

CITY BANK OF HARTFORD v. PRESS CO., Limited.

(Circuit Court, E. D. Pennsylvania, June 6, 1893.)

No. 52.

1. NEGOTIABLE INSTRUMENTS—ACTIONS—AFFIDAVIT OF DEFENSE—EXECUTION.

An affidavit of defense that "the notes sued on do not purport on their face to have been signed by two managers of the defendant company," and that "there is no averment that the persons who signed them are or were" such managers, is not sustained where the notes are signed by the "chairman" and the "treasurer" of the defendant; for Act Pa. May 10, 1889, (P. L. p. 183,) expressly provides that these officers shall be managers.

2. SAME—BONA FIDE PURCHASERS—FOREIGN CORPORATIONS.

The defense that the payee of negotiable notes given in Pennsylvania was a foreign corporation which had failed to comply with the conditions prescribed by statute to entitle it to do business therein, and that the contract under which they were given was in violation of that statute, is not available against one who paid value for the notes before maturity, and had no notice of the illegality infecting them.

At Law. Action by the City Bank of Hartford against the Press Company, Limited. Plaintiff took a rule to show cause why judgment should not be entered for want of a sufficient affidavit of defense. Rule absolute.

John Hampton Barnes, Geo. Tucker Bispham, and Wayne MacVeagh, for plaintiff.

Jas. H. Shakespeare, for defendant.

DALLAS, Circuit Judge. This action is brought on three promissory notes made by the defendant to the order of the Thorne Typesetting Machine Company, and by it indorsed. Two affidavits of defense have been filed, which set up—First, that "the notes sued upon do not purport on their face to have been signed by two managers of the defendant company, nor is there any averment that the persons who signed the same are or were managers of the defendant company;" second, that the payee, being a corporation not of the state of Pennsylvania, had not complied with certain requirements of a statute of that state which it was necessary that it should comply with in order that it might lawfully do business therein, and that these notes were given under a contract which was violative of that statute.

The first of these defenses is ineffectual, because each of the notes appears on its face to have been signed by the "chairman" and by the "treasurer" of the defendant association; and the act of the general assembly of Pennsylvania of May 10, 1889, (P. L. p. 183,) expressly provides that these officers shall be managers. In the case of Thorne Typesetting Company v. The Record Publishing Company, (not reported,) Judge Thayer, president of the court of common pleas No. 4 of Philadelphia county, recently sustained the defense last mentioned, as between the original parties to notes like those which are the subject of the present action. I am not disposed to question the soundness of

that decision, but it cannot avail the defendant in this case. The plaintiff here is a holder who "purchased before maturity, for value." This is alleged in the plaintiff's statement of claim, and is not denied in the affidavits of defense. It must, therefore, upon this rule, be assumed to be the fact. Moreover, the affidavits do not assert that the plaintiff had notice of the payee's not having complied with the Pennsylvania law; and, having bought the notes before maturity, the presumption is that it did not have such notice. Hence it appears, upon the case as presented, that the plaintiff is a purchaser of negotiable notes, for value, before maturity, and without notice; and that, as against such a plaintiff, the statutory illegality alleged is not a valid defense, is hardly open to question. "The bona fide holder for value who has received the paper in the usual course of business is unaffected by the fact that it originated in an illegal consideration" of the character relied upon as a defense to this suit. If the law were otherwise, the business of discounting commercial paper would involve a hazard against which it would be impracticable for banks, or others who engage in it, to guard themselves. Daniel, Neg. Inst. § 197, (2;) Byles on Bills, (Sharswood Ed. 1853,) p. 110; Wyatt v. Bulmer, 2 Esp. 538, and notes; Williams v. Cheney, 3 Gray, 220; Carpenter v. Longan, 16 Wall. 271. The rule for judgment for want of a sufficient affidavit of defense is made absolute.

NESTELLE v. NORTHERN PAC. R. CO.

(Circuit Court, D. Washington, W. D. June 5, 1893.)

LIMITATION OF ACTIONS—RUNNING OF STATUTE—DEATH BY WRONGFUL ACT.

The statute of limitations begins to run against the statutory right of action for an injury resulting in death only at the time the death occurs, although that event takes place long after the time of receiving the injury.

At Law. Action by L. W. Nestelle, as administrator of his wife's estate, against the Northern Pacific Railroad Company, to recover damages for her death. Demurrer to complaint overruled.

Carroll, Palmer & Palmer, for plaintiff.

Ashton & Chapman, for defendant.

HANFORD, District Judge. The plaintiff, as administrator of the estate of his deceased wife, prosecutes this action to recover damages for an injury to her, causing her death, which happened while she was traveling as a passenger on the defendant's railroad, and which injury the complaint alleges to have resulted from negligence in the management and operation of said railroad. The injury was suffered more than three years before the action was commenced, and the defendant contends that the action is therefore barred by the statute of limitations of this state, although it was commenced within one year from the death of the intestate, and on this ground has demurred to the complaint.

The attorney for the defendant has argued, with ingenuity and force, that the wrongful act for which damages may be recovered by an action at law is the ground of the defendant's liability in every such case, and that the right of action must be deemed to have accrued, and that the statute of limitations commences to run, immediately upon the happening of an injury. But I think that the argument is based upon false premises. A wrong and a resulting injury—two distinct elements—are both essential to a complete case. A right of action *ex delicto* does not accrue to an individual in his own right, or to him in a representative character, until an injury has resulted from a wrong to him in the character in which he may be entitled to sue. Now, coming directly to the case in hand, it is to be observed that it is a statutory action, differing from an ordinary action *ex delicto* in this: that the death of a person, resulting from a wrong, is a necessary element, and until the death of Mrs. Nestelle this cause of action had not accrued in favor of her legal representative. *Mason v. Railway Co.*, (Utah,) 24 Pac. Rep. 796. In my opinion it is not material at this stage of the case whether, if a judgment had been rendered during the lifetime of Mrs. Nestelle, in an action for the same injury, it would or would not bar this action. The statute gives an action to the legal representatives of the deceased to recover damages for her death, if the same was caused by the defendant's negligence, (2 Hill's Code, § 138,) without limiting the time for commencing the same, otherwise than as provided in 2 Hill's Code, § 120, which reads as follows: "An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

Demurrer overruled.

S. S. WHITE DENTAL MANUF'G CO. v. JOHNSON et al.

(Circuit Court, E. D. Pennsylvania. June 6, 1893.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

Complainant in a suit for the infringement of a patent is entitled to a preliminary injunction where it appears that the supreme court of the District of Columbia has in a prior suit sustained the validity of his patent, and held that it was infringed by a device which was substantially the same as that of the present defendant.

In Equity. Suit by the S. S. White Dental Manufacturing Company against Johnson and others for the infringement of complainant's patent. Complainants move for a preliminary injunction. Writ granted.

Jos. C. Fraley, for complainant.

George Harding, George B. Selden, and Jerome Carty, for defendants.

DALLAS, Circuit Judge. This is a motion for preliminary injunction. The circumstances which have been urged in argument as showing acquiescence by the plaintiffs in the conduct of the de-