HAMBLETON *v.* DUHAM and others.

(*Circuit Court, D. California.* December 8, 1884.)

1. REMOVAL OF CAUSE—CASE ARISING UNDER LAWS OF UNITED STATES—PETITION.
   The petition must set out the facts, and question arising thereon, so that the court can determine the question of jurisdiction, when it is sought to remove a case to a federal court on the ground that it arises under a law of the United States.
2. SAME—CONSTRUCTION OF LAW—ACT 1875, § 2.
   Unless a case arises out of a controversy as to the effect or operation of a provision in a law of the United States, as shown by the facts alleged, it cannot be removed under the second section of the act of 1875.
3. SAME—FACTS STATED ON INFORMATION AND BELIEF.
   Semble, that a statement of jurisdictional facts on information and belief will not be sufficient.

Motion to Remand.

R. Clark, for motion.

J. H. Craddock, J. Lambert, and *W. C. Belcher, contra.*

SAWYER, J. The jurisdictional facts attempted to be alleged are stated in the form held to be insufficient in *Wolff* v. *Archibald,* 14 FED. REP. 369: "as defendants are informed and believe." The court there held that jurisdictional facts must be positively alleged. On this point the sufficiency of the petition is, at least, doubtful. But, whether that ruling be correct or not, the allegations are insufficient, because they do not state facts showing that any particular disputed question of construction of the statute will arise, or how it will arise, so that the court can determine for itself, from the facts, that the decision will turn upon a disputed construction of the statute. On this point only the conclusion of the petitioner is stated. For all that appears, from the facts stated, the case may be determined entirely upon a disputed question of fact; as, whether the land is, in fact, swamp land or upland or some other question of fact. The petition is insufficient in this particular, under the decision in *Trafton* v. *Nougues,* 4 Sawy. 179; *Dowell* v. *Griswold,* 5 Sawy. 39; *Gold Washing Co.* v. *Keyes,* 96 U. S. 199.

Cause remanded to the state court, with costs.

KEYS MANUF'G Co. and others *v.* KIMPEL and others.[1]

(*Circuit Court, E. D. Missouri.* December 1, 1884.)

JURISDICTION—MORTGAGE—GENERAL ASSIGNMENT.

Where a state court has full control of mortgaged property under a general assignment, a federal court will not entertain a bill asking to have the mortgage declared to be for the benefit of all the mortgagor's creditors.

In Equity. Demurrer to plea.

The complainants are creditors of John Kimpel. As such, they file their bill, and state that said Kimpel, while insolvent, mortgaged all his personal property in St. Louis and Kansas City to one Frederick Vaugh, (now deceased,) and subsequently made a general assignment, for the benefit of his creditors, to one Henry Zeigenheim; and complainants pray that said mortgage be declared to be for the benefit of all said Kimpel's creditors. The administrator of said Vaugh, who is a party defendant, has filed a plea to the jurisdiction of this court, on the ground that all of said Kimpel's property is now being administered upon by said assignee under the orders of the St. Louis circuit court, and states that complainants have proved up their claims before said assignee, and that certain allowances have been made them; that said administrator has filed a petition in said court claiming, by virtue of said mortgage, to have an interest in the property therein described; that said court has ordered said mortgaged property sold free and clear of all claims and demands of said administrator, but reserving to him the same right to prefer such claims against the proceeds realized from such sale as he had against said property; that said property has been sold; that the proceeds are now held subject to the order of said court; and that said court has full custody, cognizance, power, and authority of and in said estate, and power to decide upon the rights of all parties claiming in the premises.

Mills & Flitcraft, *Gilbert Elliot*, and *Geo. R. Lockwood*, for complainants.

Rudolph Schulenburg, for Julius C. Hartman, administrator of Frederick Vaugh.

TREAT, J. There seems to be some misunderstanding at the bar concerning the rulings made during this and a former term with respect to mortgages, and deeds of trust to secure indebtedness; and also concerning partial and general assignments under the Missouri statutes. The bill sets out a mortgage, and not an assignment; the right of redemption being in the mortgagor. Whether under proper allegations and proofs such a mortgage could be held to operate as a general assignment for the benefit of *all* creditors, it is unnecessary

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

to discuss. It must suffice that the plea avers that the entire property covered by said mortgage, and a subsequent general assignment, is now in the custody of a state circuit court, and is in the course of administration by it. The case of *Taylor* v. *Carryl*, 20 How. 583, seems to be conclusive on the point. True, the doctrine announced in that case was brought into apparent doubt in the case of *Payne* v. *Hook*, 7 Wall. 425, which latter case was so far modified by the subsequent rulings of the United States supreme court in the same case of *Hook* v. *Payne*, 14 Wall. 252, as practically to leave the prior doctrine, which is more in accord with our systems of jurisprudence, undisturbed. Inasmuch as the state circuit court has full control of the property and funds involved, and is administering the same through its duly-qualified officer, not only comity, but sound principles of law, require that there should be no such conflicts of jurisdiction as are sought in this case.

Demurrer overruled, and bill dismissed.

In re Strauss *v.* Meyer and others.[1]

(*Circuit Court, E. D. Missouri.* December 3, 1884.)

Equity Practice—Costs—Attorney's Fee.

No attorney's fees for the examination of witnesses, called before a master or special examiner, are taxable as costs.

In Equity.

Suit for the infringement of a patent. Motion to retax costs because of the allowance of an attorney's fee of $2.50 for each witness examined before the examiner appointed herein to take testimony prior to the granting of a preliminary injunction, and for each witness examined before the master appointed to ascertain the damages sustained by the complainant, and the profits made by the defendant from the infringement complained of.

S. Obermeyer and *Taylor & Pollard*, for plaintiff.

Lee & Chandler, for defendants.

Treat, J. The party is not entitled to counsel fees for witnesses called before the master, and I doubt whether he is entitled to fees for witnesses called before the special examiner. Testimony taken before a special examiner is not in the nature of depositions taken at different places where a party may be compelled to go, and I will allow nothing of the kind. I think it is outside of the fee-bill, and outside of the reason of it. The party has to appear and conduct the case before the special examiner who is appointed therefor, and

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