
Syllabus.

Decisions on such motions, by the District Courts, were required to be made upon such grounds of law and facts as the case might furnish; and upon like grounds were the decisions of the Supreme Court, upon appeal, required to be made. We cannot doubt that the decision of the District Court, in such a case, was the exercise of a discretion not reviewable in the Territorial Supreme Court, except under an express statute of the Territory. And we are obliged to think that the decision of the appellate court was equally an exercise of discretion upon the law and the facts, and not reviewable here in the absence of any act of Congress authorizing appeals in such cases.

This view of the preliminary question makes it unnecessary to examine the other important points in the case, which have been so ably and exhaustively discussed by counsel. We think the judgment of the Supreme Territorial Court only an order affirming the order of the District Court denying a motion for new trial, and that it is therefore not reviewable here on error.

WRIT DISMISSED.

BELL v. RAILROAD COMPANY.

1. Municipal corporations, such as the county boards of police usual in Mississippi, when authorized by statute to do acts which otherwise they would have no power to do—such, for example, as subscribe to a railroad incorporated and beginning in another State and passing through their own State—cannot modify or alter the subscription as authorized by the statute. A compromise by such board with a railroad company which does so modify or alter the subscription is, accordingly, void.
2. A sheriff, *ex officio* collector of taxes, who under the direction properly given of such county police board has collected a tax which such board was authorized by statute, upon certain conditions, to levy for the benefit of another body, a railroad company, has no right to decide whether such municipal body has laid the tax rightly or not, or to settle differences between the tax-payers, the county, and the third body. If the president of the board of police direct him to pay it to the third body his duty is to pay it.

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3. The fact that the statute made it the duty of such sheriff before entering upon the duty of collecting to give a bond to the president of the board of police, with sureties to be approved by him, and by which he should bind himself to "keep safely and pay over to the order of the president of the board of police all money collected by him," and that the sheriff did not give a bond in such form at all, does not affect this obligation.
4. Where there is a plea to merits, and the parties go to trial accordingly, irregularities previously set up by pleas in abatement and demurrers to them are waived.

ERROR to the District Court of the United States for the Northern District of Mississippi.

The Mobile and Ohio Railroad Company, a corporation created by the laws of Alabama, was compelled, in order to reach its northern terminus, to pass through Mississippi, and the legislature being desirous that the road should be built, gave to the corporation the necessary powers to extend their line through the State. As the enterprise was one of great public utility, it was deemed important that the counties benefited by the construction of the road should have the privilege of subscribing for and holding stock in it. Provision was accordingly made for the police court of any county through which the road should be located, or of any county contiguous to it, to subscribe for stock, if the sense of the people of the county, obtained through an election, was in favor of it, and authority was given to levy a special tax to pay for the stock, if the vote was for the subscription. The sheriff of the county, who was ex-officio tax collector, was required, before he entered on the discharge of the duties imposed on him by this legislation, to execute a bond, payable to the president of the board of police and his successors in office, conditioned that he would safely keep and *pay over to his order* all moneys collected by virtue of the tax thus levied. The County of Pontotoc voted to subscribe for one hundred thousand dollars of stock in the road, and the board of police of the county, at their August term, 1852, levied a tax to pay for this subscription, and directed the sheriff to collect it, who, in pursuance of his instructions, did collect a certain sum of money.

The police court, for some reason not disclosed by the rec-

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ord, failed to make the subscription, and controversy arose with the railroad corporation because this was not done, resulting in a litigation. This litigation was finally compromised; the railroad company agreeing to release all claim against the county on account of any liability for stock heretofore voted for by the people of the county, to be taken by the county, and the condition of the release being that the board of police would pay over as a bonus the sum collected by the sheriff.

The president of the board accordingly, by written draft, directed the sheriff, a certain Bell, to pay to the railroad company the sum of money already collected by him under order of the board of police for the purpose of paying for stock in the said company. Bell, when called on by the agent of the company, specially appointed to settle the dispute, to know if he would accept the order, told his agent "to get up his order and fix it up right, and if things were fixed up right, he, Bell, had the money." When, however, the order was actually presented, Bell would not accept the order nor pay the money, alleging that the stock had been illegally subscribed for.

He had not given a bond in the form prescribed by the statute authorizing the subscription.

The company now brought *assumpsit* against Bell in the Federal court for the Northern District of Mississippi, to recover the sum which he had collected, setting out the order, acceptance, and non-payment; declaring also on an account stated. Evidence of the compromise and agreement was put in evidence and relied on; also the written order of the president of the police board on Bell, to pay the money to the railroad company.

The court below charged, among other things, that the police court had no authority except such as was derived from the acts of the legislature, and as such had no authority to make a compromise, and that their action therein was void. That the money in the hands of Bell vested in the company so soon as an order was made by the president of the police board on him to pay the money to the company.

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That Bell had no right to judge of the fact whether the stock had or had not been legally subscribed for.

Judgment went accordingly in favor of the railroad company for the sum collected by the sheriff, Bell, defendant in the suit, and he now brought the case here on error on exceptions to the charge.

The record showed that there were pleas in abatement and a demurrer to them in the case; the disposition of which was not very plain. There was also a plea to the merits subsequently put in, on which the suit went to trial, and was tried.

The case was submitted on the record on behalf of the plaintiff in error, Bell, and a printed brief of *Mr. Peck, contra*, who contended that, if the compromise between the railroad company and the county was made in good faith, it was binding. The company having a right to sue, and the county a right to defend, the right to settle in any way, including compromise as one way, followed; but that if this was not so, that the error had been to the prejudice of the railroad company and not to that of Bell, and that the charge having been correct on other points, there was no error for which judgment could be reversed. In other respects—the learned counsel argued—the charge was right.

Mr. Justice DAVIS delivered the opinion of the court, and after stating the case proceeded thus:

It is not necessary to consider the terms of the compromise as a basis of recovery; for it is very clear that a municipal corporation like the board of police could not modify or alter the stock subscription voted by the people, in the absence of power from the legislature, and as there is no pretence that this was conferred, it follows that the agreement made with the railroad company was without authority of law, and void. But the company did not rest their right to recover on *this agreement*, and the court expressly charged the jury that no effect could be given to it.

There is, however, aside from this agreement or compromise, a substantial ground—relied on by the court below.

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and sustained by the evidence—on which the judgment in this case can be supported. If the County of Pontotoc, according to the requirements of the law, voted a subscription to the stock of the railroad; the board of police levied a tax to pay for it; the tax was collected; and the president of the board instructed Bell, who was the sheriff, and had the money, to pay it to the agent of the company, who also demanded payment, then the liability of Bell is fixed, and he cannot be allowed to interpose collateral matters by way of defence. The money in the hands of Bell vested in the railroad corporation so soon as the president of the board of police drew the order, and, on presentation, *he* was obliged to pay. *His* duty was obedience. It was no part of his business to sit in judgment on the proceedings of the board of police, nor was he at liberty to constitute himself an arbiter to settle the differences that had arisen, or might arise, between the county, the tax-payers, and the company, growing out of the vote to subscribe stock, and the refusal to make the subscription.

So far as Bell was concerned, the board of police had the exclusive power over this subject; and if in the exercise of that power the president of the board directed him to pay the money to the Mobile and Ohio Railroad, he could not question the authority nor review the decision. And the omission to give the bond, as by law required, cannot affect his liability, although it may lessen the security of the company.

There is great confusion in the record in relation to the disposition of the demurrers and pleas in abatement; but, as Bell filed a plea to the merits, and the parties went to trial, all antecedent irregularities were waived.

There is no error in the record, and the judgment below is

AFFIRMED WITH COSTS.