STEIGER *v.* BONN.

Circuit Court, D. New Jersey. October 18, 1880.

1. PROCESS—SERVICE—FRAUD.—Where a defendant, residing in another district, is enticed and induced to come into the district where the plaintiff resides by the false representations or deceptive contrivances of the plaintiff, or of any one acting in his behalf, for the purpose of serving legal process upon him, and the same is served through such improper means, such service is illegal, and ought to be set aside, and the process dismissed.

Union Sugar Refinery v. *Mathiesson,* 2 Cliff. 304–309.

Motion to set aside Writ, etc.

J. Henry Stone, for defendant.

Mr. Gilchrist, Att'y Gen., for plaintiff.

NIXON, D. J. This is a motion to set aside the summons issued in the case, on the ground that the defendant was induced, by deceptive and fraudulent means, to come within the jurisdiction of the court for the purpose of serving the writ upon him. There seems to be a substantial agreement between the counsel of the respective parties as to the law of the case. They assent to the rule laid down by Mr. Justice Clifford in *The Union Sugar Refinery* v. *Mathiesson,* 2 Cliff. 304–309, where he says "that where the defendant, residing in another district, is enticed and induced to come into the district where the plaintiff resides by the false representations or deceptive contrivances of the plaintiff, or of any one acting in his behalf, for the purpose of serving legal process upon him, and the same is served through such improper means, such service is illegal, and ought to be set aside, and that the process should be dismissed." The only question is whether the facts shown are sufficient to identify the plaintiff with, and hold him responsible for, the

deception and fraud used to lure the defendant into the state.

The facts are that the defendant is a citizen of the state of New York, residing in the city of New York, and engaged in the business of importing, publishing, and selling school books in the German language; that a convention of the German-American Teachers' Association, a body composed of German teachers from various states of the Union, was to 18 be held on the twenty-eighth, twenty-ninth, and thirtieth days of July last, at the high-school building in the city of Newark; that many of the members of this association were customers of the defendant, and in the habit of purchasing books of him; that the plaintiff and defendant had a lawsuit then pending in the supreme court of the state of New York, growing out of some business transactions between them; that the plaintiff, desirous of removing said controversy into this jurisdiction, and conceiving the notion that the defendant would attend the sessions of the German School Association at Newark, procured a summons from this court and took it to the United States deputy marshal at Jersey City, gave him instructions in regard to its service on the twenty-eighth of July, and introduced to the marshal a gentleman, whose name is not known, who knew the defendant by sight, and who was to accompany the officer to Newark to designate to him the defendant; that they went to Newark on the afternoon of the 28th, and were joined by another man, called, "Charley," who was also to aid the marshal in identifying the defendant; that they visited the convention on the twenty-eighth and twenty-ninth of July, but failed to find the defendant, one of these men paying the officer for his attendance on the last-named day, and promising to give him notice if his attendance was desired on the next day; that he was notified to meet these men at Newark on the afternoon of the 30th, when the defendant was

found and the writ served; that the defendant visited New Jersey in consequence of having received at his place of business in the city of New York, at about 1 o'clock P. M. of that day, a telegram of the following tenor:

"NEW YORK, July 30, 1880.

"*To E. Steiger, 25 Park Place, New York:* Please call at headquarters of German-American teachers, at 842 Broad street, this afternoon.

{Signed}

"W. I. ECKOFF."

—that the W. I. Eckoff, whose name was signed to the telegram, was a German teacher, and president of the convention then assembled at the place designated, with whom the plaintiff had a casual acquaintance; that the telegram was not 19 sent by the said Eckoff, nor by any one in his behalf, and it was, doubtless, forwarded by some one to bring the defendant within this jurisdiction.

If the plaintiff, or any one acting in his behalf, was instrumental in decoying him hither by the use of such a device, it must be held that the writ should be quashed and the suit dismissed. But if other persons, not connected with the plaintiff, procured his attendance, even by these improper methods, for any purpose, the plaintiff has the right to avail himself of the opportunity of serving the writ. The defendant is *found* in the district, in the sense in which the term is used in the eleventh section of the judiciary act, (section 739, Rev. St.,) and the plaintiff is not chargeable with any deception or fraud practiced by these over whom he had no control, and for whose actions he is not responsible. Such I understand to be the substance of the opinion of the court in the case of *The Union Sugar Refinery* v. *Matheisson, supra.*

The question involved must be decided by ascertaining upon which party the burden of proof lies. There is no pretence that the deputy marshal had any

knowledge of the forged telegram. Do the undisputed facts make such a presumption against the plaintiff or his agent, who accompanied the officer, that he is called upon to rebut them with proof that he was not privy to the deception practiced upon the defendant?

I am of that opinion. The presumption of the plaintiff's participation in the deception is stronger here than in the case of *Hevener* v. *Heist,* 30 Leg. Int. 46, and yet in that case the court set aside the writ. The defendant had been brought to Philadelphia from Bucks county, Pensylvania, by a forged telegram, and on his arival he was served with the writ by the deputy sheriff. Judge Sharswood thought the burden of proof was upon the plaintiff to explain how the officer knew that the defendant was coming. There was no evidence as to who sent the telegram, and yet the learned judge held that the failure of the plaintiff to show that he did not direct the officer in the service was fatal to the legality of the proceedings. "I am clearly of the opinion," he says, "that it was incumbent on the plaintiff to produce the sheriff's deputy 20 who made the arrest, in order to show that it was not by the instruction of the plaintiff or his attorney that he went with the writ at that time to that place to arrest the defendant."

The evidence is uncontradicted that the deputy marshal did go, at the time and place designated by the agent of the plaintiff, to make the service of the summons, and there is no disavowal on his part that he procured the presence of the defendant then and there.

The writ must be set aside.