

account of such prejudice or local influence, to remove said cause. Deponent further deposes that the facts stated in the foregoing petition for removal by the said Richmond & Danville Railroad Company are true."

A bond was also filed, in accordance with the law. The order of the judge of the superior court was as follows:

"Upon considering the foregoing petition, bond, and affidavit, it is ordered that the bond be accepted and approved, and that this court proceed no further in this case. It is further ordered that the clerk of this court make out a complete transcript of the record of this case, and of all processes, pleadings, depositions, testimony, and other proceedings therein had, and furnish the same to the petitioner, the Richmond & Danville Railroad Company, or its counsel, in order that the same may be filed in the circuit court of the United States for the Northern district of Georgia."

The record was filed in this court September 26, 1887, and a motion is now made to remand the case to the state court. The motion to remand is based on the ground that under the act of March 3, 1887, (24 St. at Large, 552,) it is now necessary, even as to a defendant seeking a removal, to make a stronger case before this court to justify retaining jurisdiction than would have been necessary under the original act of 1867, (Rev. St. U. S. § 639, subsec. 3.) In other words, that the language "when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have a right, on account of such prejudice or local influence, to remove said case," (Act March 3, 1887, § 2,) was intended to change the law and practice, as it formerly existed, of removal by affidavit of the party. Before the passage of the last-named act, the law in terms authorized the removal upon the affidavit of either party stating "that he has reason to believe, and does believe, that from prejudice or local influence, he will not be able to obtain justice in said state court." The latter part of section 2 of the act of March 3, 1887, as to removals by plaintiffs on account of prejudice or local influence, is in the following language:

"At any time before the trial of any suit which is now pending in any circuit court, or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe, and did believe, that from prejudice or local influence he was unable to obtain justice in said state court, the circuit court shall, on application of the other party, examine into the truth of the affidavit, and the grounds thereof; and, unless it shall appear to the satisfaction of the said court that said party will not be able to obtain justice in such state court, it shall cause the same to be remanded thereto."

This in terms makes it the duty of the court, in the case of a removal by a plaintiff, on the application of the other party to examine into the truth of the affidavit, and the grounds thereof. But no such provision is made as to a case removed by a defendant. It is clear from this that it was intended by congress to establish a different rule as to defendants removing cases to this court from that of plaintiffs. And the reason for a different rule is apparent: The plaintiff, in a case in

the state court, has gone there voluntarily, whereas the defendant has been taken there against his will; certainly without his consent. The law, therefore, very properly places more restrictions around the right to remove in the former than in the latter case. It will also be seen that, even as to plaintiffs, the right to remove by affidavit, as formerly practiced, still exists, subject to an examination by this court, after the case reaches it, as to sufficiency of the grounds of removal. Now, what is required of a defendant seeking a removal under the act of 1887? An examination of that act will show that the act of 1867 (subsection 3, Rev. St. U. S. § 639) is not expressly repealed. It is still in force, therefore, except in so far as it is repealed by necessary implication. Now, is the language "shall be made to appear to said circuit court," sufficient to indicate an intention to change the rule as it existed under the original act of removal, by affidavit of the party? Is it not, rather, a proper construction to hold that the two acts should be read and construed together, and that so read and construed, the law now is that it shall be made to appear to this court by the affidavit of the defendant that he has reason to believe, etc.—this affidavit to state, of course, in addition to what would have been necessary under the old act, "that he will not be able to obtain justice in any other state court to which the defendant, under the laws of such state, had the right, on account of such prejudice or local influence, to remove said case." It seems to me that the latter view is the only one that can be adopted, if proper construction be given to all the legislation, as it now stands, on this subject. Again, the express provision in the act of March 3, 1887, as to the duty of this court to examine into the sufficiency of the grounds for removal, in the case of a plaintiff removing his case here, and the absence of any such provision as to a defendant so removing, seems to be significant of the fact that the law as it formerly existed is not changed as to defendants.

It was suggested and argued by counsel for plaintiff, that the application of defendant to remove this case should have been made originally to this court. Finding the case in this court, removed here by an order of the judge of the state court, it seems to me unnecessary to consider this question. I determine, whether or not, finding the case here, I should retain jurisdiction. I think the court should retain jurisdiction for the reasons I have stated, and therefore the motion to remand is denied.

After writing the foregoing opinion, and before filing it, I have received the Federal Reporter of November 29, 1887, and I find therein (volume 32, p. 417) an opinion in the case of *Fisk v. Henarie*, from the circuit court in Oregon, rendered by Judge DEADY, in which he reaches the same conclusion as to the proper construction of that part of the act of 1887 under consideration, that I have announced above. I am gratified to have the concurrence of this learned judge in the view I have taken of this new law.

GAVIN v. VANCE.

(Circuit Court, W. D. Tennessee. December 24, 1887.)

1. REMOVAL OF CAUSES—ACT OF MARCH 3, 1887—CITIZENS OF DIFFERENT STATES—NON-RESIDENT DEFENDANTS.

Where the suit involves a controversy between citizens of different states, and the federal jurisdiction depends solely on that fact, if the suit be one in which the plaintiff is a citizen of the state in which the suit is brought, and the defendant a non-resident of that state, the latter may remove the case from the state court in which it is brought to the proper federal court, under the act of March 3, 1887.

2. SAME—ORIGINAL JURISDICTION—DISTRICTS IN WHICH SUIT MAY BE BROUGHT.

While the right of removal may depend on the capacity of the particular federal court to entertain original jurisdiction of the suit sought to be removed, the act of March 3, 1887, permits a plaintiff to sue the defendant in the federal district of his own residence, as well as in that of which the defendant is an inhabitant, when the federal jurisdiction depends only on the fact of a diverse citizenship of the parties, and therefore such a suit is removable by the defendant, if brought in a state court of the plaintiff's own state, as this was. *Yuba County v. Mining Co.*, 32 Fed. Rep. 183, considered.

3. SAME—TIME OF REMOVAL—CODE TENN. §§ 5022-5094—EFFECT OF FILING ANSWER.

Under the provisions of the Tennessee Code, regulating equity proceedings against non-resident defendants, and the equity rules of practice governing those courts, the filing of an answer or plea by the defendant does not abridge the time allowed for removal, and his petition is still in time if filed before the time elapses allowing him to defend the suit. It is the expiration of the time allowed to defend which terminates the right of removal, and not the filing of the demurrer, plea, or answer, under the act of March 3, 1887.

4. SAME—ORDER OF PUBLICATION FIXING TIME.

If the order of publication be issued under the *attachment* laws, instead of under the sections of the Code regulating chancery proceedings, it can have no effect to foreclose the time of removal, if the suit be of an equitable nature, and the attachment has issued on the fiat of the chancellor. The distinctions in procedure between these two classes of cases must be observed in their relation to the act of congress of March 3, 1887, regulating removal to the federal court.

In Equity. Motion to remand.

H. C. Warinner, for the motion.

C. F. Vance, *contra*.

HAMMOND, J. Since the argument of this motion, counsel for the plaintiff has suggested an additional ground for remanding the case, which will be first considered. He cites the case of *Yuba Co. v. Mining Co.*, 32 Fed. Rep. 183, and insists that, under the new act of congress of March 3, 1887, (24 St. 552,) this court could have had no *original* jurisdiction of this case, because the defendant Vance, not being an inhabitant of this district, could not have been sued here; and, such being the fact, that the cause cannot be removed under the second section of the new act, which confines the right of removal to those cases of which this court could have acquired *original* jurisdiction under the first section of the act. The case cited seems to hold this, unless there be a distinction between corporations and natural persons in relation to this jurisdiction, that being