

## STEBBINS v. LANCASHIRE INSURANCE COMPANY.

A petition for the removal of a cause to the federal court filed at the fifth term, the pleadings being complete at the second term, is not filed at the term when the cause can first be tried.

PETITION, for the removal of a cause to the circuit court of the United States. The action was entered at the October term, 1877. At the October term, 1878, a nonsuit was ordered on the ground that the form of action was wrong. At the June law term, 1879, the plaintiff's exception was sustained, and he had leave to amend by changing the form of action. At the October term, 1879, his amendment was filed and allowed, and the defendants thereupon filed their petition for removal, which was denied, and they excepted.

*Cushing and Batchelder & Faulkner*, for the defendants.

*Lane & Dole*, and *Davenport & Eddy* (of Vermont), for the plaintiff.

SMITH, J. The term at which a cause can first be tried is the term at which the cause is first triable on its merits. *Huddy v. Havens*, 3 W. N. C. 432; Am. Law Reg., May, 1879, p. 312. It is the first term at which the case is at issue for trial and might be ordered to be tried. *New York Warehouse & Security Co. v. Loomis*, 122 Mass. 431. It is the term when the cause is ready for trial, although the court and parties may not be ready to try it. *Gurnee v. City of Brunswick*, 1 Hughes 270; *Forrest Home v. Keeler*, 9 Reporter 432. The fact that there is other business entitled to precedence on the docket does not obviate the necessity of filing the petition for removal at the first term when the case could otherwise be tried. *Preston v. Insurance Co.*, 58 N. H. 76; *Warehouse Co. v. Loomis*, *supra*; *Huddy v. Havens*, *supra*; *Murray v. Holden*, 10 Reporter 162. Nor does the time when a cause may first be tried depend upon the diligence of counsel in completing the pleadings. *Fulton v. Golden*, 8 Reporter 517. The object of the statute of 1875 was to abridge the right of removal by fixing a definite time within which it might be exercised. *Preston v. Insurance Co.*, *supra*.

By our course of procedure a cause is tried upon the general issue unless a special plea is filed within ninety days from the commencement of the term when the action is entered. Unless so filed, special pleas are not received except upon leave of the court and payment of costs occasioned by the delay. 9th Rule of Court. No special plea was filed in this case. By the law and practice of this state, therefore, this case could have been tried at the

April term, 1878. The pleadings were then complete, and the parties at issue upon the original declaration. No actual trial was had, for the plaintiff's motion for leave to amend was denied, and a nonsuit ordered. If the parties had gone to actual trial, the same result must have followed. The original declaration showed a good cause of action, which the plea denied. The trouble was not in the pleadings, but in the fact disclosed upon the motion to amend, that the policy of insurance, upon which the plaintiff relied as evidence of the contract with the defendants, would not support his declaration. That a different issue may be presented by the amended pleadings does not alter the fact that the case would have been tried upon the pleadings as they stood at the October term, 1878. The petition for removal was not seasonably filed, and for that reason was properly denied.

*Exceptions overruled.*

CLARK, J., did not sit: the others concurred.

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BACON v. GOODNOW.

Payment of a mortgage debt by one having an interest to protect will operate as an assignment of the mortgage whenever justice requires it.

WRIT OF ENTRY. Oliver Bacon died seized of the demanded premises, March 25, 1835, leaving a will executed June 25, 1829, which was duly proved on the first Tuesday of April, 1835, and Jacob Bacon, a son of the testator named as executor and residuary legatee in the will, was appointed executor. The second clause of the will is as follows: "I give, bequeath, and devise to my son, Jacob Bacon, and my daughters, Mary Bacon and Rebecca Bacon, all the real estate of which I may die possessed, to be equally divided between them, they paying all my just debts and funeral charges; and, in case either of them shall die without heirs, the share of such one so dying shall go to the survivor or survivors, or their heirs." At the date of the will, and at the testator's death, the demanded premises were subject to a mortgage made by the testator, April 17, 1824; to his daughters, Mary and Rebecca, to secure a note to Mary for \$100. and a note to Rebecca for \$200. These notes remaining unpaid, Mary and Rebecca brought a suit against Jacob to foreclose the mortgage, and in October, 1844, recovered a conditional judgment for \$668, damages and costs, and on December 31, 1844, took possession of the demanded premises under a writ of possession. December 29, 1845, Mary and Rebecca released to Jacob, by a quitclaim deed, all their rights and interest in the mortgage, in consideration of \$717.10. February 6, 1846, Jacob,

59	415
68	485
59	415
69	165