

Counsel for Parties.

citation, nor with a notice of an application for the allowance of an appeal, until after the expiration of sixty days, Sundays exclusive, from the time of the rendition of the decree appealed from. In the same affidavit it is stated, however, that the proctor of the appellees was informed that an appeal bond had been presented to the Circuit Court for approval within the sixty days. It is also stated that on the 10th of January, 1884, an order allowing an appeal was entered *nunc pro tunc* as of the date of the presentation of the bond. An affidavit filed by the appellants shows, that, on the day the bond was presented to the Circuit Court, it was approved, allowed and filed in the cause. As upon this motion it rests upon the appellees to show that the bond was not accepted in time, and that has not been done, the motion to vacate the supersedeas is denied.

In this connection we take occasion to say, that motions of this kind, made before the record is printed, must be accompanied by a statement of the facts on which they rest, agreed to by the parties, or supported by printed copies of so much of the record as will enable us to act understandingly, without reference to the transcript on file.

Motion denied.

SCHARFF & Another *v.* LEVY & Another.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Submitted November 24, 1884.—Decided December 15, 1884.

A case cannot be removed from a State court under the act of March 3, 1875, 18 Stat. 470, after hearing on a demurrer to a complaint because it did not state facts sufficient to constitute a cause of action. *Alley v. Nott*, 111 U. S. 472, affirmed.

The facts are stated in the opinion of the court.

Mr. John W. Noble and *John C. Orrick* for plaintiff in error.

Mr. John P. Ellis and *Mr. Jeff. Chandler* for defendant in error.

Opinion of the Court.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The order remanding this cause to the State court from which it was removed is affirmed on the authority of *Alley v. Nott*, 111 U. S. 472, where it was decided that a case could not be removed from a State court under the act of March 3, 1875, ch. 137, 18 Stat. 470, after a hearing on a demurrer to a complaint because it did not state facts sufficient to constitute a cause of action. To that decision we adhere. The Code of Civil Procedure of New York, from which State that cause came, provided that the court might, in its discretion, allow the party in fault to plead over or amend after the decision against him on a demurrer. In Missouri, from which State this case comes, § 3518 of the Revised Statutes, 1879, provides that a plaintiff may amend, of course, with or without costs, as the court may order. But in Missouri, as in New York, a general demurrer to a petition or complaint raises an issue of law, which when tried, will finally dispose of the case unless the plaintiff amends or the defendant answers, as may be required. "If final judgment is entered on the demurrer, it will be a final determination of the rights of the parties, which can be pleaded in bar of another suit for the same cause of action." An issue of law involving the merits of the action is as much tried on the hearing of a demurrer in Missouri as it is in New York. The fact that in Missouri an amendment may be made or a plea filed as a matter of course does not affect the principle on which the right of removal depends.

The demurrer in the present case is not set out in full in the record, but it is conceded, in the brief of counsel for the plaintiffs in error, that it was "on the ground that the facts stated did not constitute a cause of action," and that would have been a fair inference from the entry, "demurrer filed," if the admission had not been made.

Affirmed.