

DANIELSON v. NORTHWESTERN FUEL CO.

(Circuit Court, D. Minnesota, Fifth Division. February 15, 1893.)

1. JUDGMENT—FINALITY—EXECUTION.

Where a motion for a new trial is made and duly filed with leave after judgment is entered, according to the practice of some districts, the judgment does not become final, so as to authorize the issuance of execution, until the motion is disposed of.

2. SAME—NEW TRIAL.

Where an order denying a motion for a new trial is signed by the judge at chambers, in vacation, it does not become effective, so as to render the judgment final, until the order is filed of record in the clerk's office.

3. SAME—EXECUTION—WHEN ISSUABLE.

Under Rev. St. § 1007, providing that until the expiration of 10 days an execution shall not issue "in any case where a writ of error may be a supersedeas," Sundays are to be excluded in the computation of time.

At Law. Action by Karl Danielson against the Northwestern Fuel Company. Hearing on motion to quash an execution. Granted.

Statement by NELSON, District Judge:

The judgment in this cause was entered in the fifth division of this district October 17, 1892, and on that day an order was entered, staying the issue of execution thereon, and a motion was made, before the stay expired, for a new trial. This motion was heard at chambers, and taken under advisement, and on January 18, 1893, an order was signed by the judge, denying said motion, which order was sent to the clerk's office of the court in the fifth division for record, and was filed and entered of record therein on January 21, 1893. On January 30, 1893, an execution was issued by the clerk, but retained by him till January 31, 1893, and was received by a deputy United States marshal on the same day, but no levy was made, under and by virtue of the same, until February 2, 1893. On the 2d day of February aforesaid a citation was duly issued, a writ of error duly filed, and a supersedeas bond duly approved and filed. A bill of exceptions had been settled, signed, and filed before the latter day. A motion is now made to quash the execution, and set aside all proceedings that may have been done under the same.

Draper, Davis & Hollister, for the motion.

John W. Arctander, opposed.

NELSON, District Judge, (after stating the facts.) No execution could issue until a final judgment is rendered. The judgment became final at the time when the motion for a new trial was determined. See *Woods v. Lindvall*, 48 Fed. Rep. 73, 1 C. C. A. 34.

Although the order denying the motion for a new trial was signed by the judge in vacation, and at chambers, upon January 18, 1893, it was not effective, so that the judgment became final, until the order was filed of record in the clerk's office in the division in which the judgment was entered, which was on January 21, 1893.

Under section 1007, Rev. St. U. S., as interpreted by the United States supreme court, (*Doyle v. Wisconsin*, 94 U. S. 52,) the legislative intent is to be determined by looking at the old law as it existed before the revision; and when this is done it is found that, until the expiration of the term of 10 days, "execution shall not issue in any case where a writ of error may be a supersedeas;" and the term of

10 days also excludes Sundays. See, also, *Kitchen v. Randolph*, 93 U. S. 86, and *Danville v. Brown*, 128 U. S. 503, 9 Sup. Ct. Rep. 149.

Motion to quash execution is granted.

BALTIMORE & O. R. CO. v. PARRETTE et al.

(Circuit Court, S. D. Ohio, E. D. March 10, 1893.)

No. 622.

1. EMINENT DOMAIN—PARTIES—RIGHTS OF LESSEE.

A judgment condemning lands for public use does not affect a lessee's right of possession when he is not made a party.

2. RES JUDICATA—SUITS AT LAW AND IN EQUITY.

Where a lessee who was not made a party to condemnation proceedings brings suit to enjoin a city from opening a street through the leased premises, a decree finding that the equities are with the defendant, and dismissing the bill, does not bar the lessee from maintaining a subsequent action at law to assert his legal right of possession.

At Law. Action of ejectment by the Baltimore & Ohio Railroad Company against Thomas F. Parrette and others. Judgment for plaintiff.

J. H. Collins, for complainant.

Joseph Hidy and Ace Gregg, for respondents.

SAGE, District Judge. This is an action in ejectment against Thomas F. Parrette, Lewis C. Mallow, and Henry Fulton, commissioners of Fayette county, Ohio, and against Addison Hays & N. B. Hall, partners as Hays & Hall, to recover possession of a strip of land 28 feet wide and 50 feet long, on the southwest side of the complainant's main track, a short distance northeast of its passenger depot at Washington court house, Fayette county, Ohio. The petition was filed on the 23d day of August, 1892. It sets forth that the defendants, on or about the 14th day of August, 1892, in the night season, entered upon said strip of land, and erected thereon a wooden structure of trestles, sills, flooring boards, and other material of similar character; that said entry was unlawful, wrongful, and without any right or title; and that they had remained in possession and were in possession thereof. The plaintiff, setting up its own title and right of possession, prays for judgment.

The defendants deny the complainant's ownership, and its right to the exclusive possession of said property, or that they have remained in possession of said premises ever since the 14th day of August, 1892, or that they were in the possession of the same on the 23d day of August, 1892, or have been at any time since that date, or that they have kept plaintiff out of possession. They admit that the plaintiff has a limited and qualified ownership in the premises, and that the defendants, on the 14th day of August, 1892, entered upon the same, and erected thereon a bridge across Paint creek; but they deny that the entry was unlawful or wrongful, and assert their full right to do what they did do. They further