

LYDDY v. GANO, Ex'x, Etc., and others.

(Circuit Court, S. D. New York. 1886.)

REMOVAL OF CAUSE—SEPARABLE CONTROVERSY—CITIZENSHIP.

A., a citizen of New York, filed a bill as creditor of B., deceased, in the state court, against his heirs at law, to compel satisfaction of his debt, out of real estate in their hands. Some of the defendants were citizens of New York, but others were citizens of another state, and the latter removed the case to the federal court. Under the New York statute, although the heirs at law were respectively liable to the extent of the estate which had descended to them, all of such heirs were, nevertheless, indispensable parties to the suit. *Held*, that the suit did not present a separable controversy which could be determined, as between the removing defendants and complainant, without the presence of the other defendants who were citizens of New York, and that the cause should be remanded.

On Motion to Remand.

WALLACE, J. The complainant, a citizen of this state, has filed a bill as a creditor of one McCunn, deceased, against the heirs at law of the deceased, to compel satisfaction of his debt out of the real estate now in their hands, which descended or was devised to them. Some of the defendants are citizens of this state, but others, those upon whose petition the suit was removed here from the state court, are citizens of other states. The rights and remedies of creditors against heirs and devisees of a deceased person are wholly controlled by statutory law in this state, and the contention of the defendants is that the heirs are severally and not jointly liable to the payment of their proportionate share of the creditor's demand, out of the real estate in their hands. Although they are respectively liable to the extent of the estate which has descended to them, nevertheless all the heirs are indispensable parties to the suit. If the suit were brought against one only of the heirs, it would be an unanswerable objection to the relief sought, that all were not made parties. *Dodge v. Stevens*, 94 N. Y. 216; *Wainburgh v. Gates*, 11 Paige, 513; *Parson v. Brown*, 7 Paige, 354. The suit, therefore, does not present a separable controversy which can be determined, as between the removing defendants and the complainant, without the presence of the other defendants, who are citizens of this state.

The motion to remand is granted.

v.26F,no.4—12

STATE *v.* WALRUFF and others.¹

(Circuit Court, D. Kansas. January 22, 1886.)

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—POWER OF STATE TO PREVENT USE OF PROPERTY IN MANUFACTURE OF LIQUORS WITHOUT COMPENSATION—DUE PROCESS OF LAW.

Between 1870 and 1874 defendants constructed a brewery in Lawrence, Kansas. The building, machinery, and fixtures were designed and adapted for the making of beer, and nothing else. For such purpose they were worth \$50,000; for any other purpose not to exceed \$5,000. At the time of the erection of the building, and up to 1880, the making of beer was legal, but in that year a constitutional amendment was adopted, prohibiting the manufacture of beer except for medicinal, scientific, and mechanical purposes, and in 1881 and 1885 laws were enacted to carry this prohibition into effect. Under these laws a permit was essential for the manufacture for the excepted purposes. To the defendants this permit was refused. An injunction was thereupon sued out from the state court, enjoining defendants *absolutely* from the manufacture of beer. *Held* that, in so far as the constitutional amendment, and the statutes passed in pursuance thereof, deprived defendants of the use of their property, acquired previous to the adoption of the amendment, without compensation, they deprived them of their property without due process of law, within the meaning of the fourteenth amendment to the constitution of the United States, and were void.²

2. SAME—REMOVAL OF CAUSE—FEDERAL QUESTION.

Held, further, that the construction of the constitutional amendment and the acts of 1881 and 1885, under the circumstances of this case, presented a federal question, and the defendants had the right to remove the case from the state court to the United States circuit court for decision.

On Motion by Plaintiff to Remand Case to State Court. The opinion states the facts.

R. A. French, Geo. J. Barker, C. S. Glead, and J. W. Glead, for plaintiff.

This is a civil case commenced in the district court of Douglas county, state of Kansas, by the county attorney of said county, to abate an alleged nuisance, to-wit, a place where intoxicating liquors are manufactured, bartered, sold, and given away, in violation of the prohibitory liquor law of the state, (chapter 128, Laws 1881, as amended by chapter 149, Laws 1885.) The defendants filed with the clerk of the district court a bond and petition for removal to this court, and, on the hearing of said petition, the same was overruled by the judge of said court, and said case held for trial. The defendants thereupon filed in this court transcripts of the records therein, and had said action placed upon the docket of this court. This action is removable, if removable at all, under the removal act of 1875, and under the second paragraph of that act, which is as follows:

“That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution and laws of the United States, or treaties made,” etc.

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

² See note at end of case.