WALTERS et al. v. WESTERN & A. R. CO. et al.

McLENDON v. STAHLMAN.

(Circuit Court of Appeals, Fifth Circuit. May 5, 1896.)

No. 457.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

This was a suit by William T. Walters and others against the Western & Atlantic Railroad Company and others. J. S. McLendon filed an intervening petition, asking the allowance of a claim against the assets of the corporation, which petition was referred to a special master. On the coming in of the master's report, an order was taken directing the payment of $80 to McLendon. 69 Fed. 679. From this order he appeals.

W. L. Albert and John L. Hopkins, for appellants.
J. Carroll Payne, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SPEER, District Judge.

PER CURIAM. The judge of the circuit court gave elaborate reasons for his decree. Without affirming his reasons in toto, we are satisfied that the decree appealed from is correct, on the ground that, at the date of the garnishment of the Western & Atlantic Railroad Company on the judgment against Perino Brown, the said railroad company is not shown to have been indebted to said Brown beyond the sum of $80, which sum, by the decree, is awarded to the intervener. Decree affirmed.

THE ICE KING.

In re KNICKERBOCKER STEAM TOWAGE CO.

(Circuit Court of Appeals, Second Circuit. April 7, 1896.)

No. 137.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by James McCaldin and Joseph McCaldin against the steam tug Ice King to recover damages suffered by the steam tug McCaldin Brothers in a collision between the two boats. The Knickerbocker Steam Towage Company, as owner of the Ice King, filed a petition for limitation of liability. Limitation allowed, and decree for libelant for one-half the damages. 52 Fed. 894. The claimant of the Ice King appealed from so much of the decree as adjudged the Ice King at fault in the collision. The owners of the McCaldin Brothers also appealed.

McCarthy & Berier, for petitioner appellant.
Carpenter & Park, for appellants James and Joseph McCaldin.
Chas. M. Stafford, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

Decree affirmed on opinion of district judge, without costs.

HUNT et al. v. HOWES et al.

(Circuit Court of Appeals, Fifth Circuit. April 14, 1896.)

No. 406.

PRACTICE ON APPEAL—DISMISSAL FOR WANT OF JURISDICTION—COSTS.

Plaintiffs brought an action in the United States circuit court, whose jurisdiction of the case rested wholly upon diverse citizenship, alleging in their complaint that they were residents of the state of Montana, but failing to allege that they were citizens thereof. The defendants answered. There was a protracted trial of the case, resulting in a verdict and judgment for the plaintiffs. The defendants moved for a new trial, upon numerous grounds. This motion was denied. The defendants then presented voluminous bills of exceptions, sued out a writ of error, and presented numerous assignments of error. At no stage of the proceedings, until the hearing in the circuit court of appeals, did the defendants suggest the defect in the allegations of citizenship, nor the want of jurisdiction; but, upon such hearing, they moved to dismiss the writ of error, and remand the cause, with instructions to dismiss it, for want of jurisdiction. It clearly appeared from the record, though not by direct averment, that the necessary diversity of citizenship existed. *Held* that, as the court was without jurisdiction, because of the defective averment, the cause would be remanded for appropriate action by the circuit court, which might, in its discretion, permit an amendment; but, as the writ of error was superfluous, the costs thereof would be taxed against the defendants. Boarman, District Judge, dissenting.

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

This was an action by Howes & Strevell against T. C. Hunt and others. There were verdict and judgment for plaintiffs. Defendants' motion for new trial was overruled, whereupon they bring their writ of error.

W. H. Webster, for plaintiffs in error.

Geo. H. Noyes, for defendants in error.

Before McCORMICK, Circuit Judge, and BOARMAN and SPEER, District Judges.

SPEER, District Judge. The plaintiffs, Howes & Strevell, averring themselves to be residents of Miles City, in the county of Custer, in the state of Montana, sued the defendants, who, it appears, are citizens of the Northern district of Texas. On the trial, verdict and judgment were rendered in behalf of the plaintiffs. Motion for new trial was made by the defendants, which was overruled, and the cause was brought here by writ of error.

When called for disposition, counsel for plaintiffs in error moved to dismiss the writ of error, and to remand the case, with instructions to the circuit court to dismiss it, because the record wholly failed to disclose the proper diversity of citizenship necessary to confer jurisdiction upon the circuit court or upon this court. It is well settled that the necessary diversity of citizenship must appear in the record in order to give jurisdiction to a court of the United States, where such diversity is relied upon for that purpose. Railway Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510; Insurance Co. v. Rhoads, 119 U. S. 237, 7 Sup. Ct. 193. In the latter case, which was an action