

DAVIS et al. v. COUNTY COURT OF RANDOLPH COUNTY et al.

(Circuit Court, D. West Virginia. August 4, 1898.)

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

A cause is not removable unless all the parties on one side are citizens of different states from those on the other side, or unless there is a separable controversy wholly between some of the parties who are citizens of different states, in which the question at issue can be fully determined between them.

2. SAME—SUIT FOR INJUNCTION.

A suit by taxpayers of a county against the county court and a citizen of another state, to restrain the court from erecting a new court house, and the other defendant from executing a contract to build it, entered into with the county court, is not removable by the nonresident defendant on the ground that there is a separable controversy, as an injunction against either defendant necessarily operates upon both.

C. W. Dailey, for plaintiffs.

J. L. Wamsley and E. D. Talbott, for defendants.

JACKSON, District Judge. This is a bill filed by James Henry, John P. Davis, and R. D. Darden, who are citizens, residents, voters, and taxpayers of the county of Randolph, in the state of West Virginia, who sue on behalf of themselves and all of the taxpayers of the said county, against the county court of Randolph county, Patrick Cricard, a commissioner and president of said court, J. W. Gooden and Omar Conrad, commissioners, who are all citizens and residents of Randolph county, W. Va., and John P. Conn, a citizen and resident of the state of Pennsylvania. The purpose and object of this bill is to restrain the county commissioners from the erection of a new court house at Beverly, in Randolph county, and to restrain the defendant Conn from executing a contract entered into with him by the county court on the 6th day of June, 1898, for the construction and erection of the court-house building, as provided for in the contract.

It is not necessary for the court at this time to consider the various questions involved and raised by the pleadings in this case. It appears from the bill that the plaintiffs and the defendants are all citizens of West Virginia, except the defendant Conn, who is a citizen and resident of Pennsylvania. The defendant Conn filed his petition in the circuit court of Randolph county for the removal of this cause to the United States circuit court for this district, claiming that he had a separable controversy between himself and the plaintiffs. It is now heard upon a motion to remand the cause upon the ground that it is not a cause that can be removed into the United States court, for the reason that there is no separable controversy between the plaintiffs and defendants in this case. I was inclined to think, when I first heard this motion, that the relief sought by the defendant Conn could be had independent of his co-defendant, the county court, but upon further reflection I have reached the conclusion that the defense of the defendants is one and inseparable, and that the case cannot proceed, as against one of the defendants, without the presence of the other.

In the case of Dickinson and others, citizens and taxpayers of the county of Kanawha, in the state of West Virginia, against the county court of Kanawha county and the Vulcan Road-Machine Company, a Pennsylvania corporation, a similar question was raised, which was decided by this court. The county court of Kanawha county had entered into a contract with the Vulcan Road-Machine Company for the erection and construction of two bridges in the county of Kanawha, as provided for in the contract. The case was removed from the circuit court of Kanawha county to the United States court, sitting at Charleston. A motion was made to remand the case, upon the ground that there was no separable controversy between the plaintiffs and any of the defendants. After mature consideration, I remanded the case, for the reason that the plaintiffs and one of the defendants, the county court, were citizens and residents of the same state, and there did not exist such a separable controversy between the plaintiffs and defendants as would confer jurisdiction upon this court. (Not reported.)

This ruling would seem to be a precedent to control my action upon this motion. It has been held that in an action by resident taxpayers against county officials and bondholders, one of whom is a nonresident, to restrain the collection of a tax levied for the payment of illegal bonds, and to cancel the bonds, there is no separable controversy with relation to the county officials and bondholders. *Anderson v. Bowers*, 40 Fed. 708. This case seems to me to rule the point at issue upon this motion. It is very clear that, unless all the parties on one side of the controversy are citizens of different states from those on the other side, or that there is a separable controversy wholly between some of the parties, who are citizens of different states, in which the question at issue can be fully determined as between them, then the case cannot be removed. *Hyde v. Ruble*, 104 U. S. 407; *Ayre v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. 90; *Coney v. Winchell*, 116 U. S. 227, 6 Sup. Ct. 366; *Safe-Deposit Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733; *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32; *Brooks v. Clark*, 119 U. S. 503, 7 Sup. Ct. 301.

The plaintiffs in this bill seek to restrain the defendants from the erection of the court house under the contract before referred to. To make the injunction now existing effective, it should operate against both defendants, who are the only parties to the contract. The court could not dissolve it as to Conn, the petitioner, and at the same time permit it to stand as to his co-defendant the county court. Such action would be unjust to both of the defendants, and possibly result in expensive litigation.

The relief asked for by the plaintiffs in their bill grows directly out of the contract between the two defendants, and it is not perceived what decree the court could enter in this case, if it retained it, that would not operate upon both of the defendants. It follows that, as the county court is a citizen of the same state as the complainants, the suit is not removable, and the case will be remanded, for the reasons assigned, to the circuit court of Randolph county.

ATLANTIC & V. FERTILIZING CO. v. CARTER et al.¹

(Circuit Court, E. D. Virginia. July, 1882.)

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

The provision in Rev. St. § 639, allowing the removal of a part only of a suit, was repealed by the act of March 3, 1875, § 2, which provides for the removal of the whole suit when there is a separable controversy, the parties to which have a right of removal.

This was a creditors' bill filed in the circuit court of Loudon county, Va., by the Atlantic & Virginia Fertilizing Company, in behalf of itself and such other lien creditors of Benjamin F. Carter as might choose to come in. The defendants were Benjamin F. Carter, Rebecca M. Carter (his wife), Edward Nichols (substituted trustee), B. P. Noland (trustee), the Virginia Marble Company, Phoebe Hoge, and R. H. Dulaney.

The purpose of the bill was to ascertain the liens on a tract of some 400 acres of land belonging to the defendant Carter, and to procure a sale thereof for the satisfaction of the same. The bill showed that, besides various liens therein set out, the defendants Carter and wife had executed a deed conveying to the defendant the Virginia Marble Company all the marble, sandstone, etc., contained in the said tract, with a perpetual right of entry thereon for the purpose of quarrying and removing the same, subject, however, to a defeasance or forfeiture of said rights on the abandonment of the work by the said company, and its failure to prosecute the same for two years consecutively. The bill charges that a forfeiture had occurred by default of the said company for the period specified.

In April, 1881, complainant filed an amended bill, making one William Wright a party defendant, and alleging that he claimed to have an interest in and possession of about 100 acres of the said land under a deed of lease from the Virginia Marble Company. The amended bill asked that the rights of both the Virginia Marble Company and Wright, as its lessee, be declared forfeited, that possession of the lands be surrendered to Carter, and that the same be sold, as prayed in the original bill, free from any claims of the lessee and sublessee. After further proceedings in the cause, the defendant Wright on May 1, 1882, filed a petition and bond for the removal of the cause to the proper federal court, alleging that he was a citizen of Indiana, and that the other parties to the suit were citizens of Virginia, that he had expended fully \$25,000 on the property, and that the suit could be determined, so far as concerned his rights, without the presence of the other defendants. The petitioner prayed "that the said suit, so far as your petitioner's rights are involved, may be removed for trial into the circuit court of the United States for the Eastern district of Virginia; * * * such removal being in pursuance of section 639 of the Revised Statutes of the United States," etc. This petition was granted by the state court, and that part of the cause involving the petitioner's rights was accordingly removed into this court. The matter is now heard on complainant's motion to remand. In support of the motion it was contended (1) that Wright, being but a subtenant, was bound, on common-law principles, by the acts and forfeitures of his landlord, the Virginia Marble Company, and could have no standing in court independently of it, and that the question whether a forfeiture had been incurred was still in the state court; (2) that Rev. St. § 639, was no longer in force, so as to authorize the removal of part only of a suit.

C. P. Janney, for petitioner.

John M. Orr and Payne & Alexander, for complainants.

¹ This case has been heretofore reported in 4 Hughes, 217, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.