

In re Estate of McCLEAN, Jr., Deceased.

(Circuit Court, W. D. Pennsylvania. December 14, 1885.)

1. REMOVAL OF CAUSE—SEPARABLE CONTROVERSY.

Where the subject-matter of the suit is a testamentary trust, all the beneficiaries, by themselves or their guardians, being joint exceptants to the trustee's account, the purpose of the proceeding being the enforcement of the trust,—the preservation of the trust-estate, and its due administration,—held that, as between one of the exceptants and the trustee, there was no separable controversy under the removal act.

2. SAME—CITIZENSHIP OF GUARDIAN.

Upon a question of the right of removal, the citizenship of the guardian suing, and not that of his ward, is the test of jurisdiction.

Motion to Remand the Cause to the Orphans' Court of Allegheny County.

S. A. McClung, for the motion.

Wm. A. Stone, contra.

ACHESON, J. Undoubtedly, in resolving the question of jurisdiction, regard must be had to the state of the record as it was when the petition for removal was filed. But, discarding the subsequent order of the state court, how stands the case in respect to the parties? On the one side we find Mrs. Susanna McClean, A. J. Pentecost, guardian of Harry McClean, a minor, and William H. Parsons, guardian of Florence H. McClean, a minor, and on the other side Abdiel McClure. Now, according to the allegations of the petition for removal, all these parties are citizens of the state of Pennsylvania, except William H. Parsons, and his ward. Is there disclosed, then, in the suit "a controversy which is wholly between citizens of different states, and which can be fully determined as between them?" For the proper solution of the problem we must consider the subject-matter of the suit, and this we discover to be a testamentary trust; Mrs. McClean and the two named minors being the beneficiaries, and Abdiel McClure the trustee. In the state court Mrs. McClean and the guardians of the two minors joined in filing exceptions to the account of the trustee. The object of the proceeding is the enforcement of the testamentary trust,—the preservation of the trust estate, and its due administration. Now, certainly, all the beneficiaries are directly interested in the relief sought, and the presence of all the named parties would seem to be necessary for full and complete redress. *Winchester v. Loud*, 108 U. S. 130; S. C. 2 Sup. Ct. Rep. 311. I am, then, of opinion that there is here no separable controversy, within the meaning of the removal act, between William H. Parsons, guardian of Florence H. McClean, and the testamentary trustee.

Nor would the case be removable were the proposed amendment (averring that the minor, Harry McClean, is a citizen of the state of New York) allowed; for not only would the citizenship of Mrs. Mc-

Clean remain as an obstacle to a removal, but the question of jurisdiction is to be tested by the citizenship of Pentecost, the guardian, and not by that of his ward. *Coal Co. v. Blatchford*, 11 Wall. 172.

The suit must be remanded to the orphans' court of Allegheny county, and it is so ordered.

BRUTTEL, Adm'r, etc., v. CHICAGO, M. & ST. P. RY. Co. and another.

(Circuit Court, N. D. Iowa, E. D. November Term, 1885.)

REMOVAL OF CASE FROM STATE COURT—SEPARABLE CONTROVERSY.

In an action under the laws of Iowa by an administrator against a railroad company and the engineer of one of its engines, to recover damages for the death of his decedent, a fellow-servant of such engineer, there is such a separable controversy as entitles one of the defendants, if a resident of another state, to a removal of the cause to a United States court, under the act of 1875, as construed in *Ayres v. Wiswall*, 112 U. S. 187; S. C. 5 Sup. Ct. Rep. 90.

Motion to Remand Cause to State Court.

Crane & Joerus, for plaintiff.

W. J. Knight, for defendants.

SHIRAS, J. In the petition filed in this cause, in the district court of Dubuque county, it is averred that plaintiff is the administrator of the estate of Alvis Fink, deceased; that the Chicago, Milwaukee & St. Paul Railway Company is a corporation engaged in operating a line of railroad extending northwardly from Dubuque to the station of Specht's Ferry; that the defendant Emsley was, in November, 1883, an engineer in the employ of the railway company, engaged in running a passenger train on said company's road; that on or about November 29, 1883, said Alvis Fink was in the employ of the said railway company as a night track watchman; and that, while engaged in the performance of his duty as such watchman, "the said defendants, while operating and running a passenger train over the defendant company's road, did carelessly, negligently, and wrongfully run said train of cars upon and against Alvis Fink," and thereby caused his death, to the damage of his estate in the sum of \$10,000, for which amount the plaintiff, as administrator of the estate of said deceased, prays judgment against both defendants. Separate answers were filed by the defendants; and thereupon the railway company filed, in proper time and form, a petition and bond for the removal of the cause to this court, averring that plaintiff and the defendant Emsley were citizens of Iowa, and the railway company was organized under the laws of the State of Wisconsin; and further averring that in the cause there was embraced a separable controversy between plaintiff and the railway company. The state court granted