

fendants there situate, could have no validity here, even of a prima facie character. *Bischoff v. Wethered*, 9 Wall. 812, 814. But the statement of claim expressly asserts that the court which rendered the judgment was, at the time of its rendition, a court of record, duly constituted, and of general jurisdiction, and that it had jurisdiction not only of the subject-matter, but also of the parties to the action; and this general averment is supplemented by the specific allegation that Amable B. Bonneville, whose executor is defendant here, "was then a resident and subject of said dominion and empire." In view of these statements of fact, I cannot sustain the demurrer upon the ground now under consideration. The law upon the subject was, I think, well stated in *Schisby v. Westenholz* (1870-71) L. R. 6 Q. B. 155, where Blackburn, J., at pages 160 and 161, said:

"Again, it was argued before us that foreign judgments obtained by default, where the citation was [as in the present case] by an artificial mode prescribed by the laws of the country in which the judgment was given, were not enforceable in this country, because such a mode of citation was contrary to natural justice. Now, on this we think some things are quite clear on principle. If the defendants had been, at the time of the judgment, subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been, at the time the suit was commenced, residents in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them."

The application of this language to the case in hand need not be pointed out; it is obvious.

2. The brief on behalf of the defendant quite forcibly opposes the right of the plaintiff assignee to maintain this action in his own name, but, though otherwise quite exhaustive, the plaintiff's brief is wholly silent upon this question. Under these circumstances, and in view of the fact that this particular objection, if well founded, may, perhaps, be overcome by amendment, I deem it inadvisable to now pass upon it. Accordingly, the demurrer will be retained for further consideration, and with leave to either party to move the court in the premises as may be advised.

BARNES CYCLE CO. v. REED.

(Circuit Court, W. D. Pennsylvania. January 3, 1898.)

No. 1.

GUARANTY—NOTICE OF ACCEPTANCE.

Where a guarantor signs the guaranty without request of the guarantee, and in his absence, for no consideration except future advances to be made to the principal, the writing is a mere proposal, requiring acceptance and notice thereof to the guarantor in order to bind him. The mere recital of a nominal consideration, without stating whether it comes from the guarantee or the principal, does not affect this rule.

This was an action at law by the Barnes Cycle Company against C. M. Reed upon an alleged contract of guaranty. At the trial the court directed a verdict for the defendant, and the case is now heard upon a motion for a new trial.

Fish & Crosby, for plaintiff.
T. A. Lamb, for defendant.

BUFFINGTON, District Judge. This is a motion for a new trial. The court gave peremptory instructions in favor of the defendant, and therein, it is contended, committed error. A careful examination of the authorities has strengthened us in the view taken at the trial of the questions involved, and we are of opinion there was no error in the instructions given. The facts of the case are these: On November 20, 1895, one Schlaudecker entered into a provisional written contract or arrangement with the Barnes Cycle Company, the plaintiff, providing for his acting as that company's agent, and the future ordering of a large number of bicycles from it. This paper contained the proviso that the "contract shall not be considered as binding upon the first party (the Barnes Cycle Company) until approved in writing by the Barnes Cycle Company"; and upon the writing was a printed form for such approval and acceptance by that company. This writing was on February 10, 1896, taken by Schlaudecker to C. M. Reed, the defendant, who then signed his name to an indorsement thereon, which reads as follows:

"In consideration of the execution by the Barnes Cycle Company of the foregoing contract with Leo Schlaudecker, Erie, Pa., and the sum of one dollar, receipt whereof is hereby acknowledged, I hereby guaranty the payment, when the same becomes due, of all sums owing, or which may hereafter be owing, for bicycles and bicycle attachments, sold and delivered by said Barnes Cycle Company to said Leo Schlaudecker under this contract; and, for the like consideration, I further guaranty the performance by said Leo Schlaudecker of all the other provisions of said contract in his part to be performed.

"Dated Erie, Pa., 2/10, 1896.

Chas. M. Reed."

The paper was subsequently returned by Schlaudecker to the Barnes Cycle Company, which company, on February 15, 1896, approved and accepted the original contract, as follows:

"Syracuse, N. Y., Feby. 15, 1896.

"The above contract is hereby approved and accepted.

"The Barnes Cycle Co.,

"By A. R. Peck. [L. S.]"

No notice was given Reed of such signing or acceptance, and there is no evidence that he knew of any goods being furnished to Schlaudecker by the Barnes Company before August, 1896, at which time all deliveries were completed. Thereafter Schlaudecker failed, and, not having paid for the bicycles furnished him, the present suit was brought against Reed upon his said undertaking.

As we view this case, the writing of November 20, 1895, between Schlaudecker and the Barnes Company, was provisional only, and was not to, and did not, become a contract until its approval in writing by the Barnes Cycle Company. In this inchoate, incomplete form, in which it had remained for almost three months after its original signing, it was brought by Schlaudecker to Reed, and, as stated above, the indorsed agreement was signed by the latter.

It will be noted that when thus signed there was no valid, subsisting contract between Schlaudecker and the Barnes Cycle Company. It only became a valid, enforceable contract, as against the Barnes Company, five days later, when that company indorsed its acceptance and approval upon it.

Under the circumstances, we are of opinion that the undertaking of Reed was provisional, and not absolute. The Barnes Company was not bound to accept it, or, indeed, to enter into the contract with Schlaudecker. If it saw fit to contract with Schlaudecker, and accept Reed's offer, we are of opinion it was bound to notify Reed of that fact, and of its acceptance of his offer; for, as we construe Reed's undertaking, the future execution of the contract by the Barnes Company was the consideration for him making his agreement. Hence the necessity for notice. This view of the law is in accord with the authorities, both state and federal. The case of *Machine Co. v. Richards*, 115 U. S. 527, 6 Sup. Ct. 175, is strikingly in point. It was there said:

"But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract."

We see no difference between that case and the one in hand. Save that in the one at bar, the receipt of a nominal consideration is acknowledged, the facts are quite alike. But this difference should not be controlling, under the circumstances and writings of this case; for that this nominal consideration was paid by the Barnes Company does not affirmatively appear from the writing itself, and its payment by Schlaudecker may be quite as consistently inferred therefrom as its payment by the Barnes Company.

In *Davis v. Wells*, 104 U. S. 164, the question of the necessity of notice was considered, and, after a full discussion of the prior federal authorities, the court said:

"There seems to be some confusion as to the reason and foundation of the rule, and consequently some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise. In others it has been considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it, as a condition of the promise of the guarantor. The former is the sense in which the rule is to be understood as having been applied in the decisions of this court."

This principle is the ground upon which the Pennsylvania cases of *Coe v. Buehler*, 110 Pa. St. 366, 5 Atl. 20, and *Gardner v. Lloyd*, 110 Pa. St. 285, 2 Atl. 562, rest. In the former case the court said:

"The absence of notice of acceptance by the plaintiffs to the defendant is fatal to their claim. When the defendant signed the guaranty it was his proposition only. The contract which he proposed to guaranty had not been executed or accepted by the plaintiffs. True, they did execute it soon afterwards, yet they gave no notice thereof to the defendant."

In the latter the court, after discussing the pertinent Pennsylvania cases, says:

"In all of them the doctrine is enforced that where the event is future, and depends upon the will of the guarantee, he must give notice of acceptance to the guarantor before the latter becomes subject to any liability."

The motion for a new trial is refused.

In re KIRBY.

(District Court, D. South Dakota. January 19, 1898.)

1. ATTORNEYS—DISBARMENT—CONVICTION OF INFAMOUS OFFENSE.

A court will disbar an attorney convicted of an offense involving moral turpitude, and to which congress has attached an infamous punishment, though it is not a felony.

2. SAME—EFFECT OF WRIT OF ERROR.

The suing out of a writ of error to review a judgment of a federal court convicting an attorney of an offense, and the granting of a supersedeas thereon, do not vacate the judgment, so as to prevent its being ground for the defendant's disbarment.

Proceeding for the disbarment of Joe Kirby.

S. B. Van Buskirk, for petitioners.

Joe Kirby, in pro. per.

CARLAND, District Judge. On January 7, 1898, J. D. Elliott, United States attorney for this district, filed in this court his sworn petition, wherein it is charged that Joe Kirby, an attorney of this court, was at the April, 1897, term of said court duly convicted upon an indictment charging said Joe Kirby with having received and had in his possession and control, with intent to convert the same to his own use, certain postage stamps of the United States, he (the said Kirby) knowing the same to have been theretofore feloniously stolen and carried away from a certain post office of the United States; that on June 25, 1897, being a day of said April term, said Joe Kirby was duly sentenced upon said conviction to a term of two years in the penitentiary of South Dakota. Said petition prayed the judgment of this court in the premises, and that said Joe Kirby be disbarred and removed from his office as an attorney of this court. Upon the filing of said petition, said Joe Kirby was cited to appear before this court on the 17th day of January, 1898, and show cause why the prayer of the petition should not be granted. On the return day respondent appeared in his own behalf, and S. B. Van Buskirk, assistant United States attorney, in support of the petition.

Respondent first objected to the jurisdiction of the court on the ground that the matter charged against him could not be heard except at a special or general term of this court, and then filed an answer denying generally the allegations of the petition, except as said allegations might be admitted by other matters set forth in the answer. The answer then set forth that a writ of error had been sued out of the supreme court of the United States to reverse the judgment of conviction set forth in the petition, and that a supersedeas had been granted pending the decision of said supreme court, which writ of error was still pending and undetermined. A certified copy of the proceedings of this court in the case of the United States against Joe Kirby was introduced in evidence in support of the petition, from which it appears that the allegations of the petition are true. This court will take judicial notice, upon its attention being called thereto, of the issuance of the writ of error and the granting of a supersedeas. No other evidence was introduced on either side.