DODSON v. FLETCHER.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 827.

APPEAL—DEFECT OF PARTIES—VOLUNTARY APPEARANCE.

It is not competent for parties to confer jurisdiction on the circuit court of appeals to review a judgment, six months after the judgment or decree sought to be reviewed was entered, by the voluntary appearance of necessary parties to the appeal. Accordingly, *held*, that an order of dismissal of an appeal, for want of necessary parties, would not be vacated, upon their admission of service of the citation and entry of appearance.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

J. D. Cook, for the motion.

W. C. Ratcliffe and John Fletcher, opposed.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. A motion to set aside the order of dismissal, which was entered in this case on January 26, 1897 (78 Fed. 214), has been filed; and the motion is supported by an acknowledgment of service of the citation, and by an entry of appearance of certain parties who were made parties to the original suit, but were not made parties to the appeal. On these papers we were asked to vacate the order dismissing the cause. The application, however, must be denied. The decree from which the appeal was taken was entered on May 1, 1896. T. M. Dodson perfected his appeal by filing the necessary bond on May 23, 1896. The only defendant who is made a party to the appeal is John G. Fletcher, trustee. The act of congress creating this court allows six months within which to perfect an appeal. When the six months limited had expired, no appeal had been perfected upon which this court could review the decree of the trial court. We think that it is not competent for parties to confer jurisdiction upon this court to review a judgment, six months after the judgment or decree sought to be reviewed was entered, by the voluntary appearance of necessary parties to the appeal. The motion to set aside the dismissal and for leave to enter the appearance of certain parties is denied.

NEAD v. MILLERSBURG HOME WATER CO.

(Circuit Court, E. D. Pennsylvania. February 23, 1897.)

No. 31.

1. TAXABLE COSTS—DEPOSITIONS NOT USED ON TRIAL.

The cost of depositions of witnesses in the penitentiary, taken in good faith, and offered on the trial, but not used because of the production of the witnesses by order of the court, may be taxed in the bill of costs.

2. SAME—WITNESS FEES OF OFFICER OF CORPORATE PARTY.

Witness fees and mileage of officers of a corporation which is a party will be taxed as costs in the federal courts, where such is the practice of the state courts, and there is no settled practice relative thereto in the federal courts of the district.

After the trial of above case, resulting in a verdict and judgment thereon against the plaintiff, the defendant company filed its bill of costs, claiming, inter alia, viz.: (1) The cost of the depositions of two witnesses who were confined in the Eastern Penitentiary, taken by defendant in conformity with the rules of court. These depositions were offered in evidence on the trial by the defendant, and objected to by the plaintiff. The objection was sustained, and the court ordered the issuing of a writ of habeas corpus ad testificandum, under which said witnesses were produced in court, and testified viva voce. (2) Witness fees and mileage for the president of the defendant company. Upon the taxing of the said bill, the clerk allowed the item of cost of the depositions, but disallowed the item for witness fees and mileage, because the president of the defendant company was in fact a party to the action, and not entitled thereto. To said allowance and disallowance, exceptions were filed by the plaintiff and the defendant respectively.

Ellery P. Ingham and Harvey K. Newitt, for plaintiff.

H. L. Lark and Edward L. Perkins, for defendant, cited:

Bank v. Greider, 2 Chester Co. Rep. 204; Evans v. School Board, Id. 205; Mining Co. v. Dusenberry, Id.; Susquehanna Mut. Fire Ins. Co. v. Commercial Ins. Co. (Com. Pl.) 18 Wkly. Notes Cas. 132; The Elizabeth & Helen, 4 Ben. 101, Fed. Cas. No. 4,354; Huntress v. Epsom, 15 Fed. 732; Tuck v. Olds, 29 Fed. 883.

DALLAS, Circuit Judge (after stating the facts). Respecting the cost of the depositions, inasmuch as they were taken in good faith by the defendant in the preparation of the case for trial, and were not waived at the trial, but their use was prevented by reason of the production of the witnesses under a writ of habeas corpus ad testificandum, issued by order of the court, the defendant cannot justly be precluded from having this item of cost taxed and allowed, and the plaintiff's exceptions are dismissed.

As to the witness fees and mileage charged for the president of the defendant corporation, it is admitted that, if he had been the party defendant, such costs would not be taxable. But a corporation is an entity distinct from its officers. The practice of the state courts, as abundantly shown by the authorities cited by the defendant, is to allow and tax as costs the witness fees and mileage for the officers of corporations, where, as here, they attend as witnesses, and not as representatives of the corporation, I find no authority showing any settled practice upon this point in the federal courts of this district, but am of opinion that the defendant's exceptions must be sustained.

FISH et al. v. OGDENSBURGH & L. C. R. CO. et al.

(Circuit Court, N. D. New York. March 26, 1897.)

FEDERAL COURTS — JURISDICTION — FORECLOSURE SUIT — POSSESSION OF MORTGAGED PROPERTY.

A federal court having possession, through its receiver, of the mortgaged property, has jurisdiction of a suit to foreclose the mortgage, regardless of the citizenship of the parties.

William D. Guthrie, Wager Swayne, and William B. Hornblower, for complainants.

B. F. Fifield and Edward C. James, for defendant Central Vermont R. Co.

COXE, District Judge. This is a suit by trustees to foreclose a mortgage made by the defendant, the Ogdensburgh & Lake Champlain Railroad Company. The defendant, the Central Vermont Railroad Company has filed a demurrer disputing the jurisdiction of the court and otherwise attacking the bill as being indefinite and defective for lack of proper parties defendant. Jurisdiction is not based upon the diverse citizenship of the parties. It rests wholly upon the fact that, prior to the commencement of this suit, the entire property involved in the controversy was taken possession of and has ever since been held by this court through its receivers, duly appointed. On two occasions this court, indirectly at least, has decided against the contention of the defendant. If not strictly res judicata it must be admitted that the decision permitting this suit to be brought and the decision refusing permission to sue the receivers in a state court are inconsistent with the theory of the demurrer. But, as an original proposition, it is thought that the bill must be sustained. It is conceded that full and ultimate relief cannot be had in the state court. After that court has pronounced its decree it is powerless to enforce it and must, in the language of the defendant's brief, "turn the parties over to the receivership court to satisfy or execute the decree." Granting that the state court may proceed thus far, how is the right of this court to do the same affected? Why all this circumlocution? Why two suits where one is sufficient? The process of "turning the parties over" can only be effected by bill, petition or other analogous proceeding. If this court must take jurisdiction of an action upon a judgment why may it not take jurisdiction of an action upon the instrument on which the judgment was obtained? That its jurisdiction must be invoked in the end is undisputed; that it may be invoked in the beginning would seem to follow as a logical conclusion. In both cases the power of the court to proceed depends not upon the character of the complainants' demand but upon the fact that they are seeking to reach property which is in the custody and control of the court. The rule seems to be well settled that where property is in the actual possession of the circuit court the right to decide upon conflicting claims to that property, irrespective of the citizenship of the parties, vests in that court as a necessary incident to the situation. In other words, when the court has full possession of property it is not required to yield the property and the right to administer thereon to another tribunal.