

704

- 2 -

H. M. HALL,

Relator,

VS.

MARY F. SMITH,
As Town Clerk of the
Town of Bay Minette,
Alabama, a Municipal
Corporation,

Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

AT LAW. NUMBER _____.

" DEMURRER.

Now comes the Respondent in the above entitled cause and demurs to the petition filed herein and for grounds of demurrer sets down and assigns separately and severally the following:

1. The said Petition fails to point out or cite any clear legal right on the part of Petitioner or Relator to the thing demanded.

2. It affirmatively appears from the said Petition that the Petitioner or Relator does not have a clear legal right to the thing demanded.

3. Because the Ordinance adopted by the Town Council of the Town of Bay Minette, Alabama, a copy of which is attached to the said Petition and marked Exhibit "A" is unconstitutional.

4. Because the Ordinance adopted by the Town Council of the Town of Bay Minette, Alabama, a copy of which is attached to the said Petition and marked Exhibit "A" is unconstitutional in that it violates Section 100 of the Constitution of Alabama.

5. Because the Ordinance adopted by the Town Council of the Town of Bay Minette, Alabama, a copy of which is attached to the said Petition and marked Exhibit "A" is unconstitutional in that it diminishes or reduces a legal obligation justly due the Town of Bay Minette, Alabama, a Municipal Corporation, and thereby violates the provisions of Section 100 of the Constitution of Alabama.

J. B. Blackburn
Attorney for Mary F. Smith, as Town
Clerk of the Town of Bay Minette, Alabama,
a Municipal Corporation, Respondent.

2
RECORDED

DEMURRER.

H. M. HALL,

Relator,

VS.

MARY F. SMITH,
As Town Clerk of the Town of
Bay Minette, Alabama, a Municipal
Corporation,

Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

AT LAW. NUMBER 704.

Filed September 25, 1941
R. S. Duck, Clerk

J. B. BLACKBURN
ATTORNEY AT LAW
BAY MINETTE, ALABAMA

H. M. HALL,
Complainant

vs.

MARY SMITH, as Clerk of
the Town of Bay Minette,
Alabama,
Defendant

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

Petition for Writ of Mandamus

TO THE HONORABLE F. W. HARE, JUDGE OF THE CIRCUIT
COURT OF BALDWIN COUNTY, ALABAMA.

Your petitioner respectfully shows unto your Honor that he is over the age of twenty-one (21) years and a resident of Baldwin County, Alabama; that Mary Smith is over the age of twenty-one (21) years, a resident of Baldwin County, Alabama and is Clerk of the Town of Bay Minette, Alabama, having been duly legally elected and qualified to that office.

Petitioner further shows to your Honor that he is the owner of lots 3 and 4 of the Nihart and Stapleton Subdivision of a part of Block 105 of Hand Land Company's Addition to the Town of Bay Minette; that under Street Improvement Ordinance of the Town of Bay Minette, adopted July 2, 1929, numbered 49 and ordinances and resolutions supplemental thereto an assessment was placed on and against said lots for street improvement purposes in the principal sum of \$ 365.10; that under said ordinances and resolutions the interest rate on said assessment was fixed at 6% per annum to commence on the 22nd day of March, 1930, which for this proceeding is admitted to be valid; that said assessment remained unpaid; that on the 5th day of August, 1941 the Town of Bay Minette acting through and by its duly elected Town Council passed, adopted, approved and put into effect an ordinance numbered 439, fixing the rate of interest on the unpaid assessments under said ordinances and resolutions at 3% per annum for the first year and 2% per annum for each year subsequent to the first year, provided the same was paid within the time said ordinance remained in force and effect;

that the town council in conformity with the statutes made and provided, designated the said Mary Smith as town Clerk, as the person to collect, receive and receipt for said assessments and on the 15 day of Sept., 1941 she was acting in such capacity; that on said day this petitioner tendered to her in such capacity the total amount of principal of the assessment against said lots, viz. the sum of \$ 365.10 and interest thereon from the 22nd day of March, 1930 at 3% for the first year and 2% for each year subsequent to the first year, viz. the total sum of \$ 452.74 which was, and is the total principal of said assessment and interest thereon under said ordinance of the 5th day of August, 1941, number 439, which ordinance is hereto attached, marked exhibit "A" and made a part of this petition; that said Mary Smith as Clerk of the Town of Bay Minette, acting in her capacity as the person to receive, collect and receipt for such assessments, refused to receive and accept said money in payment of said assessment, principal and interest and refused to receipt for the same and refused to issue a release and discharge of the lien of said assessment on the ground that said ordinance of the 5th day of August, 1941, numbered 439 is in violation of Section 100 of the Constitution of Alabama and therefore void and of no effect. Her letter of refusal is attached hereto, marked Exhibit "B."

Petitioner further shows that the town of Bay Minette, a municipal corporation, is and has always been the owner of said assessments including the assessment against the said lots owned by this petitioner; that at no time has the town issued bonds or borrowed money against said assessments or any of them or pledged, transferred or assessed the same, and neither now or at any time has any person other than the town been entitled to the proceeds of said assessment, principal or interest or any part of the same, but the same are now and have always been the property of the town of Bay Minette, Alabama.

Petitioner further shows unto your honor that the said ordinance of the 5th day of August, 1941, numbered 439 is not violation of Section 100 of the Constitution of Alabama, but on the contrary, is valid and in force and was on the 15th day of Sept., 1941, valid and in force and effect and the said Mary Smith as town Clerk acting as aforesaid, wrongfully and illegally refused to receive and accept the said monies tendered to her as aforesaid and wrongfully and illegally refused to receipt for the same and to issue to this petitioner a release and discharge of the lien of said assessment on said lots.

Premises stated, your petitioner prays that your Honor will grant an order for the issuance of an alternative Writ of Mandamus commanding and directing the said Mary Smith as Clerk of the Town of Bay Minette, Alabama as the person designated to collect and receipt for the street improvement assessments levied under Street Improvements Ordinances of the Town of Bay Minette, Alabama on the 2nd day of July, 1929, numbered 49 and ordinances and resolutions supplemental thereto and under ordinance numbered 439 adopted by the said Town Council of Bay Minette on the 5th day of August, 1941 to receive and accept the said sum of money tendered to her by your petitioner on the 28th day of August, 1941 and to receipt for the same and to issue a release and discharge of the lien of said assessment on lots 3 and 4, or to appear before this Court on a day to be named in said Writ and show cause, if any there be, why a peremptory Writ of Mandamus should not issue, requiring her to receive and accept said monies and receipt for the same and to issue a release and discharge of the lien of said assessment on said lots; and petitioner prays for any other or further relief to which he may be entitled in the premises.



Attorney for Complainant

EXHIBIT "A"

ORDINANCE NO. 439

BE IT ORDAINED by the Town Council of the Town of Bay Minette, Alabama, that;

SECTION I: The interest due and to become due on unpaid street improvement assessments under Street Improvement order number 49, adopted the 2nd day of July, 1929, and ordinances and resolutions supplemental thereto, be and the same is reduced to the rate of three per cent for the first year and two per cent per annum thereafter to September 22, 1941, provided such assessments, principal and interest at the said rates shall be paid during the period this ordinance shall be in force and effect.

SECTION II: The Town Clerk as the person designated to collect such assessments, be, and she is hereby authorized and directed to receive and accept the principal of said assessments and interest at the rate of three per cent for the first year and two per cent per annum thereafter to September 22, 1941 in full payment of said assessments and to issue a receipt in the name of the Town of Bay Minette, Alabama in full payment and release of the said assessment and the lien securing the same, provided the same is paid within the time this ordinance is in force and effect.

SECTION III: This ordinance shall be and remain in effect from its adoption to September 22, 1941, and not thereafter, unless within such period an action shall be brought in a court of competent jurisdiction to test the validity of this ordinance; and in this event, this ordinance shall be and remain in full force and effect for 60 days after the validity of this ordinance shall have been determined by the Court and not thereafter.

SECTION IV: If an action shall be brought to test the validity of this ordinance, and this ordinance shall be held to be valid, no interest shall be charged on said assessments after September 22, 1941, provided the same are paid within the period this ordinance is in force. But, if such assessments or either of them shall not be paid during the period this ordinance shall be in force and effect, then such of them as shall not be paid during such period shall be paid in full, principal and interest, at the rate specified in such Street Improvement Ordinance number 49, adopted on the 2nd day of July, 1929, and the ordinances and resolutions supplemental thereto. The purpose of this ordinance is to permit such assessments to be paid at a reduced rate of interest and the lien securing the same to be discharged, if and only if such assessments shall be paid in full, principal and interest, at the rates herein provided, within the period this ordinance is in force and effect.

SECTION V: This ordinance shall become effective upon its adoption and approval.

EXHIBIT "B"

Bay Minette, Alabama
September 15, 1941

Mr. H. M. Hall,
Bay Minette, Alabama.

Dear Mr. Hall:

This will acknowledge that you have this day tendered to me as Town Clerk of the Town of Bay Minette, Alabama, a Municipal Corporation, the sum of \$452.74 which you offered in full settlement of all principal and interest considered by you to be due to the Town of Bay Minette, Alabama, a Municipal Corporation, for the paving assessments on or against Lots Numbered Three (3) and Four (4) in Nihart and Stapleton's Subdivision of a part of Block Numbered One Hundred Five (105) in the Hand Land Company's Addition to the Town of Bay Minette, Alabama, at which time you requested that I, as Town Clerk of the said Town, issue to you a receipt in full for the said assessments and interest, and cancel and discharge the lien which is owned and held by the Town of Bay Minette, Alabama, a Municipal Corporation, against the above described property.

I refuse to accept the tender which you made, to issue the receipt which you requested and cancel the lien due the Town of Bay Minette, Alabama, a Municipal Corporation, for the following reasons:

Under Ordinance Number 49 adopted by the Town Council of the Town of Bay Minette, Alabama on July 2, 1929 and the Ordinances and Resolutions supplemental thereto, a paving assessment for street improvement purposes was duly and legally levied against the said Lot Three (3) for the principal sum of \$182.55 and against the said Lot Four (4) for the principal sum of \$182.55, which ordinances provided that the said assessments would draw interest from the time they became due at the rate of six per cent (6%) per annum. These assessments became due in full on the 22nd day of March, 1930, no payments have been made thereon, and at this time (September 15, 1941) the Town of Bay Minette, Alabama, a Municipal Corporation, is entitled to the principal sum of Three Hundred Sixty-five and 10/100 Dollars (\$365.10) in full, together with interest thereon from the 22nd day of March, 1930 at the rate of six per cent (6%) per annum, amounting to \$251.42, making a total of \$616.52, so that the amount of \$452.74 which you tendered to me today as outlined above, lacks the sum of \$173.76 of paying the assessments in full with interest thereon at six per cent (6%) from the 22nd day of March, 1930, to this date.

In making your tender to me as Town Clerk of the Town of Bay Minette, Alabama, you figured the principal and interest correctly as provided by Ordinance Number 439, adopted by the Town Council of the Town of Bay Minette, Alabama, on August 5, 1941, but this Ordinance is, in my opinion, unconstitutional and void because it violates the provisions of Section 100 of the Alabama Constitution of 1901 in that it is an attempt by the Town Council of the Town of Bay Minette, Alabama to diminish or release an obligation legally due to the said Town of Bay Minette, Alabama, a Municipal Corporation.

Very truly yours,

/s/ Mary F. Smith

As town Clerk of the Town of
Bay Minette, Alabama, a
Municipal Corporation.

STATE OF ALABAMA

BALDWIN COUNTY

Personally appeared before me, Ruby C. Graham, a Notary Public in and for said State and said County, H. M. Hall, who, being by me duly sworn, deposes and says that he has read the foregoing petition and that the facts stated therein are true to the best of his knowledge, information and belief.

H. M. Hall

Sworn to and subscribed before me, this the 17 day of September, 1941.

Ruby C. Graham
Notary Public, Baldwin
County, Alabama.

Now comes Mary F. Smith, as Town Clerk of the Town of Bay Minette, Alabama, a Municipal Corporation, by her attorney and accepts service in this cause and waives all other and further notice. The said Respondent also waives the issuance of the Alternative writ of Mandamus in this cause. Done on this the 25th day of Sept. 1941

Mary F. Smith, as
Town Clerk of the Town
of Bay Minette, a
Municipal Corporation
By J. B. Blackburn
Atty & Record "

2.

704

Petition for writ of
Habeas Corpus

RECORDED

Filed September 19, 1941
R. E. Duck, Register-Clerk

BEEBE & HALL
LAWYERS
BAY MINETTE, ALABAMA

AT A REGULAR TERM OF THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA,
LAW SIDE, IN WHICH THE OFFICERS AUTHORIZED BY LAW TO HOLD OR SERVE
SUCH COURT WAS SERVING, THE FOLLOWING PROCEEDINGS WERE HAD IN THE
CAUSE STYLED.

H. M. HALL,

Petitioner,

VS.

MARY F. SMITH, as
Clerk of the Town of
Bay Minette, Alabama,

Defendant.

Number 704.

.....

After copying Defendant's Demurrer, the next items in the transcript should be as shown below.

.....

MINUTE ENTRY

| | | |
|----------------|---|---------|
| H. M. HALL, |) | |
| Petitioner, |) | |
| VS. |) | No. 704 |
| MARY F. SMITH, |) | |
| As Clerk, |) | |
| Defendant. |) | |

January ~~day of~~ 31, 1944

Came the parties by Attorneys and the Defendant files Demurrer to Petition for Mandamus, and the same being heard and considered by the Court it is therefore ordered and adjudged by the Court that the said Demurrer be and the same is overruled.

.....

Then copy Defendant's Answer. After Defendant's answer copy Petitioner's Demurrer to Answer.

.....

MINUTE ENTRY

| | | |
|----------------|---|---------|
| H. M. HALL, |) | |
| Petitioner, |) | |
| VS. |) | No. 704 |
| MARY F. SMITH, |) | |
| As Clerk, |) | |
| Defendant |) | |

February ~~day of~~ 4, 1947

Came the parties by Attorneys and the Petitioner files Demurrer to Defendant's answer, and the same being heard and considered by the Court it is therefore ordered and adjudged by the Court that the said Demurrer be and the same is sustained.

.....

Then copy Defendant's amended answer; then recopy Petitioner's Demurrer which is the same Demurrer of Petitioner as that copied above.

.....

MINUTE ENTRY

| | | |
|----------------|---|---------|
| H. M. HALL, |) | |
| Petitioner, |) | |
| VS. |) | No. 704 |
| MARY F. SMITH, |) | |
| as Clerk, |) | |
| Defendant. |) | |

February 4,
~~4th day of February,~~ 1947.

Came the parties by Attorneys and the Defendant declined to plead further.

.....

Then copy Writ of Mandamus.
Defendant's appeal.
Security for cost of appeal.
Supersedeas bond.

.....

H. M. HALL,

Relator,

VS.

MARY F. SMITH, as Town Clerk
of the Town of Bay Minette,
Alabama, a Municipal Corporation,

Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

AT LAW.

“ ANSWER

Now comes Mary F. Smith, as Town Clerk of the Town of Bay Minette, Alabama, a Municipal Corporation, the Respondent named in this cause, and for answer to the Petition filed by the Relator in this cause says:

1. The Respondent admits that the Petitioner or Relator is over twenty-one years of age and a resident of Baldwin County, Alabama; that she is over twenty-one years of age, a resident of Baldwin County, Alabama, and that she is Clerk of the Town of Bay Minette, Alabama, a Municipal Corporation, duly elected and qualified as such officer.

2. The Respondent admits that the Petitioner or Relator is the owner of Lots Three and Four of the Nihart and Stapleton Subdivision of a part of Block One Hundred Five of the Hand Land Company's Addition to the Town of Bay Minette, Alabama; that under Street Improvement Ordinance Number Forty-nine of the Town of Bay Minette, Alabama, adopted July 2, 1929, and the ordinance and resolutions supplemental thereto, a valid assessment was placed against the two said lots for the total principal sum of \$365.10; that in, under and by the said ordinances and resolutions the interest rate on the said assessments was fixed at six per cent per annum to commence on March 22, 1930, and that no part of the said assessments or the interest thereon has been paid.

The Respondent further admits that on August 5, 1941, while the said assessments and the interest thereon at six per cent per annum from March 22, 1930 were justly due to the Town of Bay Minette, Alabama, a Municipal Corporation, delinquent in full

and unpaid, the Town Council of the said Town of Bay Minette, Alabama, passed, adopted, approved and attempted to put into effect an Ordinance Numbered 439, a copy of which said Ordinance is attached to the Petition filed in this cause, marked Exhibit "A" and made a part thereof, which said Ordinance attempts to reduce the interest rate on the assessments referred to therein from six per cent per annum to three per cent per annum for the first year and two per cent per annum thereafter, provided payments are made as specified in the said ordinance. The Respondent further admits that she, as Town Clerk of the said Town is the person designated by said ordinance to collect, receive and receipt for the said assessments and interest as provided in the said Ordinance Numbered 439, and that she was acting in such capacity on September 15, 1941. Respondent also admits that on September 15, 1941, the Petitioner or Relator tendered to her as said Clerk the total amount of the principal assessments against the said lots amounting to the sum of \$365.10 and interest thereon as provided in the said Ordinance Numbered 439 amounting to the sum of \$87.64, making a total of \$452.74; that she as Clerk aforesaid refused to accept the tender so made, in full settlement of the total principal and interest due on the said assessments, to issue a receipt therefor and to cancel and discharge the lien of the said assessment held and owned by the said Town of Bay Minette, Alabama.

Respondent further alleges that at the time the said tender was so made to her as Clerk aforesaid, the total amount of the principal and interest then due to the said Town as provided in Ordinance Numbered 49 and the Ordinances and resolutions supplemental thereto was \$616.52 as will fully appear from the Respondent's letter, a copy of which is attached to the Petition filed herein marked Exhibit "B" and made a part thereof so that the amount of \$452.74 which was tendered was \$163.78 less than the amount legally due the said Town.

Respondent expressly admits that she as Clerk aforesaid

refused to accept the said tender, to issue a receipt in full for said assessments and interest thereon and to cancel the lien therefor owned and held by the said Town of Bay Minette, Alabama, because the said Ordinance Numbered 439 adopted by the Town Council of the said Town on August 5, 1941, is void and of no effect because it violates Section 100 of the Constitution of Alabama in that it is an attempt to remit, release or diminish an obligation or liability justly due by the Petitioner or Relator to the Town of Bay Minette, a Municipal Corporation which is held and owned by the said municipality without securing or receiving payment of the full face value thereof.

3. Respondent admits that the said Town of Bay Minette, Alabama, a Municipal Corporation, is and has always been the owner of the said assessments and the liens securing payment thereof, including the assessments and liens against the lots owned by the Petitioner; that at no time has the said town issued bonds or borrowed money against the said assessments or any of them, not pledged, transferred or assigned the same and further that no person other than the said Town has at any time been entitled to the proceeds of the said assessments or any part thereof, either of principal or interest and that the same are now and have always been the property of the said Town of Bay Minette, Alabama, a Municipal Corporation.

The said Lots Three (3) and Four (4) in Nihart and Stapleton's Subdivision of a part of Block Numbered One Hundred Five (105) of the Hand Land Company's Addition to the Town of Bay Minette, Alabama, each has a frontage of twenty-five (25) feet on Court House Square in the Town of Bay Minette, Alabama, making a total frontage on said Court House Square of Fifty (50) feet. The said lots were improved at the time this suit was filed and on this date and there was then and is now situated on the said lots a two-story brick building approximately fifty feet by fifty feet in

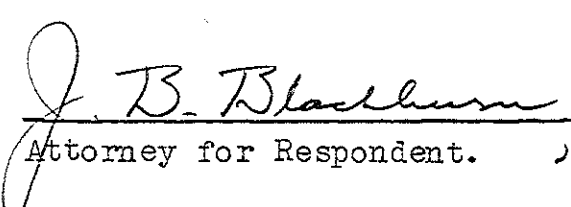
size with two stores on the lower floor and a number of offices on the upper floor. The said lots are assessed for taxation at the sum of Three Hundred Dollars (\$300.00) and the said improvements are assessed for taxation at the sum of Thirty-five Hundred Dollars (\$3500.00) but in truth and fact the property is worth much more than the total assessed valuation of Thirty-eight Hundred Dollars (\$3800.00).

Respondent denies that the said Ordinance Numbered 439 of August 5, 1941 is valid and that it was in full force on September 15, 1941, and further denies that she as such officer wrongfully and illegally refused to receive and accept the moneys tendered to her by the Petitioner or Relator and that she wrongfully and illegally refused to issue said Petitioner a release and discharge of the lien of said assessment on the said lots.

4. The Respondent, for further answer to the said Petition, alleges that the Petitioner has wholly failed to allege any facts showing that he has a specific legal right to have this Respondent accept his tender, issue him a receipt in full for the said assessments and interest thereon, and cancel, release and discharge the lien held and owned by the Town of Bay Minette, Alabama, a Municipal Corporation, on or against his said property and that Respondent is under a duty and has the authority to do the said acts. Respondent further alleges that it affirmatively appears from the Petition filed in this cause that Petitioner's entire alleged right to the thing or things demanded is based upon the said Ordinance Numbered 439, which is unconstitutional and void.

5. Each and all of the allegations of the said Petition which have not been specifically answered are hereby expressly denied.

Having fully answered the said Petition, Respondent prays that the relief prayed for therein be denied and that Respondent be discharged with her reasonable costs in this behalf expended.


Attorney for Respondent.))

ANSWER

RECORDED

H. M. HALL,

Relator,

VS.

MARY F. SMITH, as Town Clerk of
the Town of Bay Minette, Alabama,
a Municipal Corporation,

Respondent.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

AT LAW.

NUMBER 704.

Filed Sept 17-1945
R. B. Blackburn

J. B. BLACKBURN

ATTORNEY AT LAW

BAY MINETTE, ALABAMA

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

JOHN E. MANDEVILLE, CLERK

WILLIAM J. O'CONNOR
DEPUTY CLERK

MYRTLE M. TROTT
DEPUTY CLERK

MOBILE 15, ALABAMA

May 21st, 1948

Mrs. Alice J. Duck,
Clerk, Circuit Court,
Bay Minette, Alabama

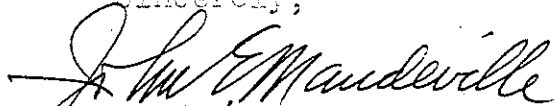
Dear Mrs. Duck:-

I am returning to you herewith your file and docket sheet in case No. 1184 - State of Alabama, ex rel, J. M. Broadus, Versus, E.N.Bell and Leonard Trione.

Judge Bates, who tried this case by agreement of both parties to the cause, has made his ruling in this Mandamus Petition on the docket sheet, and his order should be self explanatory. This order seemed to be agreeable to both parties to the cause and their attorneys.

You will notice the costs were taxed against the Petitioner in this cause.

Sincerely,



JOHN E. MANDEVILLE,
Clerk, Circuit Court, Mobile County, Alabama.

H. M. HALL,

PETITIONER,

VS

MARY SMITH, AS CLERK
OF THE TOWN OF BAY
MINETTE, ALABAMA,

DEFENDANT.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW.

Comes the Petitioner in the above styled cause and demurs to Defendant's answer and as grounds therefor says;

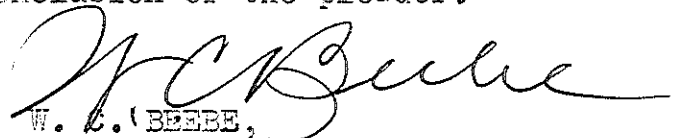
1. The matters set up do not constitute a defense to Petitioner's complaint.
2. The matters alleged therein are frivolous.
3. The matters therein alleged are not responsive to Petitioner's complaint.
4. The matters therein allege neither traverse or deny nor confess and avoid the allegations of petitioner's complaint.
5. The matters alleged in said answer are legally insufficient as an answer to Petitioner's complaint.
6. The matters alleged in said answer if true do not constitute a defense to Petitioners action.
7. The allegation that the amount legally due was \$616.52 and the amount tendered was \$163.78 less than the amount due is a conclusion of the pleader.
8. The facts alleged in said answer are legally insufficient to authorize her to refuse to accept the money tendered and to cancel the lein of assessment.

9. The matters alleged in said answer show that the defendant wrongfully and illegally refused to accept the moneys tendered and to cancel the lien of assessment.

10. The allegation that ordinance 439 is void and of no effect and in violation of Section 100 of the Constitution is a conclusion of the pleader.

11. The allegation that ordinance 439 is invaled is a conclusion of the pleader.

12. The allegation that Petitioner has failed to allege facts showing that he has a specific legal right to have respondent accept the moneys tendered and the lien of assessment cancelled is a conclusion of the pleader.


W. C. BEEBE,
For Petitioner.

RECORDED

- 5 -

Petitioner de muer

Filed Feb 4, 1947

Refiled Feb 4, 1947
To Amended Answer

H. M. HALL,

Relator,

VS

MARY F. SMITH, as Town Clerk
of the Town of Bay Minette,
Alabama, a Municipal Corporation,

Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

AT LAW.

AMENDED ANSWER

Now comes Mary F. Smith, as Town Clerk of the Town of Bay Minette, Alabama, a Municipal Corporation, the Respondent named ^{amended} in this cause, and for/answer to the Petition filed by the Relator in this cause says:

1. The Respondent admits that the Petitioner or Relator is over twenty-one years of age and a resident of Baldwin County, Alabama; that she is over twenty-one years of age, a resident of Baldwin County, Alabama, and that she is Clerk of the Town of Bay Minette, Alabama, a Municipal Corporation, duly elected and qualified as such officer.

2. The Respondent admits that the Petitioner or Relator is the owner of Lots Three and Four of the Nihart and Stapleton Subdivision of a part of Block One Hundred Five of the Hand Land Company's Addition to the Town of Bay Minette, Alabama; that under Street Improvement Ordinance Number Forty-nine of the Town of Bay Minette, Alabama, adopted July 2, 1929, and the ordinances and resolutions supplemental thereto, a valid assessment was placed against the two said lots for the total principal sum of \$365.10; that in, under and by the said ordinances and resolutions the interest rate on the said assessments was fixed at six percent per annum to commence on March 22, 1930, and that no part of the said assessments or the interest thereon has been paid.

The Respondent further admits that on August 5, 1941, while the said assessments and the interest thereon at six percent per annum from March 22, 1930 were justly due to the Town of Bay

Minette, Alabama, a Municipal Corporation, delinquent in full and unpaid, the Town Council of the said Town of Bay Minette, Alabama, passed, adopted, approved and attempted to put into effect an Ordinance Numbered 439, a copy of which said Ordinance is attached to the Petition filed in this cause, marked Exhibit "A" and made a part thereof, which said Ordinance attempts to reduce the interest rate on the assessments referred to therein from six percent per annum to three percent per annum for the first year and two percent per annum thereafter, provided payments are made as specified in the said ordinance. The Respondent further admits that she, as Town Clerk of the said Town is the person designated by said ordinance to collect, receive and receipt for the said assessments and interest as provided in the said Ordinance Numbered 439, and that she was acting in such capacity on September 15, 1941. Respondent also admits that on September 15, 1941, the Petitioner or Relator tendered to her as said Clerk the total amount of the principal assessments against the said lots amounting to the sum of \$365.10 and interest thereon as provided in the said Ordinance Numbered 439 amounting to the sum of \$87.64, making a total of \$452.74; that she as Clerk aforesaid refused to accept the tender so made, in full settlement of the total principal and interest due on the said assessments, to issue a receipt therefor and to cancel and discharge the lien of the said Assessment held and owned by the said Town of Bay Minette, Alabama.

Respondent further alleges that at the time the said tender was so made to her as Clerk aforesaid, the total amount of the principal and interest then due to the said Town as provided in Ordinance Numbered 49 and the Ordinances and resolutions supplemental thereto was \$616.52 as will fully appear from the Respondent's letter, a copy of which is attached to the Petition filed herein marked Exhibit "B" and made a part thereof so that the amount of \$452.74 which was tendered was \$163.78 less than the amount legally due the said Town.

Respondent expressly admits that she as Clerk aforesaid

refused to accept the said tender, to issue a receipt in full for said assessments and interest thereon and to cancel the lien therefor owned and held by the said Town of Bay Minette, Alabama, because the said Ordinance Numbered 439 adopted by the Town Council of the said Town on August 5, 1941, is void and of no effect because it violates Section 100 of the Constitution of Alabama in that it is an attempt to remit, release or diminish an obligation or liability justly due by the Petitioner or Relator to the Town of Bay Minette, a Municipal Corporation which is held and owned by the said municipality without securing or receiving payment of the full face value thereof.

3. Respondent admits that the said Town of Bay Minette, Alabama, a Municipal Corporation, is and has always been the owner of the said assessments and the liens securing payment thereof, including the assessments and liens against the lots owned by the Petitioner; that at no time has the said town issued bonds or borrowed money against the said assessments or any of them, not pledged, transferred or assigned the same and further that no person other than the said Town has at any time been entitled to the proceeds of the said assessments or any part thereof, either of principal or interest and that the same are now and have always been the property of the said Town of Bay Minette, Alabama, a Municipal Corporation.

The said Lots Three (3) and Four (4) in Nihart and Stapleton's Subdivision of a part of Block Numbered One Hundred Five (105) of the Hand Land Company's Addition to the Town of Bay Minette, Alabama, each has a frontage of twenty-five (25) feet on Court House Square in the Town of Bay Minette, Alabama, making a total frontage on said Court House Square of Fifty (50) feet. The said lots were improved at the time this suit was filed and on this date and there was then and is now situated on the said lots a two-story brick building approximately fifty feet by fifty feet in size with two stores on the lower floor and a number of offices on the upper floor. The said lots are assessed for taxation at the sum of Three Hundred Dollars (\$300.00) and the said improvements are assessed for taxa-


tion at the sum of Thirty-five Hundred Dollars (\$3500.00) but in truth and fact the property is worth much more than the total assessed valuation of Thirty-eight Hundred Dollars (\$3800.00). The total value of the said lots and building at the time of the filing of this suit was more than Ten Thousand Dollars (\$10,000.00) because of which the claim of the said Town is not doubtful in any way.

Respondent denies that the said Ordinance Numbered 439 of August 5, 1941 is valid and that it was in full force on September 15, 1941, and further denies that she as such officer wrongfully and illegally refused to receive and accept the moneys tendered to her by the Petitioner or Relator and that she wrongfully and illegally refused to issue said Petitioner a release and discharge of the lien of said assessment on the said lots.

4. The Respondent, for further answer to the said Petition, alleges that the Petitioner has wholly failed to allege any facts showing that he has a specific legal right to have this Respondent accept his tender, issue him a receipt in full for the said assessments and interest thereon, and cancel, release and discharge the lien held and owned by the Town of Bay Minette, Alabama, a Municipal Corporation, on or against his said property and that Respondent is under a duty and has the authority to do the said acts. Respondent further alleges that it affirmatively appears from the Petition filed in this cause that Petitioner's entire alleged right to the thing or things demanded is based upon the said Ordinance Numbered 439, which is unconstitutional and void.

5. Each and all of the allegations of the said Petition which have not been specifically answered are hereby expressly denied.

Having fully answered the said Petition, Respondent prays that the relief prayed for therein be denied and that Respondent be discharged with her reasonable costs in this behalf expended.


Attorney for Respondent

1-
RECORDED

AMENDED ANSWER

H. M. HALL, ---

Relator,

VS

MARY F. SMITH, as Town Clerk
of the Town of Bay Minette,
Alabama, a Municipal Corporation,

Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
AT LAW.

*Filed Feb. 4,
1946*

J. B. BLACKBURN
ATTORNEY AT LAW
BAY MINETTE, ALABAMA

H. M. HALL,

Plaintiff,

VS

MARY F. SMITH,
As Town Clerk of the Town
of Bay Minette, Alabama,
a Municipal Corporation,

Respondent.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW

NO. 704

SUPERSEDEAS BOND

STATE OF ALABAMA

BALDWIN COUNTY

KNOW ALL MEN BY THESE PRESENTS: That we, Mary F. Smith, as Town Clerk of the Town of Bay Minette, Alabama, a Municipal Corporation, as Principal and the undersigned as Sureties are held and firmly bound unto H. M. Hall, his heirs, executors and administrators in the sum of \$100.00, for the payment of which we jointly and severally bind ourselves, our heirs, executors and administrators, firmly by these presents:

Sealed with our seals and dated the 3rd day of March, 1947.

The condition of the above obligation is such that whereas, the above bound Mary F. Smith, as Town Clerk of the Town of Bay Minette, Alabama, a Municipal Corporation, has applied for and obtained an appeal, returnable to the next term of the Supreme Court of Alabama to supersede and reverse a judgment in favor of the Plaintiff and against the Defendant at the February 5, 1947 term of the Circuit Court of Baldwin County, Alabama.

Now if the said Mary F. Smith, as Town Clerk of the Town of Bay Minette, Alabama, a Municipal Corporation, shall prosecute to effect her said suit in the Supreme Court of Alabama and satisfy such judgment if the said Supreme Court shall render in this case, then this obligation to be void, otherwise to remain in full force and effect.

Mary F. Smith (SEAL)
As Town Clerk of the Town of Bay
Minette, Alabama, a Municipal Corporation

L. D. Owens (SEAL)

E. B. Newton (SEAL)

Taken and approved on this the
5th day of March, 1947.

Alice J. Duck
Clerk of the Circuit Court

RECORDED
INDEXED
MAR 11 1947
CLERK OF THE CIRCUIT COURT

RECORDED

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MAR 11 1947
CLERK OF THE CIRCUIT COURT

H. M. HALL,

Petitioner,

VS.

MARY F. SMITH, as
Clerk of the Town of
Bay Minette, Alabama,
a Municipal Corporation,


Defendant.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
AT LAW. NUMBER 704.

APPEAL OF DEFENDANT.

Now comes the Defendant, Mary F. Smith, as Town Clerk
of the Town of Bay Minette, Alabama and appeals from the final
judgment of the Court in the above entitled cause.

Dated March 5, 1947.


Attorney for Defendant.

SUPERSEDEAS BOND

RECORDED

H. M. HALL,

Plaintiff,

VS

MARY F. SMITH,
As Town Clerk of the Town
of Bay Minette, Alabama,
a Municipal Corporation,

Respondent.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW

NO. 704

FILED

MAR 5 1947

ALICE J. DUCK, Clerk

APPEAL OF DEFENDANT.

H. M. HALL,

Petitioner,

VS.

MARY F. SMITH, as Town
Clerk of the Town of Bay
Minette, Alabama, a Muni-
cipal Corporation,

Defendant.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
AT LAW. NUMBER 704.

FILED March 5, 1947.

*Alice J. Neuch
clerk*

RECORDED

H. M. HALL,

Plaintiff,

VS

MARY F. SMITH,
As Town Clerk of the Town
of Bay Minette, Alabama,
a Municipal Corporation,

Respondent.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW NO. 704

SECURITY FOR COST OF APPEAL

I hereby acknowledge myself security for cost
of the appeal taken by the Defendant from the final judgment of
the Circuit Court of Baldwin County, Alabama in the above entitled
cause, dated March 5, 1947.

J. B. Blackburn (SEAL)

Taken and approved on this the
5th day of March, 1947.

Alice J. Luck
Clerk of the Circuit Court

SECURITY FOR COST OF APPEAL

H. M. HALL,

Plaintiff

VS

MARY F. SMITH,
As Town Clerk of the Town
of Bay Minette, Alabama,
a Municipal Corporation,

Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

AT LAW

NO. 704

FILED
MAR 5 1947
ALICE J. DUCK, Clerk

MINUTE ENTRY

H. M. HALL,

)

Petitioner,

)

VS.

)

No. 704

MARY F. SMITH,
as Clerk,

)

)

Defendant.

February 24 ~~25~~ *of 1947*

Came the parties by Attorneys and the Petitioner files Demurrer to Defendant's amended answer and the same being heard and considered by the Court it is therefore ordered and adjudged by the Court that the said Demurrer be and the same is sustained.

.....
Stop.

~~Then copy Writ of Mandamus.~~

H. M. HALL,

Petitioner,

VS.

MARY F. SMITH, as
Town Clerk of the Town
of Bay Minette, Alabama,
a Municipal Corporation,

Defendant.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

AT LAW. NUMBER 704.

CITATION OF APPEAL.

TO H. M. HALL, PETITIONER, OR TO W. C. BEEBE, HIS ATTORNEY OF RECORD:

WHEREAS, on the 5th day of March, 1947, the Defendant
took an appeal from the final judgment rendered in this cause dated
~~March~~ Feb. 5, 1947:

NOW THEREFORE, you are cited to appear as required by
law, before the Supreme Court of Alabama to defend the said appeal
if you think proper so to do.

Witness my hand this 30th day of October, 1947.

Alice J. Luck
Clerk of the Circuit Court of Baldwin
County, Alabama.

I hereby accept service and waive further notice of
the within Citation of Appeal.

Dated this 7 day of Nov, 1947.

W. C. Beebe
Attorney for H. M. Hall, Petitioner,
(Appellee)

CITATION OF ARREAL.

H. M. HALL,

Petitioner,

VS.

MARY F. SMITH, as Town
Clerk of the Town of Bay
Minette, Alabama, a Muni-
cipal Corporation,

Defendant..

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

AT LAW. NUMBER 704.

H. M. HALL,
PETITIONER,
VS

MARY SMITH, AS CLERK
OF THE TOWN OF BAY
MINETTE, ALABAMA,
DEFENDANT.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
AT LAW.

Comes the Petitioner in the above styled cause and
demurs to Defendant's answer and as grounds therefor says;

1. The matters set up do not constitute a defense to
Petitioner's complaint.
2. The matters alleged therein are frivolous.
3. The matters therein alleged are not responsive to
Petitioner's complaint.
4. The matters therein allege neither traverse or deny
nor confess and avoid the allegations of petitioner's
complaint.
5. The matters alleged in said answer are legally in-
sufficient as an answer to Petitioner's complaint.
6. The matters alleged in said answer if true do not
constitute a defense to Petitioners action.
7. The allegation that the amount legally due was \$616.52
and the amount tendered was \$163.78 less than the amount
due is a conclusion of the pleader.
8. The facts alleged in said answer are legally insuff-
icient to authorize her to refuse to accept the money
tendered and to cancel the lein of assessment.

9. The matters alleged in said answer show that the defendant wrongfully and illegally refused to accept the moneys tendered and to cancel the lien of assessment.
10. The allegation that ordinance 439 is void and of no effect and in violation of Section 100 of the Constitution is a conclusion of the pleader.
11. The allegation that ordinance 439 is invaled is a conclusion of the pleader.
12. The allegation that Petitioner has failed to allege facts showing that he has a specific legal right to have respondent accept the moneys tendered and the lien of assessment cancelled is a conclusion of the pleader.

W. C. BEEBE,
For Petitioner.

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE COURT OF APPEALS OF ALABAMA

October Term 1907.

To the Clerk of the Circuit Court

of Baldwin County—Greeting:

Whereas, in the matter of

Mary F. Smith et al, Appellant,

vs.

H. M. Hall, Appellee,

recently pending in the Court of Appeals of Alabama, on appeal from the said

_____ Court of _____ County,

our Court of Appeals did on the 6 day of April, 1908,

render a judgment of affirmance

_____ in said cause; and,

Whereas, a certificate of such action of the Court of Appeals was duly issued to you, and thereafter an application for a rehearing of said cause was filed in this Court on the 20 day of April, 1908;

Now, it is hereby certified, that our Court of Appeals, or one of the Justices thereof, did, on the 20 day of April, 1908, order that the said certificate be recalled. And you will accordingly return the same to this office at once, together with copy of the opinion in said cause issued to you.

Witness, Charles Bricken, Jr., Clerk of the Court

of Appeals of Alabama, at the Capitol, this the

20 day of April, 1908

Charles Bricken, Jr.
Clerk of the Court of Appeals of Alabama.

THE COURT OF APPEALS OF ALABAMA

October Term, 19 47

1st Div., No. 565

Mary F. Smith,
as Clerk etc
Appellant.....

H. M. Hall
Appellee.....

From Baldwin Circuit Court.

CERTIFICATE OF RECALL
On Application for Rehearing.

THE STATE OF ALABAMA, }
Baldwin County. }

Filed this 21st day of

April 1948
Chief Clerk
J. C. Clark

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE COURT OF APPEALS OF ALABAMA

October Term 1907

To the Clerk of the Circuit Court
of Salmon County—Greeting:

Whereas, in the matter of

Mary F. Smith as Clara E. S. Appellant,

vs.

H. M. Hall, Appellee,

recently pending in the Court of Appeals of Alabama, on appeal from the said

Court of _____ County,

our Court of Appeals did on the 6 day of April, 1908

render a judgment of affirmance

in said cause; and,

Whereas, a certificate of such action of the Court of Appeals was duly issued to you, and
thereafter an application for a rehearing of said cause was filed in this Court on the 20
day of April, 1908; and overruled -

Now, it is hereby certified, that our Court of Appeals Supreme, or one of the Justices thereof, did,
on the 26 day of May, 1908, order that the said certificate be recalled.

And you will accordingly return the same to this office at once, together with copy of the opinion
in said cause issued to you.

Witness, Charles Bricken, Jr., Clerk of the Court

of Appeals of Alabama, at the Capitol, this the

26 day of May, 1908

Charles Bricken Jr.
Clerk of the Court of Appeals of Alabama.

THE COURT OF APPEALS OF ALABAMA

October Term, 19. 67

1st Div., No. 565

Mary F. Smith,
as Clerk etc
Appellant.....

A M Hall
Appellee.....

From Baldwin Circuit Court.

CERTIFICATE OF RECALL

On Application, for Rehearing.

Certiorari

THE STATE OF ALABAMA, }

County. }

Filed this 3-27 day of

19 48

Alice J. Smith
Clerk

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE COURT OF APPEALS OF ALABAMA

October Term 19 47.

To the Clerk of the Circuit Court

of Baldwin County—Greeting:

Whereas, the Record and Proceedings of the Circuit Court

of said county, in a certain cause lately pending in said Court between

Mary F. Smith, as Clerk of the Town of Bay Minette, Alabama, Appellant,

and

H. M. Hall, Appellee,

wherein by said Court, at the Term, 19, it was considered adversely to said appellant, were brought before our Court of Appeals, by appeal taken, pursuant to law, on behalf of said appellant:

NOW, IT IS HEREBY CERTIFIED, That it was thereupon considered by our Court of Appeals, on the 6th day of April 19 48, that said judgment of said Circuit Court be in all things affirmed, and that it was further considered that the appellant, and L. D. Owen and F. B. Newton pay the judgment of the circuit court ten per cent damages thereon with interest and

pay the costs accruing on said appeal in this Court and in the Court below.

Witness, Charles Bricken, Jr., Clerk of the Court
of Appeals of Alabama, at the Capitol, this the
6th day of April, 1948

Charles Bricken, Jr.
Clerk, Court of Appeals of Alabama.

MAY 11 1948 APPLICATION FOR REHEARING OVERRULED

JUN 30 1948 Certificate Clerk Supreme Court Petition Denied

704

THE COURT OF APPEALS OF ALABAMA

October Term, 1947.....

1st Div., No. 565

Mary F. Smith, as Clerk of

the Town of Bay Minette,

Alabama

Appellant,

vs.

H. M. Hall

Appellee.

From Baldwin Circuit Court.

CERTIFICATE OF AFFIRMANCE.

THE STATE OF ALABAMA,

Baldwin County. }

Filed this 7th day of

April 1948

W. J. Duck

BROWN PRINTING CO., MONTGOMERY, ALA., 1934

Recalled

4-21-48
W. J. Duck
clerk

Refiled 5-13-48
W. J. Duck
clerk

APR 61948

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1947-48.

1 Div. 565.

Mary F. Smith, as Clerk of the
Town of Bay Minette, Alabama

v.

H. M. Hall

Appeal from Baldwin Circuit Court.

HARWOOD, JUDGE.

The appellee here, designated hereinafter as petitioner, on 19 September 1941, filed a petition for a writ of mandamus against appellant, hereinafter referred to as respondent, praying for ^{an} alternative writ of mandamus to be issued commanding

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respondent to accept and receipt for certain monies tendered her for certain improvement assessments levied by the Town of Bay Minette on property belonging to the petitioner.

The petition alleges that a valid assessment was levied against the property now owned by him by the Town of Bay Minette, for street improvement purposes, the assessment so levied fixing the interest rate at six per cent, all of which is secured by lien held by the town. That while the total amount of the assessment and interest thereon was due in full and delinquent, the Town Council of the Town of Bay Minette enacted an ordinance, a copy of said ordinance being attached to and made a part of said petition, reducing the rate of interest from six per cent to three per cent for the first year and two per cent for each subsequent year to and including September 18, 1941. This ordinance also provided that it should remain in full force and effect and payment might be made thereunder at any time sixty days after termination of any suit brought to test its validity.

The petition also alleges that the Town owns the assessment herein involved, and that same has not been assigned or pledged.

The respondent appeared, waived the issuance of the alternative writ, and demurred to the petition on the grounds that said ordinance seeking to reduce the amount of interest due on the assessment was violative of Section 100 of the Constitution of Alabama.

The petition originating this cause was filed in the lower court on 19 September 1941. The judgment and order of the lower court here appealed from was entered 5 February 1947. Appeal from said order being duly perfected to this court, the cause was submitted on 16 December 1947.

The proceedings below raise only one question, namely, whether a municipality which owns a public improvement assessment against property in the municipality may reduce the interest rate on such assessment retroactively.

Section 100 of our Constitution is as follows:

"No obligation or liability of any person, association, or corporation held or owned by this state, or by any county or other municipality thereof, shall ever be remitted,

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released, or postponed, or in any way diminished, by the legislature; nor shall such liability or obligation be extinguished except by payment thereof; nor shall such liability or obligation be exchanged or transferred except upon payment of its face value; provided, that this section shall not prevent the legislature from providing by general law for the compromise of doubtful claims."

The above section governs county and municipal officers as well as the Legislature. New Farley National Bank v. Montgomery County, 203 Ala. 654, 84 So. 815.

Section 100, supra, however, by its very words pertains to the obligation or liability of any person, association, or corporation held or owned by this state, county or municipality thereof. (Underlining ours).

Municipalities may make street improvements and assess the cost thereof against the abutting property. The municipal governing body fixes the amount of the assessment for such improvement, and the governing body has no power to reduce or abate an assessment for such public improvement after it has become final except in cases where appeals are taken within the time allowed. All such assessments bear "interest" as fixed at not exceeding eight per cent per annum after the expiration of thirty days from the date on which the assessment is made final. (See generally Chapter 11, Title 37, Code of Alabama 1940; Municipal Improvement Act, General Acts 1927, p. 753).

However, it is clear under our decisions that assessments levied for public improvements do not create a personal liability against the owner of the property abutting the improvement; only a charge, secured by a lien, is created against the property improved. Bellenger v. Morgane, 225 Ala. 227, 142 So. 657; Hamrick v. Town of Abbeville, 228 Ala. 666, 155 So. 87; City of Huntsville v. Madison, 166 Ala. 389, 52 So. 326; Griffin Lumber Company v. Neill et al., 240 Ala. 573, 200 So. 415. Thus, the liability or obligation created by a municipal improvement assessment is in rem against the specific property improved, and is not the personal liability or obligation of the owner of such property. It is our conclusion therefore that this municipal assessment for a public improvement was not an obligation or a liability

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within the purview of Section 100 of our Constitution, supra.

The appellant also strongly urges that the lower court erred in its judgment and order because of the provisions of Section 28, Municipal Improvement Act, supra, now Section 538, Title 37, Code of Alabama 1940, which contains the following provision:

"The governing body shall have no power to reduce or abate an assessment made for public improvements after such assessments shall have been made final, etc."

This contention necessitates a determination as to whether the "interest" sought to be abated constitutes a part of the assessment, for only the reduction of "interest" on the assessment and not the assessment is here involved.

As stated by the Supreme Court of Oregon, the power to assess is embraced in, and in its exercise, is a manifestation of the power of taxation. The assessment is a forced charge imposed upon property by the sovereign power and its validity does not depend on any theory of contract. See Colby v. City of Medford, 850, 485, 167 P. 487.

While it is well established that interest on a contractual obligation is a part of such obligation, it is also almost as equally well established that where an obligation grows out of the exercise of sovereign power, and is against property only, then what may be denominated as interest is actually a penalty imposed for non compliance, and as such is not a part of the obligation. State v. Hetsman (Montana) 44 P. 2d. 747; Liversay v. DeArmand, 131 Or. 563, 284 P. 166; First Total C. M. v. Superior Court, 93 Wash. 433, 161 P. 77; Biles v. Robey (Ariz.) 30 P. 2d 841; Islais Co. v. Matheson, (Cal. App.) 35 P. 2d 1051; Jones v. Williams, 121 Tex. 94, 45 S. W. 2d 130; State v. Koeln, 332 Mo. 1229, 61 S. W. 2d 750; Griev v. National Bank of Kentucky's Receiver, 252 Ky. 753, 68 S. W. 2d 21.

Specifically, as to the nature of interest on improvement assessments, several courts have determined that such charge, when imposed in connection with a public improvement assessment

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is a penalty, and as such might be reduced without violating provisions of their respective Constitutions identical or similar to Section 100 of our Constitution. . See Colby v. City of Medford, supra; Whitehead v. Meekly, (Okla.) 163 P. 124; City of St. Joseph to use of Swenson v. Forsee, (Mo.) 91 S. W. 445.

The above principles in our opinion lead to the conclusion that that portion of Section 538, Title 37, Code of Alabama 1940, prohibiting the governing body of a municipality from reducing or abating public improvement assessment after same has been made final in no way precludes the reduction of the interest on such assessments, since such payment, though denominated "interest," is essentially a penalty, and no part of the assessment.

Having concluded that the ordinance here involved is valid, it follows on basic legal principles too well settled to require citation that the action of the respondent, as town clerk, in refusing to accept the amount tendered by the petitioner was without legal excuse. The action of the court below in the premises was therefore correct, and this cause is due to be affirmed. It is so ordered.

AFFIRMED.

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE COURT OF APPEALS OF ALABAMA.

1st Div., No. 565

Mary F. Smith, as Clerk etc Appellant

v.

H. M. Hall Appellee

From Baldwin Circuit Court

The State of Alabama,
City and County of Montgomery. }

I, Charles Bricken, Jr., Clerk of the Court of Appeals of Alabama, do hereby certify that the foregoing pages-numbered from one to five inclusive, contain a full, true and correct copy of the opinion of said Court of Appeals in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, Charles Bricken, Jr., Clerk of the Court
of Appeals of Alabama, at the Capitol, this the

6 day of April, 1908

Charles Bricken, Jr.
Clerk of the Court of Appeals of Alabama.

THE COURT OF APPEALS OF ALABAMA

1st Div., No. 565

Mary F. Smith,
as Clerk, etc.
Appellant

vs.

H. M. Hall
Appellee

From Baldwin Circuit Court.

COPY OF OPINION

BROWN PRINTING CO., MONTGOMERY 1946

Filed

4-7-48

Alice J. Smith
Clerk

Refiled 7-6-48

Alice J. Smith
Clerk

H. M. HALL,
PETITIONER,

VS

MARY SMITH, AS CLERK OF
THE TOWN OF BAY MINETTE,
ALABAMA,
DEFENDANT.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA,

AT LAW.

Upon the filing of the petition in this cause, the Defendant appeared, by attorney, and waived the issuance of the alternative writ as prayed for, and demurred to the petition. The court overruled Defendant's demurrers. The Defendant filed an answer, to which the Petitioner demurred. The court sustained the demurrers. The Defendant filed an amended answer, to which the Petitioner demurred. The court sustained the demurrers. The Defendant declined to plead further.

The issue raised by the petition in this cause and the demurrers thereto, the answer and the amended answer of the Defendant and the demurrers thereto, is whether or not ordinance 439 is violative of Section 100 of the Constitution.

Ordinance 49 adopted July 2, 1929, and ordinances and resolutions supplemental thereto, levied a street improvement assessment against the property described in the petition, and fixed the rate of interest thereon at six per-cent. The town was, and is, the owner of said assessment and has no obligations out against the same. No part of such assessment principal or interest has been paid; The property is worth more than the assessment principal and interest. Ordinance 439, adopted August 5, 1941, reduces the interest rate from six per-cent per annum to three per-cent for the first year after July 2, 1929, and to two per-cent thereafter, to September 22, 1941. On September 15, 1941, within the time provided in ordinance number 439, the Petitioner tendered the amount of the assessment and interest as provided in the ordinance. The Defendant, the clerk of the Town of Bay Minette, being the person designated to collect such assess-

ments refused to receive such monies. Thereupon, on September 19, 1941, the Petitioner filed his petition in this cause as a friendly test suit. The Defendant's refusal to accept such tendered monies was based upon the contention that ordinance 439 is violative of Section 100 of the Constitution, which in substance provides that no obligation or liability of any person to a municipality shall ever be remitted, released, or postponed or diminished by the legislature, nor extinguished except by payment thereof.

The Defendant's contention is that the principal of the street improvement assessment, and the interest thereon, is an obligation or liability, within the meaning of this section of the Constitution.

This Court is of the opinion and so holds:

1. That a street improvement assessment is not an obligation or liability within the meaning of Section 100 of the Constitution.
2. That, if it were an obligation or liability within the meaning of Section 100, interest thereon is not a part of the obligation or liability but is a penalty from which relief may be given by way of reduction or remission.

It is therefore the opinion of the court, and it so holds, that ordinance 439 does not violate Section 100 of the Constitution, but is valid. And it follows therefrom that the Defendant wrongfully refused to accept the monies tendered under said ordinance.

It is therefore ordered, adjudged and decreed that a writ of mandamus issued to the Defendant, Mary Smith, as clerk of the Town of Bay Minette, Alabama, the person designated to collect and receipt for street improvement assessments under ordinance Number 49 and ordinances and resolutions supplemented thereto and ordinances Number 439 of the Town of Bay Minette, Alabama, commanding her that she immediately receive and accept the monies tendered her by the Petitioner in payment of the street improvement assessment on Lot Three (3)

and Four (4) of the Nihart and Stapleton Subdivision of a part of
~~Block 105 of Hand Land Company's Addition to the Town of Bay Minette,~~
Alabama, and to receipt for the same so tendered to her by the said
H. M. Hall, and that she issue to him a release and discharge of the
lien of the street improvement assessment of the Town of Bay Minette
against the said property under said ordinances.

Done this 5th day of February, 1947.

J. M. Hare
Judge.

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Filed
2-5-47
Alice J. Clark
clerk

W. C. BEEBE

LAWYER

DAY MINETTE ALABAMA