

THE FIFTH NATIONAL BANK OF PITTSBURGH v. THE PITTSBURGH & CASTLE SHANNON RAILROAD Co.

(District Court, W. D. Pennsylvania. February 18, 1880.)

STOCKHOLDERS—BOARD OF DIRECTORS—PETITION—RECEIVER.—The stockholders of a defendant corporation cannot obtain the removal of a receiver by petition, where it appears from the pleadings that such corporation has a regularly elected board of directors, and that such board is in active sympathy with the petitioners.

NATIONAL BANK—RECEIVER—DISTRICT COURT—JURISDICTION.—A district court of the United States has jurisdiction of a bill in equity praying for the appointment of a receiver of an insolvent corporation, filed by a national bank established within the district within which such court is held.

Petition by alleged majority of the defendant stockholders.
S. Schoyer, Jr., for petitioners.

D. T. Watson and *Knox & Reed*, for the receiver and defendant company.

Hampton & Dalzell, for H. Sellers McKee.

Slagle & Wiley, for the Iron City National Bank.

ACHESON, J. The parties to this suit are the Fifth National Bank of Pittsburgh, plaintiff, and the Pittsburgh & Castle Shannon Railroad Company and George R. Duncan, trustee of certain mortgage bondholders, defendants.

Certain stockholders of the corporation defendant, claiming to represent a majority of the stock, filed a petition in the case, containing various prayers, only two of which are now pressed, viz.: (1) that W. W. Martin be removed from the receivership of the defendant company, and James M. Bailey appointed in his stead; (2) that the Iron City National Bank and Sellers McKee, judgment creditors of the defendant corporation, be restrained from proceeding by execution against the corporation.

At first I was disposed to regard the petition in the light of a cross-bill; but, upon a careful examination, I find it lacks the essential elements of such bill. Upon the pleadings as they now stand the petitioners are strangers to this case, and

have no right to relief in the manner proposed, even had they shown good ground therefor. I reach this conclusion with the less hesitation because it appears, from the affidavits read, that the petitioners now have in active sympathy and co-operation with them a majority of the board of directors, and, of course, have it in their power to control the corporation and be heard in court through it.

I might here stop with a simple order dismissing the petition, but the case is so peculiar that I feel called on to add some additional observations.

It was said by counsel for one of the judgment creditors that the court should itself take notice that the case is one not within the jurisdiction of the court. But I do not agree with the counsel upon the question of jurisdiction. By section 563 of the Revised Statutes the United States district courts have jurisdiction, *inter alia*, "of all suits by or against any association established under any law providing for national banking associations within the district within which the court is held."

But while of opinion that the controversy is within the jurisdiction of this court, I am very sure a receiver of the defendant corporation would never have been appointed had the court been in possession of all the facts which have been developed upon the present hearing. It is now plain that the rights of the plaintiff were not of such a character and were not in such jeopardy as to call for a remedy so extraordinary as the appointment of a receiver. Had any opposition been made by the defendants, clearly the court would have refused such appointment. In fact, it now for the first time appears that the corporation defendant acquiesced in, if it did not secretly promote, the appointment of a receiver in its own interests. This was not apparent to the court when the appointment was made.

At that time there was a contest for the office of receivership between the stockholders, some favoring Mr. Martin, others Mr. Bailey. The former was appointed. I do not find he has been guilty of any act of commission or omission since his appointment calling for his removal for cause.

No one having a proper standing in court has asked the court to rescind the order appointing a receiver, and I do not think the court of its own motion is called upon to make such order.

But creditors of the corporation will no longer be hindered in bringing suits or proceeding by execution against it. Leave will be and is hereby granted to them to proceed by suit and execution.

This permission, however, is subject to a qualification in the case of M. B. Thompson, Jane Reamer, Minerva H. Ra-hauser, Jane Redman and Margaret Reamer. These parties proceeded in the common pleas court, No. 2, against the Pittsburgh & Castle Shannon Railroad Company and the receiver, by an action of ejectment, in clear contempt of the authority of this court. A subsequent application was made to this court to sustain that suit, but this was refused. I have been asked to reconsider the action of the court in this regard, and I was, at first, disposed to do so; but upon reflection I have concluded not to disturb the former order of the court. But leave is now granted to said parties to bring and prosecute to judgment and execution a new action of ejectment, or such other suits as may be appropriate to their case.

Petition dismissed.

MACK and others v. LANCASHIRE INS. CO.

(Circuit Court, E. D. Missouri. —, 1880.)

PLEADING—ANSWER—GENERAL DENIAL.—Under the rules of pleading established by the state of Missouri, as modified by the act of 1875, affirmative matters of defence cannot be set up under a general denial.

Demurrer to answer.

Noble & Orrick, for plaintiffs.

O. B. Sansum and B. Gratz Brown, for defendant.

TREAT, J., (*orally*.) There is a demurrer to the second count of the answer. In the course of the argument I directed the attention of counsel to a great many matters, not because this case involved all of the inquiries suggested, but to get their assistance in order that I might settle, as far as is practicable, in my own mind, the rules of pleading under the statute of the state. I should like to write an opinion as to the effect of the state act of 1875, but I think I can state my views intelligibly. Here is an action under a fire policy containing many provisions. The only point under consideration is, how must the pleadings in this case, under the rules of pleading established by the state, as modified by the act of 1875, be made up? The plaintiffs here aver a contract under the terms of which they, having done certain things, are entitled to recover. There are warranties and other matters contained in the policy which constitute substantive matters of defence, and which the party can set up, whereby he can defeat the right of recovery. How shall those matters be set up?

The state statute of 1875 permits, instead of a specific denial as to each of the allegations, a general denial; but it does not, and I wish this distinction understood as the rule of the court, it does not permit, under a general denial, affirmative matters of defence to be set up. But if a party has an affirmative matter of defence to be set up, as to a breach of warranty or other matters of that kind, which may occur under a policy, he must set them up affirmatively and separately. Let me illustrate: This is an ordinary form of a declaration on a fire policy; the policy is set out; the plain-

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