

munity would be admissible to bring home knowledge of the fact to Keith, who resides there. 1 Brick. Dig. p. 847, §§ 616-617. But the notoriety of a sale or purchase in a community is nothing more than hearsay, and is inadmissible as evidence, and it is, in our opinion, inadmissible to raise a presumption of knowledge in the community of such sale or purchase. *Steele v. Worthington*, 7 Port. (Ala.) 266; *Yarborough v. Moss*, 9 Ala. 382. If, then, the court misconceived the purpose of the inquiry as to the notoriety of Fennell's selling goods at cost, as is claimed, we are still of the opinion that there was no error in the ruling of the court in reference to it. There was evidence, admitted without objection, that Fennell sold an overcoat at a price below cost, and that he sold some other goods at very low prices, some of them, in the opinion of the witnesses, at cost; that no one else in the community had the reputation of selling as cheaply; and that it was generally understood that he was selling cheaply. But the evidence further was that he was selling for cash and others on credit, that he bought for cash generally, and most other merchants there bought on credit, and that discounts are given from 1 to 10 per cent. on cash purchases. It also appeared that while Fennell actually sold some goods of a particular class somewhat cheaper than merchants there generally did, there were some kinds of goods that could be bought cheaper elsewhere, and it appeared that some of the goods bought from Fennell by merchants, or by other persons for them, were sold by such merchants at the same prices. The fact that Fennell sold goods cheaper than other merchants generally in the same place did, and that he sold some particular article, whether as a leader or otherwise, at cost or below cost, is not of itself such a suspicious circumstance as, if known to Keith, ought to have put him on inquiry, and which, if followed up, would necessarily or naturally have led to knowledge of Fennell's fraudulent intent. Considering all the facts and circumstances as shown by the evidence, we are satisfied with the conclusions heretofore reached by us in the case.

There was evidence of Fennell's removing some goods from his store in Scottsboro to Woodville some time in the fall of 1884, and prior to Keith's purchase; but there was no evidence, direct or circumstantial, of Keith's knowledge of this. There was also evidence of Fennell's removing goods from a store in Woodville, 20 miles from Scottsboro, about the time of the seizure by the marshal. This was a very suspicious circumstance, but this occurred, even if known to Keith, after the purchase by him.

Rehearing denied.

McMULLEN v. NORTHERN PAC. R. CO.

(Circuit Court, E. D. Wisconsin. August 4, 1893.)

1. REMOVAL OF CAUSES—PRACTICE — REFUSAL OF PARTY TO RECOGNIZE JURISDICTION.

In a cause removed to a federal circuit court from a state court which had refused to order the removal, plaintiff, after refusing to recognize the

jurisdiction of the federal court, although he had due notice of its order docketing the cause, will not be heard in the federal court in opposition to a motion to dismiss the cause because it has been pending three stated terms without prosecution.

2. **SAME—WAIVER BY DEFENDANT.**

Where a state court persists in holding a cause for trial after it has been duly removed to a federal court, the defendant does not, by participating in such trial, waive his rights in the federal court. *Insurance Co. v. Dunn*, 19 Wall. 214.

At Law. Action by Mary McMullen, administratrix, against the Northern Pacific Railroad Company. Heard on defendant's motion to dismiss. Granted.

Ryan & Merton, for plaintiff.

Thomas H. Gill, for defendant.

SEAMAN, District Judge. The defendant moves to dismiss, upon due notice and affidavits, (1) under circuit court rule 40, because the cause has been pending three stated terms of the court without prosecution; and (2) under rule 69, because plaintiff has not given security for costs. The record shows that the action was commenced in the county court of Waukesha county, July 27, 1891, and that upon a petition and bond for removal filed in that court, and transcript of the record filed in this court, before the first day of its succeeding term, an order of this court was made on October 5, 1891, (being the first day of said next term,) docketing said cause, upon full understanding of the circumstances, and of the refusal of said county court to order removal. The plaintiff was duly notified of such order of this court, but declined to recognize jurisdiction; has neither appeared nor moved for remand, but now makes special appearance, by counsel, to urge in opposition to this motion (1) that jurisdiction has never been obtained by this court; and (2) that the defendant has waived all question by proceeding to trial and judgment in the court of original jurisdiction.

Neither of these objections meets the motion to dismiss. The plaintiff has ignored all the proceedings for removal of the cause, and rested upon the claim in her behalf that the petition for removal was not filed in time to become effective. In such case, jurisdiction would remain with the county court, and the plaintiff would be entitled to proceed to judgment, as it is now stated has been the course. On the other hand, if the petition and bond were duly filed, they operated at once to divest that court of all jurisdiction, whether an order for removal was made or refused. *Kern v. Huidekoper*, 103 U. S. 485; *Insurance Co. v. Dunn*, 19 Wall. 214. And in the latter case, if the county court insisted on holding the cause for trial, the participation therein of the defendant, under such requirement, would not waive or affect its rights in this court. *Id.*

With this position of the plaintiff, it is unnecessary—if not improper, in view of the order of October 5, 1891, docketing the cause—to inquire on this motion whether or not the filing of the petition for removal was made effective by the amendment granted by the

county court. It is sufficient that the rules here invoked in behalf of defendant have been violated, and entitle it to dismissal, and that the excuses offered by the plaintiff, by way of objections, all favor such disposition. 1 Desty, Fed. Proc. § 113. The plaintiff cannot claim to hold her cause for hearing in both courts, and, under the circumstances shown, must take dismissal here. It is so ordered, at plaintiff's cost.

CITY OF CARLSBAD et al. v. W. T. THACKERAY & CO.

(Circuit Court, N. D. Illinois, N. D. August 10, 1891.)

TRADE-MARKS AND TRADE-NAMES—CARLSBAD SALTS.

The city of Carlsbad, Bohemia, sole owner of the celebrated mineral springs of that city, having for 50 years been engaged in the business of evaporating the waters, and selling the salts thus obtained under the names "Carlsbad Salts" and "Carlsbad Sprudel Salts," is entitled to an injunction to restrain other parties from using these words, even with the word "Artificial" added thereto, as names for artificial salts containing the same chemical elements, although the artificial salts may be superior to the natural product.

In Equity. Bill by the city of Carlsbad and others against W. T. Thackeray & Co. to restrain respondent from infringing complainants' trade-marks. Decree for complainants.

A. M. Gerstlet and Jerome Carty, for complainants.

John G. Elliott, for defendant.

BLODGETT, District Judge. By the bill in this case, complainants charge that the city of Carlsbad, situated in Bohemia, in the empire of Austria, is the sole owner of the celebrated mineral springs of said city, and has for many years been engaged in the business of evaporating the waters of said springs, and thereby producing the essential salts contained in them, and from which said waters derive their peculiar medical qualities and value, and has put said salts upon the market under the names of "Carlsbad Sprudel," "Carlsbad Salts," and "Carlsbad Sprudel salts," and that such salts have become widely known by such names, and are understood to mean and indicate salts obtained from the natural waters of the springs so owned by the city of Carlsbad. That defendant has engaged in the business of making artificial salts, and putting them upon the market, and offering them for sale, by the names and designations of "Carlsbad Sprudel" and "Carlsbad Sprudel (Artificial)," which salts are not made from the natural waters of the Carlsbad Springs, but, by reason of the name "Carlsbad" being used, are calculated to deceive purchasers and thus injure the business of the complainant and also impose upon the public. An injunction is prayed, restraining defendant from making and selling any artificial salts as "Carlsbad Salts" or as "Carlsbad Sprudel," and from using the word "Carlsbad" as the designation of the defendant's salts.

Defendant is a corporation doing business in the city of Chicago, and on the hearing of the motion for the injunction admitted that