

court, that issue must be such as to embrace and cover the alleged defense, either as permitting the facts of which it consists to be adduced in evidence, or as setting them out specially as a bar to the action. If the issue be not of this character it cannot be true, as matter of law, that the decision of the case necessarily depends upon a federal question, because the latter cannot arise except upon facts exhibited either by plea or in proof. In the present case there is a demurrer to the declaration raising only, as a question of law, the sufficiency of the plaintiffs' statement of their cause of action. That is the case sought to be removed, and it involves no question under any law of the United States. If the defendant has a defense arising under any such law, he cannot make it under the pleadings in the case, and whether he ever will or can do so does not certainly appear. It cannot be inferred from anything at present in the record. If the demurrer is well taken, he certainly will not, for the demurrer sustained is a decision upon the merits, and ends the action; or if it leads to an amendment, that may make a different case. If it is overruled, whether the defendant will plead, and if so, what, is not made to appear. It is not open, for the purpose of jurisdiction, to speculate upon what may take place in the progress of the cause. The ground of present jurisdiction must appear in the record as it actually exists, and the petition for removal can be taken as part of that record only so far as it states facts which may be regarded as legally consistent with the pleadings of the parties, and within the purview of the issue, if one has been made between them.

For these reasons the motion of the plaintiffs to remand the cause to the superior court of Detroit is granted, and the cause is remanded accordingly, at the costs of the defendant.

McFADDEN and others v. ROBINSON and others.

(Circuit Court, D. California. October 20, 1884.)

REMOVAL OF CAUSE — CASE ARISING UNDER CONSTITUTION OR LAWS OF UNITED STATES.

A case removed to a federal court, on the ground that the suit arose under the constitution or laws of the United States, will be remanded to the state court when the record fails to show that there will arise some contested point of law depending upon the constitution or laws of the United States, what the question is, and how it will arise.

Motion to Remand Cause.

A. L. Rhodes, for complainants.

Wm. Matthews, for defendants.

SAWYER, J. The suit is in equity, to quiet title to a tract of land which is covered by two patents, issued upon confirmations of two

Spanish grants; one for the Santa Ana rancho, and the other for the Las Bolsas rancho.

The petition for removal states as follows: That the action arises under the act of March 3, 1851, and under the treaty of Guadalupe Hidalgo; that the claim of plaintiff is based on a right and title which originated under Spain, while California was a province of Spain, and also upon an *expediente* made by the authorities of Mexico while California was a part of the domain of the republic of Mexico; that the grant was presented by Bernardo Yorba to the tribunals of the United States for confirmation, under the act of 1851; that the claim was subsequently confirmed, and a patent issued upon the confirmation, December 21, 1883; that the patent includes all the land in controversy; that the complainants have acquired, and they now hold, all the title to the land in controversy which passed by said Spanish and Mexican titles, and said patent, and that they now claim the same under said title and under no other title; that the defendants are owners in fee of the lands in controversy; that their rights arise under a title granted by Spain, and a further grant by Mexico, while California was still a part of the domain of those countries, respectively; that the title is other and different from that held by complainants; that the title was held in 1852 by Ramon Yorba *et al.*; that in that year it was presented to the board of land commissioners for confirmation, and was afterwards finally confirmed; that patents thereto were issued as follows: For one undivided half to Ramon Yorba *et al.*, on June 9, 1874, and the other half to Justo Murillo *et al.*, August 27, 1877; that defendants hold all the title passing by both these last-named patents, and they hold no other title; and that the matter in dispute depends upon, and will be determined by, the weight and force in law of the respective patents, and titles therefrom derived, held, as aforesaid, by complainants and defendants.

The case as stated in the petition for removal, in my judgment, does not appear to present any disputed question of law arising under the constitution or laws of the United States. So far as appears, neither party questions the right of the Spanish and Mexican governments to make either grant,—either the grant under which the complainants claim, or that under which the defendants claim. Neither party appears to question the right of the grantees of either grant to the protection accorded by the treaty. Both parties rely upon the binding and obligatory force and effect of the treaty. Neither party denies the validity of the act of March 8, 1851. Neither party denies to the other any right claimed under that act. Neither party gives a different construction to the act, or any of its provisions, from that claimed by the other. Neither party denies the validity of the proceedings of the other for a confirmation of the title under which they claim; nor the correctness of the survey; nor of the patent.

In respect to the above matters, there does not appear to be any

contested question of law arising under the constitution or laws of the United States in the case. The only question in the case seems to be this: Conceding that both parties had grants of tracts of land, that each grant was confirmed, that a patent issued for each rancho as confirmed, and that the tract in controversy in this case is covered by grants and patents, which party acquired the title to the tract in controversy? And that depends upon which in fact acquired the oldest effective grant. That question is to be determined by an examination of the proceedings of the Spanish and Mexican governments in making the inchoate grants to the respective parties, and upon the subsequent acts of the parties and Mexican government under the grants, and before the cession of California to the United States; or upon the facts and laws of Mexico in force in California before its acquisition by the United States. It should affirmatively appear that there will arise some contested point of law depending upon the constitution or laws of the United States, and what the question is. Nothing of the kind affirmatively appears in the petition or records. It appears to me that this case falls within the rule adopted in *Trafton v. Nougues*, 4 Sawy. 178, substantially affirmed by the United States supreme court in *Gold Washing Co. v. Keyes*, 96 U. S. 199, and within the case of *Romie v. Gasanova*, 91 U. S. 379; also *McStay v. Friedman*, 92 U. S. 723, 724, and *San Francisco v. Scott*, 111 U. S. 768; S. C. 4 Sup. Ct. Rep. 688.

The cases cited by defendants do not appear to me to conflict with the doctrine of those cases. In *Hills v. Homton*, 4 Sawy. 198, the whole case turned upon a disputed construction of the two patents. There was clearly a contested question of law arising under the constitution and laws of the United States. The other cases do not appear to determine or discuss any question arising in this case. It is not enough that a question may possibly arise under the constitution and laws of the United States. It should be made to appear from the facts stated that such a question will arise, and what the question is, and how it will arise. Should one arise in the course of the trial in the state court material to the correct decision of the case, the ruling of the state court may still be reviewed by the United States supreme court on writ of error in favor of the party against whom the ruling is made.

Upon the views expressed, the case must be remanded to the state court; and it is so ordered.

HICKOX v. ELLIOTT and others.

(Circuit Court, D. Oregon. November 12, 1884.)

1. LIMITATIONS.

A suit in equity may be maintained to enforce a security for a debt, although an action against the debtor directly upon the indebtedness is barred by lapse of time: and for such purpose the debt exists, notwithstanding the lapse of time.

2. SUIT TO SET ASIDE A CONVEYANCE.

A suit in equity to set aside an assignment or conveyance of property made to hinder or delay creditors, should ordinarily be brought within the same time after the right accrues as an action at law to recover possession of the same property.

3. PARTIES TO A SUIT.

Where a trustee sues to recover possession of the trust property for the benefit of the *cestui que trust* merely, or simply to enforce his right thereto against third persons, such *cestui que trust* is not a necessary party thereto; and in a suit to set aside an assignment or conveyance made to hinder or delay creditors, the grantor or assignor therein, if he has parted with all his right in the property, is not a necessary party either.

4. EQUITABLE ASSIGNMENT—MAINTENANCE.

E. being a member of a railway construction firm in Oregon, and defendant in a suit brought there by his partners to dissolve said firm and determine the rights of the parties therein, applied in California to W., a citizen of that state, for a loan of money to aid him in asserting his rights in said suit, which W. agreed to and did advance on E.'s promise to repay the same, with interest, and his assignment to H., in trust for W., of all his interest in said firm, as a security for the repayment of said money and interest, in which suit there was afterwards a decree given in favor of E. and against his partners for a sum of money; and at the time of making such assignment E. also gave W. the option to take a portion of any railway property or bonds that he might obtain in such suit, in lieu of said money and interest. *Held*, (1) that the assignment of E.'s interest in the firm embraced the decree in his favor for the sum of money which represented and stood for such interest, and that the trustee therein became in equity the assignee of said decree as soon as it came into existence, and might maintain a suit to set aside specific covinous assignments and conveyances by the defendant therein, made with intent to hinder and delay the collection of the same; (2) the option given W. is not involved in the suit to enforce the decree, and therefore it is immaterial whether it is void for champerty or not; (3) the contract for the loan and repayment of the money was made and to be fulfilled in California, and therefore valid, whether champertous or not, by the law of Oregon; and the fact that security was taken on property in Oregon for the performance of the contract, does not change its character in this respect.

Suit to Set Aside Conveyances to Hinder and Delay Creditors.

James K. Kelly and C. E. S. Wood, for plaintiff.

Thomas N. Strong, for Joseph Holladay.

W. H. Holmes, for S. G. Elliott.

C. J. Macdougall, for Ben Holladay.

DEADY, J. This suit is brought by George C. Hickox, a citizen of California, against Simon G. Elliott, Ben Holladay, Joseph Holladay, and William H. Effinger, citizens of Oregon, to subject certain property, the legal title of which is now in Joseph Holladay, to the payment of a certain decree heretofore given by the supreme court of Oregon against Ben Holladay, on the ground that said property was