

SMITH v. NEW YORK & MAINE GRANITE PAVING BLOCK CO.

(Circuit Court of Appeals, Second Circuit. June 15, 1893.)

SHIPPING—DEMURRAGE—CONSTRUCTION OF BILL OF LADING.

A bill of lading provided that "48 hours after arrival in port, and notice thereof to the consignee, there shall be allowed for receiving cargo at the rate of one day for every 75 tons thereof, after which the cargo consignee shall pay demurrage at the rate of six cents per ton." "After arrival and notice as aforesaid and the expiration of said 48 hours, said vessel shall have precedence in discharging over all vessels arriving, or giving notice, after her arrival; and for any violation of this provision she shall be compensated in demurrage," etc. *Held*, that the consignee has control of the ship hereunder as regards time and place of discharge, and is liable in demurrage for delay beyond the stipulated time on account of his failure to provide her a berth. 56 Fed. Rep. 525, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. This was a libel by James N. Smith against the New York & Maine Granite Paving Block Company for demurrage. There was a decree for libellant, (56 Fed. Rep. 525,) and respondent appeals. Affirmed.

Geo. F. Harriman, for appellant.

Edward L. Owen, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This is an appeal from the decree of the district court, southern district of New York, awarding libellant damages by reason of the detention of the schooner Rachel Seaman in the discharge of her cargo in the port of New York. The schooner brought a cargo of paving stones to this port, arriving on the evening of July 23, 1891, and reporting to the consignee on the following day. She did not, however, obtain a berth until August 1st, completing her discharge within six days thereafter. The only question in the case is whether, under the bill of lading, which is in a peculiar form known as the "New Stone Bill of Lading," the vessel or the consignee was to provide the berth. The court held that the consignee had the right to select the wharf at which she should discharge, and had control of the ship as respects time and place of discharge, subject only to the payment of demurrage if the stipulated time allowed was exceeded; that the consignee failed to provide a wharf within the time stipulated, and that for the delay thus caused he was bound to pay demurrage.

In the absence of any custom or express contract, it is, no doubt, as the district judge found, the ship's business to find a berth in the port of discharge. The record is without proof of custom, and singularly barren of evidence calculated to throw light upon the somewhat obscure phraseology of this document, which constitutes the contract of the parties. In our opinion, however, there is

enough upon the face of the bill of lading to warrant the conclusion reached by the district judge. After the usual provisions as to shipment, delivery, and freight, the bill contains the following clauses:

"And 48 hours after the arrival at the above-named port, and notice thereof to the consignee, there shall be allowed for receiving cargo at the rate of one day, Sundays and legal holidays excepted, for every seventy-five tons thereof, after which the cargo consignee or assignee shall pay demurrage at the rate of six cents per ton. * * * After arrival and notice as aforesaid, and the expiration of said 48 hours, said vessel shall have precedence in discharging over all vessels arriving or giving notice after her arrival; and for any violation of this provision she shall be compensated in demurrage, as if while delayed by such violation her discharge had proceeded at the rate of one hundred and fifty tons per day."

The first of these clauses, if standing alone, would not indicate that the consignee was to control the discharge. Having given her 48 hours' notice, and provided herself with a berth, the ship might insist upon discharge there at the rate of 75 tons per day. Thus the ship, and the ship only, could fix the time when lay days should begin, irrespective of the convenience of the consignee's business. But the latter clause indicates that such was not the intention of the parties. By a clear implication it provides that the ship shall not have precedence in discharging over any vessels "arriving or giving notice before her arrival." This seems to contemplate that she must take her turn with other vessels coming to the same consignee, and must to that extent accommodate her time to the exigencies of his business. In the case at bar both master and consignee evidently understood that the ship was thus to wait her turn, presumably at a wharf of consignee's selection; but in this case that is immaterial. Upon arrival the master "asked if there was any chance for a berth," and the respondent promised to let his broker "know when there was," which eventually he did. Being thus required to await his turn with other ships, of whose arrival and notice to the consignee he knew nothing, the master was justified in waiting for a berth till he was informed by the consignee that his turn had come. That the consignee has failed to make any proof in the case of the fact (if it be a fact) that other ships were in ahead of the Rachel Seaman, thus excusing his delay in giving her prompt attention in turn, is his own oversight. Having failed to make such proof, he cannot avail of the excuse.

The decree of the district court is affirmed, with interest and costs.

CRASWELL v. BELANGER.

(Circuit Court of Appeals, Ninth Circuit. May 8, 1893.)

No. 75.

1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—RECORD.

The complaint originally filed in a cause that was afterwards removed to the United States circuit court alleged that plaintiff was a resident of the state of Washington, and defendant was a resident of Prince Edward's island, in the dominion of Canada, on certain dates therein mentioned, all of which were prior to the bringing of the action. The petition for removal alleged that "said suit is a controversy between plaintiff, a citizen of Washington, and this defendant, who is * * * a citizen of the British empire," etc. *Held*, that it does not affirmatively appear that this diversity of citizenship existed at the time the action was commenced, and the circuit court had no jurisdiction.

2. SAME—APPEAL—REVERSAL—COSTS.

As it appears that the improper removal in such case is solely the fault of the defendant in failing to state in his petition the necessary jurisdictional facts, the reversal of the judgment against him on a writ of error brought by him must be at his costs.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

This was an action by Mary E. Belanger against Robert H. Craswell for breach of marriage promise. There were verdict and judgment for plaintiff in the court below, and the defendant brings error. Judgment reversed.

James Hamilton Lewis, for plaintiff in error.

George W. Tyler, (Tyler, Hays & Tyler, on the brief,) for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This action was commenced in the superior court of the state of Washington for the county of Jefferson on October 12, 1891, by the defendant in error, (plaintiff in the court below,) to recover damages for breach of promise of marriage. The plaintiff in error, (defendant in the court below,) before the time for answer expired, appeared and filed a petition and bond for the removal of the case from the state court to the United States circuit court for the district of Washington, whereupon the state court made an order allowing the removal, and proceeded no further in the case. The record from the state court was filed in the United States circuit court on the 24th of March, 1892. No objection was ever made by either party as to the sufficiency of the record to authorize the removal of the case. The case was tried in the circuit court, and resulted in favor of the defendant in error.

The plaintiff in error in this court, at whose instance the case was removed from the state court, now claims, for the first time, that the circuit court had no jurisdiction to hear or try the case. The question of jurisdiction is to be determined by the test of the

sufficiency of the record to show the necessary diversity of the citizenship of the parties. Upon this point the complaint alleges "that defendant is, and at all the times hereinafter stated was, a resident of Bloomfield, Prince Edward's island, in the dominion of Canada, * * * and that the plaintiff is a resident of Port Townsend, in the state of Washington." The various times alluded to in the complaint refer to certain dates in the years 1884, 1888, 1890, and 1891. The petition for removal states that "said suit is a controversy between the plaintiff, who is a citizen of the state of Washington, and this defendant, who is not a citizen of the state of Washington, and is a foreign citizen and subject; that is to say, a citizen of the British empire, and a subject of her Britannic majesty, Queen Victoria." It does not affirmatively appear from these statements that at the time of the commencement of the action the plaintiff therein was a citizen of the state of Washington, or that the defendant therein was a citizen of the dominion of Canada. The record is silent as to the citizenship of the parties at that time. This omission is fatal to the jurisdiction of the circuit court. The supreme court of the United States has repeatedly and uniformly held:

1. That in order to justify the removal of a cause from a state court to the national courts the necessary jurisdictional facts must affirmatively appear in the record of removal, that no presumptions can be indulged in, in favor of the jurisdiction of the national courts, and that, where the jurisdiction of the national courts does not affirmatively appear in the record, the appellate court will on its own motion notice the defect. *Robertson v. Cease*, 97 U. S. 648; *Turner v. Trust Co.*, 106 U. S. 554, 1 Sup. Ct. Rep. 519; *Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. Rep. 510; *Timmons v. Land Co.*, 139 U. S. 378, 11 Sup. Ct. Rep. 585. See, also, *Telephone Co. v. Robinson*, 48 Fed. Rep. 769, 1 C. C. A. 91, and authorities post.

2. That in order to authorize the removal of a cause, the diversity of the citizenship of the parties must be shown to exist at the time of the commencement of the action, as well as at the time of the filing of the petition for the removal. *Gibson v. Bruce*, 108 U. S. 561, 2 Sup. Ct. Rep. 873; *Railway Co. v. Shirley*, 111 U. S. 358, 4 Sup. Ct. Rep. 472; *Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. Rep. 510; *Akers v. Akers*, 117 U. S. 197, 6 Sup. Ct. Rep. 669; *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. Rep. 518; *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. Rep. 9; *Graves v. Corbin*, 132 U. S. 591, 10 Sup. Ct. Rep. 196; *La Confiance Compagnie v. Hall*, 137 U. S. 61, 11 Sup. Ct. Rep. 5. That an averment as to the residence of the parties is not the equivalent of an averment of citizenship for the purpose of giving the national courts jurisdiction. *Robertson v. Cease*, 97 U. S. 648; *Insurance Co. v. Rhoads*, 119 U. S. 237, 7 Sup. Ct. Rep. 193; *Everhart v. College*, 120 U. S. 223, 7 Sup. Ct. Rep. 555; *Menard v. Goggan*, 121 U. S. 253, 7 Sup. Ct. Rep. 873. See, also, *Telephone Co. v. Robinson*, (5th Circuit,) 1 C. C. A. 91, 2 U. S. App. 148, 48 Fed. Rep. 769; *Tinsley v. Hoot*, 3 C. C. A. 612, 53 Fed. Rep. 682.

3. That, where the record (as in this case) does not affirmatively show that the circuit court of the United States had jurisdiction, the judgment will be reversed without any inquiry into the merits; but, where it appears (as it does here) that the fault of the improper removal of the case rests solely with the plaintiff in error in failing to state in his petition for removal the necessary jurisdictional facts, the reversal must be at his costs. *Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. Rep. 510; *Hancock v. Holbrook*, 112 U. S. 229, 5 Sup. Ct. Rep. 115; *Halsted v. Buster*, 119 U. S. 341, 7 Sup. Ct. Rep. 276; *Clay v. College*, 120 U. S. 223, 7 Sup. Ct. Rep. 555; *Menard v. Goggan*, 121 U. S. 253, 7 Sup. Ct. Rep. 873; *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. Rep. 518; *Graves v. Corbin*, 132 U. S. 590, 10 Sup. Ct. Rep. 196.

These authorities conclusively show that the state court had no authority to remove this case, and that the circuit court had no jurisdiction in the premises. The judgment of the circuit court is therefore reversed, with costs against the plaintiff in error, (defendant in the court below,) and this case is remanded, with directions to the circuit court to enter a judgment against him for the costs incurred in the circuit court, and in this court, and thereupon to remand the case to the state court from whence it came,

O'CONNELL v. REED et al.

(Circuit Court of Appeals, Eighth Circuit. May 15, 1893.)

No. 210.

1 FEDERAL COURTS—FOLLOWING STATE PRACTICE.

The federal courts will conform the practice, pleadings, and forms and modes of proceeding in civil causes in the circuit courts, as near as may be, to the statutes of the states in which they are held, and to the practice of the courts in those states; but it is their right and duty to reject any subordinate provision of the state statutes, and any rule of practice of the state courts, which, in their judgment, will "unwisely incurber the administration of the law, or tend to defeat the ends of justice, in their tribunals."

2 SAME—JURISDICTIONAL AMOUNT—STATE DECISIONS.

Plaintiff sued out an attachment under Code Civil Proc. Kan. § 191, for a debt due, and another, against the same defendant, under section 230, for a debt not due. Both claims grew out of the same running account, and together exceeded \$2,000. He brought suit in the United States circuit court for the whole amount. Defendant, having demurred, cited section 83 of the Code, allowing a defendant to demur where causes of action were improperly joined, and section 92, requiring separate petitions for each cause of action where the demurrer was sustained, and a decision of the supreme court of Kansas construing these provisions, and holding that it was a misjoinder to include in one petition a claim due, and one not due; and he asked judgment on his demurrer in this case because neither claim alone was within the jurisdiction of the court. *Held*, that Rev. St. U. S. § 914, which provides that the "practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes" in the federal courts "shall conform, as near as may be" to those existing in the courts of the states in which they are held, does not require those courts to follow state decisions in matters which affect their jurisdiction, and as the amount in controversy in this case is within the jurisdiction of the court the demurrer will be overruled.