

DAVIDSON, SHERIFF, *v.* TRIMBLE, JUDGE.

4-7588

183 S. W. 2d 922

Opinion delivered December 11, 1944.

**PROHIBITION—JURISDICTION TO RETRY REMANDED CAUSE.**—Where the Supreme Court reversed a judgment and remanded the cause, jurisdiction of Circuit Court reattached, and the defendant's petition to prohibit the lower court from again trying the issues would be denied.

Prohibition to Washington Circuit Court; *J. W. Trimble*, Judge; writ denied.

*O. E. Williams* and *S. Hubert Mayes*, for petitioner.

GRIFFIN SMITH, Chief Justice. In *Davidson, Sheriff, v. Chandler*, 206 Ark. 375, 175 S. W. 2d 567, the judgment was reversed. A concluding paragraph of the opinion is:

"Our conclusion is that the act of Burton in killing Chandler was not done under color of his office on the facts here presented, and that Sheriff Davidson and his surety are not liable therefor. Burton was not a defendant in this action, and whether his bond to the Sheriff may be liable for his tort is not before us."

It was then said: "The judgment is accordingly reversed and the cause remanded."

There was no express direction that a retrial be had to determine Davidson's liability; but, even though this Court found that a judgment against Davidson and his surety was improper, the trial court was justified in construing the order to be one for a new trial.

The defendant now seeks by prohibition to prevent a retrial of the cause. It may be, as petitioner insists, that another trial would be unavailing, and this will be so unless substantial testimony in addition to that previously considered is introduced. *Railway Company v. Morgart*, 56 Ark. 213, 19 S. W. 751. However, the court below is not without jurisdiction, nor is its proposed action in excess of its jurisdiction; and prohibition does not lie.

Petition denied.

---