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Wabash Western Ry. Vs. Brow

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Decided On : Nov-30-1896

Appeal No. : 164 U.S. 271

Appellant : Wabash Western Ry.

Respondent : Brow

Judgement :

Wabash Western Ry. v. Brow - 164 U.S. 271 (1896)
U.S. Supreme Court Wabash Western Ry. v. Brow, 164 U.S. 271 (1896)

Wabash Western Railway v. Brow

No. 235

Submitted November 6, 1896

Decided November 30, 1896

164 U.S. 271

CERTIORARI TO THE CIRCUIT COURT

OF APPEALS FOR THE SIXTH CIRCUIT

SYLLABUS

The filing by the defendant in an action in a state court of a petition for its removal to the proper Circuit Court of the United States does not prevent the defendant, after the case is removed, from moving in the federal court to dismiss it for want of jurisdiction of the person of the defendant in the state court or in the federal court.

Joseph Brow commenced suit in the Circuit Court of Wayne County, Mich. against the Wabash Western Railway to recover the sum of twenty thousand dollars for personal injuries (caused, as he alleged, by defendant's negligence) by the service, September 24, 1892, of a declaration and notice to appear and plead within twenty days, on Fred J. Hill, as agent of the company, which declaration and notice were subsequently filed in that court. On the 7th of October, defendant filed its petition and bond for removal in that court, and an order accepting said bond, and removing the cause to the Circuit Court of the United States for the Eastern District of Michigan and directing the transmission of a transcript of record was entered.

The petition alleged that the matter and amount in dispute exceeded, exclusive of interest and costs, the sum or value of two thousand dollars, and that the controversy was between citizens of different states; that petitioner was at the time of the commencement of the suit, and still was,

"a corporation created and existing under the laws of the State of Missouri, having its principal business office at the City of St. Louis in said state, and a citizen of the said State of Missouri and a resident of said state and that the plaintiff, Joseph Brow, was then, and still is, a citizen of the State of Michigan, and a resident of the County of Wayne, in said state."

The record having been filed in the Circuit Court of the

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United States for the Eastern District of Michigan, a motion to set aside the declaration and rule to plead was made in the cause in these words and figures:

"And now comes the Wabash Western Railway, defendant (appearing specially for the purpose of this motion), and moves the court, upon the files and records of the court in this cause and upon the affidavit of Fred J. Hill, filed and served with this motion, to set aside the service of the declaration and rule to plead in this cause and to dismiss the same for want of jurisdiction of the person of the defendant in the state court from which this cause was removed, and in this Court."

The affidavit was to the effect that Hill, on September 24, 1892, was the freight agent of

"the Wabash Railroad Company, a corporation which owns and operates a railroad from Detroit to the Michigan state line, and was not an agent of the Wabash Western Railway, defendant in this suit,"

and that, on the day aforesaid, the Wabash Western Railway

"did not own, operate, or control any railroad in the State of Michigan or have any officers or agent of any description therein, and did no business and had no property and no place of business in said state, and that on said day deponent was not a ticket or station agent of the said defendant nor an officer or agent of the defendant of any description."

The motion was denied by the circuit court, with leave to defendant to plead within ten days, and defendant excepted. Thereafterwards defendant filed a plea in said cause as follows:

"And the said defendant, appearing and pleading under protest, and excepting to the refusal of the court to grant its motion to dismiss, by Alfred Russell, its attorney, comes and demands a trial of the matters set forth in the declaration of the said plaintiff."

The cause was subsequently tried, and resulted in a judgment in favor of Brow for $2,500 and costs. The bill of exceptions sets forth that then the case came on for trial, the defendant company protested in open court against being forced to go to trial, and for cause of protest showed to the court that the defendant was a

corporation organized in the State of Missouri and that, at the time of the commencement

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of this suit, the defendant had no agent, business, property, officer, or servant in the State of Michigan, and had not been served, and had not appeared.

The court overruled the protest, and defendant duly excepted. An instruction embracing the same point was also asked by defendant and refused, and an exception taken.

A writ of error was allowed from the Circuit Court of Appeals for the Sixth Circuit, and the cause heard by that court. Among the errors assigned were the refusal of the circuit court to grant the motion to set aside the service of declaration and rule to plead, and to dismiss the cause; the compelling of defendant to go to trial against its protest, the court having no jurisdiction over its person, and the refusal of the instruction presenting the same point. The opinion is reported in 65 F. 941, and fully discusses the objection to the jurisdiction of the state court over defendant's person, ruling that the filing of a petition for removal to the circuit court effected a general appearance, and that it was too late, after such removal had been perfected, for it, in the circuit court, to attempt to plead that that court had no personal jurisdiction over the company by virtue of the process issued. The case was also considered upon the merits, and the judgment was affirmed. Thereupon application was made by plaintiff in error to this Court to issue a writ of certiorari to the circuit court of appeals, which was granted, and, the record having been sent up, the cause was submitted on briefs.

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MR. CHIEF JUSTICE FULLER, after stating the facts in the foregoing language, delivered the opinion of the Court.

This was not a proceeding *in rem,* or *quasi in rem,* but a personal action brought in the Circuit Court of Wayne County, Michigan, against a corporation which was

neither incorporated nor did business, nor had any agent or property, within the State of Michigan, and service of declaration and rule to plead was made on an individual who was not in any respect an officer or agent of the corporation. The state court therefore acquired no jurisdiction over the person of

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the defendant by the service. Did the application for removal amount to such an appearance as conceded jurisdiction over the person?

We have already decided that when, in a petition for removal, it is expressed that the defendant appears specially and for the sole purpose of presenting the petition, the application cannot be treated as submitting the defendant to the jurisdiction of the state court for any other purpose. *Goldey v. Morning News,* 156 U. S. 518 .

The question

"how far a petition for removal, in general terms, without specifying and restricting the purpose of the defendant's appearance in the state court, might be considered, like a general appearance, as a waiver of any objection to the jurisdiction of the court over the person of the defendant"

was not required to be determined, and was therefore reserved, but we think that the line of reasoning in that case, and in the preceding case of *Martin v. Baltimore & Ohio Railroad,* 151 U. S. 673 , compels the same conclusion on the question as presented in the case before us.

In *Goldey v. Morning News,* MR. JUSTICE GRAY, speaking for the Court, observed:

"The theory that a defendant, by filing in the state court a petition for removal into the circuit court of the United States, necessarily waives the right to insist that for any reason the state court had not acquired jurisdiction of his person is inconsistent with the terms as well as with the spirit of the existing act of Congress regulating removals from a court of a state into the circuit court of the United

States. The jurisdiction of the circuit court of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States, and cannot be enlarged or abridged by any statute of a state. The legislature or the judiciary of a state can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the state into the circuit court of the United States nor limit the effect of such removal. . . . Although the suit must be actually pending in the state court before it can be removed, its removal into the circuit court of the United States does not admit

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that it was rightfully pending in the state court or that the defendant could have been compelled to answer therein, but enables the defendant to avail himself, in the circuit court of the United States, of any and every defense duly and seasonably reserved and pleaded to the action 'in the same manner as if it had been originally commenced in said circuit court.' 156 U.S. 156 U. S. 523 , 156 U. S. 525 ."

In *Martin v. Baltimore & Ohio Railroad,* referring to the provision of the act of Congress of 1887 defining the time of filing a petition for removal in the state court, it was said:

"This provision allows the petition for removal to be filed at or before the time when the defendant is required by the local law or rule of court 'to answer or plead to the declaration or complaint.' These words make no distinction between different kinds of answers or pleas, and all pleas or answers of the defendant, whether in matter of law, by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court or in suspension or abatement of the particular suit or by plea in bar of the whole right of action, are said in the standard books on pleading 'to oppose or answer' the declaration or complaint which the defendant is summoned to meet. Stephen on Pleading (1st Am.ed.) 60, 62, 63, 70-71, 239; Lawes on Pleading 36. The Judiciary Act of September 24, 1789, c. 20, 12, required a petition for removal of a case from a state court into the circuit court of the United States to be filed by the defendant 'at the time of entering his appearance in such state court.' 1 Stat.

79. The recent acts of Congress have tended more and more to contract the jurisdiction of the courts of the United States, which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earlier statutes. *Pullman Car Co. v. Speck,* 113 U. S. 84 ; *Smith v. Lyon,* 133 U. S. 315 , 133 U. S. 320 ; *In re Pennsylvania Co.,* 137 U. S. 451 , 137 U. S. 454 ; *Fisk v. Henarie,* 142 U. S. 459 , 142 U. S. 467 ; *Shaw v. Quincy Mining Co.,* 145 U. S. 444 , 145 U. S. 449 . Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal

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should be filed in the state court as soon as the defendant was required to make any defense whatever in that court, so that if the case should be removed, the validity of any and all of his defenses should be tried and determined in the circuit court of the United States."

151 U.S. 151 U. S. 686 -687.

Want of jurisdiction over the person is one of these defenses, and to use language of Judge Drummond in *Atchison v. Morris,* 11 F. 582, we regard it as not open to doubt that

"the party has a right to the opinion of the federal court on every question that may arise in the case, not only in relation to the pleadings and merits, but to the service of process, and it would be contrary to the manifest intent of Congress to hold that a party who has the right to remove a cause is foreclosed as to any question which the federal court can be called upon under the law to decide."

An appearance which waives the objection of jurisdiction over the person is a voluntary appearance, and this may be effected in many ways, and sometimes may result from the act of the defendant, even when not in fact intended. But the right of the defendant to a removal is a statutory one, and he is obliged to pursue the course pointed out, and when he confines himself to the enforcement of that

right in the manner prescribed, he ought not to be held thereby to have voluntarily waived any other right he possesses. An acknowledged right cannot be forfeited by pursuit of the means the law affords of asserting that right. *Bank v. Slocomb,* 14 Pet. 65. The statute does not require the removing party to raise the question of jurisdiction over his person in the state court before removing the cause, or to reserve that question in respect of a court which is to lose any power to deal with it, and to decide that the presentation of the petition and bond is a waiver of the objection would be to place a limitation upon the jurisdiction of the circuit court which is wholly inconsistent with the act.

Moreover, the petition does not invoke the aid of the court touching relief only grantable in the exercise of jurisdiction of the person. The statute imposes the duty on the state court, on the filing of the petition and bond, "to accept such

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petition and bond and proceed no further in such suit," and if the cause be removable, an order of the state court denying the application is ineffectual, for the petitioner may, notwithstanding, file a copy of the record in the circuit court and that court must proceed in the cause.

In this aspect, the conclusion is impossible that the party submits to the jurisdiction of the state court by availing himself of a right to which he is entitled under the act of Congress, and which the state court is by that act required to recognize.

It is conceded that if defendant had stated that it appeared specially for the purpose of making the application, that would have been sufficient, and yet when the purpose for which the applicant comes into the state court is the single purpose of removing the cause, and what he does has no relation to anything else, it is not apparent why he should be called on to repeat that this is his sole purpose, and when removal is had before any step is taken in the case, as the statute provides that "the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court," it seems to us that it cannot be successfully denied that every question is open for determination in the circuit

court, as we have indeed already decided.

The circuit court of appeals held that a petition to remove, without more, was tantamount to a general appearance, but that this result could be avoided by a special appearance accompanying, or made part of, the petition, which would not be waived by or be inconsistent with the general appearance, because the application was analogous to an objection to jurisdiction over the subject matter. We do not concur in this view. By the exercise of the right of removal, the petitioner refuses to permit the state court to deal with the case in any way because he prefers another forum to which the law gives him the right to resort. This may be said to challenge the jurisdiction of the state court in the sense of declining to submit to it, and not necessarily otherwise.

We are of opinion that the filing of a petition for removal does not amount to a general appearance, but to a special appearance only.

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Section 12 of the Judiciary Act of September 24, 1789, c. 20, required the petition for removal to be filed by the defendant "at the time of entering his appearance in such state court" (1 Stat. 79), and those words were omitted in the act of 1887, though probably the omission is of no special significance. Some cases are referred to, however, which were decided under that section, and have not been followed under the present statute. *Pollard v. Dwight,* 4 Cranch 421; *Bushnell v. Kennedy,* 9 Wall. 387; *Sayles v. Northwestern Insurance Co.,* 2 Curtis 212. These were all cases of attachment, and of jurisdiction asserted in the state courts through the levy of the writs. The two last cited were satisfactorily disposed of in *Goldey v. Morning News.*

In *Pollard v. Dwight,* it appears that the objection that the circuit court had no jurisdiction, "the plaintiffs being citizens of Massachusetts and Connecticut, and the defendants citizens of Virginia, not found in the district of Connecticut," was not raised in the circuit court, but for the first time in the assignment of errors after judgment in that court, and it was accordingly held that,

"by appearing to the action, the defendants in the court below placed themselves precisely in the situation in which they would have stood, had process been served upon them, and consequently waived all objections to the nonservice of process."

The judgment of the circuit court of appeals is reversed; the judgment of the circuit court is also reversed, and the cause remanded to that court, with directions to grant a new trial, sustain the motion to set aside the service of the declaration and rule to plead, and dismiss the action.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

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