

PATTEN v. CILLEY.

(Circuit Court, D. New Hampshire. July 6, 1894.)

No. 400.

APPEALABLE ORDERS—DISMISSAL OF PETITION FOR REMOVAL.

The dismissal of a petition for removal on the ground of local prejudice stands on the same ground as an order of remand, and is not a final judgment from which a writ of error will lie. In *re Pennsylvania Co.*, 11 Sup. Ct. 141, 137 U. S. 451; and in *re Coe*, 5 U. S. App. 6, 1 C. C. A. 326, and 49 Fed. 481, followed.

This was an application for a writ of error to the supreme court to review an order dismissing, for want of jurisdiction over the subject-matter, a petition for removal of the cause from the state court, on the ground of local prejudice. 58 Fed. 977.

Harvey D. Hadlock and W. L. Foster, for petitioner.

Bingham & Mitchell and Streeter, Walker & Chase, for respondent.

Before COLT, Circuit Judge, and ALDRICH, District Judge.

ALDRICH, District Judge. At the August term, 1892, this court remanded the probate proceeding in which Horatio G. Cilley was appellant in the state probate court, and which he removed to this court within the time in which a party may remove a proper cause as a matter of right. Such order was upon the ground that the court had no jurisdiction over the subject-matter of the controversy. Subsequently, the same party petitioned for the removal of the same controversy, on the ground of local prejudice; and such petition was dismissed December 11, 1893, for the same reasons, and the case is reported in *Re Cilley*, 58 Fed. 977. This is an application or petition for writ of error from such order of dismissal, to the supreme court of the United States. In *re Pennsylvania Co.*, 137 U. S. 451-454, 11 Sup. Ct. 141; *Patten v. Cilley* (1892) 1 C. C. A. 522, 50 Fed. 337; and in *re Coe*, 5 U. S. App. 6, 1 C. C. A. 326, and 49 Fed. 481,—would seem to settle this question against the petitioner. The case first cited was a petition for removal on the ground of local prejudice; and Mr. Justice Bradley, in denying the petition for mandamus, seems to have made no distinction between the dismissal of a petition for removal and a remanding order. In *re Coe* does not suggest any distinction, and, indeed, the opinion in that case is based upon the idea that the order is not a final decision of the cause, but rather a refusal to hear and decide, from which there is no appeal. The dismissal of a petition for removal is as much a refusal to hear and decide as a remanding order, and we do not see our way clear to make the distinction which the petitioner claims. See, also, *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118; *Railroad Co. v. Roberts*, 141 U. S. 690, 12 Sup. Ct. 123; *Joy v. Adelbert College*, 146 U. S. 355, 13 Sup. Ct. 186; *Wauton v. De Wolf*, 142 U. S. 138, 12 Sup. Ct. 173; *American*

Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 382, 13 Sup. Ct. 758.

The writ is denied, and the petition dismissed.

COLT, Circuit Judge, concurs.

CILLEY v. PATTEN et al.

(Circuit Court, D. New Hampshire. July 6, 1894.)

No. 255.

1. FEDERAL COURTS—JURISDICTION—PROCEEDINGS TO CONTEST WILLS.

A federal court has no jurisdiction to disestablish a will admitted to probate in the state court and establish one not admitted, where the state courts of equity have no such powers.

2. SAME—DIVERSE CITIZENSHIP—ACTUAL INTERESTS OF PARTIES.

In determining questions of jurisdiction on the ground of diverse citizenship, the parties are to be placed on the side of the controversy to which they belong according to their actual interests.

This was a suit by Horatio G. Cilley against William A. Patten, in which John J. Cilley and J. Henry Dearborn were also joined as defendants, to disestablish a will admitted to probate in the state court and establish an earlier will. For reports of previous decisions in the same litigation, see 46 Fed. 892; 1 C. C. A. 522, 50 Fed. 337; 58 Fed. 977; also, 62 Fed. 497.

Harvey D. Hadlock, for complainant.

Streeter, Walker & Chase and Bingham & Mitchell, for respondent Patten.

Before COLT, Circuit Judge, and ALDRICH, District Judge.

ALDRICH, District Judge. This is a bill in equity, and involves the validity of the will of Matilda P. Jenness, dated March 26, 1884, in which William A. Patten is sole legatee, or, to speak more specifically, seeks the disestablishment of the will of 1884, admitted to probate in the state court, and the establishment of a will dated in 1878, not probated in the state court, and in which Horatio G. Cilley, John J. Cilley, and J. Henry Dearborn are sole legatees. It also prays for relief in the circuit court of the United States annulling the decrees of the probate courts in New Hampshire, an accounting by the sole legatee under the probated will of 1884 to the sole legatees of the unprobated will of 1878, and, as incident thereto, the setting aside of certain assignments from the testatrix to Patten, between the dates of the earlier will and the later one. The controversy is the same, as that involved in the probate proceeding before this court in *Re Cilley* (determined December 11, 1893) 58 Fed. 977. The decision of the question then considered proceeded upon the idea that the federal courts had no jurisdiction over the probate of wills in a state where there was no statute conferring jurisdiction upon its own equity or common-law courts. We think the reasoning there covers the present cause. If the will of 1884