

which this court had already jurisdiction, when the object was to assert or protect his rights or equities in property before the court. The record shows that he is fully aware of the pendency of the suit, and he has testified therein. The present defendant is objecting to a decree establishing a vendor's lien on the land, on the ground that since the bringing of the suit he has conveyed the land to George Lyle, and that the latter has equities which should be protected. The latter has full knowledge of the pendency of the proceeding, but does not seek to intervene in the cause. Under these circumstances, the court cannot refuse to decree relief to complainant because George Lyle, holding under a conveyance from defendant, executed after this suit was brought, might, if he chose to assert it, be able to show an equity growing out of payments made upon the land before the suit was filed.

Complainants are therefore entitled to a decree adjudging the amount due Mrs. Shropshire from John Lyle, and declaring same to be a vendor's lien upon the realty, and ordering sale of such realty for the payment of the sum found due, with interest and costs.

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FULLER and another *v.* METROPOLITAN LIFE INS. Co. and another.

(*Circuit Court, S. D. New York. August 9, 1887.*)

**EQUITY PRACTICE—MOTION TO DISMISS.**

The court will not, upon an ordinary notice of motion to dismiss, anticipate the regular trial of a cause, by examining the pleadings and proofs, to determine whether the court has jurisdiction of the action, or whether the complainant is entitled to the relief sought.

*L. A. Fuller*, for complainants.

*Arnoux, Ritch & Woodford*, for defendants.

LACOMBE, J. Issue has been joined in this case by filing an answer, and the complainant has thereupon taken and completed his proof. Defendants now move to dismiss the bill "on the ground that the testimony wholly fails to support any right to relief in this court." In other words, instead of waiting for the regular trial term, and then disposing of the case in the usual manner, defendants request that a species of semi-trial be now had under an ordinary notice of motion. The court is invited to consider the pleadings and proof as if the case were properly here for final disposition, and, if it fail to concur in the defendants' view of the law, they may, putting in such further testimony as they may be advised, proceed hereafter to try the case over again, at another term, and probably before another judge. The inconvenience of such a practice is manifest, and as it is concededly novel, defendants being unable to point to a single case, reported or unreported, in which it has been approved, this court must decline to sanction its inauguration.

Defendants also claim that the court has no jurisdiction; the amount in controversy not exceeding \$500. Inasmuch as its jurisdiction may be challenged at any time, they contend that the court should now dismiss the bill on that ground. The defendants concede that upon the bill alone such a motion would not prevail, it being "possible to infer from the bill, standing alone, the existence of a state of facts by reason of which the amount in controversy might exceed \$500." But they contend that "*looking through* the testimony with a view to discovering the amount in controversy," it becomes evident that there is a total failure on the part of the complainant to show a sufficient amount in controversy to sustain the jurisdiction. If, however, this is to be determined by a consideration of the proof as well as the pleading, such determination is neither more nor less than a trial, and must, like other trials, be had at the regular term assigned for such business.

The preliminary objection raised by complainant to the hearing of this motion is therefore sustained, and the motion dismissed, for the reasons indicated above.

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UNITED STATES v. BADEAU.

(*Circuit Court, S. D. New York. July 6, 1887.*)

1. JURY—QUESTIONS OF LAW AND FACT—FEES OF OFFICER.

The question in this case, whether a consular officer was entitled to retain certain moneys received by him as received for non-official services, or whether he was obliged to account for them as received for official acts, *held*, upon the evidence, not to present a question of fact for the jury; there being no conflict in the evidence as to the character of the acts for which the moneys were received.

2. PLEADING—AMENDMENT AT TRIAL—REFUSAL OF.

To refuse an amendment of the complaint on the trial, the effect of which would be to change a fully stated cause of action for money had and received into one upon an account stated, thus introducing technicalities not tending to the promotion of justice, is a just exercise of the discretion of the trial court.

3. CONSULAR OFFICER—NON-OFFICIAL FEES—ACCOUNTING.

Fees received by a consular officer for taking affidavits, acknowledgments, and authentications for individuals, in transactions having no relation, direct or remote, with the official business of the government, are for services not required by consular regulations, and are the personal emoluments of the officer, for which he is not required to account to the treasury department.

4. DEPARTMENT REGULATIONS—INTERPRETATION.

The construction and interpretation by the state department of the regulations issued to consuls by the secretary of state, defining what acts are to be deemed official and what non-official, are controlling as to their meaning in case of doubt, and should conclude the accounting officers of the treasury department.

At Law.

*Stephen A. Walker*, U. S. Atty., for the United States.

*Stephen G. Clarke*, for defendant in error.