

FIRST LITTLETON BRIDGE CORP. v. CONNECTICUT RIVER LUMBER CO.

(Circuit Court, D. New Hampshire. September 24, 1895.)

No. 404.

REMOVAL OF CAUSES.

In this case the petition for removal to a federal court was not filed until after the time allowed by the state court for filing pleas in abatement, and it was held that the circumstances did not show a waiver of the matter of time, and the case must be remanded.

Action by the First Littleton Bridge Corporation against the Connecticut River Lumber Company. On motion to remand to the state court.

James W. Remick and Harry Bingham, for plaintiff.

Drew, Jordan & Buckley and Geo. H. Bingham, for defendant.

PUTNAM, Circuit Judge. I find that the writ was returnable to the term of the supreme court of the state held on the third Tuesday of September, 1894, and that at that time the following rule of that court was in force:

"Pleas in abatement shall be delivered to the counsel of the adverse party or filed with the clerk, and notice thereof put upon the docket within the first four days of the term."

I find that there is no claim that this rule is not peremptory, with reference to the period named in it, or that the court has power to extend it. I find that the petition for removal was not filed in the state court until after the expiration of the period of four days named in the rule, so that, on the authority of *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673, 684, 14 Sup. Ct. 533, it was not seasonable. I find that there was no actual waiver of the defect, with any intention to waive. I find the petitioner did not serve the plaintiff with a copy of the removal papers, or notify it that the petition had been filed. I find that no appearance has been entered in this court by the plaintiff, as provided by rule 5, which was in force on and after September 1, 1894, and that no appearance by the plaintiff, in any form, has been actually made in this court, except for the purpose of making the motion to remand. I find that the attorneys for the plaintiff intended to enter their appearance, wrote the clerk to make the entry for them, and that the clerk called their attention to the necessity of a formal entry under rule 5, but that, as already said, no appearance was in fact entered. I find that certain conversations and correspondence have taken place between the attorneys of the plaintiff and those of the defendant touching this case and its trial on the merits; but I am unable to find, from the facts submitted, that the plaintiff or its attorneys knew, or were bound to know, before these conversations and correspondence, either with the clerk or the defendant's attorneys, or until about the time when the petition to remand was filed, that the removal papers were not seasonable. Therefore I do not find that the plaintiff has, by unreasonable delay or otherwise, waived, as a matter

of fact, the defect in the removal proceedings. The actual entry of a general appearance by the plaintiff, or proceedings by it or its attorneys, in open court, prior to the filing of the petition to remand, if such had been proved, would probably have taken effect as a waiver by force of law. But, in the absence of sufficient proof of the matters hereinbefore stated, I am of the opinion that the inchoate and executory transactions referred to do not have any such effect.

As the matter now stands, the plaintiff is entitled to its costs in this court. *Martin v. Snyder*, 148 U. S. 663, 664, 13 Sup. Ct. 706. Therefore the clerk will enter the following order: Ordered, that the findings of the court accompanying this order be filed and entered of record, and that an order be entered remanding the case, with costs for the plaintiff.

DE BEAUMONT v. WEBSTER.

(Circuit Court, D. New Jersey. January 2, 1896.)

WITNESS—COMPETENCY—INTERESTED PARTY—REV. ST. § 858.

Rev. St. § 858, contains the whole law governing the courts of the United States in respect to the competency, as witnesses, of interested parties, and no state statute can annex any further qualification to its provisions. Accordingly, *held*, that an interested party could not be wholly excluded as a witness in an action brought in a federal court by an administratrix, but only such parts of his testimony could be rejected as related to transactions with, or statements by, the intestate.

This was a suit brought by Alexandre De Beaumont, and continued after his death by his administratrix, against Warren Webster, for an accounting. The cause was heard on the pleadings and proofs, and at the same time a motion was made to strike out certain testimony of Warren Webster.

Carrie B. Kilgore and David C. Harrington, for complainant.
E. Cooper Shapley and Ernest Howard Hunter, for defendant.

DALLAS, Circuit Judge. Immediately before the argument of this case was entered upon, complainant's counsel presented a motion in writing to strike out the testimony of Warren Webster, on the ground that his examination as a witness on his own behalf occurred after the death of Alexandre De Beaumont, and the substitution of his administratrix as a party plaintiff. This motion has been retained by me, and will now be filed as of December 5, 1895,—the day upon which it was made.

By section 858 of the Revised Statutes of the United States, it is enacted that “* * * no witness shall be excluded * * * because he is a party to or interested in the issue tried:” provided (so far as affects the present case) “that in actions by * * * administrators * * * neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the * * * intestate.” This section is the whole law of the matter, and no state statute can, for this court, annex any qualification to the general