Felton, 73 Fed. 311, on which the defendant relies, was wrongly decided, and I am not able to follow it.

The motion to vacate the order remanding the case will be overruled.

SUGAR CREEK, P. B. & P. C. R. CO. v. McKELL et al.

McKELL v. SUGAR CREEK, P. B. & P. C. R. CO.

(Circuit Court, D. West Virginia. May 28, 1896.)

1. REMOVAL OF CAUSES—CONDEMNATION PROCEEDINGS—DIVERSE CITIZENSHIP.
   A proceeding the object and purpose of which is to enforce, between parties, a right to condemn lands, under the constitution and laws of a state, is a suit which may be removed to a federal court, when the parties are citizens of different states.
2. SAME—SEPARABLE CONTROVERSY.
   Where an application is made, under state laws, to condemn a portion of a large tract of land, the whole of which is owned in fee by a defendant, who is a citizen of another state than the applicant's, and a small part of which, including some of the land sought to be condemned, has been leased by him to another defendant, who is a citizen of the same state as the applicant, there is a separable controversy between the applicant and such first-named defendant as to the land not leased, which can be removed to a federal court, on the ground of diverse citizenship.

St. Clair & Gaines, for the railroad company.
Brown, Jackson & Knight, for McKell and others.

JACKSON, District Judge. These cases are heard upon a motion to remand them to the state court. The application for the removal in the condemnation case was made in conformity to the statute, as is shown by the record, and is in fact conceded by counsel who make the motion to remand.

Two points are relied upon to support the motion to remand. First, that the trial of the right to condemn is only cognizable in courts of the state under whose laws and within whose boundaries proceedings are had, and that the courts of the United States are without jurisdiction; second, that a part of the defendants in the condemnation proceedings are citizens of the same state as the applicant, and that there is no separable controversy as to them.

As to the first point relied upon by counsel, that the federal court is without jurisdiction in this class of cases, I am clearly of the opinion that the question has been repeatedly well settled. This is a suit between the applicant, on the one side, and the defendants, on the other, in which is involved the right of the applicant to condemn lands, under the constitution and laws of the state, for a public purpose. It is in no sense an ex parte application; and, under the constitution and law of the state, a right is given to any one who desires to make application for the condemnation of land under the statute, and to enforce it. This proceeding, the object and purpose of which are to enforce this right between parties, has all the characteristics of a suit, and may be removed from a state to a federal court. Such I hold to be the law in this case, and there-

fore the first position is not well taken. Mineral Range R. Co. v. Detroit & L. S. Copper Co., 25 Fed. 515; Union Pac. Ry. Co. v. Kansas City, 115 U. S. 1–18, 5 Sup. Ct. 1113; Boom Co. v. Patterson, 98 U. S. 403; Searl v. School Dist., 124 U. S. 197, 8 Sup. Ct. 460.

As to the second point, it is claimed that some of the defendants in the proceeding are citizens of the same state as the applicant. The petition discloses that Thomas G. McKell, one of the defendants, is the only owner of the land, so far as is known, and that he holds the title in fee. It is also claimed that McKell and his wife had executed a lease to one McDonald for a portion of the land proposed to be taken, with the power and authority to organize a joint-stock company to lease said land to said company when so formed. It appears that McDonald has organized, under the terms and provisions of the state laws, the McDonald Colliery Company; but there is no evidence of its existence, so far as the records of the county disclose in which the land lies, of either of the lease to McDonald or McDonald's lease to the McDonald Colliery Company. It further appears that the defendants McDonald and the McDonald Colliery Company were only tenants at will of the defendant McKell to a very small portion of the land sought to be taken, and that the defendant McKell is the owner of a large tract of land, a small portion of which the applicant desires to condemn, as well as a part of that portion leased by McKell to the colliery company. It is apparent that, McKell being the owner in fee to the whole tract, subject only to a lease for a small portion of it to the colliery company, there is a separable controversy as between the applicant and McKell as to the land not leased by him to the colliery company. As to that portion, he is in the actual possession of it, exercising exclusive control over it, the colliery company having no interest of any kind whatever in it.

It is suggested that, the defendant the McDonald Colliery Company being also a corporation created under the laws of the state of West Virginia, the joining of that defendant in the proceedings of the applicant defeats the jurisdiction of the court. To sustain this position, the applicant's counsel have cited the case of City of Bellaire v. Baltimore & O. R. Co., 146 U. S. 117, 13 Sup. Ct. 16. A close examination of that case will show that the two cases are very different. In that case the fee to the land to be condemned was owned by one of the defendants, who was a citizen of the same state as the applicant, all of which was under lease to the co-defendant, who sought to remove the case. The court held that the fact that the defendant had distinct interest in the single tract of land, which was sought to be condemned, the interest of one being the lease of the whole lot, and the interest of the other being the reversion of the whole lot, did not introduce a separable controversy into the case, and the case was therefore not removed. The question presented here, I think, is different. Here the applicant seeks to condemn, not only the land of McKell, who is a nonresident, but the land of the McDonald Colliery Company, a citizen of the same state with the applicant. There can be no question that, as between McKell and the applicant, there is a separable controversy,

which is wholly a controversy between him and the applicant, and that this separable controversy is wholly between citizens of different states, and, as to the applicant and McKell, can be fully heard and determined as between them in the circuit court of the United States for this district, under the act of 1887, as amended in 1888, which is the same as the act of 1875, except that the plaintiff may not remove under the act of 1887 as he might do under the act of 1875. The act of 1887 provides that where a controversy exists wholly between citizens of different states, which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. Here is a separable controversy in this case. If is a controversy between the railroad company and McKell, the defendant, who is the exclusive owner in fee of a large tract of land, which is sought to be condemned for the purposes of the railroad. The co-defendant, as to that portion of this land not leased, has no interest in it. In the view I take of this case, the defendant McKell, who is a citizen of Ohio, has a separate and distinct controversy, which can be wholly and fully determined as between him and the plaintiff in this action, and is therefore entitled to remove and carry the whole case into the courts of the United States. In the case of City of Bellaire v. Baltimore & O. R. Co., cited above, the motion to remand was based upon the ground that there did not exist a separable controversy between the railroad company and the city of Bellaire. In that case the Baltimore & Ohio Railroad Company was the lessee of the Central Ohio Railroad Company, claiming the same piece of land; and the controversy was not a separable controversy between the Baltimore & Ohio Railroad Company and the city of Bellaire, but it was a controversy between the Baltimore & Ohio Railroad Company, on the one side, with its co-defendant, the Central Ohio Railroad Company, which was a citizen of the same state as the plaintiff in the action, the city of Bellaire. In the case of Union Pac. Ry. Co. v. Kansas City, 115 U. S. 1–18, 5 Sup. Ct. 1113, relied upon by the Baltimore & Ohio Railroad Company to support its petition for removal of the case referred to, the supreme court held that it did not support the position of the railroad company for the reason that there was an application to condemn several different and distinct lots of land, which were owned by different persons. As we have seen, the controversy here is between the applicant and McKell, as to one of the tracts of land in which the McDonald Colliery Company has no interest whatever, and whatever judgment the court should enter as to that tract of land in no wise affected the rights and interests of the McDonald Colliery Company.

For the reasons assigned, I am of the opinion that a separable controversy exists between the applicant in this case and McKell, and, under the act of congress, this case is removable into the circuit court of the United States. Union Pac. Ry. Co. v. Kansas City, 115 U. S. 1, 5 Sup. Ct. 1113. The motion to remand is overruled.

RUTTER et al. v. SHOSHONE MIN. CO.

(Circuit Court, D. Idaho. June 22, 1896.)

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.
   A suit brought in pursuance of Rev. St. § 2326, and based upon an adverse claim made upon the filing of an application for a patent for mining ground, is a suit arising under the laws of the United States. Burke v. Concentrating Co., 46 Fed. 644, followed. Bushnell v. Smelting Co., 13 Sup. Ct. 771, 148 U. S. 682, distinguished.

2. EQUITABLE AND LEGAL SUITS—ADVERSE CLAIM TO MINING LAND.
   Suits brought in pursuance of Rev. St. § 2326, to settle adverse claims to mining ground, are in their nature equitable, and not legal, actions. Doe v. Mining Co., 43 Fed. 219, followed.

This was a suit by Royal J. Rutter and F. W. Bradley against the Shoshone Mining Company to determine an adverse claim to mining land. The cause was heard upon demurrer to the complaint.

John R. McBride, for complainants.
W. B. Heybrun, for defendant.

BEATTY, District Judge. This action is in pursuance of section 2326, Rev. St., and is based upon an adverse claim by complainant to the application of defendant for patent to mining ground. All except two of the several causes of demurrer to the original complaint are cured by the amended complaint, which complainants are permitted to file. In the remaining causes are involved the questions (1) whether such suits arise under the laws of the United States, and (2) whether they are at law or in equity.

It seems settled by the authority of several circuit court decisions that such cases are within the jurisdiction of the United States courts. In the last case upon the subject, Burke v. Concentrating Co., 46 Fed. 644, the question was directly raised, and was fully considered and decided by Judge Sawyer. Defendant now cites Bushnell v. Smelting Co., 148 U. S. 682, 13 Sup. Ct. 771, as holding a contrary view. While this was a suit of the nature provided for by section 2326, it was commenced and tried in the state court, where the only question for decision was as to the course of a ledge. The first attempt to suggest a federal question was by a petition in the state supreme court for rehearing, and the United States supreme court says this was too late to be considered, even if a federal question were involved in the case. It also says that the question turned largely upon the construction of a state statute prescribing the width of mining locations. While there is some intimation only, not a declaration, that the pleader must specially plead some facts showing that a federal question is involved, the decision seems to rest solely upon the procedure had in the state court, which was for the settling of a single fact that in no way involved the construction of any United States statute. If it does overrule the doctrine of 46 Fed. 644, it does not do so with such directness as will justify this court in now departing from the prior

clear holding of other courts, and by some eminent judges. Therefore that cause of demurrer is overruled.

The remaining question, as one of practice, is important, and seems never to have been directly considered by the supreme court, but has been by a few other courts, whose decisions have been contrary. The statute (section 2326, ante) directs that, when a party enters in a local land office his adverse claim to an application for patent to mining ground, he shall commence his proceedings in some court of competent jurisdiction to determine the question of "the right of possession" to the ground in dispute, and according to the judgment of such court the rights of the parties are finally determined in the land office. By the act of March 3, 1881, this section is so amended that, if neither party shows title to the ground in controversy, neither will have judgment in his favor. So far as the court is concerned, it is a special proceeding, referred to its determination for the guidance of the land office, and the jurisdiction of the court in such cases is based upon prior proceedings in such office. In questions of title and patent for agricultural and other lands, similar matters are determined by the local land office. So they might be in mineral entries had congress so determined. The questions for consideration are such as may, if congress had so directed, be adjudicated without the aid of a jury. There is nothing in the nature of the questions involved that entitles any of the parties to a jury trial, within the intent of the seventh constitutional amendment, for the whole proceeding, and every part thereof, is nothing more than a procedure established by the government for the disposal of its lands, and certainly it cannot be claimed that the purchaser can demand a trial by jury to determine his claim to government lands. In all such contests it must be remembered that the government is an interested party, so far as to see that the claimants have complied with the mining requirements before they get any title to the lands. The statutes and some decisions say that this action is to determine "the right of possession" to the ground in controversy. If this were all, it might be determined by ejectment; but it is submitted that this is not all, and that the use of this expression in the statute is an inadvertence or an inaccuracy, for the entire import and object of the statute is to have determined the more important question as to who, if any one, is entitled to the patent. Frequently a party has a right to the possession and not to the patent. He is entitled to the possession as soon as he duly locates a claim, but not to a patent until he shall have done the necessary work.

This action, then, is to find who is entitled to the conveyance from the government,—from the trustee,—for the land in controversy. Actions for conveyance of realty are essentially equitable. Again, whatever claim either party may have to the ground in controversy is based upon an equitable title alone, while the legal title remains in the government. Common-law actions deal with legal, and not equitable, titles. Judge Ross, in Doe v. Mining Co., 43 Fed. 219, held such actions equitable, for which he assigns cogent reasons that need not be repeated here. Hammer v. Milling Co., 130

U. S. 291, 9 Sup. Ct. 548, was an action like the one under consideration, and was tried in the Montana territorial court by a jury. On page 295, 130 U. S., and page 550, 9 Sup. Ct., it is said: "As seen by this statement, the suit is brought for special relief, and the judgment entered is such as a court exercising jurisdiction in equity alone could render." And on page 296, 130 U. S., and page 550, 9 Sup. Ct.: "The court might, therefore, have heard this case and disposed of the issue without the intervention of a jury."

It is true that this particular question, so far as can be gathered from the case, was not directly discussed. Judge Ross, however, when the case of Doe v. Mining Co. came before him, at a time subsequent to his decision above cited, called attention to this supreme court case as a full justification of his ruling, to which he adhered, as appears by the printed report of counsel's argument in the cause now in my possession. Many cases of this nature have gone to the supreme court, some of which were tried in the lower courts by juries and others by the courts themselves, but in none is the question directly decided. While there are a few adverse state and territorial decisions, time will not be taken to review them.

Attention had been called to an act of congress of March 3, 1881, supra, in which the title refers to "suits at law," and the act itself says that "the jury shall so find," etc.; from which it is argued that congress intended to declare these legal actions. It may well be doubted that congress, by this indirect language, intended to define the forum in which such actions should be tried, or that, if the action provided for by section 2326 is equitable, this changed it to a legal one.

From the foregoing considerations, it is concluded such actions are equitable, and the demurrer is overruled.

COOLIDGE v RAY.

(Circuit Court, N. D. Georgia. May 29, 1896.)

CIRCUIT COURTS—JURISDICTION—AMOUNT IN CONTROVERSY—FORECLOSURE SUIT.

When a deed is given for the purpose of securing a debt, under the Georgia statutes, the mortgagee, independently of any express stipulation in the accompanying bond for reconveyance, has a right to pay the premium for proper insurance of the property conveyed, and to collect the same, as a part of the amount secured by the deed; and accordingly, in a suit for the foreclosure of such a security, the amount of insurance premiums paid by the mortgagee is properly included with the principal, in estimating the amount involved, for the purposes of the jurisdiction of the United States circuit court.

Brandon & Arkwright, for complainant.
Lavender R. Ray, pro se.

NEWMAN, District Judge. A bill is filed to foreclose a mortgage securing a note for $2,000, bearing interest at the rate of 7 per cent. per annum, payable semiannually, by interest coupons attach-