in the state of New York. It is further admitted, that the said John Dewhurst in all things complied with the said statutes of bankruptcy before referred to, and that on the 11th of August 1792, he obtained a certificate of bankruptcy duly executed.

"Upon the above state of the case, it is submitted to the supreme court of the United States, to determine whether the certificate issued under the laws of Pennsylvania, operates as a discharge of the said debt, notwithstanding its being contracted in another state, where there was no bankrupt law, and while the defendant was resident in the said state of New York. If the court should be of opinion that it does, it is agreed that judgment be entered for the defendant; otherwise, for the plaintiff, for $1120 damages, and six cents costs."

The Court, on the ensuing morning, returned the state of the case, declaring, that they could not take cognisance of any suit or controversy, which was not brought before them, by the regular process of the law.

Motion refused.

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*Ex parte* Hallowell.

*Attorneys.*

An attorney of the supreme court may be transferred to the roll of counsellors.

Mr. Hallowell had been admitted, originally, as an attorney of this court; but now *Lewis* moved, that his *name should be taken from the roll of attorneys, and placed on the list of counsellors.

*411]

The Court directed the transfer to be made; and Mr. Hallowell was qualified, *de novo*, as counsellor.

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Fowler *et al. v.* Lindsey *et al.*

Fowler *et al. v.* Miller.

*Certiorari.—States as parties.*

A *certiorari* does not lie to remove a canse, on account of the absence of jurisdiction in the court in which it is pending.

The fact that the land which is the subject of controversy was granted by, and is claimed under, a state, does not make the state a party to the suit; nor does an issue, whether it be within the limits of a state.[1]

A rule had been originally obtained in these actions (which were depending in the circuit court for the district of Connecticut), at the instance of the defendants, requiring the plaintiff to show cause why a *venire* should not be awarded to summon a jury from some district, other than that of Connecticut or New York; but it was changed, by consent, into a rule to show cause why the actions should not be removed by *certiorari* into the supreme court as exclusively belonging to that jurisdiction.

On showing cause, it appeared, that suits, in the nature of ejectments had been instituted in the circuit court for the district of Connecticut, to re-

[1] And see United States Bank *v.* Planters' Bank, 9 Wheat. 904; Bank of Kentucky *v.* Wister, 2 Pet. 318.

cover a tract of land, being part of the Connecticut Gore, which that state had granted to Andrew Ward and Jeremiah Hasley, and by whom it had been conveyed to the plaintiffs. The defendants pleaded that they were inhabitants of the state of New York; that the premises for which the suits were brought, lay in the county of Steuben, in the state of New York; and that the circuit court for the district of New York, or the courts of the state, and no other court, could take cognisance of the actions. The plaintiffs replied, that the premises lay in the state of Connecticut; and issue being joined, a *venire* was awarded. On the return, however, the defendants challenged the array, because the marshal of the district of Connecticut, a resident and citizen of that state, had arrayed the jury by his deputy, who was also a citizen of Connecticut, and interested as a purchaser or claimant in the Connecticut Gore, under the same title as the plaintiffs. The plaintiffs prayed *oyer* of the record and return, averred that the deputy-marshal was not interested in the question in issue, and demurred to the challenge, for being double, and contrary to the record, which did not show that the jury was returned by the deputy-marshal. The defendants joined in demurrer. THE COURT overruled the challenge, as it respected the general interest of the marshal and his deputy, owing to their being citizens of Connecticut; but allowed it, and quashed the array, on account of the particular *interest of the deputy, he being interested in the same tract of land, under color of the same title as the plaintiffs. [*412

The amended rule was argued by *Lewis* and *Hoffman* (the Attorney-General of New York), in favor of its being made absolute, and by *Hillhouse*, of Connecticut, against it, on the question, whether the suits ought to be considered as virtually depending between the states of Connecticut and New York? And the following opinions were delivered by the court, the Chief Justice, however, declining, on account of the interest of Connecticut, to take any part in the decision, and CHASE and IREDELL, Justices, being absent on account of indisposition.

WASHINGTON, Justice.—The first question that occurs from the arguments, on the present occasion, respects the nature of the rights, that are contested in the suits, depending in the circuit court. Without entering into a critical examination of the constitution and laws, in relation to the jurisdiction of the supreme court, I lay down the following as a safe rule: That a case which belongs to the jurisdiction of the supreme court, on account of the interest that a state has in the controversy, must be a case in which a state is either nominally, or substantially, the party. It is not sufficient, that a state may be consequentially affected; for in such case (as where the grants of different states are brought into litigation), the circuit court has clearly a jurisdiction. And this remark furnishes an answer to the suggestions, that have been founded on the remote interest of the state, in making retribution to her grantees, upon the event of an eviction.

It is not contended, that the states are nominally the parties; nor do I think that they can be regarded as substantially the parties to the suits: nay, it appears to me, that they are not even interested or affected. They have a right either to the soil or to the jurisdiction. If they have the right of soil, they may contest it, at any time, in this court, notwithstanding a decision in the present suits; and though they may have parted with the

right of soil, still, the right of jurisdiction is unimpaired. A decision, as to the former object, between individual citizens, can never affect the right of the state, as to the latter object: it is *res inter alios acta.* For, suppose the jury in some cases should find in favor of the title under New York; and in others, they should find in favor of the title under Connecticut, how would this decide the right of jurisdiction? And on what principle, can private citizens, in the litigation of their private claims, be competent to investigate, determine and fix the important rights of sovereignty?

*413] *The question of jurisdiction remaining, therefore, unaffected by the proceedings in these suits, is there no other mode by which it may be tried? I will not say, that as tate could sue at law for such an incorporeal right as that of sovereignty and jurisdiction; but even if a court of law would not afford a remedy, I can see no reason why a remedy should not be obtained in a court of equity. The state of New York might, I think, file a bill against the state of Connecticut, praying to be quieted as to the boundaries of the disputed territory; and this court, in order to effectuate justice, might appoint commissioners to ascertain and report those boundaries.[1] There being no redress at law, would be a sufficient reason for the interposition of the equitable powers of the court; since, it is monstrous, to talk of existing rights, without applying correspondent remedies.

But as it is proposed to remove the suits under consideration from the circuit court into this court, by writs of *certiorari*, I ask, whether it has ever happened, in the course of judicial proceedings, that a *certiorari* has issued from a superior to an inferior court, to remove a cause merely from a defect of jurisdiction? I do not know that such a case could ever occur. If the state is really a party to the suit in the inferior court, a plea to the jurisdiction may be there put in; or, perhaps, without such a plea, this court would reverse the judgment on a writ of error: and if the state is not a party, there is no pretence for the removal.

A *certiorari*, however, can only issue, as original process, to remove a cause, and change the *venue*, when the superior court is satisfied, that a fair and impartial trial will not otherwise be obtained; and it is sometimes used, as auxiliary process, where, for instance, diminution of the record is alleged, on a writ of error: but in such cases, the superior court must have jurisdiction of the controversy. And as it does not appear to me, that this court has exclusive or original jurisdiction of the suits in question, I am of opinion, that the rule must be discharged.

Paterson, Justice.—The rule to show cause why a *venire* should not be awarded to summon a jury from some district other than that of Connecticut or New York, cannot be supported. It has, indeed, been abandoned. The argument proceeds on the ground of removing the cause into this court, as having exclusive jurisdiction of it, because it is a controversy between states. The constitution of the United States, and the act of congress, although the phraseology be somewhat different, may be construed in perfect conformity with each other. The present is a controversy between individuals, respect-

*414] ing their right or title to a particular tract of land, and *cannot be extended to third parties or states. Its decision will not affect the state

[1] Rhode Island *v.* Massachusetts, 12 Pet. 657.

of Connecticut or New York; because neither of them is before the court, nor is it possible to bring either of them, as a party, before the court, in the present action. The state, as such, is not before us. Besides, if the cause should be removed into this court, it would answer no purpose; for I am not able to discern by what authority we could change the *venue*, or direct a jury to be drawn from another district. As to this particular, there is no devolution of power, either by the constitution or law. The authority must be given—we cannot usurp or take it.

If the point of jurisdiction be raised by the pleadings, the circuit court is competent to its decision; and therefore, the cause cannot be removed into this court previously to such decision. To remove a cause from one court to another, on the allegation of the want of jurisdiction, is a novelty in judicial proceedings. Would not the *certiorari* to remove, be an admission of the jurisdiction below? Neither of the motions is within the letter or spirit of the constitution or law.

How far a suit may, with effect, be instituted in this court, to decide the right of jurisdiction between two states, abstractedly from the right of soil, it is not necessary to determine. The question is a great one; but not before us. I regret the incompetence of this court to give the aid prayed for. No prejudice or passion, whether of a state or personal nature, should insinuate itself in the administration of justice. Jurymen, especially, should be above all prejudice, all passion, and all interest in the matter to be determined. But it is the duty of judges to declare, and not to make the law.

Cushing, Justice.—These motions are to be determined, rather by the constitution and the laws made under it, than by any remote analogies drawn from English practice.

Both by the constitution and the judicial act, the supreme court has original jurisdiction, where a state is a party. In this case, the state does not appear to be a party, by anything on the record. It is a controversy or suit between private citizens only; an action of ejectment, in which the defendant pleads to the jurisdiction, that the land lies in the state of New York, and issue is taken on that fact. Whether the land lies in New York or Connecticut, does not appear to affect the right or title to the land in question. The right of jurisdiction and the right of soil may depend on very different words, charters and foundations. A decision of that issue can only determine the controversy as between the private citizens, who are parties to the suit, and the event only *give the land to the plaintiff or defendant; but could have no controlling influence over the line [*415 of jurisdiction; with respect to which, if either state has a contest with the other, or with individuals, the state has its remedy, I suppose, under the constitution and the laws, by proper application, but not in this way; for she is not a party to the suit.

If an individual will put the event of his cause in a plea of this kind, on a fact, which is not essential to his right; I cannot think, it can prejudice the right of jurisdiction appertaining to a state. I agree with the rest of the court, that neither of the motions can be granted.

By the Court.—Let the rules be discharged.