

giving of a bond for costs would or would not work a continuance of the case depended, not upon any provision of the law, but upon the acts of the parties litigant. Thus the plaintiff, by giving the bond before the adjournment, could have brought the case up for trial, and the defendant, by filing an answer, might have waived the order made at its request, and have insisted upon a trial. There is no provision of the Code of Iowa that enabled either party to insist, as a matter of law, that the case could not be tried at the first term. Hence the cause, in fact, belonged to that class of cases which, by the express declaration of section 2744, are triable at the first term after due service. Being legally triable at the first term, then, under the express ruling in *Ailee v. Potter, supra*, the petition for removal must be filed at that term. The true test, in determining when the application for removal must be made, is the question whether a given case belongs to a class of cases which, under the provisions of the Code of Iowa, are triable at the first term after service, or to the class which, by reason of some provision of the Code, cannot be forced to trial until the second term. If the case belongs to the former class, then the application must be made before or at the first term, even though it may be apparent that by reason of some special fact the case may not be actually in a condition to be tried. As is well said in *Ailee v. Potter*, this conclusion "has the merit of fixing a certain and definite rule as to the time in which the application for the removal of law actions in this state must be made. It has the added merit of preventing delay, which experience shows to be one of the ordinary abuses of the right of removal."

Motion to remand is therefore sustained.

LOZANO and others v. WEHMER, as Ex'x, etc.

(Circuit Court, E. D. Wisconsin. January 21, 1885.)

1. JURISDICTION OF CIRCUIT COURT—AMOUNT IN DISPUTE—ACT OF MARCH 3, 1875, § 5—DISMISSING CASE.

Where the complaint or declaration alleges a claim within the jurisdiction of the circuit court, and the trial develops a substantial controversy or dispute over such claim, the jurisdiction will not be defeated by proof of partial payment of the demand, especially if there is an issue upon such payment; but where the plaintiff, by written statement of the facts presented at the trial, admits that before suit brought the claim was paid, except a balance less than \$500, the case will be dismissed for want of jurisdiction, on motion of defendant, or by the court *sua sponte*.

2. NAME—REMEDY IN OTHER COURTS.

The want of remedy in other courts constitutes no reason for affording a remedy in the circuit court.

At Law.

Shepard & Shepard, for plaintiffs.

J. V. V. Platto, for defendant.

DYER, J. The plaintiffs allege in their complaint that between the eleventh day of August, 1881, and the sixth day of February, 1882, they sold to Louis H. Wehmer, then in life, but since deceased, goods and merchandise of the value of \$518; that he died testate, February 15, 1882, possessed of personal estate; that the defendant was duly appointed executrix of the last will of the deceased, and that no part of the plaintiffs' demand has been paid; and judgment is demanded for the amount thereof, with interest. Several defenses are interposed, among which is that of payment, and also a general denial of liability. A trial by jury having been waived, the case has been submitted to the court upon certain undisputed evidence and an agreed statement of facts, from which it appears that Louis H. Wehmer died on the twenty-third day of January, 1882; that a special administrator of the estate of the deceased was appointed by the probate court, pursuant to the statutes of Wisconsin, on the twenty-fourth day of January; that the entire demand of the plaintiffs was paid by the deceased in his life-time, except two items of \$60 each, under dates of January 6 and February 6, 1882; that the portion of the plaintiffs' demand so paid amounted to \$424, and that prior to the commencement of this suit the special administrator surrendered to the defendant, as executrix, the assets and estate of the testator. Concerning the item of \$60, under date of January 6, 1882, there is no dispute between the parties. It is admitted that the deceased made that purchase in his life-time, and that it is unpaid. As to the item of \$60, of date February 6th, it is shown that the deceased in his life-time was a retail druggist and dealer in cigars; that after his death the special administrator, being in charge of the business, ordered from the plaintiffs, without any authority from the probate court so to do, a quantity of cigars, amounting in value to \$60, which entered into and were sold by the special administrator as part of the stock of merchandise left by the deceased. Thus it will be seen that the real controversy between the parties is upon the item of the plaintiffs' demand last referred to, amounting to \$60; and that the total amount for which judgment is asked is \$120, and interest.

Upon this state of facts it is obvious that this court ought not to retain the case for judgment on the merits, but should dismiss it for want of jurisdiction. There was some discussion on the argument as to whether the jurisdiction of the court depended upon the amount for which judgment was demanded in the complaint, or upon the sum actually in controversy as shown at the trial; and cases were cited by plaintiffs' counsel arising under the original judiciary act, to the effect that, for the purposes of jurisdiction, the sum demanded in the declaration or complaint is to be regarded as the amount in controversy. But section 5 of the act of congress of March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States," etc., (18 St. pt. 3, p. 470,) provides "that if, in any suit

commenced in a circuit court, * * * it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * * the said circuit court shall proceed no further therein, but shall dismiss the suit, * * * and shall make such order as to costs as shall be just." This provision of law is new in the act of 1875. It exactly covers the case at bar. It was intended to meet just such a state of case as we have here. The circumstance that the plaintiffs demand judgment in their complaint for an amount in excess of that required for purposes of jurisdiction, cannot help them. It is evident that the suit "does not really and substantially involve a dispute or controversy properly within the jurisdiction" of this court, and the plaintiffs must be presumed to have known such to have been the fact when they brought their suit; for they now come into court and voluntarily stipulate that their demand, except the sum of \$120, was fully paid by the deceased in his life-time. The provision of the act of 1875, before quoted, was passed to prevent just such an attempt to invoke the jurisdiction of the federal court as is here disclosed. The plaintiffs ought to have known, they must have known, they will at least be presumed to have known, that their demand, in excess of \$120, was paid by the testator in his life-time; and yet they come into this court, in the first instance, including in their demand all the items thus fully paid, and demanding judgment for the same, and then at the trial admit, in a written stipulation of facts, that they received payment, before suit brought, of \$424 of their demand, and that the real sum in dispute is \$120. No proof is presented, no suggestion was made on argument, that the plaintiffs supposed, or had any ground for supposing, when they commenced their suit, that their demand had not been paid, except the sum of \$120.

Where the complaint or declaration alleges a claim within the jurisdiction of the court, and the trial develops a substantial controversy or dispute over such claim, the jurisdiction will not be defeated by proof of partial payment of the demand, especially if there is an issue upon such payment. But that is not this case. Here the plaintiffs, by written statement of the facts presented at the trial, admit that the testator, in his life-time, paid them in full, except the sum of \$120,—\$60 of which was incurred after his death by the special administrator. The case is clearly within the act of 1875. Authorities are not needed in support of a proposition so plain. If this point of jurisdiction had not been raised at the trial by counsel for the defendant, it would still be the duty of the court, *sua sponte*, to order a dismissal of the suit. It is well said by Judge Brown in *Rae v. Grand Trunk Ry. Co.* 14 FED. REP. 402, that "if it should appear that the plaintiff, at the time suit was commenced, must have known that the amount of his recovery would be less than five hun-

dred dollars, I apprehend it is the duty of the court to dismiss; although, if he had sued in good faith to recover more than five hundred dollars, the fact that the verdict for a less sum was obtained, would not deprive the court of jurisdiction, and would only affect his right to costs." Here the plaintiffs must have known when they brought their suit that the amount of their recovery would be less than \$500. Suggestion was made on the argument that if the plaintiffs could not recover in this court they were without remedy; for they could not sue in the state court, and the time within which they might have presented their demand to the probate court for allowance, under the state statute, had long since elapsed. The want of remedy in other courts constitutes no reason for affording a remedy in this court. Indeed, the very suggestion leads this court to apprehend that the plaintiffs brought their suit in this court because they had lost their remedy in any other court, and hoped to successfully invoke the jurisdiction of this court by asserting a demand, concerning the greater part of which there could be no dispute, because, as they admit, it had been previously paid. Suit dismissed, with costs, except attorney's fees.

MAYOR, ETC., OF THE CITY OF KNOXVILLE v. KNOXVILLE & O. R. Co.

(Circuit Court, E. D. Tennessee. December, 1884.)

1. CORPORATIONS—ULTRA VIRES.

The powers of a corporation are only such as are conferred by law. Everything done by a corporation in excess of such authority is voidable at the instance of the parties interested in and injuriously affected thereby.

2. SAME—CHARTER A CONTRACT—LEGISLATURE CANNOT IMPAIR—TRANSFER OF FRANCHISE.

Where the charter of a railroad corporation did not authorize the transfer of its franchise and other property to another corporation, upon the assumption by the latter of all the duties and obligations of the former, and upon issuing to the stockholders of the former an equal amount of the stock of the latter corporation, *held*, that it was not competent for the legislature, by authorizing such transfer, to do more than to waive the rights of the public. It could not divest or impair the rights of the stockholders as between themselves, as guaranteed by the company's charter, without their consent.

3. SAME—VOIDABLE CONVEYANCES—LACHES.

In this case there has been no such laches as to preclude the assertion of the dissenting stockholders.

4. SAME—ULTRA VIRES CONVEYANCES—SUBSEQUENT MORTGAGE—INNOCENT BONDHOLDERS.

Where a corporation unauthorizedly made a conveyance of its property, and the transferee subsequently mortgaged the same to secure certain bonds which were sold for value without actual notice of the defect in the title, *held*, that they are charged with notice of such defect, it being apparent upon the face of the first conveyance; and the first conveyance being set aside, the mortgage will be removed as a cloud upon the title. But in this case an account is ordered between the parties to said conveyance, and the transferee will be entitled to a lien for any balance found due, and to a sale of the property, the proceeds to be