

tion, remanded the case, and thereupon the defendant promptly filed a second petition for removal, upon the same grounds that were set forth in the original petition, and at once filed the transcript in the United States court. The cause was again remanded, and the supreme court held that "when the circuit court first remanded the cause, the order to that effect not being superseded, the state court was reinvested with jurisdiction which could not be defeated by another removal upon the same grounds and by the same party. A different construction of the statute, as may be readily seen, might work injurious delays in the preparation and trial of causes."

In the case at bar the second removal is sought by the same party, but not wholly upon the same grounds. The right of removal of a cause from a state to a federal court is a mode of enforcing the right of citizens of different states to submit causes between them to the decision of a court of the United States. The statutes regulating this right of removal define the circumstances under which the right may be exercised; yet the ultimate object of the several provisions is the same, to-wit, the enabling litigants who are citizens of different states to submit the controversies pending between them to the decision of the federal tribunals. When a citizen of Illinois, for instance, is sued by a citizen of Iowa, in one of the courts of Iowa, for an amount in excess of \$500, the cause is one within the jurisdiction of the United States courts, and under the existing statute it may be removed into the federal court of the proper district. The right of removal conferred by the act of congress is intended to enable the party entitled thereto to remove the cause into the federal court, and if the party exercises the right, and, by filing the requisite petition and bond, deprives the state court of jurisdiction and confers it upon the federal court, then the litigant has enjoyed the benefit of the right of removal, and if, through his own fault, he fails to file the transcript in the United States court, and after the delay of a year he then procures the redocketing of the cause in the state court, and fully recognizes the jurisdiction of that court, should he be again permitted to remove the case into the federal court?

The case of *St. Paul & C. Ry. Co. v. McLean*, *supra*, declares that the same party cannot remove the case upon the same grounds, the reason assigned for the ruling being that a different construction of the statute might work injurious delays in the preparation and trial of causes. Does not the same reason apply, even though the second removal may be asked for upon a different ground? So far as appears in this case, when the plaintiffs herein first petitioned for a removal, they could have made the application and obtained the removal under either section of the statute. It is not shown that there has been any change of circumstances, or in the facts connected with the case, or that the local prejudice or influence now complained of did not exist when the first removal was petitioned for. The plaintiffs had the right to remove the case. They did in fact remove it,

and deprived the state court of jurisdiction for a full year. They then caused the case to be redocketed in the state court, and then, in about a year after this was done, they again petitioned for a removal of the case, assigning as a reason the existence of local prejudice. No reason is given for this delay; nor is it shown that the local prejudice complained of has arisen or come to their knowledge since the redocketing of the case in the state court.

It is apparent, if it be held that the right of removal exists absolutely, under such circumstances, that parties will be enabled to use the right of removal which is conferred simply to enable parties to transfer cases into the federal courts for trial, as a means of delay and protracting litigation to the manifest injury of the other parties in interest. Under such circumstances, we think the federal court should refuse to entertain jurisdiction of the case.

Motion to remand is sustained.

OLYPHANT v. ST. LOUIS ORE & STEEL Co. and others.¹

(Circuit Court, E. D. Missouri. November 8, 1884.)

1. MORTGAGOR AND MORTGAGEE—PAYMENT OF EXPENSES PRIOR TO APPOINTMENT OF RECEIVER.

A court has power, in a suit for the foreclosure of a mortgage upon the property of a corporation, to order its receiver to pay employes of the company in full for services rendered within six months before his appointment.

2. SAME—COSTS OF LITIGATION.

It is not the duty of a receiver appointed in a foreclosure suit to repay costs incurred by the plaintiff in the litigation, while such litigation remains pending

In Equity. Foreclosure suit. Exceptions to master's report concerning certain claims allowed by the receiver of the St. Louis Ore & Steel Co.

The third exception referred to in the opinion of the court relates to the following item: "August 1, 1884. Paid voucher, *ac.* O. L. Garrison, secretary, \$250,"—which represented salary due Mr. Garrison, formerly secretary of said company and now secretary of its receiver. It is objected to because it includes services rendered to the company for a short period of time immediately preceding the appointment of the receiver. The claim was allowed pursuant to the order appointing a provisional receiver, dated July 21, 1884, providing "that the receiver may proceed to pay all just claims and accounts for labor, supplies, professional services, salaries of officers, and employes * * * for said steel and ore company that have been earned or have matured within six months before the making of this order." The other exceptions relate to the deposit of \$250 with the

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

clerk of the court to defray costs incidental to this proceeding, and to another deposit of \$50 with the clerk of United States circuit court for the Southern district of Illinois.

Noble & Orrick, for intervening bondholders.

Hitchcock, Madill & Finkelnburg, for receiver.

TREAT, J. The third exception to the master's report, pertaining to the allowance of O. L. Garrison, is overruled. As to the other two exceptions, the case is not yet in condition for the decision thereof. This suit was instituted by the plaintiff, and necessarily at his cost. He chooses to ask for the appointment of a receiver, whose duty it is to preserve the property pending the litigation, and not to pay plaintiff's expenses connected therewith. It may be that the plaintiff's demand, from the beginning, has been wrongful; and if so, whatever, at his instance, has been done, must be at his expense. In the intermediate time, his costs and expenses connected with the litigation are not to be paid by the receiver; for *non constat* that his demand is rightful. Hence the question presented by the last two exceptions are sustained, with leave hereafter to present the same as the final determination of equities may require.

MAISH v. BIRD and others.

(*Circuit Court*, S. D. Iowa, C. D. October Term, 1884.)

TAXATION—CHATTEL MORTGAGE—LIEN OF TAX ASSESSED AGAINST MORTGAGOR.

Under the statutes of Iowa, taxes are not a lien upon personalty until distraint therefor is made in the mode pointed out in the statutes; and a mortgagee of personal property who takes possession under his mortgage, and sells the property, either directly or through the decree or order of a court, before any distraint is made, is entitled to the proceeds so far as may be necessary to pay his claim as against the taxes assessed against the mortgagor.

In Equity.

Wright, Cummins & Wright, for complainants.

Sherman, Mitchell & Dudley, for county treasurer.

SHIRAS, J. William K. Bird, in January, 1882, was engaged in the mercantile business at Des Moines, Iowa. On the sixth of January he executed a chattel mortgage on his stock in trade to the Iowa National Bank to secure his indebtedness to this bank. Certain other creditors levied writs of attachment on the property, and the complainant, to whom the mortgage had been assigned, replevied the same, and also filed a bill for the foreclosure of the mortgage. The court appointed a receiver, who took possession of the property, and, under direction of the court, sold the same, the proceeds being held for distribution to the parties to whom it should be ultimately adjudged to be due. The county treasurer of Polk county now applies

to the court for an order directing the receiver to pay out of the funds realized from the sale of the goods the taxes assessed against W. K. Bird for the year 1882. This application is resisted by the complainant, on the ground that the fund is not sufficient to pay his claim in full, and that the taxes are not a lien upon the property or its proceeds, no levy thereof having been made upon the property. On part of the county treasurer it is urged that the matter stands just as it would if an actual levy had been made, for the reason that when the taxes became delinquent, so that a levy therefor could have been made, the property was in possession of this court, and that he could not, therefore, seize the same, and that the court will, therefore, deem that to have been done which would have been done had not the possession by the court of the property forbidden it.

Under the provisions of the statutes of Iowa, taxes are not declared to be a lien upon personalty. Section 857 of the Code provides that if any one neglects to pay the taxes assessed against him before the first day of February, the treasurer is directed to make the same by distress and sale of his personal property, and the tax-list alone shall be sufficient warrant for such distress. The taxes claimed by the treasurer were for the year 1882, and hence the treasurer could have distrained for the collection thereof on or after the first day of February, 1883. At that time the goods were in possession of the receiver. Assuming, without deciding it, that the fact that the court, through the receiver, had possession of the goods, should be deemed to place the treasurer in the same position as though he had created a lien on the property, the question then arises whether such lien for the taxes assessed against W. K. Bird for the year 1882 is superior or paramount to that of complainant as mortgagee, or is there an equity in favor of such taxes which entitles them to priority? I do not find that this question has been settled by the supreme court of Iowa, so that this court must determine it without aid from that source.

It will not be claimed that personal property, sold by the tax-debtor after the taxes have become delinquent, but before any distraint thereof has been made, is subject to be seized in the hands of a purchaser and subjected to the payment of the tax. If this were the rule, then every one who buys goods in the ordinary way of trade of a merchant cannot know whether his title is a perfect one or not, except by ascertaining whether his vendor has paid all taxes assessed against him. If there are taxes due, then, under such a rule, the purchaser would take subject to the right of the county treasurer to seize the goods and sell them for the unpaid taxes. Certainly no such burden or risk is placed upon the purchaser by the statutes of Iowa, and in the absence of express statutory provisions so declaring, courts are not justified in adopting a rule which would so greatly interfere with the ordinary business affairs of the community.

In the case at bar it may be urged that complainant is only a

mortgagee, and that his lien as such may well be postponed to that of the taxes assessed against the mortgagor. The record shows that the mortgages under which complainant claims were executed and possession thereunder taken for his benefit in January, 1882, more than one year before the treasurer could have distrained for the taxes now claimed. The property has been sold, and the money realized therefrom is to be distributed. When possession was taken by the mortgagee, and the property was sold, the legal title had vested in the mortgagee, and the case stood, so far as this question is concerned, the same as though the mortgagee had originally bought the goods. If the taxes were in any sense a lien upon or equity in the goods paramount to the mortgage, then such right or lien still exists, and the goods can be seized in the hands of those who bought them from the mortgagee. If no such lien or equity exists against the goods in the hands of the present owners, why should it be held to exist against the proceeds of the goods, which it is admitted belong to the mortgagee?

In the argument it was suggested that in assignments for the benefit of creditors, under the statutes of Iowa, taxes were declared to be entitled to priority of payment from the funds in the hands of the assignee, and that in *Huiscamp v. Albert*, 60 Iowa, 421, S. C. 15 N. W. Rep. 264, the supreme court had intimated, without deciding it, that, under the statute, taxes might be deemed to be a lien on the personal property in the hands of an assignee. This statute declares the rule that is to be applied when the proceeds of the property of an insolvent debtor are distributed under an assignment for the benefit of creditors, and whatever may be the construction of the statute upon the question of a lien upon the property, as against an assignee, it is clear that the priority created by the statute, whether accompanied with a lien or not, is confined to cases of assignments made under the statutes.

It is not clear, however, that even in cases of assignment for benefit of creditors the taxes have a priority over liens created by express contract long before the assignment was made or the taxes were levied. The assignee takes the property subject to all prior rights and liens, and it may be that the priority conferred by the statutes upon the taxes is confined to rights conferred by the deed of assignments,—that is to say, the taxes are entitled to priority of payment over all other parties whose right to claim payment depends upon the deed of assignment, but they are not entitled to priority over the liens on personalty which antedate the assignment and all rights conferred thereby; but, however this may be, the rule provided for distribution in cases of assignments is not applicable to the case at bar.

The conclusions reached are that, under the statutes of Iowa, taxes are not a lien upon personalty until distraint therefor is made in the mode pointed out in the statutes; that a person purchasing personal property before a distraint thereof has been made is protected against

a subsequent distraint for the taxes assessed against his vendor; and that a mortgagee of personal property who takes possession under his mortgages and sells the property, either directly or through the decree or order of a court before any distraint is made, is entitled to the proceeds so far as may be necessary to pay his claim, as against the taxes assessed against the mortgagor. The petition, therefore, filed by the county treasurer is dismissed at his costs.

HURST and others v. COLEY.¹

(Circuit Court, S. D. Georgia, W. D. 1884.)

EXPENSES OF REALIZING ON COLLATERALS—WHEN CHARGEABLE AGAINST DEBTOR.

Where collaterals are delivered to a creditor for the purpose of securing a debt, and the creditor redelivers them for collection to the debtor's agent in pursuance of an arrangement made with the debtor, and where the creditor is compelled to bring suit against such agent for the recovery of the collaterals, or their proceeds, the creditor is entitled to deduct from the amount recovered in such suit reasonable expenses thereof, before applying the amount to the debt. It is otherwise if the creditor delivered them to the agent as *his* agent, or where the suit was unnecessary.

Action on two promissory notes signed "J. A. D. Coley, Agt.," and on which there was due \$1,500.

The plaintiff offered in evidence, in connection with the notes, an instrument signed by Charlotte T. Coley, the principal, directed to the plaintiffs, in which she authorized them to credit her husband as her agent, and stating that she would be responsible for all debts so created, and that her separate estate should be bound thereby. The original indebtedness consisted of other notes besides those introduced in evidence. The testimony disclosed the fact that, at the time of the creation of the indebtedness, J. A. D. Coley, agent, transferred to the plaintiffs, as collateral security for the indebtedness, a considerable amount of planters' notes. About the time these notes matured, the plaintiffs redelivered these collaterals into the hands of J. A. D. Coley, to be by him collected, and the proceeds of which were to be applied to the payment of the debt of the plaintiffs. Whether they were delivered to him as agent of plaintiffs or defendant, the evidence was conflicting. Considerable collections were made by J. A. D. Coley, but he failed to account for the same, and the plaintiffs thereupon brought action against him of trover for the notes. This case is reported in 15 FED. REP. 645. The judgment recovered in that case was paid, and the plaintiffs credited on the notes of J. A. D. Coley, agent, the net amount of the judgment; that is, the amount of the judgment, less the counsel fees paid in the case, and less the actual

¹ Reported by Walter B. Hill, Esq., of the Macon, Georgia, bar.