

so situated as to authorize a removal, this court must follow that construction. The case of *Myers v. Swann*, 107 U. S. 546, S. C. 2 Sup. Ct. Rep. 685, has not overruled these cases.

The removal act of 1867 is a more extensive act as to time when it may be put in operation than many of the other removal acts, in that it may be invoked at any time before trial. It requires the court, in order to transfer the cause, to inquire into no fact beyond the belief or fear on the part of the plaintiff or defendant seeking the removal that on account of local prejudice he cannot obtain justice in his cause in the local tribunals. This might wisely be permitted if the local tribunals were of the locality of the adverse party. But it seems to me that the intention of congress was that the locality—the citizenship—of the party adverse to that of him seeking the removal should be in the state where the local prejudice is averred to exist. The fact that enough exists to give the circuit court jurisdiction under the general statutes—viz., citizenship of different states—is not enough under the local prejudice act. In this case Mr. and Mrs. Nicholson are citizens of Mississippi, and the cause is pending in Louisiana; they are the chief defendants.

Let the cause be remanded.

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LACROIX v. LYONS.<sup>1</sup>

(Circuit Court, E. D. Louisiana. March 6, 1886.)

1. REMOVAL OF CAUSES—REMAND—ALIENAGE OF PARTIES.

A motion to remand on the ground of the alienage of both parties will be refused in a case removed into the circuit court where the jurisdiction is apparent on the record, because, in such a case, the jurisdiction can only be attacked by sworn plea or exception.

2. SAME—CASE AT LAW AND IN EQUITY.

Where a case comes from a state court as one case, of which the circuit court has jurisdiction, that court does not lose jurisdiction because one part of the case has to be tried on the equity side, and the other part on the law side, of the court.

On Motion to Remand.

*Ernest T. Florance*, for defendant.

*Ernest B. Knittschnitt*, for plaintiff.

PARDEE, J. This suit was instituted in the civil district court of the parish of Orleans for an injunction to prevent infringement of a trade-mark. The petition alleged that the plaintiff was an alien citizen of France, and that the defendant was a citizen of one of the United States. An injunction *pendente lite* was issued. The defendant filed

<sup>1</sup> Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

an answer denying plaintiff's right to the alleged trade-mark, claimed it for himself, and further set up "that under the law of France of June 23, 1857, entitled '*Sur les marques de fabrique et de commerce*,' plaintiff had no title to said trade-mark in France, and under the treaties of the United States and France no title thereto in the United States." The defendant, besides answering, filed a demand in reconvention for damages for the illegal and wrongful issuance of the injunction, and for damages resulting from the publication thereof, and for attorney's fees; and at the conclusion of the reconventional demand the averment is made that plaintiff resides in the republic of France and defendant in the parish of Orleans. Thereupon the plaintiff filed a petition and bond for removal of the case to this court. In the petition for removal is an allegation that the plaintiff was, at the commencement of the suit, and still is, an alien, a resident and citizen of the French republic, and that the defendant then was and still is a citizen of one of the United States. The state court accepted the bond, and directed the removal of the case.

In this court the transcript has been filed, and the plaintiff has recast his pleading so as to conform to the equity rules of this court; and in the recast bill the averment is again made of alienage of plaintiff, and the citizenship of defendant, and a case is made that in part arises under the laws of the United States. After the transcript was filed in this court the defendant made a motion to remand the cause to the state court on the ground that both plaintiff and defendant were aliens, the one being a citizen of France and the other of Great Britain. This motion was postponed to allow the complainant to recast his pleadings to enable the court to determine whether the case should go on the equity docket or law docket, or both. Since the pleadings were recast the motion to remand is again made on the same ground of alienage of both parties.

This motion is now for decision, and is refused because (1) when a case is once brought in this court with jurisdiction apparent on the record, the jurisdiction should only be attacked by sworn plea or exception. Equity Rules, 31; Circuit Court Rules, No. 7. See *Hoyt v. Wright*, 4 Fed. Rep. 168, and the case of *Hartog v. Memory*, 116 U. S. 588, S. C. 6 Sup. Ct. Rep. 521. (2) Because if the alienage of both parties is established, still the jurisdiction of the court is apparent on the record, as the case is one arising under the treaties of the United States. See *Railroad Co. v. Mississippi*, 102 U. S. 135. (3) Because as the requisite citizenship to warrant a removal to this court was apparent, on the record, the allegation in the petition for removal of the alienage of the plaintiff and the citizenship of the defendant was a useless averment, and did not operate to hinder the removal from being claimed and operative on the ground that the case was one arising under the public treaties of the United States. See section 3, Act 1875. (4) Because if the case were remanded on the ground claimed, it could be at once removed again to this court, and