

contested and determined thereby, according to the established mode of procedure; and, so long as it exceeds \$500 in amount, it is immaterial how or whence the plaintiff became the owner of the several items that may constitute or enter into this sum or demand. Indeed, cases may arise in which the assignee of a demand may maintain an action thereon in this court, so far as the value of "the matter in dispute" is concerned, when the assignor could not. For instance, where the demand bears interest, the sum due thereon at the time of the assignment may be less than \$500; but when suit is brought on it by the assignee, the value of it may exceed \$500. Of course, a collusive or pretended assignment of an item in the plaintiff's demand may be set up as a defense to a recovery thereon by the *pseudo* assignee. But when the transaction is *bona fide*, and the legal title is transferred to the assignee, he may maintain an action thereon in this court without reference to its value, provided that the whole sum sought to be recovered therein exceeds \$500, and the citizenship of the assignor and defendant was such at the time of the assignment that a suit might have been maintained between them herein. See *Stanley v. Board of Sup'rs*, 15 FED. REP. 483; *Judson v. Macon Co.* 2 Dill. 213.

The demurrer is overruled.

FITTON and Wife v. PHENIX ASSUR. Co. and others.

(Circuit Court, D. Vermont. February 10, 1885.)

EQUITY PRACTICE—REFERRING ISSUES OF FACT TO JURY—REV. ST. § 648.

The United States circuit court may send issues of fact, properly raised by the pleadings in an equity case, to a jury for trial.

In Equity.

James L. Martin, for defendants.

Martin H. Goddard, for orators.

WHEELER, J. This cause has been heard before on demurrer to the bill, which was overruled as to the defendants now before the court, with leave to answer over. *Fitton v. Fire Ins. Ass'n*, 20 FED. REP. 766. The defendants have answered that the agreement to bind insurance was procured by fraudulent representations of the orators as to the situation of the property, as to exposure to and precautions against loss from fire; that the loss occurred through want of the precautions represented to be employed, and the wrongful, willful, and negligent acts of the orators. Issues of fact are raised by the traverse of the answers, and the defendants now move that these issues be sent to a jury. The motion is opposed upon the ground that by the statutes of the United States the power to send issues of fact to a jury is

not given to, but rather taken from, the circuit courts as courts of equity, and that these issues should be tried by the court, and not sent to a jury, if the power to send them exists. The provision of the statute chiefly relied upon to show want of such power is that found in section 648, providing that "the trial of issues of fact in the circuit courts shall be by jury, except in cases of equity, and of admiralty and maritime jurisdiction."

It is argued that the exception excludes that mode of trial in the excepted cases. But that is not understood to be the meaning of the provision. The object of it seems to have been to carry out the constitutional provision guarantying the right to trial by jury in common-law cases, and at the same time not to require a trial in that mode in equity and admiralty cases. This provision was enacted in early times, and the power of a circuit court under it to send issues to a jury has always been recognized. *Field v. Holland*, 6 Cranch, 8; *Harding v. Handy*, 11 Wheat. 103; *Brockett v. Brockett*, 3 How. 691. It is expressly stated to exist in *Garsed v. Beall*, 92 U. S. 684. The motion cannot be denied upon that ground. The inconvenience of so sending the issues has been dwelt upon in the argument, but as the trial must be in the same court, with the difference only that it is upon the law side by jury, according to the course of the trial of common-law cases, instead of on the equity side by the judges, according to the ordinary course of equity procedure, that consideration is entitled to but little weight. The principal question is as to the propriety of so sending the issues in this particular case. The issues are the same that they would have been if an insurance in fact by delivery of a policy, instead of a mere agreement to insure, had been effected. The orators have standing in this court merely on account of that difference. The right to trial by jury of an issue of fact proper for their cognizance is valuable as it exists, and is guarantied by the constitutions and laws of this country, notwithstanding the hostility shown to it in some quarters. The defendants have not an absolute right to that mode of trial in this case, because it is not within the constitutional or statutory provisions; but they have the right to have their request for it carefully considered when it falls so naturally in the line of the right in other cases. These issues seem to be very proper for the cognizance of a jury in this case.

Motion granted.

HANNER, Jr., and others v. MOULTON and others.

(Circuit Court, N. D. Texas. January Term, 1885.)

WILL—INTENTION—EXTRINSIC EVIDENCE—LATENT AMBIGUITY.

A will contained the following devise: "I will to J. W. H., Jr., J. P., and J. P., Jr., my tract of land, containing near 1,500 acres first-rate land, lying, I believe, in Ellis county, Texas." At the date of his will, and at the time of his death, the testator was the owner of a head-right certificate for 1,476 acres, but he never owned any land whatever in Ellis county, and he never owned any lands elsewhere in Texas to which the devise applied. *Held*, that parol evidence was not admissible to show that the testator supposed that such certificate had been located in Ellis county, making him the owner of the lands covered thereby, or that it was his intention, as shown by his declarations and conversations, to devise this certificate, if it should turn out that it had not been located, and that he was advised by the attorney who wrote the will that the devise would be effectual to carry out such purpose.

In Equity. Final hearing upon pleadings and evidence.

John L. Henry and John D. Park, for plaintiffs.

Sawnie Robertson, for defendants.

Before WOODS and McCORMICK, JJ.

WOODS, Justice. The bill was filed January 27, 1882, for a decree to establish the title of the plaintiffs to several tracts of land in the state of Texas; one of 586 acres in Ellis county; one of 640 acres in Falls county; and one of 250 acres in Clay county, and to declare that the deeds under which the defendants claimed title to said lands were null and void. The plaintiffs asserted title to the lands, as devisees under the will of James Park, deceased, who died September 4, 1866, at his domicile, in the county of Williamson, in the state of Tennessee. The devise under which the plaintiffs claimed title was in these words:

"I will to John W. Hanner, Jr., James Park, and John Park, Jr., my tract of land, containing near fifteen hundred acres first-rate land, lying, I believe, in Ellis county, Texas. My papers are in the hands of J. A. N. Murray and W. H. Gill, of Clarksville, Texas, who must account for all papers of mine in the hands of Wm. A. Park's widow at his death."

The testator did not, at the date of his will or at his death, own any lands in Ellis county, Texas, nor did he, as the plaintiffs insisted, own any lands in any other county of Texas to which said devise referred. But the testator, at his death, was the owner of a head-right certificate for one-third of a league of land—1,476 acres—issued in the year 1838 by the republic of Texas to one William H. Ewing, which was transferred by Ewing to him by deed dated April 9, 1846. C. R. Johns, one of the defendants; having been, in July, 1867, appointed by the probate court of Travis county, in the state of Texas, administrator, with the will annexed, of the estate of James Park, the testator, by order of the same probate court, sold, at public sale, in April, 1869, for \$110.70, the head-right certificate above mentioned, shown