

SMITH V. CHICAGO, B. & Q. RY. CO.

Circuit Court, S. D. Iowa, W. D.

March Term, 1887.

REMOVAL OF CAUSE—REMAND—ASSIGNMENT OF CAUSE OF ACTION.

Where a case has been removed, on the petition of defendant, from a state court to a United States court, by reason of the difference of citizenship of the parties, a motion to remand, on the ground that the cause of action has been assigned to one who is of the same citizenship as the defendant, cannot be granted when the record simply shows a motion in the state court, before the removal of the cause, for leave to substitute a new plaintiff, on which motion the court took no action.

At Law. On motion to remand.

Anderson & Eaton and J. Lyman, for plaintiff.

Smith McPherson, for defendant.

SHIRAB, J. At the June term, 1886, of the circuit court of Fremont county, Iowa, the plaintiff filed a petition against the defendant company, seeking to recover damages in the sum of, \$20,000 for personal injuries received while on a train on defendant's road as a passenger. On the first day of June, 1886, the defendant filed a petition and bond for removal of the cause into the federal court, on the ground that Josephine Smith was, when the suit was brought, and then was, a citizen of Iowa, and the defendant a corporation created under the laws of Illinois. Prior to the filing of this petition for removal, a motion had been filed asking for the substitution of one Eugene R. Cox as plaintiff, it being averred that the cause of action had been assigned by Josephine Smith to said Cox; it being also averred in the motion that he was a citizen of Illinois.

The record fails to show that the state court took any action upon the motion for leave to substitute a new plaintiff. So far as the record now on file in this court is concerned, it does not appear that any change of plaintiff has been effected, and the cause upon the record appears to be between Josephine, Smith and the, railway company. Upon a motion to remand, the court must take the facts to be as the same are set forth in the petition for removal, aided by reference, when necessary, to the pleadings to ascertain the character of the action. To justify us in granting the motion to remand, we would, be compelled to hold that the action was not one between Josephine Smith and the railway company. The averments in the petition for removal and the facts appearing on the face of the record will, not sustain us in so finding.

If it be true, as a matter of fact, that the cause of action had been legally assigned to Eugene R. Cox, a citizen of Illinois, before the petition for removal was filed, no reason is now perceived why such fact would not defeat the jurisdiction of this court; but such fact, if true, cannot be made to appear upon a motion to remand. If a party desires to controvert the truth of the allegations contained in the petition for removal, he should file a proper plea to the jurisdiction, setting forth

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the matters of fact upon which he relies, and, upon such a plea, the court can hear and determine the issues of fact thus tendered. *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. Rep. 799.

As the matter is now presented, the motion to remand must be overruled, and it is so ordered.

LOVE, J., concurs.