

ing the plant within 30 days, and complete same on or before the 1st day of September, 1891, and also conditioned that the said water-supply and power company should pay the interest on said \$10,000 in bonds until such time as the principal should have been all consumed by the city for fire-hydrant rentals, and containing other conditions not necessary to mention.

(10) The copies of all instruments and proceedings herein referred to as contained in plaintiff's petition, or as exhibits thereto, are made part of these findings.

Conclusions of Law.

(1) The plaintiff is shown by the proof to be a bona fide purchaser, for value, without notice, of the bonds, and coupons attached thereto, upon which suit is brought, and should therefore recover.

(2) The right of plaintiff to recover upon the coupons involved in the suit is neither defeated nor impaired by the judgment of the state district court dissolving the original incorporation of Uvalde and the subsequent reincorporation of the city. *Shapleigh v. City of San Angelo*, 167 U. S. 646, 17 Sup. Ct. 957.

(3) Judgment should be rendered for plaintiff against the defendant for the sum of \$4,678.05, with legal interest thereon from the 10th day of May, 1898, and it is so ordered.

John H. Clark and R. L. Ball, for plaintiff in error.

Thos. H. Franklin, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and PAR-LANGE, District Judge.

PER CURIAM. In this case a jury was waived by stipulation in writing, and the cause was submitted to and tried by the court. A special finding of facts and conclusions of law were entered, and to the effect that the plaintiff below, defendant in error here, was an innocent purchaser for value and without notice, either in fact or in law, of any irregularity attending the issuance or disposition of the bonds in question. On the facts as found, we agree with the trial judge, and his judgment is affirmed.

PITKIN v. COWEN et al.

(Circuit Court, S. D. Ohio, E. D. January 13, 1899.)

No. 873.

1. REMOVAL OF CAUSES—ACTION AGAINST FEDERAL RECEIVERS.

A federal court will take judicial notice that defendants, who are sued in the state court as receivers operating a railroad, are acting under its own appointment, as shown by its records, and hence that a federal question is disclosed, although the plaintiff's petition is silent as to the authority under which defendants were acting.

2. SAME—RIGHT OF RECEIVER TO REMOVE—ANCILLARY SUITS.

Under section 3 of the judiciary acts of 1887 and 1888, a suit against railroad receivers appointed by a federal court is not removable into such court from a state court on the ground that it is ancillary to the main suit in which the receivers were appointed, where the cause of action arose out of acts or transactions of the receivers "in carrying on the business connected with the property," and not out of any transaction of the insolvent corporation.¹

On Motion to Remand.

¹ As to removal of suits by and against federal receivers, see note to *Plow Works v. Finks*, 26 C. C. A. 49.

H. H. & R. M. Greer, for plaintiff.

J. H. Collins, for defendants.

THOMPSON, District Judge. This suit was commenced in the court of common pleas of Knox county, in this state, and was thence removed to this court. It is now submitted to the court upon a motion to remand it to said court of common pleas, upon the ground that "neither the parties to the suit, nor the amount involved, entitles the defendants to have this case removed from said Knox county." This suit was brought against the defendant receivers to recover damages for the death of the plaintiff's intestate, wrongfully caused, as is alleged in the original petition, by the negligence of the employees of the receivers in operating a train over the railroad in their charge. The amount claimed is \$1,999. The original petition alleges that the defendants were appointed receivers of the Baltimore & Ohio Railway Company, and that, as such receivers, they are in possession of, and are now operating, a line of railroad, part of which runs through the said county of Knox; but the petition does not show by what court the receivers were appointed; and it is claimed on behalf of the plaintiff that no cause is shown in the original petition for the removal of the case to this court,—in other words, that the original petition does not show a federal question, diverse citizenship, or any other recognized cause justifying removal.

It is well settled that, in order to justify a removal, the cause must appear in the original petition, and it cannot be supplied by the averments of the petition for removal. There is no claim here that the removal can be justified upon the ground of diverse citizenship; and it is claimed that no federal question is shown; that no facts are stated in the original petition raising a federal question. It is conceded, and must be under the authorities, that, if it were shown in this petition that the receivers were appointed by a United States court, then a federal question would be presented, because, as said by the supreme court of the United States in *Railway Co. v. Cox*, 145 U. S. 603, 12 Sup. Ct. 908:

"As the receivers became such by reason of, and derived their authority from, and operated the road in obedience to, the orders of the circuit court in the exercise of its judicial powers, we hold that jurisdiction existed, because the suit was one arising under the constitution and laws of the United States."

But it is said that, for aught that appears in the original petition, these receivers may have been appointed by one of the state courts, and therefore no federal question is presented. If, however, it appears from the petition, in connection with matters of which the court will take judicial notice, that these receivers were appointed by this court, then a federal question is presented, and cause for removal is shown. I think this court may take judicial notice of the fact that the receivers were appointed by this court. This court is advised by its own record that they were appointed receivers of this road, and at the time of the death of plaintiff's intestate were, and now are, in control thereof, as such receivers; and this excludes any suggestion that they may have been appointed, and may be in possession of the road, by the authority of a state court. I therefore hold that a federal question is sufficiently

shown in the original petition to furnish a basis for removal if the other necessary conditions exist to justify it.

But it is claimed, in the second place, that the removal was not justified, because the original petition shows that the amount of the claim is less than \$2,000. The defendants, on the other hand, claim that the suit is ancillary to the suit in which the receivers were appointed, and is within the jurisdiction of this court, regardless of the citizenship of the parties, the nature of the controversy, or the amount involved.

By section 1 of the act of congress of March 3, 1887, as corrected and amended by the act of August 13, 1888 (1 Supp. Rev. St. U. S. [2d. Ed.] p. 611), it is provided:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority."

And by section 2 of said act it is provided:

"That any suit of a civil nature at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district."

And by section 3 of said act of August 13, 1888 (1 Supp. Rev. St. U. S. [2d. Ed.] p. 614), it is provided that:

"Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed, but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed so far as the same shall be necessary to the ends of justice."

And the question is whether the removal was justified under these acts.

In support of their contention, counsel for the defendants cite a case on all fours with the case at bar, and which in every point sustains the claim of the defendants. I refer to the case of *Carpenter v. Railway Co.*, 75 Fed. 850. In that case the court overruled the motion to remand, and in support of its action says:

"And in the case of *White v. Ewing*, 159 U. S. 36-40, 15 Sup. Ct. 1019. * * * the opinion of the court * * * asserts that, where a circuit court obtains jurisdiction over an insolvent corporation by the filing of an original bill and by the appointment of a receiver, 'any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the circuit court, regardless either of the citizenship of the parties, or of the amount in controversy.' * * * And, 'where an insolvent corporation is placed in the hands of a receiver of the circuit court, such appointment draws to the jurisdiction of that court the control of its assets, so far as persons having claims to participate in the distribution of such assets are concerned, and that parties must go into that court in order to assert their rights, prove their demands, and

receive whatever may be due them, or their share or interest in the estate. * * * There is just as much reason for questioning the jurisdiction of the court in this case upon the ground of the want of diverse citizenship as upon the ground that the requisite amount is not involved.' "

It will be observed, however, that the language quoted from *White v. Ewing* is used with reference to the "winding up," not to the "carrying on," of the business of an insolvent corporation. It refers to suits brought to adjudicate claims due to or from the insolvent corporation, necessary to be determined in order to a distribution of the fund, —to transactions of the insolvent corporation, and not to transactions of receivers; and the suits therefore were ancillary to the main suit, and could only be brought by leave of the court in which the main suit was pending. The statutes above cited do not authorize the receiver to be sued in such cases. They only authorize him to "be sued in respect of any act or transaction of his in carrying on the business connected" with the property in his hands. This view of the law is supported by the following cases: *Central Trust Co. v. East Tennessee, V. & G. Ry. Co.*, 59 Fed. 523; *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11; *Railway Co. v. Johnson*, 151 U. S. 81, 14 Sup. Ct. 250.

It appearing, therefore, that this suit was brought against the receivers in respect of an act or transaction of theirs in carrying on the business connected with the property in their hands, and, the amount claimed being less than \$2,000, I am of opinion that the case was not removable. To hold otherwise would nullify the statute, and make the jurisdiction of the state courts in such cases dependent upon the mere will of the receivers. I do not think the statute is open to any such construction. I believe that congress intended that persons having claims against a receiver incurred in carrying on a business in connection with the property in his hands, where the amount was under \$2,000, might sue in the state courts in the locality where the cause of action arose, and not be compelled to bear the expense of litigation in a United States court, often far from the place where the claimants reside. The statute is peculiarly applicable to receiverships of railroads. When the claim is litigated in the state court, if it results in a judgment in favor of the plaintiff, then his claim must be presented to this court, as the court in which the receiver was appointed; and this court, under the last clause of section 3, will determine the place and rank of such claim in the distribution of the property in the hands of the receiver. The motion to remand, therefore, will be sustained.

CUMMINGS et al. v. CUMMINGS et al.

(Circuit Court, W. D. North Carolina. January 17, 1899.)

1. TAXATION—EFFECT OF SALE FOR TAXES—LAWS OF NORTH CAROLINA.

Under the laws of North Carolina the claim and lien of the state for taxes on real estate is in rem; and although land is in the possession of a life tenant, upon whom rests the legal duty of paying the taxes thereon, a sale for their nonpayment conveys the entire title, and not merely the life estate.

2. SAME—AUTHORITY TO EXECUTE TAX DEED—EXPIRATION OF SHERIFF'S TERM.

Under the statutes of North Carolina, a sheriff who, as tax collector, has received tax lists for collection, may sell realty, for nonpayment of

taxes charged thereon, after his term of office as sheriff has expired, and is also the proper person to execute deeds on sales so made by him; and a deed executed by his successor on such a sale, except in case of his death, as to which special provision is made, is void.

This is a suit in equity by Nellie L. Cummings and S. Alice Cummings, minors, by their next friend, R. F. Alexander, against P. A. Cummings and others, to establish rights in certain real estate.

T. H. Cobb, for plaintiffs.

Merrimon & Merrimon, for defendants.

SIMONTON, Circuit Judge. These points have thus far been decided in this case: That the trust deed executed by Mrs. Cummings to Child, trustee, purporting to be a deed of trust of the land purchased by her to secure unpaid purchase money, being the deed of a married woman, was not executed in accordance with the law of North Carolina, and was inoperative. That Child, trustee, took no power of sale thereunder. That the sale made by Doubleday, who had been substituted in lieu of Child, the deceased trustee, was also inoperative and void. That this sale was made because of the nonpayment of a note of \$500 and interest, the remainder of the purchase money unpaid, charged to be an incumbrance on the estate; and that in no event could the purchase by P. A. Cummings at that sale, and his payment of the amount due, operate so as to entitle him to a conveyance in fee. He was the life tenant. He could not, by this act, deprive the complainants, tenants in remainder, of their estate; but his payment of the balance due, and the removal of the incumbrance, inured, not to his benefit solely, but to the benefit of the inheritance. That, notwithstanding the conveyance in fee to him, he remained and continued to be the tenant for life.

The lot of land has been sold for the nonpayment of the tax thereon. The question now is as to the effect of this sale. P. A. Cummings, having obtained a conveyance in fee of this lot, executed a deed of trust conveying the legal estate therein to D. C. Waddell, in trust to secure the sum of \$3,000 borrowed by him from A. J. Lyman and A. B. Lyman. Subsequently he executed a second deed of trust or mortgage to these Lymans as part security for another loan of \$3,000. By express terms, in both of these deeds, Cummings bound himself to pay all taxes accruing on this lot. As he only had a life estate in the lot, he could only bind the life estate. The land was listed for the taxes of 1892 in the name of P. A. Cummings. This was known by the Lymans. The tax was not paid. At the time of the listing and the nonpayment of the tax, Reynolds was the sheriff of Buncombe county, in which the land lay. His term of office as sheriff expired 1st December, 1892. He then became the tax collector. On 11th July, 1893, he offered for sale this lot of land for nonpayment of the tax, and it was bid in by J. E. Rankin, chairman, he being then chairman of the board of county commissioners. Subsequently, 1st September, 1894, a conveyance of this lot of land was made by J. H. Weaver, tax collector, to A. H. Lyman and C. E. Lyman, as assignees of the county commissioners. The complainants, who were then, and still are, minors, more than a

year after this conveyance tendered to these purchasers the amount paid by them, with all proper interest, and were by them referred to Weaver, the tax collector. They then paid to Weaver, tax collector, this amount, taking his receipt therefor. He made at the time, in the sale book, the memoranda required on the redemption of land sold for taxes. The bill has been taken pro confesso against all the defendants except A. J. Lyman and A. B. Lyman, who are in no way connected with A. H. Lyman and E. C. Lyman. The complainants contend that P. A. Cummings, the tenant by the curtesy, having neglected to pay the tax on this lot of land for so long a time that it was sold for taxes, and not having redeemed the same within one year after such sale, has forfeited his estate to the remainder-men, who have themselves redeemed the land. Acts N. C. 1893, c. 297, § 99. As tenant for life, Cummings was bound to keep down the taxes. Black, Tax Titles, § 285. When he conveyed his interest and estate under the trust deed and mortgage, he conveyed it bound by this burden. He covenanted in these deeds to pay the taxes as they accrued. By law and by deed he was quoad this lot of land the taxpayer. Recognizing this, the lot was listed in his name, with the knowledge of the Lymans. He received due notice that his tax was due and unpaid. This, too, was within the actual knowledge of the Lymans, to whom, upon inquiry, he promised that he would not neglect it. Upon his failure to fulfill the duty thus imposed on him by law, by his own deeds, and by his verbal promises, the lot was put up for sale, and was sold. Assuming, for the present, that all the proceedings leading up to this sale were regular, or that, if any irregularities existed, they have been cured, it is clear that the whole title to this lot—the fee—was forfeited and sold. The state of North Carolina has the ultimate ownership of all the land within its boundaries. These lands are held under the state subject to the payment of the taxes assessed thereon. The lien of the state therefor is in rem. The state looks to the res for the tax. If the tax be not paid, the state can sell the land. Moore v. Byrd (N. C.) 23 S. E. 968. Indeed, one reason why the life tenant is bound to keep down the tax is that he is bound to preserve the interest of the remainder-men. If the tax be not paid, the inheritance may be forfeited. So the question need not be discussed whether the life estate only has been forfeited, or the reversion left in Cummings after his deed of trust. If anything be forfeited, it is the whole estate, because the tax is assessed on the res. This, also, is clear from the terms of the act under which this lot was listed by Cummings (Acts N. C. 1891, c. 326, § 12): "Every person required to list property shall make out and deliver to the list taker a statement verified by his oath of all the property, real and personal, in his possession or under his control on 1st of June, either as owner or holder thereof." It is admitted that this lot was then in possession of Cummings, as holder or owner thereof. Has this lot of land been forfeited? The law of North Carolina requires certain things to be done by the taxpayer. Upon the failure to do these, his land is subject to the forfeiture. When these acts are not done, then the officers of the state must do certain other acts leading up to the sale, purchase, and conveyance of the land, and then the title of the former owner is gone, and the purchaser takes the title. All these are

essential prerequisites. The taxpayer must fail to do the things he should have done. The officers of the state must pursue the methods prescribed. The purchaser must conform to the line imposed on him in the acts of the legislature, otherwise the forfeiture is not complete.

The complainants contend that there was a valid forfeiture of this property, and that the rights of the purchaser were assured, subject to their right of redemption; that they have exercised this right of redemption, and that they can now get all that the purchaser was entitled to. Their rights depend, therefore, in great measure, if not altogether, on the rights of the purchaser. The vital question, therefore, is as to these rights. The law of North Carolina gives to the deed executed to the purchaser after a sale for nonpayment of taxes great and overwhelming force. So drastic is its effect that the constitutionality of the law is gravely disputed. The supreme court of that state, in perhaps its most recent decision, has avoided passing upon it. *Peebles v. Taylor* (1896) 24 S. E. 797, end of opinion. Be this as it may, the deed is the culminating act, the execution of the power of forfeiture, the final judgment of forfeiture, essential to the forfeiture. When a sale for nonpayment of taxes takes place, the officer authorized to make the sale gives to the highest bidder at the sale a certificate to that effect. The purchaser is not then entitled to the deed. That can only be executed upon the presentation and delivery of the certificate at any time within one year after the sale, or proof of the loss and of the contents of the certificate. Acts 1893, c. 296, § 64. The purchaser can either demand a deed or he can foreclose the lien the state has on the land for all unpaid taxes, by proceedings for foreclosure. Section 80 of the same act. And section 81 declares:

"If the owner of any such certificate shall fail or neglect either to demand a deed thereon or to commence an action for the foreclosure of the same as provided in the preceding section, within two years from the date thereof, the same shall cease to be valid or of any force whatever, either as against the person holding or owning the title adverse thereto, and all other persons, or as against the state, county and all other municipal subdivisions thereof."

When this property was listed, and the tax was assessed, Reynolds was the officer charged with the collection of the taxes, he being the sheriff of the county. His term of office as sheriff expired 1st December, 1892, before any sale of the land had been had. He offered the land for sale in July, 1893. Assuming, for the sake of argument, that the proper entry was made of the purchase in the name of the county, and that there was a proper assignment to A. H. Lyman and C. E. Lyman, a deed was executed to them by J. H. Weaver, tax collector, 1st September, 1894. The sale was properly made by Reynolds, although it was made after his term of office had expired. When the tax lists were put into his hands, he was charged with the full amount of them, and he was bound to discharge himself. He therefore could retain the list, and collect the taxes thereon. In *State v. McNeill*, 74 N. C. 537, the court says:

"If the sheriff is re-elected, as it happened in this case, he is then bound to collect the taxes of the preceding year, but this is by virtue of his former election, and under the responsibility of his old bond. The duty of collecting taxes is not incident to the office of sheriff, though ordinarily discharged with that office. The duty, therefore, does not terminate with the office.

but he is bound to go on and collect the taxes after the term of his office has expired, and the sureties on his bond are liable for the moneys by him collected, or that should have been collected, after that time."

Reynolds then had the right to sell. If he had the right to sell, he had the right to do anything to consummate the sale. He should have executed the deed. This clearly appears from the language of chapter 242, Act 1891, which declares that when a tax collector has made a sale, and then dies before making a deed, his successor in office shall be the proper person to make the deed. This is the only case in which the successor in office is clothed with any such power. It arises ex necessitate. "*Expressio unius est exclusio alterius.*" If he be alive, he is the person to make the deed. Reynolds is alive. Certainly he was alive when this deed was made. This being so, A. H. Lyman and C. E. Lyman have no deed; and the time for obtaining one has passed, under section 81, c. 297, Acts 1893, above quoted. The rights of the persons holding or owning adverse title to that purported to be conveyed in the deed are not affected. And as the tax collector has received all the tax due, and the interest thereon, the state has no claim. There is no forfeiture.

KOSZTELNIK v. BETHLEHEM IRON CO.

(Circuit Court, E. D. New York. November 12, 1898.)

1. PLEADING—DENIAL OF EXECUTION OF RELEASE—VERIFICATION ON INFORMATION AND BELIEF.

Where it is shown that a plaintiff is unable to read the English language, he will be permitted to deny the execution of a release pleaded by defendant, and written in English, on information and belief; nor will a second paragraph of the reply be stricken out which alleges that, if he executed the release, he did so in ignorance of the nature of the instruments, and by reason of the fraudulent misrepresentations of defendant as to its contents.

2. RELEASE—AVOIDANCE FOR FRAUD—DEFENSE IN ACTION AT LAW.

A plaintiff may show fraud touching its execution to avoid a release pleaded as a defense in an action at law, but not fraud inducing him to enter into contract of release, which is an equitable defense.

On Motion Attacking Sufficiency of Reply.

Catlin & Nekarda, for plaintiff.

Lord, Day & Lord, for defendant.

THOMAS, District Judge. This action is brought by the plaintiff to recover for personal injuries alleged to have been received by reason of the negligence of the defendant. The answer alleges as a separate defense that the plaintiff, for a valuable consideration, executed a release, discharging the cause of action. Upon the defendant's motion, the court directed the plaintiff to reply to this defense. Thereupon a reply was served by the plaintiff, which contains two subdivisions, as follows:

"First. He denies on information and belief all the allegations in said second defense contained. Second. For a further reply to said defense, plaintiff alleges that, if the instrument in writing described in said answer was signed