The Avoidance by an Arkansas Bankruptcy Trustee Of a Mortgage Defectively Acknowledged

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I. Introduction, including the basic proposition of §544(a) of the Bankruptcy Code.

The Federal Bankruptcy Code provides a number of instances in which the trustee may reach back and avoid transactions entered into by the debtor before the petition. Perhaps best known is the infamous preference, where the trustee may undo a pre-petition transfer of the debtor’s property that was entirely proper and enforceable under state law at the time it was made.1 Less dramatically, pre-petition transfers that defrauded creditors are avoidable by the trustee under the Bankruptcy Code in a manner very similar to the way they are made avoidable by state law.2

Perhaps the most fundamental of these pre-petition avoidance techniques are found in §544 of the Bankruptcy Code. Most basic is the rule of §544(b), which says that any pre-petition transfer avoidable under state law by an existing unsecured creditor is avoidable by the trustee, who, after all, represents the unsecured creditors. Of course, few transfers, other than fraudulent transfers, are avoidable under state law by unsecured creditors, so the impact of §544(b) is minimal.3

More important, then, is the so-called “strong arm” provision of §544(a). Here the trustee is given not the powers of actual unsecured creditors, as in §544(b), but the avoidance powers under state law of three hypothetical creditors and purchasers: an execution lienor against personal property, a bona fide purchaser of real property, and a judgment creditor with a nulla bona return.4 No such actual creditor need exist. Indeed, the statute is written to describe fictitious parties that cannot logically exist, for example a creditor who lends money and suffers default and sues and recovers

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1. 11 U.S.C. §547(b). This sounds very much like impairing the obligations of a contract, and it is. Recall that the constitutional prohibition against such impairment only runs to the states, not the federal government, see U.S. Constitution, Art. 1, §10, cl.1.

2. 11 U.S.C. §548(a), which is quite similar to the Uniform Fraudulent Transfer Act, see Ark. Code Ann. §4-59-201 et seq

3. The principal use of §544(b) is to avoid fraudulent transfers that occurred beyond the one-year statute of limitations contained in §548 but within the three-year statute of limitations found in Ark. Code Ann. §4-59-209.


In this article we are primarily interested in the trustee’s status as the *bona fide* purchaser of real property and the avoidance powers that flow therefrom. In particular, we address this question: in which situations will §544(a)(3) render a defectively acknowledged mortgage ineffective against the trustee? With this limitation, then, we remove from the present discussion two related, but distinguishable, questions: What are the bankruptcy ramifications of defects in the mortgage documents other than those relating to acknowledgment? And what §544(a)(3) attacks might the trustee make on a defective deed, as distinguished from a defective mortgage? These questions we relegate to later discussion.

Given our narrow focus, it makes good sense to begin with the precise language of §544(a)(3):

The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of the debtor or any obligation incurred by the debtor that is voidable by – . . . (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

Some observations on the statutory language:

(1) It’s not poetry.

(2) One of the problems with the way the subsection is written is that there are two “transfers” involved. First, there is the transfer of an interest in real property by the debtor to a transferee; typically this is a pre-bankruptcy loan transaction in which the debtor grants a mortgage to the lender. This transfer is the actual one, and is the one that it is the trustee’s object to avoid, thereby enlarging the estate for the benefit of unsecured creditors.

Then there is the fictitious transfer – the “let’s pretend” transfer – from the debtor to the trustee as *bona fide* purchaser. This transfer never in fact took place, but the trustee gets to pretend that it did. The §544(a)(3) battle becomes, then, between the real mortgagee and the trustee as fictitious purchaser.

Between these two transfers, one actual and one fictitious, which wins? The answer is determined by state law and, if there is a defect in the actual transfer, then often the fictitious transfer to the trustee will prevail, the trustee may avoid the actual transfer, and the property comes into the bankruptcy estate unencumbered. It will often be the case that the defect in this actual transfer is that the transferee failed to record as required by state law, but we are interested here in the cases where the defect is manifest, or not, in the acknowledgment of the mortgage document itself.

(3) The trustee gets the status of a *bona fide* purchaser even if the trustee herself, or some actual creditor, has or had information that would deny a real purchaser *bona fide* status.

(4) Not only may transfers be avoided, thereby increasing the size of the bankruptcy estate, but so, too, may obligations of the debtor be avoided, thereby decreasing the size of the pool of creditors who claim against the estate. One sees in the cases many more trustees avoiding transfers than obligations.

(5) The avoidance of the transfer of fixtures is governed by §544(a)(1), not (a)(3).

(6) Perfection is mentioned twice in the subsection, and that’s confusing. Let’s edit the passage down, leaving out words that are presently superfluous:

The trustee may avoid any transfer that is voidable by (3) a *bona fide* purchaser,
against whom such transfer may be perfected, that obtains the status of a bona fide purchaser and perfects such transfer, as of the commencement of the case.9

The trick in reading this gobbledygook is to understand that the two phrases saying “such transfer” refer to the two different transfers, the actual one and the fictitious one. The first “such transfer” clause says that the actual transferee from the debtor does not have to have perfected the actual transfer unless applicable state law allows that transferee to be perfected. As the Legislative Statement says, “[T]he statute is written] so as not to require a creditor to perform the impossible in order to perfect his interest. . . . [T]he bona fide purchaser test in section 544(a)(3) should not require a transferee to perfect a transfer against an entity with respect to which applicable law does not permit perfection.”10

The second “such transfer” clause says that the trustee gets to pretend not only that she is a bona fide purchaser as of the date of petition, but that she perfected her purchase on the same day.

(7) And the sub-section finally makes it clear that the trustee’s bona fide purchaser status is entirely hypothetical and does not require that there actually be any such purchaser with the actual ability to attack the actual transfer from the debtor to actual mortgagee.

With that introduction to the statute’s language, we may now turn our attention to the leading Arkansas case involving the avoidance of a defective deed or mortgage under §544(a)(3).

II. In re Bearhouse, Inc.11

In 1986, the First National Bank of Crossett lent about half a million dollars to Bearhouse, Inc. Bearhouse gave a note in return, secured by a mortgage on certain real property in Ashley County. Lonnie Couch, who was the president of Bearhouse, signed both the note and the mortgage on behalf of the corporation, as he had the authority to do. The signing was done on the premises of the corporation, in the presence of an officer of the bank. Neither document was notarized at the time of the signing. Later, back at the bank, Donna Rice, an employee of the bank and a notary public, notarized Couch’s signature, even though she had not personally been present at the signing, nor did she personally know Mr. Couch.12 One suspects that Ms. Rice was under considerable pressure from her employer to fake the notarization, but the court does not mention this pressure.

In 1987, Bearhouse, Inc. petitioned in Chapter 7, later to convert to Chapter 11. Claude Hawkins, the Chapter 7 trustee, became the Chapter 11 trustee and brought an adversary proceeding to attack the validity of the Bank’s mortgage on the Ashley County property, using §544(a)(3).13 The Bankruptcy Court, Judge Mixon presiding, dismissed the trustee’s complaint and refused to avoid the mortgage.14

The Arkansas law, as Judge Mixon saw it, was that the way for a mortgagee from a property owner to protect its mortgage against a subsequent purchaser from the borrower is for the mortgage to be properly recorded in the Circuit Clerk’s office.15

9. Id. (editorial changes not indicated).
12. Id. at 926.
13. Id. A conversion from Chapter 7 to Chapter 11 is unusual, as is the appointment of a trustee in Chapter 11. The Bearhouse opinion mentions that Hawkins was appointed the Chapter 11 trustee “with the agreement of the debtor.” Id.
14. Id. at 929.
In a footnote, Judge Mixon noted that in Arkansas an unrecorded mortgage is valid between the parties, but not against subsequent purchasers, even subsequent purchasers with actual notice of the mortgage.\(^{16}\) Thus Arkansas is what is known as a “pure race” jurisdiction, with respect to mortgages.\(^{17}\)

Only properly acknowledged mortgages may be properly recorded.\(^{18}\) For this proposition, Judge Mixon cited Ark. Code Ann. §18-40-101, Ark. Code Ann. §§16-47-101 through -218, and Ark. Code Ann. §§18-12-201 through -209, and this string cite requires a bit of amplification. Section 18-40-101 contains the essential substantive provision saying that mortgages have to be acknowledged.\(^{19}\) Both § 18-12-206 and §16-47-106 identically require that the mortgagor appear in person before the officer taking the acknowledgment, while §§16-47-202 and 205 make the same point somewhat less emphatically.\(^{20}\)

Thus at the outset Ms. Rice’s improper acknowledgment of a signature not executed in her presence, by a person unknown to her, would seem to be a fatal flaw, leading to the invalidity of the mortgage against the trustee under §544(a)(3). Judge Mixon, however, stated a majority rule from other jurisdictions to the effect that if a mortgage is in fact recorded, even if not properly recorded, and if the document appears, on its face, to be correctly recorded, then a subsequent purchaser or encumbrancer takes subject to the prior conveyance.\(^{21}\)

By recognizing this majority rule, Judge Mixon essentially created three categories of mortgages in Arkansas. First, there are unrecorded mortgages, which are enforceable only between the parties, but not against third parties, even third parties with knowledge of the transaction.\(^{22}\) But wait! Why should an unrecorded mortgage be unenforceable against a subsequent mortgagee who actually knew of the existence of the first mortgage? Such a rule encourages prompt and proper recordation which is good for the operation of the entire recording system, even if in a few cases the result seems unjust.\(^{23}\)

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17. With respect to deeds, the Arkansas rule is “race-notice,” meaning that only subsequent purchasers and encumbrancers without notice of the prior deed may join the race, see Ark. Code Ann. §14-15-404.


19. Actually, §18-40-101 provides that mortgages must be either acknowledged or proved. (The statute says “proven,” but that must be ungrammatical.) The difference between proof and acknowledgment depends on whether the attestation is present, or after the fact. Previously signed mortgages may be proved by the acknowledgment of witnesses, see Ark. Code Ann. §18-12-206(b), which is double-codified as Ark. Code Ann. §16-47-106(b), see note 20, infra.

20. For reasons that are a little unclear, §§ 18-12-201 through -208 are double-codified, and are also found in the Arkansas Code as §§ 16-47-101 through -108, and §18-12-209 is double-codified as §16-47-110. Recent amendments, however, appear to be codified only in Title 18. Thus, for example, §16-47-103 still contains a reference to “chancery courts” that has been removed from §18-12-203. More substantively, §18-12-208 was amended in 1993 to add a sub-section (b), which is not found in §14-47-108.

Both Title 18, Chapter 12 and Title 16, Chapter 47 are called “Acknowledgment and Proof of Instruments,” and just to be safe, apparently, Judge Mixon cited both codifications. Finally, Ark. Code Ann. §§16-47-201 through -218 are Arkansas’s version of the Uniform Acknowledgment Act, which supplements, but does not replace the previously cited non-uniform provisions of Arkansas law dealing with acknowledgments.

21. *Bearhouse*, 99 B.R. at 928. Judge Mixon in fact stated the rule more broadly, to apply both to mortgages and deeds.

22. *See, e.g.*, Leonhard v. Flood, 56 S.W. 781 (1900).

23. The U.C.C. rule is that a subsequent perfected security interest beats a prior unperfected one, irrespective of the knowledge of the latter lender, see Ark. Code Ann. §4-9-324(a)(1). If neither security interest is perfect, priority dates to attachment, see Ark. Code Ann. §4-9-324(a)(3).
Second, in Judge Mixon’s scheme, there are properly recorded mortgages, which are enforceable against encumbrancers whose interests attach subsequent to the recordation. This is the standard case, into which most mortgage transactions fall, which are not threatened by §544(a)(3), and with which lawyers generally do not get involved.

Third, there are improperly recorded mortgages, which are enforceable against third parties only if the defect in the recordation is not plain on the face of the mortgage. It is here that our present interest lies.

The mortgage from Bearhouse, Inc. to the First National Bank of Crossett was not properly recorded, but, of course, the defect in Ms. Rice’s acknowledgment was not plain from the face of the mortgage. “On its face, the acknowledged mortgage bears no indication of irregularity or defect, and conforms with applicable state law.” Hence the improper recordation did not affect the enforceability of the mortgage and the trustee could not avoid it, even as a fictitious bona fide purchaser under §544(a)(3).

It is this third category that needs amplification, and Judge Mixon provided it with a discussion of the Arkansas cases in which the defect in the document did, or did not, render a mortgage unenforceable against third parties. We will now review those cases.

### III. Situations in which the defect renders the mortgage avoidable by the trustee.

#### A. Absence of the acknowledgment.

In four cases listed by Judge Mixon, the mortgage contained no acknowledgment at all. *Dean v. Planters National Bank,* 25 was a Bankruptcy Act case in which the trustee sought to attack a prepetition payment by the debtor to the bank as a preference. The bank claimed it had a security interest – then called a “chattel mortgage” – in certain personal property of the debtor, which would have shielded it from preference attack.26 The trustee attacked the validity of the chattel mortgage because the documents creating it were not acknowledged and notarized as required.27 The court held that the defects rendered the chattel mortgage unenforceable against third parties, the lien was invalid against the trustee and the payment on the note was a preference.28

In *Prince v. Alford,* 29 Alford owned a lot in Blytheville that he leased to Downs. Prince purchased the lease from Downs, with the permission of Alford. Alford then sold to Reeves, who built a building on the lot, one room of which he offered to Prince, but Prince thought he was entitled to possession of the entire building, under the lease with Alford. Prince then sued Alford and Reeves for damages. The trial judge directed a verdict for the defendants, and Prince appealed. *Held: Reversed*

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26. A pre-petition payment on a valid lien is not a preference because the payment does not deplete the debtor’s estate, freeing up, as it does, a property of value equivalent to the payment. This protection only applies if the collateral has a value at least equal to the amount owed.

27. There is no longer a requirement that security interests be witnessed, acknowledged or notarized, see *Ark. Code Ann.* §4-9-203.


29. 293 S.W. 36 (Ark. 1927).
and remanded to send to the jury the question of whether the deed from Alford to Reeves “was not in fact a mere subterfuge adopted to defeat the lease.”

But the Supreme Court went on:

Reeves may have bought with notice of the lease, although he did not buy collusively. It has been said that the lease was not acknowledged, although it was recorded, and, even though it would not therefore be constructive notice, under § 1525, C. & M. Digest, this fact may be considered in determining whether Reeves had actual notice before purchasing the lot.

Because Prince involves the enforceability of a lease, not a mortgage, against a subsequent transferee, the Court was using a different rule with respect to the role of actual knowledge, but the case still shows, as Judge Mixon noted, that an unacknowledged lease may not be properly recorded.

In Dodd v. Parker, Mr. and Mrs. Joyner mortgaged certain property in Little Rock belonging to Mrs. Joyner to Mrs. Dodd. Mr. Joyner acknowledged the mortgage, but Mrs. Joyner did not. The Joyners then sold the property to Mr. Parker. Mrs. Dodd then advertised the property for sale, pursuant to a power granted to her in the mortgage, but Parker sued to enjoin the sale. The trial court issued the injunction and Mrs. Dodd appealed. Held: Affirmed.

The Supreme Court wrote:

We do not stop to consider whether a mortgage of a married woman’s own land, acknowledged by her to have been executed for the purpose of relinquishing her dower is effectual to carry any estate whatever, because this mortgage was never acknowledged at all. Nor need we discuss the question whether a mortgage signed by a married woman, but never acknowledged, is good between the original parties; for here the rights of a third party have intervened. . . . [I]t has been uniformly held in this State that an unregistered mortgage, or one which has been improperly admitted to registration, constitutes no lien upon the mortgaged property, as against a stranger, notwithstanding he may have actual knowledge of its existence.

The Court cited a number of direct precedents for this holding, including Main v. Alexander, which Judge Mixon cited, 105 years later.

We emphasize that, from the later perspective of Bearhouse, this statement from Dodd is too broad, and some improperly recorded mortgages do become liens on property against third parties. But surely a long series of cases shows that entirely unacknowledged documents are not enforceable against subsequent purchasers and encumbrancers.

B. Failure to use proper words in the acknowledgment.

When discussing the precise language used in acknowledgments, the place to begin is with the statutory requirements of Ark. Code Ann. §16-47-207. Entitled “Forms of certificates,” this statute gives four alternative forms, one for individuals, one for corporations, one for attorneys in fact and

30. Id. at 37.
31. Id. at 38.
32. 40 Ark. 536 (1883).
33. Id. at 539-40.
34. 9 Ark. 112 (1848). The Dodd court also cited Hannah v. Carrington, 18 Ark. 85 (1856); Jacoway v. Gault, 20 Ark. 190 (1859); Carnall v. Duval, 22 Ark. 136 (1860); Little v. Dodge, 32 Ark. 453 (1877); Martin v. O’Bannon, 35 Ark. 62 (1879) and Conner v. Abbott, 35 Ark. 365 (1880).
one for public officers and trustees. However, the introductory phrase to these forms says that “a certificate substantially in one of following forms” must be used. The Eighth Circuit agreed in Bank of Hampton v. Wright, a case that arose in Arkansas and which was cited with approval by Judge Mixon in Bearhouse. In Wright, the Eighth Circuit cited Advance-Rumely Thresher Co. v. Wagner, a case that arose in Iowa, for this proposition: “[I]t is the general rule that forms of acknowledgment as prescribed in statutes are permissive, and not mandatory. It is sufficient if substantial compliance as to essentials is present.” Substantial compliance with the statutory forms is the key, then, under both the statute and the case law, to judging acknowledgments.

In Wright, the Eighth Circuit held that the acknowledgment did not substantially comply with the statutory requirements. In that case, the Abbott Company owned a lot in Hampton, Arkansas and mortgaged it to the Bank of Hampton. C.I. Abbott and W.R. Reddin, officers of the company, executed the mortgage. The acknowledgment attested to this:

Be it remembered, that on this day came before me, the undersigned, a circuit clerk within and for the county aforesaid, duly commissioned and acting C.I. Abbott, president, and W.R. Reddin, secretary, of Abbott Company, a corporation to me well known as the grantor, in the foregoing deed, and stated that they had executed the same for the consideration and purposes therein mentioned and set forth.

The missing language, the court held, would have shown the authorization from the corporation to the officers to execute the mortgage. As the official form of §16-47-207(2) says:

On this the ___ day of ___, 19__, before me, _______, the undersigned officer, personally appeared ______, who acknowledged himself to be the ____ of _____. a corporation, and the, as such ______, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as ______.

The Eighth Circuit wrote:

The acknowledgment in question does not meet [the substantial compliance] test in omitting the important fact of the authorization of the instrument by the corporation. The controversy before us is whether this defect invalidated the mortgage as against the trustee.

Wright was a Bankruptcy Act case, so the court turned to old §75, as a modern court would turn to

36. Id. (emphasis added).
37. 35 F.2d 321 (8th Cir. 1929).
38. Bearhouse, 99 B.R. at 928, n.3.
39. 29 F.2d 984 (8th Cir. 1928).
40. Id. at 987.
41. Wright, 35 F.2d at 322.
42. Ark. Code Ann. §16-47-207(2)(emphasis added). Note the small Y2K problem with the date. Presumably, it would be in “substantial compliance” with the statutory form now to give the date as “20__.”
43. Wright, 35 F.2d at 322.
§544(a) to determine this question, affirming, in the end, the district court’s determination that the defect in the acknowledgment rendered the mortgage invalid against third parties.44

In Drew County Bank & Trust Co. v. Sorben,45 the Bank and Sorben had conflicting mortgages to overlapping acreage; Sorben’s was filed first, but was informally acknowledged. The Court preferred the bank’s mortgage: “[Sorben’s] acknowledgment, however, was fatally defective because it failed to state that the mortgage was executed ‘for the consideration and purposes therein mentioned and set forth,’” quoting the language of an earlier statute.46

Connor v. Abbott47 is a confusing case. First, it contains a party with the same name as Bank of Hampton v. Wright,48 discussed above. Second, it is a long case that cites little authority; no cases are mentioned at all, and two treatises get only short shrift. Third, it involves the now thankfully obsolete rules regarding femme covert and femme sole, as Kate Martin, a married woman, signed the mortgage in that case as if she were single. Finally, and most confusing of all, is the court’s holding that “[t]he acknowledgment of [one of the mortgagors] is defective. It fails in stating that the mortgage was executed for the ‘consideration’ therein set forth.”49

To a 21st century ear, this sounds backwards. As shown by Sorben, just discussed, the rule probably should be stated that the acknowledgment failed for not stating that the mortgage was executed for the consideration set forth. Indeed, the Court’s own headnote for the case states the principle this way:

If the acknowledgment of the execution of a mortgage fails to state that the mortgage was executed for the “consideration” therein expressed, it is insufficient, and the mortgage, though recorded, is void against subsequent purchasers, even with notice; but is good between the parties to it. 50

With regard to the language used in the acknowledgment, then, it is one thing to state the holding of Wright that only substantial compliance with the statutory form is needed, but it is another thing to read the holdings of the cases, including Wright itself. These holding show that there is still some teeth to the requirement that proper language must be used in the acknowledgment in order to render a deed or mortgage enforceable against third parties.

Finally, with respect to the actual words of the acknowledgment, we must mention the so-called “Curative Acts” or “Validation Acts,” found, for our present purposes, in Ark. Code Ann. §18-12-208.51 These acts – or series of acts as there have been many over the years – forgive certain technical lapses in the acknowledgment of recorded deeds.

Of particular interest in relation to Wright’s “substantial compliance” test is §18-12-208(a)(2), which forgives the situation where “the officer who certified the acknowledgment or acknowledgments to such instruments omitted any words required by law to be in the certificate or acknowledgment.” At first blush, this would seem to sweep much more broadly than Wright and would cure even substantial defects found in the language of the acknowledgment. Note however, that this forgiveness

44. Id. at 323.
45. 28 S.W.2d 730 (Ark. 1930).
46. Id. at 730, quoting §1521 of Crawford & Moses’ Arkansas Digest.
47. 35 Ark. 365 (1880).
48. 35 F.2d 321 (8th Cir. 1929).
49. Connor, 35 Ark. at 374.
50. Id. at 365.
51. The same statute is double-codified in Ark. Code Ann. §16-47-108, see note 20, supra. An important 2003 clarifying amendment, however, was not picked up by the codifiers and does not appear in the pocket part to Volume 14B of the Arkansas Code.
works only in retrospect, from August 13, 1993, and earlier. Certain defects are forgiven prospec-
tively from that date by §18-12-208(b), but not including the one found in sub-
section (a)(2).

C. Too few disinterested witnesses.

In Cumberland Bldg. & Loan Ass’n v. Sparks,\(^52\) Mr. and Mrs. Sparks mortgaged certain property to
the Southern Saving Fund & Loan Co., without the mortgage having been acknowledged or attested to
by two disinterested parties. The mortgage was assigned to the Cumberland Building & Loan Association,
and the land was sold to J. W. and O.N. Killough. Before turning to questions the court deemed more important,
involving fraudulent transfers and subrogation, the Eighth Circuit applied Arkansas law to hold that the mortgage
was invalid against third parties due to the lack of attestation.\(^53\)

And in Leonhard v. Flood,\(^54\) Henry and Catherine Flood borrowed $2,000 from John
Leonhard, guaranteed by Edwin Pettit and J. F. Swanson. To protect Pettit and Swanson, the
Floods granted a mortgage to Leonhard on certain property belonging to Mrs. Flood, and this mort-
gage was acknowledged by Pettit. The Floods then conveyed the property to their sons, and to the
Flood Brick & Tile Co., a company owned by themselves and their sons. When the mortgage was
foreclosed upon, challenge was made to Pettit’s acknowledgment, and the court held for the chal-
lengers:

Under [the] circumstances, Pettit was directly interested in the mortgage given for
his benefit, and the acknowledgment taken before him was void. This being so, the
mortgage could not legally be recorded, and the record thereof was without effect.\(^55\)

D. Lack of a notary’s signature.

In Bank of Weiner v. Jonesboro Trust Co.,\(^56\) Ruegger mortgaged certain lands in Poinsett
County to the trust company, and gave a chattel mortgage on the crop to the bank. When Ruegger
became insolvent, the inevitable conflict arose between the two. The chattel mortgage had been
sealed by a notary, but was unsigned, and the Supreme Court had little difficulty in finding that
the trust company had priority.\(^57\)

Turning once again to the “Curative Acts” found in Ark. Code Ann. §18-12-208, we find the
both retrospective and prospective validation of mortgages which were recorded notwithstanding
the absence of the notary’s seal or with the notary’s commission expiration date stated improperly.\(^58\)

E. Summary of these cases.

These are the cases that Judge Mixon cited in Bearhouse and together they do stand for the
proposition that he derived from them. In each instance, the defect in the mortgage would have
been visible on the face of the document, at least to

\(^{52}\) 111 F. 647 (8th Cir. 1901).
\(^{53}\) Id. at 650.
\(^{54}\) 56 S.W. 781 (Ark. 1900).
\(^{55}\) Id. at 783.
\(^{56}\) 271 S.W. 952 (Ark. 1925).
\(^{57}\) Id. at 953.
\(^{58}\) ARK. CODE ANN. §18-12-209(a)(3), (4), (6), (7) and (b)(1), (2), (3) and (4).
a subsequent grantee who studied it closely. Some – most particularly the cases involving chattel mortgages and those that implicate the “Curative Statutes“– are not longer good law, because of a statutory change, and many of them state the rule too broadly, as we are about to see, but half of the Bearhouse proposition has been established: defects visible on the face of a mortgage render the instrument invalid against subsequent good faith purchasers or encumbrancers, including the bankruptcy trustee, under §544(a)(3).

We now turn to the cases where the defect is not plain on the face of the documents.

IV. Situations in which the defect does not render the mortgage avoidable by the trustee.

A. Acknowledgments over the telephone.

Judge Mixon cited three cases in which the acknowledgment occurred at long distance. In Stallings v. Poteete, Mary House, then ninety, leased her farm to Earl Poteete in 1972, in 1974, then again in 1978. Marjorie Waller, a notary public, notarized all three leases, the final one following a telephone conversation with the parties. Soon thereafter, Ms. House passed away, and the farm was inherited by Alan Stallings, and others. Mr. Stallings, as executor of the will, demanded possession of the property, and Poteete sued to enjoin the harassment. Stallings counterclaimed for a declaratory judgment that the lease was invalid, in part because Ms. House had not appeared personally before Ms. Waller. The chancellor held that the lease was valid and Mr. Stallings appealed. Held: Affirmed. Ms. Waller personally knew Ms. House and testified that she recognized her voice on the telephone. More to the point, “the notary’s certificate of acknowledgment is regular on its face, and absent any finding of fraud or forgery, we conclude the telephone acknowledgment is valid.”

The Stallings court cited Abernathy v. Harris, as did Judge Mixon in Bearhouse. In Abernathy, the Harrises mortgaged certain property to Varnell, which mortgages were assigned to Abernathy. Subsequently, the Harrises mortgaged the property again to the Grant County Bank. When the Harrises defaulted to Abernathy, the bank challenged the validity of the earlier mortgages due, in part, to the fact that Mrs. Harris had spoken to the notary over the telephone, and had not appeared in person. Even though telephones were less common at the time of Abernathy than they were to become at the time of Stallings – the Supreme Court in the early cases carefully uses the apostrophe when it shortens the name of the device to “the ‘phone” – still the Court had little trouble with the long-distance acknowledgment:

The mortgage on its face purports to convey the homestead right and to relinquish that of dower. The notary’s certificate of acknowledgment is regular on its face and conforms to the statute. [T]he certificate of the officer is conclusive of every fact appearing in the certificate, and that evidence as to what transpired at the time the acknowledgment was taken and certified was inadmissible to impeach the certificate except for fraud or imposition in obtaining the acknowledgment where notice of the fraud or imposition is brought home to the grantee.

Bearhouse and Abernathy both cited the 1923 case of Wooten v. Farmers’ & Merchants’ Bank.
apparently the first Arkansas case involving notarization over the telephone. Once again, in Wooten, the Court held that when the telephone attestation appears correct on its face, the subsequent purchaser or encumbrancer can not complain, even though the statute requires that the attestation be done in the presence of the notary.64

B. No questions asked by the notary of the signer.

Each of the four statutory forms for the certificate of acknowledgment sets out a requirement for the notary to meet. In three cases, the signer of the document must be “known” to the notary, “or satisfactorily proven.”65 In the fourth case, the signer must prove to the notary that he or she has the authority from a corporation to sign.66 What if the notary makes no inquiry to ascertain such information, and acknowledges the signature anyway? That is what happened in Clifford v. Federal Bank & Trust Co.67 James Clifford borrowed $7500 from the Federal Bank & Trust Co., giving as collateral stock in his business, plus a promise to give further collateral, if demanded by the bank. Such a demand was made, and James and Margaret Clifford gave mortgages on two pieces of real property. These mortgages were notarized by an employee of the bank, who did not know Mrs. Clifford and did not ask any questions of her. When James Clifford and his business suffered an assignment for the benefit of creditors, the assignee, A.V. Walker, brought suit in equity to have the mortgages cancelled. Walker offered several grounds for cancellation; of interest to us was his theory that Mrs. Clifford had not properly acknowledged the mortgages, for their had been no “ceremony” of attestation.

Citing a long series of prior cases, culminating in Meyer v. Gossett,68 the Supreme Court held that, where there is an appearance before the officer and an acknowledgment of it in some manner, it was held that the certificate of the officer is conclusive of every fact appearing in the certificate, and that evidence as to what transpired at the time the acknowledgment was taken and certified was inadmissible to impeach the certificate, except for fraud or imposition in obtaining the acknowledgment, where the notice of fraud or imposition is brought home to the grantee.69

Judge Mixon drew from Clifford’s string cite one case for individual mention, and that case will serve as a nice wrap-up of our issue. In Davis v. Hale,70 Charles and Hattie Davis executed two disputed deeds of trust. The first, on November 5, 1909, was to H.J. Hale, trustee, for the benefit of W.P. Hale, who had lent the Davises $300. This deed was notarized to the extent of having the acknowledgment form attached and the notary’s

64. Id.

65. Ark. Code Ann. §16-47-207(1), (3) and (4). “Proved” would have been better, see note 19, supra.


67. 19 S.W.2d 1026 (Ark. 1929)

68. 19 S.W.2d 1026 (Ark. 1882).

69. Id. at 1027. The Clifford Court also cited Donahue v. Mills, 41 Ark. 421 (1883); Petty v. Grisard, 45 Ark. 117 (1885); Nichols v. Howson, 126 S.W. 830 (Ark. 1910); Bell v. Castelberry, 132 S.W. 649 (Ark. 1910); Davis v. Hale, 170 S.W. 99 (Ark. 1914); Polk v. Brown, 174 S.W. 562 (Ark. 1915); Nevada County Bank v. Gee, 197 S.W. 680 (Ark. 1917); Lawrence v. Mahoney, 225 S.W. 340 (Ark. 1920); Eades v. Morrilton Lumber Co., 288 S.W. 1 (Ark. 1926); and Miles v. Jerry, 250 S.W. 34 (Ark. 1923).

70. 170 S.W. 99 (Ark. 1914).
name inserted, but the notary, S.S. Semmes, never signed.\textsuperscript{71} This deed of trust was meant to cover the homestead of the Davises, however, it misdescribed the property.

The second deed of trust, on March 1, 1911, was from the Davises to F.B. Hale, trustee, for the benefit of the Osceola Cotton Oil Company, which had lent, or more likely provided goods and services to the Charles Davis, to the extent of $800. This deed was acknowledged before a stockholder and officer of the beneficiary oil company. The property described was the homestead of the Davises.\textsuperscript{72}

Charles Davis died in November of 1911, leaving Hattie and his three children as his heirs, and in 1913 H.J and F.B. Hale sued in chancery to foreclose on the deeds of trust.\textsuperscript{73} The chancellor reformed the first deed to meet the expectations of the parties, thereby reaching the homestead, and then declared the priority of the deeds to be in the order given.\textsuperscript{74} The Supreme Court reversed in part, finding that the first deed was fatally flawed, because of the absence of S.S. Semmes' signature. The second deed was valid, however, even though witnessed by an interested party, because no fraud or coercion was alleged or proved.\textsuperscript{75}

In \textit{Davis}, then, we can see Judge Mixon's rule at work, for the first deed of trust would have appeared, on even cursory inspection by a subsequent purchaser or encumbrancer to be defective: the notary's signature was absent. But the defect in the second deed of trust was invisible: the connection between the witness and the creditor would have been know only to one with insider information. Against \textit{bona fide} purchasers, and the bankruptcy trustee, the earlier document should be unenforceable, but the later one not.\textsuperscript{76}

\textbf{V. Conclusion.}

We have found in \textit{Bearhouse} the kind of well-researched, well-reasoned and well-written opinion that we have come to expect from Judge Mixon. The cases he cites are old, but they fit together to form the rule that he applies, making \textsection{544(a)(3)} both a strong tool for trustees and at the same time protective of the rights of innocent purchasers and mortgagees whose documents contain a hidden, and innocently occurring flaw. \textit{Bearhouse} should stand the test of time.

\begin{itemize}
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} \textit{Id.}
\item \textsuperscript{73} \textit{Id.}
\item \textsuperscript{74} \textit{Id.}
\item \textsuperscript{75} \textit{Id.} at 101-02.
\item \textsuperscript{76} It is true that under the usual rule, even the first deed of trust would have been valid between the parties. There were no innocent third parties relying upon the unsigned notary seal in \textit{Davis}; Hattie had signed the deed of trust, and the children did not take for value. This fact was not discussed by the Supreme Court, but might be explained away by noting that the law was especially solicitous about the homestead of a widow such as Hattie, and her children. The Court wrote:

\begin{quote}
The property embraced in the deed of trust given in favor of W. P. Hale embraced the homestead of Charles Davis. The act of March 18, 1887, provides that no conveyance, mortgage or other instrument affecting the homestead of any married man shall be of any validity unless the wife joins in the execution of such instrument and acknowledges the same. Under this statute the wife must not only join in the execution of the deed of trust but must also acknowledge that she has executed it in order to render it a valid encumbrance against the homestead.
\end{quote}