

## PHELPS V. CANADA CENT. R. CO.

(Circuit Court, N. D. New York. April 3, 1882.)

## REMOVAL OF CAUSE—AMENDING COMPLAINT.

Where, before the removal of a cause, the state court has restricted plaintiff to his cause of action for breach of contract, on which an attachment has been granted, and he has elected to consent to such order, and it is still in force when the case is removed to the federal court, a motion by plaintiff in the circuit court for leave to amend his complaint may be denied, no change in the relative position or rights of the parties having been made.

## Motion to Serve Amended Complaint.

*Mullin & Griffin*, for plaintiff.

*Edward C. James*, for defendant.

WALLACE, J. Before this action was removed into this court the state court had granted an order restricting the plaintiff from averring in his complaint any cause of action against the defendant other than for alleged breach of contract set forth in the affidavit upon which the defendant's property was attached and its appearance thereby compelled. Although the main point considered by the state court upon the motion which resulted in such order was the right of the plaintiff to incorporate into his complaint a cause of action and prayer for equitable relief, the order made was both broad and explicit in its terms, and confined the plaintiff to the cause of action set forth in the affidavit for the attachment. The plaintiff elected to consent to that order as a condition of retaining his attachment, which would otherwise have been vacated. Whether the state court would have thus adjudged if the plaintiff had complained upon a cause of action at law only, it is not for this court to determine. It suffices that the order, as made, was in force when the action was removed to this court. Undoubtedly, this court has power to modify that order, but it would be unseemly, when nothing has occurred since the removal to change the rights or position of the parties, to disregard the adjudication of the state court made upon hearing and deliberation and consented to by the plaintiff.

Although the plaintiff is entitled, by the Code of Procedure of the state, to amend, as of course, within the time limited by the Code after the defendant has answered, that right was waived, in so far as the exercise of it would involve any departure from the terms of the order, by the election signified upon the hearing which resulted in the order.

The motion for leave to serve the amended complaint is denied.

SIMPKINS *v.* LAKE SHORE & M. S. RY.<sup>1</sup>

(*Circuit Court, E. D. New York.* December 28, 1883.)

## REMOVED CAUSE—JURISDICTION OF STATE COURT—DETERMINATION OF CONTROLLING JURISDICTIONAL ISSUE NOT PROPERLY HAD ON MOTION FOR SECURITY FOR COSTS.

An action having been begun in a state court, under a state statute giving that court jurisdiction of such actions when brought against a foreign corporation, provided the plaintiff be a resident of the state, the answer averred, as an objection to the jurisdiction, that the plaintiff was not a resident of the state. The defendant having removed the action to this court, moved for security for costs on affidavits tending to show such non-residence of the plaintiff, which were met by counter affidavits. *Held*, that the issue thus presented was one of the issues of the cause presented by the pleadings and was controlling; for if the action would fail in the state court on account of the plaintiff's non-residence, it would fail in this court; and that the determination of a jurisdictional fact, which might involve a dismissal of the action, could not properly be sought by a motion on affidavits, but should be left to abide the trial of the issue presented by the answer.

## Motion to Compel Security for Costs.

*C. Ferguson, Jr.*, for plaintiff.

*Burrill, Zubriskie & Burrill*, for defendant.

BENEDICT, J. This case comes before the court upon a motion on the part of the defendant to compel security for costs, upon the ground that the plaintiff is a non-resident. The action was commenced in the supreme court of the state. The complaint filed in the state court averred that the defendant is a foreign corporation. By a statute of the state, the supreme court of the state has jurisdiction of actions like the present when brought against foreign corporations, provided the plaintiff be a resident of the state, not otherwise. The answer filed in the state court averred, by way of objection to the jurisdiction, that the plaintiff was not a resident of the state of New York, but of England. Thereafter, the defendant removed the case to this court, and now moves for security for costs upon affidavits tending to show the plaintiff to be a non-resident of the state. Counter-affidavits are read in support of the plaintiff's averment that he is a resident. The issue thus raised is the same raised by the defendant's answer. It is one of the issues of the cause presented by the pleadings while the cause was in the state court. This issue tendered by the defendant's answer is, moreover, controlling; for if the defendant be a non-resident, as the answer asserts, the action would have failed in the state court for want of jurisdiction, and must therefore fail here, notwithstanding the plaintiff, if a non-resident, may also be an alien, and the action, for that reason, one which this court is competent to entertain. For it is the cause instituted in the state court which is to be determined by this court, and the plaintiff's residence, if fatal to the action in case it had remained in the state court, must

<sup>1</sup> Reported by R. D. & Wyllys Benedict, of the New York bar.