

thorized the court to exercise jurisdiction. In the case at bar this court has no jurisdiction, except upon the ground of diverse citizenship. Whether such diverse citizenship exists hinges on the question, is the state of Indiana a citizen of the state of Indiana, within the meaning of the removal act, for the purpose of giving this court jurisdiction? This question must be answered in the negative. A suit instituted by a state in one of its own courts against a citizen of another state is not removable into a circuit court of the United States on the ground of a diversity of the citizenship of the parties. *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. Rep. 799; *Ferguson v. Ross*, 38 Fed. Rep. 161; *State of Alabama v. Wolfe*, 18 Fed. Rep. 836. There is no federal question presented by the record in this case, and in that respect it differs from the case of *Railroad Co. v. Mississippi*, 102 U. S. 135.

The want of jurisdiction is affirmatively shown on the face of the record. In such case neither silence nor positive consent will confer jurisdiction, because the parties cannot confer on the court a jurisdiction denied to it by the statute. If this court should try the case, it would be the duty of the appellate court to which it might be taken to reverse and remand, with instructions to this court to return it to the state court. *Graves v. Corbin*, 132 U. S. 571, 10 Sup. Ct. Rep. 196. This court will not permit a cause of action of which it has no jurisdiction to be tried before it, even if the parties should stipulate in writing to abide its judgment.

Let the cause be remanded, at the costs of the defendant.

NEW CHESTER WATER CO. et al. v. HOLLY MANUF'G CO. et al.

(Circuit Court of Appeals, Third Circuit. November 14, 1892.)

No. 7.

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP—PARTIES.

A firm owning substantially all the stock of a water company purchased engines for the same, and subsequently suffered judgment by confession for a balance due thereon. In the mean time they sold and transferred all the stock to others, and conveyed the land on which the engines were located to the water company. A suit was subsequently brought by the seller of the engines to assert a vendor's lien thereon, and by an amendment the members of the firm were made parties plaintiff. Held that, as no relief was sought against them, and as they had parted with all their interest, they were merely formal parties, and it was not necessary to make them parties defendant, and the fact that they were citizens of the same state with complainants did not oust the jurisdiction. 48 Fed. Rep. 879, affirmed.

2. EQUITY—PARTIES—JURISDICTION OF FEDERAL COURTS.

In a suit to assert a vendor's lien against specific machinery of a corporation it is not necessary to make the trustee of its mortgage bondholders a party defendant, when substantially all the bondholders themselves are before the court. The trustee being without the territorial jurisdiction of the court, its presence can be dispensed with under equity rule 47, even though it might otherwise be deemed a proper or necessary party. 48 Fed. Rep. 879, affirmed.

3. VENDOR'S LIEN—NOTICE—CORPORATIONS.

A firm which owned all the stock of a water company, and whose employes were its officers, purchased pumping engines, contracting that the same should be subject to a lien for the price, and placed them in the company's works. After erection, the engines remained in the exclusive charge and management of the seller's agent. Meanwhile the firm disposed of all

its stock, and conveyed to the water company the land on which the engines stood. *Held*, that the company had notice of the lien, and took subject thereto. 48 Fed. Rep. 879, affirmed.

4. SAME—VALIDITY—PUBLIC POLICY.

There is no public policy which renders invalid a contractual vendor's lien upon the pumping engines of a water company.

5. FIXTURES—SALE—INTENT OF PARTIES.

On a sale of pumping engines for waterworks the purchaser expressly agreed that the seller should have a lien thereon, with full right of possession, until the price was paid. *Held*, that this showed an intent that they should not become a part of the realty, and, under the Pennsylvania decisions, this intent was controlling, and the lien was not waived in favor of the mortgage bondholders or other creditors by attaching the engines to the foundation in the usual manner.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

In Equity. Bill to establish and enforce a lien on certain pumping engines for the purchase price thereof. Decree for complainants. 48 Fed. Rep. 879. Defendants appeal. Affirmed.

Statement by WALES, District Judge:

This was a suit in equity, brought in the United States circuit court for the eastern district of Pennsylvania by the Holly Manufacturing Company, a corporation organized under the laws of the state of New York, and a citizen of that state, against the New Chester Water Company and the South Chester Water Company, corporations organized under the laws of the state of Pennsylvania, and citizens of said state; William G. Hopper and Harry S. Hopper, citizens of the state of Pennsylvania, trading under the name of William G. Hopper & Co.; William Bucknell, a citizen of the state of Pennsylvania; Richard Wood, George Wood, Walter Wood, and Stuart Wood, citizens of the state of Pennsylvania, trading under the firm name of R. D. Wood & Co.; and the Bienville Water Supply Company, a corporation existing under the laws of the state of Alabama, and a citizen thereof.

The bill, as originally filed, alleges that on March 21, 1887, the New Chester Water Company made a contract with Samuel R. Bullock and William S. Mercer, citizens of the state of New York, doing business under the name of Samuel R. Bullock & Co., by which Bullock & Co. agreed to construct and equip, at their own proper cost and expense, a system of waterworks at or near Chester, Pa., in the manner and according to the plans and specifications prepared by the chief engineer of the water company; the said works to be completed and ready for occupation on or before the 1st day of January, 1888. Bullock & Co. also agreed to furnish at their own expense all lands necessary for the location of engine and boiler house and reservoir site. On the completion of the works the water company was to cause an inspection and test of the same, to satisfy it that the said works were constructed and equipped in accordance with the terms of the contract. Bullock & Co. covenanted to transfer and deliver the said waterworks and other property to the New Chester Water Company free from and unincumbered by any liens for the benefit of laborers, mechanics, or material men. In consideration of the execution and performance of the contract by Bullock & Co., the water company was to pay that firm \$500,000 in first mortgage 6 per cent. bonds of the water company, secured by a first mortgage on all the property and franchises of the water company, as authorized by resolutions of its stockholders and board of directors, and 17,000 shares of its common capital stock at a par value of \$50 each. The bonds and stock were all delivered to Bullock & Co. to enable them to proceed with and to procure the construction and completion of the water supply system, and to be used for that purpose, and to the payment of the said Bullock & Co. therefor when completed. That, for the purpose of carrying out their contract with the water company, Bullock & Co., on August 3, 1887, made a contract with the Holly Manufacturing Company to set up in working order at the pumping station in Chester, Pa., two pumping engines, for which Bullock & Co. were to pay to the Holly Manufacturing Company the sum of \$50,000 in six specified installments until the whole amount of the purchase money of the said engines and connections should be fully paid to the Holly Manufacturing Company. That the Holly Manufacturing Company constructed and erected

the engines in accordance with the contract, and received from Bullock & Co. \$8,333.33 on account; and there remains due and owing to the complainant the sum of \$41,667, with interest from August 11, 1888. That Bullock & Co., after making the contract of August 3, 1887, with the Holly Manufacturing Company, for the purpose of raising money to carry on the construction of the water works, pledged the bonds and shares of the water company to William G. Hopper & Co. to secure the price of materials and money to be supplied for the completion of the said waterworks.

The bill averred, in substance, the facts above stated, and prayed a decree establishing a lien in favor of the Holly Manufacturing Company, free and superior to any and all liens and claims of any other parties upon the said pumping engines; and, further, that the defendants in this cause may be decreed to pay to the Holly Manufacturing Company the amount ascertained to be due for said pumps at a short day; and that, in default thereof, the defendants be absolutely foreclosed of all right in equity of redemption in the same.

To the bill as originally filed the defendants demurred upon the ground of the nonjoinder as parties in the cause of Samuel R. Bullock and William S. Mercer, trading as Samuel R. Bullock & Co., whereupon the said Samuel R. Bullock & Co. were brought upon the record by an amendment which set forth they joined as parties plaintiff, "not as seeking any special or distinct relief in the premises in this proceeding, but in affirmation of the rights of their complainant, the Holly Manufacturing Company, and in order to invest the court with full jurisdiction in the premises, so that a complete decree, protecting the rights of all parties, can be made." Thereupon the defendants answered, inter alia, suggesting that the principal controversy in the cause was between the complainant the Holly Manufacturing Company and Bullock & Co., all of whom were citizens of the state of New York, and that, therefore, the court was without jurisdiction in the premises.

At the hearing upon the bill, answer, and proofs, the following facts appeared:

In the year 1885 charters of incorporation were obtained for four water companies, namely, the New Chester Water Company, the South Chester Water Company, the Penn Water Company, and the Upland Water Company, formed for the purpose of furnishing water for public and domestic use to the city of Chester and adjacent boroughs in Delaware county, Pa. On December 9, 1886, before any work was done by them, a written agreement was entered into between the four named companies in their corporate capacity, all the stockholders thereof individually, and Samuel R. Bullock & Co., a firm of waterworks contractors. The leading purpose of the parties to this agreement is expressed in the following clause of the preamble:

"And whereas, the stockholders are desirous of selling their said shares of capital stock, and of transferring and surrendering the absolute control of the water companies, and the vendees (Bullock & Company) are desirous of purchasing and acquiring the same, accordingly the stockholders thereby agreed to transfer all the stock of said companies to Samuel R. Bullock & Company, and to deliver to them all the charters, certificates of organization, books, papers, deeds, maps, plans, estimates, stock certificate books, transfer books, minute books, receipts, accounts, contracts, the corporate seals, and all other property of any and every description, kind, or nature belonging to the water companies, or any of them; and, in consideration thereof, Bullock & Company agreed to enter into a contract with the water companies, on terms to be arranged, for the construction and equipment of a system of waterworks for furnishing water to the places which the companies were authorized to supply."

The stockholders having complied with their part of this agreement, the following transactions took place and contracts were entered into, all on March 21, 1887: Resolutions were adopted by the stockholders of the Penn Water Company and Upland Water Company to sell and convey the franchises and property of those companies to the South Chester Water Company, and such written transfers were executed. Resolutions were adopted by the stockholders of the South Chester Water Company to increase its capital stock from \$1,000 to \$600,000, and to issue its bonds for \$300,000, to be secured by a mortgage upon its franchises and property. Resolutions were adopted by the stockholders of the New Chester Company to increase its capital stock from \$500,000 to \$1,000,000, to issue its bonds for \$500,000, to be secured by a mortgage upon its franchises and property, and that the company guaranty the said bonds of the South Chester Water Company. The New Chester Water Company and the South Chester Water Company entered into an agreement which, inter alia, provided that the former company, by

its machinery, and from its reservoirs, would supply water through the pipes of the latter company to its territory. And, finally, a contract in writing was entered into between Samuel R. Bullock & Co. and the New Chester Water Company, whereby the former agreed to provide the necessary land for an engine and boiler house and a reservoir site, and to furnish all material and labor for and to construct and equip waterworks at Chester, to be accepted by the water company after completion and satisfactory inspection and test, for the consideration to the contractors of \$500,000 in the mortgage bonds of the water company and 17,000 shares of its capital stock of the par value of \$50 each. At that date, March 21, 1887, the stockholders of the New Chester Water Company and the number of their respective shares were as follows: Samuel R. Bullock & Co., 9,995 shares; J. L. Forwood, 1 share; W. H. Miller, 1 share; E. F. Fuller, 1 share; Ellis Morrison, 1 share; Charles M. Berrian, 1 share. Each of the last-named five persons then held one share of stock in each of the other named water companies, Bullock & Co. holding the rest of the stock thereof. The proofs fully warrant the conclusion that these holdings of stock by Forwood, Miller, Fuller, Morrison, and Berrian were nominal and formal, merely to give a legal status to the organization. These five persons constituted the board of directors of the New Chester Water Company, Forwood being president, and Miller secretary. Fuller was chief engineer of the company, and an employe of Bullock & Co. Berrian was the attorney of the company, and private counsel of Mr. Bullock. All these five directors were completely under the control and direction of Samuel R. Bullock & Co. Emil Woltman, the treasurer of the company, was the confidential clerk of that firm. Samuel R. Bullock testified: "An arrangement was perfected, whereby the personnel of the New Chester Water Company was subordinated to the management, direction, and control of my firm, based upon the idea that we would carry out the objects for which that company was incorporated." At the dates of several transactions to which reference is about to be made, and from March 21, 1887, continuously down until November, 1888, Samuel R. Bullock & Co. had "the absolute control" of the New Chester Water Company, and the organization of that company was wholly under the management and practically in the hands of that firm. The directors acquiesced in whatever that firm did, and practically were but its agents.

On April 1, 1887, the New Chester Water Company executed a mortgage of its franchises and property, then owned or thereafter to be acquired, to the Farmers' Loan & Trust Company, a corporation of the state of New York, to secure payment of \$500,000 of its bonds, payable to Samuel R. Bullock & Co. or bearer, and the South Chester Water Company executed a like mortgage to the same trustee, to secure like bonds to the amount of \$300,000. On May 31, 1887, an agreement in writing was entered into between the South Ward Waterworks, a corporation, the city of Chester, and the New Chester Water Company, whereby, for a consideration mentioned, and moving from the last-named company, the first-named corporation agreed to sell, transfer, and convey all its property, real and personal, to the New Chester Water Company. On June 13, 1887, a contract in writing was made between William G. Hopper & Co. and Samuel R. Bullock & Co., whereby, for a specified consideration, the former agreed to furnish to the latter advances of money upon the bonds of the New Chester Water Company, as earned by and delivered to Bullock & Co., and the notes of that firm, with a deposit as further collateral security of all the stock of the New Chester Water Company and the property of the South Ward Waterworks. On July 7, 1887, Hopper & Co. made a special advance of about \$300,000 to Bullock & Co., to enable them to consummate the purchase of the South Ward Waterworks, and as security therefor Bullock & Co. delivered to Hopper & Co. the above-mentioned \$300,000 of bonds of the South Chester Water Company. In pursuance of a written authority signed "J. L. Forwood, President," and "W. H. Miller, Secretary," the real estate of the South Ward Waterworks, by the deed of that corporation, dated and executed July 7, 1887, was conveyed to Samuel R. Bullock in fee. On July 12, 1887, Samuel R. Bullock, by deed of that date, conveyed the said real estate to H. S. Hopper, who, on July 29, 1887, executed and gave to Bullock an instrument in writing setting forth that the conveyance to him was made as security for advances made and to be made by Hopper & Co. to Bullock & Co. All the advances which Hopper & Co. ever made under their contract of June 13, 1887, were made prior to September, 1887. On August 3, 1887, Samuel R. Bullock & Co. and the Holly Manufacturing Company, a corporation of the state of New York, entered into a written contract, whereby the latter agreed to manufacture two pumping engines of specified capacity, and set up the same at the city of Chester, for the

sum of \$50,000; payable \$8,333.33 on each engine when delivered in Chester, and the like sum on each engine when it has been properly run 30 days, and the like sum on each engine 30 days thereafter. The contract contains the following clause:

"When said engines and connections are completed and ready for service, and on notice thereof to the party of the first part (Bullock & Co.) to that effect, the same shall be subjected to a fair trial of their capacity and efficiency for not exceeding twenty-four hours, and on the successful testing thereof the liability of the party of the second part (Holly Company) hereunder shall cease and determine, but it is expressly understood and agreed that the party of the second part shall have a lien on all of said engines and connections, and the party of the second part may remain in and have full possession thereof until the whole amount of the purchase price of said engines and connections shall have been fully paid to the party of the second part or its assignee."

One payment only, namely, the sum of \$8,333.33, was made to the Holly Company under its contract, and at the date of the bringing of this suit the balance, or sum of \$41,667, was due that company on said engines.

On October 26, 1887, a tripartite agreement was entered into between Samuel R. Bullock & Co., R. D. Wood & Co., and William G. Hopper & Co., whereby, after reciting contracts between Bullock & Co. and Hopper & Co. for advances by the latter to the former upon a pledge of bonds and stocks of water companies, and assignments by Bullock & Co. to Wood & Co. of the bonds and stock so pledged as collateral security for materials that they had furnished, and contracts between Bullock & Co. and Wood & Co., by which the latter had undertaken to complete waterworks at Chester, Greencastle, and Mobile, and the representation by Bullock & Co. that \$200,000 would enable them to complete those works, William G. Hopper & Co. agreed to advance to Bullock & Co. \$200,000, the same to be applied by Wood & Co. to the completion of the waterworks at the three named places in certain specified proportions, Wood & Co. to present to Hopper & Co. the detailed applications by Bullock & Co. for money as needed, and Hopper & Co. thereupon to furnish such amounts (within the limit stated) to Wood & Co., who should give their checks for the same to Bullock & Co., who should disburse the moneys for the purposes aforesaid; and, in consideration of this advance by Hopper & Co., Wood & Co. agreed to procure the completion of the waterworks at the three named places, "clear of all liens ahead of the securities held by William G. Hopper & Co." Under this agreement Hopper & Co. advanced the \$200,000, which was all applied to the waterworks at the three named places, but not in the proportions mentioned in the contract. The specified amount applicable to the works at Chester was \$129,800, whereas the sum actually applied was \$61,000 only. But the representation by Bullock & Co. that \$200,000 would suffice to complete the works at the three places proved to be incorrect, for, besides the money so advanced by Hopper & Co., Wood & Co., in the completion of these works, used \$105,000 of their own money, and even then the balance of \$41,667 due the Holly Company on the pumping engines at Chester was left unpaid, and also \$25,000 due that company on engines at Mobile. All the advances by Hopper & Co. under the tripartite agreement were made before the latter part of January, 1888, except a trifling sum, which was paid shortly afterwards.

In October, 1887, the Holly Company shipped one of the pumping engines to Chester, and in February, 1888, the other. Each was consigned to that company itself, and its agents at Chester received the engines, and proceeded, at its expense, to put them in place. They were set on the top of masonry foundations, and were attached thereto by a number of two-inch iron bolts. They could not be operated or tested otherwise. The engines stand in a brick building erected on land which the South Ward Waterworks Company agreed to sell and convey to the New Chester Water Company, but actually conveyed to Samuel R. Bullock, who conveyed the same to H. S. Hopper for the purpose set forth in the paper executed by the latter, as already mentioned. Each engine weighs from about 70 to 80 tons, but they can easily be disconnected from the foundations on which they rest without disturbing the foundations, and can readily be taken apart and through the door of the engine house without injury to the building. When the first engine was shipped to Chester, John Lockman, by order of the Holly Company, and as its agent, went there to superintend the erection of the engines, and to take charge and control thereof. This he did, remaining constantly in charge. The work of setting them up and ready for service was not completed until some time in July, 1888, but for the delay the Holly Company was not responsible.