

## CAMPRELLÉ v. BALBACH.

(Circuit Court, S. D. New York. March 20, 1891.)

## 1. REMOVAL OF CAUSES—CITIZENSHIP—PETITION.

Under the removal act of 1887, (24 St. U. S. 552,) which provides that certain actions may be removed from the state to the federal courts, "by the defendant or defendants therein, being non-residents of that state," a removal cannot be had unless the petition shows on its face that the defendant was a non-resident when the action was begun.

## 2. SAME—MOTION TO REMAND—AFFIDAVITS.

On motion to remand, defects in the petition for removal cannot be supplied by affidavits.

At Law. On motion to remand.

*H. F. Lawrence*, for plaintiff.

*S. Mallet-Prevost*, for defendant.

LACOMBE, Circuit Judge. This is a motion to remand. The action was begun in the superior court of the city of New York by the service of a summons on June 11, 1890. By reason of various motions to make the complaint more definite, and for bills of particulars, and by extensions, the time to answer the complaint (or rather the amended complaint) did not expire until December 5th. The cause was removed into this court, December 4, 1890. The record in the state court showed that the controversy was one between citizens of different states, such difference of citizenship existing when the action was begun; and that the defendant was a non-resident of the state of New York when the petition for removal was verified, December 4, 1890; but did not show that he was such non-resident when the action was begun. The removal act of 1887 (chapter 373, 24 St. 552) provides that—

"Any suit of a civil nature [other than those involving a federal question] of which the circuit courts of the United States are given jurisdiction [including controversies between citizens of different states,] \* \* \* brought in any state court, may be removed into the circuit courts of the United States \* \* \* by the defendant or defendants therein, being non-residents of that state."

The act does not expressly state whether a defendant, in order to be entitled to removal, must show non-residence from the beginning of the action, or need show only non-residence at the time of filing the petition. Which construction shall be given to the language used in the act is the question presented on this motion. The precise point seems never to have been decided. In *Freeman v. Butler*, 39 Fed. Rep. 1, it was referred to, but not disposed of; the petition in that case not showing non-residence, even at the time of removal. Inasmuch as the removal act of 1887 manifestly shows that it was the purpose of congress to restrict the jurisdiction of the circuit courts, (*Smith v. Lyon*, 133 U. S. 319, 10 Sup. Ct. Rep. 303,) the interpretation apparently most in accord with the intention of congress is that which holds that the *status* of parties, so far as the right to removal is concerned, is to be

settled by their condition at the time of the beginning of the action. If, when the summons was served, the state court had jurisdiction, and there was no right of removal to the federal court because the defendant was a resident of the state in the court of which he was sued, it can hardly be held that it was the intention of congress to allow such defendant to escape from the jurisdiction of the state court by changing his residence after the commencement of the action. Such an interpretation would allow a citizen and resident of the state of New York, sued in the courts of his own state by a citizen of another state, to drag his litigation into the federal courts by merely changing his residence, abandoning the courts of the state in which he was a citizen, and which his adversary, though a citizen of another state, was willing to accept as the forum which should pass upon the justice of his claim. It certainly was not the intention of congress to incumber the calendar of the federal courts with such litigation, and, unless the removal act of 1887 is interpreted as the plaintiff contends it should be, such a result is possible. The record, therefore, which was before the state court, did not on its face show that the cause was one removable to the federal court.

The defendant, however, asks leave to file an affidavit in aid of his petition for removal, alleging that he was a non-resident of this state when the action was brought. This, however, he cannot do. The case must be determined by the record presented to the state court. Unless at the time the application for removal was made such record upon its face shows that the case was a removable one, it is not in law removed from the state courts. The jurisdiction of that court remains unaffected, and, under the act of congress, the jurisdiction of this court cannot attach until it becomes the duty of the state court to proceed no further. No such duty, of course, arises unless a case is made by the record presented to the state court entitling the party to a removal. There is no precedent, which authorizes an amendment to be made in the circuit court, by which grounds of jurisdiction may be made to appear, which were not presented to the state court on the motion for removal. The converse has been expressly held repeatedly by the supreme court. *Cameron v. Hodges*, 127 U. S. 322, 8 Sup. Ct. Rep. 1154; *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. Rep. 692; *Jackson v. Allen*, 132 U. S. 34, 10 Sup. Ct. Rep. 9. The motion to remand is granted.

## LOWRY v. CHICAGO, B. &amp; Q. R. Co.

(Circuit Court, D. Nebraska. May 6, 1891.)

## 1. REMOVAL OF CAUSES—FEDERAL QUESTION—INTERSTATE COMMERCE LAW.

An action against an interstate common carrier by rail for damages caused by unjust discrimination in rates and charges against plaintiff as a shipper over its road, and in affording other shippers better facilities, and for unlawfully demanding and receiving extortionate rates from plaintiff, is an action arising under the interstate commerce act, though not in express terms based on that act, and, though an action would lie for the same cause at common law, is removable under Act Cong. March 3, 1887, when the petition for removal sets up defenses based on the interstate commerce act.

## 2. SAME.

The plaintiff may be content to rest his case on the common-law liability of common carriers, but he cannot thereby deprive the defendant, as a carrier of interstate commerce, of any defense it has under the interstate commerce act. A case arises under a law of the United States, whenever that law is the basis of the right or privilege, or claim or protection, or defense, of the party, in whole or in part, by whom it is set up. It is enough that there is a federal question in the case, whether it is relied on by the plaintiff or the defendant.

## 3. SAME—REVIEW.

On a motion to remand, the court will not anticipate the trial of the case by construing the act of congress and determining the rights of the parties thereunder. It cannot eliminate the federal question from the case by a premature decision of it, and then remand the suit upon the theory that it no longer involves a federal question.

At Law. On motion to remand.

*John L. Webster, G. M. Lambertson, and John P. Maule, for plaintiff.*  
*Marquette, Deweese & Hall, for defendant.*

CALDWELL, J. This is a suit at law, brought by the plaintiff against the defendant as an interstate common carrier by rail, upon three separate causes of action. The following is a brief summary of the facts constituting the causes of action: (1) That the defendant unjustly discriminated against the plaintiff in respect to rates and charges on shipments of grain from points in Nebraska to points in other states, by giving other shippers, who made like shipments under similar circumstances and conditions, and from and to the same places and at the same time, lower rates and better advantages, in respect to the number of cars, weight, and promptness in dispatch of shipment, than were given to the plaintiff. (2) That from 1884 to 1889 the plaintiff shipped over the defendant's road from Staplehurst and other points in Nebraska, to Chicago and other cities in the United States, large quantities of wheat and other grains, for the carriage of which the defendant "unlawfully demanded, charged, received, and exacted from the plaintiff a rate that was unjust, extortionate, and unreasonable." (3) That through the fault and negligence of the defendant, and its connecting lines, agents, and employes, all the grain shipped by the plaintiff was not delivered to the consignees. The aggregate amount of damages claimed by the plaintiff is \$145,000. The suit was brought in the state court, where the defendant appeared, and in apt time filed an answer to the first cause of action, and a petition to remove the suit into this court, upon the ground that