Case No. 4,382. ELLERMAN v. NEW ORLEANS, ETC., R. CO. ET AL.

{2 Woods, 120.}[1]

Circuit Court, D. Louisiana. Nov. Term, 1875.[2]

REMOVAL OF CAUSES—SUSPENSION OF POWERS OF STATE COURT—ORDER OF REMOVAL—APPEAL—CITIZENSHIP—WARRANTY PARTIES—WHARFAGE DUES—EXCLUSIVE RIGHT TO COLLECT.

1. In a case which can be removed from the state to a federal court under the act of congress of March 3, 1875 {18 Stat. 470}, the timely presentation of the petition and bond for removal is effectual to suspend all the powers of the state court in which the suit is pending.

{Cited in Dennis v. Alachua County, Case No. 3,791.}

2. An appeal does not lie to an order of a state court for the removal of a cause to a federal court, and although the requirements necessary to a suspensive appeal from such an order may have been observed, they are not effectual to prevent a removal.

3. The fact that defendants, in a cause pending in a Louisiana state court, have called in warranty parties who are citizens of the same state with the plaintiffs, furnishes no good ground against the removal of that part of the cause which concerns the original parties, notwithstanding the fact that the statute of Louisiana declares that the trial of the call in warranty cannot be separated from the trial of the main issue.

{Cited in Taylor v. Rockefeller, Case No. 13,802.}

4. The joint resolution of the legislature of Louisiana of March 6, 1869, does not confer upon the railroad company or those claiming under it the right to collect wharfage dues from vessels, etc., landing at the levee front of its riparian property.

{See note at end of case.}

In equity. This cause was commenced on the 11th of September, 1875 {by Henry Ellerman against the New Orleans, Mobile & Texas Railroad Company and others}, in the superior district court for the parish of Orleans. It appears from the petition, that on the 29th day of June, 1875, the city of New Orleans, by contract of that date, transferred to the plaintiff all the revenues to be derived from the wharfage and levee dues, belonging to the city of New Orleans. The plaintiff claims that by virtue of said contract, he was subrogated to all the rights and privileges of the city in relation to the collection and receipt of said revenues. By virtue of the ordinance which authorized said contract, a certain amount of wharfage and levee dues was assessed against every vessel using wharfs, according to her size and capacity, to which sum plaintiff claimed to be entitled. The defendant railroad company had taken possession of the wharves and levee on the Mississippi river in front of the city of New Orleans for the distance of three hundred and fifty feet immediately below Calliope street, and claimed the right to collect wharfage and levee dues from vessels landing or mooring at the said wharf, whether said vessels were connected with the business of the railroad company or not, and had actually contracted with certain lines of steamers in no way concerned with the business of said railroad company to allow them

to land at said levee for a certain amount of wharfage to be paid. The railroad company claimed this right to collect wharfage from all vessels using its wharf, by virtue of the fact that it was the riparian proprietor of the said three hundred and fifty feet next below Calliope street, and by virtue of a joint resolution of the legislature of the state of Louisiana, approved March 6, 1869. This resolution gave the railroad company the right to inclose and occupy for its purposes and uses that portion of the levee batture and wharf in front of the riparian property which the company owned, and exempted from the payment of wharfage and levee dues vessels, etc., landing at said wharf with the consent of the company, and imposed the obligation upon the company to keep said wharf in repair. The plaintiff claimed that the city of New Orleans had a vested right in the wharves and levees, and in the revenues derived therefrom, which had been transferred to him by the contract aforesaid. He therefore brought his suit against the defendant railroad company, and against the city of New Orleans, and in his petition, set forth the facts above stated, and prayed for an injunction restraining the railroad company from granting permission to any steamships or vessels to land or moor at the wharves or levees aforesaid, except such vessels as were immediately connected with the business of said railroad company, and further, that said company be prohibited from collecting wharfage or levee dues upon any vessels landing at said wharf. On September 11, 1875, the injunction prayed for was allowed. Soon after, the railroad company filed its exception to the petition, in which it was alleged that at the date of filing of the petition, and at the date of the said contract of the plaintiff with the city of New Orleans, and at the date of filing the exception it had not, and has not now any control, occupation, management, or power over the wharf property mentioned in the petition, wherefore the suit ought not to be maintained against the said company, but ought to be dismissed. In support of this exception, the defendant company answered, that it was an Alabama corporation; that on January 1, 1869, it had conveyed all its property to trustees to secure the payment of 4,000 bonds of $1,000 each; that upon default in payment of interest, the trustees took possession of all

the defendant company's property, including the said wharves, as they were authorized to do by said deed of conveyance, and they were afterwards appointed by the United States circuit court for the district of Louisiana, trustees and receivers of said railroad company's property, and were required to administer and manage the same to the exclusion of the defendant railroad company. After the filing of their answer, a supplemental petition was filed, in which it was alleged that J. M. Witherspoon and A. K. Roberts did cause and direct vessels to be landed at the wharves aforesaid, and the same relief was prayed against them as against the railroad company. These persons having been served with process, filed their answer, in which they disclaimed any right or interest in the wharf property, and alleged that they acted in the premises under a license from the said trustees, Edwin D. Morgan and James A. Raynor, who had title and were in possession of said property under the orders of the United States circuit court. And they prayed to be discharged from the case after citation to the said trustees, Morgan and Raynor, whom they called in warranty to come into court and assume the defense of the same. Morgan and Raynor were then cited, and filed their answer, admitting they were in possession of said wharf, admitting that they had allowed the vessels mentioned in the petition to lie at said wharf, and to receive and discharge cargo, and claimed to have the right so to do by virtue of the joint resolution above mentioned, and of their estate as riparian proprietors. Afterwards the plaintiff filed another supplemental petition, whereby he made Morgan and Raynor, trustees, parties defendant to the action, and they were enjoined in the same terms as the railroad company had been. After all these proceedings, the said trustees, Morgan and Raynor, and the railroad company, filed their petition for a removal of the cause from the state court, in which it was pending, to this court. The petition stated that Morgan and Raynor were citizens of New York, and the railroad company a citizen of the state of Alabama, and that Henry Ellerman, the plaintiff, was a citizen of the state of Louisiana, and that the controversy between the plaintiff and said petitioners, the defendants, could be fully determined without the presence of any other party to the suit. The petitioners for removal at the same time filed the bond required by the act of congress, and the court in which the cause was pending made an order for its removal to this court. From this order of removal the plaintiff Ellerman took what is called a suspensive appeal to the supreme court of the state of Louisiana, the effect of which he claimed was to supersede the order of removal, until the appeal had been heard and determined by the appellate court. Notwithstanding the appeal, the defendants filed the record of the case in this court as required by the statute, and moved to dissolve the injunction allowed by the state court.

John A. Campbell, for the motion.

W. W. King, contra.

WOODS, Circuit Judge. The counsel for Ellerman, the plaintiff, as one reason why this court should not dissolve the injunction issued by the state court says that the case has not been in fact removed to this court, and therefore we are without jurisdiction to entertain the motion. This preliminary question must therefore be first disposed of.

The first reason assigned by counsel for plaintiff why the case is not properly before this court is, because an order for removal was necessary to be made by the state court, and being made, was superseded by the suspensive appeal to the supreme court of the state. There is nothing in the acts of congress of the United States on the subject of the removal of suits from the state courts to the United States courts, to give support to the idea that the United States court is dependent upon the state supreme court for a judgment or an opinion on the order of removal. The presentation of a proper petition and bond is, by the acts of congress, as well as by the decisions of the supreme court of the United States, effectual to suspend all the powers of the state court in which the suit is. The acts of congress have no reference to the appellate court. Under the act of 1789 (1 Stat. 79, § 12), the application to remove was to be made at the appearance term; by the act of March 3, 1875 (18 Stat. 470, § 3), the application may be made at the term at which the cause could be first tried, and before trial. The state court is required to proceed no further when the affidavit and bond have been made and filed. The allowance of an appeal is not a compliance with the act of congress. It is true, a number of the state courts have adopted a different rule. State v. Judge, 23 La. Ann. 29; Bryant v. Rich, 106 Mass. 180; Whiton v. Chicago & N. W. Ry. Co., 25 Wis. 424; Darst v. Bates, 51 Ill. 439. But in considering the cases in the reports of the supreme court of the United States, I am unable to find anything to support the practice. In the case of Insurance Co. v. Dunn, 19 "Wall. [86 U. S.] 214, it was held that after petition had been filed and bond given for the removal of a cause to the federal court, no power of action thereafter remained to the state court, and that every question necessarily including that of its own jurisdiction must be decided in the federal court. In a still later case the same court says that "the suitor making the application has an unqualified and unrestrained right to a removal, on complying with the requirements of the act of congress." Insurance Co. v. Morse, 20 Wall. [87 U. S.] 445. See, also, Kanouse v. Martin, 15 How. [56 U. S.] 198; Gordon v. Longest, 16 Pet [41 U. S.] 97. The New York courts have decided that an

appeal does not lie to an order of removal from the inferior to the superior courts of the state. Stevens v. Phoenix Ins. Co., 41 N. Y. 149; Bell v. Dix, 49 N. Y. 232. See, also, Matthews v. Lyall [Case No. 9,285]. It is probable that the practice of allowing an appeal arose out of the silence of the statutes in respect to the method of making a removal and of enforcing the order. The early acts provided: 1st, for an affidavit from the applicant, showing his right to remove; 2d, a bond to secure a return of the record to the court of the United States. This being done, the statute declared the effect. This was that the state court should proceed no further. One would suppose this was clear enough, but it was not. The act of March, 1875 (18 Stat. 470), is more explicit: 1st, the same affidavit is required; 2d, the condition of the bond is materially enlarged; it provides for the payment of costs and damages in case the suit is improperly removed; 3d, it gives a power to the circuit court to remand the case, which resulted before only by construction; 4th, it compels the clerk of the court to furnish a copy of the record, by a penal section in the act (section 7); 5th, it empowers the circuit court to send a certiorari to the state court to obtain it (section 7). The writ of certiorari is a very ancient writ of the common law. In the Natura Brevium it is described as the writ whereby to remove records out of one court to another. Fitzh. Nat Brev. 554, A; 2 Comyn, Dig. tit. "Certiorari," 332. The mandatory part of the writ is: "We command you that you send the record and proceedings aforesaid, with all things touching them, to us under your seal, distinctly and openly, and this writ, so that having inspected the record and proceedings, we may cause further to be done thereupon," etc. Clearly, an appeal to the state supreme court would be no proper return to this writ, nor stay action in this court. The case of Insurance Co. v. Morse, supra, establishes this. The fact that the railroad company was required to keep an agent in this state, upon whom process might be served, does not prevent a removal of the case to this court. Morton v. Mutual Life Ins. Co., 105 Mass. 141. I am therefore of opinion that the suspensive appeal taken from the order of removal was not effectual to prevent the removal of the case to this court.

The next reason given why the cause has not been effectually removed is, because this court has not jurisdiction over the necessary parties. This idea is based on what is called the call in warranty, by Witherspoon and Roberts on Morgan and Raynor. Witherspoon and Roberts are citizens of Louisiana, and, as according to the law of Louisiana (Acts 1868, p. 28, c. 12, § 1), the trial of the case as against Morgan and Raynor, the persons called in warranty, cannot be separated from the trial against Witherspoon and Roberts, it is claimed that the jurisdiction of this court is ousted—in other words, that Witherspoon and Roberts are parties to the controversy in this court, and, being citizens of the same state as plaintiff, the court is without jurisdiction. It is a sufficient reply to this to refer to the act of March 3, 1875, § 2, supra, which declares that "when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different

states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit into the circuit court of the United States for the proper district." This case falls within this provision of the statute, and the law of the United States, and not of the state of Louisiana, must control. This court may try the case as between Ellerman, plaintiff, on the one hand, and Morgan and Raynor and the railroad company, on the other, and leave the state court to take such action as it may be advised as to the case between Ellerman, and Witherspoon and Roberts.

I am therefore of opinion that the case is properly on the docket of this court, and that the court has jurisdiction thereof.

The merits of the motion to dissolve the injunction next require attention. This turns upon the joint resolution of the legislature of March 6, 1869, heretofore referred to. See Acts 1869, p. 67. If the railroad company, or those claiming under it, have the right to collect wharfage, it is by virtue of that joint resolution, and not otherwise. In the case of City of New Orleans v. New Orleans, M. & C. R. Co. [27 La. Ann. 414], this joint resolution was considered by the supreme court of this state. The suit was brought to recover the sum of $764, for wharf dues charged by the city against the railroad company for the barges and flats of the company lying at the wharves referred to in the joint resolution. The defense was, that under the joint resolution, the railroad company was exempt from the payment of wharfage dues for barges, etc., which landed at said wharf. To this the city replied, that the joint resolution was unconstitutional, among other reasons, because the legislature transcended legislative powers in passing said resolution, donating public revenues to a private purpose. In passing upon this objection to the joint resolution, the supreme court of this state says [supra]: "The grant was not a donation of public revenue to a private purpose. The grant is a license to a railroad company to use its property on the river bank for public purposes; to wit, to facilitate the transaction of its business with the public. It was the control by the legislature of a public servitude." This construction of the resolution is inconsistent with the idea that the right was granted to it by the railroad company to charge wharfage dues against vessels landing at said wharf, which were in no way connected with

the business of the railroad company, or that the railroad company might maintain a free wharf for such vessels. The railroad company owned the banks of the river at the place where the wharves in question are, subject to the public servitude. The legislature granted the company the right to inclose this strip of land along the river bank, and use it, in the language of the supreme court, "for public purposes; to wit; to facilitate the transaction of its business with the public." Under this grant, the railroad company claims the right to use the wharves precisely as if they were the private property of a private person, and to collect wharfage from all water craft using them, whether they have any connection with the business of the railroad company or not. This construction of the grant is clearly opposed to the views of the supreme court of the state. Those views are binding on this court, and, in accordance with them, I must hold that the injunction in this case rightfully issued, and the motion to dissolve it must be overruled.

{NOTE. On defendant's appeal this decision was reversed by the supreme court, Mr. Justice Matthews delivering the opinion. It was pointed out that the decision of the supreme court of Louisiana in the case of City of New Orleans v. New Orleans, M. & C. R. Co., 27 La, Ann. 414, which was relied upon in the principal case, did not hold that the rights of the railroad company under the joint resolution of March 6, 1859, were limited to the use of the wharf for railroad purposes merely; but that that decision did affirm that the disposal of the public right in the wharf was "in the state, to the exclusion of the city," so that, if the joint resolution had been a cession to a natural person as riparian proprietor, it would have been conclusive upon the city, and those claiming in its right. It was held that, even if the grant to the railroad company limited the rise of the property to purposes incident to its corporate business, it must, in order to be beneficial, be essential that the railroad company should have the right to exclude all other uses which would effectually withdraw it from the jurisdiction of the city authorities over the general subject of the public wharves. Mr. Justice Matthews said that "The sole remaining question, then, is whether Ellerman, as assignee of the city, has any legal interest which entitled him to enjoin the railroad company from using its wharf as a public wharf beyond the limits of such using as defined by that construction of the resolution." In deciding this question it was held that the legal interest which qualifies a complainant, other than the state itself, to sue in such a case, Is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty, e. g. "A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The state has a legal interest in preventing the usurpation and perversion of its franchise, because it is trustee of its powers for uses strictly public. In these questions the appellant has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only

injury of which he can be heard, in a judicial tribunal, to complain, is an invasion of some legal or equitable right." New Orleans, M. & T. R. v. Ellerman, 105 U. S. 166.]

[1] [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

[2] Reversed in 105 U. S. 166.]