MAHER v. TOWER HOTEL CO. et al.

(Circuit Court, N. D. Illinois, N. D. May 11, 1899.)

1. REMOVAL OF CAUSES—SEVERABLE CONTROVERSY—FORECLOSURE SUITS.
In a suit in equity in Illinois to foreclose a trust deed, the trustee is a necessary party defendant, and the controversy is not severable, as between such trustee, the owner of the equity of redemption, and subsequent incumbrancers or lienors.[1]

2. SAME—TIME FOR FILING PETITION—DEMURRER.
The time allowed for filing a demurrer marks the limit of the time within which the defendant is required to "answer or plead" to the declaration or complaint under the terms of the removal act, and a defendant cannot remove a cause after his demurrer has been overruled and a rule entered against him to plead over.

3. SAME—PRACTICE—LOCAL PREJUDICE.
When application is made for removal on account of local prejudice or influence, the better practice is to allow counter affidavits to be filed, and to require it to be shown that defendant cannot in reality obtain justice in the state courts on account of such influence or prejudice.[2]

On Motion to Remand.

A. M. Lasley, for complainant.
E. T. Cahill, for certain defendants.

KOHLSAAT, District Judge. This cause comes on to be heard upon motion of complainant to remand to the circuit court of Cook county, Ill., from whence it is claimed this cause was improperly removed to this court. This is a foreclosure suit, the bill being filed in the state court on September 13, 1898, against the Tower Hotel Company, Timothy D. Crocker, Eliza P. O. Crocker, his wife, and others, to secure the sale of certain premises for the payment of certain notes of the Tower Hotel Company; the said Timothy D. Crocker being the present owner of the equity of redemption. On November 22, 1898, said Crocker and wife entered their appearance in that suit, and on December 10, 1898, filed a general and special demurrer therein. Subsequently, on April 3, 1899, the demurrer of defendants was overruled, and a rule entered on all defendants to plead or answer to the bill of complaint within 20 days. On April 20, 1899, defendants Crocker and wife filed in the state court a petition for removal, alleging that complainant was a citizen of Illinois, that petitioners were citizens of Ohio, that the suit was of a civil nature (being a proceeding in equity to foreclose a trust deed), that petitioners were the only defendants directly interested in the controversy, that all other defendants were only nominal parties, and that petitioners could not obtain justice on account of prejudice or local influence in the court in which the suit was brought, nor in any other state court to which they have the right to remove the cause on account of such prejudice or local influence. The petition for removal is subscribed and sworn to by the solicitor of Crocker and wife, and said

[1] For removal of causes in separable controversy cases, see note to Robbins v. Ellenbogen, 18 C. C. A. 86.

[2] For local prejudice as ground for removal, see note to Schwenk v. Strang, 8 C. C. A. 95.

solicitor also files his affidavit in said court stating that complainant is the widow and sole devisee of one Albert J. Maher, who was at one time an assessor or other public officer in the state of Illinois; that as such public officer said Maher became acquainted with large numbers of people in the state of Illinois, of more or less political influence; that in consequence thereof large numbers of people in said state are indebted to said Maher for political and other favors; that said influence, prejudice, and obligations now exist and extend to said widow, and that by consequence thereof prejudice and local influence now exist against petitioners; also, that affiant believes the trial judge to be prejudiced against petitioners, and also believes that said prejudice in favor of said widow extends to the other state judges to whom the cause could be removed on account of prejudice or local influence. A copy of the foregoing petition and affidavit was also filed in this court on April 25, 1899, and at the hearing of this matter a petition and affidavit of practically the same purport as above, subscribed and sworn to by said Crocker and wife, was filed herein.

The court holds that in a foreclosure proceeding the controversy is not severable, as between the owners of the equity, the trustee in the trust deed, and subsequent incumbrancers or lienors. Hax v. Caspar, 31 Fed. 499. A trustee in a trust deed is a necessary party to a suit to foreclose. Walsh v. Truesdell, 1 Ill. App. 126; Lambert v. Hyers, 22 Ill. App. 616.

Time within which to file a demurrer is within the terms of the statute with reference to the time within which defendant is required to "answer or plead" to the declaration or complaint. Martin's Adm'r v. Railroad Co., 151 U. S. 686, 14 Sup. Ct. 533. A hearing before the state court upon a demurrer, and a ruling thereon, constitute a "trial of a case," such as to prevent removal. Hobart v. Railroad Co., 81 Fed. 5.

While difference of opinion has been expressed by the different federal circuit courts with relation to the showing required when application is made for removal on account of local influence or prejudice, this court is of the opinion that the better rule is that counter affidavits be allowed, and that it be made to appear to the court that the defendant cannot in reality obtain justice in the state courts on account of such prejudice or local influence.

The reasons shown by petitioners' affidavit herein impress the court as frivolous, and, in addition thereto, there is no proper showing as to the courts, outside of Cook county, to which petitioners would have the right, under the Illinois statute, to remove the cause. The petition for removal is denied, and the cause remanded to the circuit court of Cook county, Ill.

HARTFORD & C. W. R. CO. v. MONTAGUE.

(Circuit Court, D. Connecticut. May 9, 1899.)

1. REMOVAL OF CAUSES—MOTION TO REMAND—TIME FOR FILING
It is the settled practice in the circuit courts of the United States in the Second circuit to allow a motion to remand to be made at once on the removal of a cause from a state court, without waiting for the next term, and, unless the record is filed by the removing defendant within a reasonable time, to permit it to be filed by the plaintiff.

2. SAME—NATURE OF SUIT—STATUTORY PROCEEDING TO CONDEMN PROPERTY.
Under the statutes of Connecticut relating to the condemnation of property under the power of eminent domain, which delegate to a judge of a state court the power to first determine the right to take the property, and then to appoint a commission to fix the compensation, such a proceeding is not a suit at common law or in equity, of which a federal court would have original jurisdiction under the judiciary act of 1888, and hence is not removable under such act.

Gross, Hyde & Shipman, for complainant.
Edward D. Robbins, for defendant.

TOWNSEND, District Judge. Motion to remand. The plaintiff herein originally applied to a judge of the superior court of the state of Connecticut for the appointment of appraisers to estimate damages for the taking and occupation of certain real estate for railroad purposes, belonging to the defendant, in accordance with the provisions of section 3464 of the General Statutes of the state of Connecticut. Said judge having fixed a date for a hearing thereon, defendant seasonably removed the case into this court upon the ground that the controversy was between citizens of different states, and that the amount in dispute exceeded, exclusive of costs, the sum of $2,000. The plaintiff now moves to remand for want of jurisdiction, alleging that such proceeding is not a suit of a civil nature at common law or in equity, of which the circuit courts of the United States are given original jurisdiction. It is claimed that, even if, prior to the act of March 3, 1887, as amended by the act of August 13, 1888, such a case could be removed into the federal courts, such right of removal was taken away by said acts, the effect of which is to provide that only such suits can be removed as might have been originally brought in the United States circuit courts. Railroad Co. v. Davidson, 157 U. S. 201, 15 Sup. Ct. 563.

The preliminary question was raised by counsel for defendant that the motion to remand could not be heard before the beginning of the next term of the circuit court after removal. It appears that there has been much conflict upon this question between the different circuits. Hamilton v. Fowler, 83 Fed. 321; Kansas City & T. R. Co. v. Interstate Lumber Co., 36 Fed. 9. It has been the settled practice in this circuit for many years to allow the removing defendant a reasonable time in which to file the record, and, upon his failure so to do, to thereafter permit the plaintiff to file the record, and in either event to allow the plaintiff to move instanter to remand.

The sole remaining question is whether this is a suit of which this