NEW JERSEY COURT OF ERRORS AND APPEALS

ALFRED L. MILLER, *et als.*,
Complainant,
vs.
JOHN A. WILLETT, *et als.*,
Defendants.

On Appeal from Decree advised by Vice-Chancellor Grey sustaining Demurrer.

SUPPLEMENTAL BRIEF OF APPELLANTS.

The fact of the defendants' liability can hardly be disputed. Even the Vice-Chancellor concedes that. The language of the statute seems to be certain and clear, and if it were not so, if there were any doubt as to its meaning, the courts of the home State have set that doubt finally at rest. In the case of Zang vs. Wyant, 25 Colo. 551; 71 Am. St. Rep. 138, the statute was under review in the Supreme Court of that State and received a construction which has never been changed or modified, and is the law of that State to-day. Speaking of that very statute, the Court said: "Such statute renders stockholders in banking associations individually liable for the debts of the association in double the amount of the value of the par value of the stock owned by them, notwithstanding they may have paid, or are still liable to the corporation for, their original subscription." That construction is conclusive here upon

the question of the liability of the defendants, either at law or in equity, and the argument therefor may proceed upon that assumption. If there be such a right in favor of the complainants, there must be a remedy somewhere. But the action of the court below practically deprived the com plainants of all relief, for that court is not open to them upon "the case stated in the bill," which is the true case, nor is the enforcement of their rights in a court of law practically possible, owing to the peculiar situation of parties on both sides of the case.

That the complainants are, in this State, entitled to an action at law against the defendants is further abundantly established by practice and authority. Auer vs. Lombard, 72 Fed. Rep. 209; Dennick vs. Railroad Co., 103 U. S. 11, 18; Bank vs. Reckless, 96 Fed. Rep. 70.

The last was a New Jersey case. It was brought in the Circuit Court before Judge Gray. The plaintiff was a creditor of the Western Farm Mortgage Company, and brought suit against a stockholder of the latter to enforce a liability created by a statute of a foreign State. The Court said: "It is too late now to question the proposition that an action to enforce a liability thus created by or existing under and by virtue of the statute law of a State is transitory in its nature, and may be maintained in the courts of another State against a stockholder who resides there. It is abundantly supported by the authorities of many late cases, of both State and Federal. The Supreme Court of the United States in Dennick vs. Railroad Co. Supra, states the doctrine thus clearly: "Whenever, by either the common law or the statute law of a State, a right has become fixed, and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.

And, then, too, the liability has been held to be con-

tractual. It is not the creature of the statute pure and simple, but arises out of the implied promise or agreement of the stockholder. The case of the Western National Bank of New York vs. Theodore Skillman, tried at the Somerset Circuit some few years ago, was a case of this kind, and we take the liberty of quoting from the language of the trial judge in that case as expressing the idea in this connection very much better than we can. He said:

"The argument of counsel impressed me with the idea that this action was founded upon a statutory liability, a liability which was a pure creature of the statute, in which case it was open obviously to the question whether we would enforce in this State the liability which was the pure creature of the statute of another State without reference to whether its enforcement would be fair or just or not. *But the more I have reflected upon this matter the more satisfied am I that it is a purely contractual liability; contractual in the sense of a personal contract.* Had the defendant in this case united with a hundred other people to establish and conduct a business in Kansas, called the Western Farm Mortgage and Trust Company, they would be liable like partners; they would be liable for the debts of the whole partnership: and while they could have provided that primarily the partnership property should be subjected to the payment of those debts, they could not escape from having their own property subjected to the payment of debts in case the partnership property was insufficient."

'Corporations were devised for the purpose of escaping that kind of partnership liability. The purpose was to enable the organization of individuals to engage in business without becoming personally liable beyond certain amounts. Now such corporations are the creatures of statute, the statute of a sovereign power; they get their franchise to do their business, they get their existence as artificial persons, from the sovereign power, and the sovereign power may impose any conditions or restrictions upon them as it chooses. It might say to them, You may become incorporated, but it is upon the condition that each incorporator shall still be liable as a partner, either generally or in a limited way."

"In this case the constitution of Kansas distinctly says that in the creation of these artificial persons the debts of the artificial persons shall still be the debts of the individual stockholders to a certain extent, and the Legislature in determining how that is to be done might have adopted two modes. They might have said, The stockholders shall be liable to pay their proportion of all the debts of the company upon their being all ascertained and established by some judicial proceeding, or they might do it as it is claimed in this case they did do, they might say you must still retain when you come into this artificial organization the liability which you would have had if it had been a partnership, to the extent of so much money, namely, the par value of your stock; that is, that each should be answerable just as a partner, with a limit as to the amount. Now, I hardly think the Legislature meant to say that by this statute; it seems to me the fair construction is the other way; but, it is conceded here, the courts of Kansas say it is not so. The courts of Kansas say that the legislation intended by this act really imposed this obligation—an obligation to pay up to the amount of the par value of the stock any debt of the company. Well, now, that is the contract sued on. *I think it is a personal contract. It is a personal contract entered into by the party when he became one of the organizers or became a stockholder;* the organization was his agent to incur the indebtedness that it was his obligation to pay, not primarily, but secondarily, if the organization did not pay. If the corporation did not pay, then to the amount of his contribution up to the par value of his stock he should be liable."

"Now, we enforce contracts of that character made in another State unless they are against good morals, or against the public policy of this State. Well, I can not say it is against the public morals. A man has a right to make such a contract. It may be a very injudicious contract, but he has a right to do it, and I see no law of morals that is violated by it. Nor can I see that it violates any public policy of this State. It is true, we have no such law, but I do not see that that fact would justify me in saying that this sort of contract is one that ought not to be enforced in this State because contrary to our public policy."

The rest of his remarks were devoted to a review of

the statute of 1897 and its effect upon the case on trial, and it was held that so far as that case was concerned the statute was unconstitutional in that it both took away the obligation of a contract and deprived one of a remedy that he had when the contract was made.

So that it would seem to be established beyond a doubt that the defendants owe a personal pecuniary liability to the complainants in this case, and the question is as to how that liability is to be enforced. Are these four hundred and fifty complainants to be driven to their separate action at law against these fifteen or twenty defendants, with all the costs and inconvenience thereby implied? Is there no other way except to cast this almost infinite burden forthwith upon the courts? We say no; that no such course should be resorted to, and the law which deals with the power of a court of equity says no; that to relieve suitors and courts from such burdens, courts of equity will take charge of the rights and obligations of parties and determine them as the ends of justice require; that, instead of the three or four hundred suits that in this case would be necessary, they will extend their jurisdiction to matters of this kind in order that they may in a single cause be heard and determined with reasonable promptness and without unreasonable cost. It is upon this one ground that we have sought the jurisdiction of this court. We never claimed and do not claim now that the facts contained in the bill of complaint in this case in themselves suggest any inherent equity calling for the interference of this court; whatever rights we have are purely legal in their nature. But upon the sole ground of convenience and cost to the parties and to the courts that we ask to come in here to have our claims against the defendants finally ascertained and satisfied in one and the same cause.

Defendants say that the present case plainly comes

within the class prohibited by Chapter 50 of the Acts of the Legislature of New Jersey, approved March 30, 1897, and is not within its proviso.

The obligations in the present case were incurred when the stock of the defendant was subscribed for, which was long before the act mentioned was passed, and under Bank vs. Reckless and Bank vs. Skillman, the action is so far as this case is concerned unconstitutional. The present case is exactly parallel with Bank vs. Reckless and Bank vs. Skillman, so far as the act of 1897 is concerned.

HORTON & TILT,

TOLLES & COBBEY,

Solicitors for, and

EUGENE EMLEY,

Counsel with Appellants.

New Jersey Court of Errors and Appeals

ALBERT G. NEGLEY, JR.,
Plaintiff and Defendant in Error,

vs.

NEW YORK LIFE INSURANCE COMPANY,
Defendant and Plaintiff in Error.

} *On Writ of Error.*

BRIEF FOR DEFENDANT IN ERROR.

The facts in the case are, briefly, as follows:

On January 10, 1901, the defendant in error and the plaintiff in error entered into a written contract, whereby the defendant in error was employed as an agent for the purpose of canvassing for applications for insurance on the lives of individuals and of performing other duties in connection therewith. The defendant in error continued to work under this contract until the twelfth day of July, nineteen hundred and four, when he was dis-

charged. The defendant in error brought suit in the New Jersey Supreme Court for damages resulting from his discharge and obtained a judgment for $500 and costs.

The exceptions relied upon the plaintiff in error to reverse the judgment are of two classes. Six of the exceptions relate to the admission of evidence and the seventh is to the refusal of the trial judge to nonsuit.

The exceptions relating to the evidence will be considered first:

First Exception, Case, p. 28:—

To this exception there does not appear to be any assignment of error and consequently should not be considered, and further, the question seems to be relevant. The witness was asked what his income was during the second year of his employment under the contract. It is respectfully submitted that the only way to show how much the defendant in error would have earned after he was discharged was to show what he had earned in the past. In fact there is no other way to ascertain his earnings after he was discharged except by what he had earned under the contract in the past.

Second Exception, Case, p. 30:—

It will be found upon looking at the state of the case that the question objected to was not answered and consequently there can be no error.

Third Exception, Case, p. 31:—

It is submitted that this exception cannot be considered as error by the court because the ground of objection was not stated, and such omission is fatal to

the exception in that it cannot be considered by the court on review by writ of error.

Mooney v. *Peck*, 20 Vr., 232.

Oliphant v. *Brearley*, 25 Vr., 521.

N. J. Zinc & Iron Co. v. *Lehigh Zinc Co.*, 30 Vr., 189.

State v. *Hendrick*, 41 Vr., 41.

Fourth Exception, Case, p. 33:—

Upon examining the state of the case it will be found that the question to which this exception was taken was not answered and consequently there could be no error.

Fifth and Sixth Exceptions, Case, pgs. 33-34:—

The same objection applies to these exceptions as applies to the third exception, which is that the grounds of the objection were not stated.

In addition to the foregoing grounds in relation to the third, fifth and sixth exceptions, and in fact in relation to all the exceptions to the evidence, the charge of the trial judge pointed out to the jury what should be considered by them in assessing the damages.

The following is quoted from the charge of the court, Case, p. 100:

"If you find a verdict for the plaintiff therefore you "must determine how much would Mr. Negley have "earned between the 12th of July and the 12th of "August if he had not been wrongfully discharged on "the 12th of July and award him that amount. Now "there is nothing to show exactly what he would have "earned because he was deprived of the opportunity "of earning, and so you have to calculate from what he

"had earned in the past what he would probably earn "in the future. During the year 1903 he says he "earned somewheres between nine and ten thousand "dollars, in 1902 he earned between four and five "thousand dollars; in 1901 I think somewhere in the "neighborhood of twenty-five hundred dollars, but in "1904 he fell off and only earned, according to his own "story, some five or six hundred dollars; and accord- "ing to the testimony of the defendants about one hun- "dred and fifty dollars in six months. He says him- "self that his ability to work in 1904 had become, to a "large extent, a negative quantity, he had broken down "by reason of the affliction which came to him in the "death of his wife, and he had hardly been able to get "back in the saddle until about a month or six weeks "before his discharge, and then that he was beginning "to get back in the capacity to do the work which he "had been doing in the past. Now, with the facts "before you as to what he had been earning in pre- "vious years, as to the condition of his health in 1904 "and as to his gradual recovery, you must make up "your minds what he would have earned by way of "commission, and other moneys which he would have "been entitled to under his agreement, in the thirty "days subsequent to the day of his discharge and that "amount you will allow him if you find a verdict in his "favor."

Upon an examination of this part of the charge of the court which relates to the damages, we find that the jury was instructed to disregard all evidence in relation to what would have been earned by the defendant in error after the expiration of thirty days from the twelfth day of July, nineteen hundred and four, and therefore the jury could not have been misled as to any evidence given as to the possible receipts of Nylic after this time by the defendant in error, and if

this evidence in relation to future earnings was immaterial and irrelevant, the admission thereof was cured by the charge of the court.

It is submitted that the case of *Gottlieb* v. *N. J. St. Ry. Co., Ct. of Errors and Appeals,* 43 Vr., 480, is similar to the case at hand. In the Gottlieb case evidence was admitted which was irrelevant. The following is quoted from the opinion of Justice Fort:

"Reaching this conclusion requires an examination "of other assignments of error of the plaintiff in error "in the Supreme Court and the defendant in error "here, upon which reversal was sought there and here. "But two of them need to be noticed. One relates to "the admission by the trial judge of evidence of what "became of the store of the deceased after her decease "and what was done with the goods in the store after "her decease. Both the questions and the answers on "this line were clearly irrelevant and should not have "been admitted. They could be harmful, however, "only upon the question of damages, and as the charge "clearly defined what damages were recoverable, and "in such a way as to exclude the possibility of this "evidence in any way entering into the estimation of "the damages by the jury, we do not think there should "be a reversal for this cause."

The charge of the trial judge pointed out to the jury what evidence they should consider as to the damages to the exclusion of all other evidence in relation thereto, and the instructions of the court in relation to the damages must have been followed by the jury in reaching their verdict, as their verdict was an exceedingly fair one. The testimony showed that the defendant in error had earned over three thousand dollars the first year of his employment, nearly fifty-five hundred dol-

lars during the second year of his employment, and nearly ten thousand dollars during the third and last year of his employment, but that in the six months from January 10, 1904, to July 12, 1904, his earning powers had been diminished on account of the death of his wife, and that he was just beginning to get back his ability to work when he was discharged.

The verdict of five hundred dollars is fair and reasonable, because it is at the rate of about one-half of his earnings in the year 1903 and a little more than his earnings in the year 1902.

The seventh exception relates to the motion for a non-suit.

The grounds of the motion were that the defendant in error gave a rebate on two policies of insurance in the Noss case. At page 44 of the case the defendant in error testified that the premiums on the Noss policies were paid in full by note and cash. The entire premiums amounted to $451.20. Payment was made by a note of $382, and cash $69.20.

The plaintiff in error lays great stress upon the letter which was written by the defendant in error in reference to the $100. This is explained by the defendant in error at pages 45 and 48 of the case, that the letter was not all that was said; that there was a conversation between him and the Nosses before the policies were placed, and that the $100 was all that the Nosses would have to pay at the time the letter was written, and that the cash should be paid later, which is testified to by the defendant in error at page 49 of the case, and the matter more fully explained. At page 57 of the case the defendant in error testified that he gave no rebate in the Noss case and no rebate to White.

Certainly in the face of this testimony the trial judge could not grant a non-suit, and it was a question for the jury whether the defendant in error had violated his contract. There was no motion for the direction of a verdict and the question was left to the jury for determination.

It is respectfully submitted that the judgment should be affirmed with costs.

RAYMOND, VAN BLARCOM & ANTHONY,
Attorneys for Defendants in Error.

ANDREW VAN BLARCOM,
Of Counsel.