

OLAY v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Sixth Circuit. October 4, 1898.)

No. 608.

COSTS—SHOWING OF POVERTY—PLAINTIFF SUING IN REPRESENTATIVE CAPACITY.

The payment of the ordinary costs of proceedings in error in the circuit court of appeals cannot be dispensed with on a showing merely that the plaintiff in error, who is suing in a representative capacity, has no funds in such capacity, but it must also appear that the beneficiaries in whose interest the suit is maintained are unable to pay the required costs.

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

This cause comes on to be heard upon a petition by the plaintiff in error of the tenor following: "Your petitioner, plaintiff in error in the above cause, respectfully shows that this suit was brought originally in the law court at Johnson City, Tenn., and was, on petition of the defendant, removed to the United States circuit court at Knoxville, Tenn. It is an action for damages for personal injuries resulting in death. Plaintiff's intestate left surviving her a father, brother, and sister. While the suit was pending, the father died. The trial judge held, upon the hearing of the cause, that the suit abated with his death. The case was a good one upon the merits, as petitioner verily believes, and the only question for trial in this court is whether there is error in the judgment of the trial judge in his holding referred to above. Plaintiff's intestate left no estate of any character, and plaintiff has nothing to pay the docketing fee and the fee for printing the record in this court. The transcript of the record in the cause has been made, and is now in the hands of the clerk of this court. Petitioner therefore prays that the filing of the docket fees and the printing of the record be dispensed with in this cause."

J. B. Cox and Isaac Harr, for plaintiff in error.

Jourolmon, Welcker & Hudson, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

PER CURIAM. This petition must be denied, because it does not appear therefrom that the persons who claim to be the beneficiaries and the real parties in interest in the cause of action are paupers, and unable to pay the ordinary costs of the proceeding in error. It is not sufficient, in a suit brought by one in a representative capacity, as is the case with such suits under the Tennessee statutes, to make it appear that in his representative capacity he has no funds with which to prosecute the suit. It must also appear that those persons who will enjoy the fruit of the litigation, and who are the real parties in interest, are also in such a condition of poverty that they cannot pay the costs of that which is done for their benefit. The application is therefore denied, without prejudice to its renewal, upon an affidavit which shall remedy the defect herein pointed out, within 30 days.

BRYAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 10, 1898.)

No. 443.

1. POSTMASTER'S BOND—LIABILITY FOR ACTS OF CLERK.

A postmaster's bond, conditioned for the payment of all moneys "that shall come into his hands * * * from money orders issued by him," covers moneys received and embezzled by a money-order clerk.

2. SAME.

The liability on a postmaster's bond for the acts of a clerk is not affected by the fact that the clerk is appointed under the civil service act, and not by the postmaster.

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

John T. Carey and Page, McCutcheon & Eells, for plaintiffs in error.

Samuel Knight, for the United States.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. This was an action by the United States to recover from William J. Bryan and others, the plaintiffs in error, the sum of \$9,399.88 and interest from April 30, 1892, on account of their alleged liability as principal and sureties upon an official bond given by Bryan for the faithful performance of his duties as postmaster of the city of San Francisco for a term which commenced July 14, 1886, and ended June 30, 1890. By the terms of this bond the plaintiffs in error became jointly and severally bound to the United States that Bryan, the principal therein, would pay the balance of all moneys that might "come into his hands from postage collected * * * or money orders issued by him," and would also "faithfully do and perform all of the duties and obligations imposed upon or required of him by law or the rules and regulations of the department in connection with the money-order business." The complaint alleges that Bryan, in his official capacity as postmaster, received the sum of money demanded in this action in the transaction of the money-order business of his office, and neglected to account for and pay the same over to the United States. The answer in one paragraph contains a denial of the averment that Bryan did not properly account for and pay the balance of all moneys that came into his hands on money-order account in the post office at San Francisco, but this denial is qualified by an admission that there was due to the United States on such account, on June 30, 1890, the sum sued for, and that the same has not been paid; and it is alleged as a defense to this action that these moneys were embezzled by one James S. Kennedy, a clerk in charge of the money-order accounts and money-order funds of the post office at the city of San Francisco, during the period of time covered by the bond; that Kennedy was not appointed by Bryan, but held such office of clerk under the civil service laws of the United States, and the rules and regulations adopted in pursuance thereof, governing the tenure of office of clerks of that class, and that