CAPWELL v. SIPE et al.

(Circuit Court, N. D. Ohio, E. D. May, 1892.)

1. RES JUDICATA—DISMISSAL OF SUIT.
In an action in a federal court in one state on a judgment of a supreme court of another state, it is no defense that, before the action in the state court was commenced, a suit on the same cause of action was pending in such federal court, which suit was dismissed subsequent to the entry of judgment in the state court.
2. WRITS—PERSONAL SERVICE ON NONRESIDENT—JUDGMENT—COLLATERAL ATTACK.
Where a nonresident was personally served with summons in a state court, while within the jurisdiction of such court, solely for the purpose of trying another suit pending in said court as party defendant, and the court held the service good, and gave judgment thereon, such service cannot be collaterally attacked in a subsequent suit on the judgment in a federal court.

At Law. Action by Roger F. Capwell against John F. Sipe and others. On demurrer to answer. Demurrer sustained.

Hutchins & Campbell, for plaintiff.

W. C. Ong, for defendants.

Before TAFT, Circuit Judge, and RICKS, District Judge.

TAFT, Circuit Judge. The questions here to be decided arise on a demurrer to the answer of the defendants. Plaintiff's cause of action is founded on a judgment rendered by the supreme court of the county of Providence, in the state of Rhode Island, in favor of the plaintiff against the defendants. The defenses are two. One is that, before the action in Rhode Island was begun, a suit on the same cause of action was begun in this court, and that the suit here was pending when judgment was entered in Rhode Island, and that subsequently the suit here was dismissed. No reason is suggested why this constitutes any defense in the present action, or in any way affects the validity of the Rhode Island judgment. The demurrer to this defense must be sustained.

The other and principal defense set up in the answer is that the defendants were personally served with summons in the Rhode Island suit while they were within the jurisdiction of the Rhode Island court, and had gone there solely for the purpose of attending, as parties defendant, the trial of another suit pending in the same court. They pleaded this fact in abatement, and contended that the purpose for which they came exempted them from service. The supreme court of Rhode Island, however, overruled the plea, on the ground that such an exemption existed only in case of witnesses, but did not exist in case of the parties to the suit, whether they were witnesses or not. It is now contended that the judgment against defendants, based on such a service, is void for want of jurisdiction in the court over the defendants. We do not think so. The defendants were within the territorial jurisdiction of the court rendering the judgment, and they were personally served with the process. They relied on an exemption allowed by many courts on the ground of public policy. In this case, as the suit on which the defendants were in attendance was pending in the same court which

was asked to recognize the exemption, it is a question of the public policy of the state of Rhode Island, in respect to which the Rhode Island court had jurisdiction to decide conclusively between the parties before it. It is not a failure of due process of law to serve a person with summons within the jurisdiction in attendance on another case as a party. If the legislature should pass a statute exempting witnesses in such a case, but permitting parties to be served, it would not be invalid, and we cannot see why a Rhode Island court cannot hold the law of the state, in the absence of statute, to have the same effect. This is not a case of constructive or substituted service, as in *Pennoyer* v. *Neff*, 95 U. S. 714. There was no failure to serve the defendants personally. There was, at the most, only an abuse of the process of the court. *Construction Co.* v. *Fitzgerald*, 137 U. S. 98, 105, 11 Sup. Ct. Rep. 36. Suppose that a plaintiff were to induce a defendant by fraud to come into the jurisdiction in order to serve him, and that after personal service the court should refuse, on motion of defendant, to set aside the service, could the jurisdiction of the court in such a case be collaterally attacked? We think not. The abuse of the process of the court can only be corrected by the court from which it issues, and if the court fails to find an abuse of its process, and refuses to set the service aside, when actual personal service is made, we do not think its refusal constitutes anything more than error, which cannot be collaterally inquired into or corrected. The question is one of exemption from personal service on grounds of public policy, personal service having been actually made. It may be true that, were a United States court sitting in Rhode Island called upon in an original suit before it to decide this question, it would be regarded as one of general law, and that such court would not be controlled by the decision of the state court upon the point. But here we are called on to say that, in a case where personal service is admitted, and a judgment was rendered, the decision of the supreme court with the parties before it upon a question of public policy was erroneous, and that the error invalidates the judgment. No such power is given us in the collateral examination of a judgment.

The demurrer must be sustained.

CHAMBERLAIN v. MENSING.

(*Circuit Court, D. South Carolina.* September 1, 1892.)

1. EJECTMENT—STATING SEPARATE CAUSES OF ACTION—MOTION TO MAKE COMPLAINT MORE DEFINITE.
   In an action to recover possession of distinct parcels of land, not contiguous to each other, where defendant's alleged wrongful entry upon and withholding of one has no connection with the other, if the complaint fails to state separately the distinct causes of action as to each parcel, as required by the Code of Civil Procedure of South Carolina, the remedy is by motion to make the complaint more definite and certain, not by demurrer. *Westlake* v. *Farrow*, 13 S. E. Rep. 469, 34 S. C. 270, followed.
2. SAME—DAMAGES FOR WITHHOLDING POSSESSION.
   But a claim in such complaint for damages for such wrongful entry and possession need not be separately stated, as such damages are not, under the Code, an independent cause of action.

At Law. Motion to make complaint more definite and certain. Granted.

C. B. Northrop, for the motion.

Mitchell & Smith, opposed.

SIMONTON, District Judge. The complaint sets out that plaintiff is seised in fee of, and entitled to the possession of, "all those two lots or parcels of land situated and lying and being in the town of Summerville, county of Berkley, and state of South Carolina, to wit, one lot containing three acres, more or less, between Fourth and Fifth North, Main, and Magnolia streets, being the lots lettered *a*, *b*, and *c*, on square No. 41, in the Map of Summerville, made by C. E. Detmold; and also one other lot, containing three acres, between Railroad avenue and First North and Gum and Loblolly streets, being the lots lettered *a*, *b*, and *c*, on square No. 1, on said Map of New Summerville." That the defendant is in the possession of said lands, and wrongfully withholds the same from plaintiff. That he obtained possession by means of a wrongful, fraudulent, and tortious entry thereon, well knowing that he had no title whatsoever to the same, or right of possession thereof, but with the intent by such wrongfully taking possession to put plaintiff to his action, believing that plaintiff would not be able to establish a legal title to the same sufficient to recover thereof, although defendant knew that he himself was in no wise entitled to the same. The damages are laid at $1,500. The prayer is for the possession of the premises and for the damages. The defendant asks that the plaintiff be ordered to make his complaint more definite and certain, by separately and distinctly stating the cause of action in reference to the separate parcels of land sought to be recovered, and by separately and distinctly stating the cause of action for damages, actual or punitive, sought to be recovered.

The plaintiff objects to this motion *in limine*, upon the ground that the proper mode of seeking relief is by demurrer. We are bound by the decisions of the court of South Carolina on this question. The rule in this state is established in the recent decision of *Westlake* v. *Farrow*, 34 S.