

NELSON v. HENNESSEY and another.

(Circuit Court, D. Minnesota. December 15, 1887.)

REMOVAL OF CAUSES—CITIZENSHIP—PARTIES.

In an action for damages for the death of plaintiff's intestate, caused by the falling of a building, the owner of the building, a resident of another state, and the tenant in occupation a resident of the state where action was brought were joined as parties defendant. The complaint did not show that the tenant was in any way responsible for the unsafe condition of the building, or that he was bound to put the building in good condition, but alleged merely that he was the tenant in occupation. *Held*, that the tenant was improperly joined as a defendant, and such joinder could not operate to defeat a non-resident defendant's right of removal from the state court to the federal court.

On Motion to Remand.

Otto J. Nelson, as administrator, brought action for damages for the death of his intestate, caused by the falling of a building, making David J. Hennessey, the owner of the building, and Johnson, the tenant in occupation, defendants. Hennessey was a resident of another state, and on that ground secured a removal to the federal court. Plaintiff then moved to remand, as only one of the defendants was a resident of another state, and the action was for a joint tort.

Berryhill & Davidson, for plaintiff.

Lawler & Derment, for defendants.

BREWER, J. This is a motion to remand. The complaint charges the death of the plaintiff's intestate through the negligence of the defendants, and seeks to recover therefor. There are two defendants, Hennessey and Johnson. Hennessey, by reason of difference of citizenship, would be entitled to a removal. Johnson, being a citizen of the same state with the plaintiff, would not. It is claimed that this is an action for a joint tort, and therefore, unless both defendants have a right of removal, this court cannot take jurisdiction, and the case must be remanded. This is undoubtedly true if the complaint discloses a joint tort. But it is also true that, where there has been a tort committed by one party, the plaintiff cannot join another and merely nominal party, as defendant, so as to prevent a removal to which the real defendant is entitled. Now, this complaint charges that the defendant Hennessey was the owner of a building; that it was unsafe, the foundation insecure; that its condition was known to Hennessey; and that, by reason of its falling, plaintiff's intestate was injured and killed. There thus appears a cause of action against this defendant, through whose negligence the injury was occasioned. Then, as to the defendant Johnson, it simply alleges that he was a tenant in occupation of the building. It nowhere appears that the building was safe and secure when Johnson leased it, and that, through his negligence, it became insecure and unsafe, and there is no allegation that the tenant was under any contract or other obligation to repair the building or make it secure,—nothing but the simple fact that Johnson was the tenant and in occupation. Now, a tenant

takes a building as he finds it, and if he preserves it in the same condition in which he received it, he is not liable for any injury which results alone from such condition. He must be guilty of some wrong, either of negligence, causing the insecurity and instability, or of disregard of some contract obligation to put it in repair and good condition. Clearly, so far as is disclosed, he was under no responsibility for the injury. He was therefore improperly joined. The only real party is the owner of the building, and as he is a citizen of another state, he is entitled to a removal to this court.

Motion to remand overruled.

SHORT *v.* CHICAGO, M. & ST. P. RY.

(Circuit Court, D. Minnesota. December 15, 1887.)

1. REMOVAL OF CAUSES—ACT OF MARCH 3, 1887—LOCAL PREJUDICE.

Act of congress of March 3, 1887, § 2, provides that, in suits in the state courts, where the defendant is a citizen of another state, he may have the cause removed to the circuit court of the United States if it shall be made to appear to the circuit court that from prejudice or local influence he cannot obtain justice in the state court. *Held* that, under this section, a mere formal affidavit by the defendant that he believes that he cannot obtain justice because of prejudice or local influence is not sufficient; but the fact that such prejudice or local influence exists must be shown to the circuit by oral testimony or by affidavit.

2. SAME.

The affidavit showing local prejudice and influence as a ground for the removal of causes from the state to the federal courts, under the provisions of act of congress of March 3, 1887, may be filed in the state court, and a certified copy thereof sent up to the circuit court.

3. SAME.

The provisions of the act of congress 1867, relating to the removal of causes from the state to the federal courts on the ground of prejudice and local influence, were repealed by the provisions of the act of congress of March 3, 1887, even though express words of repeal were not used.

4. COURTS—ACT OF MARCH 3, 1881—SUIT AGAINST CITIZEN OF ANOTHER STATE.

Under the provisions of act of congress of March 3, 1887, an action may be maintained in the circuit court of the United States against a citizen of another state.

On Motion to Remand.

The plaintiff, Allen M. Short, brought action against the defendant railroad company, in the state court. The defendant served an order of removal to the circuit court of the United States, whereupon the plaintiff moves to remand to the state courts, upon the ground that the affidavit upon which the order of removal was based was insufficient.

Wilson & Bowers, for plaintiff.

W. H. Norris and Flandrau, Squires & Cutcheon, for defendant.

BREWER, J. This is a motion to remand. The action was brought by a citizen of Minnesota against this railroad corporation, which is a