

838 MERCHANTS' & PLANTERS' BANK & TRUST [183
 COMPANY *v.* USSERY.
MERCHANTS' & PLANTERS' BANK & TRUST COMPANY *v.*
 USSERY.

Opinion delivered May 25, 1931.

1. JUDGMENT—VACATING AFTER LAPSE OF TERM.—A court with terms fixed by law has no power to vacate a judgment or decree after the term at which it was rendered except for causes mentioned in Crawford & Moses' Dig., § 6290, subd. 7.
2. JUDGMENT—UNAVOIDABLE CASUALTY.—Where a defendant was prevented without fault from appearing in or defending an action, the court could vacate the judgment or decree after the term under Crawford & Moses' Dig., § 6290, subd. 7.
3. JUDGMENT—UNAVOIDABLE CASUALTY.—Where defendant's child told defendant that he would see counsel and advise her as to her proper defense, but failed to do so, this was insufficient to justify vacating a decree after the term, within § 6290, *Id.*
4. PRINCIPAL AND AGENT—AGENT'S NEGLIGENCE.—Where a defendant made her son her agent to procure counsel and conduct her defense to the action, and he failed to do so, she is bound by his negligence, not occasioned by misleading conduct of opposing counsel or misleading statement of a court officer.
5. JUDGMENT—RELIEF AFTER TERM.—A party seeking relief against a judgment after term on the ground of unavoidable casualty cannot have relief if the taking of judgment against her was due to her own negligence.
6. JUDGMENT—RELIEF AFTER TERM.—In an action to vacate a judgment rendered at a former term on the ground that there was no service of process, the burden of proof is upon the party alleging it, as the officer's return is *prima facie* true.
7. PROCESS—CONCLUSIVENESS OF OFFICER'S RETURN.—Defendant's affidavit to vacate a decree after term for want of service of process held insufficient to overcome the sheriff's return of service.

Appeal from Jefferson Chancery Court; *Harvey E. Lucas*, Chancellor; reversed.

STATEMENT OF FACTS.

This is an appeal from an order of the chancery court opening a decree rendered at a former term of the court. On the 16th day of April, 1930, Merchants' & Planters' Bank & Trust Company filed a complaint in the chancery court against C. D. Rutledge, Sterling E.

Ussery, Mrs. Virginia Ussery, Patrick C. Ussery, Cassie B. Ussery, Sallie Ussery Norwood, and Bettie Ussery Ray, asking judgment against the defendants, C. D. Rutledge, Sterling E. Ussery and Virginia Ussery, for an amount alleged to be due it, and also praying that a deed dated April 24, 1909, purporting to be executed by J. S. Ussery and Virginia Ussery, for a consideration of one dollar to Pat C. Ussery, Bettie S. Ussery, Sally Virginia Ussery, and Cassie B. Ussery, to certain lots in the city of Pine Bluff, be canceled and set aside as having been executed in fraud of its rights as a creditor. The complaint also alleges that the property involved in the suit had been devised to the defendants under a will executed by J. S. Ussery, husband of Virginia Ussery and the father of the devisees named in the will. It is also alleged that the will was duly admitted to probate after the death of the testator in 1910. It is also alleged that C. D. Rutledge and S. E. Ussery were indebted to the plaintiff in a certain sum evidenced by their promissory note, which is exhibited with the complaint. It is also alleged that on June 12, 1929, plaintiff bank advanced to the firm of Rutledge & Ussery the sum of \$1,000, and that on March 18, 1929, the defendant, Mrs. Virginia Ussery, had executed and delivered to the plaintiff a written instrument whereby she promised to pay the amounts advanced by plaintiff to the firm of Rutledge & Ussery for a period of two years beginning February 2, 1929. This written instrument was also made an exhibit to the complaint.

The summons was directed to the sheriff of Jefferson County and is in common form. It contains a return of the sheriff that it was executed by delivering a true copy of the summons on the 17th day of April, 1930, to C. D. Rutledge, Sterling E. Ussery, Mrs. Virginia Ussery, Cassie B. Ussery, and Sally Ussery Norwood.

On the 9th day of May, 1930, a day of the April term of said chancery court, a decree was entered of record in said case. The decree recites that the defendant, C. D.

COMPANY *v.* USSERY.

Rutledge, Sterling E. Ussery, Mrs. Virginia Ussery, Cassie B. Ussery and Sally Ussery Norwood were duly served with summons by the sheriff of the county more than twenty days prior to the date of the decree. The decree further recites that the cause is heard upon the complaint, with exhibits thereto, the original note sued on and filed in open court, the original guaranty of Mrs. Virginia Ussery filed in open court, summons and return of the sheriff thereto, testimony of witnesses heard in open court, and records of the recorder of Jefferson County, as referred to in the complaint. Continuing, the decree contains the following:

“The court finds that on March 18, 1929, Mrs. Virginia Ussery executed and delivered to plaintiff a written instrument whereby she promised, as surety, to pay any and all amounts advanced by plaintiff to the firm of Rutledge & Ussery for a period of two years beginning February 2, 1929. That on June 12, 1929, plaintiff advanced to the firm of Rutledge & Ussery the sum of one thousand dollars, and on said date said firm executed its promissory note in said sum, due ninety days after date, bearing interest from date until paid at the rate of 8 per cent. per annum. That the firm of Rutledge & Ussery was composed of the defendants, C. D. Rutledge and S. E. Ussery. That there is still due upon said note, as of this date, the sum of \$547. That C. D. Rutledge & S. E. Ussery are totally insolvent, and Mrs. Virginia Ussery is totally insolvent, and possesses no property out of which execution based upon said indebtedness may be satisfied, excepting an estate for life in the lands described in the complaint.

“The court finds that under the terms of the will of J. S. Ussery, who died in Jefferson County, Arkansas, in the year 1910, the defendant Sally Ussery Norwood became the owner of the north half of lots 3 and 4, block 32, Pine Bluff Land Company's addition to the city of Pine Bluff, Arkansas, subject to the dower rights of Virginia Ussery, and the defendant, Cassie B. Ussery, became the owner of the south half of lots 3 and 4, block 32, Pine

Bluff Land Company's addition to the city of Pine Bluff, subject to the dower rights of Virginia Ussery. That, immediately after the death of said J. S. Ussery, Virginia Ussery was by each of the defendants, Cassie B. Ussery and Sally Ussery Norwood, assigned as dower an estate of life in an undivided one-third of the property devised to each of said defendants, as aforesaid, and accepted said assignment, and by consent of all parties entered into possession of said property and improvements thereon, and has continued in possession until this date, collecting the rents therefrom, said parties accounting between themselves, and without any notice, either actual or constructive, to third parties of any claim of Sally Ussery Norwood or Cassie B. Ussery adverse to her said life estate. That plaintiff advanced moneys to the firm of Rutledge & Ussery upon the written guaranty of Mrs. Virginia Ussery, believing that she owned a life estate in an undivided one-third interest in said lots 3 and 4, and the defendants, Sally Ussery Norwood and Cassie B. Ussery, well knew that said money was advanced in reliance upon said belief and upon the record title and possession of Mrs. Virginia Ussery, and said defendants are estopped to assert any title adverse thereto as against the claim of plaintiff. That the purported deed, dated April 24, 1909, from J. S. Ussery and wife to Bettie S. Ussery, Sally B. Ussery, Patrick C. Ussery and Cassie B. Ussery, recorded in deed record 131 at page 151, recorder's office of Jefferson County, Arkansas, was not in truth executed by J. S. Ussery and wife, and is void so far as same concerns lots 3 and 4, and was executed for the purpose of hindering and delaying the plaintiff as a creditor of Virginia Ussery in the collection of its debt.

"It is therefore, by the court considered, adjudged and decreed that the plaintiff, Merchants' & Planters' Bank & Trust Company, have and recover of and from the defendants, C. D. Rutledge and S. E. Ussery and Mrs. Virginia Ussery, and each of them, the sum of \$547 with interest from this date until paid at the rate of eight per

The only evidence introduced in support of the motion to vacate the decree was a warranty deed purporting to have been executed by J. S. Ussery and Virginia Ussery, his wife, to Sally Ussery Norwood, Cassie B. Ussery, Bettie S. Ussery and Patrick C. Ussery, to the property involved in this action, which is situated in Pine Bluff, Arkansas. The deed recites a consideration of one dollar and that the grantees are the children of the grantors. The deed was duly signed and acknowledged on the 24th day of April, 1909, but was not filed of record until the 17th day of July, 1929.

The written guaranty signed by Mrs. Virginia Ussery, which was made an exhibit to the original complaint, was executed on the 18th day of March, 1929.

On the 7th day of February, 1931, which was a day of the November term, 1930, an order was entered of record opening the original decree rendered on a regular day of the April, 1930, term of said court. The court found that the defendants Cassie B. Ussery and Sally Ussery Norwood were not served with summons in the original case and had no actual notice of it, and that they had a meritorious defense to the action.

Bridges, McGaughey & Bridges, for appellant.

E. W. Brockman, for appellee.

HART, C. J., (after stating the facts). The original decree was entered of record on May 9, 1930, which was a regular day of the April term of the Jefferson Chancery Court. The motion of the defendants to vacate the decree was filed on the 19th day of November, 1930, which was a day of the November term of said court. Acts of 1923, p. 376.

A court with terms fixed by law has no power to vacate a judgment or decree after the lapse of the term at which it was rendered except for causes named in § 6290 of Crawford & Moses' Digest. *Terry v. Logue*, 97 Ark. 314, 133 S. W. 1135; *Robinson v. Citizens' Bank of*

court. Her failure to make a defense was due entirely to the negligence or omission of her own agent, and she must be bound by his misconduct. It was the duty of the defendant to keep herself informed of the progress of the case and obtain relief on the ground of unavoidable casualty under the statute, she must have shown that she was not guilty of negligence and cannot have relief if the taking of the decree against her appears to have been due to her own carelessness. *Trumbull v. Harris*, 114 Ark. 493, 170 S. W. 222.

As to the defendant, Cassie B. Ussery, but little need be said. The original decree finds, and the return of the sheriff of Jefferson County shows, that this defendant was duly served with summons in the manner prescribed by law. No denial of this fact is made by this defendant. He does not state or allege that any fraud was practiced on him nor that any unavoidable casualty prevented him from answering or making his defense to the original action. Therefore he does not even allege any ground for opening the decree under the provisions of § 6290 of the Digest.

We now come to the defendant, Sally Ussery Norwood. She alleges that she was not served with summons and sets up a defense to the original action. In an action to vacate a judgment rendered at a former term of court on the ground that there was no service of process, the burden of proof is upon the party asserting it because the officer's return of service is *prima facie* true. *Holman v. Lowrance*, 102 Ark. 252, 144 S. W. 190; and *Karnes v. Ramey*, 172 Ark. 125, 287 S. W. 743.

In this case, the return of service of summons by the sheriff in the original suit shows that the defendant, Sally Ussery Norwood, was duly served with summons in Jefferson County, Arkansas, on the 17th day of April, 1930, by having a true copy of the summons delivered to her by the sheriff. The return was filed with the clerk of the court on the 18th day of April 1930. A decree was

entered of record on May 9, 1930. It recites that service of summons was duly had on Sally Ussery Norwood by the sheriff serving her with summons in the manner prescribed by law. In the application to vacate the decree, this defendant contents herself with making her affidavit to the petition to vacate the decree. The burden was upon her to show that no service of summons was had on her, and we do not think that her affidavit merely was sufficient to overturn the return of the sheriff as to the service of summons, when considered in connection with the attendant circumstances in the case.

Therefore we hold that the court erred in vacating the original decree and in allowing the defendants to interpose a defense to the action. The order of the chancery court opening the decree rendered at the former term of the court will be reversed, and the cause will be remanded with directions to the chancery court to overrule the application of the defendants to vacate the decree under the provisions of § 6290 of Crawford & Moses' Digest.

It is so ordered.
