DUNHAM v. BAIRD.

Case No. 4,147.

{Brunner, Col. Cas. 18;[1] 1 Law & Eq. Rep. 391; 2 Wkly. Notes Cas. 52.}

Circuit Court, E. D. Pennsylvania. 1875.

REMOVAL OF CAUSE TO FEDERAL COURT—ACT OF MARCH 3, 1875.

On a petition for removal of a cause from a state court, no action of the state court upon either petition or bond is required by the act of March 3,1875 [18 Stat. 470]; it is for the United States court to determine the sufficiency of the latter.

[Cited in Huddy v. Havens, Case No. 6,826.]

[2] {Motion to dismiss suit for want of jurisdiction. This suit was originally brought in the district court of the county of Philadelphia to June term, 1874, and, after issue joined, was thence transferred (on the cessation of that court) to the common pleas No. 3 of the same county. A petition to remove the cause to the circuit court of the United States for the eastern district of Pennsylvania was presented by the defendants on June 12, 1875, and on June 19th a rule to show cause why the petition should not be granted was discharged. 1 Wkly. Notes Cas. 493. On July 26th, 1875, a petition was granted by Paxson, J., of the supreme court, for a rule to show cause why a writ of peremptory mandamus should not issue to the judges of the common pleas No. 3, directing them to proceed no further, with the above cause and to permit it to be removed to the circuit court of the U. S. (1 Wkly. Notes Cas. 625), and the rule was made returnable on the first Monday of Jany., 1876. In August a bond was filed by the defendants, in the common pleas No. 3, conditioned as required by the act of congress of March 3, 1875 (18 Stat. 470), and a certified copy of the record, was on Sept 1 filed in this court, whereupon the plaintiffs moved to dismiss the suit for want of jurisdiction.

S. C. Perkins, for the motion. The suit is by citizens of Connecticut against citizens of Pennsylvania, Section 2, of the Acts of March 3, 1875, allowing suits to be removed from the state courts to this court where there is "a controversy between citizens of different states," was not intended to apply, where, as here, the defendants are sued in their own forum by strangers, and local prejudice cannot be expected. But the petition in the common pleas was presented too late under the proviso of section 3 of the same act directing the party entitled to remove the suit to file his petition and bond in the state court "before or at the term at which said cause could be first tried; and before the trial thereof." The act was passed in March term; while the petition was not filed till June term. The term at which the said cause could be first tried was June 1874, at which time the cause was at issue. The defendants recognized and acquiesced in the authority of the state courts by filing their petition, and obtaining their rule to show cause. They will not be permitted to proceed here, after a refusal by the state court to allow the case to be removed. This

course is required by judicial comity. But in any event this court will not allow this case to proceed until the rule for a mandamus

has been disposed of in the supreme court of the state. The defendants chose to pursue the remedy, and until its determination they can adopt no other. Lastly the bond was filed in vacation and was never approved. The act of congress has therefore not been complied with since the bond has no vitality until approved.

{Sydney Biddle and McMurtrie, contra. The language of the act plainly includes cases where a citizen is sued in his own state, by those of another state. The petition was not filed too late, for the act provides for all pending cases, and the first term after the passage of the act, at which the cause could be tried, was the June term, the March term being judicially over after the first return day (March 1st), after which day the act was passed. The language of the act gives this court no discretion except where the ease has been "wrongfully or improperly removed," which cannot be alleged here. The objection that the bond had been filed in vacation, and had not been approved, was taken (Osgood v. Chicago D. & V. R. Co. {Case No. 10,604}), but the judge of U. S. court, said that no action of the state court was required. There it could not have been obtained, since the court had refused the petition.}[2]

MCKENNAN, Circuit Judge. The petition was filed in time, and no action of the state court was required by the act of the 3d March, 1875, upon either petition or bond; it was for the United States court to determine the sufficiency of the latter, and upon a careful perusal of the judiciary act of the 3d March, 1875, the court is of opinion that its provisions were intended to be co-extensive with the powers conferred upon the judiciary in section 2, subsection 1, article 3, of the constitution of the United States. The petition for removal was not filed too late in the state court as it was presented in the term succeeding that in which the act was passed. {Motion denied.}[2]

[1] {Reported by Albert Brunner, Esq., and here reprinted by permission.}

[2] {From 2 Wkly. Notes Cas. 52.}