Case No. 9,967.

MURRAY ET AL. v. PATRIE.

{5 Blatchf. 343.}[1]

Circuit Court, S. D. New York. July 17, 1866.

REMOVAL OF CAUSES—REMOVAL AFTER JUDGMENT—ORIGINAL JURISDICTION—CASES ARISING UNDER CONSTITUTION.

1. Under the constitution of the United States, causes may he removed from state courts to the circuit courts of the United States after, as well as before, judgment.

{Cited in Fisk v. Union P. R. Co., Case No. 4,827.}

2. Original jurisdiction may be conferred by congress upon the circuit courts of the United States, by the removal into them, from the state courts, of cases arising under the constitution, the laws of the United States, and treaties.

{Cited in Fisk v. Union P. R. Co., Case No. 4,827; Woolridge v. M'Kenna, 8 Fed. 658.}

{Cited in Stone v. Sargent, 129 Mass. 506.}

3. Such a case arises when the question assumes such a form that the judicial power is capable of acting on it.

4. When a case is so removed, the question whether the removal is in violation of the constitution, and whether the case is one arising under the constitution, &c., may be raised on the trial.

{Cited in Eaton v. Calhoun, 15 Fed. 159.}

{5. Cited in Fisk v. Union P. R. Co., Case No. 4,827, to the point that where necessary to the exercise of its jurisdiction a federal court will issue a writ of mandamus or other particular process.}

{6. Cited in Tennessee v. Davis, 100 U. S. 294, in dissenting opinion of Mr. Justice Clifford, to the point that removals under section 643, Rev. St., are confined to civil actions.}

This was an application for an order requiring the clerk of the supreme court of the state of New York for the county of Greene, to make a return to a writ of error issued by this court, to remove into this court a suit brought in such state court by Albert W. Patrie against Robert Murray and William Buckley, to recover damages for false imprisonment, and in which

a judgment had been rendered by such state court in favor of Patrie, for $9,343.34. After such judgment was rendered, the defendants therein sued out such a writ of error.

Samuel Blatchford and Clarence A. Seward, for plaintiffs in error.

Amasa J. Parker, for defendant in error.

NELSON, Circuit Justice. The principal ground of defence set up on the trial of the suit in the state court was, that the arrest and imprisonment of the plaintiff therein, which occurred between the 27th of August, 1862, and the 3d of September, 1802, took place under the order of the president of the United States. The fourth section of the habeas corpus act of March 3, 1863 (12 Stat. 756), provides, that any order of the president, &c., made during the Rebellion, shall be a defence, in all courts, to any action, &c., pending or to be commenced for any arrest or imprisonment made or committed under such order, or under color of any law of congress. The fifth section provides for the removal of any such suit commenced in a state court, to the circuit court of the United States, either before or after judgment. As respects the latter, the section declares, that "it shall, also, be competent for either party, within six months after the rendition of a judgment in any such cause, by writ of error or other process, to remove the same to the circuit court of the United States of that district in which such judgment shall have been rendered; and the said circuit court shall thereupon proceed to try and determine the facts and the law in 1062 such action, in the same manner as if the same had been there originally commenced, the judgment in such case notwithstanding."

This provision of the 5th section, and, indeed, the whole of it as to the removal of causes, is a literal copy of the 6th section of the act of March 3, 1815 (3 Stat. 233). The question of the removal of causes from the state courts to the circuit courts of the United

States was discussed very much in Martin v. Hunter's Lessee, 1 Wheat. [14 U. S.] 346–350, and no doubt was entertained that it might take place after, as well as before, judgment. It was again commented upon in the case of Osborn v. Bank of U. S., 9 Wheat. [22 U. S.] 821–828, and especially by Sir. Justice Johnson, in his dissenting opinion (pages 884–889.) Mr. Justice Johnson was inclined to the conclusion, that congress could not confer original jurisdiction upon the circuit courts of the United States, either directly or by removal from state courts, in cases arising under the constitution, the laws of the United States, and treaties," &c., inasmuch as the federal court must assume the jurisdiction upon the simple hypothesis that such question had arisen, and that, until such question had actually arisen and was presented for decision, the case was exclusively cognizable in the state court. This view led the learned justice to maintain that the question could be brought properly before the federal court only under the 25th section of the judiciary act [1 Stat. 85], as it could not be ascertained whether the case had actually arisen, till it was heard and decided. The chief justice, who delivered the opinion of the court, held that jurisdiction could be entertained when the question assumed such a form that the judicial power was capable of acting on it; that it then became a case; and that the judicial power extended to all cases arising under the constitution, &c.

I admit, that the bringing of the suit in the federal court, and the averments in the declaration in conformity with the act of congress conferring the jurisdiction, do not vest it necessarily or definitely in the court. If it did, the argument of the learned counsel against this motion would be conclusive, namely, that the principle would draw within the federal jurisdiction cases without limit, at the election of the plaintiff. But the defendant may meet the question,

whether or not it is a case arising under the constitution, &c., by pleading, or on the trial, as I have endeavored to show in Dennistoun v. Draper [Case No. 3,804], and thus confine the jurisdiction within the constitutional limit So in the case of original jurisdiction by removal from the state court.

An objection is taken to the removal in this case, on the ground of its violation of the 7th amendment to the constitution, which is, that "no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." Whether or not this amendment would deprive this court or jurisdiction, I am not inclined to determine on this motion. It is a question that may come up on the trial, and be there ruled by the court, and the ruling can be reviewed on error by the supreme court. The question, also, whether the fourth section of the act of March 3d, 1863, is constitutional, and, if so, whether it applies to this case, are questions that belong to the trial, and need not now be examined.

It was suggested by the, counsel for both parties, on the argument, that, if the court had any serious doubts upon the questions involved in this removal, the decision be reserved, and the cause heard before both of the judges, that the parties might have the benefit of a division of opinion, if such should be the result. Having come to the conclusion that the objections to the jurisdiction are properly available on the trial, the suggestion is unimportant.

Let an order be entered requiring the return to be made.

[1] [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

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