

and *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 10 Sup. Ct. Rep. 1004, as I conceive, fully sustains the above position. The supreme court in the last-named case said:

"From the cases we have cited, it is evident that, by the general law, railroad companies created by two or more states, though joined in their interests, in the operations of their roads, in the issue of their stock, and in the division of their profits, so as practically to be a single corporation, do not lose their identity, and that each one has its existence and its standing in the courts of the country only by virtue of the legislation of the state by which it is created."

The effect of the legislation of Arkansas making the defendant a corporation of the state of Arkansas cannot be so construed as to take away the right of the defendant, created by law a citizen of Missouri, from going into the federal court, or hindering a citizen from bringing a suit against it in such courts, as to do so would be an exercise of power by the legislature of the state, which, under the constitution of the United States, belongs alone to congress,—that of defining the jurisdiction of the federal courts. I believe the situation of the parties in the case is such that jurisdiction exists in this court.

The motion to remand will be overruled.

WILLIAMS v. MASSACHUSETTS BEN. ASS'N.

(Circuit Court, N. D. New York. October 8, 1891.)

REMOVAL OF CAUSES—PETITIONING JUDGE IN VACATION.

The presentation of a petition and bond for the removal of a cause to the federal court, to a justice of the state court in vacation, and, on his declining to act thereon, filing them in the office of the clerk of the county, is not a compliance with the removal act, (Act Cong. March 3, 1887,) which requires that "the state court" shall have an opportunity to act on the petition; and such proceeding will not effect the removal.

At Law.

J. K. Hayward, for the motion.

R. E. Thomas, opposed.

COXE, J. This is a motion by the defendant to compel the plaintiff's attorney to receive the defendant's answer. The motion is opposed on the ground that the action is pending in the supreme court of the state of New York and was never removed to this court. The summons and complaint were served on the 16th of June, 1891. By the provisions of the New York Code the defendant had 20 days thereafter in which to answer or demur. The last day to answer, therefore, was July 6, 1891. It was also the last day on which the cause could be removed to this court. Section 3, Act March 3, 1887, (corrected August 13, 1888,) 25 St. at Large, 433. On the 27th of June, 1891, the defendant presented a petition for removal and a bond to a justice of the state court. The affidavits in opposition to the motion state that there was no court on

the 27th of June, and that the presentation was simply to the justice in chambers. They further state that the justice informed the plaintiff's representative, at the time, that no court was in session; that he was sitting only as a judge in chambers and in that capacity was not authorized to act upon the application. As these allegations are not denied I shall assume that they correctly state the facts. The justice having declined, for the reason stated, and also because the bond was defective, to act upon the petition and bond, they were, on the 3d of July, 1891, filed in the clerk's office of Oneida county. July 3d was not a court day. On the 12th of September, 1891, the state court being in session, the petition and bond were again presented, but the court declined to accept them, and an order denying the defendant's application was duly entered. If the proceedings prior to July 6th did not operate to remove the cause it is still in the state court. The defendant's acts after that date were ineffectual. They were too late. *Delbanco v. Singletary*, 40 Fed. Rep. 177; *Doyle v. Beaupre*, 39 Fed. Rep. 289; *Dwyer v. Peshall*, 32 Fed. Rep. 497; *Manley v. Olney*, Id. 708; *Railroad Co. v. Houston*, Id. 711; *Wedekind v. Pacific Co.*, 36 Fed. Rep. 279; *Coal, etc., Co. v. Waller*, 37 Fed. Rep. 545; *Hurd v. Gere*, 38 Fed. Rep. 537; *Lockhart v. Railroad Co.*, Id. 274; *Dixon v. Telegraph Co.*, Id. 377; *Kaitel v. Wylie*, Id. 865; *Spangler v. Railroad Co.*, 42 Fed. Rep. 305.

This motion turns, therefore, upon the question whether or not the presentation upon the 27th of June, and the subsequent filing in the clerk's office, was a compliance with the federal statute. Is it sufficient to present the petition and bond, when no court is in session, to a judge of the state court sitting in his office, and subsequently to file them in the office of the clerk? Manifestly not! It is "the state court" which is authorized to act upon the petition, and not a judge or a clerk of the state court. In the case of *Roberts v. Railway Co.*, 45 Fed. Rep. 433, it was said:

"The petition should be presented to the state court, and opportunity given that court to act. In this case the petition was presented to the clerk of the state court, and filed by him, and a certified copy immediately made and given the defendant. The court never had its attention called to the petition. This is not the proper practice indicated by the statute granting removals from the state court, or recognized by the United States supreme court."

Shedd v. Fuller, 36 Fed. Rep. 609; *Stone v. State*, 117 U. S. 430, 6 Sup. Ct. Rep. 799; *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. Rep. 692.

As the cause is still in the supreme court of the state of New York, this court has no jurisdiction to grant the motion.

CARPENTER v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, N. D. Iowa. September 24, 1891.)

REMOVAL OF CAUSES—PRACTICE.

Where a petition, supported by affidavits, for the removal of a cause from a state to the federal court, on the ground of local prejudice or influence, has been legally granted, the filing of the transcript in the federal court in accordance with the order of removal merely takes the case there for trial, and does not give plaintiff a right to file affidavits, denying the existence of local prejudice, in support of a motion to remand, and to compel the court to re-examine the question; but, before such issue can be made, leave of the court must be first obtained. Ordinarily the first hearing and determination will be held final.

At Law.

Rickel, Crocker & Christie, for plaintiff.

Mills & Keeler, for defendant.

SHIRAS, J. From the record in this cause it appears that the action was brought in the district court of Linn county, Iowa, the plaintiff being a citizen of the state of Iowa, and the defendant a corporation created under the laws of the state of Wisconsin. A petition was filed in due season in this court by the defendant, supported by affidavits, praying for an order removing the case into this court, on the ground of the existence of local prejudice and influence. This court found the showing thus made to be sufficient, and granted an order for the removal of the cause. The transcript having been filed in this court, the plaintiff filed a motion to remand, supported by affidavits, denying the existence of local prejudice or influence, and now seeks to have the court reconsider its finding and ruling upon that question. There can be no doubt that, under the ruling made by the supreme court, in *Re Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. Rep. 141, this court was justified in granting the order for removal upon the showing submitted to it. The showing then made was sufficient to legally satisfy the court of the truth of the allegations contained in the petition for removal. The order of removal was, therefore, properly made, and the cause was rightfully removed. The filing of the transcript in accordance with the order of removal brought the case here for trial, not for a re-examination of the grounds upon which the order of removal was based. It is not open, under such circumstances, as a mere matter of right, to the plaintiff to file affidavits denying the existence of local prejudice, and thus to compel the court to re-examine that question. Of course if, upon the face of the record, it appeared that jurisdiction did not exist, a motion to remand would be entirely proper; but, if the purpose is to have the court retry the question of fact already determined in granting the order of removal, then, before such issue can be made, leave of court must be first obtained for such purpose. It is possible that in extreme cases, and where it may be true that the court has been imposed upon in some matter connected with the hearing and granting of the order of removal, a re-examination of the question of fact may be allowed; but ordinarily the