
Buckingham et al. v. McLean.

*ORDER.

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This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs and damages, at the rate of six per centum per annum.

JOHN S. BUCKINGHAM AND MARK BUCKINGHAM, APPELLANTS, *v.* NATHANIEL C. MCLEAN, ASSIGNEE IN BANKRUPTCY OF JOHN MAHARD, JR.

Where a defendant in error or an appellee wishes to have a case dismissed because no citation has been served upon him, his counsel should give notice of the motion when his appearance is entered, or at the same term; and also that his appearance is entered for that purpose. A general appearance is a waiver of the want of notice.¹

An appeal in equity brings up all the matters which were decided in the Circuit Court to the prejudice of the appellant; including a prior decree of that court from which an appeal was then taken, but which appeal was dismissed under the rules of this court.²

BEFORE this case was reached upon the docket, a motion was made to dismiss it upon the ground that the appellees had not been served with a citation, and also upon another ground, which is stated in the following opinion of the court as pronounced by Mr. Justice McLean.

Mr. Justice MCLEAN.

This is an appeal from the Circuit Court of the Ohio District, and a motion is made to dismiss it on two grounds.

1. Because no citation has been issued.
2. "Because the appeal is from the decree of 1848 and interlocutory decrees, whereas all the matters contested by the appellants were finally adjudicated and decreed at the November term, 1846, from which decree an appeal was taken

¹ DISTINGUISHED. *Carroll v. Dorsey*, 693; also *United States v. Yates*, 6 Id., 20 How., 207. REFERRED TO. *Moynihan v. Wilson*, 2 Flipp., 135. See note to *McDonough v. Millaudon*, 3 How.,

605. ² CITED. *The William Bagaley*, 5 Wall., 412; *Mail Co. v. Flanders*, 12 Id., 135.

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which was dismissed by this court, and no appeal has been since taken."

At November term, 1846, a decree was entered against the appellants. In January term, 1847, an appeal was prayed by them from that decree, which was granted, and bond was given. But the appellants failing to file the record and docket the cause in this court, as required by the rules, it was, on motion of the appellee's counsel docketed and dismissed at December term, 1847. At the same term a motion was made to reinstate the cause upon the docket, which motion was overruled.

*151] *Afterward, at October term, 1849, the appellants prayed an appeal from the final decree made at the November term, 1848, which was granted, and that is the appeal which is now pending.

It seems that no notice of this appeal has been served on the appellee, and on that ground the motion to dismiss is made. A general appearance was entered by the counsel for the appellee at December term, 1850, but the motion to dismiss was not filed until February, 1852. In the case of *McDonough v. Millaudon*, 3 How., 707, a motion was made to dismiss the cause on the ground that the clerk of the Supreme Court of Louisiana issued the writ of error, and signed the citation; and the court said, "this case has been here for two terms; a writ of *certiorari* has been sent down, at the instance of the defendant in error, in whose behalf the motion is made, to complete the record; he now moves to dismiss for the first time, and we think he comes too late."

The object of a citation on a writ of error or an appeal is to give notice of the removal of the cause, and such notice may be waived by entering a general appearance by counsel. Where an appearance is entered, the objection that notice has not been given is a mere technicality, and the party availing himself of it, should, at the first term he appears, give notice of the motion to dismiss, and that his appearance is entered for that purpose. A delay to give this notice may throw the other party off his guard, until the limitation of the writ of error or the appeal may have expired. In this case we think the motion is made too late.

The record appeal was regularly taken and perfected. By this appeal all the questions are brought before us, which were decided to the prejudice of the appellants. From the nature of the controversy until the final decree was entered, as between all the parties, the case could not, properly, be brought before this court. The motion to dismiss is overruled.

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When the case was called in its regular order, it was argued, and the following is a report of it.

JOHN S. BUCKINGHAM AND MARK BUCKINGHAM, APPELLANTS, *v.* NATHANIEL C. MCLEAN, ASSIGNEE IN BANKRUPTCY OF JOHN MAHARD, JR.

Where a bill in chancery was filed by the assignee of a bankrupt, claiming certain shares of bank stock, the same being also claimed by the bank and by other persons who were all made defendants, and the answer of the bank set forth apparently valid titles to the stock, which were not impeached by the complainant in the subsequent proceedings in the cause, nor impeached by the other defendants, the Circuit Court decreed correctly in confirming the title of the bank.

*A power of attorney to confess a judgment is a security within the [*_152 second section of the Bankrupt Act, 5 Stat. at L., 442.

And this security is void if given by the debtor in contemplation of bankruptcy. But by these terms is meant an act of bankruptcy on an application by himself to be decreed a bankrupt, and not a mere state of insolvency.¹

In this case there is evidence enough to show that the debtor contemplated a legal bankruptcy when the power of attorney was given.

It is not usury in a bank which has power by its charter to deal in exchange, to charge the market rates of exchange upon time bills.²

THIS was an appeal from the Circuit Court of the United States for the District of Ohio, sitting as a court of equity.

On the 27th of May, 1842, John Mahard, Jr., filed his petition in bankruptcy, and on the 20th of July, 1842, was declared a bankrupt.

Nathaniel C. McLean was appointed his assignee in bankruptcy.

¹ CITED. *Watson v. Taylor*, 21 Wall., 386. *S. P. Ex parte Bonnet*, 1 N. Y. Leg. Obs., 310; *Jones v. Sleeper*, 2 Id., 131; *Dennett v. Mitchell*, 6 Law Rep., 16; *Atkinson v. Farmer's Bank*, Crabbe, 529; *Ex parte Sanger*, 2 Bank Reg., 164; *Ex parte Debble*, Id., 185; *Ex parte Schick*, 2 Ben., 5; *Matter of Black*, Id., 196; *Matter of Craft*, Id., 214; *Pierce v. Evans*, 61 Pa. St., 415. Such a transaction was not an act of bankruptcy under the act of 1800, unless the debtor procured judgment to be entered thereon and execution issued. *Barnes v. Billington*, 1 Wash. C. C., 29. And mere honest inaction on the part of an insolvent debtor, who is sued on a just debt and allows

judgment to go against him, is not an act of bankruptcy, under the act of 1867, § 39, unless it appears that there was an actual intent to prefer a creditor. *Wright v. Filley*, 1 Dill., 171. As to the meaning of the words "in contemplation of bankruptcy," see *Re Wolfskill*, 5 Sawy., 385.

² *S. P. Orr v. Lacy*, 4 McLean, 243. The purchase of securities at any price which the parties may agree upon is not usurious. *Junction R. R. Co. v. Bank of Ashland*, 12 Wall., 226; *Alabama Gold Life Ins. Co. v. Hall*, 58 Ala., 1. Compare *Atlantic State Bank v. Savery*, 82 N. Y., 291.