

SIMPKINS *v.* LAKE SHORE & M. S. RY.¹

(*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, Zabriskie & 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

¹ Reported by R. D. & Wyllys Benedict, of the New York bar.

be fatal here. The defendant, therefore, by the present motion, seeks the determination of a jurisdictional fact, which determination, if in accordance with the defendant's contention, would involve a dismissal of the action. Such a determination cannot, in my opinion, be properly sought in this manner by a motion upon affidavits, but should be left to abide the result of the trial of the issue presented by the answer.

Motion denied.

MOORE and others v. NORTH RIVER CONSTRUCTION Co. and others.

(Circuit Court, N. D. New York. April 3, 1884.)

JURISDICTION OF FEDERAL COURTS—SEPARATE CONTROVERSY.

Where citizens of New York, who are creditors of a New Jersey corporation, bring suit in the nature of a creditor's bill to reach real estate which they allege was fraudulently and unlawfully conveyed to a New York corporation, no relief being demanded against the New Jersey company, *held*, that there was no separate controversy between citizens of different states such as to give jurisdiction to the United States courts.

On Motion to Remand.

Edward W. Paige and *Alonzo P. Strong*, for plaintiffs.

P. B. McLennan, *Otto T. Bannard*, and *Albert B. Boardman*, for defendants.

COXE, J. The plaintiffs are citizens of New York. The defendant, the North River Construction Company, is a New Jersey corporation. The other two defendants are New York corporations. The plaintiffs are creditors of the construction company. There being no pleading before the court but the complaint, it must be the sole guide in determining the character of the action. The relief demanded is that certain real estate alleged to have been paid for by the construction company, when insolvent, and conveyed direct to the railway company in fraud of the plaintiffs' rights, be sold to satisfy their claims. Also that an injunction issue restraining the defendants from disposing of or incumbering the land. No judgment is asked against the construction company.

Because the plaintiffs are not judgment creditors, it is argued that there is a controversy between them and the construction company, and that this court therefore has jurisdiction. In one sense, undoubtedly, this is true, but is it such a controversy as is contemplated by the statute? Is it, to use the language of the chief justice in *Hyde v. Ruble*, 104 U. S. 409, "a separate and distinct cause of action?" Does the complaint state two causes of action or one? No separate judgment could be entered against the construction company. Should the trial court find on the main issue that there were no purchases of land as alleged, the complaint would be dismissed as