

**Editor's note: Appealed – reversed, Civ.No. 79-96 TUC-MAR (D.Ariz. Dec. 14, 1983).**

GEORGE RODDA, JR.

IBLA 75-422 (Supp.)

Decided October 11, 1978

Appeal from decision of Administrative Law Judge Harvey C. Sweitzer rejecting in part Soldiers' Additional Homestead Rights Application A-8857.

Affirmed.

1. Scrip: Validity—Soldiers' Additional Homesteads: Generally

An application by a remote assignee to exercise soldiers' additional homestead rights is properly rejected when the validity of the right on which the assignment is based has not been established.

APPEARANCES: George Rodda, Jr., Esq., pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

George Rodda, Jr., appeals from a decision of Administrative Law Judge Harvey C. Sweitzer dated January 16, 1978, which found that the facts surrounding an assignment of certain Soldiers' Additional Homestead (SAH) scrip, now in the possession of Rodda, were such as would justify an earlier (February 26, 1975) decision of the Arizona State Office, Bureau of Land Management (BLM), rejecting an SAH application based upon Rodda's rights as a remote assignee of that scrip. This application, which was premised on rights arising from three separate assignments of SAH scrip, was the subject of a previous decision by this Board, George Rodda, Jr., 27 IBLA 186 (1976), in which we conclusively adjudicated the status of Rodda's rights under two of these SAH scrip assignments, but referred the question of his rights under the third assignment (the "Whitcomb" scrip) to the Hearings Division to allow Rodda an opportunity to come forward with certain factual showings in support of the validity of his claim. We now find, as did Judge Sweitzer below, that Rodda has failed to establish the facts necessary to a finding that the scrip in question should have been honored by BLM.

The factual question upon which the hearing below focused concerned a January 15, 1958, assignment of the Whitcomb scrip which Rodda's assignor, Dr. Norman Lewis McBride, was alleged to have made to one Roy Maggert. McBride testified at the hearing that he had made no such assignment and appellant contends that the assignment which appears in the case file is a forgery executed by Maggert himself. McBride stated that, in July 1957, he was contacted by Eldon J. Fairbanks, an associate of Maggert, who offered to see to the timely recordation of the scrip pursuant to the Act of August 5, 1955, 69 Stat. 535, 43 U.S.C. § 274 (note) (1970). See, Rodda, supra. McBride admitted signing "two forms" for Fairbanks and giving him the scrip papers for recordation. 1/

Eldon Fairbanks thus emerges as a crucial link in establishing the exact circumstances surrounding Maggert's acquisition of the Whitcomb scrip, and our opinion in Rodda, supra, specifically stated that the testimony of Fairbanks was of central importance to the appellant's case. As we said in Rodda, supra at 192, "Fairbanks' testimony would certainly be useful in determining the truth of appellant's contentions. We reiterate that appellant has the burden of establishing his present right to the Whitcomb scrip. Failure to do this must result in the rejection of the claim." (Emphasis added.) Despite this rather specific admonition, appellant failed to produce Fairbanks as a witness at the hearing and failed also to advance any explanation for his absence. An affidavit from Fairbanks was introduced at the hearing, but we are of the opinion that this document, unaccompanied by any testimony from its author, raises as many questions as it dispels.

[1] As the decision below properly states, "Courts have frequently held that, to establish fraud, evidence must be clear and convincing." See, United States v. American Bell Telephone Co., 167 U.S. 224, 241, 17 S. Ct. 809, 42 L. Ed. 144 (1897). More specifically, the general rule relating to proof of fraud is that, since a court or jury should be cautious in arriving at conclusions prejudicial to character and honesty, clear and convincing proof is required to preponderate over the general presumption that men are honest and do not ordinarily commit fraud or act in bad faith. Barr Rubber Products Company v. Sun Rubber Company, 425 F.2d 1114 (2d Cir. 1970); Rogers et ux. v. Commissioner of Internal Revenue, 111 F.2d 987 (6th Cir. 1940). See also, Lalone v. United States, 164 U.S. 255, 257, 15 S. Ct. 74, 41 L. Ed. 425 (1896). Thus, the evidentiary burden with which appellant was charged, both in the decision below and by our decision in Rodda, supra, was a burden of going forward with affirmative proof of the alleged fraud, such evidence to be "clear and convincing" in character.

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1/ BLM records indicate that the assignment of the Whitcomb scrip for 40 acres dated September 8, 1932, from B. A. Mason to Norman Lewis McBride was recorded July 31, 1957.

We find that the normal evidentiary burden of going forward with a clear and convincing case should apply to appellant Rodda in that his allegations of fraud inevitably involve a third party not charged with dishonesty or tainted dealing, i.e., Eldon Fairbanks. <sup>2/</sup> Thus, we agree that the record before us leaves too much to speculation, especially in regard to the circumstances surrounding Fairbanks' entrustment of the scrip in question to Maggert, and in regard to the exact relationship between these two individuals. The mere assertion by Dr. McBride that, "to my knowledge it (the signature on the assignment) is not my signature" is not enough to establish fraud. As our decision in Rodda, supra, suggested, the actual testimony of Fairbanks is a vital evidentiary link and, without it, appellant's case remains ambiguous and weak. Accordingly, we find, with Judge Sweitzer, that appellant has failed to carry the burden of demonstrating fraud in connection with McBride's assignment to Roy Maggert.

Rodda, on appeal from Judge Sweitzer's decision, complains that the Government made no objection when Fairbanks' affidavit was received into evidence and cites authority for the proposition that the affidavit cannot now be questioned or attacked in any manner. Even assuming, arguendo, the correctness of this position, we find that no objection has been raised, either in the Government's post-hearing brief or in the decision below, to receipt into evidence of the Fairbanks' affidavit. Judge Sweitzer's opinion merely points out the obvious substantive deficiency which appears when any litigant attempts to establish a vital factual link in his case with evidence which is not subject to adversarial scrutiny in the form of cross-examination. Judge Sweitzer merely states the obvious when he observes that Fairbanks' absence from the hearing leaves certain questions unanswered, and it is quite preposterous to suggest that this gaping flaw in appellant's case is somehow hidden from official view by the fact that counsel for the Government did not comment on it during the hearing. Certainly this mistaken proposition affords no basis for relief on appeal.

As stated, supra, the decision below correctly placed the burden of going forward with the evidence upon appellant. Rodda objects on appeal to the "burden of proof criteria" applied below, and cites various Departmental decisions and legislative reports from the last century in support of his contention that, in cases involving any possible forfeiture of SAH rights, the whole burden of proof is upon the party alleging want of compliance with the applicable statute. Assuming, again without conceding the point, that this was once an

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<sup>2/</sup> BLM records indicate that Eldon Fairbanks twice attempted to use the Whitcomb scrip as basis for a selection: once alleging assignment from Angel Island Corporation to himself, this first application was rejected by BLM because its record showed that McBride had assigned the Whitcomb scrip to Angel Island Corporation; the second because Angel Island had never recorded its assignment from McBride within the time limits of the statute.

accurate statement of the law respecting SAH rights, we observe that the Act of August 5, 1955, supra, provides quite specifically for the forfeiture of SAH rights which are the subject of an assignment that is not presented for recordation within 6 months. The 19th century legislative policy of "abhorrence of a forfeiture" of these SAH rights would thus appear to be conclusively renounced, and we note, furthermore, the Act of August 31, 1964, 78 Stat. 751, which provided that all SAH claims not satisfied by January 1, 1975, would become null and void in every respect. Appellant's contentions regarding the liberal past practices of the Department are thus of historical interest only, and have no application to the issue of what burden of proof should be applied in the present circumstances.

Judge Sweitzer, in his decision below, refused to receive evidence offered by Rodda in connection with the scrip rights issued in the names of John B. Dill and Daniel C. Burleigh, which rights were invoked by Rodda in his original application to the Arizona State Office, BLM. As Judge Sweitzer correctly held, this Board, in George Rodda Jr., 27 IBLA 186 (1976), conclusively adjudicated the status of appellant's entitlement under remote assignments of those rights. Only the questions surrounding the assignment of the Whitcomb scrip were referred for hearing by that decision, and Judge Sweitzer properly found that he was without authority to receive and consider evidence relating to the Burleigh and Dill rights.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge appealed from is affirmed; and the decision of the Arizona State Office, Bureau of Land Management, dated February 26, 1975, rejecting soldiers' additional homestead application A 8857, which was set aside by Rodda, supra, as to the 40 acres in the Whitcomb scrip, and the matter referred to the Administrative Law Judge as above set forth, is reinstated, and we now affirm that decision as to its rejection of the Whitcomb right.

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Douglas E. Henriques  
Administrative Judge

We concur.

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Joan B. Thompson  
Administrative Judge

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Joseph W. Goss  
Administrative Judge

