Hassler, Inc. Vs. Shaw

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SooperKanoon Citation : sooperkanoon.com/94537

Court : US Supreme Court

Decided On : May-10-1926

Appeal No. : 271 U.S. 195

Appellant : Hassler, Inc.

Respondent : Shaw

Judgement :

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Hassler, Inc. v. Shaw

No. 278

Argued April 27, 1926

Decided May 10, 1926

271 U.S. 195

ERROR TO THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

SYLLABUS

1. A petition to remove from state to federal court is not a general appearance. P. 271 U. S. 199 .

2. Pleading to the merits, after overruling of motion to dismiss for lack of jurisdiction over defendant which defendant does not waive, is not submission to the jurisdiction. P. 271 U. S. 200 .

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3. Where objection to the jurisdiction appears in the record proper, it is not necessary to reiterate it in a bill of exceptions. P. 271 U. S. 200 .

3 F.2d 605 reversed.

Error to a judgment of the district court on a verdict recovered in an action on contract brought in a South Carolina court by a resident of that state against an Indiana corporation and removed to the federal court.

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MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a writ of error upon a judgment *in personam* against the plaintiff in error on the ground that there never was any valid service of process against it and that therefore there was no jurisdiction in the Court. The writ was transferred from the circuit court of appeals to this Court, the case being one in which the jurisdiction of the district court, and that alone, was in issue within the meaning of 238 of the Judicial Code, under the decisions in *Shepard v. Adams,* 168 U. S. 618 , *Remington v. Central Pacific R. Co.,* 198 U. S. 95 , and *Board of Trade v. Hammond Elevator Co.,* 198 U. S. 424 , and therefore not open to review in the circuit court of appeals. *The Carlo Poma,* 255 U. S. 219 .

The suit is for an alleged breach of contract, and was brought in a court of the South Carolina against a corporation of Indiana. The only personal service was by delivery of copies of the summons and complaint in Indiana on May 12, 1919, as the record shows. An attachment was levied on property alleged to belong to the defendant and within the state. The record further shows that, in the same month, the defendant moved to set aside the service, and that the motion was refused, without prejudice to the defendant's right to set up the special defense in its answer, this being a right clearly given by the statutes of South Carolina. The case then was removed to the district court of the United States, and subsequently, in September of the same year, an answer was filed alleging the above-mentioned motion and order and setting up that the Court had no jurisdiction,

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because the defendant was an Indiana corporation doing no business and having no property within the state upon which attachment could be levied so as to give the Court jurisdiction, and also, reserving its right to object to the jurisdiction, pleading to the merits. In March, 1921, an amended complaint was filed alleging that the defendant had property in the state and setting forth the cause of action. The defendant answered, denying the jurisdiction as before and denying that it had property within the state, and saving its right to object to the jurisdiction, again answering to the merits. With regard to the attachment, it is enough to say that a third party intervened, claimed the goods, and finally got judgment for them. But before that happened, there was a trial on the merits between the plaintiff and defendant, and a verdict for the plaintiff in 1921. The motion for judgment was delayed until May, 1924. In the same month, the defendant moved to set aside the verdict and to dismiss the complaint for want of jurisdiction. The judge then sitting thought that the question of jurisdiction should be left to the decision of the appellate court, and ordered judgment. A motion to vacate the judgment was overruled on the same ground.

Thus, it is manifest that the record shows a judgment against a defendant never served with process and without any attachment of property -- a judgment void upon its face unless the record discloses that the defendant came in and

submitted to the jurisdiction, although not served. The record discloses no general appearance in terms, but, on the contrary, a continuous insistence by the defendant that it had not been brought within the power of the Court. But acts and omissions are relied upon as having the effect of a general appearance. First in order of time, it is said that the petition to remove had that effect. This, if true, would be unjust, but the contrary is

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established. *General Investment Co. v. Lake Shore & Michigan Southern Ry. Co.,* 260 U. S. 261 , 260 U. S. 268 -269; *Wabash Western Ry. Co. v. Brow,* 164 U. S. 271 , 164 U. S. 279 . Then it is said that pleading to the merits was an appearance notwithstanding the effort of the defendant to subordinate its denial of the cause of action to its protest against the jurisdiction and notwithstanding the statute of South Carolina and the order in the case purporting to save its rights. This again would be unjust, but such is not the law. *Harkness v. Hyde,* 98 U. S. 476 , 98 U. S. 479 ; *Southern Pacific Co. v. Denton,* 146 U. S. 202 , 146 U. S. 209 . It is said that going to trial on the merits without saving an exception submitted to the jurisdiction. The plaintiff (the defendant in error) objects to our seeking any explanation in a bill of exceptions that he says was allowed too late, but the record shows that, at the time of the trial, the attachment was outstanding, not having been vacated until later, and that it no doubt may have been, as the bill of exceptions shows that it was, the expectation of the trial judge that the verdict would be satisfied out of the attached goods. The record showed the defendant's denial of the right to proceed, and the grounds for it. It was not necessary to reiterate the denial in a bill of exceptions in order to get it on the record. It already was there.

There was some suggestion that the emphasis, at least, of the answer denying jurisdiction was on the absence of the defendant from the state and its having no property there. But the answer and the amended answer elaborately set out the motion to set aside the service and the reservation of the defendant's rights by the state judge. It seems to us impossible to doubt that this was meant to save the question, and that it would be hypertechnical to require a more explicit statement

that the grounds of the motion as well as the other matters mentioned were still the basis on which jurisdiction was denied. The other

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matters were added simply to give further force to the failure to serve within the state. We are of opinion that the record does not disclose an appearance by the defendant, or any submission to the jurisdiction that it sought and had a right to avoid.

Judgment reversed.