ORDER OF RAILWAY CONDUCTORS OF AMERICA v. BANDY.

Opinion delivered June 25, 1928.

1. PROHIBITION—FUNCTION OF WRIT.—The office of the writ of prohibition is to restrain an inferior tribunal from proceeding in a matter not within its jurisdiction; but it is never granted unless the inferior tribunal has clearly exceeded its authority, and the party applying for it has no other protection against the wrong that shall be done by such usurpation.
2. PROHIBITION—WHEN APPROPRIATE REMEDY.—The writ of prohibition is an appropriate remedy to restrain the exercise of jurisdiction by an inferior court over a subject-matter when it has none, and over parties where it can acquire none.
3. PROHIBITION—WHEN WRIT LIES.—The writ of prohibition lies when it affirmatively appears from the face of the record that no service was had upon the defendants and that they did not enter their appearance.
4. INSURANCE—JURISDICTION AS TO FOREIGN COMPANY.—Service of summons on the Insurance Commissioner conferred no jurisdiction over a foreign insurance company which had no property within the State and had not attempted to do business in it.

5. APPEARANCE—EFFECT OF APPEALING.—A party appealing from an order denying a motion to quash service of summons will be treated as in court, although the service is held invalid.
6. PROHIBITION—WHEN WRIT LIES.—Prohibition lies when the circuit court is about to proceed in a case in which it had no jurisdiction over defendants and could acquire none, and defendants had no adequate remedy in the trial court.

Prohibition to Greene Circuit Court; *W. W. Bandy,* Judge; writ granted.

STATEMENT OF FACTS.

Order of Railway Conductors of America, Mutual Benefit Department of Order of Railway Conductors of America, and Order of Railway Conductors of America, Accident Insurance Department of Order of Railway Conductors of America, brought separate original applications for a writ of prohibition against W. W. Bandy, judge of the circuit court of the Second Judicial District of Arkansas, and Charles Finnegan, to prohibit said circuit court from taking further action in suits instituted against them in said court.

The record shows that Charles Finnegan brought separate suits against each petitioner herein to recover an amount alleged to be due him on a benefit certificate or an insurance policy issued by said defendant. According to the allegations of the complaint, in each case it is alleged that the Order of Railway Conductors of America is a voluntary organization, composed of persons in charge of the operation of complete trains and under supervision of the movement thereof. Continuing, the complaint reads as follows:

"That the said Order of Railway Conductors of America established and maintained what is known as a mutual benefit department, whose object is to aid and benefit disabled members and the widows, relatives, and legal representatives of deceased members of said Order of Railway Conductors of America. That said mutual benefit department, while composed of only those persons belonging to the Order of Railway Conductors of America who contribute to a common fund for that purpose,

is controlled and operated by the general officers of the Order of Railway Conductors of America.

"Plaintiff alleges that on the 10th day of March, 1916, the Mutual Benefit Department of the Order of Railway Conductors of America executed to Charles Finnegan, the plaintiff, its certificate of membership, being certificate series C, No. 9604, in the sum of $3,000; that, under the provisions of said certificate of membership, on the payment of membership fees and each and every assessment that may be levied against the certificate, and in accordance with existing laws of the mutual benefit department, the Mutual Benefit Department of the Order of Railway Conductors of America agreed to and with the said Charles Finnegan, in case of his death, and after due notice and satisfactory evidence of such death, to pay his wife, Anna Finnegan, the sum of $3,000. And, in the event of the said Charles Finnegan becoming disabled as specified in the laws of said mutual benefit department in force at the time the disability occurred, to pay to the said Charles Finnegan the said amount of $3,000. Copy of certificate attached and marked Exhibit A.

"Plaintiff paid all assessments levied against him from the time of the issuance of said certificate up until the.....day of....., 1926.

"That during the month of April, 1925, while the plaintiff was a member of said Mutual Benefit Department of said Order of Railway Conductors of America, and was a conductor on the St. Louis-San Francisco Railway, while engaged in the performance of his duties, a cinder lodged in his left eye, from the effect of which the plaintiff lost the sight of his left eye, becoming totally blind in said eye. And thereafter, by reason of said disability, being discharged as railway conductor, and being incapacitated from further performing his duties of occupation thus resulting in total loss of eyesight.

"That article 18 of the constitution and by-laws of said Mutual Benefit Department of said Order of Railway Conductors of America at that time provided:

" 'If any member of this department becomes disabled by amputation or severance of the right hand at or above the wrist joint; by the amputation or severance of the right foot at or above the ankle joint; by total loss of eyesight (which shall not include color-blindness), or by total loss of sense of hearing; and which is furnished within the time limit fixed in article 17 hereof, a certificate on a blank provided by the department for that purpose, signed by a competent physician and five members of the department, giving the date, cause and nature of the disability, he shall be entitled to full payment of this certificate * * *'.

"Plaintiff further states that he made application to said Mutual Benefit Department of the Order of Railway Conductors of America, as provided in said by-laws, and that said officers in charge of said mutual benefit department refused to furnish blanks on which to make proof of disability, and that for that reason he was unable to comply with article 17 as to the blanks required to be furnished and proofs required to be made of disability.

"That the defendants have failed and refused to pay the amount of said certificate or any part thereof, and that by reason of the facts herein set forth this plaintiff is entitled to recover the sum of $3,000, with interest at 6 per cent. per annum from the 1st day of May, 1925, to this date.

"That plaintiff is now and has been at all times a citizen and resident of the State of Arkansas."

A copy of the certificate is attached to the complaint and marked Exhibit A. Exhibit A is a certificate of membership in favor of Charles Finnegan for $3,000 in the Mutual Benefit Department of the Order of Railway Conductors, in which it is "declared and agreed that this certificate is issued and delivered and any claim thereunder shall be payable at the office of the said mutual benefit department in Cedar Rapids,

Iowa, and not elsewhere." Under its terms the provisions of the certificate, the application and the laws of the order, make the contract between the parties.

Summons was issued to the sheriff of Pulaski County, and the return shows service to have been made by delivering a copy to J. S. Maloney, Insurance Commissioner. The defendant in the action, without entering its appearance, appeared solely for the purpose of filing a motion to quash the service of summons. In its motion it is stated that it is a voluntary, unincorporated labor organization, made up of a membership of several hundred thousand members, residing throughout the United States, organized for the benefit of its members, and that service of summons was not in conformity with the laws of the State of Arkansas. The plaintiff in the action filed a response to the motion to quash the service of summons, and in its response said that the Order of Railway Conductors was a necessary party to the suit for the reason that the Mutual Benefit Department of the Order of Railway Conductors was operated by and through said Order of Railway Conductors of America. Continuing, the response is as follows:

"That said organization and the officers thereof are conducting said mutual benefit department as an accident and life relief association, and as such are conducting an insurance company, officered, controlled, maintained and directed by said organization, but simply under another title, head, or name. That for this reason said Order of Railway Conductors of America is a necessary party to this action, and that service on the Insurance Commissioner of the State of Arkansas, on losses occurring within the State of Arkansas and liability occurring in the State of Arkansas, are suable in this State by service on the State Commissioner of Insurance."

The petitioners for the writ of prohibition filed affidavits showing that its home office is in the State of Iowa, and that it had designated no person in the State of Arkansas upon whom service of summons could

be had; that J. S. Maloney had not been given authority to accept service of summons for either of the defendants, and that he had never had any connection with either of the organizations attempted to be sued by Charles Finnegan in the circuit court of Greene County, Arkansas.

The circuit court overruled the motion of the defendant to quash the service of summons, and the defendants in the action in the circuit court filed an application in this court for a writ of prohibition in each case; and, on account of the issues being the same, they were consolidated for the purpose of trial.

Block & Kirsch, for appellant.

Jeff Bratton and *Cooley, Adams & Fuhr,* for appellee.

HART, C. J., (after stating the facts). The office of the writ of prohibition is to restrain an inferior tribunal from proceeding in a matter not within its jurisdiction; but it is never granted unless the inferior tribunal has clearly exceeded its authority and the party applying for it has no other protection against the wrong that shall be done by such usurpation. *Russell* v. *Jacoway,* 33 Ark. 191; *Monette Road Improvement District* v. *Dudley,* 144 Ark. 169, 222 S. W. 59; and *Dist. No. 21 United Mine Workers of America* v. *Bourland,* 169 Ark. 796, 277 S. W. 546. The rule announced in these cases is that the writ of prohibition is an appropriate remedy to restrain the exercise of jurisdiction by an inferior court over a subject-matter when it has none and over parties where it can acquire none.

Where the court has jurisdiction over the subject-matter, and the question of its jurisdiction of the person turns upon some fact to be determined by the court, its decision that it has jurisdiction, if wrong, is an error, and prohibition is not the proper remedy. Works on Courts and Jurisdiction, page 634. But that condition is not the status here. The question of jurisdiction in the case at bar does not turn upon the sufficiency or insufficiency of the service of process, and the fact that

the circuit court held it to be sufficient does not avail. A different rule prevails where there is an entire want of service or where, upon the face of the record, it is shown that there was no service and that none could be acquired. In the case at bar the jurisdiction or lack of jurisdiction of the circuit court did not depend upon facts which are not made a matter of record in the proceedings in that court. It appears from the face of the record in the case in the circuit court that it was not authorized to proceed, and it affirmatively appears from the face of the record that no service of process was had upon the defendants and that they did not enter their appearance.

According to the allegations of the complaint of the plaintiff in the circuit court, the benefit certificate or policy sued on was issued, delivered and payment was required at the home office of the insurance company in the State of Iowa. There is no showing whatever that the insurance company did any business in the State of Arkansas or that it had any property here which could be impounded by the court in an action against it. Service was attempted to be had upon it by service of summons upon the Insurance Commissioner, under our statute authorizing such service. It is obvious, however, that such service could not be had upon nonresidents, whether persons or corporations, who did not do any business in this State. If such were the law, a person could make a contract of insurance with either a person or corporation in any State of the United States and then, by simply removing to this State, could acquire jurisdiction over such person or corporation, whether it had any property in this State or did any business in this State or not; and this would extend the jurisdiction of our courts beyond the territorial limits of the State, which every one would concede could not be done. In the very nature of the case, courts of the various States can only exercise jurisdiction over persons and property within the territorial limits of the State. Nonresidents can only be sued where they have entered the

State of Arkansas for the purpose of doing business here, or have acquired property in the State which may be impounded in a proper action. No such state of affairs exists in the present case. As we have already seen, the policy was issued, delivered and made payable at the office of the insurer in the State of Iowa, and there is nothing whatever in the record tending to show that it has any property or has attempted to do any business in the State of Arkansas.

If it had proceeded further in the matter, this court, upon appeal, would have quashed the service of summons; but such action on the part of the defendants would have entered their appearance to the action. In an unbroken line of decisions this court has held that a party appealing from an order denying a motion to quash service of summons will be treated as in court, although the service is held invalid. Moreover, the appearance is general, and the defendant, by appealing, becomes a party to the proceeding, and must follow the case to its conclusion or take the consequences. *Murphy* v. *Williams,* 1 Ark. 376; *Hodges* v. *Frazer,* 31 Ark. 58; *Benjamin* v. *Birmingham,* 50 Ark. 433, 8 S. W. 183; *Waggoner* v. *Fogleman,* 53 Ark. 181, 13 S. W. 729; *Southern B. & L. Assn.* v. *Hallum,* 59 Ark. 583, 28 S. W. 420; *Ark. Coal, etc. Co.* v. *Haley,* 62 Ark. 144, 34 S. W. 545; *Beal-Doyle Dry Goods Co.* v. *Odd Fellows Building Co.,* 109 Ark. 77, 158 S. W. 955; and *Duncan Lumber Co.* v. *Blalock,* 171 Ark. 397, 284 S. W. 15, and cases cited.

The theory of these cases is that the defendant recognizes the case as being in court, with jurisdiction over the parties, by appealing. The reason underlying the doctrine is that no appeal could be taken by a party unless the court acquired jurisdiction over his person, and he necessarily assumes the attitude that such jurisdiction had been acquired when he appeals, and, having taken that position, he is bound thereby and will not be heard afterwards to say otherwise. And, if the defendants had appealed from the order of the court refusing to quash the service of summons on them, they

would have become parties to the action, and must have followed the suit to the end.

In this view of the matter, it will be readily seen that the defendants had no adequate relief in the circuit court, and the face of the record in the circuit court shows that it was about to exercise judicial power over persons who had never been served with process and over whom no service of process could be had, and who absolutely refused to enter their appearance to the action. A case directly in point is *People* v. *Judge of the Wayne Circuit Court,* 26 Mich. 100. In that case there was a motion for prohibition. The record shows that a summons from the Wayne Circuit Court was issued against a nonresident of the State who was not found in the State. In a *per curiam* opinion it was said:

"The Wayne Circuit Court acquired no jurisdiction of the case. To give jurisdiction for the purpose of supporting the garnishee proceedings, it is necessary that some sort of service as to the principal defendant should be made within the county, either upon the person or upon the property or credits. Merely taking out a summons, which is never served, is not enough. The statute which authorizes the service of notice out of the State, presupposes that some sort of service has been made in the county, giving the court jurisdiction; and the notice is required for the purpose of fairness, and to preclude secret and collusive proceedings."

We are of the opinion that it appears from the face of the record that the circuit court was about to proceed in a case where it had no jurisdiction over the persons of the defendants, and could acquire none. The writ of prohibition asked for will be granted, and the clerk is directed to issue the writ restraining or prohibiting the circuit court from proceeding further in the case. It is so ordered.