

DEMOND *v.* CRARY.

(*Circuit Court, E. D. New York. March 26, 1880.*)

PLEA IN ABATEMENT—PRIOR ACTION PENDING—COUNTER CLAIM.—An action wherein defendant had set up a counter claim was removed from the state court to the U. S. circuit court. Subsequently another action, begun by the defendant in the first suit against the plaintiff, was also removed to the U. S. circuit court, and noticed for trial. At the time of the hearing in the second action a motion was granted in the first action, and an order made, permitting the withdrawal of the counter claim. *Held*, that such an order, under the circumstances, did not defeat the plea in abatement in the second action of another action pending between the same parties.

Jesse Johnson, for plaintiff.

S. W. Holcombe, for defendant.

BENEDICT, J. The counter claim made in the prior action and set up in the plea in abatement, is, in legal effect, an action by the plaintiff against this defendant. *Fettretch v. McKay*, 47 N. Y. 426. Being for the same cause of action as the present suit, it was properly pleaded in abatement and constitutes a good defence. *Ins. Co. v. Brune's Assignee*, 96 U. S. (6 Otto) 592.

The order permitting the withdrawal of the counter claim in the former action, obtained since the issue was perfected in this suit, and after the same had been noticed for trial by the plaintiff upon the issues tendered by the plea—which order, of course, is not set up in the pleadings, having been obtained since the commencement of the term at which the cause was noticed for trial—is not sufficient to defeat the plea. The defendant is entitled to judgment dismissing the complaint.

In re TIBURCIO PARROTT.*(Circuit Court, D. California. March, 1880.)*

TREATY-MAKING POWER.—Under section 10, art. 1, of the constitution of the United States, and section 2, art. 2, the treaty-making power has been surrendered by the states to the national government, and vested in the president and senate of the United States.

TREATIES—EFFECT OF.—Under article 1, the constitution of the United States and laws made in pursuance thereof, and treaties made under its authority, are the supreme law of the land; and the judges in every state, both state and national, are bound thereby, anything in the *constitution or laws* of any state to the contrary notwithstanding.

CHINESE TREATY WITHIN TREATY-MAKING POWER.—The provisions of articles 5 and 6 of the treaty with China of June 18, 1868, recognizing the right of the citizens of China to emigrate to the United States for purposes of curiosity, trade and permanent residence, and providing that Chinese subjects residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel and residence as may be enjoyed by the citizens or subjects of the most favored nations, (16 Stat. 740,) are within the treaty-making power conferred by the constitution upon the president and senate, and are valid, and constitute a part of the supreme law of the land.

CONSTITUTION OF CALIFORNIA—TREATY.—Any provision of the constitution or laws of California in conflict with the treaty with China is void.

SECTION 2 OF ART. 19 OF THE CONSTITUTION OF CALIFORNIA, providing that no corporation formed under the laws of the state shall, directly or indirectly, in any capacity, employ any Chinese or Mongolian, and requiring the legislature to pass such laws as may be necessary to enforce the provision, is in conflict with articles 5 and 6 of said treaty with China, and is void.

ACT MAKING IT AN OFFENCE TO EMPLOY CHINESE.—The act of February 13, 1880, to enforce said article of the constitution making it an offence for any officer, director, agent, etc., of a corporation to employ Chinese violates the treaty with China, and is void.

THE PRIVILEGES AND IMMUNITIES which, under the treaty, the Chinese are entitled to enjoy to the same extent as enjoyed by the subjects of the most favored nation, are all those rights which are fundamental, and of right belong to citizens of all free governments; and among them is the right to labor, and to pursue any lawful employment in a lawful manner.

LABOR—PROPERTY.—Property is everything which has an exchangeable value. Labor is property, and the right to make it available is next in importance to the right to life and liberty.