

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

F. P. Mims,
Plaintiff,

-vs-

The Texas Company,
A. J. Rainwater,
A. F. Wooten and
L. E. Beasley,
Defendants.

ORDER OF REMAND.

The Plaintiff has brought an action for unlawful assault against the above named Defendants. He alleges that the three Defendants, Rainwater, Wooten and Beasley committed the assault - and that while so doing they were acting as agents of The Texas Company. The Texas Company is a non-resident corporation and has removed the case from the State Court to this Court. A motion to remand is made by the Plaintiff.

Manifestly there is no fraudulent joinder of the resident Defendants, who, according to the allegations, were so intimately connected with the ultimate facts out of which the controversy grows. The Defendant, Texas Company, in the verified Petition for Removal, supported by affidavits, has asserted that the allegations of agency are without foundation in fact. Neither does the Plaintiff file any traverse of the allegations in the Petition.

So as we see the proposition to be decided, it must be stated as follows: Where a plaintiff sues a non-resident corporation and joins resident defendants who were admittedly connected with the facts out of which the controversy grows, and the liability of the non-resident corporation is based on agency alone, does the fact that the agency is disputed by a strong showing make the joinder fraudulent, or is a separable controversy present, so as to compel removal? We think note. The fact that this Court may take the view that the case on the present showing may be a doubtful one against the defendant, non-resident corporation, does not go the good faith of the joinder, but to the merits of the case on trial.

The controlling principle of decision is stated in Chicago & Chic Ry. v. Cockrell: "As no negligent act or omission personal to the railway company was charged, and its liability, like that of the employees was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits of the action as an entirety and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants. Plainly, this was not such a showing as to engender or compel the conclusion that the em-

ployees were wrongfully brought into a controversy which did not concern them." Authority is also found in the cases of Chesapeake & Ohio Ry. v. Cockrell, 232 U. S. 143, 155, 58 L. Ed. 544; Chicago R. I. & Pac. Ry. v. Whiteaker, 232 U. S. 421, 425, 60 L. Ed. 360; Alabama Southern Ry. v. Thompson, 200 U. S. 206, 218, 50 L. Ed. 441; and Kraus v. Chicago, E. & O. R. Co. (C.C.A., 8th Circuit), 16 Fed. (2nd) 79.

Furthermore a traverse of the allegations in the petition for removal is unnecessary where the allegations of the petition are insufficient to warrant the removal. In Chicago etc., Ry. v. Whiteaker, where the attempt was made to show that the engineer could not have been guilty as charged because he was elsewhere on the train, it is pointed out that such averment was nothing more than a denial of the allegations made by the plaintiff, and, therefore, insufficient to justify the removal of the case. It is similarly brought out in Kraus v. Chicago, etc., R. Co., that the insufficiency of either pleadings or facts to make out a cause of action against the non-resident defendant is not the test of fraudulent joinder, but, is incident to the trial of the case; and that the right of action in its entirety should be passed upon and decided in the jurisdiction where the action is brought.

Nor do we understand that the fact that the liability of the non-resident defendant will depend upon the two-fold ground of unlawful assault and agency of the resident defendants, presents a separable controversy on the question of the agency alone. We took this same view in a case formerly before this Court, see Sanders v. Atlantic Coast Line 29 Fed. (2nd) 1010.

This seems to be the proper view because the law is clearly settled that the filing of separate answers by the separate defendants, does not make the controversies necessarily separable so as to justify removal. Here the answer of the resident defendants will be "not guilty" of "justifiable assault", while the defense of the non-resident defendant will be in addition thereto, "non agency" or "beyond the scope of agency as to the alleged assault." But this does not make the case removable under the direct ruling of several decisions of the United States Supreme Court. Here we quote from Lynes v. Standard Oil Co., 300 Fed. 815.

"The filing of separate answers, tendering separate issues for trial by several defendants sued jointly in the state court on a joint cause of action, does not divide the suit into separate controversies, so as to make it removable. A separate defense may defeat a joint recovery, but it cannot deprive the plaintiff of his right to prosecute his own suit to final determination in his own way, nor does it give the defendant any right to remove the suit. Louisville & Nashville R. R. Co. v. Ida, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63; Pirie v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; Starin v. New York, 115 U. S. 248, 6 Sup. Ct. 730, 29 L. Ed. 899; Core v. Vinal, 117 U. S.

347, 6 Sup. Ct. 737, 29 L. Ed. 912; Mining Co.
v. Canal Co., 119 U. S. 204, 6 Sup. Ct. 1034,
32 L. Ed. 233; Chesapeake & Ohio v. Dixon, Supra;
Alabama Southern Ry. v. Thompson, supra; Wecker
v. National Enameling Co., supra.

For the foregoing reasons this case is remanded to
the Court of Common Pleas for Florence County, State of
South Carolina.

April 20, 1931.

U.S. DISTRICT JUDGE

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