

DEMOND *v.* CRARY.

*Circuit Court, E. D. New York.*      March 26, 1880.

PLEA IN ABATEMENT — PRIOR ACTION PENDING — COUNTER CLAIM.—An action wherein defendant had set up a counter claim was removed from the state court to the U. S. circuit court. Subsequently another action, begun by the defendant in the first suit against the plaintiff, was also removed to the U. S. circuit court, and noticed for trial. At the time of the hearing in the second action a motion was granted in the first action, and an order made, permitting the withdrawal of the counter claim. *Held*, that such an order, under the circumstances, did not defeat the plea in abatement in the second action of another action pending between the same parties.

*Jesse Johnson*, for plaintiff.

*S. W. Holcombe*, for defendant.

BENEDICT, J. The counter claim made in the prior action and set up in the plea in abatement, is, in legal effect, an action by the plaintiff against this defendant. *Fettretch v. McKay*, 47 N. Y. 426. Being for the same cause of action as the present suit, it was properly pleaded in abatement and constitutes a good defence. *Ins. Co. v. Brune's Assignee*, 96 U. S. (6 Otto) 592.

The order permitting the withdrawal of the counter claim in the former action, obtained since the issue was perfected in this suit, and after the same had been noticed for trial by the plaintiff upon the issues tendered by the plea — which order, of course, is not set up in the pleadings, having been obtained since the commencement of the term at which the cause was noticed for trial — is not sufficient to defeat the plea. The defendant is entitled to judgment dismissing the complaint.

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