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JUDGES
OF THE
SUPREME COURT
DURING THE PERIOD OF THIS VOLUME

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AMENDMENT TO RULE VII

For reasons which are explained in the case of *North State Fire Insurance Company v. Dillard*, *infra*, p. 561, Rule VII is amended so as to read as follows:

RULE VII

In all civil cases when the appeal has been taken more than ninety days and a supersedeas bond filed, and the appellant has not filed in the office of the clerk an authenticated copy of the record, the appellee may, at any time, file in this court a certified transcript of the judgment, order or decree appealed from, the order granting the appeal and the supersedeas bond, with his motion to dismiss the appeal or affirm the judgment; and the appeal shall be dismissed or the judgment affirmed by the court at the cost of the appellant, unless the appellant pays the costs incurred on his motion and offers in good faith to prosecute his appeal and tenders an authenticated copy of the record, or shows good cause for a failure to tender the record entitling him to an extension of time for filing it under sec. 1194 of Kirby's Digest; provided, a notice of ten days of such intended motion be given the appellant or his attorney of record; and provided further, that the judgment will not be affirmed when the appeal has been voluntarily dismissed before the submission of said motion.

APPENDIX

I.

IN MEMORIAM

WILLIAM SIMONTON McCAIN

On February 11, 1908, there passed away the Honorable William Simonton McCain, a member of the bar and sometime Special Judge of this court.

On October 12, 1908, the Honorable George B. Rose, a member of the bar, presented to the court the following:

RESOLUTIONS OF THE LITTLE ROCK BAR ON THE DEATH OF JUDGE McCAIN.

"Rarely have we been called upon to mourn so great a loss as that which afflicts us to-day; for our departed brother was not only a leader at the bar, but he was the friend of us all. He was a man of such gentleness, of such all-embracing charity, of such innate kindness and purity of heart that he drew all his colleagues to him and held their affections with hooks of steel. No matter how strenuous the contest or how trying the conduct of his opponent, he never lost his temper, never uttered an acrimonious word. When all around him were wrought up to fever heat, he remained serene and gentle, ignoring all personalities and seeking only to protect his client's rights. He was the pleasantest man with whom any of us ever practiced. He was vigilant on behalf of his client and indefatigable in urging his cases to an early hearing. There is perhaps none of us who equalled him in the promptitude with which he brought his suits to trial. But he did it all with such urbanity, with so much consideration for others, that we could never take offense. The rest of us in the heat of argument sometimes say unkind and ungenerous things to one another; but there is no living man who ever heard Judge McCain say a harsh thing about or to any worthy member of the bar; and, even when he spoke of those unhappy individuals who have brought dishonor upon our profession, it was in a tone of pity and regret.

"Whether as an associate or as an adversary, to practice law with him was a delight. In him you found an opponent who sought only law and justice, frank and open as daylight; who scorned tricks and technicalities, and strove only to reach the merits of the controversy; always courteous and conciliatory, never descending to personalities nor suffering himself to become the mouthpiece of his client's malevolence. As an

associate, he was charming. Possessed of a mind of striking originality, he illuminated every discussion without seeking unduly to force his views upon his colleagues. His sterling worth and his great legal attainments commanded the respect of all his brethren, and the unalterable sweetness of his disposition won their love. His death comes to us all as a deep personal loss.

"As he was in dealing with his professional brothers, so was he in all the relations of life. He was a man of unlimited moral courage, and was free in the expression of his views; but there was always about him such evident purity of motive, and there was in his manner such gentleness and good will—a perfect urbanity that could only spring from a heart of gold—that no one took offence. His great abilities, his varied learning and his lofty character commanded the reverence of all, and his evident love for his fellow men brought universal affection in return.

"He was a model in all the relations of life. As a lawyer, his candor, his courtesy to bench and bar, his diligence and his fidelity to every trust were beyond all praise. As a citizen, he was progressive and enlightened, interested in everything that tended toward the uplifting of the community, and he was especially concerned for the education of the young. As a man, he was always on the right side. He made no mistakes in questions of morals. "Blessed are the pure in heart," saith the Lord; and truly the cup of our brother's blessings should be running over; for a purer and a cleaner heart was never lodged in the bosom of man. With such qualities it was inevitable that he should be perfect as a husband and father, loving and patient, forgiving all offenses, encouraging every good impulse and ever pointing the upward way.

"When such a man passes from amongst us, it is proper that some memorial of his worth should be left by his associates who knew him so well and loved him so much. Therefore, be it resolved:

"1. That in the death of Judge McCain our bar has been deprived of one of its most distinguished members, whose many noble and amiable qualities endeared him to us all; that our State has lost one of its foremost citizens, a man who always stood for the highest ideals of right, justice and morality, and who was a leader in every movement for the upbuilding of our commonwealth and the elevation of its people; while his bereaved family must mourn for a husband and father who was kind, patient, loving and helpful to an almost unexampled degree.

"2. Resolved, further, that we endeavor to profit by the example of our departed brother, to live up to his high ideals of professional ethics, and when in the heat of forensic strife we are tempted to say something unkind or unjust, let us think of him and hold our peace.

[Signed]

"G. B. ROSE,

"J. M. MOORE,

"W. L. TERRY,

"J. E. WILLIAMS,

"W. E. ATKINSON."

In presenting these Resolutions, Mr. Rose spoke as follows:

Judge William Simonton McCain was born in Tipton County, Tennessee, on May 31st, 1848. He was left an orphan without means at the age of twelve, and his education was obtained under great difficulties. In 1867 he came to Arkansas, settling at Monticello, where he began the study of the law. When only nineteen years of age, he was licensed to practice, and entered into partnership with Judge W. T. Wells. On July 4th, 1876, he removed to Pine Bluff, and formed a partnership with Major Herman Carlton, who was then one of the leaders of the bar. Two years later Major Carlton died, and he then became associated with Mr. John W. Crawford. In 1886 he went to Paris, Kentucky, and began to practice in partnership with his nephew, Mr. Emmett Dickson. At the end of two years, however, he returned to Pine Bluff, and shortly afterward removed to Little Rock, where he continued to reside until his death.

While living at Monticello, he married Miss Eliza Chestnutt, of that place, who survives him, as do also four sons.

Judge McCain was one of the most remarkable personalities that ever adorned our bar. He was tall and handsome in person, and there was upon his smooth-shaven face an expression of benevolence and candor that won the hearts even of casual strangers. His kindly smile, however, was only a faint indication of the treasures that lay beneath.

He was, without exaggeration, one of the best men that ever lived. No one was ever kinder, more charitable, or more generous in his estimate of others. He was absolutely without malice. He saw the faults of men, but they excited his pity, not his abhorrence, and he desired their amendment, not their castigation. And of the actions of all men he took the most charitable view possible, excusing their shortcomings and throwing over their pardonable transgressions the mantle of forgiveness. And, as he was without malice, so was he without envy. He rejoiced with all his soul in the prosperity of others. No spirit of rivalry embittered his forensic contests. He was glad to see his brother lawyers prosper, and rejoiced with them in their successes as much as he regretted their failures.

I have never known any man whose manner was so conciliatory. So far as I can learn, he never had a difference with a brother lawyer. He was vigorous and efficient in the conduct of his cases, pushing them on to an early hearing more effectively perhaps than any of us, and yet he never gave offense. When he was on the other side, you had to get ready for trial; but, however reluctant you were to do so, you could not resent his firm insistence, so kind and courteous was it; and, no matter how heated the argument, he never said anything that could wound the most sensitive opponent. Yet there was about him no weakness. He was a strong man, who insisted firmly upon his client's right; but the kindness of a heart of gold made discourtesy impossible.

There was never a lawyer who cared less for technicalities. He brushed them away as mere cobwebs that encumbered the path of justice, and went straight to the merits. He possessed no florid eloquence. He spoke fluently and well, but his appeal was to the reason, never to passion or prejudice. It was justice that he sought, not an unworthy victory, and he did his best only when convinced that his cause was just.

He maintained in its absolute perfection the ethics of his profession. It was no trouble for him to do right. He was simply incapable of doing a wilful wrong. He could not have taken an unworthy advantage of an opponent if he had tried. Nature had so made him that the straight path of conscience and duty was the only one that he could follow. He was born a perfect gentleman, with high, pure instincts, and during years of close friendship I could never perceive that there was any dross in his composition.

Soon after I came to the bar I was struck with the generosity of his nature. I was associated with him for the first time in a case that came to this court. He was much older than I, and he naturally prepared the brief here, and handed it to me. I was a very young man, with more than the average presumption and folly of youth; and I was foolish enough to think that I could improve on his manner of presenting his ideas. So I wrote the brief over again, changing its whole arrangement and scarcely leaving a paragraph as it had stood. I had sense enough to know that he would in all likelihood be very angry, and I took it back to him with great trepidation, escaping before he could see what I had done. But in a little while he came to me and told me that he thought the brief was greatly improved, and that he would print it exactly as I had written it. I was foolish enough then to feel much flattered; now I know that I should have hung my head in shame. And as he acted then, so was he on every occasion, always appreciative of the efforts of others, generous alike to adversary and associate.

He was a learned lawyer, who stuck to his office and read the books; but the most striking thing about his mind was its originality. No matter what subject was under discussion, he could suggest some view that had not occurred to others. They seemed to fly from his mind like sparks from an anvil. Of course, they were not all well taken. Some of them were in the teeth of the authorities. It is the nature of originality that it cannot follow the conventions. But they were always suggestive, often illuminating. There was no member of the bar with whom it was pleasanter to be associated. In consultation you were sure to get some ideas that would not have occurred to you, and he did not seek to force his views on colleagues to whom they were not acceptable.

With all these endearing qualities it was natural that he was well beloved. All of his brethren regarded him with a singular affection. And he was particularly kind to the younger members of the profession, never too busy to listen to their troubles and to enlighten their per-

plexities. Rarely in the annals of any bar has a death been felt as a personal loss by so many.

Not alone at the bar was he honored. He was a leader in the community, and his moral instincts were faultless. On any question of right or wrong he was always on the right side. He was an elder in the First Presbyterian Church, and he was sincerely religious; but his religion was the religion of sweetness and light, with none of that austerity that too often accompanies the profession of Calvinistic doctrines. He held firmly to his own faith; but his toleration of the religious opinions of others was perfect.

He was thoroughly public spirited and a leader in every thing that looked to the upbuilding of our State. He had a large practice and was a busy man; but he could always find time to attend meetings where serious public questions were to be considered, to serve on committees, and to discharge to the utmost his duties as a citizen. Though so mild in his manner, he was possessed of great moral courage, and never shirked responsibility nor avoided an issue. He did not look on those who differed from him as bad men, but he maintained what he believed to be the right with a firmness equal to his courtesy.

He was greatly interested in young people and their education. His heart was always young and responded to theirs; and they instinctively recognized that he was their friend. In his own family he was perfect. No better husband or father ever lived, none kinder, wiser, more generous and devoted.

He has left us now, and our hearts are sad because of our loss. But there is no danger of his being forgotten. His personality was so striking that the memory of him is planted deep in the bosoms of us all. And we shall be better men because we knew him. The good that he has done will not be interred with his bones. The example of his courtesy, his kindness, his patience under provocation, his devotion to duty, will not be lost upon us. Perhaps none of us will attain his moral excellence, but we shall come nearer that ideal because he showed us the way.

The Chief Justice responded as follows:

The professional life of Judge McCain was worthy of emulation and set a standard so high that it would infinitely benefit our profession to live to it. To his reverent mind, "law had its seat in the bosom of God," and its object was to enforce Right and redress Wrong. To him municipal law was formed and administered to secure as near as humanly possible its supreme end—equal and exact justice. He was ever interested in perfecting our code of laws, and drafted and influenced into enactment many important statutes.

His indefatigable energy, keen intellect and great learning were at the fullest service of his clients in the assertion or defense of their rights, but their rights were under the law and not in opposition to it nor evasion

of it. He made his client's cause "as strong as the law, no stronger; as weak as the law, no weaker." He was courteous, affable and just in his daily intercourse with his brethren of the bar, and considerate of and helpful to the courts.

He followed the elder traditions of the American Bar, which made the lawyer a leader in public affairs, and carried this unthankful but patriotic burden. His lifework is left upon the statute book, upon the records of this Court, occasionally as a judge, constantly as a lawyer; and in a wider way his impress is upon the Bar and the people as a lawyer of the highest character and a patriotic citizen, standing always for the Right as God gave him light to see it.

The pre-eminent characteristic of Judge McCain's life was that in every walk of it he was a Christian gentleman. He was a charming companion and drew friends to him with the strongest ties of affection, and among those friends were all the members of this Court. The Court is gratified at the just and beautiful tributes paid his memory at the Bar, and these Resolutions and the address will be preserved in the records of the Court, so that posterity may know what a splendid gentleman has passed before us.

II.

OPINIONS NOT REPORTED.

Rogers *v.* State; error to Sebastian Circuit Court; Daniel Hon, judge; affirmed April 20, 1908; per McCulloch, J.

Luxora Banking Co. *v.* Riley; appeal from Mississippi Circuit Court; Frank Smith, judge; affirmed May 4, 1908; per Hill, C. J.

Head *v.* Cook; appeal from St. Francis Chancery Court; Edward D. Robertson, chancellor; affirmed May 25, 1908; per Hill, C. J.

Franklin *v.* Hill; appeal from Ashley Circuit Court; Henry W. Wells, judge; affirmed June 1, 1908; per Hill, C. J.

Thompson *v.* Lonsdale; appeal from Garland Chancery Court; Alphonzo Curl, chancellor; affirmed June 1, 1908; per McCulloch, J.

Robinson *v.* State; appeal from Conway Circuit Court; Hugh Basham, judge; affirmed June 8, 1908; per Battle, J.

McAdoo *v.* Conner; appeal from Madison Chancery Court; T. H. Humphreys, chancellor; affirmed June 22, 1908; per Battle, J.

III.

CASES DISPOSED OF ON MOTION.

Interstate Medical Association of Arkansas *v.* Lizzie N. Elliott; Carroll Circuit Court; J. S. Maples, judge; appeal dismissed for non compliance with Rule nine, May 4, 1908; *per curiam*.

Choctaw, Ok'ahoma & Gulf Railroad Company *v.* Lula A. Duke, Admx.; Saline Circuit Court; W. H. Evans, judge; settled and cause dismissed by consent, May 11, 1908; *per curiam*.

St. Louis, Iron Mountain & Southern Railway Company *v.* Lesser-Goldman Cotton Company; Nevada Circuit Court; Jacob M. Carter, judge; settled and judgment by consent, May 11, 1908; *per curiam*.

St. Louis, Iron Mountain & Southern Railway Company *v.* W. B. Waller *et al.*; Nevada Circuit Court; Jacob M. Carter, judge; settled and judgment by consent, May 11, 1908; *per curiam*.

St. Louis, Iron Mountain & Southern Railway Company *v.* Prescott Hardware Company *et al.*; Nevada Circuit Court, Jacob M. Carter, judge; settled and judgment by consent, May 11, 1908; *per curiam*.

Byron Upton *v.* The State of Arkansas; Columbia Circuit Court; George W. Hays, judge; appellant pardoned and appeal dismissed on his motion, May 18, 1908; *per curiam*.

E. E. Hudspeth *v.* The State of Arkansas; Pike Circuit Court; James S. Steel, judge; appellant pardoned and appeal dismissed on his motion, May 25, 1908; *per curiam*.

St. Louis, Iron Mountain & Southern Railway Company *v.* The State of Arkansas; Crawford Circuit Court; Jephtha H. Evans, judge; appeal dismissed on motion of the attorney general, May 25, 1908; *per curiam*.

St. Louis & San Francisco Railroad Company *v.* The State of Arkansas; Sebastian Circuit Court, Greenwood District; Daniel Hon, judge; appeal dismissed on motion of the attorney general, May 25, 1908; *per curiam*.

Will Gideon *v.* The State of Arkansas; Izard Circuit Court; J. W. Meeks, judge; appeal dismissed on motion of the attorney general, May 25, 1908; *per curiam*.

Chicago, Rock Island & Pacific Railway Company *v.* F. M. Jaco *et al.*; Perry Circuit Court; Edward W. Winfield, judge; settled and appeal dismissed, May 25, 1908; *per curiam*.

Frank H. Dodge, Receiver Peoples' Fire Insurance Company *v.* R. D. Plunkett *et al.*; appeal from Pulaski Chancery Court; Jesse C. Hart, chancellor; appeal dismissed for non compliance with rule nine, June 29, 1908; *per curiam*.

