Did Aetna Casualty and Surety Company, or the liability insurance carrier, pay the Estate of Jacie Arbell Underwood Shotwell for the loss of her automobile in the amount of $3,151.00, or any other amount?

9. If it did make such payment, to whom was it made and please furnish copy of both sides of the check.

10. Did Aetna Casualty and Surety Company pay the owner of the truck involved in the collision for the damage or loss of that vehicle, and if so, was a release obtained in the name of the estate or personal representative of Jacie Arbell Underwood Shotwell; specifically did the release name Bar-

bara Jean Higgins or Corldeen Frances Berry as administratrix?

11. Did Aetna Casualty and Surety Company receive a letter from Kermit E. Allman, Sergeant City of Roanoke, dated November 15, 1966, advising them of his appointment as Administrator on the Estate of Jacie Arbell Underwood Shotwell by order entered November 10, 1966, and further advising them of and tendering to them a Motion for Judgment and Notice of Motion for Judgment served on him on November 14, 1966 by Arthur H. Rockwell, plaintiff.

12. Did Aetna Casualty and Surety Company receive a letter from W. M. Gravatt, Jr., Attorney for Arthur H. Rockwell, dated November 30, 1966, notifying them of the appointment of Kermit E. Allman as Administrator of the Estate of Jacie Arbell Underwood Shotwell and further stating as follows:

"There is some question as to the name of the parties involved, since I understand your insurance policy was in the name of Jacie A. Underwood, although the State Police's report shows the name Jacie Arbell Underwood Shotwell. I have been advised unofficially that this decedent was married shortly before the accident. The Court in Roanoke is anxious to ascertain the names of the heirs of the decedent. If you have any information concerning this, I would appreciate it if you would furnish it to me or directly to Sergeant Allman, Administrator of the estate."

page 16 } 13. Was the Responsive Pleading of Defendant which was filed and copy mailed to counsel for defendant on November 30, 1966, authorized by and filed for Aetna Casualty and Surety Company, the insurance carrier for the decedent, Jacie Arbell Underwood Shotwell?

14. Did Aetna Casualty and Surety Company or any of its agents or employees know the identity of Corldeen Frances Berry or Barbara Jean Higgins, individually or as administratrices, at the time said Responsive Pleading was filed?

15. When did W. H. Jolly, Counsel for Aetna Casualty and Surety Company, learn of the proceedings in the Circuit Court of Botetourt County concerning the appointment of Corldeen Frances Berry and Barbara Jean Higgins as administratrices.

16. Who, if anyone, informed said attorney of the existence of these two people, or of their status in respect to being personal representatives of Jacie Arbell Underwood Shotwell?

Arthur H. Rockwell

By W. M. Gravatt, Jr.
W. M. Gravatt, Jr., Counsel

Received and filed Jul 23 1968.

Ruth Dillard, Deputy Clerk.

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MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, by counsel, and moves the Court to enter Summary Judgment in favor of the said defendant herein on the grounds that, from the evidence taken in open court and the exhibits filed therewith, the appointment of Kermit E. Allman as Administrator of the Estate of Jacie Arbell Underwood Shotwell, deceased, was void and of no legal effect, inasmuch as the Court was without jurisdiction to make such appointment, and for the further reason that prior to said purported appointment the two surviving children of the decedent had already been appointed and qualified as Co-Administratrices of said estate by the Clerk of the Circuit Court of Botetourt County, in which County the said decedent resided and owned a mansion house at the time of her death.

Respectfully submitted,

Kermit E. Allman, Administrator, etc.

By W. H. Jolly
Of Counsel

page 20 }

* * * * *

Tendered and taken under advisement 7-30-68.

F.L.H.

page 21 }

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MOTION TO AMEND PLEADINGS

* * * * *

Comes now the plaintiff, by counsel, and pursuant to Code Section 8-97 and 8-119 and Supreme Court of Appeals Rule 3:13, moves the court to allow the plaintiff to amend his Motion for Judgment to correct a misnomer contained therein, and to show the name of the party defendant to be instead of Kermit E. Allman, Administrator of the Estate of Jacie Arbell Underwood Shotwell, deceased, to be Corldeen Frances Berry and Barbara Jean Higgins, Administratrices of Jacie Underwood Shotwell, deceased. The grounds for this motion are based upon after discovered information contained in an Affidavit filed on behalf of the plaintiff attached hereto.

Respectfully submitted,

Arthur H. Rockwell

By W. M. Gravatt, Jr.
Of Counsel

Tendered and taken under advisement 7-30-68.

F.L.H.

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AFFIDAVIT

State of Virginia,
County of Nottoway, to-wit:

This day W. M. Gravatt, Jr., attorney at law, appeared before me, Mary Lee Perkins, a notary public in and for the County and State aforesaid, and after being duly sworn made oath that he is attorney for Arthur H. Rockwell, *plainitff* in this suit, and that neither he nor the plaintiff nor anyone acting for them, had any information whatsoever prior to

July 8, 1968 concerning the appointment or qualification of Corldeen Frances Berry and Barbara Jean Higgins, as administratrices of the Estate of Jacie Underwood Shotwell, in the Circuit Court of Botetourt County, Virginia. The affiant further made oath that the name and style of the defendant in this suit previously referred to as Kermit E. Allman, Administrator of the Estate of Jacie Arbell Underwood Shotwell, deceased, appears to be a misnomer and that the correct name of the defendant should be Corldeen Frances Berry and Barbara Jean Higgins, Administratrices of Jacie Underwood Shotwell. The affiant further made oath that to the best of his knowledge and belief Aetna Casualty and Surety Company is the real party in interest defendant in this suit and knew the existence of the aforesaid administratrices in Botetourt County before and at the time the Responsive Pleadings were filed in this cause.

W. M. Gravatt, Jr.

Subscribed and sworn to before me this 26th
page 24 } day of July, 1968.
My commission expires: January 4, 1970.

Mary Lee Perkins
Notary Public

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* * * * *

ANSWERS TO INTERROGATORIES

Comes now the defendant, by counsel, and without waiving his objection to answering any of the interrogatories propounded by the plaintiff and furnishing the information herein solely for the purpose of permitting the Court to rule on the Motion for Summary Judgment, which the Court now has under advisement, the said defendant, by counsel, for his answers to said interrogatories, now comes and says:

1. The firm of Kime, Jolly & Clemens, of which W. H. Jolly is a partner, was employed by The Aetna Casualty and Surety Company, pursuant to its contract with Jacie Arbell Underwood Shotwell to represent her interest, or the interest of her estate, in any action at law instituted against such estate arising out of the automobile accident in issue.

2. The Aetna Casualty and Surety Company, Hartford, Connecticut 06115.

3. The undersigned does not have a copy of the policy in

question; however, it was a standard automobile liability policy, which was in full force and effect at the time of the happening of the accident in question.

page 27 } 4. In so far as the undersigned is advised (and in this regard the undersigned has made inquiry through the claims office of the company in Roanoke, Virginia and through the office of the agent, likewise in Roanoke), none of the employees or agents of said company did know the identity of the personal representatives appointed by the Circuit Court of Botetourt County for the Estate of Jacie Arbell Underwood Shotwell.

5. See answer to No. 4.

6. The undersigned has ascertained that a check in the amount of $81.77 was either delivered or mailed by the agent who wrote the policy to the estate of the deceased. The records of the agent do not reflect the name of the individual to whom said check was transmitted.

7. The check was for a refund on said policy. The canceled check is stored with the company's records in Richmond; however, it is conceded that the check was endorsed either by one of the personal representatives, or was credited to the account of the estate.

8. The Aetna Casualty and Surety Company did pay, pursuant to the collision coverage of the policy, an amount for the damage to the Shotwell automobile; however, the amount of said check or to whom it was paid cannot be stated unequivocally by the undersigned. The undersigned is advised that the check was paid to The Colonial-American National Bank, which bank had financed said automobile and the loss payable on the collision policy was in favor of said bank.

9. See answer to No. 8.

page 28 } 10. In so far as the undersigned is advised, the owner of the truck involved in the collision was paid and a release was obtained in the name of The Aetna Casualty and Surety Company. The release did not name Barbara Jean Higgins or Corldeen Frances Berry.

11. The answer to No. 11 is yes.

12. The Aetna Casualty and Surety Company did receive a letter referred to in Question No. 12; however, since suit was instituted on November 14, 1966 and service had already been had on the company's registered agent, the suit papers had been forwarded to the undersigned on November 28, 1966 and the Answer was filed by the undersigned on November 30, 1966, the date of said letter. Having referred this matter to counsel, the company did not answer the letter as the entire matter was then in the hands of its attorneys.

13. The Responsive Pleading of the defendant was not filed for The Aetna Casualty and Surety Company.

14. For answer to Question No. 14, reference is made to the answer to Interrogatory No. 4.

15. The undersigned (not counsel for The Aetna Casualty and Surety Company in this action at law) learned of the proceedings in the Circuit Court of Botetourt County on July 8, 1968.

16. The undersigned learned of the existence of the two children on or about July 2, 1968, but was unable to locate or contact either one of them until July 8, 1968, at which time Corldeen Frances Berry informed the undersigned their status with reference to their mother's estate.

Kermit E. Allman, Administrator, etc.

By W. H. Jolly
Counsel

Kime, Jolly & Clemens
430 E. Clay Street
Salem, Virginia

Received 8-20-68.

Carolyn W. Robinson, D. C.

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ORDER

This day came the defendant, by counsel, pursuant to notice, and renewed his Motion for Summary Judgment, heretofore filed herein on July 10, 1968, and the Court, after having considered said Motion in the light of the depositions taken in open court on July 9, 1968 and a further hearing held on July 30, 1968 and after having heard the argument of counsel and having considered the briefs filed by the parties hereto, being of the opinion that at the time of the death of Jacie Arbell Underwood Shotwell she was a resident of Botetourt County, Virginia and owned a mansion house situate therein and that her two children, Corldeen Frances Berry and Barbara Jean Higgins, did, on December 21, 1964, duly qualify

in the Clerk's Office of the Circuit Court of Botetourt County as Co-Administratrices of their mother's estate and subsequently settled the same, and it further appearing to the Court that the accident, which gave rise to the institution of this action at law, occurred in Roanoke County, Virginia and not in the City of Roanoke, and it still further appearing to the Court that the Order this Court entered on November 10, 1966 purporting to appoint Kermit E. Allman as Administrator of said decedent's estate was based

page 31 } upon allegations that no personal representative had theretofore been appointed, which allegations this Court doth now find to be erroneous inasmuch as the two aforementioned children of the decedent had theretofore, towit: on December 21, 1964, been appointed as such personal representatives by the Court having jurisdiction over the estate of the decedent, and the Court being thus of the opinion that said purported appointment of Kermit E. Allman was void, it is, accordingly, so ADJUDGED and ORDERED;

And it still further appearing to the Court that, inasmuch as said purported appointment was void, the Motion for Summary Judgment, filed on behalf of the defendant, Kermit E. Allman, Administrator, should be sustained and it is, accordingly, so ADJUDGED and ORDERED, and said Motion is sustained and the motion filed by the Plaintiff to amend is accordingly overruled and this action at law is, accordingly, dismissed and stricken from the docket of this Court, to all of which action on the part of the Court the plaintiff, by counsel, duly excepted and leave is hereby granted unto counsel for the plaintiff to, within ten (10) days from and after the entry of this Order, file such exceptions as he deems appropriate hereto.

Enter: March 7th, 1969.

F. L. Hoback, Judge

We request the entry of this Order:
W. H. Jolly
Of Counsel for Defendant

Seen and Objected to:
W. M. Gravatt, Jr.
Of Counsel for Plaintiff

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

Notice is hereby given that Arthur H. Rockwell, plaintiff, hereby appeals the order and judgment entered herein on the 7th day of March, 1969, and makes the following assignments of error:

1. That the court committed error in ruling that the appointment of Kermit E. Allman as Administrator was void.
2. That the court committed error in sustaining the defendant's motion for summary judgment and dismissing the action at law of the plaintiff.
3. That the court committed error in refusing to grant the motion of the plaintiff to amend his pleading for correction of misnomer.
4. That the court committed error in dismissing the cause of action upon a special pleading filed on behalf of the defendant subsequent to and after the filing of grounds of defense, joining of the general issue, continuance of the cause by agreement, and the setting of the cause for trial by jury.

Arthur H. Rockwell

By W. M. Gravatt, Jr.
Counsel

Received and Filed April 14, 1969.

Patsy Testerman, Deputy Clerk.

* * * * *

APPEARANCES:

W. M. Gravitt, Jr., Esq.,
Blackstone, Virginia,
Benjamin E. Chapman, Esq.,
Salem, Virginia,
Of counsel for Plaintiff

W. H. Jolly, Esq.,
Kime & Jolly,
Salem, Virginia,
Attorney for Defendant

The subject cause was heard by the Hon. F. L. Hoback, Judge of the Circuit Court of the City of Roanoke, State of Virginia, on the 9th day of July, 1968.

* * * * *

7/9/68
page 3 } CORLDEEN FRANCES BERRY a witness of lawful age, sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION

By Mr. Jolly:
Q. Would you state your name and address, please?
A. Mrs. William Berry, 2115 Berkley Avenue, Southwest, Roanoke.
Q. And what is your age, Mrs. Berry?
A. 34.
Q. Ma'am?
A. 34.
Q. Now, Mrs. Berry, are you related to Mrs. Jacie Underwood Shotwell?
A. I am her daughter.
Q. And how many children did Mrs. Shotwell have?
A. Two.
Q. And is the other one also a girl?
A. Yes.
Q. And what's her name, please?
A. Mrs. Barbara Jean Higgins.
Q. And where does she live?
A. Grandin Road, 2924 Grandin Road.
Q. Now, of course you recall—I am sure, with a great deal of sorrow—your mother's death in 1964; and I be-
7/9/68 lieve she was killed in an automobile accident that
page 4 } occurred on December 15, of that year; is that correct?
A. Yes, sir.
Q. At that time, Mrs. Berry, where did your mother reside?
A. Rainbow Forest.

Corldeen Frances Berry

Q. And in what political subdivision is Rainbow Forest?
A. Botetourt County.
Q. Did she own a home?
A. She was buying.
Q. Did she have title to a home?
A. Yes.
Q. Subject to a loan, I am sure—like all of us—in Rainbow Forest at the time?
A. Yes, sir.
Q. And how long had she lived in Rainbow Forest?
A. She moved there in July—I think it was about the first part of July. I am not exactly sure about the date.
Q. Some time in the summer of 1964?
A. Yes, sir.
Q. And she was then a resident and had a home in Botetourt County at the time of her death?
A. Yes, sir.
Q. Now, was any qualification had on her estate, and if so, who qualified?
7/9/68 A. My sister and I.
page 5 } Q. That is you and Barbara Jean Higgins?
A. Yes, sir.
Q. And I show you here a photostatic copy of a certificate of qualification, and ask you if that is a true copy of the certificate showing your and your sister's qualification?
A. Yes, sir.
Q. And what date did you qualify in the Circuit Court of Botetourt County?
A. The 21st day of December, 1964.

Mr. Jolly: I'd like to file this, if it please the Court, as Defendant's Exhibit A.

(Defendant's Exhibit A—Photostatic copy of certificate of qualification, dated December 21, 1964)

By Mr. Jolly: (Continuing)
Q. Mrs. Berry, did you and your sister employ counsel to assist you in the settlement of your mother's estate?
A. Yes, sir.
Q. And who was that man?
A. James Flippin.
Q. Mr. James Flippin?
A. Yes, sir.
Q. And he's an attorney practicing here in the City of Roanoke; is that correct?

A. Yes, sir.

7/9/68 page 6 Q. And did you and your sister, with his help, complete and settle your mother's estate?

A. Yes, sir.

Q. Was the inheritance tax return prepared and filed?

A. Yes, sir.

Q. And a settlement of the estate filed with the Commissioner of Accounts in Botetourt County?

A. Yes, sir.

Q. And all of those papers or copies are available, and are recorded in Botetourt County; is that correct?

A. Yes, sir.

Q. Now, do you, of your own knowledge, know of the mechanics of the settlement of the estate, or did you rely on Mr. Flippin in that regard?

A. We relied on him; we gave him the books and bills and things like—let him fix all of it.

Q. And he fixed it all up?

A. Except for the inheritance taxes, and we had Mr.—I can't think of his name now—he was Commissioner of Revenue—filed my inheritance taxes for me.

Q. When you qualified, I believe the certificate shows that you gave bond in the penalty of $15,000; is that correct?

A. Yes.

Q. You and your sister?

A. Yes, sir.

7/9/68 page 7 Q. Have you been now discharged from that bond?

A. Yes, sir—as far as I know.

Q. Do you know about when?

A. It was six months after, I guess, when the estate was settled.

Q. Was it within a year from your mother's death?

A. Yes.

Q. During the time of the administration of the estate, or even up until the very moment you are testifying, has any claim been made against you or your sister in your capacities as administratrices of the estate, by or on behalf of Mr. Arthur H. Rockwell, the Plaintiff in this suit?

A. No, sir.

Q. When did you first learn that Mr. Rockwell claimed to have been injured in that automobile accident in which your mother was killed?

A. (The witness does not respond)

Q. And who told you?

Corldeen Frances Berry

A. You did.

Q. So, up until yesterday, the 8th day of July, you didn't even know that Mr. Rockwell had been hurt; is that correct?

A. Yes, sir.

Q. And no process or no papers or anything had been served on you?

A. No, sir.

7/9/68 page 8 } Q. Either individually or as administratrix?

A. No, sir.

Q. And there's no question that your mother, at the time of her death, was a resident of the County of Botetourt?

A. No, sir.

Q. And not a resident of the City of Roanoke?

A. Correct.

Q. I think that's all. You answer any questions these gentlemen want to ask you.

CROSS-EXAMINATION

By Mr. Gravitt:

Q. Mrs. Berry, was your mother married in the year 1964?

A. She was married, but she was in the process of getting a divorce.

Q. My question was, was she married in 1964?

A. I guess you'd say she was still married.

Q. Did she get married in 1964?

A. I don't remember. I believe it was in '63 she got married.

Q. If I would show you a copy of the marriage certificate, would you think that would refresh you?

A. Yes, sir.

Mr. Jolly: If you will show it to me, I will be glad to stipulate whatever the marriage certificate says, as a fact. (Examining document) On the 16th day of May, 1964, she married Mr. Shotwell. I will concede that to be a fact.

7/9/68 page 9 }

Mr. Gravitt: Do you object to that going into evidence?

Mr. Jolly: None whatsoever; no, sir.

(Plaintiff's Exhibit No. 1—Copy of certificate of marriage)

By Mr. Gravitt: (Continuing)

Q. This certificate shows that Mrs. Jacie Arbell Witt Underwood married Clarence Huel Shotwell in the City of Roanoke as of the date stated; is that correct, or not?

A. Yes, sir.

Q. It states that Robert Thomas Shotwell's residence is 1212 Wise Avenue, Southeast, Roanoke, Virginia; do you know whether or not that's correct?

A. No. I don't remember the address.

Q. It states that the residence of Jacie Arbell Witt Underwood is 1635 - 9th Street, Southeast, Roanoke, Virginia, at the time?

A. Yes, sir.

Q. Now, that was the residence that originally was in the name of Mr. and Mrs. Underwood?

A. Yes, sir.

Q. Your father?

7/9/68 page 10 } A. No. He was my stepfather.

Q. Your stepfather? And was then later transferred to Mrs. Jacie Underwood; is that correct?

A. Yes, sir.

Q. Now, do you know where the residence of Mr. Shotwell was at the time that your mother died?

A. I think he had moved back in with his sister-in-law, or someone—but I don't know where.

Q. Would you deny that he was a resident of the City of Roanoke?

A. No, sir.

By Mr. Jolly:

Q. Do you know whether he was a resident of the City?

A. I don't know.

Mr. Jolly: How can she deny it, if she doesn't know. She can't deny it.

Mr. Gravitt: I will try to authenticate this. (Passing paper to Mr. Jolly) Do you have any objection to filing that?

(Plaintiff's Exhibit No. 2—Copy of letter from Clarence H. Shotwell to George E. Holt, dated December 19, 1964)

By Mr. Gravitt: (Continuing)

Q. I show you a letter from Clarence H. Shotwell, addressed to George E. Holt, Jr., Clerk of the Botetourt Circuit Court, and ask you whether or not

7/9/68 page 11 } you ever saw that?

A. No, I don't remember. I probably did.

Q. As a matter of fact, then, in settling this estate, and so forth, you were aware that he was a citizen of the town of Roanoke—a resident?

Corldeen Frances Berry

A. He was, I reckon. He was living in the house.

Q. And in this letter he states to the Clerk, to "Please appoint as administratrix's of the estate of Jacie Arbelle Underwood Shotwell, Corldeen Frances Berry and Barbara Jean Higgins her two daughters.

(Signed) Clarence H. Shotwell
Roanoke, Virginia."

Isn't it a fact that he was residing, and also your mother was residing at 1635 - 9th Street, Southeast, Roanoke?

A. She wasn't living in Roanoke when she got killed; no, sir. She was separated—they weren't living together.

Q. How long, if you can state, did your mother live at 1635 9th Street in Roanoke?

A. Well, actually, she lived two places; she had two places here in Roanoke she lived part one time, and one part the other.

Q. In Roanoke?

A. Um-hum.

Q. Did she live at 1635 - 9th Street, as far back as 1958, can you remember?

A. Yes, sir.

7/9/68 page 12 } Q. And she lived there at the time that she got married to Mr. Shotwell in May of 1964?

A. Yes, sir.

Q. Which was the same year she got killed?

A. Yes, sir.

Q. You are telling the Court that some time subsequent to May when she got married, and December when she was killed, that she moved away from Roanoke?

A. Yes, sir.

Q. Do you know whether any of her personal effects were in the residence?

A. She moved every single thing out from upstairs and took it down to Botetourt to Rainbow Forest, and rented the upstairs out to someone else.

Q. What was in the downstairs?

A. A restaurant.

Q. Did she run the restaurant?

A. Yes, sir.

Q. Can you state where the other place in Roanoke is, where she lived during this time?

A. She lived, well, at 725 Bullitt Avenue—my sister, though, had taken it over since she'd moved to 9th Street.

Q. Now, the items of account in your mother's estate at

Botetourt showed an item of insurance payment for loss of automobile, $3,151; do you know who paid that?

7/9/68 page 13 } A. No, I don't.
Q. You know what insurance company paid it?
A. No, sir.

Q. Do you know whether the check was made to you and your sister as administratrix?

A. I don't even remember it.

Q. You know whether or not your mother had liability insurance on the automobile?

A. I don't know anything about that part of it. All I know is—

Q. Did an insurance adjuster from Aetna Casualty & Surety Co. ever discuss this accident with you at any time?

A. No, sir.

Q. As administratrix?

A. No, sir.

Q. Did anyone from the insurance company or any attorney notify you that there was a suit against your mother's estate in Roanoke?

A. No, sir—not until yesterday.

Q. Not until yesterday? Can you tell us how you got the information, concerning this suit, yesterday?

A. On the telephone.

Q. From who?

A. Mr. Jolly.

7/9/68 page 14 } Q. Did State Trooper R. L. Chew ever talk to you, or do you know whether he ever talked to your sister?

A. I don't know, because I didn't want to know anything at all about what happened; all I knew, she was dead—and that was it.

Q. Do you know who he delivered her personal effects, that were in and about the automobile, to?

A. They were at the funeral home, and my sister picked them up.

Q. Do you know who, if anyone, gave the state trooper 1635 - 9th Street, Southeast, Roanoke, as your mother's address at the time of the accident?

A. I don't know who gave it to him.

Mr. Gravitt: That's all we have at this time—reserve the right to call, or question that witness later, Your Honor.

The Court: All right.

Corldeen Frances Berry

REDIRECT EXAMINATION

By Mr. Jolly:

Q. Just a couple more questions, to try to clarify this situation. Now, the property on 9th Street—1635 - 9th Street, did I understand from your answer to the questions Mr. Gravitt has asked you, that was a two-story structure?

A. Yes, sir.

Q. And it was a business downstairs and an apartment over top of it?

7/9/68 page 15 }

A. Yes, sir.

Q. And your mother lived there part-time from '58—or whenever you testified about—up until the summer of '64?

A. Yes, sir.

Q. And in the summer of '64 did she build the house in Rainbow Forest, or buy one?

A. No, sir. It was already built, and she bought it.

Q. And at that time she moved all her personal effects to Botetourt County, and rented the upstairs?

A. Yes, sir.

Q. And was it being rented at the time of her death?

A. Yes, sir. I can tell you the person who was renting it—Shorty Maxie, or something—not Maxie—Whorley.

Q. W-h-o-r-l-e-y-?

A. Um-hum.

Q. And at the time that she moved to Rainbow Forest in Botetourt County, were she and Mr. Shotwell separated?

A. Yes, sir.

Q. Do you know whether divorce proceedings had been instituted?

A. No, I don't know when they were; I know when she started, but I don't know when.

Q. Had they been instituted at the time of her death?

A. Yes, sir.

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Q. Do you know what attorney was handling the matter for her?

A. No, I don't remember his name. I believe it was Glasgow, though.

Q. You don't know who?

A. No, I don't remember his name.

Q. This Plaintiff's Exhibit 2, which has been exhibited to you, does that look like Mr. Shotwell's signature?

A. Yes, sir.

Q. It does?

A. Um-hum.
Q. And that's a request to the Clerk of the Circuit Court of Botetourt County; that's correct, isn't it?
A. Yes, sir.
Q. To appoint you and your sister?
A. Yes, sir.
Q. As administratrix of the estate?
A. Yes, sir.
Q. That's Mr. Shotwell's request?
A. Yes, sir.
Q. To the Circuit Court of Botetourt County?
A. Yes, sir.
Q. I think that's all.

RECROSS-EXAMINATION

By Mr. Gravitt:

7/9/68 page 17 } Q. Do you know in what court or what place the divorce papers were filed—whether it was in Roanoke?
A. No. I don't know anything about that part of it. I just know that she said she had filed for divorce.
Q. But you don't know whether she filed—just she said she had?
A. Just she said she had.
Q. But you had never seen any record of it anywhere?
A. No, sir.
Q. Do you know whether your mother divorced Mr. Underwood, or not?
A. Yes, sir; I do know that.
Q. Did she?
A. Yes, sir.
Q. Where was that?
A. Here in Roanoke.
Q. Do you know whether she divorced the husband before that—Mr. Witt, I believe it is?
A. Her husband before that was Mr. Harris—that was my daddy.
Q. Was that a divorce, or did he pass away?
A. She had—the divorce was not final, and he died before it was final.
Q. Was that in Roanoke?
A. Yes, sir.

7/9/68 page 18 } Q. What was the name?
A. Robert *Sheffy* Harris.
Q. That's all at this time.

James William Flippin

The Witness stands aside.

JAMES WILLIAM FLIPPIN a witness of lawful age, sworn in behalf of the Defendant, testified as follows:

DIRECT EXAMINATION

By Mr. Jolly:

Q. Would you state your full name, please, sir, for the record?

A. James William Flippin.

Q. Mr. Flippin, I believe you are a practicing attorney at law, with an office here in the City of Roanoke?

A. Yes, sir.

Q. And you are also Judge of the Juvenile & Domestic Relations Court?

A. Substitute.

Q. Now, Mr. Flippin, did you have occasion in 1964 to represent Mrs. Berry here and her sister Mrs. Higgins, in connection with her mother's estate?

A. Yes, sir; I did.

Q. And in what court was that estate handled?

A. Botetourt County Circuit Court.

7/9/68 page 19

Q. And do you know, of your own knowledge, that Mrs. Shotwell was a resident of Botetourt County at the time of her death?

A. Well, of course, I didn't know Mrs. Shotwell herself at all before—excuse me—Mrs. Shotwell before she died. Mrs. Berry or Mrs. Higgins, one, called me at home, and I found out that she had a home in Botetourt County, Rainbow Forest, I believe; and I talked with them, and went down to the Clerk's office in Botetourt County and got a letter—I believe you have already talked about that—Clarence Shotwell signed.

Q. That's Plaintiff's Exhibit No. 2?

A. Asking that the two daughters who, I understood, was the only heirs, be appointed as administrators of the estate.

Q. Now, Defendant's Exhibit A, already filed, purports to be a copy of the certificate of qualification, dated December 21, 1964—does that comport with your records as to the date of qualification?

A. Judge, give me just a minute. I just picked this file up. It's a rather voluminous thing. I would say that's correct. December is right—before Christmas—I recall that, and I am pretty sure that is the correct date. The date was December 15, 1964—I would say that's probably exactly the right date.

James William Flippin

Q. And you did assist them in paying the bills and claims against the estate?

A. Yes, sir.

7/9/68 page 20 } Q. And preparing the settlement?

A. Yes, sir.

Q. Was any claim ever made, to your knowledge, against the estate on behalf of Mr. Rockwell for injuries sustained?

A. Is Mr. Rockwell the gentleman driving another vehicle?

Q. Driving the truck that was involved in the accident.

A. When I talked to Mrs. Higgins and Mrs. Berry—of course, when they asked me to handle the estate, I mentioned that there might possibly be a claim—and seems to me I went to Roanoke County to the State Police Department. I might have talked to Trooper Chew—I am not sure about—I think I looked at an accident report. In looking at it, I felt he had no claim whatsoever—and I told them that—and we didn't pursue it any further.

Q. That's the claim on behalf of the decedent?

A. Decedent; yes, sir.

Q. Did you prepare the final settlement? And do you have a copy of it?

A. I got a notation—copied the dates in the file somewhere. That's a copy of it—signed copy.

Q. It's signed.

A. You showed me a copy a moment ago that, I am sure, had the date it was filed. That's just my notation,

7/9/68 page 21 } 8/16/65—that's just my notation; it's not—that was not signed. I made a notation in my file that was the date it was filed and approved.

Q. Could we file the signed copy as an exhibit in this proceeding, and then can you state, of your own knowledge and based on your record, that the original of this copy was filed and approved on August 16, 1965?

A. Yes, sir. I took it to Botetourt County to Commissioner Allen—I believe his name is—I took it and showed him the receipts, and everything.

(Defendant's Exhibit B—Three-page copy of list of receipts and disbursements)

By Mr. Jolly: (Continuing)

Q. To your knowledge, Mr. Flippin, does that Defendant's Exhibit B accurately list all receipts which went into the estate and all bills and claims against the estate, and the amount of those, that they were all paid?

James William Flippin

A. Yes, as far as I know, it does.

Q. And if any other claims were added to them, to your knowledge, they would be on the settlement?

A. Certainly would. Of course, Mrs. Higgins and Mrs. Berry, sometimes they received a small check or bill, and I told them to bring everything to me—I assume they did.

Q. Based on your—

A. Based on my knowledge.

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Q. And the qualification was had in the Circuit Court of Botetourt County, the settlement was filed in the Circuit Court of Botetourt County?

A. Yes, sir.

Q. There's an item listed on there, Mr. Flippin, showing receipt of $1351 insurance payment for loss of automobile; do you know anything about that, or what do you know about it?

A. This is just from memory, and I wouldn't try to be exact, but it seems to me that was a reasonably new car that had been financed by Mrs. Shotwell at the Colonial-American Bank, and I went down to see Worth Boone, who was at that time in the financing department of the Colonial-American Bank, and I talked to him about it, and he said that the insurance company would pay them on the loss-payable clause, or something to that effect, and they would credit the account —and it seems to me that it just about balanced itself out. I never dealt with any insurance company on the recovery of the damage to the car, that I remember.

Q. So Mrs. Shotwell had a loan on the automobile, which at that time was a 1963 Pontiac?

A. Seemed like to me it was—seemed like to me it was a reasonably new car. Now, she could have had another savings account, or something to the effect, and they worked them together. Anyway, this is the only way I know anything about it—is what I recall—and I might be entirely wrong on it, because it's been a long time. I just don't remember how it was.

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Q. To the best of your recollection, and subject to checking it further, apparently she had a loan on the car, and carried collision insurance, with the bank as the beneficiary, and the company settled with the bank, and then the bank settled with the estate for whatever the difference was?

A. Seemed like that's about what I remembered about it. It could be they paid Mrs. Berry and Mrs. Higgins, and they brought me the check—I just don't know. I know this: I don't recall any insurance company, as long as I remember, asking for payment. And I'm pretty sure she had a loan on the car

or, if she didn't have a loan on the car, she had some other loan—I don't recall that detail.

Q. And the real estate was disposed of after her death?

A. This is the property in Botetourt County. They had very little in it, and she sold—the heirs sold it. It looks like a note dated February 13, 1965—and Mr. Tracy Loyd handled that; and he held that in escrow—what proceeds she got—which was very little—I think $255.94 were the net proceeds.

Q. That's all the equity?

A. That the heirs received after closing costs.

Q. And would you read into the record the description of the real estate?

A. Says, "Property lying in and being in the County of Botetourt, Virginia, and described as follows, to wit: Lot 2, Block 9, Map of Rainbow Forest"—a more complete description will be furnished in the deed—"and being the property of the late Jacie A. Underwood."

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Q. Jacie A. Underwood Shotwell at the time of her death?

A. Yes.

Q. That's one and the same person?

A. Yes.

Q. I think that's all.

CROSS-EXAMINATION

By Mr. Gravitt:

Q. Mr. Flippin, you filed a copy of account; can you find any entry on that account showing where the estate paid the bank anything on a car loan?

A. You'll have to let me look through the file to tell you.

Q. Yes, sir.

A. No, I don't see any entry paying the bank.

Q. On the front page, where it says Receipts, there's an item which states "Insurance payment for loss of automobile, $3151.00"?

A. Yes, sir.

Q. So the estate did receive $3151 insurance on the automobile?

A. Let me look through this checkbook. Maybe I can help you. I may be all confused. I got a deposit on the—deposit slip made out to the estate, of $3,151 on February 1, 1965, but I don't know where the money came from. I just have to tell you, I gather—

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Q. Do you think you can find that out for us?

James William Flippin

A. I'll have to go through all these papers. My goodness, I can't pick up a stack of papers—

Mr. Jolly: I apologize, Mr. Gravitt.

Mr. Gravitt: I am not being critical of you in any way, counsel.

A. If I had enough time, I could. I hate to hold the Court up.

By Mr. Gravitt: (Continuing)

Q. Also on your front sheet, sir—as a matter of fact, in the item under Receipts, "Refund on automobile insurance, $81.77"?

A. That was a refund—I don't know where it came from. I made a notation of that.

Q. Do you know whether or not anyone from the Aetna Casualty insurance company wrote to you, contacted you, or communicated with you in any way concerning this?

A. I answered before, I didn't know; I don't think I ever talked to anybody about it. Certainly, if I thought she had a claim, I'd be in touch with somebody.

Q. I will ask you this: If you were concerned enough to go to the State Police headquarters and investigate on the accident, you probably would have found out whether or not this decedent had liability insurance, would you not?

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A. Decedent? No, I didn't find out that. When I heard about the suit—I don't know when this happened—somebody called me on Saturday morning or Sunday night, or something, and said, "Do you know that my mother's been sued?" And I didn't know Mrs. Berry or Mrs. Higgins—might have been six months ago, might be a year ago—I don't know when. I said, "How do you know it?" Somebody told her, she saw it in the paper. I said, "Well, when you get the papers, take them to her insurance company."

Q. She had insurance, did she?

A. Well, I am pretty sure she had. She just bought a new car. I don't think she'd drive a car without insurance—"Turn them over to your insurance company."

Q. Sir, can you give an estimate of any kind as to how long ago that was that you—

A. I wouldn't have any idea.

Q. Was it more than a week?

A. A week? Must have been months—almost years. I'd say '64—'68—it's been a long time.

Q. So, someone concerning Mrs. Underwood's heirs or estate was cognizant of this suit some time ago?

A. Well, she was cognizant that her mother was being sued. I don't know whether she received any papers—I couldn't answer that.

7/9/68 page 27 } Q. I believe—not to be repetitious, sir—I believe your answer about the eighty-one seventy-seven check was that you did not know who that was received from?

A. See, the way—I can't answer that right now. I got a deposit slip that shows—I made a notation on the refund of some kind of insurance.

Q. What bank were those accounts in, sir?

A. First National Exchange Bank.

Q. If we are willing to pay the expense of getting the photostatic copies of those checks, would you produce them for the Court?

A. That's up to these people. The Judge knows—if he tells me.

The Court: Any objection?

Mr. Jolly: No, sir.

Mr. Gravitt: We would like to state to the Court we are willing to pay the expense, if any there might be, in obtaining the photostats of any checks that went through that account.

A. In answer to your question, January 21, $81.77—there's a notation—not in my writing; it must be in either my secretary's or one of the—Mrs. Berry or Mrs. Higgins—says "Balance from car insurance." That's all it says.

By Mr. Gravitt: (Continuing)

Q. But, presumably, if it was received by check, we could find out whose check that was?

7/9/68 page 28 } A. I can't answer that. I guess you could, sir. I don't know whether I handled the check. When I received money, took it to the bank and deposited it—and, "Tell me what it was, so I can keep your account." My name wasn't on the checks. I don't know. I can't answer it.

Q. Would you look through your file—

Mr. Gravitt: If the Court will indulge me.

Q. Would you look through your file and see if you have a letter of any kind from Aetna Casualty & Surety Co.?

Corldeen Frances Berry

A. Certainly will. I'll be glad to. No, sir, I do not have a letter from any insurance company, except the bonding company.

Mr. Gravitt: We rest our questioning, with the understanding that we can recall this witness at a future time.

A. I've got to be at Juvenile Court. It won't be today.

By the Court:

Q. Mr. Flippin, I have one. Do you, in your settlement, show any distribution to Mr. Shotwell?

A. Yes, sir. I am sure there was a distribution. I checked the divorce case, and there was no final decree—they were still legally married. I show a distribution to Mr. Shotwell of $1,539.66.

Q. All right, sir.

By Mr. Jolly:

7/9/68 page 29 } Q. This was his courtesy interest in the estate?

A. Yes—three of them—three involved—yes, sir.

The Witness stands aside.

(CORLDEEN FRANCES BERRY, having been previously sworn in this cause, is recalled to the witness stand)

DIRECT EXAMINATION

By Mr. Jolly:

Q. There are two things I'd like to see if you can clarify a little bit for us here. On the question of that payment of some three thousand dollars from the bank to the estate, or from somebody to the estate on the automobile insurance business, do you know what was the situation, with reference to your mother and the bank?

A. She had a loan on the car when she bought it, she got collision insurance, plus she had life insurance on the loan—one paid the bank off for the car, and the other went into the estate; in other words, she had two insurances on the car.

Q. On account of the loan, she had taken out two policies, one on her life and one on the car?

A. Yes, sir.

Q. And this was the net amount paid to the estate after the loan was satisfied?

7/9/68 A. Yes, sir.

page 30 } Q. Is that correct?
A. Um-hum.

Q. You have heard Mr. Flippin testify that somebody called him and said that they had heard that the mother had been sued, or words to that effect?

A. Um-hum.

Q. Do you recall anything about that?

A. It was me. My cousin said, "I saw in the paper—"—said, "They are suing your mother's estate." I said, "It's impossible,", I said, "because—"—she said Mr. Allman was the administrator of the estate. I said, "Must be somebody else," I said, "because my sister and I were." And so I called Mr. Flippin and told him in a joking way, really—and that was it. And he said, "Forget about it, unless somebody serves you some papers"—and nobody served any papers—and I never thought anything about it.

Q. Do you recall that, when he testified a few moments ago—before he did?

A. I didn't think about it until he said something.

Q. When you heard it was Mr. Allman, the administrator, and you called Mr. Flippin, and he said, "Don't do anything unless you are served with papers," and you forgot about it?

A. That's right.

Q. And you figured it was somebody else, be-
7/9/68 cause he wasn't administrator?
page 31 } A. I thought they would call me, and nobody ever called me, until you called me yesterday. I couldn't figure out why anyone would want to know anything about mother's death, until you called me yesterday.

Q. Other than that, is that the only notice you had, up until my conversation with you?

A. That's all. That was hearsay, because I never did see the paper.

Q. That's all. Thank you.

CROSS-EXAMINATION

By Mr. Gravitt:

Q. I'd like to ask a question. Now, Mr. Flippin has filed his accounts here, and it shows no payment to the bank about any life insurance.

A. I don't know how—

Q. How do you know about that?

A. Well, Mr. Flippin—somebody, I don't remember who it was—told me that she had two insurances on the car, and the next thing I know—

Corldeen Frances Berry

Q. Do you know—

Mr. Jolly: Let her finish.

A. And the next thing I knew, we had the check. I honestly don't remember who sent the check, or anything.

By Mr. Gravitt: (Continuing)

7/9/68 page 32 } Q. Do you remember endorsing any check?

A. I do remember, but I can't remember whether we did in Mr. Flippin's office, or where.

Q. Do you remember endorsing the life insurance check?

A. I don't know whether it was the life insurance—or which one. I don't know where the check came from.

Q. You have stated to His Honor that you definitely knew she had two checks?

A. I knew she had two insurances.

Q. Two checks?

Mr. Jolly: She didn't say "checks".

A. I knew she had two insurances, one which was supposed to pay for the car, and one supposed to be paid to the estate, but I don't know which did which.

By Mr. Gravitt: (Continuing)

Q. You said, "supposed to pay off"—did it pay off?

A. It must have, because no one has ever said to me it wasn't paid for.

Q. But it never went through the account? Did you ever inspect that final account?

A. No, sir—I don't remember whether I did, or not.

Q. Do you remember that you got $1539.67 out of it?

A. Yes, sir. Now, I didn't get that cash money—I don't think—I think that was the proceeds, and everything.

7/9/68 page 33 } Q. Do you recall anything about the refund on the automobile insurance, $81.77?

A. That she had so much longer to go on her insurance policy.

Q. Who was her agent?

A. Somebody on Williamson Road. I don't remember.

Q. Did you go there to his office?

A. My sister did that.

Q. Did she go there to get the check?

A. I don't think—

Q. Refund on that?

A. It might have been mailed to her. I don't know.

Corldeen Frances Berry

Q. Your sister, or somebody, contacted the insurance agent to get the refund?

A. I don't really know. I think somebody told her that it was due, or something.

Q. Do you think your sister knows more about this than you do?

A. She was—most of the stuff I had to handle. But, now, I think—I am not sure about her talking to the insurance man—I am not sure—I don't know whether she did, or not. But most of the things I had to do.

Q. Excuse me. Have you finished?

A. Yes.

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Q. You knew that your mother had life insurance, and you knew that she had collision insurance to pay for the car; do you know that she had liability insurance to pay for any damage she might have done to anyone else?

A. No, I don't—I mean, I know you have to have it before you can get your car tags.

Q. Do you know whether or not the truck which was damaged in this wreck—which was not owned by Mr. Rockwell here—was paid for by the insurance carrier?

A. I don't know.

Q. And you don't know whether any claim was ever made for that truck, either, or not?

A. No, sir.

Q. It doesn't show anything in this account where any claim was paid?

A. As far as I know, it never was.

Q. That's all at this time. * * *

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7/30/68 page 1

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The transcript of Motion for Summary Judgment and Motion to Amend the Motion for Judgment filed in the case of *Arthur H. Rockwell* v. *Kermit E. Allman, Administrator of the Estate of Jacie Arbell Underwood Shotwell, Deceased,* heard by the Honorable F. L. Hoback, Judge of the Circuit Court for the City of Roanoke, heard in the Chambers of the Circuit Court for the County of Roanoke, Salem, Virginia, on the 30th day of July, 1968, at 11:30 A. M.

APPEARANCES:

William M. Gravatt Jr.,
Esquire
and
Benjamin E. Chapman, Esquire
Counsel for the Plaintiff

W. H. Jolly, Esquire
(Kime & Jolly)
Counsel for the Defendant

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page 6 }

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Mr. Gravatt: All right, how about letting me read my statement of facts in this brief on the first page. "On December 15, 1964, the plaintiff, Arthur H. Rockwell, was in an automobile collision on Highway 460 in Roanoke County when the truck driven by him was in collision with a Pontiac automobile driven by Jacie Arbell Underwood Shotwell. This cause of action resulted from said accident. The plaintiff is alleged to have received personal injuries as the direct proximate result of the negligence on the part of the said Shotwell. Mrs. Shotwell was instantly killed in the accident. Mrs. Shotwell and her vehicle were covered by a policy of
7/30/68 liability insurance carried by Aetna Casualty and
page 7 } Insurance Company and form SR-21 was duly filed and of record with the Division of Motor Vehicles. Over a long period of time W. M. Gravett, Jr., attorney for Rockwell, negotiated with claim representatives of said insurance company and Rockwell was examined by their doctors on at least two occasions. The claim could not be settled. The records of the Division of Motor Vehicles and state police indicated that Mrs. Shotwell had resided at 1635 Ninth Street S. E., Roanoke, Virginia, and in the deposition of record in the Clerk's Office of the Circuit Court of Roanoke, she testified as late as August, 1964," that was in a divorce action, "that she resided at this address and had been a resident of Roanoke all her life. Rockwell's attorney addressed letters to the Clerk of the Circuit Court of Roanoke County and the Clerk of the Circuit Court of the City of Roanoke prior to the filing of this suit and was advised that no one had qualified upon the estate of Mrs. Shotwell in either of these two jurisdictions. Whereupon, said attorney on Novem-

ber 9, 1966, moved the honorable judge of the Circuit Court of the City of Roanoke pursuant to section 64-124 of the Code of Virginia to appoint Kermit E. Allman, City
7/30/68 Sergeant of the City of Roanoke administrator of
page 8 } the estate of Mrs. Shotwell. Mr. Allman was appointed administrator of the said estate on November 10, 1966. Motion for judgment in this cause was filed in the said Court by attorney for Rockwell by a letter dated November 9, 1966, and served upon Mr. Allman on November 14, 1966, Aetna Casualty and Surety Company was advised by the attorney for Rockwell concerning the appointment of Mr. Allman and the filing of motion for judgment by letter dated November 15, 1966, Mr. Allman mailed the motion for judgment to Aetna Casualty and Surety Company, 3805 Cutshaw Avenue, P. O. Box 92, Richmond, Virginia and advised them of his appointment and service of the motion. In a letter dated November 30, 1966, attorney for Rockwell advised Aetna Casualty and Surety Company of the appointment of Mr. Allman and the filing of the Motion for Judgment. In the same letter the attorney for Rockwell requested that Aetna Casualty and Surety Company furnish him or Mr. Allman with any information that they had concerning the names of heirs of the decedent, Mrs. Shotwell. No such information was furnished; however, the said insurance carrier on
7/30/68 the 30th day of November, 1966, by their attorney,
page 9 } Mr. W. H. Jolly, filed in the cause their responsive pleadings on behalf of the estate of Mrs. Shotwell and the issue was joined. The case was first set for trial March 31, 1968, but was continued at the request of the plaintiff. Continuance was agreed upon by the defendant. The case was again set for trial on July 9, 1968. On July 8, 1968 counsel for plaintiff inquired by telephone of counsel for the defendant whether or not he should have an eye witness to the accident in Court the next day. Counsel for defendant advised he intended to admit liability and try the issue of injuries and damages before the jury which had been summoned and the presence of the eye witness was not necessary. Upon arriving in Roanoke the night before the trial, counsel for the plaintiff was advised by his colleague, the other attorney for the plaintiff, Mr. Benjamin E. Chapman, that the jury had been stopped because Attorney Jolly had reported to the Court after-discovered information and that he desired to make a motion to the Court the next day. On July 9, 1968, Attorney Jolly requested the Court the opportunity to introduce evidence concerning the prior appointment
7/30/68 of the administratrices of Jacie Arbell Underwood
page 10 } Shotwell in the Circuit Court of Botetourt

County. To July 8th the plaintiff Rockwell and his attorney had no information concerning the Botetourt County proceedings whatsoever. Attorney Jolly stated that July 8, 1968, was the first time he knew of the Botetourt proceedings. On July 9th, the Court received evidence that Mrs. Frances Barrett and Barbara Jean Higgins, daughters of Jacie Underwood Shotwell, had been appointed administratrices of the estate and qualified as such on December 21, 1964. One of the said daughters representing the said estate made a voluntary general appearance in the cause on July 9th and testified that she had known of the suit against Mr. Allman in his capacity as administrator for a long period of time but chose to do nothing about it. Testimony on the 9th of July indicated that the Administratrices in Botetourt County filed their final accounting which was approved by the Commissioner of Accounts on August 16, 1965, and the estate was closed. Among the receipts of the estate listed in the final accounting was an item of $81.77, refund on automobile insurance and $3151 insurance payment for loss of automobile, all indicating that Aetna Casualty and Surety Company had full knowledge of the administration of said estate in Botetourt County all during the course of the litigation involved and declined to divulge any such information to the plaintiff allowing the period of time covered by the statute of limitations to run. Attorney for the defendant on July 10, 1968, notified the plaintiff and his attorney that he would bring a motion for summary judgment for hearing before the Court on July 30, 1968, at 11:30 A. M."

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Mr. Gravatt: Well I was thinking if we can't get down to any agreement on facts that it almost puts counsel in the position that he's got to testify as to these exchanges of letters.

Mr. Jolly: Between you and the company?

Mr. Gravatt: Yes, sir, and Mr. Kermit Allman.

Mr. Jolly: I'll stipulate that you wrote the company a letter and you can file a copy of it. There isn't any question about that.

Mr. Gravatt: Well, Mr. Jolly, doesn't this boil down to

really the only thing that we're straining at here is whether or not Aetna had knowledge of this proceeding in

7/30/68 page 24 } Botetourt through some of their employees? You admitted to me yesterday that they delivered that check and this final accounting that you filed shows that they got a check. Mr. Allman didn't get it.

Mr. Jolly: That's right. The check was made payable to the estate of Jacie Underwood.

Mr. Gravatt: They had to know who to deliver it to, somebody did.

Mr. Jolly: Well for the sake, I didn't make myself plain a moment ago, if that is the crux of the problem here, for the sake of this motion I'll concede they knew who the administrators were. I don't think they did, as a matter of fact, but I'll concede this for the sake of this motion if that's the only problem on your mind. I'll concede that they knew that they delivered the check to the surviving heirs of this lady.

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A Copy—Teste:

Howard G. Turner, Clerk.

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