Case No. 4,883.

FLORENCE SEWING MACH. CO. v. GROVER & BAKER SEWING MACH. CO. ET AL.

[Holmes, 235.][1]

Circuit Court, D. Massachusetts. Aug., 1873.

REMOVAL OF CAUSES—CITIZENSHIP—ACT OF MARCH 2, 1867.

Under the act of March 2, 1867 (14 Stat. 558), a suit brought in a state court may be removed to the United States circuit court, by a defendant who is a citizen of a different state from that in which the suit is brought, although there are other defendants who are citizens of the state in which it is brought.

[See note at end of case.]

Motion by the plaintiff to dismiss a suit at law for want of jurisdiction. The plaintiff was a citizen of Massachusetts; of the defendants, one was a citizen of Massachusetts, one of Connecticut and one of New York. The suit [see Florence Sewing Mach. Co. v. Singer Manuf'g Co., Cases Nos. 4,884 and 4,885] was originally brought in the supreme judicial court of the state of Massachusetts, whence it was removed and entered in this court by the foreign defendants, under the act of congress of March 2, 1867 (14 Stat. 558), which provided for removal of suits "in which there is controversy between a citizen of the state in which the suit was brought and a citizen of another state." All the formal proceedings for the removal and entry in this court, required by the act of 1867, had been duly taken, and the only question on this motion was, whether or not that act applied to a suit in which a citizen of the state in which the suit was brought was defendant together with non-resident defendants. Petitions of the foreign defendants for removal of the suit had previously been denied by the supreme judicial court of Massachusetts.

!E. R. Hoar and A. L. Soule, for plaintiff.

The case has not been properly removed from the state court.

1. The act of March 2, 1867, applies only to cases in which all the plaintiffs are citizens of one state, and all the defendants are citizens of some other state or states. The act provides for removal of a suit "in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state." Under the act of September 24, 1789 (1 Stat. 73), § 12, the language of which 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," &c., it has been uniformly held, that, to authorize a removal, all the defendants must be citizens of some other state or states, than that in which the suit is brought. Strawbridge v. Curtiss, 3 Cranch. [7 U. S.] 267; New Orleans v. Winter, 1 Wheat. [14 U. S.] 91;

Hubbard v. Northern R. Co. [Case No. 6,818]; Moffat v. Soley [Id. 9,688]; Beardsley v. Torrey [Id. 1,190]; Commercial & Railroad Bank v. Slocomb, 14 Pet. [39 U. S.] 60; Irvine v. Lowry, Id. 293; Wilson v. Blodget [Case No. 17,792]; Bank of Cumberland v. Willis [Id. 885]; Susquehanna & W. V. Railroad & Coal Co. v. Blatchford, 11 Wall. [78 U. S.] 172. And where there are several defendants, all must join in the petition. Smith v. Rines [Case No. 13,100]; Beardsley v. Torrey [supra]. The same doctrine as to removal has been laid down under the act of 1867. Cooke v. State Nat. Bank (Sup. Ct N. Y.) 1 Lans. 494; Peters v. Peters, 41 Ga. 242; Ex parte Andrews, 40 Ala. 639; Bliss v. Rawson, 43 Ga. 181; Case v. Douglas [Case No. 2,491]; Bixby v. Couse [Id. 1,451]; Bryant v. Rich, 106 Mass. 180; Florence Sewing-Machine Co. v. Grover & Baker Sewing-Machine Co., 110 Mass. 1.

II. If the act is to be construed as applying to a case in which one of the defendants and the plaintiff, are citizens of the state in which the suit is pending, it is submitted that the act is unconstitutional. It provides for the removal of the whole cause, with all the parties. But by the constitution (article 3, § 2) the judicial power extends only, in this behalf, to controversies between citizens of different states. The construction claimed by the defendants presupposes a jurisdiction in the United States courts, of controversies between citizens of the same state; and a power in those courts to oust the state court of jurisdiction in controversies between citizens of the state, at the request of citizens of some other state, even against the will of both plaintiff and defendant, citizens of the state in whose court the suit is instituted. The construction of the judiciary act (section 11) by the United States supreme court, is the construction of language substantially the same.

B. R. Curtis, J. G. Abbott and Elias Merwin, for defendants.

The suit was brought by a citizen of this state; the petitioning defendants were citizens of another state; the matter in dispute, exclusive of costs, exceeded five hundred dollars; and the necessary petitions, affidavits, and bonds were made and filed before the trial. All the requirements of the United States statute were thus apparently fulfilled.

I. The United States statute of 1867 in question was designed to, and does in terms, clearly provide for the removal of suits, for cause, upon the petition of a foreign defendant, although there are other parties defendant who are citizens of the state where the suit is brought. This is apparent from the language of the act itself, and from the previous legislation upon this subject. The judiciary act [of 1789 (1 Stat. 73)], c. 20, § 12, confined the right of removal to suits commenced "by a citizen of the state in which the suit was brought against a citizen of another state;" and also required that the petition for removal should be filed by the defendant at the time of entering his appearance. This provision applied only to a suit between a citizen of the state in which the suit was brought and a citizen of some other state, and did not apply to a case where a resident defendant was also a party. The act of 1866, c. 288 (14 Stat. 306), for the first time, made provision for

the removal of a suit to the federal court by a non-resident defendant, although a citizen of the state where the suit was brought was also a defendant therein. That act made two changes in the previous law: 1. It allowed the cause to be removed to the federal court so far as the non-resident defendant was concerned, "if the suit was one in which there could be a final determination of the controversy, so far as it concerned him, without the presence of the other defendants as parties in the cause," but left the suit in the state court so far as it related to the resident defendant; and, 2. It allowed the petition for removal to be filed at any time before the trial, instead of requiring it to be filed with the defendant's first appearance, as in the judiciary act. To provide what was supposed to be a more impartial tribunal for non-resident defendants in every case, congress passed the act of March 2, 1867, to supply the obvious deficiencies of the statute of 1866, and to allow a nonresident to remove the cause to the federal tribunal, whenever he had reason to believe that, from prejudice or local influence, he would be unable to obtain justice in the state courts, although there were other codefendants who were residents of the state in which the suit was brought. The statute of 1867 cannot be confined to those cases where non-residents are the only defendants, without violating its language and intent.

(a) It is an act "to amend the act of 1866." The purpose of the act of 1866 was to provide for a removal of suits in behalf of nonresident defendants in those cases in which resident parties were also defendants. The obvious purpose of the statute of 1867 was to add another case to those which might be removed by non-resident defendants, although resident parties were also defendants. Neither the act of 1866, nor the judiciary act (section 12), is repealed by the statute of 1867. All subsist, and each provides for a distinct case.

(b) Under statute of 1789 (§ 12), non-residents (if the only parties defendant), can now remove a case to the federal tribunal, under the provisions of that act, without affidavit, and without the cause of local prejudice. If the statute of 1867 is also to be confined to the same class of cases (where all the defendants are non-residents), then, as it requires cause and affidavit for removal, it is a restriction upon the right of

removal as originally given by the statute of 1789,—a result which is obviously absurd.

(c) The peculiar phraseology of the statute of 1867 fairly admits of no other interpretation. The language 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," &c. The language of the statute of 1789 was, "if a suit be commenced by a citizen of the state, &c., against a citizen of another state," &c.; but here the striking phrase is, "where a suit is now pending… in which there is controversy between a citizen," &c. It is enough, however the parties may be distributed as to citizenship, if in the suit there is controversy between a citizen of one state, as plaintiff, and a citizen of another, as one of the defendants. The statute does not limit the right of removal to the case where a citizen of one state, as plaintiff, and the citizen of another state, as defendant, are the only parties to the controversy. St. 1868, c. 255, § 2 (15 Stat. 226); Johnson v. Monell [Case No. 7,399]; Fields v. Lamb [Id. 4,775]; Sands v. Smith [Id. 12,305]. The decision of Blatchford, J., in Bixby v. Couse [Id. 1,451], and other similar decisions, proceed upon the mistaken assumption that the statutes of 1789 and 1867 are substantially alike, overlooking the radical change which the latter statute makes, and was intended to make.

II. The constitution provides (part 1, art. 3, § 2) that "the judicial power shall extend to… controversies between citizens of different states." The constitutional right of the non-resident to have his controversy determined in the forum contemplated by the constitution cannot be defeated by the fact that others not entitled to go into that forum have been joined with him. Fisk v. Union P. R. [Id. 4,828]; Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 738; Railway Co. v. Whitton's Adm'r, 13 Wall. [80 U. S.] 270; Lexington v. Butler, 14 Wall. [81 U. S.] 282.

SHEPLEY, Circuit Judge. The second section of the third article of the constitution extends the judicial power of the United States to controversies "between citizens of different states." There are no words in this grant of judicial power restricting it to controversies in which citizens of different states are the sole parties. Nor are there to be found any words of limitation which would deprive congress of the power to confer upon the federal courts jurisdiction over a judicial controversy between citizens of different states arising in a suit or case, although all the persons constituting the party on one side of the case were not citizens of states different from the states of which the persons composing the other party to the suit or case were citizens. The judicial controversy contemplated by the constitution is not limited to one in which citizens of different states are exclusively interested. The grant of jurisdiction is not over "suits" or "cases" between citizens of different states, but over "controversies" between citizens of different states. Whenever, therefore, a case or suit is pending, in which there is involved a judicial "controversy" between citizens of different states, the case is one coming clearly within the terms of the constitutional grant

of judicial power, although in the same case there may be a controversy between citizens of the same state. In all the debates in the convention which framed the constitution, it seems to have been admitted by all the members of the convention that the jurisdiction of the national judiciary should embrace every subject which might endanger the national peace, by reason of the relations of the respective states to each other, and of their citizens to the citizens of other states. Before the conclusions of the convention had been reduced to the form of a written constitution, a resolution had unanimously passed the convention, "That the jurisdiction of the national judiciary shall extend" (among other things) to "questions which involve the national peace or harmony."

"Nothing," says Mr. Justice Story, "can conduce more to general harmony and confidence among all the states than a consciousness that such controversies are not exclusively to be decided by state tribunals, but may, at the election of the party, be brought before the national tribunals." "And if justice should be as fairly and as firmly administered in the former as in the latter, still the mischiefs would be most serious, if the public opinion did not indulge such a belief. Justice, in cases of this sort, should not only be above all reproach, but above all suspicion. The sources of state irritations and state jealousies are sufficiently numerous, without leaving open one so copious and constant as the belief or dread of wrong in the administration of state justice." "Probably (he subsequently remarks) no part of the judicial power of the Union has been of more practical benefit, or has given more lasting satisfaction to the people. There is not a single state which has not at some time felt the influence of this conservative power; and the general harmony which exists between the state courts and the national courts in the concurrent exercise of their jurisdiction in cases between citizens of different states, demonstrates the utility, as well as the safety, of the power. Indeed, it is not improbable that the existence of the power has operated as a silent but irresistible check to undue state legislation, at the same time that it has cherished a mutual respect and confidence between the state and national courts, as honorable as it has been beneficent."

This clause in the constitution was intended

to protect citizens of different states from danger of injustice in the state courts, through local influence or prejudice. An interpretation is contended for, which would take from congress forever the power to legislate so as to bring under its protection citizens of other states, whenever the nature of the controversy required or permitted the joinder with them, as parties, of persons who were citizens of the same states as the person or persons composing the opposite party. Such a construction would manifestly impair the end which the clause was designed to attain. The basis of the Union is in the constitutional provision that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states." It is essential to the upholding of any government that it should possess the power and the means of executing its own provisions by its own authority. To secure the inviolable maintenance of that equality of privileges and immunities guaranteed by the constitution to the citizens of the Union, it may be necessary, whenever a controversy arises in which one state, or its citizens, are opposed to another state, or its citizens, (whether the controversy be, or be not, exclusively confined to different states or the citizens of different states), to commit it to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded. How far congress will exercise this power of legislation must depend upon the state of the country, and such considerations as to the necessity for such legislation as have heretofore, or may hereafter, affect its action. Manifestly, thus far, congress has never deemed it necessary to exhaust the legislative power conferred upon it by this clause of the constitution. The twelfth section of the judiciary act (1 Stat. 79) authorized a removal to the circuit court of the United States, by a defendant, of any suit 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, where the matter in dispute exceeds the sum of five hundred dollars. Under this section, it was held, that a cause could not be removed except upon the petition of all the defendants; that to bring the case within the act, all the plaintiffs must be citizens of the state in which suit is brought, and all the defendants must be citizens of some other state or states. Smith v. Rines {Case No. 13,100}; Hubbard v. Northern R. Co. {Id. 6,818}; Beardsley v. Torrey {Id. 1,190}; Ward v. Arredondo {Id. 17,148}; Strawbridge v. Curtiss, 3 Cranch {7 U. S.} 267. These cases all turned on the construction of the words used in the eleventh and twelfth sections of the judiciary act, not on the construction of the clause of the constitution conferring judicial power. As the eleventh section of the act of congress, in prescribing the jurisdiction of the circuit court, had limited it to cases "where the suit is between a Citizen of the state where the suit is brought and a citizen of another state;" and the twelfth section had limited the right of removal to the circuit court to a "defendant in any suit 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 courts held these expressions to mean that each distinct interest should be represented by persons all of whom are entitled to sue, or be sued, in the federal courts. In the language of Chief Justice Marshall: "That is, where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts."

The modification of the jurisdiction conferred by the eleventh section, subsequently made by the act of February 28, 1839, it is not necessary here to consider. Then followed the act of July 27, 1866 (14 Stat. 306), entitled "An act for the removal of causes in certain cases from the state courts." This, act applies to 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." It contemplates suits in which the plaintiff is a citizen of the state in which the suit is brought, and in which there are several defendants, some residing in the state in which the suit is brought, and some, either aliens or citizens of a state other than that in which the Suit is brought. "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 concerns 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 the 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 is pending." Upon the filing of this petition and giving the security required by the statute, the state court is to proceed no further in the cause as against the defendant so applying for its removal. But "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 so to do." Before the passage of this act, no removal could be made

in the causes to which the act applies, because all the defendants were not entitled to petition for removal, and the courts had decided that unless it was removable as to all, it was not so as to any. After the passage of the act of 1866, in certain cases the alien, or non-resident, defendant could have the cause removed as to him, while it was allowed to proceed in the state courts as to the resident defendants. But, as in the judiciary act, the right of removal was limited to the alien, or non-resident defendant, and does not extend to the plaintiff.

Next followed the act of March 2, 1867 (14 Stat. 558), upon which the right of removal in this case is claimed. This act provides "that where a suit is now pending, or may hereafter be brought, in any state court in which there is a 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 courts an affidavit stating that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in such state court," may have the cause removed to the circuit court of the United States. This act purports to be an amendment of the act of July 27, 1866. It differs from all previous legislation of congress upon the subject of removal of suits in this respect; the previous acts referred to "suits between citizens of different states," which expression the courts had construed to be limited to suits in which all the persons constituting the party plaintiff were citizens of other states than those of which all the persons composing the party defendant were citizens, as we have before seen. The act of 1867, for the first time, uses the broader expression of the constitution, and refers to suits "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state." It differs also from the prior acts in relation to removal, by using, as to the plaintiff, the language of the eleventh section of the judiciary act, instead of the language of the twelfth. The plaintiff may or may not be a resident of the state in which the suit is brought, and the right of removal of the suit is given to the non-resident citizen, be he plaintiff or defendant. The change of the form of expression from suits between citizens of different states to suits in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, was evidently made advisedly, and for the purpose of extending and enlarging the right of removal, not of limiting it, as would be the effect if the construction contended for were admitted. The only conditions requisite to the right of removal under the act of 1867 are: that in the suit pending in the state court there shall be a controversy between a citizen of the state in which the suit is brought and a citizen of another state; that the matter in dispute shall exceed the sum of five hundred dollars, exclusive of costs; that the citizen of such other state, either plaintiff or defendant, shall make and file the affidavit required by the statute; and that he shall give the requisite surety for appearing and entering the case in the circuit court at the proper time, with the copies of the papers

in the case. Johnson v. Monell {Case No. 7,399}, opinion of Mr. Justice Miller; Sands v. Smith {Id. 12,305}. These requisites to the right of removal all exist, and have been complied with in the present case. The motion to dismiss for want of jurisdiction is therefore overruled.

Case to stand for trial.

{NOTE. The petition of the foreign defendants for removal of the suit to the circuit court of the United States was denied by the supreme judicial court of Massachusetts, to which decision an exception was taken, and the case taken to the supreme court of the United States on writ of error. In the meantime, it seems, the cause had been removed to the circuit court by the foreign defendants, and was heard August 18, 1873, as given above, on motion by plaintiff to dismiss for want of jurisdiction. Argument was had on the writ of error to the state court in the supreme court of the United States in January. 1874, and a decision rendered in March (Mr. Justice Clifford delivering the opinion), in which it was held that "either the non-resident plaintiff or non-resident 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 non-residents, 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 non-residents and join in the petition." The judgment of the state court denying the petition for removal was affirmed. Case of Sewing Machine Companies, 18 Wall. (85 U. S.) 553.}

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