

MAYOR, ALDERMEN, ETC., OF NEW YORK, v. INDEPENDENT STEAM-BOAT Co., impleaded.

(Circuit Court, S. D. New York. January 30, 1855.)

REMOVAL OF CAUSE — FEDERAL QUESTION — FERRY PRIVILEGES — INVASION BY OWNERS OF LICENSED AND ENROLLED VESSELS.

Plaintiffs filed a bill against defendants, alleging that they are entitled to enjoy the exclusive right to establish and maintain ferries between New York and the opposite shore of North river, including Staten island, and that defendants have established and maintained a ferry between Pier 18 and various places on Staten island, and praying for an injunction and an accounting. Defendants denied plaintiffs' right to the exclusive privileges claimed, and asserted that they were not operating a ferry, but were engaged as common carriers in transporting persons and freight on the navigable waters of the United States, and that all of their boats and vessels were duly enrolled and licensed for carrying on the coasting trade, under the laws of congress. *Held*, that no federal question was involved, and that the cause was not removable from the state court into the United States court.

Motion to Remand.

*E. Henry Lacombe*, counsel to the corporation.

*Work & McNamee*, for defendant.

WALLACE, J. The question arising upon this motion to remand is whether the suit is one arising under the constitution or laws of the United States. If to any extent a federal law is an ingredient of the controversy by way of claim or defense the suit was properly removed, and the motion should be denied. The bill of complaint alleges, in substance, that the plaintiffs enjoy the exclusive right to establish and maintain ferries for the transportation of passengers and freight between the city of New York and all places upon the opposite shore of the North river, including Staten island; and that the defendants without permission of the plaintiffs have established and are engaged in maintaining a ferry between pier 18 on the North river and various places upon Staten island. The prayer is for an injunction restraining the defendants from employing any ferry-boats or other vessels in the transportation of persons or merchandise from or to pier No. 18, or any other place included in their franchise, to or from any landing place on the shores of Staten island. There is also a prayer for an accounting and damages. The answer denies the plaintiff's right to the ferry privileges claimed, and asserts that the defendants are not operating a ferry, but are engaged in the lawful transportation of passengers and freight, as common carriers, upon the waters of the United States, between pier No. 18, in the city of New York, and the several landing places on Staten island; and alleges that all of the boats and vessels employed by the defendants were duly enrolled and licensed for carrying on the coasting trade under the laws of congress.

If the right to maintain a ferry and exclude the defendants from establishing one could in any way preclude the defendants from the

enjoyment of their rights in the navigation of the waters of the United States under their license, a federal question would arise. Such a license is a warrant to traverse the navigable waters of the United States granted conformably to a law enacted by congress in the exercise of its power to regulate commerce. The extent and nature of the privileges conferred by such a license involve questions of federal law. *Gibbons v. Ogden*, 9 Wheat. 1. But unless these privileges may be drawn into collision with the rights of the plaintiffs, these questions cannot arise. The plaintiffs' franchise is one "in respect of the landing place, and not of the waters," and concerns only the transit to and from the shore of that portion of the state to which their privilege extends. *Conway v. Taylor's Ex'r*, 1 Black, 603. Whether the plaintiffs own such a franchise, and whether its terms are sufficiently comprehensive to exclude the defendants from using the landing at pier 18 for the purposes of a rival ferry, or for any other purpose inconsistent with plaintiffs' rights, are questions of general jurisprudence, irrespective of federal law. The fact that the defendants under their license are entitled to navigate the public waters does not affect in the slightest degree the rights or condition of the parties. *Veazie v. Moor*, 14 How. 568.

Undoubtedly a ferry may be an instrument of interstate commerce, and, as such, subject to the regulation of congress under the commerce clause of the constitution. Railways, bridges, and wharves fall within the same category; but until congress has asserted its power over them by legislation the national authority is inert, and cannot be invoked by suitors as the foundation of any adverse rights. *Ormerod v. New York, W. S. & B. R. Co.* 21 Blatchf. 107, S. C. 13 FED. REP. 370, is an illustration. The law respecting the enrollment and license of vessels is not an assertion by congress of its authority for the regulation of those instrumentalities of commerce which are primarily the legitimate subjects of regulation by the states. An attempt to maintain the contrary was ineffectually made in *Transportation Co. v. Parkersburg*, 107 U. S. 691, S. C. 2 Sup. Ct. Rep. 732, where the court repudiated the theory that a plaintiff, the owner of a steam-boat enrolled and licensed, could challenge the right of the defendant to exact wharfage as an abridgment of the free use of the Ohio river. It was there decided that such a suit did not arise under the constitution or laws of the United States, as no act of congress had been passed regulating wharfage.

The defendants attempt by their answer to litigate the general question whether, under their license, they are not entitled to employ the waters of the United States in the business of commerce, notwithstanding the plaintiffs' franchise. If this were within the legitimate issues made by the pleadings the jurisdiction of this court would be properly invoked. But the defendants cannot force an issue upon the plaintiffs which the latter disclaim, unless it is within the boundaries of the relief sought by the bill. The plaintiffs assert a right to

be protected against the invasion of their franchise to establish and maintain a ferry. The defendants have encroached upon that right, or they have not. Whether they have or not does not depend upon the efficacy of their coasting license, or involve the authority of the United States to regulate commerce upon public waters. These matters are extraneous to the real controversy, because the franchise of the plaintiffs gives them no monopoly which conflicts with the authority of the United States or the derivative rights of the defendants; and no such effect is claimed for it by the plaintiffs. It is incumbent upon the court to ascertain whether, notwithstanding some of the averments in the pleadings, the federal question suggested is one which is a necessary ingredient in the case. *Manhattan Ry. Co. v. Mayor, etc.*, 18 FED. REP. 195. If it is found not to be, jurisdiction should be refused. The motion to remand is granted.

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WILSON SEWING-MACHINE CO. v. WILSON.

(Circuit Court, D. Connecticut. January 3, 1885.)

SERVICE OF COMPLAINT—NON-RESIDENT DEFENDANT IN ATTENDANCE ON TRIAL.

A non-resident defendant, in attendance upon the trial of his case, at which trial his presence is necessary both as a witness and for the purpose of instructing his counsel, is protected while in such attendance from service by summons of a new writ or complaint against him.

Plea in Abatement.

*L. W. Hubbard* and *Wm. C. Case*, for plaintiff.

*H. C. Robinson* and *A. P. Hyde*, for defendant.

SHIPMAN, J. This is a plea in abatement, upon the ground that the complaint was not legally served. The plaintiff is a citizen of Connecticut, and the defendant is a citizen of the state of Illinois. On March 19, 1884, four actions at law were assigned for trial in this court: one being in favor of F. H. Alford, against the present defendant; and three being upon indorsed promissory notes in favor of the indorsee, the First National Bank of Chicago, against the makers, said Alford and Charles Dickinson. The defendant was an indorser upon each of said notes. In the case in which Alford was plaintiff, the defendant was the important witness in his own behalf, and his personal presence was necessary for the instruction of his counsel. He came from Chicago to Hartford, on March 18th, expressly to attend the trial of his case. The attorney for the bank had notified his client that it was necessary to be prepared to prove that it became the owner of the notes before maturity. Wilson knew the date when the notes were discounted, and, being here upon his own case, was ready and prepared to be used as a witness in the bank cases. He was in fact called by the defendants. The trial of Alford against Wilson commenced on March 19th and was finished on March 27th.