

land) exceeds in value the sum of \$2,000. At least such is the natural and reasonable interpretation of the allegations of the petition, read in connection with the complaint. The statute, in my opinion, is to be construed with reference to the subject-matter and the matter in dispute. Taking the petition and the complaint together, and reading them practically as one paper, it appears that the matter in dispute is real property within the jurisdiction of this court, and that the value of the said real property exceeds the sum of \$2,000, exclusive of costs. There being no question of interest, upon the facts disclosed, I do not think it was essential for the petitioner to use the term "interest" in his petition; in other words, the elimination of that term from his petition does not entitle the plaintiff to have this cause remanded. The motion should be denied, and it is accordingly so ordered.

NICKERSON v. CROOK et al.

(Circuit Court, D. Washington, W. D. March 4, 1891.)

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP.

A case commenced in a court of Washington territory, and which was pending at the time of the admission of the state of Washington into the Union, and involving only a controversy between citizens of a state and citizens of said territory, does not, on account of the diverse citizenship of the parties, come within the jurisdiction of a United States circuit court, and is not transferable thereto, unless the jurisdiction can be predicated upon some other ground.

(Syllabus by the Court.)

At Law.

Town & Likens, for plaintiff.

Calkins & Shackelford, for Mrs. Crook.

Doolittle, Pritchard & Stevens, Carroll, Coiner & Davis, and *G. S. Groscup*, for other defendants.

HANFORD, J. By a stipulation of the parties this case was transferred to this court from the superior court of Pierce county. In doing so it was assumed that this court would have jurisdiction by reason of the fact that the plaintiff is a citizen of the state of Pennsylvania, and the defendant Mrs. Crook is a citizen of the state of Maryland, and the other defendants are all citizens of the state of Washington. The case was commenced in a territorial district court, and was pending at the time of the admission of the state of Washington into the Union. Whether it is one of which this court is given jurisdiction is a question requiring for an answer a true interpretation of section 23 of the enabling act. 25 St. U. S. 683. Between the plaintiff and Mrs. Crook there appears to be no controversy; certainly no separate and severable controversy. The other defendants are all citizens of the state of Washington, and were at the time the suit was commenced residents of the territory of Washington,

and not citizens of any state; so at that time the case was not one involving a controversy between citizens of different states, and not cognizable in a circuit court of the United States on the ground of the diverse citizenship of the parties. There is no other ground apparent upon which the jurisdiction of this court can be predicated, and it is my opinion that the court is without jurisdiction, and the case must be remanded to the superior court of Pierce county, for it is not to be regarded as if it were one commenced since the real defendants acquired their *status* as citizens of a state. The important fact cannot be overlooked that the case was pending at the time of the admission of the state. It is one of the cases controlled by section 23 of the enabling act, and, as that section expressly refers to the time of the commencement of the suit, and prescribes as the test of jurisdiction the question whether at that time the case was, on account of the parties or the nature of the questions in dispute, cognizable in the national courts, I cannot feel warranted in maintaining the jurisdiction on the ground that, by reason of a change in the *status* of the parties at a subsequent time, the case has become so changed in its character as to be now within the jurisdiction of a circuit court of the United States, although not so at the time of its commencement. To say that the supposed existence of the court presupposes the existence of the state, and that if the court had been in existence when the case was commenced there would have been a state of Washington, of which the real defendants would have been citizens, and therefore the case would have been one of which the court might have had jurisdiction, is but another way of saying that, if the facts were different from what they are in this case, it might have been within the jurisdiction. The court, however, is bound to deal with the actual facts, and declare the law applicable thereto, and to interpret the law fairly according to the intent of the legislature, in harmony with the language in which it is enacted; and it is not permissible by construction to make a law different from what the law-making power has made it.

I am aware that in the cases of *Herman v. McKinney*, 43 Fed. Rep. 689, and *Dorne v. Mining Co.*, Id. 690, the circuit court of South Dakota has decided this question differently, and in the opinions rendered by Judges SHIRAS and EDGERTON the opposite view has been ably argued. But, on the other hand, in *Strasburger v. Beecher*, 44 Fed. Rep. 209, the circuit court of Montana has also passed upon the question, and, as I consider, in deciding contrary to the South Dakota cases Judge KNOWLES has simply given effect to the law according to its words.

The demurrer interposed by certain of the defendants after filing an answer in this court will be overruled, because out of time, and an order will be entered upon the court's own motion, remanding the case to the superior court of Pierce county.

COMSTOCK v. HERRON *et al.*

(Circuit Court, S. D. Ohio, W. D. April 23, 1891.)

EQUITY—PLEADING—RESPONSIVE AVERMENTS.

Where a bill against the executors and trustees under a will charges them with having delayed, neglected, and refused to invest a certain sum as directed by the will, and to pay the income to complainant, the averments in the answer that defendants' conduct was known to and approved by complainant, and that she had never, until shortly before the suit, requested the investments to be made, are responsive to the bill, and will not be stricken out on exceptions.

In Equity.

Matthews & Cleveland, for complainant.

John W. Herron and *R. B. Rowlin*, for respondents.

SAGE, J. This cause is before the court upon exceptions to the answer of the respondents Herron and Fisher. The bill charges that as executors and trustees under the will of Margaret Poor, deceased, they have delayed, neglected, and refused, and still delay, neglect, and refuse, to invest the sum of \$56,667, as directed by the will, in productive real estate and mortgages or interest-bearing stocks and bonds, and to pay the income therefrom to the complainant. The respondents answer, denying the averments, and stating that they have never been requested until the present year, by the complainant or any other persons, to make said investments, and that, on the contrary, it was well known to the complainant that they were proceeding as rapidly as possible to convert the estate into money or productive property, so as to make said investments; also that their entire conduct in this matter was fully known to the complainant, and approved by her, and that she has never expressed the least dissatisfaction in reference thereto. To these averments the complainant excepts. They are directly and properly responsive to the charge of the bill. I do not think that the respondents, when charged with dereliction of duty and violation of their trust, ought to be limited to a simple denial, and to be precluded from setting up that not only was no objection made by the complainant, but that she approved their entire conduct in this matter. While it may be true that that may not affect the final decree in this case, I think the trustees are entitled to relieve themselves from the imputations which are at least implied by the averments of the bill. Moreover, these averments of the answer are directly responsive to the charge that the respondents refused to make investments. The same line of remark applies to the portions of the answer in which the respondents state that they were assisted by the complainant in their efforts to sell the Newport cottage; she being familiar with it, and owning the furniture in it. Without entering into detail, it is enough to say generally that the bill charges the trustees with neglecting their duties and refusing to carry out the provisions of the will, and that by their failure to execute the trusts reposed in them the estate is constantly being depleted, and that there is danger of the