

MELENDY v. CURRIER.

(Circuit Court, D. Vermont. October 31, 1884.)

1. REMOVAL OF CAUSE—REV. ST. § 639, SUBD. 3.

Subdivision 3 of section 639 of the Revised Statutes was not repealed by the act of 1875, (18 St. at Large, 471.)

2. SAME—TIME OF APPLICATION—NEW TRIAL—LOCAL PREJUDICE.

A case may be removed from the state court after reversal of the judgment of the trial court by the supreme court of the state, and pending the second trial, on affidavit of local prejudice, under subdivision 3 of section 639 of the Revised Statutes.

Motion to Remand Cause.

L. H. Thompson, for plaintiff.

Heman S. Royce and *John Young*, for defendant.

WHEELER, J. This cause was begun in the state court, was tried there, and a verdict and judgment for the defendant had. This judgment was reversed on exceptions, and a new trial granted. Then it was removed into this court, on an affidavit of local prejudice, under the act of 1867, now subdivision 3 of section 639 of the Revised Statutes. It has now been heard on a motion to remand. It is argued that this part of the act of 1867 was repealed by the act of 1875, (18 St. at Large, 471,) and that, if not, the time of removal is revised and regulated by the latter act, and must be as early as the term at which the cause would first stand for trial. That this part of the act of 1867 was not repealed by the act of 1875 has been repeatedly decided. *Cooke v. Ford*, 16 Amer. Law Reg. 417; *Sims v. Sims*, 17 Blatchf. 369. It is treated as in full force, notwithstanding the act of 1875, in *Bible Society v. Grove*, 101 U. S. 610.

In speaking of the provision prescribing in what cases a removal may be had, it is said by Mr. Chief Justice WAITE, in the latter case, that "the act of March 3, 1875, (18 St. 470,) has not changed this provision of the Revised Statutes." This seems to settle the question as to the repeal of the act of 1867. The act of 1875 is broad enough to include within its terms any case removable under the act of 1867, and any such case might be removed, without an affidavit of local prejudice, by complying with the terms of the act of 1875. For this reason it is said that it must govern as to the time of applying for removal. But, as the right to remove on account of local prejudice is left undisturbed by that act, the means by which the removal may be had are left as incidents to the right. There is no doubt but that a revision of the whole subject-matter of a statute repeals it, and leaves the revising statute only in force; but this latter act does not revise the whole of the subject-matter of the former; it leaves a part of it in force, and that part is in force according to its own terms. The act of 1875 does not purport to prescribe the means for removal of causes, except those removable under that act. It in terms pre

scribes methods to any party "entitled to remove any suit mentioned in the next prescribing section." This plaintiff was not entitled to remove this suit as mentioned in that section. Sections 2, 3. He was entitled to remove it under the prior law, and must go to that for the means of effecting the removal.

The cause was pending for trial when the attempt at removal was made, and had not reached a final trial. There had been a trial, but it did not prove to be final. A right to another trial had been perfected. This is what was held to be necessary in *Vannevar v. Bryant*, 21 Wall. 41. It was there said by the chief justice: "To authorize the removal, the action must at the time of the application be actually pending for trial." This was expressly decided by now Mr. Justice BLATCHFORD in *Sims v. Sims*, 17 Blatchf. 369.

Motion denied.

McHENRY and others v. NEW YORK, P. & O. R. Co. and another.

(Circuit Court, N. D. Ohio, E. D. October 18, 1884.)

1. CORPORATION—ACTION BY STOCKHOLDERS—RULE 94.

A bill by stockholders to set aside a lease made by a railroad corporation, that avers that before their bill they applied to and requested said corporation to take such action as would lead to the annulling of said lease, and stated the grounds on which such lease was claimed to be void, especially alleging the invalidity of the lease for the want of approval of the shareholders, and that they were advised by the officers of the corporation that no action could be taken in the premises with a view to such result, and the company wholly refused and neglected to take action for such purpose, or to recognize complainants as having any right to interfere in the matter of said leasing, or to call upon the corporation to take any action therein, is not sufficient, under the ninety-fourth rule promulgated by the supreme court.

2. SAME—LEASE—INTEREST OF STOCKHOLDERS.

If complainants had, by their averments, brought their case within the purview of the ninety-fourth rule, they do not, upon the facts of their case, have any such interest in the subject-matter of litigation as entitles them to maintain this suit to set aside the lease complained of.

In Equity.

Estep, Dickey & Squire and *W. W. Boynton*, for complainants, and *Dunning, Edsall, Hart & Fowler*, of counsel.

R. P. Ranney and *Adams & Russell*, for defendants, and *W. W. MacFarland* and *Benj. H. Bristow*, of counsel.

BAXTER, J. The original bill in this case was filed by Albert Thomas Pettifer, James A. Riley, and John Corby. It was demurred to. The complainants, submitting to the demurrer, asked for and obtained leave to amend and make new parties. Pettifer and Riley thereupon voluntarily withdrew from the case, and James McHenry and Andrew Agen were substituted complainants in their stead, and united with their co-complainant, John Corby, in the exhibition of an amended bill. This amended bill has also been demurred to by one

of the defendants, for that, among other causes, the complainants have not, by their averments, brought their case within the requirements of the ninety-fourth rule recently promulgated by the supreme court. This rule was prescribed to enforce the principle enunciated in the cases of *Hawes v. Oakland*, 104 U.S. 450, and *Huntington v. Palmer*, Id. 482, to-wit, "that before a shareholder is permitted, in his own name, to institute and conduct a litigation which usually belongs to a corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity with his wishes." The rule requires that "every bill brought by one or more stockholders in a corporation against a corporation and other parties, founded on a right which may be asserted by the corporation, must set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors and trustees, and, if necessary, of the shareholders, and the cause of his failure to obtain such action."

The complainants sue as stockholders of the New York, Pennsylvania & Ohio Railroad Company, for themselves and other stockholders, to set aside a lease made by said company of its road and other property to its co-defendant, and aver "that, before filing their bill, they applied to and requested said New York, Pennsylvania & Ohio Railroad Company to take such action against said Erie Company as would lead to the annulling of said lease, and gave to said former company, as the grounds of said action, substantially the grounds herein stated, especially alleging the invalidity of said lease for the want of the approval of the shareholders of either company, and they were advised by the proper officers of said company that no action could be taken in the premises with a view to such result, and that said company wholly refused and neglected to take action for such purpose, or to recognize said complainants as having any right to interfere in the matter of said leasing, or to call upon said company to take any action in relation thereto." These are the only allegations relating to the questions raised by the demurrer. They are substantially like those which the supreme court, in the cases of *Hawes v. Oakland* and *Huntington v. Palmer*, hereinbefore referred to, and the case of *Detroit v. Dean*, 106 U.S. 537, S. C. 1 Sup. Ct. Rep. 560, held to be insufficient for the purpose mentioned. These adjudications are conclusive upon us, and we cannot do otherwise than sustain defendants' demurrer, and dismiss complainants' bill.

We have thus far treated the case as if the complainants had an intrinsic interest in the controversy. But this concession is not sustained by the facts. The railroad, which is the subject of this controversy, formerly belonged to the Atlantic & Great Western Railroad Company. It was incumbered with several mortgages to secure as many series of bonds issued by it; and, being in default in the payment of interest, appropriate proceedings were instituted to foreclose