

of *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, holds that under the acts of March 3, 1887 (chapter 373), and August 13, 1888 (chapter 866), a case not depending on the citizenship of the parties, nor otherwise specially provided for, cannot be removed from a state court into a circuit court of the United States, as one arising under the constitution and laws of the United States, unless that appears by the plaintiff's statement of his own case; and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings. The case of *Railway Co. v. Ziegler*, 167 U. S. 65, 17 Sup. Ct. 728, recognizes the same doctrine, but holds that the case made by the plaintiff's own showing was one arising under an act of congress, and that the circuit court of the United States clearly had jurisdiction. Other cases cited by counsel for the plaintiff are equally inapplicable.

The case here made by the plaintiff's own showing is one arising under the constitution and laws of the United States. As the present suit is one against a receiver appointed by a circuit court of the United States, and could only be brought, as it was, in a state court, without leave, by virtue of the acts of congress of March 3, 1887 (chapter 373), and August 13, 1888 (chapter 866), it is clearly one arising under the constitution and laws of the United States, and hence is removable unless the joinder of George Colvin as a party defendant precludes the receiver from asserting his right of removal. The complaint does not state a joint cause of action in tort against the receiver and the engineer. The liability of the engineer arises from his own wrongful act in running his engine against and over the plaintiff's son, while that of the receiver grows out of the master's liability for the negligent or tortious acts of his servant when engaged about the master's business. *Warax v. Railway Co.*, 72 Fed. 637. But, if the cause of action against the receiver and his engineer were joint, it would make no difference in the receiver's right of removal. No liability can be asserted against the receiver for misfeasance or nonfeasance in performing the duties of his office, except under and by virtue of the constitution and laws of the United States. The joint liability asserted in the complaint against the receiver and his engineer is one arising from and growing out of the operations of the receivership, and hence is one arising under the constitution and laws of the United States, under and in virtue of which the receivership was created and exists. *Landers v. Felton*, 73 Fed. 311. The motion to remand is overruled.

SEEBASS et al. v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, D. New Jersey. October 25, 1897.)

1. PLEADING—ACTION ON CONTRACT—ANNEXATION OF COPY.

In an action upon a contract of insurance, a copy of the policy on which the suit is founded, annexed to the declaration and referred to therein, thereby becomes a part of the record, under section 123 of the New Jersey practice act.

2. SAME—ASSIGNMENT OF BREACH.

An assignment of a breach, in the words of the contract, when no question of law is involved, is good pleading.

This was an action at law by Therese M. Seebass and others against the Mutual Reserve Fund Life Association to recover on a contract insuring the life of Oscar Seebass. The case was heard on demurrer to a plea filed by the defendant.

Preston Stevenson, for complainants.

J. Frank Fort, for defendant.

KIRKPATRICK, District Judge. This action is brought upon a contract of insurance upon the life of one Oscar Seebass, and a copy of the policy upon which the suit is founded is annexed to the declaration, referred to therein, and thereby becomes a part of the record, under the 123d section of the New Jersey practice act. *Harrison v. Vreeland*, 38 N. J. Law, 366.

The declaration alleges that the insured "duly executed and performed all the covenants and conditions, matters and things, whatsoever, required to be performed by him under said contract." It appears by an inspection of the policy, which is made a part of the record, that one of the considerations of the contract was that the assured should pay all mortuary assessments at the office of the association within 30 days from the date of each notice, with the express condition that, if any stipulated payment should not be paid when due, then and in every such case the certificate should be null and void. The defendant, by its third plea, denies liability, by reason of the failure of the assured to pay a mortuary assessment levied in 1895, and the plea is as follows:

"And for a further plea to the said declaration the defendant, by like leave of the court first had and obtained," etc., "says that the plaintiffs ought not to have or maintain their aforesaid action thereof against it, because it says that after the making of the said contract, and during the continuance thereof, and during the lifetime of said Oscar Seebass in said declaration named, to wit, on the 1st day of August, 1895, at the city, county, and state of New York, a certain assessment or mortuary call, No. 81, and for the sum of forty-five dollars and thirty cents, was made by the said defendant upon the said Oscar Seebass, due notice whereof, dated on said last-mentioned date, was given by the said defendant to the said Oscar Seebass in the manner provided in said contract, and which said assessment or mortuary call was by the terms of said contract payable to said defendant within thirty days from the date of said notice, yet the said Oscar Seebass did not within the said period of thirty days pay to the said defendant the amount of said assessment or mortuary call, or any part thereof, although the said defendant was ready and willing to receive the same during all the time the same was payable, whereby and by reason whereof the said contract became null and void; and this the defendant is ready to verify," etc.

To this plea the plaintiffs demur, and allege for cause:

"That it does not legally appear that the plaintiffs' intestate was obligated by the contract of insurance to pay the mortuary call specified in the plea, and that by reason of such nonpayment the contract became null and void."

The plea demurred to alleges, in the language of the contract, non-compliance by the assured with one of its conditions. No more than this is required by the correct rules of pleading. An assignment of a breach, in the words of the contract, when no question of law is involved, is good. 1 Chit. Pl. 332. It is only necessary that the plea contain sufficient matter, which, if substantiated by proof, will sustain

defense. *Deweese v. Insurance Co.*, 34 N. J. Law, 244. Whether the mortuary call in this case was properly made, or whether the assured had the required notice, or failed to pay in due time, are questions of fact, to be determined by the jury from the evidence. No doubt, the burden is on the defendant to prove the facts showing valid assessments made in strict conformity with the contract and the by-laws, but that is a matter of proof, not pleading. The plea in this case gives notice to the plaintiffs of the matter which the defendant sets up in defense of its action, and a joinder therein will, upon the trial of the cause, put the defendant to its proof that it has been absolved of its obligation by the failure of the assured to perform some duty imposed upon him by the contract. The demurrer will be overruled.

KELLEY et al. v. BOETTCHER et al. CURRAN et al. v. CAMPION et al.
DONOVAN v. SAME.

(Circuit Court of Appeals, Eighth Circuit. September 15, 1897.)

Nos. 870-872.

ATTORNEYS—IMPROPER AND SCANDALOUS BRIEFS—STRIKING FROM RECORD.

Where an attorney filed in an appellate court a brief filled with denunciation and abuse of the judges who decided the case against him below, and containing attacks upon their intelligence, integrity, and personal character. *Held*, that the brief would be stricken from the files, that the name of the attorney would be stricken from the record as solicitor or counsel, and he would not be permitted to be heard further in the case, either orally or by brief; but that appellant would be permitted to appear by other counsel, and file new briefs within a time limited.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a bill in equity by Thomas D. Kelley, Margaret O. Kelley, Michael P. Kelley, and Annie B. Kelley against Charles Boettcher, John F. Campion, A. V. Hunter, A. R. Meyer, William Boyd Paige, Max Boehmer, and the Ibex Mining Company. Demurrers to the original and an amended bill were sustained by the court below, and complainants declining to amend further, a decree was entered for defendants. From this decree the present appeal was taken. The cause was heard upon a motion to strike the brief of Mr. T. A. Green from the record.

Charles Cavender and Charles J. Hughes, Jr., for the motion.

T. A. Green and E. B. Green, opposed.

Before BREWER, Circuit Justice, and SANBORN and THAYER, Circuit Judges.

BREWER, Circuit Justice. A motion has been made to strike from the files the brief of appellants, signed by T. A. Green as solicitor, and affirm the decree. The ground of the motion is, in general terms, the irrelevant, scandalous, and offensive matter with which that brief is filled. The record discloses that appellants, as plaintiffs, on June 19, 1895, by T. A. Green, their solicitor, filed a bill in equity in the cir-