

versial relations, and this means a real controversy as to the facts involved in the suit. Federal jurisdiction is not founded in fiction, nor does it depend upon the arbitrary or capricious arrangement of the parties by the pleader. While it is doubtless proper, in the first instance, and for the purposes of a decree binding all, to join as defendants all parties interested who do not desire to institute suit as plaintiffs, when the parties are before the court the court will, for the purpose of ascertaining its jurisdiction, arrange them according to their actual interests, and place them on the side of the controversy to which they belong, and, if it then appears that the controversy is not between citizens of different states, the condition contemplated by statute is wanting, and the court is without jurisdiction. The duty of the court to inquire would seem to be as fully recognized as its power to act as justice may require when the facts are made to appear by the parties upon motion and evidence. Stat. Aug. 13, 1888, § 5; Bland v. Fleeman, 29 Fed. 669; Marvin v. Ellis, 9 Fed. 367; Covert v. Waldron, 33 Fed. 311; Rich v. Bray, 37 Fed. 273; Williams v. Nottawa, 104 U. S. 209; Detroit City v. Dean, 106 U. S. 537, 1 Sup. Ct. 560; Railway Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510; Cashman v. Canal Co., 118 U. S. 58, 6 Sup. Ct. 926.

The interests of the Nebraska Cilley and the New Hampshire Cilley and Dearborn lie in the same direction. As sole legatees under the will of 1878, they claim, in substance, that all acts subsequent to 1878 should be annulled, and the will of 1878 established, while Patten alone claims that the will of 1884 is valid, and, unless defeated by proper proceedings in the probate court, supersedes all prior wills; and this is the controversy. Place the New Hampshire Cilley and Dearborn on the side of the controversy to which they belong, and there is no jurisdiction on the ground of diverse citizenship. The ingenious or capricious act of counsel in setting them up on the wrong side does not confer jurisdiction. For the above reasons, the bill is dismissed, with costs to the defendant Patten.

COLT, Circuit Judge, concurs.

MAYOR, ETC., OF BALTIMORE v. POSTAL TEL. CABLE CO.

(Circuit Court, D. Maryland. February 23, 1894.)

1. REMOVAL—JURISDICTION—AMOUNT IN CONTROVERSY.

An action was brought by a city in a state court to recover a tax of \$2 for each of 509 telegraph poles maintained in the streets, but the declaration concluded: "And plaintiff claims \$10,000." *Held*, that the actual amount in dispute was but the amount of the tax, \$1,018, and a circuit court could not take jurisdiction by removal.

2. SAME.

Defendant could not maintain that the real matter in dispute was its right to keep its poles in the streets without paying the tax and without being liable to the fine of \$10 per pole for nonpayment, imposed by the city ordinance, and the penalty of having its poles removed; for in an

action at law to recover money, the amount in controversy is determined by the particular demand sued for, and not by any contingent loss through the indirect or probative effect of the judgment, however certain such loss may be.

This was an action by the mayor, etc., of Baltimore, against the Postal Telegraph Cable Company to recover a tax of two dollars on each pole maintained by defendant in the city streets. The action was brought in a court of the state of Maryland, and removed therefrom by defendant. Plaintiff moved to remand.

William S. Bryan, Jr., for plaintiff.

N. R. Preston and Geo. H. Bates, for defendant.

MORRIS, District Judge. This case was originally brought in the court of common pleas of Baltimore city, and was removed upon the petition of the nonresident defendant. The plaintiff now moves to remand the case upon the ground that the matter in dispute does not exceed, exclusive of interest and costs, the sum or value of \$2,000, which, by the act of congress of August 13, 1888, is the sum required to give jurisdiction to this court, and to give the right of removal. The declaration contains but one count, and that is for the recovery of the tax of \$2 for each of 509 telegraph poles alleged to be maintained by the defendant in the streets of the city of Baltimore. The declaration concludes as follows: "And the plaintiff claims ten thousand dollars." The amount alleged to be due and unpaid by the single count of the declaration is the tax of \$2 on each of 509 telegraph poles, and there was filed with the declaration an account in which the only item is as follows:

Baltimore, Nov. 10, 1893.

The Postal Telegraph Cable Co., to the Mayor and City Council of Baltimore, Dr.

To license fee on 509 poles, at \$2 per pole.....\$1,018
Interest from June 15th, 1893.

To this account the mayor makes oath "that there is justly due and owing by the Postal Telegraph Cable Company, the defendant in said case, to the plaintiff, on the annexed account (the cause of action in said cause), the sum of \$1,018, over and above all discounts." If the defendant had suffered judgment to go against it by default, the whole amount for which judgment could have been entered would have been \$1,018, with interest and costs. It is true that, in actions of tort, it is the damages claimed which determine the amount in dispute, but, in an action to recover a specific sum of money, the court examines the body of the declaration, and the cause of action set out, to determine what is the real sum in dispute. *Hilton v. Dickinson*, 108 U. S. 174, 2 Sup. Ct. 424; *Lee v. Watson*, 1 Wall. 337. In this case the declaration and the sworn account disclose that the real matter in dispute is \$1,018, and not the sum demanded in the formal claim of damages.

It is urged, however, that the real matter in dispute, so far as it affects the defendant, is its right to maintain its poles, as now erected in the streets of the city, without paying the annual tax of \$2 for each, and without being liable to a fine of \$10 for each pole,

imposed by the ordinance for nonpayment, and without being subject to the penalty of having its poles removed, in default of payment, and because the right to recover in this suit depends upon the validity of the ordinance, and, if its validity is sustained in this suit, the consequence to the defendant will be that it will have to pay a large annual tax, or submit to have its poles and its business destroyed.

It is true that where a bill in equity is filed to abate a nuisance, or to set aside a deed, or for a decree giving other mandatory or preventive relief, it is the value of the property of which the defendant may be deprived by the decree sought which is the test of jurisdiction, and not the claim of the complainant. *Railroad Co. v. Ward*, 2 Black, 485; *Market Co. v. Hoffman*, 101 U. S. 112; *Estes v. Gunter*, 121 U. S. 183, 7 Sup. Ct. 854. But it has been uniformly held in actions at law, where the plaintiff's claim is for money, that the amount in controversy is determined by that particular demand which the plaintiff sues for, and not by any contingent loss which either party may sustain through the indirect or probative effect of the judgment, however certain it may be that such loss will occur. *Security Co. v. Gay*, 145 U. S. 123, 12 Sup. Ct. 815; *Elgin v. Marshall*, 106 U. S. 578, 1 Sup. Ct. 484; *Gibson v. Shufeldt*, 122 U. S. 27, 7 Sup. Ct. 1066; *Clay Center v. Farmers' Loan & Trust Co.*, 145 U. S. 225, 12 Sup. Ct. 817; *Washington & G. R. Co. v. District of Columbia*, 146 U. S. 227, 13 Sup. Ct. 64. It seems to me clear, upon authority, that this suit must be remanded.

STARCKE et al. v. KLEIN et al.

(Circuit Court of Appeals, Fifth Circuit. November 28, 1893.)

MANDAMUS—COMPELLING TRANSMISSION OF TRANSCRIPT OF RECORD ON APPEAL.

On an appeal to the circuit court of appeals that court will not grant appellants' petition for a mandamus to the clerk of the lower court to certify and transmit a transcript of the record, merely to determine in advance whether a certain deposition is part of the record, where the ordinary procedure is adequate for the purpose.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

On application for mandamus.

Wade R. Young, for appellant.

M. Dabney, for appellees.

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

McCORMICK, Circuit Judge. We do not deem it necessary to add to what we have said in cases hereinbefore decided in reference to the duty of the clerk of the circuit court in making the return to a writ of error or order granting an appeal. For the purposes of this case, our views on the subject are sufficiently expressed in the cases of *Blanks v. Klein*, 1 C. C. A. 254, 49 Fed. 1; *Pennsylvania Co.*,