

MERCHANTS' & PLANTERS' BANK *v.* HAMMOCK.

Opinion delivered January 7, 1929.

1. PROHIBITION—OFFICE 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 will be done by such usurpation.
2. PROHIBITION—DISCRETION TO GRANT.—Where the jurisdiction of an inferior tribunal is disputable, the granting or refusal of the writ of prohibition is discretionary.
3. PROHIBITION—DISPUTE AS TO EXISTENCE OF JURISDICTION.—Where the existence or nonexistence of jurisdiction depends on contested facts, which the inferior court is competent to inquire into and determine, a writ of prohibition will not be granted, although the superior court should be of the opinion that the claims of fact had been wrongfully determined by the lower court, and, if rightfully determined, would have ousted the jurisdiction.
4. PROHIBITION—JURISDICTION DEPENDENT ON PROOF.—Where the chancery court had jurisdiction to inquire into the fact whether the petitioning bank, which was a resident of the county of the suit, had been fraudulently made a party defendant for the purpose of giving the court jurisdiction, and it was not plain that there was an absence of jurisdiction, as the question depended on proof, defendant was not entitled to the writ of prohibition.

Prohibition to Desha Chancery Court; *E. G. Hammock*, Chancellor; writ denied.

STATEMENT OF FACTS.

This is a petition by the Merchants' & Planters' Bank and the Merchants' & Planters' Bank & Trust Company, hereinafter called petitioners, against *E. G. Hammock*, chancellor, hereinafter called respondent, for a writ to prohibit the chancellor from proceeding in a cause pend-

ing before him as chancellor of the Desha Chancery Court. The action referred to was one brought in the Desha Chancery Court by McGehee Special School District against the Merchants' & Planters' Bank of Pine Bluff, Arkansas, Merchants' & Planters' Title & Investment Company of Pine Bluff, Bank of Commerce of McGehee, in Desha County, Arkansas, Walter E. Taylor, as State Bank Commissioner in charge of the assets of said Bank of Commerce as an insolvent bank, and the board of directors of said Bank of Commerce.

This suit was filed and summons issued on September 30, 1927. The pleadings and the whole record in the chancery court, comprising about 600 pages of type-written matter, are set forth in full and accompany the petition for a writ of prohibition filed in this court.

It appears therefrom that the McGehee Special School District in March, 1927, sold bonds of the par value of \$105,000 to R. G. Helbron for the price of \$99,246. The Merchants' & Planters' Title & Investment Company and the Simmons National Bank of Pine Bluff assumed the contract of Helbron; and on May 17, 1927, the directors of said school district passed a resolution directing that the proceeds from the sale of said bonds be deposited as follows:

"One-fourth with Merchants' & Planters' Bank of Pine Bluff, one-fourth with Simmons National Bank of Pine Bluff, one fourth with Citizens' Bank of McGehee, one-fourth with Bank of Commerce of McGehee."

The Merchants' & Planters' Bank was alleged to be the distributing agent, and no deposits in any of the four depositories mentioned were to be made until all deposits were secured as provided by act 182 passed by the General Assembly on March 22, 1927. All parties interested understood that the Merchants' & Planters' Bank should require each depository bank either to execute a good bond signed by a surety company or to secure its deposits by bonds of the kind set forth in said act 182. Merchants' & Planters' Bank received the purchase price of said

bonds and deposited the sum of \$24,811.50 in the Bank of Commerce in McGehee, Arkansas, without requiring said bank to make bond as agreed upon.

In June, 1927, said Bank of Commerce closed its doors, and all its assets were taken over by the State Bank Commissioner. Subsequently, the school district endeavored to withdraw its account with said Bank of Commerce by draft, but payment was refused. Said Bank of Commerce was insolvent at the time said Merchants' & Planters' Bank deposited said funds of said school district, and its insolvency was known to said Merchants' & Planters' Bank and by said Bank of Commerce and its directors. Said funds were deposited in said Bank of Commerce without bond through collusion and conspiracy of said Merchants' & Planters' Bank and said Bank of Commerce in order to wrongfully permit said Bank of Commerce to receive said deposit and continue operation notwithstanding its insolvent condition. Said Merchants' & Planters' Bank was a correspondent with said Bank of Commerce and well knew its insolvent condition. Said Merchants' & Planters' Bank expressly agreed with said Bank of Commerce to loan the latter \$25,000 in bonds with which to secure said deposits above referred to, and said Bank of Commerce furnished said Merchants' & Planters' Bank sufficient collateral for this purpose. Said Merchants' & Planters' Bank, after depositing said bonds in said Bank of Commerce as above set forth, assured said school district that it would secure and deliver to it surety for said deposit; and said school district relied upon its assurance until after it ascertained that the Bank of Commerce had become insolvent.

Judgment was asked in the action by the school district against all of said defendants jointly and severally for \$23,844.15, with the accrued interest. Summons was issued to the sheriff of Jefferson County, Arkansas, against said Merchants' & Planters' Bank, and the return of the sheriff shows that it was duly served on the third day of October, 1927, by delivering a copy to the president of said bank, who is named in the return of serv-

ice. Like summons was issued against the Merchants' & Planters' Title & Investment Company, and a similar return was made by the sheriff of Jefferson County. Walter E. Taylor, as State Bank Commissioner, was served in Pulaski County, Arkansas. The sheriff of Desha County, Arkansas, served the summons on the Bank of Commerce on the 30th day of September, 1927, by delivering a copy to the proper officers thereof. The Merchants' & Planters' Bank filed an answer in which it denied all the allegations of the complaint. It filed a cross-complaint in which it averred that it was in no way liable to said school district, but, if it be held liable by reason of any loss sustained by the school district because of the failure of the said Bank of Commerce to comply with the provisions of said act 182, passed by the General Assembly of 1927, that Walter E. Taylor, as State Bank Commissioner in charge of the affairs of said Bank of Commerce, be made liable to said cross-complainant in a like sum. Said cross-complainant also alleged that it had collateral in its hands deposited by said Bank of Commerce, and asked that a lien upon said collateral be declared in its favor to secure the claim set out in its cross-complaint. The prayer of the answer and cross-complaint was that the complaint be dismissed as to said Merchants' & Planters' Bank, or, if any judgment be rendered against it, that it have judgment in like sum against Walter E. Taylor, as State Bank Commissioner, and that said judgment be declared a lien upon said collateral in its hands.

On September 3, 1928, after all the evidence in the case had been taken and the chancellor was ready to render his decision, the Merchants' & Planters' Bank & Trust Company moved the court to dismiss the case as to it on the ground that the court was without jurisdiction in the cause. Petitioners filed a motion to dismiss the cause on the ground that no cause of action against said Bank of Commerce, which was a resident of Desha County, Arkansas, had been shown and that petitioners were not jointly liable with said Bank of Commerce. Said petitioners alleged that said school district's claim against

said Bank of Commerce and Walter E. Taylor, as State Bank Commissioner, is *res judicata* by reason of said claim having been filed with and allowed by said Bank Commissioner in charge of the assets of said Bank of Commerce, and a dividend paid thereon; and that said Bank of Commerce was made a defendant in the Desha Chancery Court in order to induce said chancellor to render a decree against Merchants' & Planters' Bank and to acquire apparent jurisdiction over it.

E. G. Hammock, chancellor of the Second Chancery District of the State of Arkansas, which includes Desha County, filed a response in which he stated, among other things, that the Merchants' & Planters' Bank had filed its answer and cross-complaint; that the depositions of numerous witnesses were taken in the case of McGehee Special School District against Bank of Commerce of McGehee, Merchants' & Planters' Bank and others, and that agreements to read them as evidence in the cases were filed in the Desha Chancery Court. Respondent stated further that in open court the cause was submitted to the court by agreement of all parties, with a further agreement that a final decree should be entered of record in vacation. Pursuant to said agreement, respondent took the entire cause under submission, read all the depositions filed by the parties to the case, read and considered the written briefs and arguments of all parties, including petitioners, and, after exhaustive study and careful consideration of the whole record, pursuant to the agreement of all the parties, on the 1st day of October, 1928, respondent prepared, signed and mailed to the attorneys for the respective parties his written findings as chancellor in said case, a copy of which is attached to the petition for the writ of prohibition. Respondent rendered a decision and announced his decree on October 1, 1928, before the petition for the writ of prohibition had been filed in the Supreme Court.

Joe S. Harris and *Bridges & McGaughey*, for appellant.

J. G. Williamson, Adrian Williamson, Lamar Williamson and John Baxter, 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. *Order of Railway Conductors of America v. Bandy, Judge*, 177 Ark. 694, 8 S. W. (2d) 448, and cases cited. It is well settled that, where the jurisdiction is disputable, the granting or refusal of the writ is discretionary. *American Casualty Co. v. Lea*, 56 Ark. 539, 20 S. W. 416; *Weaver v. Leatherman*, 66 Ark. 211, 49 S. W. 977; *Finley v. Moose*, 74 Ark. 217, 85 S. W. 238, 109 Am. St. Rep. 74; *State v. Stevens*, 159 Ark. 666, 252 S. W. 900.

In *Rush v. Denhart*, 138 Ky. 245, 127 S. W. 787, Ann. Cas. 1912A, 1199, the court said:

"If we should lay down the rule that application by original proceedings might be made to us to stay the hand of the inferior jurisdictions, whenever, in the opinion of counsel, the ruling was prejudicial, although it might not leave the complainant without adequate remedy, we would have much of our time occupied in the settlement of questions that could be brought before us in the regular way by appeal. Inferior courts would be obstructed in the hearing and disposal of cases, and much confusion and uncertainty would follow."

If the making of the Bank of Commerce of McGehee a party to the original action brought by the McGehee Special School District against the Merchants' & Planters' Bank and others was a fraud upon the jurisdiction of the court, then such chancery court would have the power to determine this fact. It is well settled that if the existence or non-existence of jurisdiction depends on contested facts which the inferior court is competent to inquire into and determine, a writ of prohibition will not be granted, although the superior court should be of the

opinion that the claims of fact had been wrongfully determined by the lower court, and, if rightly determined, would have ousted the jurisdiction. The chancery court in the original action had jurisdiction of the subject-matter, and it had jurisdiction to inquire into the fact whether the Bank of Commerce of McGehee had been fraudulently made a party for the purpose of giving the Desha Chancery Court jurisdiction in the premises. In this controversy we must take the cause of action as it was alleged by the school district in its original complaint; otherwise we would try the merits of the controversy for the purpose of determining whether or not we have power to try them. In other words, the contention now made by counsel for petitioners involved the whole merits of the plaintiffs' original case against petitioners. If the allegations were true, it would defeat the plaintiffs' complaint in the original case and should have been pleaded in bar in that case and evidence given under the general issue to sustain the plea.

That this view was at first taken by counsel for the petitioners is shown by the record in the original case, which is exhibited with their petition. This record comprises over 600 pages of typewritten matter. Numerous depositions were taken by both parties, and a decision had been actually rendered by the chancellor and announced to the parties. Nothing remained to be done except to enter the decree upon the records of the chancery court in accordance with the findings of the chancellor.

The response of the chancellor shows that all parties submitted to the jurisdiction of the court and agreed that he should take the case under advisement and render his decision in vacation. All the parties prepared written briefs in the case, and after the chancellor had made an exhaustive study of the case and had prepared and announced his written findings of fact, the present petition for a writ of prohibition was filed in this court. It is not plain that there was an absence of jurisdiction in the chancery court, for the question depended upon the

proof which should be made by them in the chancery court. If there was a joint liability on the part of the Merchants' & Planters' Bank and the Bank of Commerce of McGehee, the school district had a right to sue both of these parties and to establish its claim against the Bank of Commerce, notwithstanding its insolvency. It would have a right to do this in order to receive its *pro rata* share of the dividends from it as an insolvent bank under the winding-up proceedings by the State Bank Commissioner.

Since the circumstances and conditions surrounding the parties depend upon proof, we think the case is one in which to refuse the writ of prohibition would be a proper exercise of discretion. Therefore the petition for the writ of prohibition will be denied.
