

jurisdiction it was permissible to show, by parol testimony, what relation the parties really held to the contract sought to be enforced; that the spirit and purpose of the restrictive clause in the statute were to prevent the making of assignments of choses of action for the purpose of giving jurisdiction to the federal court, where such jurisdiction would not exist as between the original parties to the contract; and, finally, "that the jurisdiction of the circuit court in the case before us was properly put by the court below upon the proposition that the true meaning of the restriction in question was not disturbed by permitting the plaintiff to show that notwithstanding the terms of the note the payee was really a maker or original promissor, and did not, by his indorsement, assign or transfer any right of action held by him against the accommodation makers." In that case the facts showed that the payee named in the note never had a cause of action against the makers, and therefore, by his indorsement of the note, he did not in fact assign or transfer a right of action, and hence it was held that the case was not within the inhibition of the statute. In the case at bar it clearly appears that the Union Loan & Trust Company never had a right of action against the makers of the notes, upon the face of which it is named as payee. By indorsing the notes it did not assign any cause or right of action held by it, and therefore the transaction does not come within the purview of the statute, which is intended to prevent the acquisition of jurisdiction by the federal courts through the transfer of rights of action by parties who could not come into these courts to parties who possess the requisite citizenship. Under the facts averred in the petition no cause or right of action against the defendant company arose upon the notes executed by it until the plaintiff bank advanced the money thereon, and the right of action then created never was vested in, or belonged to, the Union Loan & Trust Company. That company acted as the agent for the defendant in procuring the loan, and in transferring the notes to the plaintiff it did not assign a cause of action held or owned by it. I am not able to perceive any substantial difference between this case and that of *Holmes v. Goldsmith*, and the reasoning that sustained the jurisdiction in that case must have the same result when applied to the facts in this case, and as a necessary consequence the demurrer must be, and is, overruled.

UNITED STATES NAT. BANK OF NEW YORK v. McNAIR.

(Circuit Court, E. D. North Carolina. April 10, 1893.)

1. JURISDICTION—ACTION BY INDORSEE OF PROMISSORY NOTE—PLEADING—DEMURRER.

If the citizenship of the original payee of a promissory note is material to jurisdiction of an action by an indorsee against the maker, the plaintiff must affirmatively plead it; and, if the record contain no allegation thereof, the court will, for the purpose of disposing of a demurrer to the complaint on the ground that the assignor could not have maintained suit, assume that the original parties to the note were, at the time of bringing the action, citizens of the same state.

2. SAME—RIGHT OF RECEIVER OF NATIONAL BANK TO SUE—ASSIGNEE BY OPERATION OF LAW.

By the judiciary act of March 3, 1887, as corrected by the act of August 13, 1888, it is provided that no federal court shall have cognizance of any suit on a promissory note by an assignee thereof unless such suit might have been prosecuted in such court if no assignment or transfer had been made. Action was begun in the circuit court in North Carolina, by a citizen of New York against a citizen of North Carolina, on a promissory note made to the cashier of a national bank, which was also a citizen of the latter state. The note had been indorsed to the plaintiff, and after indorsement the bank became insolvent, and a receiver was appointed. Plaintiff contended that suit could have been brought on the note by the receiver had no assignment been made, and that the court therefore had jurisdiction. *Held*, that the receiver would himself have been an assignee of the note, although the assignment would have been effected by operation of law, and that, as the bank could not have brought suit on the note in the circuit court, the court had no jurisdiction.

3. SAME—CONSTRUCTION OF STATUTE.

Under the above statute no suit can be maintained on a promissory note by an assignee unless such suit could have been maintained by the original payee thereof.

At Law. Action by the United States National Bank of New York against S. P. McNair to recover the amount of a promissory note. On demurrer to complaint. Sustained, and action dismissed.

Ricaud & Weill, for plaintiff.

Du Brutz Cutler and Geo. Rountree, for defendant.

SEYMOUR, District Judge. Suit is brought on a promissory note made by defendant to the cashier of the First National Bank of Wilmington. The note was, before maturity, indorsed to the cashier of plaintiff, the United States National Bank of New York. After such indorsement the Wilmington bank became insolvent, and a receiver of such bank was duly appointed by the comptroller of the currency. The complaint avers that plaintiff was at the commencement of this action, and still is, a citizen and resident of the state of New York, and that defendant is a citizen of North Carolina, but no averment is made respecting the citizenship of the First National Bank of Wilmington or of its cashier. If the citizenship of the original payee is material to the jurisdiction of the court, it is essential to plaintiff's case to make it affirmatively appear upon the record. *Parker v. Ormsby*, 141 U. S. 81, 11 Sup. Ct. Rep. 912, and cases there cited. Not so appearing, it is proper to discuss the case, sub lite, as if it did appear that the original parties to the note for whose contents this suit is brought were, at time of bringing the action, citizens of the same state. Such is the assumption of the defendant's demurrer, as appears below.

Defendant demurs to the complaint upon the ground "that the suit is brought by the assignee of a promissory note to recover the contents thereof when the assignor thereof, being a resident of the same state as the defendant, could not have maintained a suit thereon if said assignment had not been made." The demurrer raises a question of jurisdiction depending upon the construction of the fourth clause of section 1 of the act of March 3,

1887, as amended by that of August 13, 1888, which reads as follows:

"Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or other subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

The act of 1887 repeals that part of the act of March 3, 1875, which excepted notes and bills of exchange generally from the excluding clause of the judiciary act, and restored, in that respect, such act. The judiciary act of September 24, 1789, (Rev. St. § 629, cl. 1,) gives to the circuit court original jurisdiction of all suits involving the value of \$500 and upwards between citizens of different states: "provided, that no circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange."

It is evident from a reading of the statute that plaintiff, being the assignee of a promissory note made by a citizen of North Carolina to another citizen of the same state, cannot maintain this action unless it could have been maintained had the note never been assigned. The contention of plaintiff is that a suit could have been brought on the note by the receiver of the Wilmington bank had so assignment of it been made. The argument assumes that the receiver would not in such case have been assignee of the note, but would have held it in some other way; for it is plain that if the note would, had it not been previously assigned by the Wilmington bank, have come to the receiver's hands "by assignment or transfer," then the case does not, as plaintiff contends it does, arise of an action on an assigned promissory note, which could have been maintained had there been no assignment. There would have been an assignment,—the assignment of the bank's assets,—which would, had it not been previously transferred, have included the paper now in litigation. But the assumption underlying plaintiff's theory is not in accordance with the books. A receiver is, by virtue of his appointment, assignee of the choses in action of the debtor, and can sue for them in his own name. High, Rec. § 443. The receiver of a national bank appointed by the comptroller of the currency is the statutory assignee of the association. *Kennedy v. Gibson*, 8 Wall. 498-506. It is true that the assignment to the receiver was by operation of law, and not by act of the parties, and that it has been adjudged by the supreme court that the eleventh section of the judiciary act, supra, does not apply to administrators and executors, who may, perhaps, be looked upon as assignees by operation of law. *Chappedelaine v. Dechenaux*, 4 Cranch, 306; *Childress v. Emory*, 8 Wheat. 642. Any inference in favor of the position that a receiver is not an assignee, within the meaning of the act,

is answered by the case of *Sere v. Pitot*, 6 Cranch, 332, which holds that a general assignee of the effects of an insolvent cannot sue in the federal court, if his assignor could not have sued in these courts. Marshall, C. J., delivering the opinion of the court, says:

"The circumstance that the assignment was made by operation of law, and not by the act of the party, might probably take the case out of the policy of the act, but not out of its letter and meaning. The legislature has made no exception in favor of assignments so made. It is still a suit to recover a chose in action in favor of an assignee whose suit could not have been prosecuted if no assignment had been made, and is therefore within the very terms of the law. The case decided in 4 Cranch, 306, was a suit brought by an administrator and a residuary legatee, who were both aliens. The representatives of a deceased person are not usually designated by the term 'assignees,' and are therefore not within the words of the act. That case, therefore, is not deemed a full precedent for this."

In *Sere v. Pitot*, supra, the persons who brought the action were appointed in pursuance of an application to the superior court of the territory of Orleans upon the nomination of an insolvent firm, were styled "syndics for the creditors," and were vested with the estate of the firm, not by any formal assignment, but by the laws of the territory. Their position is therefore analogous to that of the receiver of a national bank, who is also appointed and vested with the estate of his insolvent, not by assignment of parties, but by the law of the land.

I have not deemed it essential to lay stress on the words, "or transfer," inserted in the fourth clause of section 1 of the act of 1887, but not being in the corresponding section of the judiciary act. They were evidently, however, used with the purpose of enlarging the scope of the word "assignment," and of making the clause cover every case in which title to negotiable papers, whose contents might be the subject of a suit, should have become vested in a third party, whether by act of the parties or operation of law. I am therefore of the opinion that the plaintiff cannot bring his suit within the terms of the act under discussion.

There is another view of the case, resting, it seems to me, both on authority and reason, which is fatal to the jurisdiction of the court. The exception to the jurisdiction of the federal courts over controversies between citizens of different states, in as far as it is material to this action, is in these words:

"Nor shall any circuit court have cognizance of any suit to recover the contents of any promissory note in favor of any assignee unless such suit might have been prosecuted in such court to recover the said contents if no assignment had been made."

The contention of plaintiff necessarily involves the assumption that, had the National Bank of Wilmington never assigned the note in litigation, the receiver would have been entitled to sue in the federal court, not as assignee, but in some other capacity, —say, as agent of the bank and of its creditors. That being assumed for the purpose of the argument, plaintiff's contention is that he may sue in the federal court, because the suit might have been prosecuted in such court by the receiver if the assignment had not been made to himself. This is not the construction put upon the sentence by the reported cases. In every instance in

which it is attempted to put the idea in other words it is assumed that the statute says that the assignee may sue in the federal court only in case the suit might have been brought there by the original payee had there been no assignment. That this is the obvious meaning of the clause is evident from the fact that such a construction is put upon it alike by judge, reporter, and codifier, when any of them have occasion to paraphrase it. The editor of the Supplement to the Revised Statutes of 1891, in his marginal syllabus, abridges it into the following words: "Suits by assignee not to be entertained unless assignor might have sued," etc. The reporter of *Gibson v. Chew*, 16 Pet. 315, gives as the headnote of that case:

"Under the eleventh section of the judiciary acts the indorsee of a negotiable promissory note cannot sue in the circuit court if the maker and payee were, at the time the action was brought, citizens of the same state."

In the first case arising under this clause—that of *Turner v. Bank*, 4 Dall. 8—Ellsworth, C. J., says it is necessary, where the defendant appears to be a citizen of one state, if the suit be on a promissory note by an assignee, to show that the original promisor is a citizen of some other state; and in the very late case of *Parker v. Ormsby*, 141 U. S. 81-84, 11 Sup. Ct. Rep. 912, Harlan, J., says:

"It was settled by many decisions under the act of 1789 that a circuit court of the United States had no jurisdiction of a suit brought against the maker by the assignee of a promissory note payable to order unless it appeared affirmatively that it could have been maintained in that court in the name of the original payee."

The same construction is given by *Miller, J.*, in *Bradley v. Rhines' Adm'rs*, 8 Wall. 393-396, and by *Strong, J.*, in *Morgan's Ex'r v. Gay*, 19 Wall. 81. While this construction of the section was not strictly essential to the decision of the court in any of the cases cited, the fact that such an interpretation has been so uniformly put upon the words of the clause is persuasive of the meaning that must have been in the minds of the legislators who adopted them.

The court holds:

First: That the receiver of the First National Bank of Wilmington possesses, and is entitled to sue upon, the choses in action of the bank by assignment or transfer, and that consequently plaintiff, who is assignee of a promissory note made between parties who, at the commencement of the action, were citizens of the same state, cannot bring this action to recover its contents in a federal court.

Second. That the true intent and meaning of the term, "unless such suit might have been prosecuted to recover the said contents if no assignment or transfer had been made," are set forth in the reason assigned by defendant for his demurrer, viz.: "The assignor, being a resident of the same state as the defendant, could not have maintained a suit thereon if such assignment had not been made."

Judgment may be entered dismissing the action for want of jurisdiction.

ROBINSON et al. v. BELT et al.

(Circuit Court of Appeals, Eighth Circuit. May 29, 1893.)

No. 217.

1. CIRCUIT COURTS OF APPEALS—JURISDICTION—FINAL JUDGMENTS.

An order of the United States court for the Indian Territory, overruling a demurrer to an interplea, whereby a third person claims certain goods seized in attachment, is not a final judgment, and the circuit court of appeals has no jurisdiction to review the same on a writ of error.

2. SAME.

The appellate jurisdiction of the circuit courts of appeals is restricted to the review of final judgments and decrees, with the single exception of interlocutory orders granting or continuing injunctions, as to which a right of appeal is given by section 7 of the act creating the court, (26 Stat. p. 826, c. 517.)

In Error to the United States Court in the Indian Territory.
Writ dismissed.

W. T. Hutchings, N. B. Maxey, and C. L. Jackson, for plaintiffs in error.

A. J. Nichols, J. C. Hodges, and J. H. Kouglar, (John Watkins, on the brief,) for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. On the 30th of December, 1891, J. M. Robinson & Co. brought suit in the United States court for the Indian Territory against J. C. Belt to recover the sum of \$1,300. An order of attachment was sued out in the action, which was levied on a stock of general merchandise and other personalty, as the property of the defendant, Belt. C. M. King intervened in said action, and filed an interplea claiming the attached property under a deed of assignment executed by J. C. Belt to him prior to the levy of the attachment, whereby said property was conveyed to him as assignee in trust for the creditors of said Belt. The deed of assignment was made part of the interplea. To this interplea, J. M. Robinson & Co., the plaintiffs in the attachment suit, interposed a general demurrer, which was by the court overruled; and thereupon the plaintiffs took an exception to said ruling, and sued out this writ of error. There is no final judgment on the interplea, and no order or judgment whatever thereon, other than the order overruling the demurrer thereto.

The act of congress creating this court (26 Stat. p. 826, c. 517) confers on it "appellate jurisdiction to review, by appeal or writ of error, final decision" in the district and circuit courts, in the class of cases to which this appellate jurisdiction extends. The only exception to the rule restricting appeals and writs of error to final decrees and judgments is found in section 7 of the act, which provides that an appeal may be taken from an interlocutory order or decree granting or continuing an injunction. The order of the court overruling a demurrer to an interplea is not a final judgment. Elliott's App. Proc. §§ 80, 82; Slagle v. Bodmer,