LINCOLN *v.* MCGEHEE HOTEL COMPANY, INC.

Opinion delivered June 30, 1930.

1. MUNICIPAL CORPORATIONS—EASEMENT IN STREET.—Subject to the easement of the public in a street to enjoy and use it as a highway, the fee therein belongs to the owners of the adjacent lots.
2. MUNICIPAL CORPORATIONS—ENCROACHMENTS ON STREETS.—Abutting owners of real property have a right to enjoin the council from permitting or any one from making any permanent en-

croachment on the streets of the city, where they allege and prove special injury.

3. NUISANCE—SMOKE STACKS OVER STREET.—The erection of two smoke stacks securely fastened to the wall of a fourteen-story building, 44 and 40 inches in diameter, respectively, eighteen feet above the street *held* not to constitute a nuisance as to a four-story building north of the proposed building.

Appeal from Pulaski Chancery Court; *Frank H. Dodge;* affirmed.

Carmichael & Hendricks, for appellant.

Rose, Hemingway, Cantrell & Loughborough, for appellee.

HART, C. J. Appellant brought this suit in equity against the appellee to enjoin it from erecting two smokestacks which will be attached to a fourteen-story building across a street upon which abuts the building of the appellant. The record shows that the appellant and the appellee are the owners of lots in block 79 of the city of Little Rock. Appellant owns lots 1, 2 and 3 on the north side of what is called Bridge Street, extending east and west through said block, and has a four-story building which faces Main Street on the east and Bridge Street on the south. Appellee is building a fourteen-story concrete hotel on lot 12 which faces Bridge Street on the north, and Main Street on the east. Bridge Street is twenty feet five inches from the wall of appellant's building on the north to the wall of the proposed building of the appellee on the south side of Bridge Street. The city council gave the appellee permission to erect two smokestacks, respectively forty-four and forty inches in diameter, which are to be placed on a bracket or shelf eighteen feet above the surface of Bridge Street. The bracket upon which the smokestacks will rest is entirely above the traffic of the street, and will not interfere with it. The smokestacks will be riveted into the hotel building and will be as solid as the wall of the hotel. Bridge Street was dedicated in the year 1839 and the dedication recites that the abutting property owners retain a fee in the alley or street subject to the use of the public.

Other facts will be stated or referred to in the opinion.

The complaint was dismissed for want of equity, and the case is here on appeal.

Counsel for the appellant base the right to injunctive relief on the ground that the act complained of constituted a permanent encroachment upon Bridge Street and thereby became a public nuisance which the appellant, as abutting owner of real property, was entitled to abate because he was specially injured. *Ruffner* v. *Phelps,* 65 Ark. 410; *Sander* v. *Blytheville,* 164 Ark. 434.

At the outset it may be well to define the rights of all parties concerned. Subject to the easement of the public in a street to enjoy and use as a highway, the fee therein belongs to the owners of the adjacent lots. *Packet Co.* v. *Sorrels,* 50 Ark. 466; *Hoxie* v. *Gibson,* 150 Ark. 432; *Dent* v. *Bowers,* 166 Ark. 414. Under § 7607 of Crawford & Moses' Digest the city council has the care, supervision, and control of all the public streets and alleys within the city, and it is made the duty of the council to cause the same to be kept open and in repair and free from nuisance. Under the principles of law decided in these cases and many more which might be cited, abutting owners of real property have a right to enjoin the council from permitting or any one from making any permanent encroachments on the streets of the city on the ground that such encroachments constitute a public nuisance, and the abutting owners are entitled to injunctive relief where they allege and prove special injury. In the application of these well settled principles of law, this court has repeatedly held that the erection of permanent structures, or the act of closing in part or in whole any public street or alley, entitles the abutting owners of real property to abate the same by injunction. *Davies* v. *Epstein,* 77 Ark. 221, 227; *Simon* v. *Pemberton,* 112 Ark. 202; *Osceola* v. *Haynie,* 147 Ark. 290; *Brewer* v. *Mo. Pac. R. R. Co.,* 161 Ark. 528; *Langford* v. *Griffin,* 179 Ark. 577. The reason for granting injunctive relief in

each case is that the abutting property owners has been deprived of egress and ingress to and from his property, and that this constitutes a special injury to his property which differs in kind from that suffered by his neighbors. In the case at bar no special injury of this kind is shown. The smokestacks are placed on a bracket above the street, so that the ingress and egress to the property of the appellant is not in any wise affected. The smokestacks are securely fastened to the wall of the building, so that, according to the evidence introduced, they are a part of the building itself and will stand as long as the walls of the building stand.

The evidence for the appellee also shows that there will be a shadow cast by the wall of the building which is to be erected by the appellee over the building of the appellant, so that the light entering the building of appellant will not be affected by the erection of the smokestacks. In other words, the testimony shows that the shadow cast by the building would affect the light entering the appellant's building just as much without the smokestacks as with them. It is also contended by counsel for the appellant that his right to the air entering his building will be affected by the erection of the smokestacks in the alley. We do not think the proof on this phase of the case is sufficient to entitle the appellant to injunctive relief. It is a matter of common knowledge that houses are built close together in cities, and the slight interference with the air entering appellant's building will be merely an incident to city life, and, according to the proof, will not be of sufficient disturbance to his rights to entitle him to the injunctive relief prayed for.

The decree is therefore affirmed.

McKIM v. HIGHWAY IRON PRODUCTS COMPANY.

Opinion delivered June 30, 1930.

1. ACTION—COMMENCEMENT.—The filing of a claim against a county and presenting it to the county court is the institution of a suit or action, no other pleading or proceeding for that purpose being required.
2. ASSIGNMENTS—VALIDITY.—Although the assignment of a pending proceeding against a county did not comply with Crawford & Moses' Dig., it was nevertheless valid between the parties, and a subsequent garnisher takes subject to such assignment.

Appeal from Faulkner Chancery Court; *W. E. Atkinson,* Chancellor; affirmed.

R. W. Robins and *Opie Rogers,* for appellant.

J. C. & Wm. J. Clark, for appellee.

HUMPHREYS, J. Appellant brought this suit in the nature of an equitable garnishment against appellees in the chancery court of Faulkner County making a judgment he obtained in the year 1925 in the circuit court of Van Buren County against the Highway Iron Products Company the basis of the action to impound the amount of $1,530 due from Faulkner County to said Highway Iron Products Company for bridge material, and to have same applied toward the payment of his judgment. It was alleged that the Highway Iron Products Company was a foreign corporation, and had no property in Arkansas out of which to collect his judgment except the claim Faulkner County owed it. Appellant prayed that W. M. Harper, county judge, and A. H. Burkitt, county clerk, be enjoined from issuing a warrant for said claim to the Highway Iron Products Company, and that the proceeds thereof be impounded and applied to the payment of his judgment.

The Highway Iron Products Company made no defense of any kind, but Isaac Weil and Abraham Weil, partners doing business as Weil Brothers, filed an intervention claiming an assignment of the claim from the Highway Iron Products Company to them before appel-

lant impounded the proceeds thereof, in part payment of a debt which it owed them.

The issues joined as to whether there was a *bona fide* assignment of the claim by the Highway Iron Products Company to the interveners, and whether the transfer thereof met the requirements of the law, were submitted to the court upon the testimony adduced which resulted in a decree dismissing appellant's complaint for the want of equity, from which is this appeal.

The trial court found that the Highway Iron Products Company assigned its claim against Faulkner County for the bridge material to the interveners on July 6, 1928, in part payment of a mortgage which it owed them, and, after a very careful reading of the testimony, we are unable to say that the finding for them was contrary to a clear preponderance of the evidence. This disposes of the first issue.

This brings us to a consideration and determination of the issue of whether the assignment was valid as against appellant. The assignment of the claim was in the form of an indorsement upon the invoice of the bridge material, and recited that for value received the same was assigned to Weil Brothers of Fort Wayne, Indiana; the indorsement being signed by C. V. Joseph, president of the Highway Iron Products Company. The claim against the county had been filed by the Highway Iron Products Company before it was assigned to the intervener. The filing of the claim against the county was the commencement of an action thereon. It was said by this court in the case of *Jefferson County* v. *Philpot*, 66 Ark. 243, that: "The filing of a demand against a county and presenting it to the county court is therefore, according to the various definitions given, the institution of a suit or action, no other pleading or proceeding for that purpose being required."

Appellant contends that the assignment of the claim did not meet the requirements of § 6303 of Crawford & Moses' Digest, and, on account of a failure to do so, was

not a valid transfer of a pending action, so as to prevent him from impounding the proceeds of the claim and having same applied to the payment of his judgment. The statute invoked by him is as follows:

"§ 6303. The sale of a judgment or any part thereof of any court of record within this State, or the sale of any cause of action, or interest therein after suit, has been filed thereon, shall be evidenced by a written transfer, which, when acknowledged in the manner and form required by law, may be filed with the papers of such suit, and, when thus filed by the clerk, it shall be his duty to make a minute of said transfer on the margin of the record of the court where such judgment of said court is recorded, or if the judgment be not rendered when said transfer is filed, the clerk shall make a minute of such transfer on the docket of the court where the suit is entered, giving briefly the substance thereof, for which services he shall be entitled to a fee of twenty-five cents, to be paid by the party applying therefor; and this act shall apply to any and all judgments, suits, claims and causes of action, whether assignable in law and equity or not. When said transfer is duly acknowledged, filed and noted as aforesaid, the same shall be full notice and valid and binding upon all persons subsequently dealing with reference to said cause of action or judgment, whether they have actual knowledge of such transfer or not."

The statute is in derogation of the common law, and a strict compliance therewith is necessary in order to obtain protection against persons subsequently dealing with reference to a cause of action. The interveners did not attempt to comply with the statute, but their failure to do so did not render the assignment invalid, so far as appellant is concerned. The assignment was valid as between the parties thereto, and appellant, being a garnisher, occupied the position of his debtor, the Highway Iron Products Company, who was the assignor of the cause of action. As he was not a purchaser of the claim of the cause of action for value, he must be regarded and

treated as a party to the assignment, and did not take the debt as against the interveners, who were prior assignees thereof for value. *Market National Bank of Cincinnati* v. *Raspberry,* 34 Okla. 243.

No error appearing, the decree is affirmed.