(16)

Supreme Court of Errors,

FIRST JUDICIAL DISTRICT.

OCTOBER TERM, 1890.

SING CHEONG COMPANY

vs.

YUNG WING.

BRIEF FOR DEFENDANT.

FACTS.

The plaintiffs described in the original writ as "The Sing Chong Company, of Shanghai, China," and by first amendment to complaint described as "John Doe, Richard Roe, James Smith *et al.*, partners in business in Shanghai, China, under the name of the Sing Chong Company," and by second amendment described as "Chung Chag Hen, Chung Hoong Kit, Chung Wing Nam, Chung Yik Gun, and Chung Moy Gun, all of Shanghai, China, under the firm name of the Sing Chong Company," and by third amendment described as "Chung Wing Nam of Shanghai, China, subject of the Chinese Empire, Chung Chag Hen, Chung Hoong Kit, Chung Yik Gun, and Chung Moy Gun, all of Shanghai, China, and subjects of the Chinese Empire, and Chung Chag Hen, Chung Hoong Kit, Chung Wing Nam, Chung Yik Gun, and Chung Moy Gun, all of Shanghai, China, and partners in business at said Shanghai, China, under the firm name of the Sing Chong Company," brought suit against a distinguished American

citizen, and attached the educational headquarters belonging to the Chinese Government and which stood in the name of the defendant. The attachment proved unfortunate for the plaintiffs. Other attachments seem to have been made.

The defendant is a widower, with a family of young children residing in West Hartford.

The complaint alleged a large debt, which was wholly denied by the defendant.

On the 16th day of March, 1889, the plaintiffs served a notice, that they proposed to take the depositions of Chung Wing Nam and others on the 17th day of May, 1889, before John Kennedy, Consul-General, etc., at Shanghai, China, or other competent authority at the United States Consulate at Shanghai, China. (Record, p. 18.) This notice was served upon the defendant's attorneys.

Another notice was issued on the 18th day of October, 1889, to take depositions of Chung Wing Nam and Lai Pak Hin on the 30th day of November, 1889, at the same place. The service of this notice was accepted by the defendant's attorneys, reserving all rights to resist the validity of the notice itself. (Record, p. 19.)

No commission was obtained, nor were interrogatories filed, although the plaintiffs' counsel were fully and promptly advised at the time of the last notice that the notice was utterly unreasonable and would be resisted.

The depositions taken under the second notice were offered, and the court held, as a matter of fact, that the notice was not a reasonable one. To this the plaintiffs "duly excepted."

The same result followed the offer of the first depositions.

The plaintiffs moved for a postponement, and the motion was denied.

From the action of the court the plaintiffs appealed, and assign as errors: —

First and second. That the court erred in holding that there was a reasonable notice to take the depositions.

Third. That the court erred in overruling the motion to postpone.

THERE IS NO ERROR —

1. As to the third assignment of error.

There is no provision in the statute for reviewing the allowance or disallowance of a motion to postpone a cause.

2. As to the first and second assignments of error.

First.

The finding of the judge is a simple matter of fact, upon which his conclusions are final.

The Superior Court held and ruled, as a matter of fact, that no reasonable notice was given to the defendant (Record, p. 16), and this court will not review the question.

Second.

If his ruling is reviewable, it can only be held to be erroneous if, as a matter of law, he is necessarily wrong.

Such a claim can hardly be made.

To hold that forty or sixty days' notice to take depositions in China is, as a matter of law, a reasonable notice, would be making a startling precedent.

Third.

The ruling was absolutely right.

a. The provisions of the statute permitting the taking of depositions, being in derogation of the common law, must be strictly complied with and its conditions strictly construed in favor of the adverse party.

See Greenleaf on Evidence, § 323, et cit.

b. Reasonable notice is such as will give the adverse party a fair opportunity of cross-examination.

See Sharp *vs.* Lockwood, 12 Conn., 155.
Phelps *vs.* Hunt, 40 Conn., 101.

c. The statute does not contemplate the taking of depositions in foreign countries except by consent or upon written interrogatories, and any notice which would compel the attendance of an American citizen at a tribunal in China is necessarily unreasonable.

The filing of interrogatories alone could have afforded the appellee an approach to a fair opportunity of cross-examination to which he is entitled.

d. The policy of other States in the matter of taking depositions is important as bearing on the question of reasonable notice.

With the exception of a dozen States, all require depositions taken in foreign countries to be taken under commission and upon interrogatories duly filed.

Minnesota permits them to be taken upon five days' notice, with an additional day for every twenty-five miles of travel.

New Jersey requires ten days' notice, with an additional day (not including Sundays) for each fifty miles.

Maine requires one day's notice for each twenty miles of travel.

This was also the old rule in the Federal Courts.

This last State would require notice of a deposition to be taken in China to be given one year and three months in advance.

e. The circumstances of this case show that the defendant's personal presence was necessary.

The amended complaint discloses a claim based on a running account involving innumerable items and complicated by mutual operations in land and mining speculations and by the trading and hypothecating of Chinese mining certificates and other property of undetermined value.

The nature of the depositions and the line of questioning were not disclosed to the defendant until the depositions were filed in court.

Could the defendant have employed an attorney in a country whose laws and court practice are utterly dissimilar to ours, it would have been impossible, even with months of correspondence, for him to have been prepared to intelligently protect the appellee's interests.

To require the defendant to undertake in person a journey of 9,000 miles without preparation, to spend thousands of dollars in expenses, to sacrifice two or three months of valuable time, to leave a family of dependent children, was not to afford him "a fair opportunity to cross-examine the witnesses."

f. It is only as a mere matter of comity that a non-resident foreigner is allowed to come into our courts at all.

The taking of depositions of alien plaintiffs in uncivilized countries, to be used in our own courts against our own citizens, is an extreme privilege.

Our own courts, in the only reported case, refused to entertain jurisdiction in the case of such a plaintiff.

See Brinley *vs.* Avery, Kirby, 25.

Will this court now give to an alien plaintiff the privilege, not merely of suing an American citizen in our courts, but of transferring the forum for the presentation of his case to Shanghai, where he is secured an opportunity to prepare his case unhampered by opposing counsel and influenced only by self-interest and the commercial instincts and traditions of a people who make no pretensions to be bound by the principles of the common law or even of our civilization ?

g. There can be no reasonable notice given to take depositions at such a distance and under such social conditions, and in such ideas of law as prevail in China.

If our courts were open to a plaintiff from Shanghai to sue one of our own citizens, the stranger should at least come here to prosecute his suit.

3. The magistrate before whom the depositions were taken was not a proper authority under the statute.

See U. S. Revised Statutes 1875, § 1674.

H. C. & L. F. ROBINSON,
for the Defendant.

Hoggson & Robinson, Law Printers, New Haven, Conn.

Supreme Court of Rhode Island,

PROVIDENCE, Sc.

OCTOBER TERM, 1888.

THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY
vs.
THE CITY OF PROVIDENCE, *et al.*

IN EQUITY,
No. 2364.

PLAINTIFF'S BRIEF.

STATEMENT.

This is a bill in equity brought to settle the rights of the parties as to certain tide-water flats about the Cove basin at Providence, which have been filled up, and are now mainly occupied for railroad purposes. The plaintiff claims under the Hartford, Providence and Fishkill R. R. Co.; the City of Providence claims under a grant from the State, and the other defendant, the Providence and Springfield R. R. Co., claims under the city.