

REED et al. v. NORTHERN PAC. RY. CO. et al.

(Circuit Court, D. Minnesota. May 7, 1898.)

REMOVAL OF CAUSES—FEDERAL QUESTION—LIABILITY ASSUMED BY DEFENDANT FROM NATIONAL CORPORATION.

A corporation purchasing a railroad at foreclosure sale in a federal court, and assuming as part of the consideration all liabilities incurred by the receivers of that court in their management, is not entitled to remove a suit to enforce such a liability, on the ground that it involves a federal question, because the receivers, if sued, could have removed the suit on that ground.

This is an action brought in a state court by Lathrop E. Reed and others, partners as Reed & Sherwood, against the Northern Pacific Railway Company and others. Defendant Reed removed the cause to this court, and it is now heard on a motion to remand.

D. F. Morgan, for plaintiffs.

C. W. Bunn, for defendants.

LOCHREN, District Judge. This action was commenced in the state district court, Anoka county, to recover of the defendant railway companies the value of a large quantity of lumber alleged to have been burned in plaintiffs' lumber yards in July, 1894, by fire negligently dropped or scattered from the locomotives of the Northern Pacific Railroad Company and the Great Northern Railway Company while passing the said yards. The Great Northern Railway Company is a Minnesota corporation, and the Northern Pacific Railroad Company was a federal corporation, organized under acts of congress, and at the time of the said fire its railroad and property was in the possession of and operated by receivers appointed by this court, and under decree in the same action in which said receivers were appointed the said railroad and property were sold to the defendant the Northern Pacific Railway Company, which is a Wisconsin corporation, and which by the terms of the sale became obligated to pay, as part of the consideration for its purchase, any liabilities contracted or incurred by the receivers before the delivery of the possession to it of the railroad property. The action was removed to this court upon the petition of the two railroad companies, defendants, upon the alleged ground that it is a suit "arising under the constitution or laws of the United States." The plaintiffs now move for an order remanding the cause to the state court, claiming that it is not such a suit.

Had the suit been brought against the receivers while they remained in the discharge of their functions, it would have been such a suit; as the corporation represented by them existed and derived its rights and powers from the laws of the United States, and the right to sue the receivers so appointed rested on the same laws. *Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905; *Landers v. Felton*, 73 Fed. 311; *Cableman v. Railway Co.*, 82 Fed. 790. But the defendant the Northern Pacific Railway Company does not represent the Northern Pacific Railroad Company nor the receivers. It is liable, if at all, by virtue of the terms of its contract of purchase, by which it assumed the then pending indebtedness and liabilities of the receivers. If the Northern

Pacific Railroad Company had taken possession of a tract of land as owner, and one claiming better title had brought ejectment against that corporation in the state court, it might (if the value was sufficient) have removed the action to the federal court on the ground stated. But if the present Northern Pacific Railway Company, having received possession of the said land under its purchase aforesaid, were sued in ejectment for the recovery of the land, it could not remove the case on the ground stated into this court, merely because its title came from the other corporation. Neither do I think this cause can be so removed by the present Wisconsin corporation merely because it has assumed, as is claimed by the plaintiffs, a liability which once rested on said receivers.

The motion is granted, and it is directed that the cause be remanded to the state court from which it was removed.

TUG RIVER COAL & SALT CO. v. BRIGEL et al.
(Circuit Court of Appeals, Sixth Circuit. April 11, 1898.)

No. 557.

1. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP.

The citizenship which determines the jurisdiction of a federal court is that which existed at the time of commencement of the suit, and subsequent changes can neither divest nor confer jurisdiction.

2. SAME—PARTIES.

When jurisdiction vests at the commencement of suit over the indispensable parties, but its exercise is prevented by the presence of other proper parties over which the court cannot take jurisdiction, the names of such other parties may be stricken out, and the objection to the exercise of jurisdiction thereby obviated.

3. SAME—AMENDMENT OF PLEADINGS.

Where a federal court has jurisdiction over the parties and cause of action at the time suit is brought, the jurisdiction is not affected by subsequent amendments of pleadings relating to the cause of action.

4. MORTGAGE—FORECLOSURE—PARTIES.

The mortgagor and mortgagee are the only indispensable parties in a suit to foreclose a mortgage.

5. CHANCERY PRACTICE—MASTER—FINDINGS OF FACT—EFFECT.

In the absence of clear evidence of mistake of fact or error of law, a finding of fact by a master, concurred in by the court below, is binding upon an appellate court.

6. SAME—COSTS.

Where the final decree in an equity suit has been reversed by the court of appeals for want of the diverse citizenship necessary to the jurisdiction of federal courts, and the bill is subsequently amended so as to obviate that difficulty, and make a case proper for the court to proceed with, the general costs of the cause in the court below should be adjudged by the court on final hearing just as in the ordinary case. 73 Fed. 13, affirmed.

7. EVIDENCE—PAROL TO VARY WRITTEN CONTRACT.

Evidence that a written contract, absolute on its face, was not intended to take effect except upon a certain condition, does not tend to contradict, add to, or vary the contract, but only to explain it, and is admissible.

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

Bill was filed in the circuit court to foreclose a mortgage and trust deed, executed by appellant in favor of appellees, as trustees, to secure payment