

irvine Vs. Lowry

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Court : US Supreme Court

Decided On : 1840

Appeal No. : 39 U.S. 293

Appellant : irvine

Respondent : Lowry

Judgement :

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Irvine v. Lowry

39 U.S. (14 Pet.) 293

*ON CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA*

SYLLABUS

An action was brought by foreign attachment in the Court of Common Pleas of Warren County, Pennsylvania, in the name of a citizen of Pennsylvania for the use of the Lumberman's Bank, at Warren, Pennsylvania, against a citizen of New York.

The suit was on a note given by the defendant to the plaintiff, to be paid "in the office notes of the Lumberman's Bank at Warren." Some of the stockholders of the Lumberman's Bank at Warren were citizens of the State of New York. The defendant appeared to the action by counsel, and having given bond with surety to the court of common pleas, removed the cause to the Circuit Court of the United States for the Western District of Pennsylvania. A motion was made in the circuit court to remand the cause to the Court of Common Pleas of Warren County, the circuit court having no jurisdiction of the cause on the ground that the real party in the suit was the Lumberman's Bank at Warren, an aggregate corporation, some of the stockholders of the bank being citizens of the State of New York. It was held that the circuit court had jurisdiction of the case.

The decisions of the Supreme Court have been uniform, and as declared at the present term in the case of *Commercial & Railroad Bank of Vicksburg v. Slocomb*, that the courts of the United States cannot exercise jurisdiction when some of the stockholders in a corporation established in one state are citizens of another state of which the party sued by the corporation is a citizen.

A note to be paid "in the office notes of a bank" is not negotiable, by the usage or custom, of merchants. Not being a promissory note by the law merchant, the Statute of Anne, or the kindred act of assembly of Pennsylvania, it is not negotiable by endorsement, and not being under seal, it is not assignable by the act of assembly of Pennsylvania on that subject relating to bonds. No suit could be brought upon it in the name of the endorser. The legal interest in the instrument continues in the person in whose favor it has been drawn, whatever equity another may have to claim the sum due on the same, and he only is the party to a suit at law on the instrument.

On 6 May, 1839, a writ of foreign attachment was issued out of the Court of Common Pleas of Warren County, Pennsylvania, in the name of Guy C. Irvine for the use of the Lumberman's Bank at Warren against Nathaniel A. Lowry, requiring bail in eighty thousand dollars. The action was founded on a promissory note in the following terms:

"\$53,000 Warren, Pa., Sept. 6, '37"

"There months after date I promise to pay to the order of Guy C. Irvine, Esq., fifty-three thousand dollars in office notes of the Lumberman's Bank at Warren and payable at their banking house in Warren."

"N. A. LOWRY"

"Endorsed on side 'GUY C. IRVINE'"

The Sheriff of Warren County attached certain real estate in the county, and also returned that he had attached the goods and chattels of Nathaniel A. Lowry in the hands of certain persons named in the return. Among the garnishees was Guy C. Irvine.

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On 24 October, 1839, Nathaniel A. Lowry, the defendant, presented a petition to the Court of Common Pleas of Warren County stating that he was at the commencement of the action, and at the time of filing the petition, a resident and citizen of the State of New York and that Guy C. Irvine, the plaintiff in the suit, is and was at the commencement of the suit a citizen of the State of Pennsylvania, and asking the court to accept the security offered for entering his appearance in the circuit court of the United States, and in all things complying with the acts of Congress in such cases made and provided; he prayed the court to proceed no further in the cause and to allow the removal of the cause to the Circuit Court of the United States for the Western District of Pennsylvania.

The court of common pleas granted leave for the removal of the cause to the circuit court, and the defendant gave a bond with security for the entry of the cause in the circuit court.

On the same day on which the petition of Nathaniel A. Lowry was presented to the Court of Common Pleas of Warren County, the affidavits of Robert Falconer, President of the Lumberman's Bank at Warren, and of Walter W. Hodges, were

filed.

The affidavit of Mr. Falconer stated that at the date of the note on which the action was founded, he was president of the bank, and the note was received from the defendant at the time it bears date as a security for his previous indebtedness to the institution, and that Guy C. Irvine had not then or at any time since any interest in the said note except as guarantor for the payment of the same and the solvency and sufficiency of the drawer of the note.

The affidavit of Mr. Hodges stated that William Hall, Vine Elderken, Brown and Buckland, Starkweather and Brown, and sundry other persons, were stockholders in the Lumberman's Bank at Warren, and at the time of the institution of the suit were citizens of the State of New York residing in that state.

The case being in the Circuit Court of the United States for the Western District of Pennsylvania, at the November sessions of the court, Mr. Biddle, for the plaintiff, moved to remand the cause to the Court of Common Pleas of Warren County for want of jurisdiction.

On the hearing of this motion before the circuit court, Mr. McCandless, the counsel for the Lumberman's Bank at Warren, produced to the court an Act of the Assembly of Pennsylvania passed 28 February, 1834, for chartering the bank; also an Act of Assembly of Pennsylvania of 21 March, 1813, entitled, An act to recharter certain Banks, and it was admitted that the bank commenced the business of banking at Warren, in Pennsylvania, having been organized under the act of 1824. The counsel for the bank also produced the note on which the suit had been brought.

The counsel for the bank stated, and the defendant's counsel admitted, that this suit was founded on the note.

"Whereupon, it appearing to the court that this suit is founded on the note aforesaid, dated 6 Sept., 1837; that Guy C. Irvine was, at the date of the institution of this suit, a citizen of Pennsylvania,

and that N. A. Lowry was at the same date a citizen of the State of New York, that said bank was erected and duly organized at Warren, in Pennsylvania, under the Act of February 28, 1834, aforesaid, and that six persons mentioned in the record and sundry other stockholders thereof were, at the date of said suit, citizens of the State of New York, and due consideration being had of the premises, the court is divided in opinion, one of the judges thereof being of opinion that this Court has no jurisdiction of the case; that the rule, granted as aforesaid, be made absolute and the record of this suit remanded to the court of Common Pleas of the county of Warren; the other judge being of opinion that the court has jurisdiction of the case and that the rule granted as aforesaid be denied."

The judges of the circuit court certified this division of opinion to the Supreme Court of the United States.

MR. JUSTICE BALDWIN delivered the opinion of the Court.

This suit was instituted in the Court of Common Pleas of Warren County, Pennsylvania, whence it was removed to the Circuit Court for the Western District of that state pursuant to the provisions of the Judiciary Act of 1789, section twelve, and comes before this Court on a certificate of division of opinion between the judges of that court on a motion to remand the cause for want of jurisdiction.

Irvine, in whose name the suit is brought, is a citizen of Pennsylvania; the Lumberman's Bank of Warren is a corporation chartered by a law of that state and located at Warren; part of the stockholders are citizens of New York, of which state the defendant is also a citizen. The suit is brought upon a paper, of which the following is a copy:

"\$53,000 Warren, Pa., 6 September, '37"

"Three months after date, I promise to pay to the order of Guy C. Irvine, Esq., fifty-three thousand dollars in the office notes of the Lumberman's Bank at Warren, and payable at their banking house in Warren, Pa."

"N. A. LOWRY"

"Endorsed on side 'GUY C. IRVINE'"

The suit was commenced by the process of foreign attachment, agreeably to the law of Pennsylvania; the property of the defendant was attached according to its provisions, whereupon he appeared and by his counsel moved for the removal of the cause, and having complied with the requisitions of the Judiciary Act, the cause was ordered to be removed to the circuit court.

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By thus approving and submitting to the process of attachment, the defendant waived any privilege to which he was entitled by the section of the Judiciary Act, as held by this Court in [Toland v. Sprague](#), 12 Pet. 330-331, so that on his appearance and entry of bail, the attachment was dissolved and the cause will thenceforth proceed as if it had commenced by the ordinary process of the court, served on the defendant within the district. The commencement of the action in the common pleas by attachment being expressly provided for in the twelfth section of the Judiciary Act, it must be considered, when removed into the circuit court, as an original one.

This brings us to the question raised in the argument of the plaintiff's counsel, whether that Court can exercise any jurisdiction over the case on the ground that the defendant and some of the stockholders of the bank are citizens of New York, which would be a fatal objection to the jurisdiction if the corporation is to be considered as the plaintiff and sole party in interest. On this subject, the decisions of the Court have been uniform, and, as declared in the present term in [Vicksburg Bank v. Slocomb](#), 14 Pet. 60, have settled this point decisively; nothing then remains but to ascertain from the record, as certified, whether the bank is the real

plaintiff, for if they are not, then as Irvine is admitted to be a citizen of Pennsylvania and Lowry of New York, the jurisdiction is undoubted.

The paper on which the suit is brought is not negotiable by the usage or custom of merchants; it is payable to order; the promise is to pay so many dollars, but not to pay any certain sum of money; it is a promise to pay the amount "in the office notes of the Lumberman's Bank at Warren," which are not money, and at most a chattel. Not being a promissory note either by the law merchant, the statute of Anne, or the kindred act of assembly of Pennsylvania, it is not negotiable by endorsement, and not being under seal, it is not assignable by the act of assembly on that subject relating to bonds. The bank therefore cannot sue in its own name in virtue of the endorsement of Irvine in blank; nor could they so sue if it was specially endorsed to them, because the legal right of action would still remain in Irvine, though the equitable interest in the thing promised may have passed to the bank. This case, however, is not of that description; the only evidence of any transfer of the contents of the note is the blank endorsement of Irvine and the affidavit of the President of the bank, in the latter of which it is stated that the note was received by the bank from the defendant, at the time it bears date, as a security for his previous indebtedness thereto, and that Irvine had not then or since any interest in said note except as a guarantor for its payment and the solvency and sufficiency of the drawer.

In referring to the affidavit, we are not to be understood that whatever may be its contents, they would influence our decision; yet assuming the case to be as there stated, the legal right of action is in Irvine; the paper is not the evidence of an original

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debt, contracted by a discount thereof or its reception as payment of a preexisting debt due the bank. It is only a collateral security by adding the name of Irvine as endorser. Standing as such to the bank, their rights are derivative through him, and as the endorsement passes only an equity, the legal interest is in him; he is the real plaintiff in a court of Law, in which legal rights alone can be recognized.

This consideration points to the true line of discrimination between this and the case of *Brown v. Strode*, 5 Cranch 303, which was a suit against an executor on his administration bond, given to the justices of the peace of the county where the testator died, and who were citizens of the State of Virginia, as well as the defendant. The jurisdiction of the circuit court was sustained on the ground that though the plaintiffs and defendants were citizens of the same state, the former were mere nominal parties, without any interest or responsibility, and made by the law of Virginia the mere instruments or conduits through whom the legal right of the real plaintiff could be asserted; as such their names must be used, for the bond must be given to them in their official capacity; but as the person to whom the debt was due was a British subject, he was properly considered as the only party plaintiff in the action. Whatever right of action existed in virtue of the bond passed by the operation of the law of Virginia directly to the person for whose benefit it was given, through the conduit appointed for that purpose. For such and kindred cases the person or officer thus selected by the law as its agent is not a party to the suit, and no transfer of the bond or other security to the person entrusted is necessary to invest him with a complete legal interest or right of action; but cases of this description cannot be applied to actions like the present, in which the interest and responsibility of the parties to the paper depends on their contract, and the law neither dissolves or transfers any legal right of action on or to the party who accepts it as security for payment of a preexisting debt.

We are therefore of opinion that the circuit court has jurisdiction of the case, and direct that it be so certified.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Pennsylvania, and on the point and question on which the judges of the said circuit court were opposed in opinion, and which was certified to this Court for its opinion, agreeably to the act of Congress in such cases made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this Court that the said circuit court has jurisdiction of the case. Whereupon it is ordered and adjudged that it be so certified to the said circuit court accordingly.

