

JOHNSON *v.* JOHNSON.

*Circuit Court, S. D. New York.*                      June 20, 1882.

## 1. REMOVAL OF CAUSE—TIME OF APPLICATION.

Under the act of 1875 the first term during which the cause might have been tried means the first term when the cause is legally triable, not a subsequent term to which it may have been legally postponed by agreement, or by order of the court, and it has no reference to the presence or absence of witnesses, or the crowded state of the docket.

## 2. SAME-PREJUDICE AND LOCAL-INFLUENCE ACT.

It is only where a suit is removed on account of prejudice or local influence, under subdivision 3, § 639, Rev. St., which is not repealed by the act of 1875, that a removal may be had at any time before the final hearing.

## 3. SAME—DIVORCE—REMAND ON MOTION OF COURT.

An action for divorce *a vinculo* and for alimony, removed from the state court, may be remanded by this court of its own motion on suggestion of the party removing, on the ground of want of jurisdiction in this court over actions of that character.

*Robertson, Harman & Cuppia*, for plaintiff.

*Joseph J. Marrin*, for defendant.

BROWN, D. J. The papers show that this cause was at issue and duly noticed for trial and placed upon the calendar of the state court for trial in October, 1881, and that it was on the day calendar and called at several terms prior to the June term, when it was removed to this court.

When a cause is removed on account of the citizenship of the parties, it must, under the act of 1875, be removed at the first term during which the cause might have been tried in the state court. This means the first term when the cause was legally triable, not subsequent term to which it may have been legally postponed by agreement or by order of the court; and it has no reference to the presence or absence

of witnesses, or to the crowded state of the docket. *Ames v. Colorado*, 4 Dill. 263; *Sough v. Hatch*, 16 Blatchf. 233. The practice is perfectly settled in this circuit and elsewhere. *Whitehouse v. The Continental*, 2 FED. REP. 498; *Murray v. Holden*, Id. 740; *Cramer v. Mack*, 12 FED. REP. 803. It is only where a suit is removed on account of prejudice or local influence, under subdivision 3 of section 639, which is not repealed by the act of 1875, that removal may be had at any time before the final hearing. *Sims v. Sims*, 17 Blatchf. 369; *Whitehouse v. The Continental*, *supra*. There has been no order or adjudication of the state court adjudging that

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this cause could not have been tried before the June term, as in *McLean v. St. Paul*, 17 Blatchf. 363, 365; and the facts would not warrant any such adjudication.

The cause must be remanded because not removed at the first term when it might have been tried.

In another suit between the same parties for divorce *a vinculo* and alimony, removed to this court by the defendant, who afterwards asked that the cause be remanded, the plaintiff objected that the defendant could not make such an application.

BROWN, D. J. Upon the authority of *Barber v. Barber*, 21 How. 582, 584, I think this cause must be remanded by the court of its own motion as not properly within the jurisdiction of the United States courts.

*June 27, 1882.*

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