D. G. HART
ATTORNEY AT LAW
SARTIN BUILDING
WEWOKA, OKLAHOMA
PHONE 8

Sept 16, 1937

Judge C. Guy Cutlip
Seminole, Oklahoma

Dear Sir: In Re: Harlow Publishing Co. vs T. H. Lester, defendant, D. G. Hart, Administrator, Intervenor.

Find herewith enclosed brief on the part of the intervenor on the three questions, in accordance with the request of the court.

My time within which to present this has expired. The court's illness has prevented me from presenting a request for extension.

Very truly yours,

D. G. Hart

DGH:mh
Enc.

D. G. HART
ATTORNEY AT LAW
SARTIN BUILDING
WEWOKA, OKLAHOMA

Judge C. Guy Cutlip
Seminole, Oklahoma

STATE OF OKLAHOMA,
COUNTY OF SEMINOLE. IN THE DISTRICT COURT THEREOF.

Harlow Publishing Company, a Corporation, Plaintiff,

vs

T. H. Lester, Defendant, Case No. 1270.

and

D. G. Hart, Administrator with will annexed of the Estate of J. E. Lester, Deceased, Intervenor.

BRIEF OF INTERVENOR, D. G. HART, ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF J. E. LESTER, DECEASED

At the close of the trial of this case the court permitted the intervenor to brief certain questions as follows:

1. Right of administrator to intervene.
2. Whether or not the witness is estopped to say that the subject matter was a give to him by decedent.
3. Competency of witnesses.

STATMENT OF CASE

The subject matter of this action is books which were a part of the library of the late J. E. Lester, a member of the bar of Seminole County, Oklahoma. T. H. Lester mortgaged a portion of the library to the plaintiff, Harlow Publishing Company, and the debt being due and unpaid, the publishing company replevined the books in the jusice court and a judgment was rendered against T. H. Lester and in favor of the plaintiff for the possession of the books. Some time after the rendition of that judgment but before sale of the books, M. H. Mills, being then administrator with will annexed of the estate of J. E. Lester, deceased, went into that justice court, asked permission to intervene, and upon obtaining such permission claimed the books as a portion of the estate and upon a trial being had, the possession of the books was awarded to the administrator. The plaintiff has appealed to this court from that order.

The defendant, T. H. Lester, was appointed executor of his father's last will and testament several years prior to the events above mentioned. Under the will the library was given to the son. He listed the library as a portion of the estate and so far as the administration of the estate is concerned, he has treated the books as belonging to his father's estate.

In the trial of this case in this court, the plaintiff and defendant took the position that J. E. Lester in his lifetime gave these books to the defendant, T. H. Lester.

BRIEF

Intervention By Administrator.

Did the administrator of the estate of J. E. Lester have a right to intervene in the justice court after judgment for possession of the books had been given to the plaintiff? The general rule is that when a judgment is rendered and the aggrieved party does not appeal from it within the statutory time, the judgment is final as to the parties, and the court is without jurisdiction, except it retains control of it's own judgments,---to vacate or to modify in proper cases, or to give force and effect to them. But the order of possession in replevin of chattels is not a final order or judgment in the strict sense, for a sale of the property, the assessment of costs, and the order for the payment of the proceeds from the sale are yet to be made. Our supreme court and the Kansas Supreme Court, from which we take our statute, have both passed on the question. In the case of White vs McGee, 149 Okla. 65, 299 P. 222, our court said:

> "Any person may be permitted to intervene in an action where they have or claim an interest in the controversy, and where their substantial rights are in litigation."

And in case of Sizemore vs Dill, 93 Okla. 176, 220 P. 362, it said:

> "A district court, acting upon principles of manifest justice, may, in cases not provided for by the Code of Civil Procedure, permit one not a party to the suit to intervene, either before or after judgment, for the protection or advancement of some right, with reference to the subject-matter, of the litigation which he holds."

Our court again in Green Construction Company vs Oklahoma County, 174 Okla. 290, 50 P. (2nd) 625, quoted the above decisions with approval. In Sizemore vs Dill supra our court quoted the Supreme Court of Kansas in case of Gibson vs Farrell 94 P. 783, as follows:

> "A district court acting upon principles of manifest justice, may, in cases not provided for by the court of civil proceedure, permit one not a party to the suit to intervene either before or after judgment for the protection or advancement of some right with reference to the subject-matter of the litigation which he holds."

And further quoting from the same Kansas decision,

> "The application to intervene falls within no provision of the Code of Civil Proceedure, but notwithstanding this fact, a district court acting upon principles of manifest justice may, in cases not covered by the Code, permit one not a party to the suit to intervene either before or after judgment for the protection of advancement of some right with reference to the subject-matter of the litigation which he holds."

We have a statutory provision as shown by Sec. 158 Okla. Statutes 1931 and is as follows:

> "When in any action for the recovery of real or personal property any person having an interest in the property applies to be made a party the court may order it to be done."

The court may on his own motion, under the authority of Sec. 157 of our statutes, bring in necessary parties. This section is as follows:

> "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in."

Section 162 O.S. 1931 reads as follows:

> "Any person claiming property, money, effects or credits attached, may interplead in the cause, verifying the same by affidavit, made by himself, agent or attorney, and issues may be made upon such interpleader and shall be tried as like issues between plaintiff and defendant, and without any unnecessary delay."

There is no specific provision found in our justice court proceedure with regard to proceedure under pleas of intervention, but we have a statute which makes the general rules of proceedure applicable in the justice court where no special statute is found. It is Sec. 845 O.S. 1931 and reads as follows:

> "The provisions of the chapter on civil procedure, which are, in their nature, applicable to the jurisdiction and proceedings before justices, and in respect to which no special provision is made by statute, are applicable to proceedings before justices of the peace."

Under section 845 of our statute as above quoted, the justice court could, without doubt allow an intervention in a replevin case until after the replevin property awarded to the plaintiff has been sold, the costs taxed, and the proceeds distributed to those entitled to the same. It is a general rule of the court to avoid a multiplicity of suits. Had the intervention not been allowed, the administrator could have brought another replevin action in the same court. Allowing the intervenor to come in and set up his claims to the property avoided the necessity of filing another suit, saved time and was of less annoyance to this plaintiff than a new suit. Under any theory of the case, by reason of these authorities and these statutes the justice court had the right to permit the intervenor to come into this case and to set up the rights of the estate of J. E. Lester to these books.

GIFT--ESTOPPAL

In this case the plaintiff and the defendant both offered testimony to the effect that J. E. Lester in his lifetime gave the books which are the subject matter of this action to T. H. Lester. T. H. Lester in his petition for the appointment of himself as the executor of his father's will, listed the library as a part of the assets of the estate and under oath verified the petition to be true. He filed his petition in court. It has not been withdrawn, but he through several years as executor of the will administered upon the estate with these books listed as a part of the assets. J. Henry Weston was County Judge during four years of the time and received said petition, acted upon it, made the appointment of executor, and as such official supervised the administration of this estate. Now they come into court in the face of these judicial admissions and claim these books

were a gift to the defendant, T. H. Lester, made to him by J. E. Lester before his death. They are not allowed under the law to take this inconsistent position. The defendant, T. H. Lester, is estopped by his verified petition in said probate matter. He has made a judicial admission that these books belonged to the estate and he is bound by the admission, and his admission binds his mortgagee.

21 C.J. Page 1063, Sec. 20.

"Estoppal by record is the preclusion to deny the truth of a matter set forth in a record, whether judicial or legislative, and also to deny the facts adjudicated by a court of competent jurisdiction."

In Sec. 23 of the same, we find that pleadings and other judicial admissions do not constitute technical estoppal by record against the party making them,

"Nevertheless, in some cases ~~some cases~~ so called estoppal by record has been invoked with respect to material allegations or recitals in pleadings, but an examination of these authorities will usually disclose the presence of facts or circumstances to which the pleader might have been estopped or concluded other than by technical estoppal by record, as where his admissions, allegations, or recitals were inconsistent with the position he sought subsequently to assume, to the detriment or prejudice of one who properly had a right to rely upon such admissions or statments."

The position now taken by the defendant is inconsistent with his former position when he said these books were a part of the estate; and the administrator and the creditors of the Lester estate have a right to rely, and have relied on the truth of such admission and statement.

22 C.J. 329, Sec. 370.

" A judicial admission may be made in any judicial proceeding, including proceedings in probate courts and in bankruptcy. So far as the competency in evidence is concerned, the admission may be made either in the case in which it is sought to be used or in some other action...."

22 C.J. Page 330, Sec. 371.

"A judicial admission may be oral.....or it may be in writing as in pleadings or stipulations, ~~a report or inventory submitted by an executor~~ or administrator, the approval of an estate, statement submitted by a guardian....."

This estoppal likewise applies to the plaintiff as well as to the defendant. The plaintiff is the mortgagee of the defendant and had constructive notice, even actual notice, of the pendency of this administration on the Lester estate and must take notice of the things recited in the record. The rule of estoppal not only works against T. H. Lester, but against his privies. Globe and Rutgers Fire Insurance Company vs Creekmore, et al, 69 Okla. 238, 171 P. 874.

Our supreme court in the case of Hutson vs McConnell 139 Okla. 240, 281 P. 760, held:

"In a suit by an heir against the former administratrix to recover her distributive share in

said estate, as fixed by the final decree and order of distribution of the probate court, the defendant, in the absence of fraud or mistake, is estopped from defending on the grounds that she is the owner of all said property and that the deceased was merely holding the same in trust for the defendant, where it appears that such defendant made no such claim in the probate court, but as administratrix of said estate repeatedly filed pleadings, including her petition for final distribution of said estate, wherein all such property was described and referred to as belonging to the deceased."

The same doctrine is announced in the case of Smith vs French, Ex'x 170 Okla. 392,

Error

"Under section 588, Comp. Okla. Stats. 1921, no party is allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the representative of such deceased person."

COMPETENCY OF WITNESSES

Can a party to this suit testify in his own behalf concerning communications and transactions with J. E. Lester, since deceased, when his administrator is the adverse party?

Oklahoma Statute Sec. 271 reads as follows:

"No party to a civil action shall be allowed to testify in his own behalf, in respect to any transaction or communication had personally by **such party with a deceased person, when the adverse party is the executor, administrator----** of such deceased party....."

There is an unbroken line of decisions of our court and of Kansas and other states holding that a party to the action, under such conditions, could not testify. The rule is well nigh universal. There is not a single exception to the rule found. It applies to corporations litigants and would-be-witnesses as well as to natural persons.

From the multitude of decisions are the following:

Oklahoma National Bank vs Keller 124 Okla. 280
253 P. 34.

"Where one of the parties to an action is the administrator of the estate of a deceased person, the adverse party may not testify in his own behalf as to any transaction or communication had personally with such deceased person, and where **there are two adverse parties affected by the same** transaction or communication, both are disqualified under the provisions of section 588, Comp. Stat. 1921."

Leonard vs Prentice 171 Okla. 522, 43P. (2nd) 776.

"Where, after the execution of an antenuptial contract, the parties are married and live together for 13 years before the death of the husband, and during such time the husband made a will with the approval of the wife, making the antenuptial contract a part thereof and making other provisions for her at her request and the wife made certain property settlements with the husband growing out of divorce actions filed by him in which settlements the antenuptial contract was given consideration, the wife may not after the death of the husband successfully attack the antenuptial contract as against the personal

representatives of the husband."

Smith vs French 170 Okla 392, 40 P.(2nd) 1038.

"Under section 588, Comp. Okla. Stats. 1921, no party is allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the representative of such deceased person."

It was brought out in the trial of this case that the witness, J. Henry Weston, was a joint party with T. H. Lester to the same alleged transaction and participated with him in the same alleged communication with J. E. Lester, since deceased, and that he, Weston, has a part of the library and that there is now pending a replevin action against him, brought by this administrator, to recover the books held by him. The wrongful taking of the library belonging to this estate was their joint act and was possessed by them jointly for a time, and, if this case had been brought at one time by the administrator, they might have been both defendants in the one suit. Now it is evident that they are "swapping" testimony and that Weston will testify for T. H. Lester in this case and Lester will testify for Weston when his case comes on for trial. This is an attempt to evade the statute. To allow J. Henry Weston to testify is a violation of the statute. Under these authorities no testimony of either the plaintiff or defendant is competent, nor are either of the witnesses competent under the statute to testify. When the prior actions, representations and conduct of the administration of the estate by T. H. Lester, as executor, and J. Henry Weston as county judge, are considered, the court will find no credible testimony supporting the plaintiff or the defendant.

We earnestly contend that the judgment of this court should be for the administrator.

Respectfully submitted,

D. Y. Clark

Adm. with will annexed to the estate of J. E. Lester, Dec.

PAUL D. BUSBY
ATTORNEY AT LAW
217 NORTH HARVEY
OKLAHOMA CITY, OKLA.

September 28, 1937

Hon. C. Guy Cutlip, Judge.
Superior Court
Seminole, Oklahoma

Re: Harlow vs. Lester et al.
Number 1270

Dear Judge:

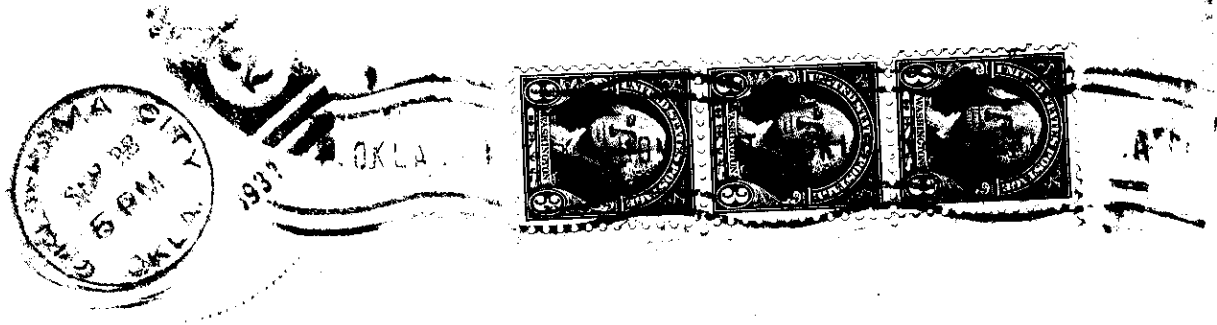
Herewith brief of plaintiff in answer to the intervenor's brief heretofore filed by Mr. D. G. Hart of Wewoka. I may have taken a few more days than the ten allotted, however, as Mr. Hart took some two months or more, I do not think he will complain.

Will you please advise me when you reach a decision in the matter?

Yours very truly,

PDB:ds

PAUL D. BUSBY
ATTORNEY AT LAW
217 North Harvey
OKLAHOMA CITY, OKLA.



Hon. C. Guy Cutlip, Judge

Superior Court

Seminole, Oklahoma

STATE OF OKLAHOMA
ss
COUNTY OF SEMINOLE

IN THE SUPERIOR COURT

HARLOW PUBLISHING COMPANY,
A Corporation,
PLAINTIFF

vs

CASE NO. 1270

T. H. LESTER,
DEFENDANT

and

D. G. HART, Administrator
with will annexed of the
Estate of J. E. Lester, Deceased.
INTERVENOR

BRIEF OF PLAINTIFF

The statement of the case, as set forth in the brief of the intervenor, is substantially correct, however, there are certain facts and some evidence that we desire to especially call the attention of the court, and will do so under the appropriate heads.

I. RIGHT OF ADMINISTRATOR TO INTERVENE

The sole question under this title is the right of one to intervene in a justice court after judgment. In this particular instance, judgment was entered in the justice court against T. H. Lester on November 28, 1934, and the application of the then administrator of the estate of J. E. Lester, deceased, M. H. Mill, to intervene, was not filed until March 30, 1936, some sixteen months after the rendition of the judgment.

We first desire to make a point that a justice of the peace and his court is purely a creature of statute; that perhaps in this jurisdiction, it is better to say that the justice of the peace is a creature of the constitution, the constitution having provided for the justice of the peace court,

and it follows that a justice of the peace has only such jurisdiction as is specifically conferred upon the court by the constitution or statute vitalizing the constitutional provision. In other words, it is a well-settled rule of law that one must be able to point to some statute giving the justice of the peace the right to do what it is contended he has the right to do. An early case reviews the origin and jurisdiction of a justice of the peace, which case is and has been followed consistently by our court.

The case above mentioned is Jeffries et al. v. Newblock, 56 Okla. 320, 155 Pac. 1150, and the rule is laid down in the first syllabus as follows:

> "A justice of the peace court is one of limited jurisdiction, and the authority to be exercised by the justice is derived from the statute."

In the opinion by Commissioner Hooker, he quotes extensively from Cyc. on the origin and powers of the justice of the peace, and on page 321 says that:

> "This appeal involves the powers of the justice of the peace. 24 Cyc. p. 403, is to the effect that:
>
> "The office of a justice of the peace is one of great antiquity, and the jurisdiction of justices of the peace has varied from time to time depending either upon the terms of their commission or particular statutes. Justices of the peace were originally mere conservators of the peace, exercising no judicial function. It is said that by the Statute of Edw. III, which is the first statute that ordains the assignment of justices of the peace by the King's commission, they had no other power but only to keep the peace.
>
> But gradually their powers were enlarged, and they came to constitute a very important agency in the administration of local government in England. They were invested with judicial powers for the first time, it seems, by the Statute of 34 Edw. III, c. 1."
>
> The same author (page 416) lays down the rule that:
>
> "The powers of a justice of the peace are statutory, and cannot be extended by construction." Cassidy v. Brooklyn, 60 Barv. (N.Y.) 105, affirmed in 47 N.Y. 659; Brownfield v. Thompson, 96 Mo. App. 340, 70 S.W. 378; Searl v. Shanks, 9 N.C. 204, 82 N.W. 734.
>
> And on page 417 it is said:

"The judicial functions and duties of justices of the peace are confined and limited by statute, and the powers thereby conferred must be strictly construed."

The same author at page 440 says:

"The civil jurisdiction of justices of the peace is purely of statutory origin, and the statutes conferring jurisdiction will not be aided or extended by inference or implication beyond their express terms."

* * * * * * * * * * * * *

Likewise on page 604 the rule is laid down as follows:

"Except where authority is conferred on justices of the peace to grant new trials, the weight of authority is to the effect that they have no power to change or in any manner interfere with judgments which they have rendered."

* * * * * * * * * * * * * *

From the foregoing authority it must be apparent that the jurisdiction of a justice of the peace is purely statutory, and that the powers which he may exercise are conferred by statute, and to determine whether or not a justice of the peace has authority to do a particular thing it is a settled rule of law that one must be able to point to some statute giving him the right to do what it is contended he has the right to do.

The intervenor cites and quotes from a number of Oklahoma cases to sustain his position that the justice of the peace may permit one to intervene at any stage of the proceeding. He also quotes a statute. We have no quarrel with the statute or the authorities cited by the intervenor, but say that the statute and authorities cited do not apply.

Section 158 O.S. 31, being the statute under which the intervenor seeks to sustain his position, was adopted from Kansas in 1893, and having been adopted from Kansas, the construction placed upon it by the Kansas court prior to its adoption is binding upon our courts. The first case under the Kansas statute which we have been able to find is Gibson v. Ferrell, 94 Pac. 783, which case has been followed and approved by both the Supreme Court of Kansas and the Oklahoma Supreme Court. In fact, the Supreme Court of Oklahoma in Sizemore et al. v. Dill, 93 Okla. 176, adopted the syllabus and a great part of the opinion in the case of Gibson v. Ferrell, supra, and that the

court may have the syllabus and opinion before it, we quote it.

> "A district court, acting upon principles of manifest justice, may, in cases not provided by the Code of Civil Procedure, permit one not a party to the suit to intervene either before or after judgment for the protection or advancement of some right with reference to the subject matter of the litigation which he holds."

And in the body of the opinion we find this language:

> "The application to intervene falls within no provision of the Code of Civil Procedure, but notwithstanding this fact, a district court acting upon principles of manifest justice may, in cases not covered by the Code, permit one not a party to the suit to intervene either before or after judgment for the protection or advancement of some right with reference to the subject-matter of the litigation which he holds. In all cases lying without the purview of the statutes the application for leave to intervene must necessarily be addressed to the sound discretion of the court. The applicant must show himself to be in a situation which appeals to the conscience of the court. He should at least disclose, and if required to do so, should satisfy the court that he has substantial right to be conserved by the intervention; that a remedy may be afforded him in the pending proceeding consistent with its objects and purpose; that the intervention will not unduly interrupt or retard the orderly conduct of the proceeding or results in the frustration of what has already been properly and regularly accomplished by the suit; and especially that the applicant appears with clean hands, and has been active in seeking the aid of the court. The preliminary motion or petition need not exhibit the applicant's claim and the relief to which he deems himself entitled with the fullness and accuracy demanded in a pleading; but unless excused by the court, it ought to be verified, and merit, good faith and diligence must always clearly appear."

It will be noted that the court distinctly and positively says that the right, or perhaps better to say the privilege of intervention is based not on the statute, but upon principles of manifest justice, equity. In fact, in the body of the opinion the court says in no uncertain terms that there is no provision of the statute authorizing intervention after judgment. In all the cases cited by the intervenor, and cases that we have been able to find, the decision has been based upon the case of Gibson v. Ferrell, and never has any court sought to change or modify the law announced therein in any particular,

and we therefore conclude that the law as above announced is now the rule in this jurisdiction.

We do not think there is any controversy or that the intervenor will contend that a justice of the peace has any equity jurisdiction, and these cases following Gibson v. Ferrell, supra, are all cases arising in the district court, and there can be no question as to the equitable powers of a district court.

From the authorities above cited and quoted, we conclude that before the intervenor can prevail, he must point to some statute giving a justice of the peace the right and power to assume jurisdiction on intervention after judgment. While it is true that Section 845 O.S. 1931 extends the provisions of the chapter on civil procedure, which are in their nature applicable to the jurisdiction and procedure before justice, yet we do not think it can be successfully contended that this section of the statute confers upon the justice court equity jurisdiction. And the intervenor having failed to point any statute giving the justice of the peace the jurisdiction he contends for, must fail on this proposition.

II. WHETHER OR NOT THE WITNESS IS ESTOPPED TO SAY THAT THE SUBJECT MATTER WAS A GIFT TO HIM BY DECEASED

The court will recall that at the trial held on June 18, 1937, T. H. Lester, on behalf of the plaintiff, testified that the subject matter of this action was a gift to him from his father, made during his father's lifetime; that the witness J. Henry Weston testified that the gift was made in his presence by J. E. Lester, deceased, to the said T. H. Lester, and that the said T. H. Lester immediately assumed possession and control of the books and continued to exercise absolute control of the said books; and that the witness J. C. Harlow testified that the said J. E. Lester, deceased, told him shortly after the date of the gift, of the gift by him to T. H. Lester. The

court will also further recall that the intervenor did not introduce any evidence denying or controverting the testimony of these witnesses.

The intervenor, in an effort to controvert or deny the testimony of the witness, introduced certified copy of the petition for letters of administration in the estate of J. E. Lester, deceased, which said petition was filed by the said T. H. Lester, and the said petition listed as assets of the estate the library of the said J. E. Lester, deceased, and as we gather it, it is the contention of the intervenor that the filing of this petition for letters of administration estops the said T. H. Lester from claiming the ownership of the books involved in this controversy.

We desire to particularly call the attention of the court to the fact that while T. H. Lester was appointed as administrator of the estate of J. E. Lester, deceased, he never functioned as such. The record, as introduced by the intervenor, shows that about all the work performed by T. H. Lester as administrator was the filing of petition of letters of appointment, and that particularly we desire to call to the court's attention the fact that the said T. H. Lester did not file an inventory of the estate in the probate court; in other words, that the proceedings instituted by T. H. Lester in the probate court were never completed by T. H. Lester, and that so far as we are informed and have been able to find from the record, no final orders have yet been entered in the probate case.

It is the contention of the plaintiff that where a litigant in another suit assumes a position different from the one assumed on trial, either by his pleadings or in any other manner, that such contradictory position may be considered as evidence against him, but not conclusive, nor will it work an estoppel. In the early case of C.R.I. & P. Railway Co. v. Mashore, 21 Okla. 275, 96 Pac. 630, the Supreme Court, in a very exhaustive opinion, passed directly on this question and states the rule in the syllabus as follows:

Evidence - Pleading in Prior Suit - Estoppel - Quasi Admissions - No Estoppel. In the trial of a case brought for work and labor, it developed that plaintiff had brought a prior action, in which he charged another party, as defendant, for the same services, which action was not tried, and no judgment rendered therein. In the case on trial, defendant asked an instruction to the effect that this former action worked an estoppel to plaintiff's prosecution of his case against it, which was denied by the court. Held not error. The bill of particulars in such former suit, being a quasi admission, was competent as evidence, but did not constitute an estoppel.

And in the body of the opinion by Dunn, J., after quoting from Wigmore on evidence, page 277, he continues quoting from Section 1065.

"The moment we leave the sphere of the same cause, we leave behind all questions of judicial admissions. A judicial admission is a waiver of proof; and a pleading is, for the purpose of the very cause itself, a defining of the lines of controversy and a waiver of proof on all matters outside these lines of dispute. But this effect ceases with that litigation itself; and when we arrive at other litigation, and seek to resort to the parties' statements as embodied in the pleadings of prior litigations, we resort to them merely as quasi admissions - i. e., ordinary statements - which now appear to tell against the party who them made them."

And he concluded section 1066 with the statement "that the pleadings in the prior cause, then, can be treated as evidence in later causes must be conceded." And this is the extent to which this author gives credit to this class and character of evidence.

An inspection of the adjudications of the court, however, discovers they are not entirely in harmony on the proposition, some of the earlier ones holding an estoppel may be worked by taking an inconsistent position in a prior suit; but we believe the better rule sustains the text of the author which we have cited. A few of the cases which we have examined, and which hold in consonance therewith, are as follows: Rich v. City of Minneapolis, 40 Minn. 82, 41 N.W. 455; Pope v. Allis, 115 U.S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393; Gardner v. Bean, 124 Mass. 347; Hunter v. Hunter of Milan, 111 Cal. 261, 43 Pac. 756, 31 L.R.A. 411, 52 Am. St. Rep. 180; Thrall v. Thrall, 60 Wis. 503, 19 N.W. 353; Coward v. Clanton, 79 Cal. 23, 21 Pac. 359; Consolidated Steel & Wire Co. v. Burnham, Hanna, Munger & Co., 8 Okla. 514, 58 Pac. 654; 8 Enc. Pleading & Practice, pp. 20-22, and cases cited.

Mr. Wharton, in his work on Criminal Evidence, declares the rule on this subject to be as follows:

"The pleadings of a party in one suit may be used in evidence against him in another, not as estoppel, but as proof, open to rebuttal and

explanation, that he admitted certain facts."

The case of Thrall v. Thrall, from the Supreme Court of Wisconsin, supra, was one wherein a son, working in New York, was induced, by his mother, to return to their 80-acre farm in Wisconsin, and provide for and work the farm during her and his father's actual life, and thereafter the farm should be his. On the death of his parents he filed a verified claim against the estate for his services and the support of his parents. This was done on the advice of counsel, but it was not paid, and no action was taken on it. Later, being in possession of the place, an action of ejectment being brought against him by the other heirs, he set up his contract, and asked for a specific performance. It was contended in that suit that he was estopped, by his former inconsistent action, from showing that he was the owner of the farm under the contract in question. The court, through Chief Justice Cole, says:

"We are utterly unable to perceive any grounds for estoppel resulting from that proceeding. The defendant testified that he was induced to commence the proceedings in the probate court by advice of counsel, who told him he could not hold the farm under his contract. This legal advice he acted upon, or allowed by the probate court, and, of course has never been paid. It seems to us too plain for discussion that no principle of estopple can be predicted on the probate proceeding."

The syllabus in the case reads:

"Where a son, under advice of counsel, puts in a claim for services in probate court against his mother's estate, but that claim is neither acted upon nor paid, held that he is not estopped from showing that such claim arose upon contract, and from asking that the contract be specifically performed."

In the case of Rich v. City of Minneapolis, supra, the court in the syllabus said:

"An admission, by a party in his pleading in an action, is evidence tending to prove the same fact in another suit between the same parties, but it is not conclusive."

* * * * * * * * * * * * * * *

The fact that the litigant in another suit assumes a position different from one assumed on trial, either by his pleadings or in any other manner, will be considered as evidence against him, but not conclusive, nor will it work an estoppel. In the case at bar the plaintiff filed his bill of particulars. This was sworn to, and in it he charged that Bitsche was his debtor. This case was not tried, and did not go to judgment, and this statement as a bill of particulars was no other or different than it would have been had it been in any other form equally as solemn. It was evidence against him, and exceedingly strong evidence, but it was not conclusive.

The rule announced in the above quotation has been

followed consistently by our court. We have been unable to find any case which modifies or in any manner limits the rule as announced therein. In the case of Eldridge v. Eldridge, 108 Okla. 93, the identical question here involved was passed upon again. The court adhering to the rule announced in the above quoted case, cited it as an authority.

When the rule as above announced, is applied to the facts in the instant case, it is apparent that the filing of the petition for letters of administration amounts to a quasi admission. And the said T. H. Lester is not concluded thereby.

While we do not in any way concede or agree that T. H. Lester is estopped from claiming ownership of the books involved herein by the filing of petition for letters of administration, we earnestly contend that there is other evidence, the testimony of J. Henry Weston and J. C. Harlow, is ample and sufficient to prove the gift by J. E. Lester, deceased, to T. H. Lester.

Inasmuch as the intervenor did not question the validity of the gift either on the trial or in his brief, we have prepared this brief with the assumption that the gift was valid in all respects, and that the question of estoppel is the only one involved.

III. COMPETENCY OF WITNESSES

The competency of the witnesses or testimony is determined by Section 271 O.S. 1931, which we quote in its entirety.

> No party to a civil action shall be allowed to testify in his own behalf, in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner or assignee of such deceased person where such party has acquired title to the cause of action immediately from such deceased person; nor shall the assignor of a thing in action be allowed to testify in behalf of such party concerning any transaction or communication had personally by such assignor with a deceased person in any such case; nor shall such party or assignor be competent to

> testify to any transaction had personally by such party or assignor with a deceased partner or joint contractor in the absence of his surviving partner or joint contractor, when such surviving partner or joint contractor is an adverse party. If the testimony of a party to the action or proceeding has been taken, and he afterwards die, and the testimony so taken shall be used after his death, in behalf executors, administrators, heirs at law, next of kin, assignee, surviving partner or joint contractor, the other party, or the assignor, shall be competent to testify as to any and all matters to which the testimony so taken relates.

In the statute, the first phrase thereof states, "No party to a civil action shall be allowed to testify in his own behalf ***." The witnesses against whom the intervenor seeks to invoke the statute are not parties to this controversy. True, T. H. Lester originally was a party, but at this late date the case, insofar as any interest T. H. Lester may have, is closed. A final judgment had been rendered. And further, T. H. Lester, as a witness, did not testify in his own behalf, but in behalf of the plaintiff herein. He was not a party to the controversy, he did not testify in his own behalf, nor do the other provisions of the statute apply to his testimony.

The witness, J. Henry Weston, is not a party to this controversy; he has no interest in it; the outcome of it cannot in any way affect him; and he did not testify in his own behalf. The statute does not apply to this witness.

The third and last witness testifying of the gift was J. C. Harlow. J. C. Harlow was not a party to the action, was not testifying in his own behalf. True, J. C. Harlow is and was at all times an officer of the plaintiff, and as such officer, an agent, and being such officer and agent of the company does not make him a party to the suit, nor testifying as an agent place him in the position testifying in his own behalf. Our Supreme Court from the earliest date has held that a conversation had with a deceased person by an agent of a party where the agent was not an interested party is admissable. First National Bank v. Davidson-Case Lumber Co., 52 Okla. 695, 53 Pac 836.

In conclusion, we respectfully submit that the justice of the peace had no power, or right, or authority, or jurisdiction to permit the administrator to intervene herein, and this being an appeal from the action of the justice of the peace, this court has no jurisdiction, power, or authority to entertain the intervening petition of the administrator, and that, therefore, the judgment of the justice of the peace should be reversed, and judgment entered for the plaintiff herein. We further respectfully submit that the witness, T. H. Lester, was not estopped from testifying as to the gift from his father by reason of the filing of the petition for letters of administration in the probate court. That at most, the filing of petition for administration amounts to an admission, not conclusive, but one that may be rebutted by competent evidence, and we earnestly contend that such admission was overcome by the evidence adduced on the trial. And we further respectfully submit that Section 271, O.S. 31, is not applicable to the witnesses or the testimony herein involved.

Respectfully submitted,

Attorney for Plaintiff

NO. 1270

IN THE SUPERIOR COURT,

SEMINOLE COUNTY, OKLAHOMA.

HARLOW PUBLISHING CO.,

vs

T. H. LESTER,

D. G. Hart, Adm'r.

BRIEF OF PLAINTIFF.

Paul D. Busby,
217 No. Harvey,
Oklahoma City, Okla.

Attorney for Plaintiff.

D. G. HART
ATTORNEY AT LAW
SARTIN BUILDING
WEWOKA, OKLAHOMA

PHONE 8

September 30, 1937

Judge C. Guy Cutlip
Judge of the Superior Court
Seminole, Oklahoma

Dear Sir: Re Harlow Publishing Co.
vs Lester, D. E. Hart,
Administrator and Intervenor

You are now in possession of my brief and the answer brief of the plaintiff. I wish to reply to the answer brief and enclose the same herewith.

Please consider it in connection with my original brief.

Thanking you I am

Very truly yours,

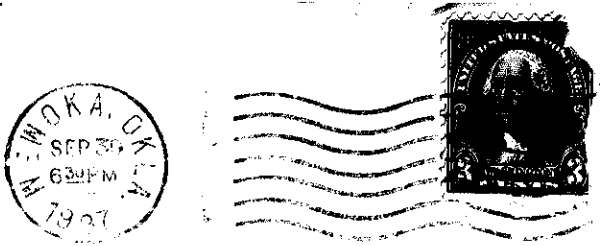
D. G. Hart

DGH/op

enc.

cc to Paul D. Busby

D. G. HART
ATTORNEY AT LAW
SARTIN BUILDING
WEWOKA, OKLAHOMA



Judge C. Guy Cutlip
Judge of the Superior Court
Seminole, Oklahoma

STATE OF OKLAHOMA,

IN THE DISTRICT COURT THEREOF.

COUNTY OF SEMINOLE.

Harlow Publishing Company, a Corporation,		
	Plaintiff,	
vs		
T. H. Lester,		
	Defendant,	Case No. 1270
and		
D. G. Hart, Administrator with will annexed of the Estate of J. E. Lester, Deceased,		
	Intervenor.	

REPLY BRIEF OF INTERVENOR

Plaintiff complains that the judgment in the Justice Court was rendered November 1934 but the application to intervene was not filed till March 30, 1936. The fact remains that the books were not sold, and the court still had jurisdiction to confirm or disaffirm the sale, make disposition of the proceeds of sale and to assess the cost.

Plaintiff points out that the justice court is a court of limited jurisdiction and that one who asserts the justice has the right to do a thing must be able to point to a statute authorizing the justice court to do that thing. That is the law. That the district court may allow such intervention plaintiff concedes and the cases so holding are uniform. We did point out to this court the general statute permitting interventions. And we did point out the justice court statute permitting the justice court to generally follow the proceedure of the district court. See Sections No. 158 and 845 quoted in our original brief. The meaning of the statute is that within the realm of its jurisdiction the justice court can meet out full justice and when the proceedure is not set forth in the statute it can proceed as the district court. The justice court had jurisdiction to hear and determine this kind of case and the amount involved. It had jurisdiction of the parties. Under the authority of Section No. 158 it could allow an intervention. From the case of Sizemoore vs Dill 93 Oklahoma 176, and cases cited therein it will be seen that such statute is not necessary. We see that if the court functions in the field of its jurisdiction, it has an inherant right to exercise that jurisdiction even in the absence of proceedure statutes. From the authorities cited in my original brief, the justice had the right to allow this intervention.

IS DEFENDANT ESTOPPED FROM CLAIMING THE BOOKS AS A GIFT.

Plaintiff states that although defendant Lester was appointed executor of the will of the J. E. Lester estate, he did not function as such. I want to challenge that statement as erroneous. He did function for about five years, under the guiding hand of the county judge, J. Henry Weston, his chief witness.

While it may be conceeded that Lester did not do all that he should have done, nor properly, what he did do, yet he did function as such official and plaintiff cannot be heard to deny it for plaintiff filed a claim against the estate with such executor and made such admission in the trial of this case. Plaintiff says the executor did not file a formal inventory and appraisement of the estate. I think plaintiff goes outside the record to say that. The petition of T. H. Lester for letters testamentary was also an inventory with the value set

opposite each item, and was sworn to by him. These books were listed as belonging to the estate. Now he says they are his own and were given and delivered to him in his father's life time. These positions are inconsistent one with the other. T. H. Lester made a false statement under oath then, or he is swearing falsely now. Under the authorities cited in my brief, the court will not hear him impeach his verified petition and take to himself the estate property. The position of J. Henry Weston, former county judge, is even worse. He now tells you that although he, as the court, directed the administration of this estate for four years, this library listed and accepted as estate property was the individual property of the executor and the county judge. Plaintiff says such actions on their part does not constitute estoppel but are merely admissions which they may explain. It is passing strange that plaintiff did not have them explained. Through about seven years the record has stood against plaintiff and defendant and against Weston. None of them have filed a pleading in this administration to have this property dropped from the list of the assets of the estate, but all face a court of equity and ask this court to take this property from the hands of the county court into whose hands they committed it.

COMPETENCY OF WITNESSES

Plaintiff states that T. H. Lester, the defendant, was called by the plaintiff and that he did not testify in his own behalf, but in behalf of plaintiff's. Just what the relationship between this plaintiff and this defendant is, I do not know, but my suspicions were aroused when defendant tried to pass to plaintiff under a $20.00 mortgage 146 volumes of the Oklahoma Reports costing from $2.50 to $5.00 per volume. Indeed he must have an interest in plaintiff. No wonder is it that plaintiff feels that Lester is its witness. Even though its position in this case cannot be sustained, at least, its gratitude can be commended. T. H. Lester was yet enough a party to this case that he took a militant attitude toward intervenor.

Plaintiff, after admitting that the witness, J. C. Harlow, is a part owner and an active officer in the plaintiff company, says he is not a party to the action and not testifying for himself. The argument of the plaintiff is absurd. The witness, J. C. Harlow, as an officer and stock-holder in the plaintiff company is a part of the corporation and is as interested as one possibly could be. The inanimate corporation cannot be a witness. It must put on its testimony by natural persons. If those persons are stock-holders and owners of the corporation, they are barred by the statute. If they are mere agents and disinterested persons they are competent. Under any other theory, the statute excepts corporations for the rule. Let me ask the court to distinguish between a mere agent of a corporation and a stock-holder in the corporation. When this has been done, it will be seen that none of plaintiff's authorities are in point. Plaintiff indeed called him to the stand, but Lester had his position as mortgagor to sustain. He did not wish to be found mortgaging the other fellows property. At most he was not and did not appear as a disinterested witness.

J. Henry Weston was an incompetent witness. He was a full partner of T. H. Lester in the alleged act of acquiring this library. Their interests attach by virtue of the single alleged gift. They acted in unison. They held the books, as they state, for a time in their joint possession. The conditions were such that they both might have been defendants in one suit. A suit against Weston for part of the books is pending. The suits are such as might be consolidated. Weston is for all intents and purposes testifying for himself and is, under the spirit of the law, an incompetent witness.

To allow Weston to testify for Lester and Lester to testify for Weston, is to allow a swap of testimony and allow them to do indirectly, what they cannot do directly.

That this brief may be what its name implies, I have not restated the authorities nor cited additional ones. I deem those cited in my brief are the law of the case and will ask that it and this reply brief may be treated as one.

Respectfully submitted,

Administrator with will annexed
of the Estate of ~~J. E.~~ Lester,
Deceased.