

BOSTON SAFE-DEPOSIT & TRUST CO. v. MACKAY et al.

(Circuit Court, S. D. New York. December 20, 1895.)

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP.

Where a citizen of one state commences an action in the state court of another state against three persons, two of whom are citizens of the state where the suit is brought, and one of whom is a citizen of a third state, such citizen of the third state may remove the case to the federal court.

This was an action by the Boston Safe-Deposit & Trust Company against John W. Mackay, E. S. Stokes, and the United Lines Telegraph Company, commenced in a court of the state of New York. The plaintiff was a citizen and resident of the commonwealth of Massachusetts; John W. Mackay, one of the defendants, was a citizen and resident of the state of Nevada; while the two remaining defendants, E. S. Stokes and the United Lines Telegraph Company, were citizens and residents of the state of New York. The defendant Mackay filed a petition and bond for removal to the United States circuit court for the Southern district of New York, and filed a transcript of the record in that court. The plaintiff moved to remand.

Wilson & Wallis, for plaintiff.

William W. Cook, for defendant John W. Mackay.

LACOMBE, Circuit Judge. Motion denied. *Garner v. Bank*, 66 Fed. 369.

BLUMENTHAL et al. v. SHAW.

(Circuit Court of Appeals, Third Circuit. November 6, 1895.)

No. 17.

WRIT OF ERROR—FINAL JUDGMENT—QUESTION NOT RAISED BELOW.

A writ of error was sued out after the time limited by law, and thereafter the plaintiff in error moved in the appellate court to dismiss the same on the ground that no final judgment had been entered in the court below. The record entry in that court was as follows: "Verdict for plaintiff, and his damages assessed at \$1,000, besides costs, & judgment accordingly." *Held*, that under the peculiar circumstances of the case the appellate court would not determine the question whether such entry was valid and conclusive of judgment, but would remit the case to the court below in order that it might first have an opportunity to pass upon the question.

In Error to the Circuit Court of the United States for the District of Delaware.

This was an action at law by Mark A. Shaw against Ferdinand Blumenthal and Julian S. Ulmann, trading as F. Blumenthal & Co. There was a verdict for plaintiff in the circuit court, and defendants sued out a writ of error. They now move to dismiss their writ of error on the ground that there is no judgment of the circuit court to which a writ of error could properly be taken.

The record entries of the proceedings in the circuit court, beginning with the trial, were as follows:

v.70F.no.9—51

"1894, Nov. 20th, trial, and jury drawn and sworn. 1894, Nov. 22d, motion for nonsuit. 1894, Nov. 23d, motion denied. 1894, Nov. 21st, 22d, 23d, and 24th trial continued. 1894, Nov. 24th, verdict for plaintiff, and his damages assessed at one thousand dollars, besides costs, & judgment accordingly. 1894, Nov. 24th, defendants move for a new trial. Ordered, that reasons be filed for the same in four days. 1895, July 25th, bill of exceptions signed, sealed, and filed. 1895, July 25th, defts.' petition praying for allowance of writ of error filed with assignments of error. 1895, July 25th, order allowing writ of error, and that petitioners execute bond with surety in \$3,000. 1895, July 25th, said defts.' and petitioners' bond on writ of error in \$3,000 filed. 1895, July 25th, said bond approved. 1895, July 25th, writ of error issued, with the approval of the district judge indorsed thereon, and copy lodged. 1895, July 25th, citation to deft. in error issued, marshal returns served, etc. 1895, Aug. 9th, citation filed."

The minutes of the court under date November 24, 1894, omitting the caption, etc., are as follows:

"The trial of the issues herein was resumed and concluded, and the court charged the jury.

"Verdict: 'And the jurors aforesaid, upon their oaths and affirmation aforesaid, do say that they find for the plaintiff, and assess his damages at the sum of one thousand dollars, besides costs.'

"The defendant moves for a new trial, and thereupon it is ordered that reasons for the same be filed in four days. The jurors were discharged from any further attendance, at this term. Court then adjourned until Monday next, at 10 o'clock a. m."

Willard Saulsbury, for plaintiffs in error.

Herbert H. Ward, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges.

PER CURIAM. We have very carefully considered the motion of the plaintiff in error for the dismissal of his writ of error in this case upon the ground that there was and is no final judgment in the court below. We, however, think it is not desirable that we should, upon the present motion, decide whether, when the writ of error issued, there was or was not such a judgment. We remit that question to the circuit court. Whether the entry of November 24, 1894, should be taken as a valid and conclusive entry of judgment in the cause is one which, in our judgment, should, under the peculiar circumstances of this case, be brought before the court whose judgment is in question, and be by that court considered, before calling upon us to pass upon it. That the entry referred to was made irregularly and prematurely, if the general practice with which we are familiar should be applied to it, we have no doubt; and it may well be that, upon examination and full consideration of the subject, the circuit court, which as yet has not had occasion to consider it, will be able to correct its record, by striking off the entry of November 24, 1894, as having been improvidently made, and so relieve the plaintiff in error from the situation, in which he apparently stands, of having sued out his writ of error after the period allowed by the statute had expired. It is accordingly ordered that the writ of error in this case be, and is hereby, dismissed without prejudice, and that the record be remitted to the circuit court for the district of Delaware, with leave to the plaintiff in error to proceed in that court as he may be advised.

**GUARANTEE TRUST & SAFE-DEPOSIT CO. v. DULUTH & W. R. CO.
et al.**

(Circuit Court, D. Minnesota, Fifth Division. June 22, 1895.)

No. 190.

RAILROAD FORECLOSURE—INTERVENTION BY STOCKHOLDERS.

In a special case, where it is alleged that the directors, for the purpose of sacrificing the interests of the stockholders, refuse to defend a suit, a court of equity will permit the stockholders to intervene and become parties defendant, so as to protect their own interests and the interests of the other stockholders who may choose to join them in the defense.

This was a suit by the Guarantee Trust & Safe-Deposit Company against the Duluth & Winnipeg Railroad Company, the North Star Construction Company, and the Safe-Deposit & Trust Company of Maryland, for the foreclosure of a mortgage. Certain stockholders petition for leave to intervene and defend.

T. J. Sherman and Munn, Boyeson & Thygeson, for complainant.
Warner, Richardson & Lawrence and Davis, Kellogg & Severance, for intervenors.

Walter Holcombe, for defendant Duluth & W. R. Co.

Robert C. Hine, for defendants North Star Const. Co. and Safe-Deposit & Trust Co. of Baltimore.

NELSON, District Judge. An action was commenced in this court October 11, 1894, to foreclose a mortgage or trust deed executed by the Duluth & Winnipeg Railroad Company, a Minnesota corporation, on or about July 1, 1889, to secure its bond issue; the North Star Construction Company of New Jersey and the Safe-Deposit & Trust Company of Baltimore being also made defendants. The Duluth & Winnipeg Railroad Company filed an answer October 11, 1894, admitting all the allegations in the complaint, and consented that the complainant have the relief demanded; and on the same day a receiver was appointed, who took charge of its property. The North Star Construction Company also answered, November 21, 1894, alleging, among other things, that its claim is prior, senior, and superior to the mortgage lien of the complainant. The Safe-Deposit & Trust Company, in its answer filed December 21, 1894, alleges that it has a claim superior to the lien of complainant, in that on or about December 2, 1890, the Duluth & Winnipeg Company and the North Star Construction Company entered into an agreement reciting that certain bonds of the Duluth & Winnipeg Railroad Company were put into its hands in escrow; that it has performed its contract, and demands payment for services. In neither answer is there any denial that the complainant is not entitled to a decree of foreclosure, nor any statement of facts which is a defense to the foreclosure proceedings. A decree pursuant to the prayer of the bill, by consent of defendants, was signed January 28, 1895, but has not been entered. In this condition of the cause a petition was presented to the court January 31, 1895, by four persons claiming to be stockholders of the Duluth & Winnipeg Railroad Company, praying that the parties to the suit be ordered to show cause why the decree should not be