

Opinion of the Court.

FIDELITY INSURANCE COMPANY *v.* HUNTINGTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO.

Submitted March 1, 1886.—Decided March 15, 1886.

A creditor's bill, to subject incumbered property to the payment of his judgment, by sale and distribution of the proceeds among lien-holders according to priority, creates no separate controversy, as to the separate lien-holders parties respondent, within the meaning of the removal acts, although their respective defences may be separate.

The case is stated in the opinion of the court.

Mr. Samuel Dickson, Mr. E. W. Kittredge, Mr. John C. Bullett, and Mr. Richard C. Dale, for appellants.

Mr. R. A. Harrison, Mr. William M. Ramsey, and Mr. Lawrence Maxwell, Jr., for appellee.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is an appeal under section 5 of the act of March 3, 1875, 18 Stat. 470, ch. 137, from an order of the Circuit Court remanding a suit which had been removed from a State court.

The case is this: Collis P. Huntington, a citizen of New York, recovered a judgment in the Court of Common Pleas of Scioto County, Ohio, on the 29th of May, 1885, against the Scioto Valley Railroad Company, an Ohio corporation, for \$639,305.67. Executions were afterwards issued upon this judgment, and levied upon the railroad, rolling-stock, and other personal property of the company. This property was covered by several mortgages, or deeds of trust, one to the Fidelity Insurance Trust and Safe Deposit Company, a Pennsylvania corporation; another to Samuel Thomas, a citizen of New York; another to the Central Trust Company of New York, a New York corporation; another to Henry K. McKarg, a citizen of New York; another to the Metropolitan Trust

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Company of the City of New York, a New York corporation; and others to various citizens of Ohio. Such being the condition of the property, Huntington began a suit in the Court of Common Pleas of Scioto County, the object of which was to marshal the liens and obtain a sale of the property, free of incumbrance, to pay his judgment, after satisfying all prior claims, and, in the meantime, to have a receiver appointed. To this suit all the several lien-holders were made parties, and the Fidelity Insurance Trust and Safe Deposit Company answered, setting up its mortgage as a first lien, and asking that the property be sold and the proceeds applied to the satisfaction of that mortgage debt. This being done, the same company presented a petition for the removal of the suit to the Circuit Court of the United States, on the ground that there was in the suit a controversy which was wholly between citizens of different States, and which could be fully determined as between them, to wit, a controversy between the petitioner, a citizen of Pennsylvania, and Huntington, the plaintiff, and all the defendants, except the petitioner, citizens of States other than Pennsylvania. When the suit was entered in the Circuit Court it was remanded, and to reverse that order this appeal was taken.

The suit as brought by Huntington is a creditor's bill to subject incumbered property to the payment of his judgment by a sale and distribution of the proceeds among lien-holders according to their respective priorities. There is but a single cause of action, and that is the equitable execution of a judgment against the property of the judgment debtor. This cause of action is not divisible. Each of the defendants may have a separate defence to the action, but we have held many times that separate defences do not create separate controversies within the meaning of the removal act. *Louisville and Nashville Railroad Co. v. Ide*, 114 U. S. 52; *Putnam v. Ingraham*, 114 U. S. 57; *Pirie v. Tvedt*, 115 U. S. 41; *Starin v. New York*, 115 U. S. 248; *Sloane v. Anderson*, ante 275. The judgment sought against the Fidelity Company is incident to the main purpose of the suit, and the fact that this incident relates alone to this company does not separate this part of the con-

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troversy from the rest of the action. What Huntington wants is not partial relief settling his rights in the property as against the Fidelity Company alone, but a complete decree, which will give him a sale of the entire property free of all incumbrances, and a division of the proceeds as the adjusted equities of each and all the parties shall require. The answer of this company shows the questions that will arise under this branch of the one controversy, but it does not create another controversy. The remedy which Huntington seeks requires the presence of all the defendants, and the settlement not of one only, but of all the branches of the case.

The order remanding the case is

Affirmed.

KLEINSCHMIDT & Others v. McANDREWS & Another.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Argued March 8, 1886.—Decided March 22, 1886.

An exception to a decision of the court on a motion for a nonsuit, ordering the same on the ground that the plaintiff had made no case for the jury, is an exception within the meaning of § 279 of the Montana Code of Civil Procedure.

The record recited the substance and effect of plaintiffs' evidence, a motion for nonsuit by defendant on the ground that there was no case in law for the jury, that the motion was granted and judgment ordered to be entered in favor of defendant, and that the plaintiffs then and there excepted to this ruling of the court: *Held*, That the exceptions applied to the whole facts in the record to which the ruling of law excepted to applied.

A bill of sale of personal property was made at nine o'clock in the evening. The property was twenty-three miles distant. Possession was delivered at four o'clock in the morning of the next day, and the vendee remained in possession until the property was seized in the afternoon of that day, on attachment at the suit of a creditor of the vendor: *Held*, That this was an immediate delivery of possession, with continued change of possession, under a statute of Montana, making sales of personal property, "unless accompanied by immediate delivery and followed by actual and continued change of possession," "conclusive evidence of fraud as against creditors."