

vided so as to render it a several proceeding;" that "the trial was one as to all of the defendants," and one judgment; and that the declaration of the statute that the judgment should be considered several was only for the purpose of regulating the manner of obtaining satisfaction. This is an interpretation of a local statute by the highest tribunal of the state, and must be respected as such. The point suggested by counsel for the lot owner—that such construction would approve legislation to deprive the federal court of legitimate jurisdiction—is not well taken. The means for tax assessment are entirely within legislative control.

The case of *City of Chicago v. Hutchinson* was decided in this court prior to the *Pacific Railroad Removal Cases*. It was a similar condemnation proceeding, and entirely in the line of the later decision. It is equally distinguished from the present case.

I am satisfied that there cannot be independent separate proceedings for this assessment; that this court is without jurisdiction, in whole or in part; and it must remain with the county court, where placed by the statute. An order for remand will be entered accordingly.

ALLEY et al v. EDWARD HINES LUMBER CO.

(Circuit Court, W. D. Michigan, S. D. December 27, 1894.)

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP.

It is not necessary, to entitle a defendant, sued in a court of a state of which he is not a citizen, to remove the case to the United States circuit court on the ground of diverse citizenship, under the second clause of section 2, Act Cong. March 3, 1887, that all the plaintiffs should be citizens of the state in which the action is brought.

This was a suit by Charles G. Alley and others against Edward Hines Lumber Company. The suit was brought in a court of the state of Michigan, and was removed by the defendant to the United States circuit court. Plaintiffs move to remand.

Smith, Nims, Hoyt & Erwin, for plaintiffs.
Bunker & Carpenter, for defendant.

SEVERENS, District Judge. Two of the plaintiffs are citizens of New York and one of Michigan. The defendant is a citizen of Illinois, and has removed the case. The ground on which the motion to remand is made is that the plaintiffs are not all citizens of Michigan, that being the state in which the suit is brought. The question turns on the construction of the act of March 3, 1887. Original jurisdiction is given by section 1. The second section provides for removals. The first and second clauses of that section require the same elements of jurisdiction to exist as in section 1. The present case is one comprehended in the second clause, and the conditions of removal must be ascertained by reference to those required by the first section for original suits. See *Tod v. Railway Co.* (C. C. A., 6th Circuit, Oct. Sess. 1894) 65 Fed. 145. The fourth clause of section 2, being the one which provides for removals on the ground of local prejudice, contains an additional requirement,

which is that the plaintiffs must be citizens of the state in which the suit is brought; and it was held by Fuller, C. J., in *Wilder v. Iron Co.*, 46 Fed. 676, and by Mr. Justice Lamar and Judge Newman in *Gann v. Railroad Co.*, 57 Fed. 417, that all the plaintiffs must be citizens of such state in order to entitle the defendant to remove the case. Indeed, there would seem to be no room for doubt, upon the clear language of the fourth clause, that this must be so. There is no such condition imposed, however, by the first and second clauses of the section; and it was held by Mr. Justice Brewer, in a carefully considered opinion in *Kansas City, etc., R. Co. v. Interstate Lumber Co.*, 37 Fed. 3, that it is not necessary to entitle the defendant to a removal, under the provisions of the second clause of section 2, that the plaintiff should be a citizen of the state in which the suit was brought; and it was held in that case that the right of removal existed, though neither of the parties was a citizen of that state. It was pointed out that the elements of jurisdiction did not include the place where suit should be brought; and that the latter, being given for the convenience of the party, might be waived by him; and it was added by Mr. Justice Brewer:

"If the suit had been commenced in this court, and process served personally upon the defendant, and it had raised no question other than upon the merits of the controversy, this court would have had undoubted jurisdiction, and the judgment, if rendered, would have been valid. If the jurisdiction of the court upon his failure to insist upon his personal privilege be conceded in the one case, why should there be doubt of the jurisdiction when he voluntarily seeks the court?"

In accord with that decision are the cases of *First Nat. Bank v. Merchants' Bank*, 37 Fed. 657; *Burck v. Taylor*, 39 Fed. 581; and *Uhl v. Burnham*, 42 Fed. 1. These cases furnish ample authority for holding that the motion to remand cannot be sustained; but I wish to add that the construction of the act adopted by them seems to me to be the right one. The cases of *Wilder v. Iron Co.* and *Gann v. Railroad Co.*, above referred to, are clearly distinguished from those last mentioned by the express language of the fourth clause of the section, limiting the kind of suits removable for local prejudice to those in which the plaintiffs are citizens of the state in which the suit is brought. The motion to remand must be overruled.

JORDAN v. WARD et al.

(Circuit Court of Appeals, Ninth Circuit. October 10, 1894.)

No. 158.

1. RESULTING TRUST—PUBLIC LANDS—PRE-EMPTION—CANCELLATION—PATENT TO CONTESTANT.

W., a citizen duly qualified, settled on a certain 40 acres of unsurveyed public land, and resided on and cultivated it as his home 4 years and 10 months, when he died. Three weeks before W.'s death, and during his temporary absence on account of sickness, J. went upon such 40 acres, removed and appropriated the improvements, and entered in the local land office his homestead entry, falsely alleging settlement thereon 14 months before such entry. A few days afterwards, and 35 days after a

plat of the survey of the township was filed in such office, W. applied to enter the land as his homestead, but his application was refused because of J.'s previous filing. About 80 days afterwards, W.'s devisee filed a contest, and the land department canceled J.'s entry, and issued a patent to such devisee, the decision being affirmed by the secretary of the interior. *Held*, that a bill by J. against such devisee and his mortgagee to establish a trust in such land, and to compel a conveyance to him, was properly dismissed.

2. SAME.

The fact that the land department canceled J.'s entry because its officers erroneously construed Rev. St. § 2291, as conferring rights on such devisee, did not entitle J. to maintain such action, it appearing that J. had no right of entry.

Appeal from the Circuit Court of the United States for the District of Washington, Northern Division.

Bill by William L. Jordan against John C. Ward and the Lombard Investment Company to establish a trust in favor of complainant in certain land, and to compel a conveyance to him. From a judgment dismissing the bill, complainant appeals. Affirmed.

Chas. K. Jenner, for appellant.

J. T. Ronald, for appellee John C. Ward.

O. G. Ellis, for appellee Lombard Investment Co.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

McKENNA, Circuit Judge. This is an action in equity to decree respondents trustees for complainant for the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, section 30, township 21 N., R. 6 E., Willamette meridian. The case is brought here on the pleadings, the complainant contending that the answers are insufficient to constitute a defense. The bill alleges, in substance:

That the said land, on the 15th of May, 1883, was unsurveyed public lands of the United States, and subject to entry under the homestead laws. That on said day plaintiff was qualified to claim the benefits of said laws, and had, prior to said date, occupied, cultivated, and improved said lands, and was upon said date, and had been long prior thereto, in peaceable possession thereof, and residing with his family upon an adjoining legal subdivision, which was surveyed public land, and subject to entry under section 2289, Rev. St. That on said day plaintiff entered at the United States land office at Olympia, Washington territory, said land and adjoining legal subdivision, containing 159 45-100 acres, under the homestead laws, and the same was allowed and entered upon the records of said office, and the legal fees accepted by the register and receiver of said office, and a receipt delivered to him,—No. 5,114. That thereafter plaintiff, with his family, continuously resided on said claim, cultivating and improving the same. That on the 8th day of July, 1889, he, having given notice of his intention according to law, made final proof of his claim except the said N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 30, and paid all fees and commissions, and a patent was duly issued to him. That he applied to make his proof on all his claim, and was able to do so, but was prevented by refusal by the officers of the land office to receive it, urging as a reason therefor a pretended cancellation of claim as to said land; and plaintiff alleges that the said officers, in so doing, erred in the interpretation of section 2291 of the Revised Statutes, and such interpretation was prejudicial to plaintiff, and against his protest. That on or about the 2d day of August, 1883, defendant Ward filed a contest affidavit in said land office, in which he alleged that he was the devisee of one John J. Winters, deceased, and prayed a hearing to determine the priority of settlement be-

tween plaintiff and said Winters to said N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 30, aforesaid. That said affidavit showed that said Winters intended to enter said land as a homestead, but died before making it, and that upon such showing the officers granted a hearing, and duly cited plaintiff to appear; and that plaintiff appeared in person and by attorney, and protested against the same, but the officers permitted the same to proceed, and decided that plaintiff's claim should be canceled; and plaintiff thereupon appealed to the commissioner of the general land office, who affirmed the said decision. Plaintiff thereupon appealed to the secretary of the interior, but said decision of the commissioner became final through no fault of, and against the protest of, plaintiff, and said claim was canceled; and that the decisions were made, and cancellation ordered, by reason of misinterpretation of said section 2291; and that no question of disputed fact entered into the consideration or determination of said cause by any of said officers. That on the 2d day of December, 1884, defendant Ward was permitted by said register and receiver to make, and did make, filing No. 7,095 as a pretended homestead, as and by virtue of his being devisee of said Winters, deceased, on said land, in pursuance of which, and final proof, a patent was issued to him, by reason of which he pretended to mortgage the said land to the Lombard Investment Company, and the latter claims such mortgage as a valid and subsisting lien. That the patent and mortgage cast a cloud on plaintiff's title, and the respondents should be decreed to hold in trust for plaintiff, and to convey such title to him. That the value of the land exceeds \$2,000, and does not exceed \$10,000, and that plaintiff has no plain and adequate remedy at law.

The prayer is in the usual form, and requires answers under oath.

The answer of the Lombard Investment Company as to the allegations of the bill says:

That it does not know, and cannot set forth, as to its belief or otherwise, and has no knowledge to enable it to deny or affirm their truth, except that it admits the issuance of a patent to Ward, and alleges the execution of a mortgage by him to it, and that it claims them as valid liens, and except that Ward's title or said mortgages cast a cloud upon any title of plaintiff, and denies that the patent to Ward was wrongfully issued. It alleges that it is a corporation created under the laws of Missouri, and entitled to do business under the laws of Washington, and that it loaned Ward \$8,062.50 in good faith, and after having searched the records of the county of King in which said lands are situated; and that said Ward executed and delivered to it his written note and coupon bond, which are attached to the answer. No point being made upon them, they are omitted.

The answer of the defendant Ward alleges substantially the following facts:

The land in dispute is the northeast quarter of the southwest quarter of section thirty (30), township twenty-one (21), north of range six (6) east, in King county, Washington. August 1, 1878, John J. Winters, a citizen duly qualified, settled on the land, being unsurveyed, and continued to reside upon and cultivated it as his home up to his death, June 9, 1883. The survey of the township was made and approved March 16, 1883, and plat filed in district land office April 26, 1883. May 15, 1883, Winters had ten acres in cultivation, and had a dwelling house, barn, and other improvements, and was in open, notorious, exclusive, and peaceable possession. For a long time prior to May 15, 1883, Jordan had resided with his family upon adjoining land, and knew of the residence of Winters. On May 15, 1883, while Winters was temporarily absent, confined to his bed of last sickness in the hospital at Seattle, Jordan, with full knowledge of the facts, went upon the land, tore down Winters' house and barn, and appropriated to himself all Winters' improvements, and on said day entered in the local land office his homestead entry for the lands upon which he had resided, including in his filing the forty acres in question, falsely alleging settlement thereon January 1, 1882. On May 31, 1883, and within the time allowed by law after filing of the plat, Winters made application to enter the land as

his homestead, which was refused for the reason that Jordan had filed on the same a few days before. Nine days later, Winters died, leaving Ward, his sole devisee, all his interest in the land. August 22, 1883, Ward, as devisee, applied to contest Jordan's entry, alleging the facts of Winters' settlement, residence, devise, death, etc., and to have same canceled as to the forty acres in dispute. Hearing was had October 7, 1883, both parties being present in person and by attorney, and the register and receiver ordered that Jordan's entry as to this land be canceled, and that Ward, as devisee of Winters, be allowed to enter same. Jordan appealed, and on June 30, 1884, the general land office decided "that said Winters complied with all the requirements of the statute from the date of his settlement up to the day of his death, that he was qualified to make a homestead entry, that he applied in due time to make a homestead entry to the tract involved, and that he was a single man," and affirmed the decision of the local land office, and instructed that Ward be allowed to enter the land. Jordan again appealed to the secretary of the interior, but afterwards filed notice duly waiving said appeal and all rights thereunder. Said appeal was by the secretary of the interior dismissed. December 2, 1884, Ward, as devisee, accordingly entered the land as a homestead, and in due time proved up and received patent, dated July 18, 1889. Jordan never did reside upon the land, and never put any improvements upon the same. Since Winters' death, Ward has been in open, notorious, exclusive, peaceable, and undisturbed possession, continuously making it his home; and it is the only home he has had. He has greatly improved the same, clearing, grubbing, putting out a hopyard of eleven acres, and constructed hopkilns, a storehouse, barn, and other improvements, to the amount of five thousand dollars (\$5,000).

Appellant excepted to the answers of respondents, but the exceptions were overruled by the court, and, appellant refusing to plead further, judgment was entered dismissing his bill. The ruling of the court is assigned as error.

The ruling was correct. If the facts set forth in the answer are true, Winters had a right of entry (Act May 14, 1880, § 3; 21 Stat. 141; *Sturr v. Beck*, 133 U. S. 547, 10 Sup. Ct. 350), and Jordan imposed on the officers by a false affidavit. It was competent for the land office, when the imposition was brought to its notice, to cancel his entry. *Knight v. Association*, 142 U. S. 161, 12 Sup. Ct. 258; *Cornelius v. Kessel*, 128 U. S. 461, 9 Sup. Ct. 122; *Mill Co. v. Brown* (decided by this court Nov. 14, 1893) 7 C. C. A. 643, 59 Fed. 35. See, also, *Mortgage Co. v. Hopper* (decided at the present term) 64 Fed. 553, where this question is fully reviewed. Jordan was given a hearing, and appeared personally and by attorney, and successively appealed from decisions against him to the commissioner of the land office and to the secretary of the interior, who affirmed the decisions of the register and receiver and commissioner. It is alleged, however, by appellant, that his entry was canceled because the officers of the land office construed section 2291, Rev. St., as conferring rights on Ward as the devisee of Winters. If so, they necessarily decided that Winters had the right of entry, and that Jordan had not, which decision, as we have already said, was correct. If they went further, and gave Ward rights he was not entitled to (of which we express no opinion), it is no concern of appellants. He, at any rate, was not entitled to a patent, and has no cause of action against respondents. *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249; *Mill Co. v. Brown* and other cases *supra*. The judgment of the circuit court is therefore affirmed.

McLAUGHLIN et al. v. NATIONAL MUTUAL BOND & INVESTMENT CO.

(Circuit Court, E. D. Pennsylvania. December 13, 1894.)

No. 16.

FRAUD—"INSTALLMENT BONDS."

The N. Co. was organized for the purpose of "issuing and selling bonds upon monthly installments, and payable from the redemption and reserve fund," ostensibly intended to assist persons of moderate means to invest their savings to advantage. The system of investments which it devised and put in practice was such that an investor, receiving no special advantage, could never get back even all he had put in; but a chance was offered, by anticipated redemption of some of the bonds, to obtain an exorbitant premium at the expense of other investors. *Held*, that such a scheme was deceptive and fraudulent, and, in its nature, simply gambling; that a bondholder who had paid money into the treasury of the corporation was entitled to have a receiver of the assets of such corporation appointed, to prevent fraud, and preserve the subject of litigation, pending the determination of the rights of all bondholders.

This was a suit by George W. McLaughlin and others against the National Mutual Bond & Investment Company for an injunction and receiver. Hearing upon bill and answer.

Ernest L. Tustin, for complainants.

John J. Ridgway, for defendant.

DALLAS, Circuit Judge. Upon the filing of this bill, and before answer, a motion for injunction and for the appointment of a receiver was made, which was refused, because no necessity for making an order involving such serious consequences, in advance of the formal presentation of the defense, was perceived. The cause has, however, been since fully heard on bill and answer, and is now for decision; but two incidental matters will be first disposed of. Charles A. Chase has applied for leave to intervene as a party plaintiff. This application is supported by affidavit that he is one of the class on whose behalf the bill was filed. I do not recall that his right to intervene was disputed. At all events, it appears to be unquestionable, and he will be allowed to exercise it. The defendant has moved that certain affidavits which were filed on behalf of the plaintiff on November 8, 1894, be stricken from the record. These affidavits were filed without leave of court, and under the impression that they would be for consideration on final hearing. This was a mistake. I have not considered them, and the defendant's motion will be granted.

The defendant is a corporation created under the law of the state of West Virginia "for the purpose [as stated in its certificate of incorporation] of issuing and selling bonds upon monthly installments, and payable from the redemption and reserve fund, made up of the appropriation of a certain part of the installments paid in, according to tables which insure perfect equity to both large and small investors; the advantage of the association being to encourage and assist persons of moderate means to systematic saving, and by advantageous co-operation to realize larger profits than they could by investing in savings banks or building associations." In pursuance of this de-