

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 95-CA-00685 COA**

**MATTIE LAKE, EXECUTRIX OF THE ESTATE OF  
SUSIE DURHAM**

**APPELLANT**

**v.**

**ROBERT JACOBS AND MARILYN K. JACOBS**

**APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,  
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	1/17/95
TRIAL JUDGE:	HON. WILLIAM J. LUTZ
COURT FROM WHICH APPEALED:	MADISON COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	GAIL SHAW- PIERSON
ATTORNEY FOR APPELLEES:	DEWEY HEMBREE
NATURE OF THE CASE:	CIVIL - REAL PROPERTY
TRIAL COURT DISPOSITION:	COURT RULED THAT PLAINTIFFS ACQUIRED RIGHTS TO PROPERTY AS A RESULT OF ADVERSE POSSESSION.
DISPOSITION:	AFFIRMED - 1/27/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/27/98

EN BANC

HERRING, J., FOR THE COURT:

This case involves a boundary dispute and a claim of adverse possession. Mattie Lake appeals in her capacity as the executrix of the estate of her mother, Susie Durham, deceased, from a judgment of the Chancery Court of Madison County, Mississippi. The judgment confirmed title to certain realty in the Appellees, Robert Jacobs and wife, Marilyn K. Jacobs.

Lake contends that (1) the trial court erred when it admitted into evidence the deposition testimony of Randolph Brown, deceased, which had been taken in a different and prior proceeding, and (2) that the judgment of the trial court was manifestly wrong and against the overwhelming weight of the

evidence, because Mr. and Mrs. Jacobs presented insufficient evidence of adverse possession. We affirm the decision of the trial court.

### **A. THE FACTS**

Robert and Marilyn Jacobs originally filed this action on October 12, 1993, against Susie Durham and other unknown persons claiming an interest in approximately 64.67 acres in Madison County, Mississippi, less and except a parcel of land containing 1.022 acres which had been the subject of prior litigation between Mr. and Mrs. Jacobs and relatives of Susie Durham. The Appellees also originally claimed title to the 1.022 acres and filed suit to protect their title to the property. However, the litigation was settled, and Mr. and Mrs. Jacobs relinquished their claim to the 1.022 acres in consideration of the sum of \$5,000.

In their present action, Mr. and Mrs. Jacobs sought to confirm their title to the acreage in question and to establish an old fence line on the west side of their 64.67 acres as the boundary line between their property and the acreage owned by Susie Durham. In this regard, the Appellees claimed that they and their predecessors in possession had the 64.67 acres under fence for many years and had openly and notoriously claimed as their own all property lying east of the fence in dispute.<sup>(1)</sup>

Mr. and Mrs. Jacobs contend that the fence in question was installed on or about 1930, just west of an old wagon road and west of a house built by Lula Collins Evans at that time. According to the deposition of Randolph Brown, deceased, which was taken for trial purposes in prior litigation on August 4, 1988, the house of Lula Evans was ultimately torn down, and the wagon road fell into disuse, but the boundary line fence remained. On the other hand, the estate of Susie Durham, deceased (which was substituted as a party in these proceedings after the death of Susie Durham), contends that the fence line in question encroaches upon that portion of a 280 acre tract of land owned by the estate which lies east and south of Mount Pilgrim Road. As shown on Tyner's plat, the fence in question runs in a north to south direction. Indeed, an inspection of Tyner's plat clearly indicates that a small portion of the property claimed by Mr. and Mrs. Jacobs encroaches upon the property which all parties agree was originally owned by Susie Durham, deceased. It is noteworthy that while the description of the 64.67 acres claimed by Mr. and Mrs. Jacobs, as described in their complaint and on Tyner's plat, lies only within the south one-half (S 1/2) of Section 35, Township 11 North, Range 4 East, Tyner's plat clearly shows that a small portion of the property (possibly as much as five acres), claimed by the Appellees lies in a portion of Section 34, which was originally owned by Ms. Susie Durham. Thus, it is apparent that Mr. and Mrs. Jacobs are claiming by adverse possession that portion of the 64.67 acres which lies east of the fence line and west of the west line of the northeast quarter of the southwest quarter (NE 1/4 SW 1/4) of Section 35, all as shown on Tyner's plat. The estate of the decedent does not contest the ownership of that portion of the 64.67 acres which actually lies within Section 35.

Mr. and Mrs. Jacobs acknowledge in their complaint that a portion of their claim of ownership is based upon the principle of adverse possession, and they assert that they and their predecessors in possession had uninterruptedly held open and notorious possession of the entire 64.67 acre tract, from fence to fence, since around 1930. On the other hand, Ms. Durham's estate contends that the disputed fence was installed with the decedent's permission no earlier than twenty years prior to the decedent's death, by Walter Scott, a neighbor, who wanted to graze his livestock in an enclosed area.

According to her family members, Ms. Durham gave Scott permission to erect the fence for this limited purpose.

Susie Durham deeded 1.022 acres of disputed land to her grandson, Percy Lee Johnson, in 1987. As shown by Tyner's plat, approximately one acre of this property lies east of the disputed fence and therefore constituted a portion of the property claimed by Mr. and Mrs. Jacobs by adverse possession. Percy Lee Johnson, a member of the armed services, and his wife, Sheila, arranged for Jim Walter Homes, Inc., to build a house on the 1.022 acres for their use when they moved back to Mississippi. In the process, Jim Walter Homes acquired a mortgage on the premises to secure the loan which Mr. and Mrs. Johnson procured from Jim Walter Homes to finance the house construction.

When Mr. and Mrs. Jacobs discovered that a house was being constructed upon the land which they claimed as their own, they filed suit against the Johnsons and Jim Walter Homes to enjoin construction of the Johnson house and to quiet their title and ownership to the disputed premises. At the time of this action, Mr. and Mrs. Johnson lived outside of Mississippi, but the attorneys who purportedly represented Jim Walter Homes as well as Mr. and Mrs. Johnson settled the boundary dispute with Mr. and Mrs. Jacobs. Mr. and Mrs. Jacobs were paid the sum of \$5,000 in exchange for their special warranty deed finally relinquishing any claim to the 1.022 acres.

The issues in the lawsuit involving Mr. and Mrs. Johnson and Jim Walter Homes involved issues almost identical to the issues which are involved in the case *sub judice*. The primary issue in the Johnson-Jacobs proceeding was whether the old fence line now in dispute constituted the western boundary of the Jacobs property, or whether Susie Durham's property extended eastward to the eastern boundary line of Section 34, Township 11 North, Range 3 East, Madison County, Mississippi. During the Johnson-Jacobs proceedings, the deposition of Randolph "Cap" Brown was taken in 1988. Brown was ninety-two years old at the time and was bedridden. He had lived on Mount Pilgrim Road for many years and owned property adjoining the 64.67 acres. Mr. Brown is now deceased. His testimony dealt almost exclusively with whether or not the fence line now in dispute was the historic boundary line between the property owned by Susie Durham and the Jacobs property. Mr. Brown emphatically stated that the fence line had been treated as the boundary line between the two properties for many years by predecessors in title to Mrs. Durham and predecessors in possession to Mr. and Mrs. Jacobs.

In the case *sub judice*, Mr. and Mrs. Jacobs sought to admit Brown's deposition testimony into evidence pursuant to Mississippi Rule of Evidence 804 (b)(1). Susie Durham's estate objected to the deposition, contending that Susie Durham was not a party to the Johnson-Jacobs litigation and, thus, did not have an opportunity to cross-examine or otherwise develop Brown's testimony. The trial court, Chancellor Ray H. Montgomery presiding, overruled the estate's objection and allowed the deposition of Brown into evidence, holding that pursuant to Rule 804(b)(1), Mr. and Mrs. Johnson and Jim Walter Homes, Inc. were predecessors in interest to the decedent, Susie Durham. Other witnesses, including Mattie Lake (the daughter of Susie Durham) and Percy Lee Johnson, supported the position of the estate of Mrs. Durham that she had allowed the fence to be erected for the sole purpose of allowing a friend to graze cattle on the property. Mr. Johnson also stated that his previous litigation with Mr. and Mrs. Jacobs had been settled without his knowledge or consent.

## **B. DISPOSITION BY TRIAL COURT**

After considering all of the evidence presented, Chancellor Montgomery ruled in favor of Mr. and Mrs. Jacobs by opinion dated December 30, 1994, and established the fence line in question as the boundary line between the Durham-Jacobs properties. The final judgment, consistent with Chancellor Montgomery's opinion, was executed by the new Chancellor, William J. Lutz, and was filed on January 17, 1995, after being submitted to both counsel for criticism as to form. Thereafter, the estate of Susie Durham filed a motion for a new trial on January 27, 1997, pursuant to Mississippi Rule of Civil Procedure 59, in which the estate contended that the chancellor's decision was (1) manifestly wrong and against the overwhelming weight of the evidence, (2) that the judgment was not supported by competent evidence, and (3) that the trial court erred in admitting the deposition of Randolph Brown into evidence over the objection of Ms. Durham's estate.

Chancellor Lutz issued a three page opinion and order addressing the motion for a new trial on June 19, 1997, in which he analyzed Mississippi Rule of Evidence 804(b)(1) as it applied to this case. The chancellor concluded that the Johnson-Jacobs case and the Jacobs-Durham case had many factual and legal similarities and dealt with an "identical" factual issue: whether or not Mr. and Mrs. Jacobs possessed the land east of the disputed fence line (which they believed to be the boundary line) by adverse possession. In addition, after concluding that the deposition of Randolph Brown was admissible, the chancellor finally ruled that the original judgment rendered by Chancellor Montgomery was supported by competent evidence and denied the motion for a new trial.

## **C. THE ISSUES**

The estate of Susie Durham, deceased, raises the following two issues, which are taken verbatim from its brief:

**I. WHETHER THE LOWER COURT COMMITTED REVERSIBLE ERROR BY ADMITTING THE DEPOSITION TESTIMONY OF RANDOLPH BROWN OVER THE OBJECTION OF SUSIE DURHAM, WHERE THE DEPOSITION TESTIMONY HAD BEEN SECURED IN A SEPARATE PRIOR PROCEEDING IN WHICH THE DEFENDANT SUSIE DURHAM WAS NOT A PARTIES [SIC] AND HAD HAD NO OPPORTUNITY TO CROSS EXAMINE THE WITNESS AND DEVELOP THE TESTIMONY.**

**II. WHETHER THE JUDGMENT OF THE LOWER COURT WAS MANIFESTLY WRONG AND AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE WHERE THE PLAINTIFFS FAILED TO PRESENT EVIDENCE TENDING TO ESTABLISH POSSESSION WHICH IS (1) OPEN, NOTORIOUS AND VISIBLE; (2) HOSTILE; (3) UNDER A CLAIM OF OWNER SHIP; (4) EXCLUSIVE; (5) PEACEFUL; AND (6) CONTINUOUS AND UNINTERRUPTED FOR A PERIOD OF TEN (10) YEARS.**

## **D. ANALYSIS**

**I. DID THE CHANCERY COURT ERR WHEN IT ADMITTED THE DEPOSITION**

## OF RANDOLPH BROWN INTO EVIDENCE OVER THE OBJECTION OF THE APPELLEE?

The decision to admit or exclude evidence is generally left to the discretion of the trial court. *Young v. City of Brookhaven*, 693 So. 2d 1355, 1358 (Miss. 1997). An appellate court will only reverse an evidentiary ruling if the trial court has abused its discretion or applied an incorrect legal standard. *Id.* at 1358. Moreover, in order to justify a reversal, a denial of a substantial right of a party must have occurred as a result of the court's evidentiary ruling. *See Mississippi Rule of Evidence 103(a)*.

In the case *sub judice*, the chancellor admitted into evidence the deposition testimony of Randolph Brown, pursuant to **Mississippi Rule of Evidence 804(b)(1)**, which states:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, *a predecessor in interest*, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(emphasis added). The official Comment to Rule 804 (b)(1) notes that "an essential ingredient of the exception has always been the unavailability of the declarant . . ." and ". . . that the party against whom it [the former testimony] is directed had a similar motive and an opportunity to develop the testimony on the previous occasion." Mr. Brown was unavailable to testify in this case because he died prior the trial of this action. Thus, we must determine whether a predecessor in interest to the estate of Susie Durham, deceased, had an opportunity and similar motive to develop Brown's testimony in the prior proceeding involving Mr. and Mrs. Jacobs, Mr. and Mrs. Johnson, and Jim Walter Homes, Inc.

Neither Mississippi Rule of Evidence 804 nor its official Comment provide a precise definition of a "predecessor in interest." Federal Rule of Evidence 804(b)(1) is identical to Mississippi Rule of Evidence 804(b)(1). In such a situation, we normally seek to determine how the federal courts have interpreted their evidentiary rule prior to making our decision as to the applicability of an identical Mississippi evidentiary rule. *Brent v. State*, 632 So. 2d 936, 943 (Miss. 1994). A case frequently cited as to the applicability of Federal Rule of Evidence 804(b)(1) and as to what constitutes a "predecessor in interest" is *Lloyd v. American Export Lines, Inc.*, 580 F. 2d 1179 (3rd Cir. 1978). In *Lloyd*, the Third Circuit stated:

. . . if it appears that in the former suit a party having a *like motive* to cross examine about the same matter as the present party would have, was accorded an adequate opportunity for examination, the testimony may be received against the present party. Under these circumstances, the previous party having a like motive to develop the testimony about the same material further is, in the first analysis, a predecessor in interest to the present party.

(emphasis added). *Id.* at 1187 (quoting McCormick, *Handbook of the Law of Evidence* § 256 at 619-20 (2d ed. 1972)).

The former testimony at issue in the *Lloyd* case was taken in a Coast Guard hearing to determine the cause of an accident. How the accident in *Lloyd* occurred was also litigated in a subsequent civil action. The United States Court of Appeals for the Third Circuit held that the Coast Guard was a predecessor in interest to the enlisted man in his subsequent civil action, even though the Coast Guard had a public interest in preventing future accidents, while the enlisted man had a private interest in being compensated for his injuries as a result of the accident. The court reasoned that although the exact interests of the Coast Guard and the enlisted man were different, "the basic interest advanced by both was that of determining culpability." The court went on to state that "[w]hile we do not endorse an extravagant interpretation of who or what constitutes a 'predecessor in interest,' we prefer one that is realistically generous over one that is formalistically grudging." *Lloyd*, **380 F.2d at 1187**.

Based upon the language found in *Lloyd v. American Export Lines, Inc.*, we rule that Jim Walter Homes and Mr. and Mrs. Johnson were predecessors in interest to Susie Durham and her estate. Although it is true that Mr. and Mrs. Johnson, Jim Walter Homes and Susie Durham, deceased, possessed different forms of interests in the property in question, they were all in a position that dictated opposition to the claim of Mr. and Mrs. Jacobs. Both causes of action in question involved the same dispute over what constituted the true boundary line between the same properties, in relation to the same fence. Even though Jim Walter Homes possessed only a security interest in the house site of Mr. and Mrs. Johnson, it did have an interest in resolving the boundary line issue in a manner consistent with the interests of the Susie Durham estate. Thus, we hold that Mr. and Mrs. Johnson, Jim Walter Homes, and the estate of Susie Durham had similar motives to cross-examine Mr. Brown and to establish that Randolph and Marilyn Jacobs had no interest in Durham's property by adverse possession.

A review of Brown's deposition reveals that the attorney for Jim Walter Homes, and for Mr. and Mrs. Johnson, aggressively cross-examined Randolph Brown concerning his knowledge of the old wire fence in question, and whether it truly was considered to be a boundary line fence. Thus, Jim Walter Homes and Mr. and Mrs. Johnson not only possessed a similar opportunity to cross-examine Mr. Brown, but actually did cross-examine him in regard to the very issue which is at the heart of the case *sub judice*. The United States Court of Appeals for the Second Circuit has held that any actual cross-examination in the prior proceeding, where there is a similar burden of proof, is relevant though not conclusive in a case such as this on the issue of similarity of motive. *United States v. DiNapoli*, **8 F.3d 909, 914 (2nd Cir. 1993)**.

Based upon the authority mentioned above and after a thorough review of the deposition of Randolph Brown, we conclude that the chancellor did not abuse his discretion in admitting Brown's deposition into evidence. We rule that Mr. and Mrs. Johnson and Jim Walter Homes, like the Coast Guard in *Lloyd*, possessed a like motive and opportunity to develop, through his deposition, the testimony of Randolph Brown on issues relevant in the present action. We further rule that the deposition testimony of Brown was properly admitted into evidence pursuant to Mississippi Rule of Evidence 804(b)(1).

## **II. DID THE CHANCELLOR COMMIT MANIFEST ERROR ON THE ISSUE OF ADVERSE POSSESSION AND WAS HIS DECISION IN FAVOR OF THE APPELLEES AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?**

In the case before us, the trial court made a finding of fact that Mr. and Mrs. Jacobs and their predecessors in possession gained ownership by adverse possession of that portion of the property, as shown on Tyner's plat, that extended between the western boundary of the SW 1/4 of Section 35, Township 11 North, Range 4 East to the wire fence as shown on the plat, all of which is located in Section 34. Although not specified exactly in the pleadings, it appears from the briefs and the record that this additional area in dispute involves approximately five acres.

**Mississippi Code Annotated Section 15-1-13 (Rev. 1995)** defines adverse possession as follows:

Ten years' actual possession by any person claiming to be the owner for that time of any land uninterrupted for ten years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy, may have commenced or continued, shall vest in every actual occupants or possessor of such land a full and complete title . . . .

A six element test has been developed by our Mississippi Supreme Court from this statute to determine whether or not a party has successfully gained ownership to property by adverse possession. As stated in *Rice v. Prichard*, **611 So. 2d 869, 871 (Miss. 1991)**, one claiming by adverse possession must prove by *clear and convincing evidence* that the possession is (1) under claim of ownership, (2) actual or hostile, (3) open, notorious, and visible, (4) continuous and uninterrupted for a period of ten years, (5) exclusive, and (6) peaceful. *See also Thornhill v. Caroline Hunt Trust Estate*, **594 So. 2d 1150, 1152-53 (Miss. 1992)**. Whether or not the land claimed by adverse possession is within or outside the "call of the title deeds" or is even within the same quarter section as the lands described in a deed does not matter. *Rice*, **611 So. 2d at 871**. Rather,

[t]he question is whether the acts by the adverse possessor are sufficient to "fly his flag" over the land and to put the record title holder on notice that the land is being held under an adverse claim of ownership.

*Id.* *See also Johnson v. Black*, **469 So. 2d 88, 90-91 (Miss. 1985)**.

### STANDARD OF REVIEW

An appellate court's normal standard of review of a chancellor's ruling on fact issues is the "severely limited substantial evidence/manifest error standard of review." *Stallings v. Bailey*, **558 So. 2d 858, 861 (Miss. 1990)**. In other words, we generally will not reverse a chancellor's finding of fact in a case such as this unless his factual findings are manifestly erroneous or unless he has applied an incorrect legal standard. *Mullins v. Ratcliff*, **515 So. 2d 1183, 1189 (Miss. 1984)**. However, we take note *sua sponte* that in his written opinion, Chancellor Montgomery made no findings of fact other than to rule for Mr. and Mrs. Jacobs. Where the chancellor, as in this case, states no basis for his findings of fact or conclusions of law other than to adopt the arguments of counsel, an appellate court is entitled to and must exercise greater latitude in determining whether the record justifies the chancellor's ruling. *Brooks v. Brooks*, **652 So. 2d 1113, 1118 (Miss. 1995)**. As such, we "do not give deference to the findings of fact and conclusions of law of the lower court. Instead, we review the record de novo." *Brooks*, **652 So. 2d at 1118**. Thus, we must analyze the record to determine if each of the six elements necessary to prove adverse possession have been proven in the case *sub judice* by clear and convincing evidence.

## RESOLUTION OF ISSUES

In *Roy v. Kayser*, 501 So. 2d 1110, 1112 (Miss. 1987), our supreme court stated:

[i]f a fence encloses the property for a period of at least ten years, under a claim of adverse possession, title vests in the claimant and possession, even though the fence was subsequently removed or fell into disrepair.

As stated in *Stallings v. Bailey*, 558 So. 2d at 860, fencing of property can be a "powerful indicator" of adverse possession. In the case *sub judice*, the old wire fence in question had undisputedly been in place for at least thirty years (since at least 1961 or 1962). According to Randolph Brown, who was unrelated to any of the parties, the fence had been in existence in its present location since 1930 when the property was purchased by Lula Evans over sixty years ago. According to the record before us, the main witnesses who testified for the Durham estate were heirs of Susie Durham, deceased.<sup>(2)</sup> They claimed that the fence was built for grazing purposes with the permission of Ms. Durham by a neighbor, Walter Scott, who was living at the time on the property now claimed by Mr. and Mrs. Jacobs. Additionally, they admit that the fence was never removed and that trees to which the fence was attached grew into the fence at various locations. However, the heirs deny that the fence was ever intended to be a boundary line fence. On the other hand, Randolph Brown stated that he remembered the fence being in place when Lula Evans purchased the property. Madison County land records show that Lula Evans made her purchase in 1930. Mr. Brown further recalled a road located on the east side and parallel to the fence which was used for wagon traffic. According to the testimony, this wagon road was located on property which is now claimed by Mr. and Mrs. Jacobs, and was ten to twelve feet wide. Brown stated that Lula Evans built a house immediately to the east of the wagon road on property now claimed by the Durham Estate, and that the house remained in place for several years. When Mrs. Evans moved to Canton, Walter Scott moved in the house for a year or two. Although the Evans house was eventually torn down, the fence remained.

Mr. and Mrs. Jacobs and their predecessors in possession demonstrated their claim of ownership by grazing cattle, cutting timber on the property from fence to fence on at least two occasions, and Mr. and Mrs. Jacobs went to court to enforce their claim to the property east of the fence by filing suit against Percy Lee Johnson, his wife Shelia Johnson, and Jim Walter Homes. The appellees were paid \$5,000 to settle the lawsuit and to convey a special warranty deed to the Johnsons, who paid only \$300 for a deed to the 1.022 acres which they purchased from Susie Durham. According to the testimony, Ms. Durham also cut timber east of Mount Pilgrim Road, but never cut timber east of the wire fence. While Ms. Durham unquestionably paid taxes on the property originally conveyed to her, she never attempted to exercise dominion over any property east of the disputed fence until the mid 1980's when she conducted a survey to determine where her boundary lines were located. She conveyed the 1.022 acres to her grandson, Percy Lee Johnson and his wife in 1987. By this time, the evidence is clear that the predecessors in possession of Mr. and Mrs. Jacobs had been in exclusive control of the disputed property since the 1930's when Lula Evans built her house on the premises.

We conclude, *in fine*, that Mr. and Mrs. Jacobs presented clear and convincing evidence to establish that they and their predecessors openly and actually claimed peaceful ownership of the property for an uninterrupted period of well over ten years, dating back to the 1930's. We further hold, from the record before us, that this claim of ownership was clearly visible for all to see, as shown by the fact

that a house was built on the premises by Lula Evans, and the property was used exclusively and continuously by subsequent owners for many years, including a period of several years when Ms. Durham had moved to St. Louis, Missouri. Moreover, the fact that Mr. and Mrs. Johnson and Jim Walter Homes paid Mr. and Mrs. Jacobs the sum of \$5,000 in exchange for a special warranty deed to the premises in a situation where the same boundary line dispute was at issue lends credence to the position of Mr. and Mrs. Jacobs that they were "flying their flag" over the disputed property.

The fact that Ms. Susie Durham and her heirs challenged the claim of ownership of Mr. and Mrs. Jacobs in later years does not alter the fact that title had passed to the predecessors of Jacobs in the past, nor is such evidence sufficient to show that the disputed property was ultimately repossessed by Ms. Durham or her family members. *See Cole v. Burlison*, 375 So. 2d 1046, 1049 (Miss. 1979), and *Ray*, 501 So. 2d at 1112. Such a "scrambling possession" is insufficient to divest title to property that has already passed to another by adverse possession. *Id.* at 1112. *See also Robertson v. Dombroski*, 678 So. 2d 637, 642 (Miss. 1996).

We affirm the decision of the trial court in this action.

**THE JUDGMENT OF THE CHANCERY COURT OF MADISON COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**BRIDGES, C.J., THOMAS, P.J., DIAZ, HINKEBEIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY McMILLIN, P.J., AND COLEMAN, J.**

KING, J., DISSENTING:

I respectfully dissent.

Because Brown's testimony was a key factor in the chancellor's determination that the Jacobs adversely possessed the disputed property, I would reverse.

The trial court, in its order of June 19, 1995, denying Appellant's motion for a new trial, found the deposition of Brown to be admissible under Mississippi Rule of Evidence 804(b)(1). The chancellor stated that there were two essential elements that must be satisfied under this rule: "First, the party against whom the hearsay is being offered must be a predecessor in interest to the party in the previous matter. Second, the predecessor in interest must have had a similar motive and opportunity to develop the testimony."

As to the first element, the chancellor found that Jim Walter Homes, Inc., and Percy and Sheila Johnson were predecessors in interest to Susie Durham. Under the second element, the chancellor found that the present litigation involved the same factual issue and dispute. He then concluded that as predecessors in interest to Susie Durham, the Johnsons, and Jim Walter Homes, Inc., shared a similar motive and had the opportunity to develop the testimony of Raymond Brown. The chancellor found both requirements of Mississippi Rule of Evidence 804(b)(1) to be satisfied and reaffirmed the prior actions. I disagree.

**Mississippi Rule of Evidence 804(b)(1)** provides, " The following are not excluded by the hearsay

rule if the declarant is unavailable as a witness:

*Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, *a predecessor in interest had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.* (emphasis added).

Rule 804 does not provide a definition of "predecessor in interest." In the absence of some specific definition, we look to other courts to determine what meaning they may have ascribed to these same or similar terms. Since M.R.E. 804(b)(1) is replicated verbatim from the Federal Rules of Evidence, we, like the chancellor, look at the federal courts application of this rule.

The case most frequently cited is ***Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3rd Cir. 1978)**. The court held: " if it appears that in the former suit a party having a *like* motive to cross examine about the same matter as the present party would have, was accorded an adequate opportunity for examination, the testimony may be received against the present party. Under these circumstances, the previous party having like motive to develop the testimony about the same material further is, in the first analysis, a predecessor in interest to the present party." ***Id.* at 1187** (quoting McCormick, *Handbook of the Law of Evidence* § 256 at 619-20 (2d ed. 1972)).

In the present case, the chancellor stated, "The factual and legal similarities between the parties is enough to establish the predecessor in interest element. That is, Jim Walter Homes and Percy and Sheila Johnson were predecessors in interest to Susie Durham." I agree with the chancellor's findings as to Percy and Sheila Johnson. Percy and Sheila Johnson obtained their lot from Susie Durham. It was a part of the same tract and bounded by the same fence, by which the Jacobs sought to establish adverse possession. This fact is clearly shown by a review of exhibit 8, the survey introduced at trial by the Jacobs. Because Percy and Sheila Johnson, like Susie Durham, claimed an actual ownership interest, I agree that they were predecessors in interest.

However, I am not persuaded that the interest of Jim Walter Homes was like that of Susie Durham. Jim Walter Homes held a deed of trust upon the Johnson's property, to secure payment of money it spent constructing a home for the Johnsons. The principle interest of Jim Walter Homes was in being repaid its money. This goal could be accomplished independent of the security interest. By way of example, if the Johnsons did not pay Jim Walter Homes, it had the option of reducing the obligation to a judgment and executing upon that judgment.

Clearly there are differences in the rights, responsibilities, and motives of someone holding an ownership interest and someone holding a security interest. Likewise, there is a difference in the value and quality of an ownership interest and a security interest. Because of these differences, I believe that the chancellor erred in finding Jim Walter Homes was a predecessor in interest to Susie Durham.

Having found that Percy and Sheila Johnson were predecessors in interest to Susie Durham, one must address the second requirement of M.R.E. 804(b)(1). Rule 804 also requires that the predecessor in interest have a similar motive and opportunity to develop the testimony. However, where the uncontradicted evidence indicates that the predecessor in interest had absolutely no participation in

the prior proceedings it would be a gross injustice to bind a third party by his inactions.

On this point, it is instructive to read the uncontradicted testimony of Percy Lee Johnson. The following testimony occurred on direct examination:

Q. Now, when you first received notice of the lawsuit that the Jacobs had filed in 1988, what did you do?

A. Well, when I first received notice I attempted to contact a lawyer. I was out of state at the time, and I attempted to contact a lawyer here within the state to try to handle the matter. Uh - it was unsuccessful due to the fact that I was out of state at the time and residing in the military. And, basically from that I really didn't do anything due to the fact that I was out of state.

Q. Did you discuss the matter with Jim Walters Homes?

A. I discussed the matter with them. I made them aware that I had a clear property -- I mean a clear deed to the property on which that the house was actually built and that, you know, basically I had rights to that property which that the cloud was actually hanging over.

Q. Did you ever authorize Jim Walter Homes or their attorney to act on your behalf in that lawsuit?

A. No.

Q. Did you authorize Jim Walter Homes to file an answer on your behalf?

A. Not on my behalf.

Q. Did you ever participate in the negotiations regarding that lawsuit?

A. No, I did not.

During Johnson's cross-examination, the following occurred:

Q. Mr. Johnson, you were represented by a lawyer in the previous lawsuit filed by Mr. and Mrs. Jacobs, weren't you?

A. No.

Q. Not at all?

A. No, I was not represented.

Q. I would like to show you what's been previously admitted into evidence as Exhibit 2 and this is Document B, on the last page there. If you could read -- uh -- first of all the first page of the - what is it? What is it called at the top?

A. Answer, Defense and Counterclaim of Percy Johnson and Sheila Johnson and Jim Walter Homes.

Q. Okay. And now, on the last page of that document, how is that signed?

A. It's not signed. It's typed - Percy Lee Johnson, Sheila Johnson, Jim Walter Homes, by counsel Stuart Robinson -- I guess that would be Stuart Robinson.

Q. Okay. So he represented to the Court that he was representing you, Sheila Johnson and Jim Walter Homes?

A. That's the way the suit was actually written. It was written to that effect.

Q. So he did file an answer on your behalf.

A. No. I guess he filed an answer on his behalf because he -- Jim Walter Homes was actually involved in the suit.

Q. But now the answer doesn't say just Jim Walter Homes, does it?

A. What answer, sir?

Q. Well, who is he signing for here?

A. Well, like I am saying, I didn't see this document. It was never presented to me that he was answering on my behalf.

Q. Well, apparently he did.

A. Well, if he did, I am saying I had no knowledge of it -- no prior knowledge of it.

The record is clear that Percy Lee Johnson did nothing in the prior lawsuit to protect his own interest. Johnson was in the military and resided out-of-state and appeared unconcerned with the cloud on his title. Johnson's testimony indicates that he was willing to stand idle on the sideline while the claim on his property was settled. He did nothing outside of telling Jim Walter Homes that he would discontinue his mortgage payments until the matter was settled. Considering these facts, it would be a stretch of the imagination to contend that he held either similar interests, or similar motives as Susie Durham in protecting her property or developing Brown's testimony in the prior action.

There is no suggestion that Shelia Johnson undertook any independent action in that matter. In deed, it would appear that Shelia Johnson was merely connected to that action because she was the wife of Percy Johnson, who had acquired title to some land from his grandmother.

Under these circumstances, I believe that the chancellor committed reversible error, in admitting the deposition. Accordingly, I would reverse and remand.

**McMILLIN, P.J., AND COLEMAN, J., JOIN THIS OPINION.**

1. For purposes of clarity, the plat of a survey of the property performed by Weldon H. Tyner on January 20, 1988, is attached as an appendix to this opinion.

2. The estate of Susie Durham, deceased, makes reference in its brief to a deposition given by the decedent, but no such deposition is a part of the record before us on appeal.