

the twelfth article that after fulfillment of the agreement in all its terms and conditions, and a retransfer of all of the stock to McCormick, "all of the increment and betterment of the assets of said company, and all additions thereto, made subsequent to the date of this agreement, shall be the joint and equal property of the parties hereto, to be disposed of as they may agree." Money advanced as the price of shares of stock in a company upon an agreement that it shall be returned and the stock reassigned might be regarded as a loan, perhaps, notwithstanding stipulations that the lender should be made president, and be guaranteed large profits,—in lieu of interest, it might be, and of compensation for services; but such a right as this to share in the increment and betterments of the corporate property cannot pertain to a loan, and is consistent only with the theory that Crimp intended, as in explicit terms he agreed, to become a shareholder. Upon this point the tenth article of the agreement is of great significance and perhaps is controlling. It provides that, in case of the failure of the first party to perform the agreement in all its parts, the 99 shares of stock shall immediately upon such failure become the property of the second party, as and for liquidated damages. No other remedy seems to have been contemplated, and in such case—such is the present case—perhaps no other can be invoked. To say the least, if that remedy were asserted, the absolute ownership of the 225 shares of stock would become vested in the appellant as the representative of the second party, and the right of the company to retake possession of the drainage contract, which could not be included in the forfeiture, would immediately revive.

The decree below is therefore affirmed.

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BLACKMORE v. GUARANTEE CO. OF NORTH AMERICA et al.

(Circuit Court of Appeals, Sixth Circuit. October 9, 1895.)

No. 309.

CONTRACTS—ACTIONS—DEFENSES—NON EST FACTUM.

Plaintiff, as receiver of a national bank, sued a former employé of the bank and a guaranty company upon a bond of indemnity against the fraudulent acts of such employé, which contained a provision that it should be essential to the validity of the bond that the employé's signature be subscribed thereto. The defendants pleaded non est factum. The bond offered in evidence was not signed by the employé of the bank, and there was no evidence that it had been executed by the defendant company. The court sustained defendants' plea, and dismissed the suit. *Held* no error.

Error to the Circuit Court of the United States for the Middle District of Tennessee.

This was an action by James W. Blackmore, receiver of the Commercial National Bank of Nashville, Tenn., against the Guarantee Company of North America and William H. Scoggins, upon a bond of indemnity. The circuit court dismissed the suit. Plaintiff brings error. *Affirmed*.

Champion, Head & Brown, for plaintiff in error.

Granbery & Marks and Stokes & Stokes, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge. This is a writ of error to a judgment of the circuit court of the United States for the Middle district of Tennessee. The declaration was on a bond of the Guarantee Company of North America agreeing to reimburse the plaintiff, the Commercial National Bank, to the amount of \$10,000 for any pecuniary loss sustained by it from the fraudulent acts of Scoggins, its assistant cashier, during the continuance of the bond. The averment of the declaration was that the Commercial National Bank had during the life of the bond sustained large pecuniary losses greatly in excess of \$10,000 through the fraudulent acts of Scoggins in falsely certifying as good checks drawn by the firm of Dobbins & Dazey upon said bank when their account was largely overdrawn, and they had no funds to their credit out of which such checks should or could have been paid. The bond was made a part of the declaration, and filed with it. It contained in its body this provision: "That it is essential to the validity of this bond that the employe's signature be hereunto subscribed and witnessed." And the copy shown did not contain any such signature. The defendant the Guarantee Company of North America, among other pleas, filed this: "That the bond upon which plaintiff's action is founded was never executed." The defendant Scoggins filed a plea as follows: "That the bond upon which the plaintiff's action is founded was not executed by him, or by any one authorized to bind him in the premises." The case came on to be heard before the court by consent without the intervention of a jury. The court held that the plea of non est factum was good, and dismissed the suit at the cost of the plaintiff. The bill of exceptions was as follows:

"The plaintiff read the bond exhibited with the bill and made a part hereof. The plaintiff then offered evidence tending to show, and which did show, that the defendant Scoggins certified checks drawn by the firm of Dobbins & Dazey on the Commercial National Bank in excess of the sum of ten thousand dollars, and at a time when the account of the said firm was overdrawn. To this evidence the defendant objected, which exception was taken under consideration by the court. The plaintiff thereupon rested his case, and upon the motion of the defendants for judgment the court sustained the exception of the defendants to the introduction of the evidence tending to show the certifications of checks of said firm by the defendant Scoggins, and sustained the plea of non est factum interposed by the defendants, upon the ground that the bond sued upon was not signed by Scoggins. To which action of the court the plaintiff then and there excepted, and now asks that this bill of exceptions be signed and sealed, and made a part of the record.

"November 23, 1894.

D. M. Key, Judge."

The action of the court in refusing to permit the bond to be introduced in evidence was plainly correct. There was no evidence to show that it was the bond of the defendant, and the issue had been directly raised by the plea of non est factum. It is now sought to argue before this court that the defendant company is estopped to claim that the bond was not executed, but no evidence upon which such estoppel is asserted is incorporated in the bill of exceptions, and,

so far as this court can properly know, none was adduced before the court below. The plaintiff failed to prove that the bond had been executed by the defendant, and without this proof the court could have taken no other action than to dismiss the suit at the cost of the plaintiff.

The judgment of the court below is affirmed, at the costs of the plaintiff in error.

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JENKS et al. v. RICHARDSON.

(Circuit Court, N. D. Ohio, E. D. October 12, 1895.)

1. ATTACHMENT—MOTION TO DISSOLVE.

On a motion to dissolve an attachment the sufficiency of the petition as showing a cause of action on the part of plaintiffs cannot be considered.

2. SAME.

A motion to discharge an attachment should be supported by an affidavit traversing the facts set out in the affidavit of plaintiff upon which the attachment was issued.

3. SAME—CIVIL ACTION.

An action for money lost at gambling on defendant's premises is a civil action for the recovery of money within the meaning of the attachment law of Ohio.

Action by Robert H. Jenks, Guy Gray, and others against Mark Richardson to recover money lost at gambling.

Parks & Parks and Boynton & Horr, for plaintiffs.  
Johnson & Hackney, for defendant.

RICKS, District Judge. This case comes before the court upon a motion filed by the defendant, Mark Richardson, to discharge the attachment heretofore issued in this case against the property of the said Richardson. Ten reasons are assigned why this attachment should be dissolved. Many of those go to the sufficiency of the facts set forth in the petition to entitle the plaintiffs to maintain their cause of action, and it therefore becomes important, in the first place, to consider how far these 10 grounds for dissolving the attachment can be considered on such motion.

It is well settled in Ohio upon what grounds and in what sort of an action an attachment may issue. Section 5521, Rev. St., provides:

"In a civil action for the recovery of money, the plaintiff may at or after the commencement thereof have an attachment against the property of the defendant upon the grounds herein stated."

Then follow nine grounds upon which such attachments may issue, the first one of which is that the defendant is a nonresident of the state. Section 5522 of the same statutes provides:

"An order of attachment shall be made by the clerk of the court in which the action is brought in any case mentioned in the preceding section when there is filed in his office an affidavit of the plaintiff, his agent or attorneys, showing, first, the nature of the plaintiff's claim; second, that it is just; third, the amount which the affiant believes the plaintiff ought to recover; fourth, the existence of one of the grounds for an attachment enumerated in the preceding section."

Now, it is well settled in Ohio that an affidavit and order of attachment form no part of the pleadings in an action, and the grounds for