UNITED STATES v. BAXTER.

(*Circuit Court of Appeals, Eighth Circuit.* August 9, 1892.)

No. 118.

WRIT OF ERROR—TIME OF SUING OUT WRIT.

When a writ of error from the circuit court of appeals is allowed within the six months fixed by the statute, (26 St. at Large, p. 826, § 11,) but is not actually issued by the clerk until after the expiration thereof, it will be dismissed, for, in the legal sense, a writ of error is not brought until it is filed in the court below.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by George N. Baxter against the United States to recover moneys claimed to be due him as district attorney. Judgment for plaintiff. Both parties bring error. Plaintiff moves to dismiss defendant's writ of error. Dismissed.

George N. Baxter, for the motion.

Eugene G. Hay, opposed.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge, delivered the opinion of the court.

The judgment in this case was rendered August 31, 1891; and while the writ of error was allowed by the acting circuit judge, February 8, 1892, it was, without fault of the district attorney, not actually issued until after March 6, 1892.

No judgment or decree of the circuit court can be reviewed in this court upon writ of error unless the writ is sued out within six months after the entry of the judgment. 26 St. U. S. p. 826, § 11. In *Brooks* v. *Norris*, 11 How. 207, the supreme court, speaking by Chief Justice TANEY, said:

"The writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ which removes the record from the inferior to the appellate court, and the period of limitation must be calculated accordingly."

And in *Scarborough* v. *Pargoud*, 108 U. S. 567, 2 Sup. Ct. Rep. 877, that court expressly decided the very question presented in this case, and held that where the writ was allowed by the judge, but was not actually issued by the clerk within the time limited for suing it out, the writ must be dismissed. *Cummings* v. *Jones*, 104 U. S. 419; *Mussina* v. *Cavazos*, 6 Wall. 355, 360. It follows that the writ of error in this case was not brought within the time limited by law, and this court is without jurisdiction. For this reason the writ is dismissed.

BLEWETT v. FRONT ST. CABLE RY. CO.

FRONT ST. CABLE RY. CO. v. BLEWETT.

(*Circuit Court of Appeals, Ninth Circuit.* July 18, 1892.)

1. BONDS—ACTION FOR PENALTY—MEASURE OF DAMAGES.
   A bond executed by defendant to plaintiff, in a penalty equal to the value of certain lands conveyed by plaintiff on the same date, recited that the land was conveyed to an "assignee" of defendant as a part of a bonus given to secure the building of a certain cable railroad, and was conditioned for the construction of the road. The road was not built, and the bond was sued on. *Held*, that the whole penalty could be recovered, as the value of the property was a proper measure of damages for the breach of the contract. 49 Fed. Rep. 126, affirmed.
2. SAME—INTEREST—WHEN ALLOWABLE.
   Where the damages equal or exceed the penalty of the bond, the rule is in favor of allowing interest from and after the date of the breach; but as the lots were wholly unproductive, yielding no income, and this fact was expressly taken into consideration by the court in disallowing interest, its finding was in the nature of the verdict of a jury, and should not be disturbed. 49 Fed. Rep. 126, affirmed.
3. PAROL EVIDENCE TO VARY WRITING.
   Parol evidence was not admissible to show that the deed which was delivered to and purported to vest the title unconditionally in the assignee was not to take effect if the road was not built on account of failure to secure additional bonus. 49 Fed. Rep. 126, affirmed.
4. PLEADING—AMENDMENTS—DISCRETION OF COURT.
   Defendant having set up such parol agreement in his answer, the court sustained a demurrer thereto, and at the trial allowed plaintiff to amend his complaint by alleging that the sole consideration for the conveyance was the bond, and the sole consideration for the bond was the conveyance. *Held*, that this amendment was within the court's discretion, not being variant from the recitals of the bond, and could not have prejudiced defendant, as the evidence admitted in support thereof could properly have been admitted under the allegations of the pleadings before the amendment.

Cross Errors to the Circuit Court of the United States for the District of Washington, Northern Division.

Action by Edward Blewett against the Front Street Cable Railway Company on a penal bond. Jury waived, and trial to the court. Findings and judgment for plaintiff for the amount of the penalty, without interest. 49 Fed. Rep. 126. Both parties bring error. Affirmed.

Burke, Shepard & Woods, (*Thomas R. Shepard,* of counsel,) for plaintiff.

Hughes, Hastings & Stedman, (*C. C. Hughes,* of counsel,) for defendant.

Before MCKENNA and GILBERT, Circuit Judges, and DEADY, District Judge.

GILBERT, Circuit Judge. This is a writ of error to the circuit court for the state of Washington. Edward Blewett, the plaintiff, brought an action against the defendant to recover upon breach of a bond. The complaint alleges that on November 23, 1889, the defendant executed to plaintiff a bond in the penal sum of $18,000, upon the condition following:

"The condition of the foregoing obligation is such that whereas, the said Edward Blewett has granted and conveyed to Jacob Furth, assignee of the Front Street Cable Railway Company, the following described property, [describing certain lots,] heretofore deeded to Jacob Furth as a part of a bonus given to secure the building of the cable road hereinafter mentioned: Now,