

STATE OF MINNESOTA V. DULUTH & I. R. R. CO. et al.

(Circuit Court, D. Minnesota. June 13, 1898.)

REMOVAL OF CAUSES—FEDERAL QUESTION.

A right of removal exists, not only when plaintiff's claim is based upon some provision of the federal constitution or statutes, but also when it appears from his statement of his case that his right of recovery would be defeated by a construction, which may fairly be contended for, of some provision of such constitution or statutes. Thus, a suit by a state to recover lands under a state statute forfeiting a previous railroad grant is removable where the validity of the act of forfeiture is questionable, under the provisions of the federal constitution.

This was a suit by the state of Minnesota against the Duluth & Iron Range Railroad Company, Walter F. Cobb, and others, to enforce a statutory declaration of forfeiture of certain lands, previously granted by the state to aid in the construction of the railroad. The cause was heard on a motion to remand it to the state court from which it was removed.

H. W. Childs, H. C. Belden, and W. P. Warner, for the State of Minnesota.

Davis, Kellogg & Severance and Draper, Davis & Hollister, for defendants.

LOCHREN, District Judge. This action was begun in the district court of the Eleventh judicial district of the state of Minnesota, county of St. Louis, and removed to this court on defendants' petition, alleging that the suit is one arising under the constitution or laws of the United States. The complainant now moves that the cause be remanded to the state court, claiming that it does not appear on the face of the complaint that a federal question is involved. The complaint, with its exhibits, is lengthy. Not only are the acts of congress under which the state derived title to the swamp lands in question pleaded, but also the incorporation of the defendant railroad company; the legislative act granting to it swamp lands to aid in the construction of its railway, conditioned upon the completion of the railroad within limited time; the change in one of the terminals of the railway, and legislative consent to the change, with extensions of the time for completion of the railroad; the final completion of the railroad within the extended time, and report of such completion and practical operation of the railroad, made by commissioners to the governor; the selection of swamp lands by the defendant railroad company, and conveyance to it by the governor of a large amount of the lands so selected; sales of many parcels of such lands to purchasers, and conveyances to such purchasers by the railroad company; and the conveyance of all other lands, selected or not, claimed by said railroad company, to the defendant Walter F. Cobb, to secure specified bonds of said railroad company; also an act of the legislature of the state of April 21, 1897, purporting to repeal all prior acts granting lands to the defendant railroad company, and purporting to forfeit and resume all lands so granted.

It appears to be settled that, to sustain the jurisdiction of this

court, it must appear by the plaintiff's statement of the facts on which his claims depend, that the suit is one arising under the constitution or laws of the United States. The case of *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, has been followed upon this point. In that case (at page 460, 152 U. S., and at page 464, 14 Sup. Ct.) the decision in *Starin v. City of New York*, 115 U. S. 248, 6 Sup. Ct. 28, approved in *Carson v. Dunham*, 121 U. S. 427, 7 Sup. Ct. 1033, that "the suit must be one in which some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the constitution or a law or treaty of the United States, or sustained by a contrary construction," was referred to as equally applicable to the act of March 3, 1887, as amended by the act of August 13, 1888, as to the prior act of 1875. In other words, to give the United States circuit court jurisdiction, it is not necessary that it should appear that plaintiff's right to recover is based upon and supported by some provision of the constitution or statutes of the United States. A federal question is equally presented if it appears from plaintiff's statement of facts that a construction, which may be fairly claimed and contended for, of a provision of such constitution or statutes, would defeat plaintiff's right of recovery. The complainant's right of recovery here depends upon the validity of the legislative act of April 21, 1897, when tested by the provisions of section 10 of article 1 of the constitution of the United States, and section 1, of article 14 of the amendments to that constitution. Every fact upon which the solution of this federal question depends is stated on the face of the complaint, and apparently the question can be presented by a demurrer to the bill of complaint. The motion to remand is denied.

HILL et al. v. KUHLMAN et al.

(Circuit Court of Appeals, Fifth Circuit. May 3, 1898.)

No. 540.

1. **CIRCUIT COURT—JURISDICTION.**

A suit to stay an action on the law side of the court for recovery of lands, and to reform a deed thereto, is an ancillary suit, and the court has jurisdiction without regard to the amount in controversy.

2. **REFORMATION OF DEED—SUFFICIENCY OF EVIDENCE.**

The evidence showed that the only land owned by grantor was a tract of 250 acres in the Tierwester survey, while the field notes set out in the deed call for a tract of land of 100 acres in another survey, not then owned by grantor, and that, if the notes in the deed are reversed, they will substantially describe the 250 acres owned by the grantor; that, since the deed, the grantee and his successors have claimed and controlled the 250 acres in the Tierwester survey, while during this time the grantor or his successors have made no claim to it. *Held* sufficient to sustain a decree, in a suit brought 50 years after the deed, that such deed be reformed to cover the 250 acres in the Tierwester survey.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

S. W. Jones and Geo. H. Breaker, for appellants.

S. R. Perryman and A. C. Bullitt, for appellees.

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

PARDEE, Circuit Judge. This is an appeal from a decree on a bill brought to stay proceedings in an action on the law side of the circuit court, instituted for the recovery of certain lands, and to reform a deed from one John Y. Hill, the common source of title of both parties in the law action, to one Sanford J. Poston, the complainants' grantor, which deed was made on the 15th day of May, 1840. On the hearing, a decree was entered in favor of the complainants, reforming the deed in question as prayed for, and remitting the parties on the question of title to the action at law. To this decree the defendants below (appellants here) assign error as follows:

"(1) The evidence, as shown by the record in this case, fails to disclose such a state of facts, positive or circumstantial, as would justify a court of equity in adding to, correcting, changing, or modifying the language of a written instrument expressive of a contract solemnly entered into between the parties; and the said circuit court of the United States erred, to the prejudice of the said James H. Hill, Bell B. Pusey, Hill Hastings, Thomas H. Hastings, and Alfred Hastings, in holding, adjudging, and decreeing that a mutual mistake had been made by the grantor, John Y. Hill, and the grantee, Sanford J. Poston, in the field notes of the deed of conveyance, of date May 15, 1840, from the former to the latter, for a certain tract of land, being the land in controversy in this suit, situated in the county of Harris, then republic of Texas, but now the state of Texas, and in so correcting the field notes of said deed as to convey two hundred and fifty acres of land, instead of one hundred acres, as expressed in and by the field notes set out in said conveyance. (2) And other errors manifest of record."

This assignment of error amounts to no more than that the court below erred on the merits of the case. Counsel for appellants, however, by brief, present in this court the question of jurisdiction, want of equity in the bill, and insufficient evidence to support the decree. It is urged that the record does not show that the value of the subject-matter in controversy is within the court's jurisdiction. As the suit is one to stay proceedings at law, and could only be brought in the court a qua, the suit is an ancillary suit, and the jurisdiction of the court is clear. The want of equity in the bill is alleged, because the allegation of mutual mistake is not direct and positive in terms; and generally it is claimed that the bill and the amendment thereto wholly fail to state such a case as would authorize the correction or reformation of a written instrument executed more than 50 years ago, because it is said that the mutual mistake is not directly averred, but only on information and belief.

As we read the original bill of complaint, we find that the mutual mistake in the deed from Hill to Poston, which is the deed sought to be reformed, is fully described, and is sufficiently charged to support a decree in favor of complainants. If the objection had been made and insisted upon in limine, it could, if sound, have been easily cured by amendment. Whether a deed should be reformed on proof of mutual mistake after 50 years depends upon the peculiar circumstances attending the case. On the facts stated in the original bill and

the amendment thereto, laches is not imputable to the complainants in this case.

On the merits, we find the allegations of the bill sufficiently established to warrant the decree appealed from. The mutual mistake alleged in the bill is in regard to the field notes given in connection with a description of the land. The case shows that while John Y. Hill owned a tract of land in the county of Harris, $1\frac{1}{2}$ miles from the city of Houston, being the southeast half of the Tierwester survey, he did not own any other land in that county; and that the deed purported to convey 250 acres off the Tierwester survey, while the field notes set out in the deed call for a tract of land of about 100 acres in another survey, not then owned or controlled or claimed by Hill; and that, if the field notes in the deed are reversed, they will substantially describe the 250 acres owned by Hill at the time of the conveyance; and that, from the time of the conveyance to Poston down to the present time, Poston and his grantees have claimed, controlled, and more or less occupied the 250 acres in the Tierwester survey, paying all taxes thereon, and as fully possessing the same as the circumstances permitted, while during all this time neither Hill nor his heirs nor other grantees have made any claim whatever to said lands. The case further shows that, in other deeds made by the said Hill about the time of the deed to Poston, he conveyed other portions of the same tract, reducing his holdings therein to the 250 acres sold to Poston, and in one of the deeds the land sold to Poston is referred to as being in the Tierwester survey. While it is possible that John Y. Hill, while pretending to sell 250 acres of land to Poston for a consideration of \$1,500, may have intended in describing the land to insert field notes which did not refer to any land he owned, yet it is not probable nor to be presumed in a court of equity, in the absence of proof. All the circumstances established by the evidence point to the fact that the insertion of such field notes was a mistake.

The decree of the circuit court seems to be just and equitable, and we see no reason to disturb it. Affirmed.

LOUISVILLE & N. R. CO. et al. v. CENTRAL TRUST CO. OF NEW YORK
et al.

(Circuit Court of Appeals, Sixth Circuit. June 1, 1898.)

No. 553.

1. RAILROADS—RECEIVERS—CLAIMS FOR TRACK RENTALS.

A claim against a railroad company which is in the hands of a receiver under foreclosure proceedings, for rent of track privileges accruing prior to the appointment of the receiver, is not entitled, as against the mortgage bondholders, to priority of payment out of the proceeds of sale, where no special equities are shown, and it appears that the lessor relied for payment upon the general credit of the lessee and its sublessee.

2. SAME.

Track rentals are not in general recognized as of the kind of claims which may become entitled, on the appointment of a receiver, to priority over the mortgage bonds.