Case of the Sewing Machine Companies

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SooperKanoon Citation : sooperkanoon.com/82465

Court : US Supreme Court

Decided On : 1873

Appeal No. : 85 U.S. 553

Appellant : Case of the Sewing Machine Companies

Judgement :

Case of the Sewing Machine Companies - 85 U.S. 553 (1873)
U.S. Supreme Court Case of the Sewing Machine Companies, 85 U.S. 18 Wall. 553 553 (1873)

Case of the Sewing Machine Companies

85 U.S. (18 Wall.) 553

ERROR TO THE SUPREME JUDICIAL

COURT OF MASSACHUSETTS

SYLLABUS

A case in which the plaintiff is a citizen of the state where the suit is brought and two of the defendants are citizens of other states, a third defendant being a citizen of the same state as the plaintiff, is not removable to the circuit court of the United States under the Act of March 2, 1867, upon the petition of the two foreign

defendants.

The Florence Sewing Machine Company, a Massachusetts corporation, sued in assumpsit in the court just named three other sewing machine companies, one of them like itself, a Massachusetts corporation, another a Connecticut corporation, and the third a New York corporation. The writ was returnable to April Term, 1871.

The purpose of the suit was to recover of the three defendant corporations an alleged overpayment which the plaintiff company alleged that it had made to them under a license agreement which they had granted to it. Service of the writ was made upon all the defendants, according to the laws of Massachusetts; upon the two foreign corporations by attachment of the property of each within the state &c.; The Massachusetts corporation which was thus sued appeared at the April Term, 1871, by counsel and filed its answer, and at the April Term, 1872, the Connecticut and New York corporations did the same.

At the said April Term, 1872, and before the trial of the case, the Connecticut corporation filed a petition under the Act of March 2, 1867, hereinafter particularly set forth, [Footnote 1] for the removal of the cause to the Circuit Court of the United

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States for the District of Massachusetts, assigning as a reason that the plaintiff corporation was a citizen of the State of Massachusetts and that it, the defendant corporation, was a citizen of the State of Connecticut, that a controversy existed between them in the said suit, and that the petitioner had reason to believe and did believe that from prejudice and local influence it would not be able to obtain, justice in the state court. An affidavit to this effect was also made in its behalf by its president and filed, and also a bond with sufficient sureties as required by law.

On the same day, a similar petition, affidavit, and bond were made and filed by and in behalf of the New York corporation.

Subsequently, at the same term and before the trial of the cause, these petitions were heard before the presiding judge. The judge (Ames, J.) refused to grant the petitions and ordered the case to proceed to trial, reserving the question whether his refusal was right for the consideration of the whole bench. The defendants excepted. A verdict was given for the plaintiff.

The exception was afterwards heard before the whole bench of the court below, which held that the petition to remove the case was rightly refused. Final judgment having been entered accordingly, the case was now brought here by the three defendant corporations.

The question thus presented was whether a case in which the plaintiff is a citizen of the state where the suit is brought and two of the defendants are citizens of other states, a third defendant being a citizen of the same state as the plaintiff, is removable to the United States circuit court upon the petition of the two foreign defendants under the statute of March 2, 1867, upon their complying with the several requirements of that statute.

To understand the arguments of counsel and the opinion of the Court, it is necessary to refer to certain clauses of the Constitution and of two acts of Congress preceding that of 1867 -- one, the Judiciary Act of 1789; the other, an act of 1866.

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The following clauses of the Constitution are referred to:

"ARTICLE III -- SECTION 2. The judicial power shall extend:"

"To all *cases* in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority."

"To all *cases* affecting ambassadors, other public ministers, and consuls."

"To all *cases* of admiralty and maritime jurisdiction."

"To *controversies* to which the United States shall be a party."

"To controversies between two or more states; between a state and citizens of another state; between *citizens of different states;* . . . between *citizens of the same state* claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, citizens, or subjects."

"In all *cases* affecting ambassadors, other public ministers, and consuls, and *those* in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other *cases beforementioned,* the Supreme Court shall have appellate jurisdiction,"

&c.;

The following are the acts of Congress which bear on the case:

First. The Judiciary Act of 1789, which thus enacts:

"SECTION 11. The circuit courts shall have original cognizance, concurrent with the courts of the several states, of all *suits* of a civil nature, at common law or in equity, where . . . the *suit is between a citizen of the state where the suit is brought, and a citizen of another state.* "

"SECTION 12. If a *suit* be commenced in any state court against an alien, or *by a citizen of the state in which the suit is brought against a citizen of another state,* and the matter in dispute exceeds the aforesaid sum of $500, . . . and the defendant shall *at the time of entering his appearance* in such state court file a petition for the removal of the cause for trial into the next circuit court, to be held in the district where the suit is pending, . . . and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing, . . . it shall then be the duty of the state court . . . to proceed no further in the cause, . . . and the said copies being entered as aforesaid in

such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process,"

&c.;

"[These sections, as interpreted by this Court, [Footnote 2] have been always understood to apply only to those cases in which all the individuals making up the plaintiffs are citizens of the state where the suit is brought and all the individuals making up the defendants are citizens of another state or states.]"

Next came an Act of July 27, 1866, entitled "An act for the removal of causes in certain cases from state courts." [Footnote 3] It was thus:

"If in any *suit* . . . in any state court against an alien, or *by a citizen of the state in which the suit is brought against a citizen of another state,* and the matter in dispute exceeds the sum of $500, . . . a citizen of the state in which the suit is brought is or shall be a defendant, and if the suit, so far as relates to the alien defendant or to the defendant who is the citizen of a state other than that in which the suit is brought is or has been instituted or prosecuted for the purpose of restraining or enjoining *him,* or if the suit is one in which there can be a final determination of the controversy, so far as it concern him, without the presence of the other defendants as parties in the cause, then and in every such case the alien defendant or the defendant who is a citizen of a state other than that in which the suit is brought may, *at any time before the trial or final hearing of the cause,* file a petition for the removal of the cause as against him into the next circuit court of the United States to be held in the district where the suit as pending and offer good and sufficient surety for his entering in such court . . . copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in said cause affecting or concerning him, and also for his there appearing, . . . and it shall be thereupon the duty of the state court to accept the surety and proceed no further in the cause as against the defendant so applying for its removal, . . . and the said copies being entered

as aforesaid in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process against the defendant who shall have so filed a petition for its removal as above provided. . . ."

"And such removal of the cause, as against the defendant petitioning therefor, into the United States court, shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the state court as against the other defendants, if he shall desire to do so."

Finally came the Act of March 2, 1867, [Footnote 4] upon which the application for removal in the case was made. Its title is,

"An act to *amend* an act entitled 'An Act for the removal of causes in certain cases from state courts,' approved July 27, 1866."

It runs thus:

" *Be it enacted* that the act entitled 'An act for the removal of causes in certain cases from state courts,' approved July 27, 1866, be and the same is hereby amended as follows: that where a suit is now pending, or may hereafter be brought in any state court in which there is *controversy* between a citizen of the state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of $500, . . . such citizen of another state, *whether he be plaintiff or defendant,* if he will make and file in such state court an affidavit, stating that he has reason to and does believe that from prejudice or local influence he will not be able to obtain justice in such state court, may, *at any time before the final hearing or trial of the suit,* file a petition in such state court for the removal of the suit into the next circuit court of the United States to be held in the district where the suit is pending and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as, by the act to which this act is amendatory, are required to be done upon the removal of a suit into the United States court, and it shall be thereupon the duty of the state court to accept the surety and proceed no

further in the suit,

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and the said copies being entered as aforesaid in such court of the United States, the suit shall there proceed in the same manner as if it had been brought there by original process,"

&c.; [Footnote 5]

The plaintiff in error asserted that under the last-named act the case was removable upon the petition of the two foreign defendants, and that it was error in the state court to retain and try it.

The defendants in error, on the other hand, asserted that under this act as under the eleventh and twelfth sections of the Judiciary Act of 1789, the right of removal was confined to cases where the parties on one side were all citizens of one state and the parties on the other were all citizens of another state.

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MR. JUSTICE CLIFFORD delivered the opinion of the Court.

Original cognizance of all suits of a civil nature, at common law or in equity, is given to the circuit courts by the eleventh section of the Judiciary Act, concurrent with the courts of the several states, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state, subject, however, to the restriction that no civil suit shall be brought before any circuit court against any inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ. [Footnote 6]

Suits commenced in a state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, may, under the twelfth

section of the same act, be removed for trial by the defendant into the circuit court for the same district if the matter in dispute exceeds the sum or value of $500, provided the defendant file a petition requested such removal at the time of entering his appearance in the state court, and offer good and sufficient surety that he will enter copies of the process against him in such circuit court on the first day of its next session, and for his appearance, and that he will give special bail in the case if such bail would be requisite in the state court. [Footnote 7]

Jurisdiction in such a case is concurrent between the proper state court and the circuit court for the same district, and the provision is that such a suit, if commenced in the state court, may be removed by the defendant for trial into the circuit court, subject to the conditions before mentioned, the privilege being given to the defendant only, as

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the plaintiff, when he institutes his suit, may elect in which of the two concurrent jurisdictions he prefers to go to trial.

These expressions in the act of Congress, where an alien is a party or the suit is between a citizen of a state where the suit is brought and a citizen of another state, says Marshall, C.J., the Court understands to mean that each distinct interest should be represented by persons all of whom are entitled to sue or may be sued in the federal courts, or in other words that where the interest is joint, each of the persons concerned in that interest must be competent to sue or be liable to be sued in the court to which the suit is removed. [Footnote 8] All of the complainants in that case were citizens of Massachusetts, and so also were all of the respondents except one, who, it was admitted, was a citizen of Vermont. Due service was made upon the resident respondents, and the record showed that the subpoena had also been served upon the other respondent in the state where he resided. Want of jurisdiction was set up by the respondents in the circuit court, and the judge presiding in the circuit court entered a decree dismissing the bill of complaint. Appeal was taken to the Supreme Court, and the Supreme Court unanimously affirmed the decree of the circuit court. Repeated decisions have

since been made by this Court and by many other courts, state and federal, to the same effect. Prior to the case of *Railroad v. Letson,* [Footnote 9] it had frequently been held by this Court that a corporation aggregate, as such, was not properly included in the word citizen as used in the Judiciary Act, and consequently that such a corporation, if regarded merely as an artificial being, could not sue in the federal courts, yet the Court decided in several cases that the Court would look beyond the corporate character of such an artificial being to the individuals of whom it was composed, and if it appeared that they were citizens of a different state from the party sued, that the suit, whether an action at law or a suit in equity, could be maintained in the

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proper circuit court. Cases of that description are quite numerous, and yet in all of them it was held by this Court that all of the corporators must be citizens of a different state from the party sued, else the jurisdiction could not be sustained. [Footnote 10] Corporations, it is true, are now regarded by this Court as inhabitants of the state by which they are created and in which they transact their corporate business, and it is also held that a corporation is capable of being treated as a citizen for all purposes of suing and being sued in a circuit court, but the rule as modified, in that regard does not diminish the authority of those cases as precedents to show that by the true construction of the Judiciary Act it requires that each of the plaintiffs, if the interest be joint, must be competent to sue each of the defendants in the circuit court to sustain the jurisdiction under the eleventh section of that act. [Footnote 11]

Certain sums of money, it is alleged, in excess of what could properly be exacted by the defendant corporations had been paid to those corporations by the plaintiffs, and the corporation defendants refusing to refund the amount of such alleged excess the corporation plaintiffs instituted an action at law, in the supreme judicial court of the state, against the corporation defendants to recover back the amount of the alleged overpayments. Patent rights, it seems, are owned by the three corporation defendants for the exclusive privilege to construct, use, and vend certain patented sewing machines, and the inference is that the corporation

plaintiffs are or have been licensees of the corporation defendants. What the precise terms of the license are or were does not very satisfactorily appear, but it may be inferred that the plaintiffs covenanted to pay to the defendants a certain patent

rent or tariff for the use of the patent right, subject to be reduced in amount in case the defendants granted licenses to other parties at a lower rate, and the charge is that the defendants did grant licenses to others at a lower rate without making to the plaintiffs the stipulated reduction; that the corporation defendants have ever since exacted the higher patent fee or tariff in violation of the terms of the license. Payments having been made the plaintiffs commenced this suit to recover back the amount. They joined as defendants the Grover & Baker Sewing Machine Company, which is a corporation established under the laws of Massachusetts; the Wheeler & Wilson Manufacturing Company, which is a corporation established under the laws of Connecticut; and the Singer Manufacturing Company, which is a corporation established under the laws of New York. Seasonable appearance was entered by the company first named at the return term, and they filed an answer within the time required by the rules of the court. Neither of the other corporation defendants entered a general appearance at the return term, but the plaintiffs caused an order of notice to issue to those corporations respectively to appear at the next term of the court, and subsequently filed proof that the order of notice was duly served by publication. By the return of the marshal it appears that personal property of those respective corporations was attached on the original process, and the plaintiffs claim that by virtue of the attachment and the due service of the order of notice the state court acquired jurisdiction of all the parties. Subsequently, however, both of the nonresident corporations appeared and, having obtained the leave of the court for the purpose, filed their answer to the action, and on the same day they filed their several petitions for the removal of the cause for trial to the circuit court for that district. Each of the petitions was accompanied by an affidavit executed by the president of the company and by a bond of the company in usual form as required by law in such a case. Hearing was had and the state court

refused to grant the prayer of the respective petitions, and directed that the parties

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should proceed to trial, to which rulings the defendants then and there excepted, and the verdict and judgment were for the plaintiffs. Exceptions were also taken by the defendants to the rulings of the court in the progress of the trial and to certain instructions given by the court to the jury, but it will not be necessary to reexamine the exceptions taken during the trial, as the only question to be determined under this writ of error is whether the rulings of the court in overruling the respective petitions for the removal of the cause into the circuit court and in directing that the parties should proceed to trial in the state court were or were not correct.

Circuit courts do not derive their judicial power immediately from the Constitution, as appears with sufficient explicitness from the Constitution itself, as the first section of the third article provides that

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

Consequently the jurisdiction of the circuit court in every case must depend upon some act of Congress, as it is clear that Congress, inasmuch as it possesses the power to ordain and establish all courts inferior to the Supreme Court, may also define their jurisdiction. Courts created by statute can have no jurisdiction in controversies between party and party but such as the statute confers. [Footnote 12] Congress, it may be conceded, may confer such jurisdiction upon the circuit courts as it may see fit, within the scope of the judicial power of the Constitution, not vested in the Supreme Court, but as such tribunals are neither created by the Constitution nor is their jurisdiction defined by that instrument, it follows that inasmuch as they are created by an act of Congress it is necessary, in every attempt to define their power, to look to that source as the means of accomplishing that end. [Footnote 13] federal judicial power,

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beyond all doubt, has its origin in the Constitution, but the organization of the system and the distribution of the subjects of jurisdiction among such inferior courts as Congress may from time to time ordain and establish, within the scope of the judicial power, always have been, and of right must be the work of the Congress.

Attempt is made in argument to maintain the right, claimed by the defendants, to remove the cause for trial in this case from the state court where it was commenced into the circuit court as being derived under the Act of the 2d of March, 1867, which is entitled an act to amend a prior act entitled an act for the removal of causes, in certain cases, from state courts.

Reference will first be made to the prior act referred to in the title of the amendatory act, as the prior act followed the Judiciary Act in many respects, and, like that act, limits the right of removal to the alien defendant and the defendant who is a citizen of a state other than that in which the suit is brought. Subsequent to those preliminary recitals, it provides in effect that where the suit is commenced in the state court against an alien, or by a citizen of the state against a citizen of another state, the nonresident defendant or the alien defendant, as the case may be, may remove the cause from the state court into the circuit court even though it appears that a citizen of the state where the suit is brought is also a defendant, if the suit, so far as it relates to the alien defendant or the nonresident defendant, was instituted and is prosecuted for the purpose of restraining or enjoining such defendant, or, if the suit is one which, so far as it respects such alien or nonresident defendant, can be finally determined without the presence of the other defendant or defendants as parties in the cause, then and in every such case the alien or nonresident defendant may, at any time before the trial or final hearing of the cause, file a petition for the removal of the same as against the petitioner into the circuit court; but the provision in the same act also is that such removal of the cause shall not be deemed to prejudice or take away the right of the plaintiff

to proceed, at the same time, with the suit in the state court, if he shall see fit, against the other defendants. [Footnote 14]

Remarks to show that the act referred to contains nothing to support the view that Congress intended by it to depart from the essential principle embodied in the Judiciary Act are hardly necessary, as it is obvious that the language of the act does not empower any defendant, unless he be an alien or nonresident, to remove the cause or to elect any other forum for the trial of the same than the one of which the suit is returnable, nor does it give any sanction whatever to the proposition that the resident defendant shall be compelled or permitted under any circumstances to go elsewhere to answer the suit. Defendants in certain cases may sever, after final judgment, for the purpose of prosecuting an appeal or writ of error, which is effected by a proceeding usually called summons and severance, which will enable one of several defendants, or any number less than the whole, to sue out a writ of error or take an appeal in a case where the other defendants or respondents refuse to join in the petition for the same. [Footnote 15] Modes of effecting a severance among executors, so that less than the whole number may sue, where also known at common law, but in such a case it was necessary that such a proceeding should be perfected before the suit was instituted. [Footnote 16] By virtue of the provision under consideration, the alien defendant or the defendant who is a citizen of a state other than that in which the suit is brought is empowered, subject to the conditions specified, without any summons and severance, to remove the cause, as between him and the plaintiff, into the circuit court for trial, leaving the cause, as between the plaintiff and the other defendants, to proceed in the state court where the suit was commenced, wholly unaffected by such removal, the only effect of the removal in such a case being to sever to that

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extent the defendants in the cause for the special purpose provided in the enactment, but the provision affords no support whatever to the theory set up by the defendants in the case before the court. [Footnote 17] Before the passage of that act, no removal could be made in such a case, as some of the defendants are by that act supposed to be citizens of the state where the suit is brought, and

all the courts, federal and state, had uniformly decided that unless the cause was removable as to all the defendants it could not be removed at all, as the act of Congress contained no provision warranting any such proceeding as summons and severance for any purpose. [Footnote 18] Unlike the Judiciary Act, however, the alien defendant or the defendant who is a citizen of a state other than that in which the suit is brought may, under the "Act for the removal of causes in certain cases from state courts," have the cause removed, as to himself, subject to the condition that such severance or partial removal shall not prejudice or take away the right of the plaintiff to proceed, at the same time, with the suit in the state court as against the other defendants, showing that the right of removal is still confined to the alien and nonresident defendant, and that no removal of the cause as to any other defendant can be made under that enactment.

Grant all that, still it is insisted by the defendants that the rulings of the state court in refusing to grant the prayers of their petitions and in directing that the parties should proceed to trial was erroneous, as the petitions were filed under the later act of Congress, which, as they contend, very much enlarges the right to remove causes from the state courts into the circuit courts for trial.

Important changes undoubtedly are made by that act in the law upon that subject, as it clearly extends the privilege

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to a nonresident plaintiff as well as to a nonresident defendant, subjecting both, however, to a new condition, wholly unknown in the prior acts of Congress, vesting such a right in an alien defendant or in a defendant who was a citizen of a state other than that in which the suit is brought. Where a suit is now pending or may hereafter be brought in any state court in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state, such citizen of another state, whether he be plaintiff or defendant, if he will make and file in such state court an affidavit stating that he has reason to believe and does believe that, from prejudice or other local influence, he will not be able to obtain justice in such state court, may, at any time before the final hearing or trial of the

suit, file a petition in such state court for the removal of the suit into the next circuit court to be held in the district where the suit is pending. Aliens, it will be seen, are not included in the provision, but the right to petition for the removal is extended to the nonresident plaintiff as well as to the nonresident defendant, in a case where it appears that a resident defendant is sued by a nonresident plaintiff, as in such a case there is controversy between a citizen of the state in which the suit is brought and a citizen of another state, just as much as there is in a case where a resident plaintiff sues a nonresident defendant in his own district, the defendant being found within the same district and served there with the original process.

Under the Judiciary Act and the succeeding act for the removal of certain causes, the plaintiff, if he elected to commence his suit in a state court, whether he was resident or nonresident, was bound by his election, nor was it ever supposed that he could subsequently be permitted to remove the cause from the state court into the circuit court in ordinary circumstances, as neither of those acts of Congress vest in the plaintiff any such right, nor do they contain any language to warrant the conclusion that Congress ever intended to confer upon a plaintiff any such power. Nonresident defendants and alien defendants might cause such

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removal to be made, but under the Judiciary Act, the condition was that such a defendant must file his petition requesting such removal at the time he entered his appearance in such state court; which condition is relaxed in this act so far as it respects nonresident defendants and nonresident plaintiffs, and it is provided that the right may be exercised "at any time before the final hearing or trial of the suit."

Viewed in the light of these suggestions, it is clear that it is a mistake to suppose that the act will operate to limit the right conferred by the Judiciary Act unless the court give it the broad construction assumed by the defendants, as it extends the right to a nonresident plaintiff as well as to a nonresident defendant, and allows both to file the necessary petition at any time before the final hearing or trial of the suit, leaving the case of the alien defendant unaffected by any of its provisions.

Mere regulation, such as requiring the cause of removal to be stated, and that the petition should be supported by an affidavit, is not sufficient change in the principle of the Judiciary Act to support the proposition, as the great purpose of the new enactment is to extend the right to a nonresident plaintiff as well as to a nonresident defendant, and to enlarge the time within which the petition may be filed, leaving the alien defendant wholly unaffected by the new regulations.

Apply these rules of construction to the three acts of Congress referred to in this case and it is clear that they will work out the following results:

(1) In a case where the suit is commenced by a plaintiff in the court of a state of which he is a citizen against a defendant who is a citizen of another state, the defendant may remove the cause into the circuit court of that district for trial.

(2) Where the plaintiff brings his suit in the court of a state other than that of which he is a citizen against a defendant who is a citizen of the state where the suit is brought, the plaintiff may remove the cause into the circuit court under the last-named act. [Footnote 19]

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Suppose, however, the plaintiff brings his suit in the court of a state other than that of which either he or the defendant is a citizen, the defendant having been found therein and been duly served with the original process, then neither the plaintiff nor the defendant can remove the cause from the state court into the circuit court for trial under any existing act of Congress, as in that case there is not controversy between a citizen of a state in which the suit is brought and a citizen of another state, nor is the suit one commenced by a citizen of a state in which the suit is brought against a citizen of another state, as the condition is as provided in the Judiciary Act. Both plaintiff and defendant being nonresidents, the acts of Congress make no provision for the removal of such a cause into the circuit court for trial.

Unaffected as the Judiciary Act is by the latest of the three acts mentioned, the law still is that if the suit is commenced against an alien in a state court, he may file a petition for the removal of the same for trial into the next circuit court to be held in the district, at the time of entering his appearance in such state court. Nonresident defendants or alien defendants may also remove certain causes from a state court into a circuit court for trial, under the intermediate act of Congress, as before explained. Where the suit is commenced in a state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, the nonresident defendant or the alien defendant, as the case may be, may remove the cause from the state court into the circuit court for trial, even though it appears that a citizen of the state where the suit is brought is also a defendant, if the suit, so far as it relates to the nonresident or alien defendant, was instituted and is prosecuted for the purpose of restraining or enjoining such defendant, or if the suit is one which, so far as it respects such defendant, can be finally determined without the presence of the other defendants as parties in the cause. Considering the stringent conditions which are embodied in the last-named act, it is doubtful whether it will prove to be one

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of much practical value, but as it remains in full force, it cannot be properly overlooked in this investigation. Suggestion is made that it is a step in advance of the Judiciary Act, but the force of the suggestion is not perceived, as it makes no provision that any party shall go into the circuit court for trial except such as may go or be sent there under the twelfth section of the Judiciary Act. Divest that act of the feature which provides for the severance of the defendants and that which empowers the plaintiff to proceed with the suit in the state court as against the other defendants, and it is exactly the same as the corresponding feature of the Judiciary Act, except that it extends the time for filing the petition for the removal of the cause from the time the petitioner enters his appearance in the state court to the time of the trial or final hearing of the cause. Separately considered, the language employed in the "act for the removal of causes in certain cases from the state courts" to describe the parties and the suit in which the alien defendant or the

nonresident defendant may remove the cause into the circuit court for trial is identical with the language employed in the Judiciary Act, the two provisions differing only in the particulars heretofore sufficiently explained, showing that the well established rule applies in construing the later act, that words and phrases, the meaning of which in a statute have been ascertained by judicial interpretation, are, when used in a subsequent statute, to be understood in the same sense. [Footnote 20] Such a construction in the case supposed becomes a part of the law, as it is presumed that the legislature in passing the later law knew what the judicial construction was which had been given to the words of the prior enactment. Support, therefore, to the theory put forth by the defendants cannot be derived either

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from the Judiciary Act or from the later act entitled An act for the removal of causes in certain cases from state courts. [Footnote 21]

Admit that, and still it is insisted by the defendants that they had the right to remove the cause from the state court under the act to amend the act called the Removal Act. [Footnote 22] Much stress is placed upon the particular language of that act, which is that

"When a suit is now pending or may hereafter be brought in any state court *in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state.* "

Instead of that, the corresponding language of the Judiciary Act is, if a suit be commenced in any state court by a citizen of the state in which the suit is brought against a citizen of another state.

Different words are certainly employed in the two provisions, but it is difficult to see in what particular the jurisdiction of the state court is lessened by the last act or in what respect the difference of phraseology supports the theory of the defendants, as "a suit by a plaintiff against a defendant" must mean substantially the same thing in the practical sense as "a suit in which there is controversy between the

parties," as each provision includes the word suit, which applies to any proceeding in a court of justice in which the plaintiff pursues his remedy to recover a right or claim. [Footnote 23] Indubitably they differ in this, that it is the defendant only who can remove the cause under the Judiciary Act, but the last-named act empowers the nonresident plaintiff, in a proper case, as well as the nonresident defendant, to exercise the same privilege, as in the former case, as well as in the latter, there is a suit pending in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state, and the express enactment is that in the case supposed "such citizen of another state, whether he be plaintiff or defendant," if he will comply with the conditions stated, may, at any time

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before the final hearing or trial of the suit, file a petition for the removal of the cause. [Footnote 24] Real parties only are empowered to claim that right under either act, and it is equally clear that the right of the defendant cannot be defeated by joining with him a mere nominal party in the action. [Footnote 25]

Special attention is also invited to the fact that the judicial power conferred by the Constitution extends to controversies between citizens of different states, and the proposition is submitted in argument that it would be competent for Congress to pass a law empowering one of a number of plaintiffs, or one of a number of defendants, to remove such a suit for trial from a state court into the circuit court for the same district if it appeared that the petitioner, whether plaintiff or defendant, was a citizen of a state other than that in which the suit was brought, even though all the other plaintiffs or other defendants were citizens of the state in whose court the suit was pending, but the Court is of the opinion that the question does not arise in this case, as the Act of Congress in question, in the judgment of the Court, does not purport to confer any such right. Were it true that the circuit courts derive their judicial power immediately from the provisions of the Constitution, it might be necessary to examine that proposition, but inasmuch as it is settled law that the jurisdiction of such courts depends upon the acts of Congress passed for the purpose of defining their powers and prescribing their duties, it is clear that no

such question can arise in a case like the present, unless it first be ascertained that Congress has passed an act purporting to confer the disputed power. Courts are disinclined to adopt a construction of an act of Congress which would extend its operation beyond what is warranted by the Constitution, but the suggestion that

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Congress possesses the power to confer a new privilege is not a sufficient reason to induce the Court to extend an existing enactment by construction so as to embrace the privilege, unless the words of the enactment are of a character to warrant the construction.

Either the nonresident plaintiff or nonresident defendant may remove the cause under the last-named act, provided all the plaintiffs or all the defendants join in the petition, and all the party petitioning are nonresidents, as required under the Judiciary Act, but it is a great mistake to suppose that any such right is conferred by that act where one or more of the plaintiffs or one or more of the petitioning defendants are citizens of the state in which the suit is pending, as the act is destitute of any language which can be properly construed to confer any such right unless all the plaintiffs or all the defendants are nonresidents and join in the petition. [Footnote 26]

Two cases only, besides the opinion given in this same case in the circuit court, to-wit, *Johnson v. Monell,* [Footnote 27] *Sands v. Smith,* [Footnote 28] are cited to support the assumed theory, neither of which necessarily involved any such question, and the reasons given for the conclusion by the learned circuit judge, on the motion to dismiss the case in the circuit court, are not satisfactory.

Judgment affirmed.

JUSTICES MILLER and BRADLEY dissented from the preceding opinion of the Court in reference to the construction of the act under consideration, and for this reason dissented from the judgment.

[Footnote 1]

Infra, p. 85 U. S. 557 -558.

[Footnote 2]

Strawbridge v. Curtiss, 3 Cranch 267; *Coal Company v. Blatchford,* 11 Wall. 172.

[Footnote 3]

14 Stat. at Large 306.

[Footnote 4]

14 Stat. at Large 558.

[Footnote 5]

It was settled by this Court in *Railway Company v. Whitton,* 13 Wall. 270, that this act was constitutional and also that corporations were embraced within the constitutional provision relating to controversies between citizens of different states.

[Footnote 6]

1 Stat. at Large 78.

[Footnote 7]

Ib., 79.

[Footnote 8]

Strawbridge v. Curtiss, 3 Cranch 267; *Conolly v. Taylor,* 2 Pet. 564; Curtis's Commentaries 75.

[Footnote 9]

43 U. S. 2 How. 550.

[Footnote 10]

Bank of the United States v. Deveaux, 5 Cranch 61; *Railroad Bank v. Slocomb,* 14 Pet. 63; *Irvine v. Lowry,* 14 Pet. 299; *Breithaupt v. Bank,* 1 Pet. 238; *West v. Aurora City,* 6 Wall. 142.

[Footnote 11]

Marshall v. Railroad, 16 How. 325; *Railroad v. Wheeler,* 1 Black 295; *Drawbridge Company v. Shepherd,* 20 How. 227; *Same Case,* 21 How. 112; *Coal Company v. Blatchford,* 11 Wall. 172.

[Footnote 12]

Turner v. Bank, 4 Dall. 10; *Sheldon v. Sill,* 8 How. 448; *McIntire v. Wood,* 7 Cranch 506; *Kendall v. United States,* 12 Pet. 616.

[Footnote 13]

Cary v. Curtis, 3 How. 245.

[Footnote 14]

14 Stat. at Large 306.

[Footnote 15]

Williams v. Bank, 11 Wheat. 414; *Wilson's Heirs v. Insurance Co.,* 12 Pet. 140; *Todd v. Daniel,* 16 Pet. 521.

[Footnote 16]

2 Williams on Executors, 4th Am. ed. 1186, note *t* ; *Goodyear v. Rubber Co.,* 2 Clifford 368.

[Footnote 17]

Smith v. Rines, 2 Sumner 338; *Ward v. Arredondo,* 1 Paine 410; *Sayles v. Insurance Co.,* 2 Curtis 212; *Hazard v. Durant,* 9 R.I. 608; *Beardsley v. Torrey,* 4 Wash. 286.

[Footnote 18]

Moffat v. Soley, 2 Paine 103; *Bissell v. Horton,* 3 Day 281; *Tuckerman v. Bigelow,* 21 Law Reporter 208; *Herndon v. Ridgway,* 17 How. 424; *Railway Co. v. Whitton,* 13 Wall. 289.

[Footnote 19]

Beery v. Irick, 22 Grattan 485.

[Footnote 20]

Potter's Dwarris 274; Bacon's Abridgment, title "Statute," I; *Pennock v. Dialogue,* 2 Pet. 18; *Cathcart v. Robinson,* 5 Pet. 280; *McCool v. Smith,* 1 Black 469; *Commonwealth v. Hartnett,* 3 Gray 450; *Ruckmaboye v. Mottichund,* 32 English Law & Equity 84; *Bogardus v. Trinity Church,* 4 Sandford's Chancery 633; *Rigg v. Wilton,* 13 Ill. 15; *Adams v. Field,* 21 Vt. 256.

[Footnote 21]

14 Stat. at Large 306.

[Footnote 22]

Ib., 559.

[Footnote 23]

2 Bouvier's Law Dictionary, 558; *Weston v. Charleston,* 2 Pet. 449; 1 Curtis' Commentaries 73, p. 85; Webster's Dictionary, "Suit."

[Footnote 24]

Cooke v. Bank, 1 Lansing 502; *Bryant v. Rich,* 106 Mass. 191; *Cooke v. Bank,* 52 N.Y. 96.

[Footnote 25]

Dodge v. Perkins, 4 Mason 435; *Rateau v. Bernard,* 3 Blatchford 245; *Ward v. Arredondo,* 1 Paine 410; *Wormley v. Wormley,* 8 Wheat. 451; 1 Curtis' Commentaries 74.

[Footnote 26]

Bryant v. Scott, 6 N.C. 392; *Hazard v. Durant,* 9 R.I. 609; *Waggener v. Cheek,* 2 Dillon 565; *Case v. Douglas,* 1 *id.* 299; *Bixby v. Couse,* 8 Blatchford 73; *Ex Parte Andrews,* 40 Ala. 648; *Peters v. Peters,* 41 Ga. 251; *Cooke v. State Bank,* 52 N.Y. 113;

[Footnote 27]

1 Woolworth 390.

[Footnote 28]

1 Dillon 290.