

IN THE DISTRICT COURT OF THE UNITED STATES }
FOR THE EASTERN DISTRICT OF SOUTH CAROLINA }

[REDACTED] as Guardian ad Litem
for [REDACTED] Plaintiff,

-vs-

Atlantic Coast Line Railroad Company
and W. A. Fetner,
Defendants.

ORDER REMANDING CASE
TO COURT OF COMMON
PLEAS FOR FLORENCE
COUNTY.

The plaintiff has made a motion to remand the above entitled case on the ground that the complaint states a joint and several cause of action against the defendants and that there is therefore no separable controversy as to the defendant Atlantic Coast Line Railroad Company. The petition for removal does not state any facts to show that the joinder of the resident defendant Fetner was sham or fraudulent. The sole question is whether it appears from the face of the complaint that a separable controversy is stated as to the non-resident defendant.

The complaint substantially alleges that Fetner, the foreman and agent of the defendant Atlantic Coast Line Railroad Company, directed [REDACTED], a minor, for whose injuries the suit is brought, to do work which he was obviously incapable of doing without injury to himself. This is the gist of the cause of action.

The first position taken by the defendant, the Coast Line, is that there is a separable controversy because the responsibility of the Coast Line is implied as a matter of law from the responsibility of a principal for the act of a servant, there being no allegation that the Coast Line participated in any other way than through the act of its servant, Fetner, and that the responsibility of the defendant Fetner is for his own act. The precise question was certified to the Supreme Court by the Circuit Court of Appeals in the case of Alabama Southern Ry. v. Thompson, 200 U. S. 212, and answered adversely to the contention of the Coast Line in this case.

The next position of the defendant Coast Line is that the act of Fetner, its co-defendant, was a mere nonfeasance, for which Fetner is not liable and that therefore no cause of action is stated against Fetner. It is not necessary to discuss at any length the distinction between misfeasance and nonfeasance and the liability of a servant for a mere act of nonfeasance in failing to perform a duty he owes to the Master and not to a third person who may be injured by such failure. In this case the allegation is that Fetner, the resident defendant, ordered the plaintiff to do work which it was obviously dangerous for him to do, considering his youth and physical ability. I do not think that this is a mere nonfeasance. It is a direct positive act that is charged. But aside from this, the question is really not whether a cause of action is stated against Fetner, but whether there is a controversy which is separable or joint and several. If no cause of action is stated against the resident defendant, that would be very persuasive as tending to show that the joinder was sham and fraudulent, but not necessarily so. Plaintiffs frequently honestly believe they have a cause of action and the Courts upon demurrer or otherwise hold they have no

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even tho it is finally held that no cause of action exists. Here the plaintiff has chosen to allege that he has a joint and several cause of action against the two defendants. It may be that the State Court will hold that there is no cause of action against either or may hold that there is a cause of action against the Coast Line and not against the defendant Fetner. But the decisions in this State show that the plaintiff at least has some ground to believe that the State Court would hold the defendant Fetner liable even for acts of nonfeasance. See Ellis vs. Southern Ry. Co., 72 S. C., 465. Carter v. A.C.L. RR. Co., 84 S. C., 546. See also Note, 20 A.L.R., pp. 97--174, where the whole subject of the liability of servant to third persons, misfeasance, nonfeasance, etc., is fully discussed and the various cases cited.

It is not necessary in this case for this Court to decide whether there is a cause of action stated against the resident defendant or not. If it was clear that no cause of action at all was stated against the resident defendant, and there was no reasonable basis upon which plaintiff could rest a belief that he had a cause of action against such resident defendant, then this Court would be justified in such a palpable case in holding that such joinder was fraudulent and sham and could be for no other purpose than to prevent a removal. But in the present state of the decisions of the Supreme Court of South Carolina and in view of the law as announced in various States (which are referred to in Note, A.L.R., supra), this Court cannot say that the contention that Fetner is liable is palpably without foundation. This whole subject was very recently considered by this Court and the various decisions reviewed in the case of Lynes v. Standard Oil Co., et al., 300 Fed. 812. In accordance with the views announced in that case, and for the reasons set forth herein, I am of opinion that there is nothing before me sufficient to show that the joinder of Fetner was sham or fraudulent, and the plaintiff's alleged cause of action is joint and several, and there is therefore no separable controversy.

It is therefore

O R D E R E D, that the above entitled case be and the same is hereby remanded to the Court of Common Pleas for the County of Florence.

(S) ERNEST F. COCHRAN,
U.S.DISTRICT JUDGE.

Charleston, S. C.,
October 4, 1924.

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