FLANDERS v. AETNA INS. CO.

Case No. 4,852.
{3 Mason. 158.}[1]

Circuit Court, D. New Hampshire. May Term, 1823.

SERVICE OF PROCESS—FOREIGN CORPORATION—GENERAL APPEARANCE—WAIVER OF OBJECTION.

A., a citizen of New Hampshire, sued a corporation established by a statute in Connecticut, in the circuit court of New Hampshire; the corporation having entered a general appearance, it was *held*, that the objection to the service under the 11th section of the judiciary act of 1789, c. 20 {1 Stat. 73}, was waived.

{Cited in Clarke v. New Jersey Steam Nav. Co., Case No. 2,859; Lee v. Aetna Ins. Co., Id. 8,181; Winans v. McKean R. & Nav. Co., Id. 17,802; Baltimore & O. R. Co. v. Harris, 12 Wall. (79 U. S.) 80; Knott v. Southern Life Ins. Co., Case No. 7,894; Robinson v. National Stock-Yard Co., 12 Fed. 362; Edwards v. Connecticut Mut. Life Ins. Co., 20 Fed. 453; Romaine v. Union Ins. Co., 28 Fed. 639; Spies v. Chicago & E. I. R. Co., 32 Fed. 713.}

This was a suit on a policy of insurance underwritten by the defendants, a corporation established in Connecticut, by a legislative act, and composed of citizens of that state, by which the plaintiff {Thomas Flanders}, a citizen of New Hampshire, was insured 3000 dollars on his house, barn, furniture, library, &c. against losses by fire. The defendants had entered a general appearance. A question arose at the bar upon a motion to dismiss the suit for want of jurisdiction, the defendants not being a corporation in the state where the suit was brought, and the act of 1789, c. 20, § 11, was cited in support of the motion.

Cushman and Bartlett, for plaintiff.

E. Cutts and Mr. Mason, for defendants.

STORY, Circuit Justice. By the judiciary act of 1789, § 11, the circuit court has jurisdiction of suits "between a citizen of the state where the suit is brought and a citizen of another state." If the case stood singly upon this clause, there would be an end of this objection, for this suit falls precisely within the description. The case of Deveaux v. Bank of U. S. 5 Cranch {9 U. S.} 61, has decided, that the jurisdiction attaches in a suit where the corporation, which is a party to the suit, is composed of citizens of the state, in the same manner as if it were against the same persons in their private capacities. In other words, the court will look behind the artificial entity, the corporation, to see who are the persons really parties in interest But the same section (section 11) goes on to provide, that no civil suit shall be brought before the circuit court "against any inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of the-serving the writ" Upon this principle, there may perhaps be difficulty in averring, that the present corporation has any inhabitancy or commorancy at all. But it is averred in the writ, that it is composed of citizens of Connecticut, and of course of persons having an inhabitancy there. The objection would

therefore be fatal, if it had been interposed in the first instance. But it has been uniformly held, that this clause does not per se oust the jurisdiction, but is a privilege given to the defendant, of which he may avail himself at a proper time, or which he may waive at his pleasure. The entering of an appearance generally has been held to be a waiver of it, and an admission of a due and effectual service to compel the party to answer. Pollard v. Dwight, 4 Cranch {8 U. S.} 421; Knox v. Summers, 3 Cranch {7 U. S.} 496; Logan v. Patrick, 5 Cranch {9 U. S.} 288; Harrison v. Rowan {Case No. 6,140};. Grade v. Palmer, 8 Wheat {21 U. S.} 699. In the present case, a general appearance has been entered, and steps taken towards the trial of the cause, as a cause rightfully in court. I think, therefore, the motion must be overruled. Motion overruled accordingly.

[1] {Reported by William P. Mason, Esq.}

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