BARNEY *v.* TEXARKANA.

4-2682

Opinion delivered June 20, 1932.

1. JUDGMENT—RES JUDICATA.—All questions which might be litigated in an action of which the court has jurisdiction are *res judicatae* as to all parties thereto and their privies.
2. COURTS—FORMER DECISION—STARE DECISIS.—A decision of the Supreme Court in a former case is conclusive in another case involving the same question, under the doctrine of *stare decisis*.
3. MUNICIPAL CORPORATIONS—REFERENDUM OF ORDINANCE—SUFFICIENCY OF PETITION.—Under Amendment 7, providing that "the sufficiency of all local petitions shall be decided in the first instance by the county clerk or the city clerk, as the case may be, subject to review by the chancery court," *held* that the sufficiency of a petition for referendum of a city ordinance, determined in the first instance by the city clerk, is reviewable only in the chancery court, and cannot be reviewed at law in a proceding for mandamus.
4. JUDGMENT—RES JUDICATA.—The judgment or decree of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed or which might have been interposed in the former suit.
5. MANDAMUS—NATURE OF REMEDY.—To be entitled to a writ of mandamus, a party must show that he has a clear legal right to the subject-matter, and that he has no other adequate remedy.
6. MANDAMUS—NATURE OF REMEDY.—The writ of mandamus does not issue as a matter of absolute right, and it will not be issued when it is clearly apparent that it would serve no purpose and would be useless when issued.
7. JUDGMENT—DEFENSES PRECLUDED.—In a former mandamus proceeding to compel a city council to call a special election for referring a city ordinance; all questions as to the sufficiency of the

petition for such referendum were concluded, both as to the parties thereto, and as to all others interested, by the judgment therein, including any equitable defense which might have been but was not interposed.

Appeal from Miller Chancery Court; *C. E. Johnson,* Chancellor; affirmed.

STATEMENT BY THE COURT.

H. M. Barney, a citizen and taxpayer of the city of Texarkana, Arkansas, brought this suit in equity against the members of the city council of that city, B. E. Carter, a citizen and taxpayer of the city, and the members of the county board of election commissioners of Miller County, Arkansas, for the review of the sufficiency of the local petition for a referendum on a certain gas rate resolution which had been adopted by the city council, and to enjoin B. E. Carter from further prosecuting a mandamus action then pending in the circuit court to compel the city council to call said referendum election on the gas rate resolution adopted by said council, and to enjoin the other defendants from calling or holding a referendum election on said gas rate resolution. The basis of the action was that no copy of the measure to be referred was ever attached to or filed with said petition for referendum as required by the statute, and that said petition was not in the form required by the statute.

The defendants answered, and, among other defenses, set up that of *res judicata.* The ground upon which this defense is based is the case of *Southern Cities Distributing Company* v. *Carter,* 184 Ark. 4, 41 S. W. (2d) 1085, in an opinion delivered June 15, 1931. This was a mandamus proceeding brought by B. E. Carter against the mayor and city council of the city of Texarkana, Arkansas, to compel them to call a special election for a referendum on a resolution of the city council of May 30, 1930, granting an increase in rates to the Southern Cities Distributing Company for supplying gas in the city of Texarkana. Among other things, in this case the court held that, under amendment 7 to our Constitution providing that every extension, grant or con-

veyance of a franchise shall be subject to referendum, a resolution of the city council granting to a public utility company holding a gas franchise an increase in rates, is subject to referendum. It was further held that a resolution of the city council granting to a public utility holding a franchise an increase in gas rates was included in the term "measure" within amendment 7 to the Constitution.

In the trial of the case, it was agreed by the defendants that no copy of the gas rate resolution filed with the city clerk on June 27, 1930, was circulated with or attached to the petition for referendum filed with and certified to the city council by the city clerk. The city clerk's certificate of the sufficiency of said referendum petition was made on June 30, 1930. The resolution was also introduced, by which the city council on July 8, 1930, granted thirteen of the original signers of the original petition for referendum permission to withdraw their names therefrom and denied said petition because of an insufficient number of qualified signers. The petition of B. E. Carter for a mandamus writ filed in the circuit court was also introduced in evidence. In it he alleged that no suit had been filed in the chancery court to review the finding of the city clerk.

Other evidence was introduced which we do not deem it necessary to set out. All the proceedings in the mandamus suit brought by B. E. Carter against the city council of Texarkana, Arkansas, including the proceedings in the Supreme Court, were introduced in evidence. Such other facts as are deemed necessary to a proper determination of the issue raised by the appeal will be stated or referred to in the opinion.

On the 13th day of May, 1932, the case was submitted to the chancery court upon the pleadings, exhibits thereto, and the evidence taken in the case. The chancellor found that the complaint of the plaintiff was without equity, and it was decreed that it be dismissed at the cost of the plaintiff. The case is here on appeal.

H. M. Barney, pro se.

Willis B. Smith, and *Ben E. Carter,* for appellee.

HART, C. J., (after stating the facts). The decree of the chancery court was based upon a holding by the court that the plea of *res judicata* of the defendants should be sustained. It is elementary that all questions which might be litigated in an action of which the court has jurisdiction are *res judicatae* as to all parties thereto and their privies. The doctrine of *res judicata* is based on public policy, reason and experience. If all questions that have been decided by the court are to be regarded as still open for discussion and revision between the same parties and their privies, there would be no end of litigation until the ingenuity of counsel and the financial ability of the parties had been exhausted.

Then, too, the decision of the court in the mandamus suit on the former appeal became *stare decisis* and we are bound by it on the present appeal. It was there held that, after the sufficiency of a referendum petition was duly certified by the proper officer, a signer was not entitled to withdraw his signature in the absence of fraud. The court also said that the correctness of the city clerk's determination of the sufficiency of the petition for referendum could only be made in the chancery court. *Southern Cities Distributing Company* v. *Carter,* 184 Ark. 4, 41 S. W. (2d) 1085. This holding was based upon the court's construction of amendment No. 7 relating to the initiative and referendum. The amendment itself specifically provides that the sufficiency of all local petitions shall be decided in the first instance by the county clerk or city clerk, as the case may be, subject to review by the chancery court.

Under our statute, a defendant, when sued at law, must make all the defenses he has, both legal and equitable. If any of his defenses are expressly cognizable in equity, he is entitled to have them tried as in equity proceedings, and, for this purpose, to a transfer of the case to the chancery court. The principle of *res judicata* extends not only to the questions of fact and of law which were decided in the former suit but also to the rights

of recovery or defense which might have been but were not presented. In short, the uniform rule adopted by this court is that the judgment or decree of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed or which might have been interposed in the former suit. *Taylor* v. *King,* 135 Ark. 43, 204 S. W. 614, and cases cited; *Howard-Sevier Road Improvement District* v. *Hunt,* 166 Ark. 62, 265 S. W. 517; *Tri-County Highway Improvement District* v. *Vincennes Bridge Company,* 170 Ark. 22, 278 S. W. 627; *Newton* v. *Altheimer,* 170 Ark. 366, 280 S. W. 641; *Stevens* v. *Shull,* 179 Ark. 766, 19 S. W. (2d) 1018; and *Blackwell Oil & Gas Company* v. *Maddox,* 182 Ark. 1152, 34 S. W. (2d) 450.

Mandamus only lies to compel a person to do that which it is his duty to do without it, and cannot be used to compel the performance of that which is not lawful. A party, to be entitled to the writ, must show that he has a clear, legal right to the subject-matter, and that he has no other adequate remedy. *Arkansas State Highway Commission* v. *Otis & Company,* 182 Ark. 242, 31 S. W. (2d) 427; and *Shackleford* v. *Thomas,* 182 Ark. 797, 32 S. W. (2d) 810.

The doctrine of *res judicata* applies to the issues that might have been litigated in proceedings to obtain a writ of mandamus. 18 R. C. L., § 318, p. 358; *Kaufer* v. *Ford,* 100 Minn. 49, 110 N. W. 364.

In *Sauls* v. *Freeman,* 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190, a writ of mandamus was granted ordering the county commissioners to call an election for a change of county seat. An injunction was later asked for against the removal of the county records to the new county seat because there had been no legal examination by the county commissioners of the petition for the election and because certain parties whose names were on the petition were not qualified signers. The court held that these questions could have been litigated in the mandamus suit, and that the award of the mandamus adjudicated the legality of the petition in all respects and settled the

question of the duty of the commissioners to call the election.

In *State* v. *Sparrow,* 89 Mich. 263, 50 N. W. 1088, a land commissioner, by writ of mandamus, was required to set off for the petitioner certain lands to which he claimed to be entitled under a contract. Subsequently, the State sought to cancel the patents issued, and it was held that the State could not cancel on the ground that the land had not been patented to the State or offered at public auction, because this ground could have been set up by the State as a defense to the petition for mandamus.

The same principle was recognized and applied by the Supreme Court of North Dakota in a county seat election in *Dimond* v. *Ely,* 28 N. D. 426, 149 N. W. 349. The reasoning of all these cases is that the writ of mandamus does not issue as a matter of absolute right, and it would be an improper use of the writ to issue it when it is clearly apparent to the court to which application is made that it would serve no purpose and would be useless when issued. See also *Murphy* v. *Scott County,* 125 Minn. 461, 147 N. W. 447; and *Southern Pacific Rd. Co.* v. *United States,* 168 U. S. 1, 18 S. Ct. 18.

The Southern Cities Distributing Company was allowed to be made a party defendant in the mandamus suit, and all other interested parties, including the plaintiff in this action, might have been made parties to that suit. If they thought that the principles of law decided in the case of *Townsend* v. *McDonald,* 184 Ark. 273, 42 S. W. (2d) 410, applied to petitions for referendum on local measures, such as the one under consideration, they should have set up that as a defense to the mandamus suit and have asked that the case be transferred to the chancery court in order to have that issue determined. Not having done so, all interested parties are concluded, not only by the issues decided in that case, but by all issues which came within the purview of the pleadings and might have been decided in the case. If the contention now made by the plaintiff is correct, this would have

constituted an equitable defense in the mandamus proceeding, and the court, upon such defense being interposed, would have transferred the case to the chancery court, or the defendants might have appealed to this court from an adverse holding of the chancery court and have obtained the relief now sought. The plaintiff in the present action, and all other parties interested, knew then as well as now the grounds upon which the referendum was sought to be held invalid. At least, by the exercise of ordinary diligence, they could have been put in possession of all the facts on the subject of which they now have knowledge.

Having failed to set up this defense to the mandamus proceeding, the parties to that suit and their privies are barred by the judgment in that case from seeking to further adjudicate the matter in this case. Therefore the decree will be affirmed.