

from China; and perhaps that the other did, if he also understood, and did not dissent from the assent; but it falls far short of proof that they or either of them came immediately from China. So far as evidence goes, the country from whence they now came is Canada. The government insists that the burden of proof is on them to show whence they came if not from China. Many cases have arisen upon the question of the right of Chinese persons to enter this country from without in which they have been required to show the right; but the question of permitting them to come into this country when out of it is very different in this respect from that of putting them out when found here. *Quock Ting v. U. S.*, 140 U. S. 417, 11 Sup. Ct. Rep. 733, 851. By the constitution of the United States no person within its reach is to be deprived of life, liberty, or property without due process of law. Amendment 5. This process may be due process of law for turning back whence he came an alien not allowed here. *Chinese Exclusion Case*, 130 U. S. 581, 9 Sup. Ct. Rep. 623. It would not seem to be due process of law for punishing an alien coming here from one country by banishment from this to another country. A proceeding for that purpose would seem to be a criminal prosecution, in which the constitution provides that "the accused shall enjoy the right to a speedy public trial by an impartial jury of the state and district wherein the crime shall have been committed." Amendment 6. These men were found within the United States, not at the boundaries, and arrested, but not on view of their entry into the country. They cannot be removed without a showing that they have unlawfully come. A process authorizing their removal unless they show a right to stay would not be the process of law that is due. That they are of a class that may be removed had to be shown by showing that they came from some other country; that included showing the country whence they came, and whence they came now. So far as this country is concerned, they had good right to be in Canada; the right of this country will be fully vindicated by their return to that country, where they still have the same right to be. To send them to China would greatly violate their rights. Judgment that appellants are not lawfully entitled to remain in this country, and that they be removed to Canada.

CHAMBERLAIN v. MENSING.

(Circuit Court, D. South Carolina. August 25, 1891.)

SUMMONS—FORM IN FEDERAL COURTS—CONFORMING TO STATE PRACTICE.

Rev. St. U. S. § 914, requires the courts of the United States, in civil cases at law, to conform as near as may be to the practice, pleadings, and form and modes of proceeding existing in the courts of the state within which such courts are held. Const. S. C. art. 4, § 31, provides that all "processes" shall run in the name of the state of South Carolina. *Held*, that the courts of South Carolina having decided that a summons is not a "process" within its constitution, and that therefore it need not be in the name of the state, a summons issued in South Carolina by the circuit court of the United States need not be in the name of the United States, in order to conform to the procedure of that state.

At Law. Action by Daniel H. Chamberlain against Henry C. Mensing. On motion to set aside summons.

Northrop & Memminger, for motion.

Mitchell & Smith, opposed.

SIMONTON, J. The body of the summons in this case is in the form in use in the state court. It is entitled in this court, contains the name of the case, and is addressed to the defendant. Besides this, and in accordance with our practice, it bears the seal of this court, the signature of its clerk, and the teste of the chief justice. The defendant now moves to set aside the summons. This is his position: Admitting that in the practice in South Carolina the summons does not issue from the court, and is merely notice by the plaintiff to the defendant that an action has been commenced, which he can defend or not as he may think proper, and is therefore not process, and does not require the seal of the court, (*Genobles v. West*, 23 S. C. 154,) yet the rule of this court (111) and the statutes of the United States (Rev. St. § 911) require the summons to bear the seal of the court, properly tested, and makes it process of the court. Inasmuch, therefore, as the constitution¹ of the state of South Carolina requires all process to be in the name of the state, the sovereign, so the summons, having thus become process in the United States court, must be in the name of its sovereign the United States. No form of process is provided for the courts of the United States by any act of congress now of force. Nor is it a principle of law that process must be in the name of the sovereign, in the absence of any provision by constitution or statute to that effect. Section 914 of the Revised Statutes requires the courts of the United States, in civil cases at law, to conform as near as may be to the practice, pleadings, and form and modes of proceeding existing in the courts of the state within which these courts are held. This rule is imperative. *Amy v. Watertown*, 130 U. S. 304, 9 Sup. Ct. Rep. 530. Section 911 adds the further provision that all writs and processes issuing out of the courts of the United States must be under the seal of the court, signed by the clerk, and tested by the chief justice if in the circuit court. There is no other provision. Now, is this practice in this court also modified by the constitution of South Carolina? That instrument requires all process from its courts to be in the name of the state. Its courts hold, as we have seen, that the summons is not within the constitutional requisite. No provision of law in the state of South Carolina, constitutional or statutory, can control the practice of this court, except so far, and so far only, as it controls the practice, pleadings, form, and mode of proceedings in the state court, which we must follow. As no law or practice, form, or mode of proceeding in the state court requires that the summons shall be in the name of the state, there can be no reason that in this court it should be in the name of the United States. The motion is dismissed.

¹ Const. S. C. art. 4, § 31, provides that all "processes" shall run in the name of the state of South Carolina.

EVANS v. CARBON HILL COAL CO.

(Circuit Court, D. Washington, N. D. August 24, 1891.)

MASTER AND SERVANT—FELLOW-SERVANTS.

A complaint wherein an employe, engaged in constructing a railway for transporting coal from defendant employer's mine, sues for injuries alleged to have been caused by the negligence of a miner, employed by defendant, while hauling lumber to be used in the mine in timbering up, is not demurrable on the ground that it shows the injury to have been caused by a fellow-servant.

At Law.

Action by J. R. Evans against the Carbon Hill Coal Company for injuries caused by the alleged negligence of an employe of defendant. Defendant demurs.

Greene & Turner, for plaintiff.

Judson & Sharpstein, for defendant.

HANFORD, J. The amended complaint in this case states facts which in my opinion are sufficient to entitle the plaintiff to recover damages for a personal injury caused by negligence. The defendant has demurred, and by the demurrer assumes and contends that, as the plaintiff alleges that he was at the time of the injury employed by the defendant as a laborer in assisting to construct a railway, or an extension to a railway, leading to the defendant's mine, and the person guilty of the negligent act complained of was at the same time employed by defendant as a miner, therefore it appears upon the face of said amended complaint that the case comes within the rule exempting employers from liability to servants for injuries caused by negligence of fellow-servants. It may transpire, when all the facts are shown, that this case does come within the rule stated; but unless the plaintiff, and the one who inflicted the injury upon him, were at the time engaged in a common employment, as well as working for a common master, the rule is not applicable. Now, without further information than this pleading gives as to the requirements of the service in which each of the actors in this cause was engaged at the time of the injury, I cannot decide that, as a matter of law, a laborer engaged in constructing a railway for transportation of coal from a mine is a fellow-servant in a common employment with a miner while at work outside of the mine, handling lumber to be used in the mine in timbering up. Let an order be entered overruling the demurrer.