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Supervisors Vs. Rogers

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Court : US Supreme Court

Decided On : 1868

Appeal No. : 74 U.S. 175

Appellant : Supervisors

Respondent : Rogers

Judgement :

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Supervisors v. Rogers

74 U.S. (7 Wall.) 175

ERROR TO THE CIRCUIT COURT

FOR NORTHERN ILLINOIS

SYLLABUS

1. The Act of February 28, 1839, § 8, 5 Stat. at Large 322, providing for the transfer, under certain circumstances named in it, of a suit from one circuit court to the most convenient circuit court in the next adjacent state, is not repealed by the

Act of March 3, 1863, 12 Stat. at Large 768, providing that under certain circumstances named in it, the circuit judge of one circuit may request the judge of any other circuit to hold the court of the former judge during a specified time.

2. A court of the United States has power to adopt in a particular case a rule of practice under a state statute, and where a circuit court is possessed of a case from another circuit, under the above-mentioned act of 1839, it may adopt the practice of the state in which the circuit court from which the case is transferred sits as fully as could the circuit court which had possession of the Case originally.

1. An act of Congress of the 28th of February, 1839 [Footnote 1] provides that in all suits in any circuit court of the United States in which it shall appear that both the judges, or the one who is solely competent to try the same, *shall be in any way interested,* or shall have been counsel, or connected with either party so as to render it improper to try the cause, it shall be the duty of such judge, or judges, on the application

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of either party, to cause the fact to be entered on the records of the court and make an order, that an authenticated copy thereof, with all the proceedings in the suit, *shall be forthwith certified to the most convenient circuit court in the next adjacent state* or in the next adjacent circuit, which circuit court shall, upon such record and order being filed with the clerk, take cognizance thereof in the same manner as if such suit had been rightfully and originally commenced therein, and shall proceed to hear and determine the same, and the proper process for the due execution of the judgment or decree rendered therein, shall run into and be executed in the district where such judgment or decree was rendered, and also into the district from which such suit was removed.

A subsequent act, one of March 3, 1863, [Footnote 2] provides that whenever the judge of the supreme court for any circuit, from disability, absence, the accumulation of business in the circuit court in any district within his circuit, or from his having been counsel, *or being interested in any cause pending* or from any

other cause shall deem it advisable *that the circuit court should be holden by the judge of any other circuit,* he may request, in writing, the judge of any other circuit *to hold the court in such district* during a time named in such request.

With these two acts on the statute book, one Rogers had brought suit, in the circuit court for *Iowa,* against the supervisors of Lee County, to recover the interest due by the county on certain bonds which it had issued, and for the payment of which interest, a tax was by the statutes of the state to be levied.

Having obtained a judgment against the county and issued execution without getting any satisfaction, he applied to the same court for an alternative writ of mandamus upon the board of county supervisors (whose duty it was, by the laws of Iowa, to levy all taxes levied) to levy a tax sufficient to pay his judgment, or to show cause for not doing so. The writ having issued, the supervisors made a return showing cause, or what they set up as such. The case subsequently

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coming on for further proceeding, and both the judges of the circuit court for Iowa being interested in the matter as taxpayers of the county of Lee, the case was ordered to be transferred to the circuit court for the Northern District of *Illinois.*

Being now in that court, a motion was made to remand it on the ground that the act first above quoted, the act, namely, of 1839, had been repealed by the subsequent one of 1863, and that, under this last act, if the two judges of the Circuit Court for Iowa were interested in the case, a circuit judge of some other district should have been requested to hold a court *in the Iowa circuit, the case* being left *there.* Instead of this, the case had been transferred and the judge had been left in his district. *The motion was, however, denied.*

2. The case being thus in the Circuit Court for Northern Illinois and a peremptory writ having issued thence, and the supervisors having refused to obey it, the relator's counsel moved that a writ should be issued "according to section 3770 of the code of Iowa," directed to the *marshal of the United States* for the district of Iowa, and commanding *him* to levy and collect the taxes named in the

peremptory writ.

This section, 3770 of the Code of Iowa, upon which the motion for the appointment of the marshal was based, is found in a chapter of the Iowa Code regulating proceedings in mandamus. It thus enacts:

"The court may, upon application of the plaintiff (besides or instead of proceeding against the defendant by attachment) direct that the act required to be done may be done by the plaintiff, *or some other person appointed by the court,* at the expense of the defendant, and, upon the act's being done, the amount of such expense may be ascertained by the court, or by a referee appointed by the court, as the court or judge may order, and the court may render judgment for the amount of such expense and costs, and enforce payment thereof by execution."

The court below accordingly issued the writ to the marshal

"commanding him to levy and collect the taxes named in the said peremptory writ, and when collected to pay said

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judgment, interest, and costs therein named,"

and in performing the said duty, requiring him to conform to the laws of the State of Iowa for the collection of state and county taxes as near as might be.

The case being here on error, it was alleged that the court below erred,

1. In overruling the motion to remand the cause to the Circuit Court of the United States for the District of Iowa and

2. In making an order for the appointment of the marshal of the United States, as a commissioner, to levy and collect the tax upon the property of Lee County.

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MR. JUSTICE NELSON delivered the opinion of the Court.

I. It will be observed on a comparison of the act of 1839 with the subsequent one of 1863 that they are very different from each other in their general purpose, scope, and intent. The first provides only for the removal and trial of a suit in which the judges are disqualified to try the particular cause on account of interest, or having been counsel or connected with either party. The second act is more general, and in the events named the judge is to be invited to hold the court for a given session or term, to be named. It is true that the reasons assigned in the section for calling on the judge embrace two of those assigned in the act of 1839 for the removal to an adjacent court, namely interest and having been counsel, but this enumeration is not of much importance in the interpretation of the act, for after the enumeration it is added, or "from any other cause," so that the judge would be authorized for a cause not enumerated to call in the judge to hold a session for any time specified, and during which he would no doubt be fully competent to try any cause coming even within the enumeration. The frame of the section, we think, shows that the main purpose of the provision was to procure a judge to hold a session or term of the court, and not to try a particular cause which the resident judge was incompetent to try. But the more decisive difference between the two acts is that the power conferred by the latter is permissive and discretionary, whereas the former is express and mandatory. The action of the judge in the latter act depends upon the question whether or not he *deems it advisable that the circuit judge of another circuit shall be called in;* in the former it is *made the duty of the judge, on the application*

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of either party, to cause the fact to be entered in the records of the court, and to make the order of removal. In the latter act, it is also discretionary with the judge requested to hold this circuit. The condition of his own circuit may render it inexpedient, or his refusal unavoidable; in the former, it is the duty of the circuit to which the cause is removed to take cognizance of the same and try it as if originally brought in that court. We are of opinion, therefore, that there is no necessary repugnancy between the two acts, and although in some particulars the

two provisions have reference to the same subject, and for the purpose of remedying a common inconvenience there are no negative words in the latter act, and to this extent the remedy may be well regarded as simply cumulative.

II. The next question is as to the appointment of the marshal as a commissioner to levy the tax in satisfaction of the judgment.

This depends upon a provision of the Code of the State of Iowa. The provision is found in a chapter regulating proceedings in the writ of mandamus, and the power is given to the court to appoint a person to discharge the duty enjoined by the peremptory writ which the defendant had refused to perform, and for which refusal he was liable to an attachment, fine, and imprisonment. It is given by way of an alternative proceeding in execution of the peremptory writ in lieu of the attachment, and is express and unqualified. The duty of levying the tax upon the taxable property of the county to pay the principal and interest of these bonds was specially enjoined upon the board of supervisors by the act of the legislature that authorized their issue, and the appointment of the marshal as a commissioner in pursuance of the above section is to provide for the performance of this duty where the board has disobeyed or evaded the law of the state, and the peremptory mandate of the court.

This section is but a modification of the law of England and of the New England states, which provide for the execution of a judgment recovered against a county, city, or tow

against the private property of any individual inhabitant, giving him the right to claim contribution from the rest of the people.

It is said that this practice prescribed for the state courts of Iowa has not been adopted by the United States circuit for that district, and hence that it is not competent for the court in the present instance to follow this mode of proceeding. But the answer is that the court, having charge of the cause under the act of 1839, is fully competent to adopt it in the particular case, as its power is the same over it

as if it had been a suit originally brought in the court.

Judgment affirmed.

MR. JUSTICE MILLER did not sit in this case.

[Footnote 1]

§ 8, 5 Stat. at Large 322.

[Footnote 2]

12 Stat. at Large 768.

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