

Turner v. Enrille.

sixty days before the return ; which had not been done in the present case. The first motion was, thereupon, waived ; and an *alias subpoena* awarded. (3 Dall. 320.)

HAZLEHURST *et al.* v. UNITED STATES.

Practice.—Non-pros.

IN error from the Circuit Court for the district of South Carolina. A rule had been obtained by *Lee*, the Attorney-General, at the opening of the court, that the plaintiffs appear and prosecute their writ of error within the term, or suffer a *non-pros.* : but it was found, that errors had been assigned in the court below, and *a joinder in error entered here. The ^{*7]} rule was, therefore, changed to the following : “that unless the plaintiffs in error appear and argue the errors to-morrow, a *non-pros.* be entered.” The plaintiffs not appearing, the writ of error was non-pressed, according to the rule.

TURNER, administrator, v. ENRILLE.

Averment of jurisdiction.

Where the jurisdiction of the federal courts depends on alienage, or the citizenship of the parties, it must be set forth on the record.

Bingham v. Cabot, 3 Dall. 382, re-affirmed.

ERROR from the Circuit Court of South Carolina. The record, as abridged for the judges, presenting the following case :

The Marquis de Caso Enrille instituted an action on the case, against Thomas Turner, the administrator of Wright Stanley, in the circuit court of North Carolina, of June term 1795.

A declaration in case was filed by the Marquis de Caso Enrille, of _____ in the island of _____, of June term 1796, in which it is set forth, that Wright Stanley (the intestate) and John Wright Stanley and James Greene were “merchants and partners, at Newbern, in the said district.” that Wright Stanley survived the other partners; that on the 4th of June 1791, in the lifetime of all the partners, they were indebted unto the said Marquis in _____ dollars ; and in consideration thereof, assumed to pay, &c. The 2d count, *insimul computassent*, when the said partners were found in arrear to the said Marquis, in other _____ dollars, &c. The plaintiff concluded with the usual averments of non-payment, to the damage of the said Marquis, _____ dollars, &c.

On the 30th November 1796, the defendant appeared, and pleaded— 1st. *Non assumpsit intest.* : replication and issue. 2d. The statute of limitations as to the intestate : replication, an account-current between merchant and factor : rejoinder, and issue. 3d. Set-off, that the plaintiff was indebted to the intestate, on the 1st of January 1792, in more than the damages by the plaintiff sustained, &c., to wit, in \$4000, for money had and received by the plaintiff to the intestate’s use, which sum is still due to the defendant, as administrator: replication, that plaintiff owed nothing, &c.: rejoinder, and issue. 4th. The statute of limitations, as to the administrator: replication,

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that the demand was made within three years, &c : reinder, and issue. 5th. *Plene administravit*: replication, assets : rejoinder, and issue.

On the 1st of June 1799, the issues were tried, a verdict was given on all the issues for the plaintiff, and the jury assessed damages at \$3289.65. Judgment for damages, costs and charges.

Writ of error. Errors assigned : 1st. That it does not appear on the pleadings, &c., that either plaintiff or defendant was an alien, or that they were citizens of different states : 2d. That there are blanks in the declaration for places, dates and sums : 3d. The general errors. Plea, *in nullo est erratum*: replication, and issue.

*For the defendant in error, *Dallas* lamented the obvious irregularities on the face of the record, though the merits were incontestably established in his favor, by the verdict and judgment. He thought, however, that the court would give every reasonable intendment to the allegations of the record, in support of the judgment and verdict ; and therefore, endeavored to distinguish the present case from the case of *Bingham v. Cabot*, 3 Dall. 382. In *Bingham v. Cabot* the defendant's place of residence was not even stated ; here, the defendants are stated to be merchants of Newbern, in the district of North Carolina. There, the plaintiffs were described generally of Massachusetts, &c. : here, the plaintiff is described specially of an island ; and the cause of action is found to arise on accounts between merchant and factor. It has not been judicially decided, that the averment of alienage, or of citizenship of different states, as a foundation for the federal jurisdiction, must be positive ; and it is sufficient, in reason, if circumstantial evidence of the fact can be collected from the record. As to the blanks in the declaration, in relation to the sums, *Dallas* requested an opportunity to consider how far the defect was cured by the verdict, or might be amended, if the court was not decisively against him on the first point.

Ingersoll, for the plaintiff in error, observed, that the case was so very desperate, that it had been virtually abandoned by the opposite counsel. He should, therefore, decline troubling the court.

BY THE COURT.—The decision in the case of *Bingham v. Cabot* must govern the present case. Let the judgment be reversed with costs.

TURNER, administrator of STANLEY, plaintiff in error, *v.* The President, Directors and Company of the BANK OF NORTH AMERICA, defendants.

Jurisdiction.—Parties.

Where an action is brought upon a promissory note, in a federal court, by an indorsee, against the maker, not only the parties to the suit, but also the payee, must be stated on the record, to be such as to give the court jurisdiction.¹

ERROR from the Circuit Court of North Carolina. This was an action upon a promissory note, made in Philadelphia, by Stanley, the intestate, in favor of Biddle & Co., and indorsed by Biddle & Co. to the Bank of North America.

¹ *Mollan v. Torrance*, 9 Wheat. 587; *Bradley v. Rhiner*, 8 Wall. 393; *Morgan v. Gay*, 19 Id. 81.