

Upon default judgment was entered against both defendants, under the practice in that state. Afterwards the non-resident defendant voluntarily appeared, pleaded to the action, and procured a removal of the cause to the proper federal court. Upon a motion to remand it was urged that there was no longer any controversy between the plaintiff and the resident defendant, the judgment concluding their contention. The court ruled against the position taken, and held the federal court to be without jurisdiction to entertain the suit. So here the non-service of process upon Hunter cannot change the character of the suit. The cause of action declared upon is joint. If removable as for a separable controversy, the whole suit is here. *Barney v. Latham*, 103 U. S. 205. The judgment must be a joint judgment. There exists no more of a separable controversy because of non-service than in the case of a default or judgment following service. To constitute a separable controversy within the removal clause of the act of 1875 there must exist in the suit a separate and distinct cause of action on which a separate and distinct suit might properly have been brought, all the parties on one side of such separate controversy being citizens of different states from those on the other. *Hyde v. Ruble*, 104 U. S. 407; *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. Rep. 171. Nor is jurisdiction aided by the provisions of Rev. St. 737, authorizing the court to entertain jurisdiction as to parties properly before the court notwithstanding the absence of necessary parties not inhabitants of, nor found within the district where suit is brought, and providing that non-joinder of such parties shall not constitute matter of abatement or objection to the suit. The statute is not applicable to the facts here. The defendant Hunter is confessedly an inhabitant of, and can be found within the district. He is therefore an indispensable party, and, being a citizen of the same state with the plaintiff, jurisdiction is defeated. *Ober v. Gallagher*, 93 U. S. 199. The cause will be remanded.

GRESHAM, J., concurs.

SMITH *et al.* v. LYON.

(Circuit Court, E. D. Missouri, E. D. March 21, 1889.)

FEDERAL COURTS—JURISDICTION.

Under act Cong. 1887, providing that where the jurisdiction of the federal courts is founded only upon the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or defendant, a suit brought by two persons on a contract entered into by them as partners cannot be maintained in a district of which the defendant and one of the plaintiffs are non-residents.

At Law.

Jefferson Chandler, R. H. Landale, and S. H. West, for plaintiffs.

R. C. Foster and A. E. Wilkinson, for defendant.

BREWER, J. This is a motion to dismiss for want of jurisdiction. The facts are these: There are two plaintiffs. The allegation of the petition is that one plaintiff is a resident and citizen of the state of Arkansas, and the other a resident and citizen of this state, and that the defendant is a resident and citizen of the state of Texas. It is insisted that the suit cannot be maintained here, because both plaintiffs are not residents of this district. Neither is the defendant a resident. The act of congress of 1887 provides that, where the "jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." It is insisted that the use of the words "the plaintiff" implies that all the plaintiffs must be residents, and the mere fact that but one of two plaintiffs having a joint interest is a resident does not give this court jurisdiction. In the judiciary act of 1889 the language in respect to jurisdiction and place of trial was: "Where an alien is a party, or the suit is between a citizen of a state where the suit is brought and a citizen of another state." And in the case of *Strawbridge v. Curtiss*, 3 Cranch, 267, the supreme court, by Mr. Justice MARSHALL, considered the question as to whether an action could be maintained where all of the plaintiffs were not citizens of the state in which the action was brought. He expresses the opinion of the court in these words:

"The court understands these expressions to mean that each distinct interest should be represented by persons all of whom are entitled to sue or may be sued in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts."

In the late case of *Iron Co. v. Stone*, 121 U. S. 631, 7 Sup. Ct. Rep. 1010, that case was cited and approved. It is familiar to all that in some of the statutes respecting the jurisdiction of the federal courts, and providing for removals, the language is "any defendant," or "one having a separable interest." In other cases it is "the plaintiff," or "the defendant," or "the party." The general, and I think I may say the uniform, construction placed upon these last expressions is that they are collective, and include all who are plaintiffs or defendants, and that each must possess all the qualifications. Following this line of decision, it seems to us that all the plaintiffs must reside in the district to enable them to sue, at least in a case in which all are jointly interested in a single cause of action. In this case the action is on a contract made between two plaintiffs as partners and the defendant. There is no separable controversy, and but a single interest. We think, therefore, that the motion is well taken, and must be sustained, and the case dismissed. It is so ordered.

SOUTHERN PAC. R. CO. v. UNITED STATES.

(Circuit Court, N. D. California. March 14, 1889.)

COURTS—FEDERAL CIRCUIT—PUBLIC LANDS—GRANTS—CLAIM TO A PATENT.

Under act Cong. March 3, 1887, § 1, the court of claims has jurisdiction over "all claims founded upon the constitution of the United States, * * * or upon any contract, express or implied, with the government of the United States, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable." Section 2 gives the circuit courts concurrent jurisdiction when the amount involved exceeds \$1,000 and does not exceed \$10,000. *Held*, that the word "claims" embraced a claim to a patent to lands earned by a land-grant railroad company, and that the United States circuit court has jurisdiction of an action to determine the right to a patent under the grant.

In Equity. On demurrer to petition.

J. D. Redding, for plaintiff.

J. C. Carey, U. S. Dist. Atty.

Before SAWYER, Circuit Judge.

SAWYER, J. This is a petition in equity presented to this court under the act of congress of March 3, 1887, entitled "An act to provide for the bringing of suits against the government of the United States," (24 St. 505,) setting up a claim to a tract of land against the United States, and asking that its title to the land be established in the plaintiff, by the decree of this court. The lands described in the petition are odd-numbered sections of the public lands, lying within the limits of the lands granted to the Southern Pacific Railroad Company, to aid in the construction of a railroad by the act of congress approved July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast." 14 St. 292. The facts alleged in the petition, if true, show, that the lands were subject to the grant, and that the petitioner has performed all the conditions prescribed in the act to entitle it to the land, and that no adverse interest had attached. Its right to a patent is shown, yet it is alleged, that though a patent has been often demanded of the proper officers they have wrongfully neglected and refused, and they still do wrongfully neglect and refuse, to issue the patent as required by law. The petitioner prays that it may be adjudged and decreed, that it has performed all the conditions required by the act of congress to entitle it to the land; that it is the owner of the land, and is entitled to a patent therefor; and that it may have such other and further relief, as the case may require, and as may be agreeable to equity. The United States demur to the complaint, on the ground that the court has no jurisdiction to entertain a suit in equity of this character against the United States—that the United States cannot be sued in such case. It is urged (1) that the "claims" provided for in this act, are strictly legal claims, and that there is no jurisdiction in cases in equity. (2) That