No. 14177

Supreme Court of Illinois

St. L. A. & T. H. R. R. Co.

vs.

Miller, Admr.

71641

Supreme Court of Illinois,

SECOND GRAND DIVISION.

January Term, 1867.

ST. LOUIS, ALTON & TERRE HAUTE R. R. CO.,
Appellant.

vs.

CHARLES H. MILLER, ADMINISTRATOR OF THE ESTATE OF JOHN S. MILLER, DEC'D.
Appellee.

Appeal from Montgomery

ABSTRACT.

This was an action of debt instituted by Appellee against Apellant in the Montgomery County Circuit Court, at the March term, 1865.

Declaration filed March 3d, 1865, in substance as follows:

3 Charles H. Miller, administrator of the estate of John S. Miller, deceased, Plaintiff in this suit, complains of the St. Louis, Alton & Terre-Haute Railroad Company, Defendant in this suit, who has been summoned, &c., of a plea, that it render to the said Plaintiff the sum of two thousand three hundred and thirty dollars, which it owes to and unjustly detains from him For that whereas the said John S. Miller in his lifetime, by the consideration of the Circuit Court held within and for the county of Montgomery, and State of Illinois, on the twenty-second day of September, at the September term of said Court, A. D. 1860, recovered judgment against the Terre-Haute, Alton & St. Louis Railroad Company for the sum of two thousand three hundred and thirty dollars, debt and costs of suit, as by the record and proceedings in said Court, now remaining, more fully appears—a copy of which record duly authenticated, the said Plaintiff now here in Court now produces, and which said judgment is in full
4 force and effect, and not reversed, annulled or satisfied, and said Plaintiff has not obtained any execution or satisfaction thereof, either in the lifetime of the said John S. Miller, deceased, nor since his death, whereby an action hath accrued to the said Plaintiff, to demand and have of and recover of the said Defendant the sum of two thousand three hundred and thirty dollars debt, the said Defendant having assumed to pay all *bona fide* claims of judgment for stock killed by the Terre-Haute, Alton & St. Louis Railroad, and all just dues for work and labor done, and for wood and ties furnished or taken for the said Terre-Haute, Alton & St. Louis Railroad Company, and all judgments had for the same, which have not been arranged or settled by said Terre-Haute, Alton & St. Louis Railroad Company have been assumed by the said St Louis, Alton & Terre-Haute Railroad Company as a condition precedent to the operation of said Road, and the said Plaintiff avers that the said judgment was had against the said Terre-Haute, Alton & St. Louis Railroad Company for work and labor done and performed by the said John S. Miller, deceased, in his lifetime for the said Company, and
5 the Plaintiff avers that said Defendant have complied with the conditions contained in section one of the law passed by the Legislature of this State, February 18th, 1861, entitled "An Act to perfect the title of purchasers of the Terre-Haute, Alton and St. Louis Railroad, and to enable such purchasers, when the Road is sold, to form a corporation, and defining the rights and duties of such corporation," and that said Defendants have controlled, operated and managed said Railroad for more than twelve months prior to this time, and are now operating the same; and the said Plaintiff brings here into Court his letters of administration upon the estate aforesaid, whereby it may appear that he has a right to sue in said capacity. Yet the said Defendant, though often requested, hath never paid the said sum of money nor any part thereof, but wholly neglects and refuses so to do to the damage of said Plaintiff of twelve hundred dollars, wherefore he brings suit, &c.

6 Certified copy of judgment by default in suit of John S. Miller in Terre-Haute, Alton & St. Louis Railroad Company rendered at September term, 1860, of the Montgomery Circuit Court, and damages assessed in favor of Plaintiff in the sum of $2330 and costs of suit.

8 Judgment by default in favor of Appellee and against Appellant.

9 Cause heard by Court at March term, 1866; finding of Court in favor of Plaintiff below in the sum of $2330, debt, and $768,90, damages, and judgment rendered therefor, and costs of suit.

10 Defendant below entered its motion for appeal, and files appeal bond in said cause.

PLAINTIFF'S BRIEF.

STATEMENT.

Plaintiff's intestate in September, 1860, recovered judgment against the Terre-Haute, Alton & St. Louis Railroad Company for $2,330 for work and labor done and performed by said intestate, in his lifetime, for said Company.

In February, 1861, the purchasers of said Road were incorporated under the style of the "St. Louis, Alton & Terre-Haute Railroad Company" by an act of the General Assembly of Illinois *made a public act*, which among other things provided that all *just* dues for work and labor done for the Terre-Haute, Alton & St. Louis Railroad, and all judgments had for the same *and not settled or arranged* shall be assumed and paid by the St. Louis, Alton & Terre Haute Railroad Co., as a *condition precedent* to the operation of the act.

In 1865, Plaintiff sued the Defendant *in debt*, and recovered judgment *by default*, and the Court assessed the damages at the amount of the original judgment and the interest and costs thereon.

From which judgment Defendants have appealed.

POINTS.

1. The record does not show any liability of Defendants to Plaintiff at law.

2. And if there was any liability at law, Plaintiff has mistaken his remedy. Debt will not lie.

3d. There is no averment in the declaration that the judgment has been surrendered or transferred to Defendant, or that such surrender or transfer has been transferred.

4th. There is no distinct averment that the judgment has not been settled or arranged by the Terre-Haute, Alton & St. Louis Railroad Company.

5th. There is no averment that the claim of Plaintiff is just.

6th There is no averment of notice.

7th. The damages were assessed by the Court, and no jury was called.

REASONS.

I.

It will be conceded that that the default waives no irregularity, or insufficiency of allegation, but the Defendant, upon appeal, may criticise and object to the declaration for the causes and grounds above set out (1 Chit Plead. 327), and in reference to those causes. We say as to the first point.

1st. The Defendant is a corporation distinct from the original judgment debtor, composed of different individuals and acting under a different charter.

2d. The Terre-Haute, Alton & St Louis Railroad Company is still in existence, and as the act of the Legislature shows has both debts and assets The Defendant had authority to buy the Railroad at a judicial sale (sec. 4); and also to acquire, by purchase or otherwise, the other property (sec. 2). The general debts of the Terre-Haute, Alton & St. Louis Railroad were to be arranged by the Defendant in a specified manner, upon the surrender and transfer to Defendant of the evidences of such debt (sec. 7.)

3d. Debts for work and labor, for wood and ties, for stock killed, and for right of way, which were *bona fide*, just, and not otherwise settled or paid, were to be paid by

the Defendant as a condition precedent to the operation of its chartered rights.

4th. In the event of non-payment, no remedy is given by the act against the Defendant, nor is it provided that the claims shall be paid out of any funds, to be raised by virtue of the act, nor is there any *independent* provision that the Defendant shall pay the claims. But, *substantially*, the provision of the act is this: that the corporation shall not exercise the corporate franchise until such claims are paid.

5th. The action in this case is not upon the original judgment, for the Defendant was not a party to that judgment, nor does it derive or claim any right under it, and was therefore not a privy to it, and therefore cannot be sued upon it, either at law or in equity.

6th. Neither can it be predicated upon any duty arising out of the act, because a legal duty can only be created by a *legal obligation* growing out of some consideration moving from the Plaintiff, as we think the following propositions will clearly demonstrate.

7th And Plaintiff bases his case upon a supposed assumption by Defendant of all just dues for work and labor done, and all judgments had for same against the Terre-Haute, Alton & St. Louis Railroad Company, and not arranged or settled by said Company, averring that Defendant has complied with the conditions of section one of their act of incorporation, and have been operating the Railroad for more than twelve months.

8th. As no specific remedy is given to such creditors by the act, the question of a remedy or liability at law must be determined by the settled rules of pleading.

9th. It is a cardinal principle at law that the legal interest is an undertaking or contract, and the right to enforce it resides in the person from whom the consideration comes Warren vs. Batchelder, 15 N. H 136.

10th The consideration for the assuming and paying these debts, by the Defendant, was the grant of corporate franchise by the State, the operation of which was to be dependent upon such payment. [The purchase of the Railroad was distinct, was made under a judicial sale, and foreclosure of mortgage, and deeds of trust, and, it is to be presumed, for a full consideration.] Hence, under the act, the State alone could take advantage of the non-payment of the debts

11th. No consideration moved from Plaintiff to Defendant Neither Plaintiff nor his intestate gave up any rights, nor lost their judgment or other lien. The judgment is still in force, *as averred in the declaration*, and the property of the debtor still bound thereby, unless taken by virtue of an earlier lien

12th. Had the original judgment and the liability of the original judgment debtor been extinguished there might have been some ground for a suit at law by Plaintiff against Defendant (McKinney vs Alvis, 14 Ill 34); since in that case there would have been a new consideration moving from the Plaintiff. Butterfield vs Hartshorn, 7 N. H. 348. But the original liability has neither been extinguished by act of the Legislature, nor by the act of the parties

13. Even if the Defendant had expressly promised Plaintiff to pay the claim, the authorities are clear that the Plaintiff cannot maintain the action unless there has been an extinguishment of the original liability. Hall vs. Marston, 17 Mass 375, seems to be the only contradictory authority; but that case was shown not to be consistent with settled legal principles, by Butterfield vs. Hartshorn, 7 N H 348; and the New Hampshire authority is expressly approved by the Illinois Supreme Court. McKinney vs. Alvis, 14 Ill. 34, and see 1 Parsons on Contracts (5th ed.) 219 and note (e).

14 It is said that where a statute casts upon a party *an obligation* to pay a specific sum of money to particular persons, the law then enables these persons to maintain an action of debt. The statute in such case is treated as a specialty, but by a careful examination of the case, it will be seen that there was an immediate consideration moving from the Plaintiff, and without it, as we have seen, there can be no *legal obligation*. Thus, where in an act of incorporation, the costs of procuring it, were by the act required to be paid out of the first moneys subscribed, the Company received an immediate benefit from the Plaintiffs, and had collected money expressly subscribed, among other things, for their payment.

15. So where, as in most cases of suits under statutes, the original cause of action arises after the taking effect of the statute—the act is a specialty ascertaining the rights and liabilities of the parties.

16. It is well settled that an act of incorporation is a contract between the State and the corporation—2 Kent's Com. side page 306,—and while the State may affix conditions precedent or subsequent to the charter, no one but the State can take advantage of their non-performance.

If the conditions are precedent, the right to exercise the franchises does not vest until performance. 1 Chit. Plead. 322—4 Kent Com. side page 125 If they are subsequent, it is a cause of forfeiture.

In this case, the payment of claims, for work and labor, was in express terms, made a condition precedent

17. If the payment of such claims were made a condition precedent—and it is impossible to give any other meaning to the letter of the act—then it is manifest that it was not the intention of the Legislature to give any right of action or remedy to the creditors against the Defendants; but the means of enforcing the payment was reserved by the State to itself, in withholding the operation of the act until payment. And the declaration in this case shows this singular inconsistency. It avers that payment was a condition precedent to the operation of the charter—it then avers non-payment, and asks judgment against the corporation. When, if payment be a condition precedent, then there can be no corporation until payment, and, of course, no one against whom judgment can be rendered.

18. And whether it is to be treated as precedent or subsequent, it is, at any rate, nothing but a condition, and the act casts no other obligation upon the Defendants except a loss of franchise if the condition be unperformed.

II.

As to the *second point*, that the action of debt will not lie, we say:

1. If there be any legal liability in this case, it is collateral to another and a different obligation.

2. The principal obligation is the indebtedness of the Terre-Haute, Alton & St. Louis Railroad Company, and the claim set up by Plaintiff is, that Defendants, by the purchase of the Railroad and use of the charter, have assumed to pay the debt.

3. Which liability, if valid, is nothing more than an undertaking to pay the debt of another person, upon the *express* contingency that it is not arranged or settled by such other person.

4. It is clear that an action of debt is not sustainable upon such collateral liability, and one of the reasons given in a recent English case is this "in respect of infinite precedents." Powell vs Ansell, 3 Manning & Granger 171—1 Chit. Plead. side page 103—Hardres 486—Hilborn vs. Artus, 3 Scam. 345

III.

As to the *third point*, that there has been no surrender or transfer of the judgment, we say:

1. That the whole scope of the act of incorporation shows that the Defendant is entitled to a surrender or transfer, precedent or simultaneous with its payment of every claim which it may adjust or pay, for the reason that the two corporations are wholly distinct—the one being a debtor, and the corporators of the other, creditors; the one an involuntary vendor, and the other a voluntary purchaser.

2. The two corporations stand at arms' length, and a transfer of the claims becomes important in reference to the purchase of the property not included in the mortgages or deeds of trust, which section 2 of the act gives authority to purchase and use.

3. Section 7 of this act provides that before any of the general creditors of the old Company can require any adjustment of their claims by the Defendant, they shall surrender or transfer the evidences of such claim to the Defendant.

4. And taking the whole act together, it is but fair to insist that the creditors named in the last section are within the scope and intendment of that provision of the 7th section, and must surrender or transfer their claims before they can acquire any right of action against the Defendant.

5. Until such surrender or transfer is made there is no consideration moving from Plaintiff to Defendant, and it is manifest from the whole scope of the act that if the act casts any *obligation* upon the Defendants to pay this claim, it is only upon the hypothesis that it is made a *legal obligation* by the act of the creditors in making such surrender or transfer.

IV.

As to the *fourth point*, that there is no averment that the claim has not been settled or arranged, we say:

1. That where the liability of the Defendant depends upon the happening or not happening of a contingency, it is necessary that the declaration in the assignment should set out the breach in the very words, or in words which are co-extensive with the import and effect of it. 1 Chit. Plead. side page 332 et. seq.

2. By the act of incorporation, it is provided that certain debts "which have not been arranged or settled by the Terre-Haute, Alton & St. Louis Railroad Company shall be assumed and paid by the Defendant as a condition," &c.

3. The only assignment of a breach in the declaration is this: "Said judgment is in full force and effect, and not reversed, annulled or satisfied, and said Plaintiff has not obtained any execution or satisfaction thereof, either in the lifetime of the said John S. Miller, deceased, nor since his death, whereby," &c., leaving it uncertain whether the judgment was not arranged or settled by the intestate in his lifetime; the original judgment having been rendered in his favor, and not in favor of the present Plaintiff. 1 Chit. Plead. side page 334. The general assignment that the judgment is in full force, and not reversed, annulled or satisfied, being clearly insufficient (Id. 332), and being nothing more than the ordinary averment in a suit upon a judgment. 2 Id. side page 485.

V.

As to the *fifth point*, that there is no averment that the claim is just, we say:

1. That the fact that the claims is just and has not been arranged or settled by the original debtor are conditions precedent, and as such must be averred. 1 Id. side page 321, 368.

2. There is no averment that the claim is just, and nothing equivalent thereto.

3. The omission of such averment is fatal on demurrer or in case of judgment by default (1 Id. side page 327), and it is upon this ground that a real and substantial, as well as equitable, defence rests; the Defendant insisting that the claim was never a meritorious one in its inception, but that the judgment was obtained against the original debtor, during its heavy pecuniary embarassments, by default, for an excessive and unjust amount.

VI.

As to the *sixth point*, that there is no averment of notice, Defendant submits:

1. That while notice is not usually necessary, yet in a case like this, where the name of the creditor is not even known to them, and where the provision of the act is a general one, requiring all of a certain class of debts to be paid, without specifying the parties, it is reasonable that the Defendant is entitled to notice.

2. Because it appears that the whole subject matter of the suit lay not only more properly within the knowledge of the Plaintiff, but the existence of the claim, and the non-settlement by the judgment debtor so far as Defendant is concerned, was exclusively within Plaintiff's knowledge, and therefore notice should have been given. 1 Id. side page 328. Lent & Paddleford 10 Mass. 230.

VII.

As to the *seventh point*, that the damages were assessed by the Court, we say:

1. That the damages in this case did not rest in computation, and were not liquidated, because it was not a suit upon the judgment, but only upon a conditional, unascertained liability.

2. The Defendant was not only liable (in any event) to the extent, that the cause of action of such judgment was for work and labor, and only to the extent that such claim was just.

3. The Defendant was not estopped by the judgment, because a judgment binds only a party or privy, and Defendant was neither.

4. We insist therefore that under any view of the act, it was for the jury to inquire, and ascertain what was the cause of action of the original judgment, and to what extent that cause of action was just.

In brief, this is one of those cases where the Def't below was subjected to a heavy judgment by the inadvertence or misunderstanding of attorneys, and but for which the result would doubtless have been quite different. Wherefore we respectfully ask of this Court of last resort a careful consideration of the points and authorities above submitted, and if they will justify a reversal of the judgment below, justice will doubtless be thereby subserved.

WILEY & PARKER,
Of Counsel for Plaintiff in Error.

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