JEROME v. COM'RS RIO GRANDE CO.[1]

WILDER v. SAME.[1]

(Circuit Court, D. Colorado. December, 1883.)

1. COUNTY WARRANTS—WHO MAY SUE.
   County warrants payable to bearer are not negotiable, as bills of exchange and promissory notes. All holders take them subject to any defense that may be made against the original payee. Nevertheless, the property therein passes by delivery, when they are payable to the holder. Hence, when the holder is a citizen of another state, he may maintain action thereon in the federal court, even when the payee cannot maintain such action.
2. SAME—DUE AS UPON DIRECT PROMISE.
   Such instruments are not assignable within the meaning of the act of congress of 1875, regulating the jurisdiction of federal courts. 18 St. 470. They are taken to be due on an original and direct promise from the maker to the bearer, and not by assignment from the first holder.
3. SAME—REMEDY.
   In such case the remedy (in the United States courts) of the holder in the first instance is by action at law, prosecuted to judgment, as a foundation for *mandamus* to compel the levy and collection of a tax for their payment.
4. INTEREST—ACTION.
   Upon warrants issued for interest on a judgment, an action will not lie.

On Demurrer to Complaint.

John L. Jerome, for plaintiffs.

L. C. Rockwell, for defendant.

HALLETT, J. These actions are upon warrants signed by the chairman of the board of county commissioners and the clerk of the county, on the county treasury, for different sums, and payable to different persons or bearer. All of them excepting two (to be mentioned hereafter) appear to have been issued for the current expenses of the county. The warrants were not issued to the plaintiff, and the citizenship of the persons to whom they were issued is not averred. A question has arisen whether upon such warrants payable to a person named, or to bearer, which circulate from hand to hand without indorsement, an action may be maintained by a holder, a citizen of another state, against a county in this state, without showing that the persons to whom they were issued are qualified to sue in this court. It cannot be contended that such warrants are negotiable as bills of exchange or promissory notes, and free from all equities in the hands of an innocent holder. All holders take them subject to any defense that may be made against the payee, even when they are payable to bearer. Dill. Mun. Corp. (3d Ed.) §§ 487, 503. Nevertheless, as they are payable to bearer, the property therein passes by delivery, and "a note payable to bearer is payable to anybody, and not affected by the disabilities of the nominal payee." *Bank of Kentucky* v. *Wister*, 2 Pet. 318. Such instruments are not assignable within the mean-

[1] From the Colorado Law Reporter.

ing of the act of congress of 1875, regulating the jurisdiction of this court. 18 St. 470. They are taken to be due on an original and direct promise from the maker to the bearer, and not by assignment from the payee or first holder. *Thompson* v. *Perrine*, 106 U. S. 589; [S. C. 1 Sup. Ct. Rep. 564, 568.] This is true only when the plaintiff becomes the owner of the paper by the delivery thereof. If his title is colorable only, and procured for the sole purpose of enabling him to bring suit in a federal court, the action will be dismissed. *Williams* v. *Nottawa*, 104 U. S. 209. But of that we have no information at present.

Objection is also made that the demands for which the warrants were issued, having been allowed by the board of county commissioners, cannot be the subject of an action against the county. The remedy of plaintiff, if any, is by *mandamus* to compel the county to levy and collect a tax with which to pay the amounts due on the warrants. Whether this is the course of proceeding in the courts of this state is not shown; but it is certain that the practice in the federal courts is to proceed to judgment as a foundation for a writ of *mandamus*. It is only a question whether the money shall be taken to be due and owing from the county on the warrants alone, or after judgment on the warrants; and, whatever the rule may be in the courts of the state, it is the settled rule of the federal courts to obtain judgment in the first instance. *Chickaming* v. *Carpenter*, 106 U. S. 663; [S. C. 1 Sup. Ct. Rep. 620.] In either case the county cannot be compelled to pay except in the time and manner provided by law. As to two of the warrants described in the sixth and seventh counts of Jerome's complaint the rule may be different. They appear to have been issued to Rollins & Young for interest on a judgment. The right of a plaintiff to interest on a judgment recovered by him is the same as the right to the principal sum for which the judgment may have been entered, and the remedy to enforce payment thereof is the same. As to the judgment and the interest thereon, there appears to be no reason for allowing a second action in the same jurisdiction. A second action can only have the effect to multiply costs, without substantial results.

The demurrer will be sustained to the sixth and seventh counts of the complaint in Jerome's case, and otherwise overruled.

McCUNE v. NORTHERN PAC. RY. CO.

(*Circuit Court, D. Oregon.* January 9, 1884.)

DEFENSE OR QUESTION NOT MADE TO JURY.

Where a party has a defense to an action arising out of the testimony in the case, and omits to present it to the jury, but relies upon a defense involving a different, if not inconsistent, conclusion from the testimony, a new trial will not be granted to enable him to submit the case to another jury upon this untried question, unless it clearly appears from the evidence that he is entitled to a verdict on that ground, and then only upon the payment of the costs of the first trial.

Action for Injury to the Person. Motion for a new trial.

William H. Effinger and *Arthur C. Emmons*, for plaintiff.

Rufus Mallory, for defendant.

DEADY, J. The plaintiff, a citizen of Indiana, brought this action against the defendant, a corporation formed under a law of the United States, to recover $10,000 damages for an injury to his person occasioned by a fall from an unfinished bridge on which he was at work for the defendant, which fall was caused by the negligence of the defendant in providing the scaffolding whereon the plaintiff, in the course of his employment, was required to work, and without any negligence on the part of the plaintiff. The answer of the defendant contains a denial of any negligence in the premises, on its part, and a plea or defense that the injury complained of was caused by the negligence of the plaintiff. The cause was tried with a jury on November 15th and 16th, and there was a verdict for the plaintiff for $2,500. And now the defendant moves the court for a new trial on the ground (1) that the evidence is insufficient to justify the verdict; and (2) for errors of law occurring at the trial.

On the argument of the motion the second ground was not pressed, and the only point relied on is that the verdict should have been for the defendant because the testimony did not warrant the conclusion that the injury to the plaintiff was caused by the negligence of the defendant, but that, upon the whole evidence, the reasonable conclusion is that the injury, if not caused by the plaintiff's carelessness, was the result of accident for which no one is to blame. The evidence given on the trial goes to show that the plaintiff was injured while working on the defendant's bridge at the second crossing of Clarke's Fork of the Columbia river, in Missoula county, Montana, on March 2, 1883; that he had been in the employ of the defendant for nearly three years prior thereto,—most of the time with the engineers,—and about half a month on the bridge, during which period he had, by overwork, put in 19 days' labor; and that two bents of the bridge of two stories each, of about 20 feet across and the same distance apart, were then raised on the west bank of the river. When the two lower of these bents were raised, they were kept in