

ROBERTS v. CHICAGO, ST. P., M. & O. RY. Co.

(Circuit Court, D. Minnesota, Third Division. March 8, 1891.)

REMOVAL OF CAUSES—PRACTICE—REMAND.

Where it appears that the petition for removal was never presented to the state court, but to the clerk thereof, and filed by him, and a certified copy immediately made and given the defendant, a motion to remand will be granted.

At Law. On motion to remand.

J. L. McDonald, for plaintiff.

Howe & Perrin, for defendant.

NELSON, J. This is a motion to remand made by the plaintiff. The correct practice is indicated by Judge GRESHAM in *Shedd v. Fuller*, 36 Fed. Rep. 609. The petition should be presented to the state court, and opportunity given that court to act. In this case the petition was presented to the clerk of the state court, and filed by him, and a certified copy immediately made and given the defendant. The court never had its attention called to the petition. This is not the proper practice indicated by the statute granting removals from the state court, or recognized by the United States supreme court.

Motion to remand granted.

REIFSNIDER v. AMERICAN IMP. PUB. CO. *et al.**(Circuit Court, E. D. Missouri, E. D. March 27, 1891.)*

1. REMOVAL OF CAUSES—APPEARANCE—SERVICE OF PROCESS.

A special appearance merely to file a petition and bond for removal does not preclude the defendant from subsequently moving to quash the service of process.

2. FOREIGN CORPORATION—JURISDICTION.

No jurisdiction of a foreign corporation which does not maintain an office or transact business within the state is acquired by service of process on the president thereof when he is within the state casually on private business.

At Law.

This suit was removed from the state circuit court. Process was served on October 7, 1890, at the city of St. Louis, Mo., by delivering a copy of the writ and petition to D. M. Parry, president of the defendant corporation. On the 20th day of October the corporation appeared specially in the state court for the purpose of removing the cause to this court. Having effected a removal of the cause, it filed in this court a plea in the nature of a motion to quash the service of process upon the corporation. Plaintiff moved to strike the plea from the files.

Geo. D. Reynolds, Frank E. Richey, and W. M. Kinsey, for plaintiff.

Frank, Dawson & Garvin, for defendants.

THAYER, J. The contention that the appearance of the defendant company in the state court for the purpose of filing a petition and bond for removal was, of necessity, a general appearance, and that the foreign corporation thereby submitted itself to the jurisdiction of the court, and waived all right to question the legality of the service had upon it, is not tenable. It is true that an appearance for removal under the twelfth section of the judiciary act of 1789 was held to have the effect claimed in *Sayles v. Insurance Co.*, 2 Curt. 212; and in *Sweeney v. Coffin*, 1 Dill. 73, Judge TREAT held that the filing of a petition and bond for removal was an appearance, within the meaning of the twelfth section of the old judiciary act, and that no other appearance was necessary. But it has been very generally held, under subsequent removal acts, that an appearance merely to file a petition and bond for removal does not preclude a party from subsequently moving to quash the service of process, on the ground that the service was illegal, or otherwise insufficient to warrant a judgment. In *Atchison v. Morris*, 11 Fed. Rep. 582, Judge DRUMMOND denied that a party by removing a cause to a federal court thereby waived his right to question the validity of the service by which jurisdiction had been acquired. "It may have been," says Judge DRUMMOND, "among other reasons, for the very purpose of objecting to the service of summons the defendant requested that the cause should be removed to the federal court, because in a proper case a party has the right to the opinion of the federal court on every question that may arise in the case, not only in relation to the pleadings and merits, but to the service of process; and it would be contrary to the manifest intent of the act of congress to hold that a party who has a right to remove a cause is foreclosed as to any question which the federal court can be called upon under the law to decide." Judges McCrARY and TREAT in a case tried in this court (*Small v. Montgomery*, 17 Fed. Rep. 865) also decided that an appearance for removal is not a waiver of any objection to the service whereby the removing party was brought into court; and the same point has been ruled the same way in several other districts and circuits under the removal act of 1875. *Vide*, *Parrott v. Insurance Co.*, 5 Fed. Rep. 391; *Wertheim v. Trust Co.*, 11 Fed. Rep. 689; *Hendrickson v. Railway Co.*, 22 Fed. Rep. 569; *Kauffman v. Kennedy*, 25 Fed. Rep. 785; *Miner v. Markham*, 28 Fed. Rep. 387; *Clews v. Iron Co.*, 44 Fed. Rep. 31.

There can be no reasonable doubt of the defendant's right to contest the validity of the service, notwithstanding the fact that it removed the cause from the state court. Now the plea which has been filed in this court by the defendant company to quash the service alleges, in substance, that when the writ was served on its president he was in this state casually on private business of his own; that the company is a foreign corporation of the state of Indiana, and has never transacted any business in this state, or maintained any office, officer, or agent or employe within the state. I do not understand the state courts to hold that they acquire jurisdiction to render judgment against a foreign corporation by a service made under the circumstances disclosed by the defendant's plea. On the contrary, I understand that service upon an officer or agent of a for-

sign corporation is only upheld as effectual to bring the corporation into court in those cases where the corporation maintains an office or transacts business within the state. *McNichol v. Reporting Agency*, 74 Mo. 457. The motion to strike the plea from the files will be overruled.

MARTIN v. MEYER *et al.*

(Circuit Court, E. D. Louisiana. February 25, 1891.)

PARTNERSHIP—ACTION AGAINST—JOINER OF PARTIES.

Under the Louisiana jurisprudence, by which a partnership is a distinct legal entity, capable of being sued when the partners are joined with it, two partners of a commercial partnership domiciled in that state may be sued with the partnership on a firm contract without joining the third, who is a non-resident.

On Exception to Jurisdiction.

This was an action by James W. Martin, a citizen of Mississippi, against V. & A. Meyer & Co., of Louisiana, a commercial firm, composed of Victor Meyer, Adolph Meyer, and other persons alleged to be unknown to plaintiff, for a balance alleged to be due for goods sold by defendants for the account of plaintiff. Defendants filed an exception to the jurisdiction, alleging that the firm was composed of Victor, Adolph, and Solomon Meyer, and that the latter was a citizen of New York; that his name is published in the city directory of New Orleans as a member of the firm, and that plaintiff must have known the fact; but that his name and citizenship was omitted from the petition to prevent the jurisdiction of the court from being ousted on the face of the pleadings. A jury was waived, and the cause tried before the court.

Before PARDEE and BILLINGS, JJ.

W. S. Benedict, for complainant.

Farrar, Jonas & Kruttschnitt, for defendants.

PER CURIAM. The plaintiff, a citizen of Mississippi, on an obligation of the commercial partnership of V. & A. Meyer, domiciled in Louisiana, may sue in this court Victor Meyer, a citizen of Louisiana, Adolph Meyer, a citizen of Louisiana, and the partnership of V. & A. Meyer, so far as the said partnership is capable of being sued and standing in judgment; but cannot sue Solomon Meyer, a citizen of the state of New York. Under the jurisprudence of Louisiana a partnership is a legal and moral entity, a civil person, with peculiar rights and attributes, separate and distinct from the individuals composing the partnership, which can have a domicile, contract and be contracted with, buy and sell, act as agent, and perform many other functions; (see *Smith v. McMicken*, 3 La. Ann. 322; *Paradise v. Gerson*, 32 La. Ann. 532; *Succession of Pilcher*, 39 La. Ann. 362, 1 South. Rep. 929;) and, while not capable of suing and being sued by itself, is capable of suing and being sued joined with the partners. When sued with the partners, and the plaintiff recovers, judgment