

Case No. 3,195.

{4 McLean, 6.}<sup>1</sup>

COOPER V. GORDON ET AL.

Circuit Court, D. Michigan.

June Term, 1845.

JURISDICTION—ACTION AGAINST JOINT INDORSERS—SERVICE OF  
PROCESS—PLEA IN ABATEMENT.

1. Where there are three joint indorsers, and the process is served on two of them, under the act of 1839 [5 Stat. 321], the suit may be prosecuted against the two.
2. A plea in abatement can not be retained, on the ground that the other joint indorser is a citizen of another district.

[At law. Action by James F. Cooper against James Wright Gordon, George C. Gibbs, and—Sanford, as joint indorsers of a promissory note.]

Mr. Hand, for plaintiff.

Mr. Romeyn, for defendants.

OPINION OF THE COURT. This action is brought by the plaintiff, a citizen of New York, against the defendants as indorsers of a note. The defendants pleaded in abatement that one Sanford, who is living, was a joint indorser with defendants. To this the plaintiff replied, that Sanford was not a citizen of Michigan, but of another state, at the time the suit was commenced. The pleadings raise the question whether, under the act of congress of the 25th February, 1839, this action is maintainable. That act provides, “that where any suit at law or equity commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the misjoinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit” Under this act, where an individual is served with process, he being within the district temporarily, but a citizen of another district, he may waive his objection to being sued out of his district, and appear in the suit. But there can be no doubt under the act that a service of process being made on a part of the defendants, they being citizens of the district, that the suit may be prosecuted against them. The statute was intended to provide for a case like this; and words could not be more appropriately used to effectuate the object.

The defendants are both citizens of Michigan, and having been served with process they are bound to answer. The demurrer is overruled.

[NOTE. On the trial of the action, the jury were unable to agree. See Case No. 3,194.]

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<sup>1</sup> {Reported by Hon. John McLean, Circuit Justice.}