

record in this court do not constitute a general appearance in the action, nor cut off defendant from contending that the service of process gave the state court no jurisdiction, and that the attachment was issued without authority. The case cited from the Sixth circuit (*Construction Co. v. Simon*, 53 Fed. 1) is not followed in this nor in several of the other circuits. See, in this circuit, *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. 635; *Golden v. Morning News*, 42 Fed. 112; *Bentlif v. Finance Corp.*, 44 Fed. 667; *Clews v. Iron Co. Id.* 31; *Wooden-Ware Co. v. Stem*, 63 Fed. 676; *Vermilya v. Brown*, 65 Fed. 149; in the First circuit, *Perkins v. Hendryx*, 40 Fed. 657; in the Sixth circuit, *Brooks v. Dun*, 51 Fed. 140; in the Seventh circuit, *Atchison v. Morris*, 11 Fed. 582; *Ahlhauser v. Butler*, 50 Fed. 706. And see, also, *Goldey v. Morning News* (decided yesterday in United States supreme court) 15 Sup. Ct. 559.

It is objected by plaintiff that the case was not properly removed, since all the defendants did not join in the petition. The two individual defendants who were impleaded with the bank are residents of Rhode Island. So far as appears, they have no property in this state upon which the attachment might be levied. Without such levy, service by publication or personal service upon them without the state conferred no jurisdiction on the state court. It is quite natural, therefore, that they did not concern themselves about removing a cause, all proceedings in which, so far as they were concerned, would be wholly void. Does their failure to unite in the petition of removal, however, deprive the defendant bank, also a resident of Rhode Island, of the right to remove? The second clause of section 2 of the act of 1887 provides that:

"Any other suit [other than such as involve a federal question] of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section [e. g. a suit in which there shall be a controversy between citizens of different states], \* \* \* may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein being non-residents of the state."

It has been held that a petition by all the defendants is essential to a removal under this clause. The third clause of the same section reads as follows:

"When in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit," etc.

This clause is identical with the second clause of the second section of the act of 1875, except that the words "plaintiffs or" have been omitted. The act of 1875 was carefully and fully considered by Judge Brown, sitting in this court, in *Insurance Co. v. Champlin*, 21 Fed. 85, and the conclusion reached that, under the specified conditions, the cause might be removed by one of several defendants, even though the suit contained but a single controversy. A different conclusion has been reached in other circuits (*Thompson v. Railway Co.*, 60 Fed. 773); but, in the absence of controlling authority, the former decision of this court should be followed here. Undoubtedly, there are many decisions of the supreme court which

on a first reading would seem to imply that this last-quoted clause (whether in the act of 1875 or 1887) applied only where the suit contains more than one controversy. But, when these cases are examined, it will be found that in each and all of them there was, at least, one defendant a citizen of the same state as one or more of the plaintiffs; and, of course, in such suits this clause could be availed of only when, besides the controversy between citizens of the same state, there was also a separable controversy between citizens of different states. Besides the supreme court decisions cited by Judge Brown in his opinion, the following, subsequently decided, may be consulted: *Corbin v. Van Brunt*, 105 U. S. 576; *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. 171; *Winchester v. Loud*, 108 U. S. 130, 2 Sup. Ct. 311; *Shainwald v. Lewis*, 108 U. S. 158, 2 Sup. Ct. 385; *Ayres v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. 90; *Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735; *Railway Co. v. Wilson*, 114 U. S. 60, 5 Sup. Ct. 738; *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1034, 1161; *Crump v. Thurber*, 115 U. S. 56, 5 Sup. Ct. 1154; *Safe-Deposit Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733; *Plymouth Con. Gold Min. Co. v. Amador & S. Canal Co.*, 118 U. S. 264, 6 Sup. Ct. 7034; *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32; *Brooks v. Clark*, 119 U. S. 502, 7 Sup. Ct. 301; *Laidly v. Huntington*, 121 U. S. 179, 7 Sup. Ct. 855; *Hedge Co. v. Fuller*, 122 U. S. 535, 7 Sup. Ct. 1265; *Brown v. Trousdale*, 138 U. S. 389, 11 Sup. Ct. 308; *Bellaire v. Railroad Co.*, 146 U. S. 117, 13 Sup. Ct. 16; *Wilson v. Oswego Tp.*, 151 U. S. 56, 14 Sup. Ct. 259.

The case being properly removed, it only remains to determine the motion to vacate the attachment and service of summons. The statutes of the United States expressly prohibit the issuing of an attachment against a national bank or its property before final judgment in any suit, action, or proceeding in any state court. *Rev. St. U. S. § 5242*; *Bank v. Mixter*, 124 U. S. 721, 8 Sup. Ct. 718. The attachment was therefore improperly issued, and should be vacated; and, inasmuch as the summons was personally served outside of the limits of the state, such service should be set aside and declared void. Motion granted.

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SNEAD v. SELLERS et al.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1894.)

No. 256.

1. JURISDICTION OF FEDERAL COURTS — DIVERSE CITIZENSHIP — RESIDENT OF TERRITORY.

A citizen of the Indian Territory cannot sue a citizen of a state in the federal courts.

2. SAME—DUTY OF APPELLATE COURT.

It is the duty of an appellate court to direct the dismissal of the case, where the complaint shows that the requisite diverse citizenship does not exist.

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

This was an action by John S. Snead against A. F. Sellers and others to try title to real estate. The circuit court rendered judgment, on the verdict of a jury, establishing a boundary line. Plaintiff brings error.

S. H. Lumpkins, for plaintiff in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge. The action in this case, trespass to try title, was brought in the circuit court under the following jurisdictional averment:

"Your petitioner, John S. Snead, a nonresident of the state of Texas, now residing and domiciled in the town of Purcell, in Pontotoc county, Chickasaw Nation, Indian Territory, as a licensed trader, and a citizen of the United States, now comes and complains of A. F. Sellers and William Connally, resident citizens of Hamilton county, Texas, and J. I. Musick, N. C. Russell, Solomon Starr, Oliver Newton, and Sarah A. Tandy, all of whom reside in Bosque county, and in said Northern district of Texas, except Mrs. Sarah A. Tandy, who resides in Lavaca county, Texas, and with respect shows to the court that heretofore, to wit," etc.

The record contains no other averment tending to show diverse citizenship of the parties to the suit, and the inference to be drawn from the averment given is that John S. Snead is a citizen of the Indian Territory. It has been uniformly held since *New Orleans v. Winter*, 1 Wheat. 91, that a citizen of a territory cannot sue a citizen of a state in the courts of the United States. See *Barney v. Baltimore City*, 6 Wall. 280-287; *Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510. The last cited case, in addition to recognizing the correctness of the decision in *New Orleans v. Winter*, also declares the duty of the appellate court in cases where it does not appear upon the record that the circuit court has jurisdiction. The judgment of the circuit court should be reversed, and the case remanded, with instructions to dismiss the action, with costs; and it is so ordered.

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THEBO v. CHOCTAW TRIBE OF INDIANS et al.

(Circuit Court of Appeals, Eighth Circuit. January 2, 1895.)

No. 453.

COURTS—JURISDICTION—CHOCTAW NATION.

The United States court in the Indian Territory has no jurisdiction of an action against the Choctaw Nation, or the chief executive officers thereof, when sued in their capacity as such, for an alleged debt or liability of the Nation, and when the judgment will operate against the Nation.

In Error to the Circuit Court of the United States in the Indian Territory.