

still holds the reversion, and upon a surrender or forfeiture of the lease would be reinstated in full ownership. The plaintiff, therefore, was not bound to accept the disclaimer, or, if it did, was entitled to a judgment respecting the costs, and passing upon the effect of the disclaimer. Moreover, in the same entry by which the Baltimore & Ohio Railroad Company was made a party defendant, the Central Ohio Railroad Company, another Ohio corporation, was also made a party defendant, as claiming to have some interest in the property sought to be appropriated. Although it is set up in the amended answer of the Midland Company that the Central Ohio Company was the lessee in the lease granted by the Midland Company, and the assignor to the Baltimore & Ohio Company, that amendment cannot be taken as establishing the fact, nor as authorizing the court to decide that the Ohio Central Company has no interest in the property. The decision in *City of Bellaire v. Baltimore & O. R. Co.*, above cited, would apply and make an order remanding the case necessary, even if the disclaimer of the Midland Company, if it were the only other party defendant, would sustain the removal by the Baltimore & Ohio Railroad Company to this court. The motion to remand will be granted, with all costs attending the removal, and in this court, to be taxed against the Baltimore & Ohio Railroad Company.

EGAN v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, N. D. Iowa, E. D. January 21, 1893.)

No. 445.

1. REMOVAL OF CAUSES—TIME OF REMOVAL—FILING PLEADINGS IN STATE COURT.

It is not necessary, in order to the removal of a cause, that any pleading on behalf of defendant should first be filed in the state court; and decisions by a state court that such filing is necessary are not binding upon the federal courts.

2. SAME—SUFFICIENCY OF PETITION.

In an action in a state court, plaintiff claimed damages in the sum of \$27,000 for a death by wrongful act. Defendant, being a citizen of another state, filed in the state court a petition for the removal of the cause to a federal court, averring that the "matter and amount in dispute" exceeded \$2,000. The state court accepted this petition and the bond filed therewith, and the transcript was filed in the federal court. *Held*, on a motion to remand, that it sufficiently appeared that a "controversy" existed between the parties, although the petition did not directly allege the same.

At Law. Action brought by Julia Egan, administratrix of the estate of John J. Egan, in an Iowa state court, against the Chicago, Milwaukee & St. Paul Railway Company, to recover damages for the alleged wrongful death of the said John J. Egan. The cause was removed by the defendant to the United States circuit court, and is now heard on a motion to remand. Denied.

Hubert O'Donnell and Henderson, Hurd, Daniels & Kiesel, for the motion.

W. J. Knight, opposed.

SHIRAS, District Judge. This action was brought originally in the district court of Dubuque county, Iowa, from which it was removed to this court upon the application of the defendant company. The plaintiff is, and was when the suit was brought, a citizen of Iowa, and the railway company was and is a corporation created under the laws of the state of Wisconsin. The action is to recover damages in the sum of \$27,000, alleged to have been caused to the estate of John J. Egan, the plaintiff's decedent, in that it is alleged that he was killed while in the employ of the company, and that his death was caused by negligence on part of the company. The state court granted the prayer of the petition for removal, which was filed in that court in due season, and the transcript was thereupon filed in this court.

In support of the motion to remand, now made on behalf of the plaintiff, two grounds are relied on; the first being that when the order of removal was made, and the transcript was filed in this court, no pleading had been filed in the state court on behalf of the defendant, and therefore it did not appear that there was a controversy between the parties justifying a removal. It has been the settled rule in this circuit for years, that the filing of a demurrer or answer to the petition of the plaintiff is not a prerequisite to the removal of a case which otherwise comes within the provisions of the removal acts. The supreme court of Iowa has in several cases held that the right of removal cannot be exercised until a pleading making an issue has been duly filed; but, as the question is one arising upon the proper construction of the statutes of the United States, these decisions are not binding upon this court, as would be the case if the question was one arising under the statutes of Iowa, in which event we would cheerfully follow the ruling of the state court. The statute of the United States requires the petition for removal on the ground of diverse citizenship to be filed before or at the time the defendant is required to plead in the state court. To avoid, as far as possible, the evils of the delay necessarily attendant on the change of forum, it has been the policy of the federal courts to require, as far as possible, prompt action on part of those who seek to remove a case from the state to the United States. It has been uniformly ruled that if the time for filing an answer, by consent of the parties, or by order of the court, has been extended beyond the time when the pleading would be due under the statute of the state or by the general rules of the court, such extension of time for pleading will not avail to extend the time for applying for a removal; and it has been likewise held that a party cannot be permitted to experiment in the state court touching the merits of his case, and then, if the results are not to his liking, remove the case into the federal court. Under the removal section of the act of 1888, a defendant may apply for a removal before the time for pleading in the state court has arrived. If it had been the intent of congress, in passing the act, not to permit a removal to be taken until after the issue had been joined in the state court, it would have been very easy to make such intent plain upon the face of the statute; but, instead of so declaring, the act grants the

right to file the petition for removal at any time before the time for pleading in the state court, which clearly indicates that it may be filed at any time before the pleading is due, and without reference to the fact of whether issue has been joined or not. The filing of an answer at the same time the petition for removal is filed confers no right upon the state court to take action on the answer. If the case is a removable one, and the petition containing the necessary averments, with the proper bond, is filed within the time fixed by the statute, then the power of the state court over the case is at an end. It cannot look into the averments contained in the answer to ascertain whether it is proper in form or in substance. So far as the state court is concerned, the answer is of no moment, provided the record otherwise shows the case to be one that is removable; and requiring it to be filed before a removal can be had only increases the expense by increasing the size of the transcript. If congress had intended not to authorize a removal, except in cases wherein an actual controversy was shown to exist by the issues made in the pleadings filed by the adversary parties, apt language would have been used, fixing the time for applying for the removal after issue had been in fact joined, instead of requiring it to be done before or at the time the answer is due according to the rules of practice in the state court.

The second position taken in support of the motion to remand is that, granting that it is not necessary to file a pleading in the state court as a prerequisite to the right to remove a case, nevertheless it must be made to appear, in some way, that there is actually a controversy between the parties, and that in the present case this was not made to appear in the state court upon the face of the record, and therefore the order of removal was improperly made, and the case should be remanded. The petition for removal, after giving the title of the court and of the case, states that "your petitioner, who is defendant in the above-entitled cause, respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars; that the controversy in said suit is between citizens of different states," etc.

The point of the objection to the petition is that it does not directly aver that there is a controversy between the parties; yet taking these averments in connection with the petition in the case, wherein a cause of action is clearly set forth in favor of the plaintiff and against the defendant, it certainly does appear that there is a controversy between the parties to the suit. The petition in the action asserts a claim against the defendant for the causes therein stated, and for damages in the sum of \$27,000, and prays judgment for that sum. The defendant in the petition for removal "shows to the court that the matter and amount in dispute in the above-entitled suit exceeds two thousand dollars," etc. Fairly construed, this is an averment that, in the case referred to, there is a matter in dispute which exceeds in amount the sum of \$2,000. The state court accepted this averment as a statement showing that there was in fact a controversy between the parties, and no ground

is now perceived why such ruling of the state court should be held bad. If, as a matter of fact, there was not a controversy between the parties, and the state court was imposed upon, there is ample power in this court to remedy the wrong, and punish, by way of costs, the wrong done; but there is no claim now made that there is not in fact an actual controversy between the parties, and always has been since the action was commenced in the state court. The record in this court shows that the defendant has filed an answer denying the allegations of the plaintiff's petition. As the case now stands, it appears that the same was removable into this court upon the petition of the defendant, in that it appears that it is now, and was when it was commenced, an action between citizens of different states, the plaintiff living in Iowa, and the defendant being a corporation of Wisconsin, wherein is involved a controversy exceeding in amount the sum of \$2,000. There is no ground for holding that the state court was in any way imposed upon, or that by the want of positive averments in the petition for removal that court was misled as to the actual facts. It is not to be denied that the petition for removal is open to the criticism made upon it, yet I do not think it ought to be held that the construction put upon it by the state court cannot be sustained.

Motion to remand is therefore overruled.

WYMAN et al. v. MATHEWS et al.

(Circuit Court, D. South Dakota, E. D. January 20, 1893.)

1. FEDERAL COURTS—ADMINISTERING STATE STATUTES—ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—PREFERENCES.

The South Dakota statute relating to assignments for benefit of creditors (Civil Code, § 4660) declares such assignments void if made upon any trust or condition by which any creditor receives a preference, but provides that in such case the property of the insolvent shall become a trust to be administered in equity in the district court, and shall inure to the benefit of all the creditors in proportion to their respective claims. *Held*, that in the case of foreign creditors the rights given by this statute may be enforced in a federal court.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES—RIGHTS OF GENERAL CREDITORS.

When an assignment has been made with preferences, the unpreferred creditors may maintain a bill under the statute to secure the application of the fund to all the debts pro rata, without first reducing their claims to judgment.

3. SAME—WHEAT CONSTITUTES—CHATTEL MORTGAGE.

A trader being insolvent, and owing a stock of goods worth about \$5,000, which was practically all the property owned by her not incumbered to its full value, made a chattel mortgage thereof to a bank to secure debts, aggregating \$4,250, with a proviso that the mortgagor should retain possession and sell the goods in the ordinary course of business for cash only, and apply the proceeds thereof to the satisfaction of the mortgage by delivering the same to the mortgagee daily at the said bank; and that in case of default in such payments, or in case the mortgagee should deem itself insecure, it might take immediate possession, and sell the goods at public auction. *Held*, that by this mortgage the trader evinced an intention to surrender dominion and control of practically all her property, and the

same was therefore, in effect, an assignment for the benefit of creditors, which was void under Civil Code S. D. § 4660, as giving a preference, and inured to the benefit of all her creditors, according to the amount of their claims.

In Equity. Bill by O. C. Wyman and others against Ida A. Mathews and others to enforce a trust in the property of an insolvent trader under the provisions of section 4660 of the Civil Code of South Dakota. Heard on application to dissolve an injunction and set aside an order appointing a receiver. Denied.

Chase, Kean & Sherman, for complainants.

Kennedy & Kennedy and Taylor, Shull & Farnsworth, for defendants.

SANBORN, Circuit Judge. Prior to December 27, 1892, the defendant Ida A. Mathews was a merchant operating a general store at Armour, in South Dakota. She had a general stock of merchandise and some store fixtures of the value of about \$5,000, and she was insolvent. She owed over \$4,000 that was past due. She had no means to pay her debts as they matured, except from the sales of the stock of merchandise. All of her property, except this stock and the fixtures in the store she occupied, was incumbered to its full value, so that she had no substantially valuable interest in any property except the stock of merchandise and fixtures. She owed the defendant the Douglas County Bank \$551 that was past due, and on December 27, 1892, to secure the payment of this debt and other debts that were past due, she made a chattel mortgage of all her stock and fixtures to the bank to secure the payment of \$4,251, according to the conditions of a promissory note made by her, payable on or before May 1, 1893, with 10 per cent. interest. The mortgage in terms provided "that the mortgagor shall retain the possession of said merchandise and fixtures, and sell and dispose of the same in the ordinary course of trade for cash, and for cash only, and apply the proceeds thereof to the satisfaction of this mortgage by delivering the same to the mortgagee daily at the said bank as security for the payment to the said Douglas Co. Bank of forty-two hundred dollars and fifty dollars, with interest thereon, as expressed" in the note; and "that in case of default made in the payment of the above-mentioned sums of money, or any part thereof, or if the mortgagee shall at any time deem himself insecure, even before the maturity of said note, then, and in either of the above cases, it shall be lawful for said mortgagee or their assigns, by themselves or agents, to take immediate possession of said goods or chattels wherever found, * * * and to sell the same at public auction," and apply the proceeds to the payment of the mortgage debt, returning the surplus to the mortgagor. The complainants were general creditors of the defendant Mathews at this date, and they have since become the assignees of claims of other creditors which amount in the aggregate to about \$2,500. On January 4, 1893, complainants filed their bill in the circuit court, alleging that the defendants were selling the property and applying the proceeds to the payment of the

mortgage debt in preference to the other creditors of the defendant Mathews, and this is admitted by the answers.

The complainants applied to the circuit court for an injunction against the defendants restraining them from the disposition of the property, and for the appointment of a receiver, on the ground that the chattel mortgage was in effect an assignment of the property of the defendant Mathews with preferences, and that it created a trust fund for the benefit of all her creditors, under the provisions of section 4660 of the Civil Code of South Dakota, and that the defendants were violating the trust thus created. An injunction was issued, and a receiver appointed. Application is now made to set aside the order appointing a receiver, and to dissolve the injunction.

Section 4660 of the Code of South Dakota provides that—

"An insolvent debtor may in good faith execute an assignment of property to one or more assignees, in trust towards the satisfaction of his creditors, in conformity to the provisions of this title; subject, however, to the provisions of this Code relative to trusts and to fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by corporations, or by other specified classes of persons: provided, moreover, that such assignment shall not be valid if it be upon or contain any trust or condition by which any creditor is to receive a preference or priority over any other creditor; but in such case the property of the insolvent shall become a trust fund, to be administered in equity in the district court, and shall inure to the benefit of all the creditors in proportion to their respective claims or demands."

Of this suit in equity to enforce a trust and to distribute a fund created under this statute, the circuit court of the United States has jurisdiction. Rights created by state statutes may be enforced in the federal courts by foreign creditors, where those statutes prescribe methods of procedure which by their terms are to be pursued in the state courts of original jurisdiction, and there is nothing of a substantial character in the methods prescribed which makes it impossible for the United States circuit court to substantially follow those methods. *Clapp v. Dittman*, 21 Fed. Rep. 15, 17; *Railway Co. v. Whitton*, 13 Wall. 270, 272, 274, 286; *Clark v. Smith*, 13 Pet. 195, 203; *Fitch v. Creighton*, 24 How. 159, 163; *Reynolds v. Bank*, 112 U. S. 410, 5 Sup. Ct. Rep. 213; *Ex parte Mc Niel*, 13 Wall. 236, 243.

It was not necessary for the complainants to reduce their claims to judgments in order to maintain this bill. The theory of the bill is that, by the execution of the chattel mortgage, a trust was created under this statute for the benefit of these and all the other creditors of the defendant Mathews. The beneficiary of a trust may allege and prove himself to be such, and may maintain his bill in equity to enforce the trust, although he is a simple contract creditor, without first exhausting his remedy at law, or reducing his claim to judgment, because it is not the judgment creditors, but all the creditors, who are the beneficiaries of the trust. *Day v. Washburn*, 24 How. 352, 356; *Clapp v. Dittman*, 21 Fed. Rep. 15, 18; *Case v. Beauregard*, 101 U. S. 688, 691; *Brisay v. Hogan*, 53 Me. 554; *Goncelier v. Foret*, 4 Minn. 13, (Gil. 1.)

When an insolvent debtor recognizes the fact that he can no longer go on in business, and determines to yield the dominion of

his entire estate, and in execution of that purpose, or with an intent to evade the statute prohibiting preferences to creditors, transfers all, or substantially all, of his property to a part of his creditors, to be applied to the payment of their claims in preference to those of his other creditors, the instrument or instruments, whether in form assignments, chattel mortgages, deeds of trust, or confessions of judgment, by which such transfer is made, constitute an assignment under this Dakota statute, the benefits of which may be claimed by any creditor not so preferred, who will take the necessary steps in a court of equity to enforce the equality contemplated by the statute. *Straw v. Jenks*, (Dak.) 43 N. W. Rep. 941; *White v. Cotzhausen*, 129 U. S. 329, 343, 9 Sup. Ct. Rep. 309; *Perry v. Corby*, 21 Fed. Rep. 15, 737; *Clapp v. Nordmeyer*, 25 Fed. Rep. 71; *Preston v. Spaulding*, 120 Ill. 208, 10 N. E. Rep. 903; *Kerbs v. Ewing*, 22 Fed. Rep. 693; *Burrows v. Lehndorff*, 8 Iowa, 96, 103; *Winner v. Hoyt*, 66 Wis. 227, 28 N. W. Rep. 380, 385.

The proofs presented on this hearing satisfy me that the defendant Mathews was insolvent when she made this chattel mortgage; that the mortgage covers substantially all her property in which she has any valuable interest; that its effect is to surrender the dominion and control of the property to the defendant the Douglas County Bank; and that the bank had ample notice at the time it took the mortgage to put it upon an inquiry that must, if pursued, have given it knowledge of all these facts. The defendant Mathews must be presumed to have intended the known and necessary result of her act, and I cannot persuade myself that she could have executed this instrument without having intended thereby to close out her business, and surrender the dominion and control of her property. It is patent that she intended no longer to conduct her business, because she could not, under the mortgage, use a dollar of the proceeds of the sales of her stock to replenish it until she had fully paid the \$4,251 and interest, in cash, out of the sales of a stock that was worth but a small margin above the amount. She had no other means of replenishing it, and she could not have conducted her business as a merchant without replenishing it. It is patent that she intended by this mortgage to surrender the dominion and control of her property to the bank, because by its terms she did in fact do so. The value of the property was so little above the amount of the mortgage debt that it could not be expected, in view of the fact that the stock must be sold out without replenishing it, that she could realize from it more than the amount of the debt; and hence, while she nominally retained the possession, she really held it in trust as the agent and for the sole benefit of the bank. The terms of the mortgage prohibited her from using one dollar of the proceeds of the sales for her own services or living expenses; they required all the proceeds to be paid over daily to the bank; they prohibited her from removing any article from the store, or disposing of any article otherwise than for cash, until the entire debt was paid; and they gave the bank the absolute right, in case she failed to comply with these terms, or in case it deemed itself insecure, to deprive her of the poor privilege of this nominal possession, and to sell the whole property

at public auction before the debt fell due, and apply the proceeds to the payment of its debt, to the exclusion of every other creditor of the mortgagor. This mortgage has the same practical operation and effect that an assignment to the bank giving it a preference for the \$4,251, and containing a provision that the assignor should act as the bank's clerk in making the sale of the goods without compensation until the bank discharged her, would have had. The defendant Mathews, under this instrument, is in effect the clerk of the bank, subject to discharge at any moment, under a contract to serve without compensation. That the form of the instrument is a chattel mortgage cannot take it from under the ban of the statute. The statute cannot be evaded by such a subterfuge. Its evident purpose was to prevent an insolvent debtor who had made up his mind that he could no longer proceed with his business, and that it was necessary for him to surrender the dominion of his property, from then preferring one or more of his creditors to others. It is a remedial statute, and must be liberally construed, so as to advance the remedy it provides, and prevent the preferences it prohibits.

Under the proofs, as they now stand, the execution of this chattel mortgage created a trust for the benefit of all the creditors of the defendant Mathews under the proviso of section 4660. If, at the final hearing, a state of facts different from that presented upon the pleadings and affidavits before me is developed, the proceeds of the property will be decreed to the parties entitled to them, but, as the case now stands, the application to set aside the order appointing the receiver, and to vacate the injunction, must be denied.

TINSLEY v. HOOT et al.

(Circuit Court of Appeals, Fifth Circuit. January 9, 1893.)

No. 80.

1. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—RESIDENCE.

Averments showing diverse residence are not equivalent to averments of diverse citizenship, and are insufficient to sustain the jurisdiction of a federal court.

2. APPEAL—JURISDICTION—DEFECTS NOTICED BY COURT OF ITS OWN MOTION.

The jurisdiction of a federal circuit court must appear affirmatively on the record, and a default therein will be noticed by the appellate court of its own motion, and the case reversed and remanded, with directions to dismiss, unless proper amendments are made.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

At Law. Action of trespass to try title, brought by Thomas Tinsley against A. B. Hoot and others. Verdict and judgment for defendants, and plaintiff brings error. Reversed.

S. W. Jones, (W. B. Denson, on the brief,) for plaintiff in error.

Percy Roberts, (F. Charles Hume, of counsel,) for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.