CROWN COTTON MILLS v. TURNER.

(Circuit Court, S. D. New York. August 26, 1897.)

FEDERAL JURISDICTION—SUIT IN WRONG DISTRICT—GENERAL APPEARANCE—MOTION TO DISMISS.

The filing of a general appearance in a federal court in an action commenced by service of summons alone is no waiver of defendant's right to move to dismiss for want of jurisdiction, when, on the subsequent service of the complaint, it for the first time appears that the only ground of federal jurisdiction is diverse citizenship, and that the action is brought in the wrong district.

This was an action at law by the Crown Cotton Mills against J. Spencer Turner. The case was heard on a motion to dismiss for want of jurisdiction.

James McKeen, for the motion.

Howard A. Taylor, opposed.

LACOMBE, Circuit Judge. The plaintiff is a Georgia corporation; defendant, a resident of the Eastern district of New York. The action was begun by the service of a summons, without complaint or any statement of the cause of action; nor was the complaint filed. Defendant entered a general appearance, demanding a copy of the complaint. It subsequently appeared, when the complaint was served, that complainant was a resident of Georgia, and the cause of action one of which the federal courts take jurisdiction solely because it involves a controversy between citizens of different states. Under the statute the action could properly be brought only in one of the districts of Georgia or in the Eastern district of New York, and the remedy of a defendant sued elsewhere is by motion to dismiss for lack of jurisdiction, which is the motion now made. It is urged in opposition that the general appearance served by defendant is a bar to his obtaining the relief asked for. It is abundantly settled that in such cases a general appearance is a waiver of the right to object that the action is not brought in the proper district, but the case at bar appears to be of novel impression, since, by reason of the fact that action was begun solely by service of the summons, there was nothing to indicate to defendant, at the time he appeared, that the Southern district of New York was not the proper one. There seems to be manifest unfairness in holding that defendant has waived rights of which he was not advised, when his ignorance is the necessary consequence of plaintiff's own act. There is nothing to the suggestion that defendant must have known that plaintiff was a Georgia corporation, because he had transacted business and carried on a correspondence with it; sending letters to, and receiving them from, Dalton, Ga. But that was no indication that plaintiff had not been incorporated in the state of New York, nor that its principal office was not in the city of New York. And, even as a Georgia corporation, it would, under recent amendments, have the right in certain cases to bring suit here for alleged infringement of patent. It was not till the cause of action was disclosed by the complaint that defendant could know positively that it was one not properly cognizable in this court. Motion granted.

BRAGDON v. PERKINS-CAMPBELL CO.

(Circuit Court, W. D. Pennsylvania. July 7, 1897.)

1. PROCESS—SERVICE ON FOREIGN CORPORATION—RETURN AS EVIDENCE.
   A return on a summons against a nonresident corporation, showing service upon a person stated therein to be agent of such corporation, is prima facie evidence of a good service under the statutes of Pennsylvania.
2. REMOVAL OF CAUSES — STATUS OF CAUSE AFTER REMOVAL — RULINGS OF STATE COURT.
   Where a nonresident defendant, sued in a state court, invokes the judgment of that court by a motion to set aside the service of the summons, he is concluded by the court's decision, and cannot renew the motion in the federal court, after removing the cause, on substantially the same evidence.

Shiras & Dickey, for plaintiff.
H. & G. C. Burgwin and Geo. N. Chalfant, for defendant.

ACHESON, Circuit Judge. This suit was begun in the court of common pleas No. 2 of Allegheny county. In the præcipe for the writ of summons and in the writ the defendant was described as "a foreign corporation doing business in the commonwealth of Pennsylvania." The return of the sheriff was: "Served Jan'y 25th, 1897, by delivering a true and attested copy of this writ to J. W. Crider, agent for the Perkins-Campbell Company, and made known to him the contents thereof." Thereupon the defendant presented to the court of common pleas a petition setting forth that it was a foreign corporation of the state of Ohio, transacting its business therein; that it did no business in the state of Pennsylvania, except to ship goods into the state from its place of business in Ohio; that J. W. Crider was not, and never had been, an agent of the defendant company, and that he had no connection with the company except as a traveling salesman, on commission; and praying for a rule on the plaintiff to show cause why the sheriff's return of service of the writ of summons should not be set aside. Accordingly, the court granted such a rule. The plaintiff filed an answer to the rule, denying the material averments of the petition, and alleging that the defendant was and had been engaged in transacting its business in the state of Pennsylvania, and that J. W. Crider was and had been the defendant's general agent for the state of Pennsylvania in charge of and conducting its business therein. Depositions on both sides were taken, and, after a hearing upon the merits, the court discharged the rule. The cause was then removed to this court by the defendant. Here the defendant obtained a rule upon the plaintiff to show cause why the service of the writ of summons should not be set aside, and the case dismissed, upon the ground that J. W. Crider was not such an agent of the defendant that service on him bound the defendant, and for want of jurisdiction over the defendant. At the hearing of this rule the case made by the defendant was the same as that upon which the state court had already passed, except that the defendant produced a new deposition containing cumulative evidence in support of its allegations. What, then, should be the action of this court? It is to be observed, first, that this record does not, on its face, disclose