DWYER et al. v. UNITED STATES, to Use of ALLENTOWN ROLLING MILLS.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 142.

1. ACTION ON BOND—DAMAGES.
   The rule that damages in an action on a bond cannot be recovered, in excess of the penalty thereof, does not apply to the costs which plaintiff incurs by the obligor's failure to pay on demand, and subsequent defense of the action.
2. INTEREST—DEMAND.
   A summons and complaint served in an action on a bond, where the damages are unliquidated, constitute a demand sufficient to start interest running.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the circuit court, Southern district of New York, in favor of defendant in error, who was plaintiff below. The action was on a bond conditioned to pay for labor and materials furnished in the erection of a lighthouse in Portland harbor. The cause was tried at circuit, and a verdict rendered by the jury (June 24, 1898) for $11,525.38. Entry of judgment was suspended for nearly six months, apparently to allow defendants to prepare and serve a bill of exceptions. This they failed to do, and judgment was entered December 17, 1898, for the amount of the verdict, $11,525.38, interest thereon from rendition to entry of judgment, $336.30, and costs, $953.32; making in all $12,815.

Charles J. Hardy, for plaintiff in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. There being no bill of exceptions, the writ of error brings up only the judgment roll, and whatever questions may arise thereon. Two assignments of error only have been presented in argument.

1. It appears that the bond was in the amount of $12,000, and defendants contend that there can be no recovery in excess of that sum. It is well settled that no damages can be recovered in excess of the penalty named in the bond, but the costs which plaintiff is made to incur by the obligors' failure to pay on demand, and subsequent defense of the action, are within neither the letter nor the spirit of the rule. The total amount of the recovery in this case, exclusive of costs, is $11,861.68,—a sum less than the penalty.

2. It is further suggested by plaintiff in error that a party is not entitled to interest on an unliquidated claim until after demand. The proposition is undoubtedly sound, but we fail to see its application here. Conceding that the plaintiff's demand was unliquidated, it appears that the verdict was "for the plaintiff for $10,924 56/100, with interest from July 16, 1897, amounting to $600 83/100, making a total of $11,525 38/100." It further appears that the summons and complaint were served on July 16, 1897. This was certainly a demand sufficient to set interest running. The judgment is affirmed.

WHEELING BRIDGE & T. RY. CO. v. FRANZHEIM.

(Circuit Court of Appeals, Fourth Circuit. May 2, 1899.)

No. 277.

DIRECTING VERDICT.

In an action by a corporation against its late president to recover a sum alleged to be due, defendant pleaded a set-off and counterclaim, but died before trial. Plaintiff, to establish its claim, produced an account rendered by defendant after he had ceased being president, showing a balance due him to a large amount. The account had been voluntarily furnished, and was the only evidence offered to support the claim of plaintiff, or to impeach the items claimed by defendant. *Held*, that it was the duty of the jury to act upon and consider the whole account, as they could not arbitrarily discredit the part showing a balance due defendant; and an order of the court directing a verdict for defendant, where the counterclaim was not urged, was not error.

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

This was an action of assumpsit in the circuit court of the United States for the district of West Virginia, brought by the Wheeling Bridge & Terminal Company against Robert H. Cochran, who, up to March 18, 1892, had been president of the plaintiff corporation. The suit was instituted August 27, 1892, and the plaintiff filed as its cause of action an account of debts and credits between it and the defendant, showing a balance in its favor of $2,147.22. The defendant pleaded non assumpsit and payment, and filed a bill of offsets, and afterwards an amended bill of offsets, showing a large balance due the defendant. A trial was had, resulting in a verdict on the defendant's set-off in favor of the defendant, Cochran, against the plaintiff corporation for $1,784.98. Upon writ of error to this court, the judgment was reversed, and a new trial directed upon the ground that the defendant had been improperly allowed as part of the verdict for coupons upon bonds of the plaintiff corporation which matured after the receiver was appointed. 15 C. C. A. 321, 68 Fed. 141. Subsequently Cochran, the defendant, died, and Franzheim was appointed his administrator in West Virginia, and on April 9, 1897, the case was revived as against him in favor of the plaintiff, and was also revived in his favor as against the plaintiff. On April 6, 1898, Charles O. Brewster, who, pending this suit, had been appointed receiver to take charge of certain property mortgaged by the plaintiff corporation, applied to be admitted as a plaintiff, claiming that the funds sued for were covered by the mortgage, and by order of April 6, 1898, he was made a party plaintiff, and he moved the court to dismiss the suit on the ground that the administrator, Franzheim, had no property of his intestate in West Virginia, and that a judgment against him would be worthless, which motion the court denied. On April 7, 1898, the case was tried a second time with a jury, the only evidence to support plaintiff's claim being an account, furnished to plaintiff by the defendant, showing a balance in defendant's favor; and upon motion of the defendant the court instructed the jury to find for the defendant. The plaintiff, by writ of error, brings the rulings of the trial court here for review.

Melville D. Post, for plaintiff in error.

Henry M. Russell and Thayer Melvin, for defendant in error.

Before GOFF, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

MORRIS, District Judge. The first error assigned is that the trial court denied the motion of the receiver to dismiss the case. We think this ruling was clearly right under Code W. Va. c. 126, § 9, which provides that a defendant who pleads a set-off or demand against the plaintiff shall be deemed to have brought an action against the plain-