9FED.CAS.—73

Case No. 5,217.

GARDEN CITY MANUF'G CO. v. SMITH.

{1 Dill. 305.}[1]

Circuit Court, D. Nebraska. 1871.

REMOVAL OF CAUSES—SUBSEQUENT MOTION TO DISCHARGE ATTACHMENT—PRIOR HEARING IN STATE COURT.

1. After a cause is removed from a state court to the circuit court of the United States, the latter court has the power, where such a practice is authorized by the state law, to entertain a motion to dissolve an attachment or discharge the attached property.

2. The circuit court may, in such case, in the exercise of a sound discretion and in furtherance of justice, hear such a motion, although a similar motion was made and overruled in the state court, prior to the removal of the cause.

{Cited in Claflin v. Steinberg. Case No. 2,777; Bates v. Days, 11 Fed. 530.}

This action was originally brought in one of the state courts, and removed here by the plaintiff under the act of March 2, 1867 (14 Stat. 558). The action was commenced by the attachment of goods pursuant to the statutes of the state. The ground of the attachment was an alleged fraudulent disposition of his property by the defendant In the state court and under the practice therein (authorized as counsel conceded by the statutes of the state) the defendant had, prior to the application for the removal, made a motion to dissolve the attachment and discharge the attached property from the levy under the writ Upon this motion both parties took testimony at large in the form of affidavits, and the motion was thereon submitted to the state court and overruled. Copies of these affidavits are on file and entered with the other papers pertaining to the case. The plaintiff subsequently removed the cause to this court, and has on file a motion for a continuance till the next term, based upon the absence of material witnesses to prove its corporate character and the justice of its demands. The defendant resists the motion for a continuance (because the suit ties up a large amount of property) unless the court will consider a motion he makes here, and which is in effect the same motion made in the state court, viz.: ";to dissolve the attachment and discharge the attached property." He renews the same motion made in the state courts, and offers to submit it either upon the affidavits taken therein or upon new or additional affidavits to be produced by the parties. It is this motion which was argued to the court the plaintiff contended that the court had no power to entertain it. The defendant maintained that the court had the power, and, under the circumstances, ought to exercise it.

Mr. Wakely, for plaintiff.

Mr. Redick, for defendant.

Before DILLON, Circuit Judge, and DUNDY, District Judge.

DILLON, Circuit Judge. This cause was removed by the plaintiff to this court under the act of March 2, 1867 (14 Stat 558), amendatory in terms of the act of July 27, 1866 (Id. 306). It was commenced in the state court by a writ of attachment issued pursuant to the statutes of the state and by rule adopted in this court Prior to the transfer, the defendant had moved to have the attachment dissolved or property attached discharged; upon this motion both parties took all the testimony they deemed essential, and submitted the question to the decision of the state court This question was one of fact, viz: whether the defendant was guilty of the fraudulent act or purpose charged against him as the ground for the attachment. The court denied the motion, and subsequently the cause was transferred to th's court, where the same motion was renewed, or a new motion of a similar character made, which the defendant offers to submit, either upon the former affidavits, or upon hew, or upon additional affidavits, as the plaintiff may elect, or the court may order.

The first question made by counsel is whether this court, after a cause is removed to it, has the power in any case to entertain such a motion. If so, the next question made is, whether, under the circumstances, it ought to exercise it in this case.

That the court has the power to entertain such a motion, does not, it seems to me, admit of reasonable doubt, it being conceded that such a motion may be rightfully made in the state court, under the state practice, which by adoption is also the practice of this court. By the express provision of the act of congress, the cause is to proceed in the same manner as if it had been originally

brought here; the attachment is to hold "in the same manner as by the laws of the state it would have been holden to answer final judgment, had it been rendered by the court in which the suit was commenced." And the power of the circuit court to "set aside or dissolve" an attachment, injunction, or other restraining process, is recognized, and the right of the opposite party to indemnity obligations filed in the state courts, expressly declared.

The intention of these provisions manifestly is to put this court, in administering such remedies, in the place of the state court and clothe it with its powers. Conceding that such a motion is authorized by the state law and practice, there can be but little doubt, under the abovementioned acts of congress and the rules of the court adopting the state statutes relating to attachments and to practice, that if no such motion had ever been made in the state court, and could have been made there had the cause remained, it could equally be made here upon its removal. Hence the right to make, and the power to hear, such a motion may exist after the cause has been transferred.

Assuming the power to exist, ought it in this case to be exercised? This is a matter which rests in the sound discretion of the court, under the special circumstances of the particular case. A decision on a motion in a pending suit is not res judicata so as to conclude the parties and the court from again re-opening the matter, in a subsequent stage of the cause.

As the parties were fully heard upon the merits of the motion in the state court, certainly there ought to be some good reason why this court should listen favorably to an application for a new hearing. I should myself in such a case feel a strong disinclination to sit in review upon the decision of the state court, when it was proposed to submit the matter upon the same evidence and no other.

Considering the special circumstances of this ease, among which is one that the plaintiff removed the action after it stood for trial in the state court, thus causing delay, and is now asking for a continuance; that he has a large amount of property attached, to the great inconvenience and probable damage of the defendant, who is ready for trial, the court will make this order on the pending motion, to wit: If the plaintiff is ready for trial at this term, the defendant's motion to discharge the attached property will be denied; otherwise it will be entertained, and both parties will be at liberty to produce additional affidavits, and be heard de novo upon the merits of the motion.

Ordered accordingly.

That suit commenced by attachment may be removed and attachment remain in force, see Barney v. Globe Bank {Case No. 1,031}; Clarke v. Chase {Id. 2,845}; McLeod v. Duncan {Id. 8,898}.

[1] {Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.}