

B. B. LARRIMORE,
Doing business as Farmer's
Hardware & Supply Company
of Robertsedale, Alabama,

Appellant,

vs.

STATE OF ALABAMA,

Appellee

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY.

TO THE HONORABLE TELFAIR J. MASHBURN, JR., JUDGE OF THE 28TH
JUDICIAL CIRCUIT OF ALABAMA:

Now comes the Appellant, B. B. Larrimore, doing business as Farmer's Hardware & Supply Company of Robertsedale, Alabama, in the above styled cause, and files this, his Bill of Complaint, and respectfully represents and shows unto your Honor and unto this Honorable Court as follows:

FIRST:

That his name is B. B. Larrimore and that he is over the age of twenty-one years, of sound mind and a resident citizen of Robertsedale, Baldwin County, Alabama.

SECOND:

That he is engaged in the business of buying and selling at retail, hardware and other general supplies and merchandise in Robertsedale, Alabama, under the name and style of Farmer's Hardware & Supply Company and that he was engaged in such business during the period of time from May 1, 1947, to July 31, 1948, as the sole owner thereof, and consequently was subject to the provisions of Title 51, Sections 751 et seq., Code of Alabama of 1940, imposing sale tax equal to two percent (2%) of the gross proceeds of all retail establishments during said period.

THIRD:

That on, to-wit; July 21, 1949, the State Department of Revenue, acting by and through Phillip J. Hamm, as its Commissioner, and under the authority conferred upon said Department by the provisions of Title 51, Sections 114 et seq., Code of Alabama of 1940,

entered an order making final an assessment previously made by said Department against the undersigned on September 27, 1948, for the period beginning May 1, 1947 and ending July 31, 1948, in the following amounts:

Total Amount of Tax Due for Period Beginning 5/1/47 and Ending 7/31/48.....	\$3750.00	
Less:		
Amount of Tax Paid with original returns during period.....	868.05	
Balance of Tax due for period.....	\$2881.95	\$2881.95
Plus:		
Interest at rate of $\frac{1}{2}$ of 1% per month or part computed to August 20, 1949.....	269.44	
Penalty of 25% for period from 5/1/47 to 12/31/47.....	355.30	
Penalty of 25% for period from 1/1/48 to 7/31/48.....	365.18	
Total amount interest and penalties.....	\$ 989.92	989.92
Total amount due for periods stated above.....	\$3871.87	

That the amount finally assessed against the undersigned, Three Thousand Eight Hundred Seventy-one and 87/100 Dollars (\$3,871.87) is the amount that the State of Alabama now claims is due from the undersigned as taxes for the period beginning May 1, 1947, and ending July 31, 1948.

FOURTH:

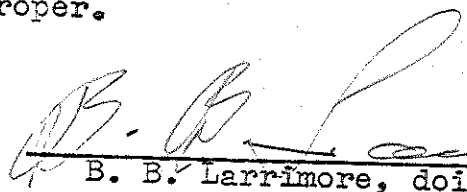
Your Appellant respectfully contends that the final assessment as computed by the said State Department of Revenue is grossly excessive and not based upon the actual gross sales or proceeds for the above noted business, but is based upon a figure highly in excess of the actual gross sales and proceeds of the business during said period. That based upon the rate of taxes (2%) as prescribed by law, the said State Department of Revenue, has ascertained and concluded that the gross sales and the proceeds of your Appellant during the period covered by said final assessment were One Hundred Eighty-seven Thousand, Five Hundred and no/100 Dollars (\$187,500.00).

FIFTH:

That the gross sales and proceeds of the above mentioned business during the period from May 1, 1947, to July 31, 1948, were Fifty-five Thousand, One Hundred Thirty-eight and 15/100 Dollars (\$55,138.15). That this figure represents the entire receipts of the said business during said term including all sales made at wholesale, and all sales made to public institutions and incorporated cities and towns within the State of Alabama, and any and all other sales expressly exempt from the operation of said tax. That upon the basis of the above figure, your Appellant would be liable to the State of Alabama for sales tax in the amount of One Thousand, One Hundred Two and 76/100 Dollars (\$1,102.76) and no more, exclusive of exempt sales. That as shown above your Appellant has heretofore paid to the State of Alabama the sum of Eight Hundred Sixty-eight and 05/100 Dollars (\$868.05), leaving a balance due to the State of Alabama, under the Alabama Sales Tax Law, the sum of Two Hundred Thirty-four and 71/100 Dollars (\$234.71) plus interest and penalty. That during the said period of time your Appellant continually made the monthly reports required of him by law; and at no time has he failed to report to the said Department of Revenue as required by the terms of said Sales Tax Law. That by the terms of the final assessment rendered against him as shown by Paragraph "Third" hereof, there was assessed against your Appellant a penalty equal to twenty-five percent (25%) of the amount claimed by the said Department to be due the State of Alabama, which penalty, by the terms of Title 51, Section 765, Code of Alabama of 1940, can only be levied if the taxpayer fails or refuses to make the returns required by him of the law after proper notice has been given to him to file said return or returns.

WHEREFORE, the premises considered, your Appellant prays that the State of Alabama be made a party to this cause by the usual writ or process of this Court requiring the said State, through its duly authorized officer or agent to appear and plead,


answer and demur within the time and under the rules prescribed by this Court and the statutes in such cases made and provided. That your Honor will enter an order setting aside the final assessment heretofore made against the undersigned B. B. Larrimore, doing business as Farmer's Hardware & Supply Company of Robertsdale, Alabama, and that your Honor will enter an order fixing the amount of tax due by the undersigned to the State of Alabama, under the terms and provisions of the Alabama Sales Tax Law based upon the actual gross sales and proceeds of the said business. And your Appellant prays for such other, further and different relief as in the premises may be meet and proper.


B. B. Larrimore, doing business
as Farmer's Hardware & Supply
Company of Robertsdale, Alabama.

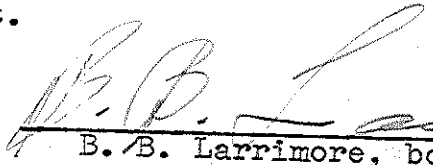
Hybart, Chason & Stone
Solicitors for Appellant.

STATE OF ALABAMA


BALDWIN COUNTY

Before me, , a Notary Public, in and for said County in said State personally appeared B. B. Larrimore, doing business as Farmer's Hardware & Supply Company of Robertsdale, Alabama, who after being by me first duly and legally sworn says:

That the allegations contained in the foregoing Bill of Complaint are true and correct.


B. B. Larrimore, doing business
as Farmer's Hardware & Supply
Company of Robertsdale, Alabama.

Sworn to and subscribed before
me, this 17th day of September, 1949.


Notary Public, Baldwin County,
Alabama.

SUMMONS AND COMPLAINT

Moore Printing Co.

THE STATE OF ALABAMA, }
BALDWIN COUNTY

CIRCUIT COURT, BALDWIN COUNTY

No. 2335-----

-----TERM, 1949-----

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You Are Hereby Commanded to Summon The State of Alabama acting by and through its
duly authorized officers and agents

to appear and plead, answer or demur, within thirty days from the service hereof, to the complaint filed in
the Circuit Court of Baldwin County, State of Alabama, at Bay Minette, against The State of

Alabama, appellee
Defendant-----

by B. B. Larrimore, d/b/a Farmers Hardware & Supply Company of Robertsdale.

Alabama, Appellant
Plaintiff-----

Witness my hand this 19th day of September 1949-----

Wing Luck, Clerk

No. 2335

Page

THE STATE OF ALABAMA
BALDWIN COUNTY

CIRCUIT COURT

B. B. LARRIMORE, d/b/a Farmer's

Hardware & Supply Company of
Robertsdale, Alabama Plaintiffs
vs.

STATE OF ALABAMA

Defendants

SUMMONS and COMPLAINT

Filed September 19, 1949

, Clerk

Plaintiff's Attorney

Defendant's Attorney

Defendant lives at

RECEIVED IN OFFICE

, 19

, Sheriff

I have executed this summons

this, 19
by leaving a copy with

Sheriff

Deputy Sheriff

B. B. LARRIMORE,
Doing business as Farmer's
Hardware & Supply Company of
Robertsdale, Alabama,

Appellant,

vs.

STATE OF ALABAMA,

Appellee.

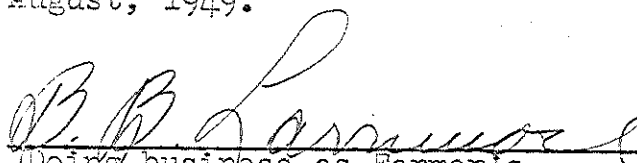
IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY.

TO THE HONORABLE SECRETARY OF THE STATE DEPARTMENT OF REVENUE OF
THE STATE OF ALABAMA:

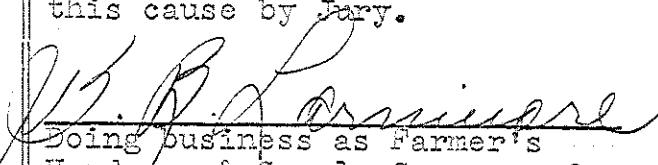
Take notice that the undersigned, B. B. Larrimore, doing
business as Farmer's Hardware & Supply Company of Robertsdale,
Alabama, has appealed to the Circuit Court of Baldwin County,
Alabama, sitting in Equity, from the action of the State Department
of Revenue making final the ^{sales} tax assessment against the undersigned,
which said assessment was made final by the State Department of
Revenue on the 21st day of July, 1949.

This notice of appeal is given pursuant to the require-
ments of Title 51, Section 140 of the 1940 Code of Alabama.

Dated this 18th day of August, 1949.


Doing business as Farmer's
Hardware & Supply Company of
Robertsdale, Alabama.

Appellant demands a trial of
this cause by Jury.


Doing business as Farmer's
Hardware & Supply Company of
Robertsdale, Alabama.

We hereby certify that we have on this the 18th day of
August, 1949, mailed a copy of the foregoing notice of appeal by
Registered Mail, return receipt requested, postage prepaid, to the
Secretary of the State Department of Revenue, Montgomery, Alabama.

Dated this 18th day of August, 1949.

Hybart, Chason & Stone

By:


Solicitors for Appellant.

B. B. LARRIMORE,
Doing business as Farmer's
Hardware & Supply Company of
Robertsdale, Alabama,

Appellant,

vs.

STATE OF ALABAMA,

Appellee.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

IN EQUITY.

KNOW ALL MEN BY THESE PRESENTS: That we, B. B. Larrimore doing business as Farmer's Hardware & Supply Company of Robertsdale, Alabama, as principal and the undersigned as sureties, are held and firmly bound unto the State of Alabama in the sum of Eight Thousand Dollars (\$8,000.00), for the payment of which, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 18th day of August, 1949.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH THAT:

Whereas, the above named B. B. Larrimore, doing business as Farmer's Hardware & Supply Company of Robertsdale, Alabama, has filed a notice of appeal to the Circuit Court of Baldwin County, Alabama, in Equity, from a final assessment made by the State Department of Revenue dated July 21, 1949, whereby said State Department of Revenue fixed the sales tax payable by him from May 1, 1947, to July 31, 1948, together with penalties and interest, at the sum of Three Thousand Eight Hundred Seventy-one and 87/100 Dollars (\$3,871.87).

NOW THEREFORE, if the said B. B. Larrimore, doing business as Farmer's Hardware & Supply Company of Robertsdale, Alabama, shall pay such judgment as may be rendered against him in said Circuit Court, this obligation to be void, otherwise to remain in full force and effect.

B. B. Larrimore SEAL
Doing business as Farmer's Hardware
& Supply Company of Robertsdale,
Alabama.

Taken and approved this
19th day of August, 1949.

Walter H. Hoile SEAL

Register
Register.

H. L. Taylor SEAL

B. B. LARRIMORE, d/b/a
FARMER'S HARDWARE AND
SUPPLY COMPANY OF ROB-
ERTSDALE, ALABAMA,

Appellant

V.

STATE OF ALABAMA,

Appellee

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA,
IN EQUITY

MOTION TO STRIKE

NOW COMES the appellee, State of Alabama, in this cause and moves the Court to strike the following parts, phases, and aspects of the appellant's notice of appeal, as are hereinafter specifically designated, separately and severally, on the grounds that such portions and phases of the notice of appeal are irrelevant, frivolous, and impertinent, and on the further grounds hereinafter designated, separately and severally, to-wit:

1. To strike that portion of said notice of appeal wherein the appellant demands a jury trial in this cause, on the further ground that this is an appeal from final assessments of sales tax which have been made by the State Department of Revenue and which appeal is taken under Title 51, Section 140, Code of Alabama 1940, and which is an exclusive remedy for such an appeal, and wherein the right to a trial by jury has not been authorized ^{or created} by the Legislature.

2. To strike appellant's demand for a trial by jury in that this is a tax appeal under Section 140, supra, of the Alabama Code of 1940, and that the appellant has no vested right to a trial by jury in this cause.

3. That appellant has no constitutional right in this cause to a trial by jury.

4. That appellant has no right to a trial by jury in this cause as a matter of law.

5. The right of trial by jury does not extend to tax appeals wherein the State of Alabama is the appellee in the Circuit Court in Equity.

6. That this cause being a tax appeal against the State, purely by the consent of the Legislature, and the Legislature having not authorized or provided in said statute a right to a jury trial, the right to a jury trial in such appeals does not exist.



SI GARRETT
Attorney General



WALLACE L. JOHNSON
Assistant Attorney General

I hereby certify that I have mailed, properly stamped and addressed, a copy of the foregoing motion to strike, to Hon. Norleorne C. Stone, of the firm of Hybart, Chason and Stone, opposing counsel, of Bay Minette, Alabama, on this the 11 day of April 1951.



WALLACE L. JOHNSON
Assistant Attorney General

B. B. LARRIMORE, d/b/a
FARMER'S HARDWARE AND
SUPPLY COMPANY OF ROB-
ERTSDALE, ALABAMA,

Appellant

V.

STATE OF ALABAMA,

Appellee

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY

BRIEF IN SUPPORT OF MOTION TO STRIKE

In support of our motion to strike that portion of ap-
pellant's notice of appeal from final tax assessment under the
provisions of Title 51, Section 140, demanding a trial by jury,
we respectfully urge this Honorable Court to consider the fol-
lowing propositions of law and authorities.

In the case of In Re One Chevrolet Automobile. Senior
v. State, 87 So. 592, the Supreme Court of Alabama held that:

"Section 11, of the Constitution of Alabama of 1901,
preserving the right of trial by jury, does not extend
to causes unknown to the common law or to the statutory
law as it existed at the time of the adoption of the
constitution. This provision extends only to those
cases in which the right existed at the time of the
adoption of same."

In the tax assessment case of State v. Bley, 162 Ala.
239, 50 So. 264, the Alabama Supreme Court upheld the doctrine
expressed in the One Chevrolet Automobile case, supra, and
quoted from Judge Cooley's work on taxation the following lan-
guage:


"* * * It would cripple the legislative power, and subject
the action of the department whose function it is to
make laws on its own views of the questions of public
interest and public policy which the laws involve, to
a review and possible reversal at the hands of a jury.
It would not so much strengthen the judicial department
as it would weaken the legislative; for the courts them-
selves, though juries sit with and as a part of them,
are compelled to recognize a large degree of independ-
ence in the action of these assistants. Such independ-
ence is often useful, and never can be seriously detri-
mental, when a verdict determines a single controversy
only; but to make juries the assessors of the claims of
the state upon individuals could only introduce an-
archy. * * * " (Emphasis supplied).

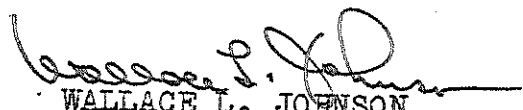
In the case of Campbell v. State, 242 Ala. 215, 5 So. (2d) 466, involving an appeal from sales tax assessments, the Supreme Court of Alabama, at page 221, held that no right to trial by jury exists in tax appeals under Title 51, Section 140, Code of Alabama 1940. See also in this connection the case of Ex parte Homewood Dairy Products Company, 241 Ala. 470, 3 So. (2d) 58.

In the recent sales tax case of Ex parte State Ex rel Attorney General, 252 Ala. 149, 39 So. (2d) 669, decided by the Alabama Supreme Court on February 24, 1949, the decision in the Campbell case, supra, was upheld.

In view of the foregoing propositions of law and citations of authorities, we respectfully submit to this Honorable Court that the motion to strike is well taken and should be granted.


Respectfully submitted,


SI GARRETT
Attorney General


WALLACE L. JOHNSON
Assistant Attorney General

ATTORNEYS FOR THE APPELLEE

I hereby certify that I have mailed, properly stamped and addressed, a copy of the foregoing brief in support of motion to strike, to Hon. Norleorne C. Stone, of the firm of Hybart, Chason and Stone, opposing counsel, of Bay Minette, Alabama, on this the 11 day of April 1951.


WALLACE L. JOHNSON
Assistant Attorney General

B. B. LARRIMORE, d/b/a
FARMER'S HARDWARE AND
SUPPLY COMPANY OF
ROBERTSDALE, ALABAMA,

Appellant,

vs.

STATE OF ALABAMA,

Appellee.

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IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN EQUITY.

BRIEF OF APPELLANT ON MOTION TO STRIKE

We shall concern ourselves first with a consideration of the Brief filed by the Attorney General in support of his motion to strike the jury demand of the Appellant.

The Bley Case and the Homewood Dairy Case, cited by the Appellee in support of this motion, concern themselves with the proposition of whether or not the provisions of Section 11 of the Constitution of Alabama require that a citizen be given the right of appeal from the rulings of administrative agencies of this State. In other words, these cases are concerned with the Constitutionality, in the light of Section 11, supra, of Acts which deny the right of appeal to a citizen appearing before those administrative agencies prescribed in the Acts. Such is not our case, and therefore these cases cannot be deemed to be conclusive of the question presented by the motion of the Appellee. This is so because we are not here concerned with the right of appeal from the finding of the State Department of Revenue since that right has been expressly granted to the taxpayer by the Legislature in Sections 140 and 768 of Title 51 of the Code of Alabama of 1940; but we are rather here concerned with the question of whether or not the right of appeal granted to the taxpayer by the Legislature to Equity Courts of this State includes the right to have the facts found by the State Department of Revenue tried by a jury.

The finding of the Supreme Court in the case of Homewood Dairy can be further distinguished from the issues here involved for the reason that there the Appellant sought a review to test the legality and reasonableness of the finding of the Milk Control

Board on the evidence presented to them and the facts found by said Board, and did not seek to review the facts but merely their legal sufficiency to sustain the finding of the administrative agency. To further illustrate the distinguishing features of the two cases noted above we quote from the case of Ex parte State ex rel. Attorney General, 252 Ala. 149, 39 So. 2d. 669 at page 672 where it is said:

"The Bley case, supra, involved an assessment of property taxes, but in the case of Campbell v. State, 242 Ala. 215, 5 So. 2d. 466, 472, the constitutionality of the Sales Tax Act, with respect to due process and the right to a jury trial, was involved; and it was there said: 'In State v. Bley 162 Ala. 239, 50 So. 263, it was held that neither due process nor the right of trial by jury required the grant to a taxpayer of the right to appeal to a court to have an assessment reviewed by it.'" (Emphasis ours).

The Appellant would call the attention of this Honorable Court to the statement of Justice Foster in the case of Campbell v. State, 242 Ala. 251, 5 So. 2d. 466 wherein he said, and it was dictum, as follows:

"We are not here concerned with the question of whether on an appeal under section 768 (as in section 140), supra, the taxpayer should be accorded a jury trial on any constitutional ground, because no such appeal was taken. If on that appeal, appellant has the constitutional right to a jury trial, it would be granted though the statute does not provide for a jury on such trial, since it does not prohibit a jury trial. The court will obey the constitutional mandate and grant a jury, rather than knock down an act because it does not expressly provide for a jury, if it does not prohibit one and the Constitution guarantees it. Montgomery St. Ry. Co. v. Sayre, 72 Ala. 443. Compare Tillery v. Commercial Nat. Bank, supra, at page 128 of 4 So. 2d. (11 and 12)."

We would also call the attention of this court to the summation by Justice Foster in the Homewood Dairy Case, supra, of the effect of the ruling of the Supreme Court in the case of City of Huntsville v. Pulley, 187 Ala. 367, 65 So. 405, which is as follows:

"This court held that 'court' in the statute includes a jury if the law contemplates a jury trial. Proceeding then to determine whether an appeal with such provision contemplates a jury trial, the court held that it did so under those circumstances. The reasoning was that on such an appeal whether the trial should be without a jury or with a jury depends upon the issue to be tried. If it is a question of

fact, the jury must act as a part of the court when demanded. If it is to declare the law, or the legal conclusion from facts found, the judge must act. This is founded upon the "clear policy of our people, as exemplified by Constitution and statutes, to submit all issues of fact in courts of law to the verdict of a jury, even where the Constitution does not so require", and that it is "a sound rule of construction to hold that when original or appellate jurisdiction of any cause is vested by law in jury courts, and trial by jury is not plainly inhibited, a jury must be impaneled and a verdict rendered thereon as in ordinary cases, unless a jury trial is waived by the parties."

The Appellee has cited one further case in support of the motion to strike the jury demand and that is the case of In re One Chevrolet Automobile Senior v. State, 205 Ala. 337, 87 So. 592. This last noted case does not involve an appeal from a ruling of an administrative agency but the decision therein turns upon the Constitutionality of the condemnation proceeding under the Prohibition Laws in Equity in the light of Section 11, supra. Again we submit the question presented by this motion is not whether the Act is unconstitutional in that it does not provide for an appeal to a jury, but whether or not the constitutional mandate of Section 11 finds application on the trial of the facts on appeal from the ruling of the State Department of Revenue.

We most respectfully submit that if Section 11 of the Code of Alabama means anything it means that an individual shall not be denied the right to have issues of facts tried before a jury of his peers. A reading of the Bill of Complaint and the Answer thereto will convince this court, we are sure, that we are here to try an issue of fact and not to inquire into the legality or reasonableness of the finding of the State Department of Revenue in the light of the facts which they found. The observations of the Supreme Court of Alabama in the Pulley case and in the case of Campbell v. State find direct application to the issues presented here by this motion and in the light of these observations, such motion should be denied.

Respectfully submitted,

CHASON & STONE

By: _____

I, Norborne C. Stone, do hereby certify that I am one of the Attorneys for the Appellant in the above styled cause and that I have mailed a copy of the foregoing Brief, postage prepaid, and properly addressed to the Attorney General of the State of Alabama, the Judicial Building, Montgomery, Alabama, to the attention of Mr. Wallace L. Johnson, Assistant Attorney General, the Attorney for the State of Alabama, Appellee, on this the _____ day of April, 1951.

Norborne C. Stone

B. B. LARRIMORE, d/b/a
FARMER'S HARDWARE AND
SUPPLY COMPANY OF
ROBERTSDALE, ALABAMA,

Appellant,

VS.

STATE OF ALABAMA,

Appellee.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY. NO. 2335.

DECREE

This cause coming on to be heard was submitted on the Notice of Appeal from the final tax assessment of the Department of Revenue and supersedeas bond, Appellant's Bill of Complaint and Appellee's Answer and testimony heard ore tenus by the Court, all of which having been considered by the Court, the Court is of the opinion as follows:

1. That B. B. Larrimore, doing business as Farmers Hardware and Supply Company of Robertsdale, Alabama, owes to the State of Alabama the sum of \$255.27 for sales tax on goods sold by him between May 1, 1947 and July 31, 1948.

2. That the Appellant, B. B. Larrimore, doing business as Farmers Hardware and Supply Company of Robertsdale, Alabama, ^{has} by his actions, shown a willful or fraudulent intent to evade the tax due and that as a result thereof should pay a penalty of twenty-five percent (25%) on the tax due.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. That the Appellant, B. B. Larrimore, doing business as Farmers Hardware and Supply Company of Robertsdale, Alabama, pay to the State of Alabama the sum of \$255.27 for sales tax on goods sold by him during the period between May 1, 1947 and July 31, 1948, together with interest at the rate of six percent (6%) per annum from July 31, 1948, or the sum of \$26.80 as interest.

2. That the Appellant, B. B. Larrimore, doing business as Farmers Hardware and Supply Company of Robertsdale, Alabama, pay a penalty of twenty-five percent (25%) of the above sum or \$63.81.

3. That the Appellant, B. B. Larrimore, doing business as Farmers Hardware and Supply Company of Robertsdale, Alabama, pay the costs of this action, for which let execution issue.

Done this 28th day of May, 1951.

Jelfair G. Mashburn, Jr.
Judge

B. B. LARRIMORE,
doing business as
FARMERS'S HARDWARE &
SUPPLY COMPANY OF
ROBERTSDALE, ALABAMA,

Appellant

vs

STATE OF ALABAMA,

Appellee

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA,

IN EQUITY,

NO. _____

DE M U R R E R

Comes the appellee in said cause and demurs to the bill of complaint heretofore filed and as grounds thereof assigns the following, separately and severally:

1. There is no equity in the bill.
2. The allegations of the bill are vague, indefinite, and uncertain.
3. No facts are alleged which show that the assessment heretofore made is incorrect or invalid.
4. No facts are alleged which, if true, overcome the prima facie presumption of correctness of the assessment heretofore made.
5. The allegations of the complaint are mere conclusions of the pleader and are unsupported by allegations of fact.
6. If affirmatively appears that the assessment heretofore made is legal, valid, and correct, in all respects.

A. A. Carmichael
Attorney General of Alabama

Lawrence F. Gooden
Assistant Attorney General of Alabama

STATE OF ALABAMA)
)
MONTGOMERY COUNTY)

I, hereby certify that I have this day mailed a copy of the
above and foregoing demurrer to Hybart, Chason & Stone, Bay Minette,
Alabama, attorneys of record for appellant in this cause.

Dated this the 18th day of October, 1949.

Gardner F. Gooding, Jr.
Of counsel for appellee

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, IN EQUITY.

NO. 2335

STATE OF ALABAMA

Now comes the appellee in the above identified cause, and for answer to the original bill of complaint filed herein, says, separately and severally, as follows:

5. Answering paragraph 5 of the bill of complaint, appellee denies the allegations thereof. Appellee specifically denies that the appellant had, at any time, failed or refused to make returns, but on the contrary, appellee would respectfully allege and show unto the Court that, while appellant had made returns, that he had not included in such returns at any time the sales tax due by him to the State for and on account of the gross intake of operating said business. Appellee further specifically denies that the assessment against the appellant of a penalty equal to twenty-five percent (25%) of the amount claimed by said Department of Revenue can only be levied if the taxpayer fails or refuses to make the returns required by him, but on the contrary, appellee alleges that such assessment or penalty may be made under the provisions of Title 51, Section 766, Code of Alabama 1940.

6. Further answering the Bill in its entirety, appellee alleges that appellant did not keep and preserve suitable records of gross sales made by him or the gross proceeds of sales, or gross receipts of sales made in the operation of his business for said periods of time, and that it was, therefore, impossible to actually determine the accurate amount of taxes due by the appellant for said periods of time. Appellee further avers that appellant did not keep all invoices of records, sales and merchandise purchased for resale for a period of two years as required by law. Further answering said Bill, the appellee alleges that under the provisions of Section 759, Title 51, Code of Alabama 1940, appellant was required by law to keep such records as would enable the Department of Revenue to determine from his books: (a) The volume of gross sales made, (b) the receipts from gross sales made, (c) the volume of deductible sales made, (d) the amount of receipts from deductible sales and all invoices reporting purchases for a period of the last two years. Appellee avers that appellant disregarded the provisions of the statute and kept no records which would enable the auditors of the State Department of Revenue to accurately determine the tax liability of the appellant.

Appellee further avers that the auditors of the State Department of Revenue carefully examined all records submitted to them by the appellant during the regular audit of his books, and that its determination of the amount of actual taxes due by the appellant was based upon the available records and such other additional information as they were able to find, shedding light on the liability of the appellant for additional sales taxes.

Appellee avers that in the absence of full and complete records kept by the appellant, which would enable the Department of Revenue to determine correctly and accurately the volume of taxable sales made by appellant and the amount of sales taxes accruing thereon, for the identified periods of time, the Department was authorized by law to make an assessment upon such information as it might reasonably obtain; that the Department did reasonably obtain the information upon which the identified assessments were made and did make the assessments therein identified. Further answering said Bill, the appellee avers that the assessments from which the appeals were taken represent a correct amount of taxes due by the appellant for the identified periods of time according to the best information available to the State Department of Revenue.

AND NOW HAVING ANSWERED the bill of complaint as it is advised is necessary, appellee prays that said assessment be by this Court ratified and confirmed, and that decree be entered against appellant for the amount of said assessment, together with costs of this appeal, and appellee will ever pray, etc.

A. A. Carmichael

A. A. CARMICHAEL
ATTORNEY GENERAL

Wallace L. Johnson

WALLACE L. JOHNSON
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR APPELLEE

I hereby certify that I have this day mailed a copy of the above and foregoing answer to the firm of Hybart, Chason and Stone, Bay Minette, Alabama, attorneys for appellant in this cause, with postage prepaid.

Dated this the 25th day of October, 1950.

Wallace L. Johnson

WALLACE L. JOHNSON
ASSISTANT ATTORNEY GENERAL

OF COUNSEL