

WOOLF v. CHISOLM and others.

(Circuit Court, S. D. New York. May 27, 1887.)

REMOVAL OF CAUSES—PRACTICE—PETITION—TIME FOR FILING.

Under the act of congress of March 3, 1887, which restricts the right of removal of an action from a state court to the United States circuit court, as it then existed, a defendant must file his petition within the time in which, by the laws of the state or the rules of the state court, he is required to file his original answer or plea, and not within the time when he is required or may elect to file an amended answer.

On Motion to Remand. At law.
Van Duzer & Taylor, for plaintiff.
Dos Passos Bros., for defendants.

WALLACE, J. It was the obvious purpose of the act of March 3, 1887, to restrict the right of removal of an action from a state court to the circuit court, as it then existed. The right is restricted as to the parties who can exercise it, as to the classes of actions in which it may be exercised, and as to the time at which an election to exercise the privilege must be made. The defendants now invoke this act to give them the privilege of removal under circumstances in which it did not exist previously. They had elected not to remove, and had waived their privilege before the new act was passed, by waiting until after the February term of the state court, the term at which the action could have been tried within the meaning of the former removal act. Subsequently, the pleadings were amended, and the defendants filed a petition for removal with their amended answer.

By the true construction of the new act, a defendant must file his petition within the time in which by the laws of the state or the rules of the state court he is required to serve or file his original answer or plea, not within the time when he is required or may elect to file an amended or supplemental answer. The defendants, therefore, have not complied with the conditions upon which their right to remove depends. Much less can they rely upon the language of the new act to revise a lost right of removal. The motion to remand is granted.

v.30F.no.13—56

KELLOGG v. CHAPMAN.

(Circuit Court, D. Nebraska. May 9, 1887.)

1. EQUITY—REFORMATION OF DEED.

It was discovered that owing to a mistake in the measurements of a lot, a portion forming a narrow gore six to ten feet in width had not been conveyed in a deed. This portion lay between the rest of the lot and a street. It appeared that measurements corresponding with the measurements in the original plat were used in the deed; that the defendant had failed for 22 years to assert any title to the omitted portion; and that his grantee had made large improvements upon a part of the tract, and had regularly paid the taxes. It was also in evidence that the grantor had admitted that he supposed he had conveyed the whole lot. *Held*, that the circumstances and the evidence sufficiently established the intention to convey the whole lot, and that the court would reform the deed.¹

2. SAME—LACHES.

Defendant claimed that a portion of the purchase price of certain property held by plaintiff had not been paid, but it appeared that defendant had for a series of 22 years made no effort to collect said balance. *Held*, that defendant's inaction was sufficiently significant to establish that no such balance of purchase money remained unpaid.

In Equity. Bill to reform deed.

BREWER, J. This is a bill to correct a mistake in a deed. The facts are these:

In 1880 one John H. Kellom was the owner of 40 acres situated in the city of Omaha. He platted the tract as Capitol addition to said city, dividing the tract into nine lots of various forms and sizes, one of which was numbered lot 6, and was supposed to contain 16 6-100 acres. On the north side of the lot was laid out a street named Farnam street, which was an extension of one of the principal streets of the city. According to the plat the boundaries of said lot were as follows:

"Beginning at the north-east corner of said lot on Farnam street, running west five hundred and sixty feet; thence south twenty-nine feet; thence west eight hundred and fifteen feet; thence south, on the extreme west line of the lands first above described, four hundred and ninety-seven feet to the south-east corner of said lands; thence east, on the south line of said tract and on the line of the government survey, thirteen hundred and seventy-five feet; thence north five hundred and twenty-six feet, to the place of beginning."

The same year Kellom and wife conveyed by deed said lot 6 to one Houston Nuckolls, and on the twelfth of November, 1861, the said Nuckolls and wife conveyed the property to defendant.

On the thirteenth of July, 1863, the defendant conveyed the west 10 acres to William P. Kellogg, by deed, whose description was as follows:

"All that piece of land situate in the county of Douglas, and territory of Nebraska, and described as follows, to-wit: Commencing at the south-west

¹Equity will relieve against a mutual mistake in regard to something material to the transaction. *Fritzler v. Robinson*, (Iowa,) 31 N. W. Rep. 61, and note; *Griffith v. County of Sebastian*, (Ark.) 3 S. W. Rep. 886; *Muhlenberg v. Henning*, (Pa.) 9 Atl. Rep. 144; *Henderson v. Stokes*, (N. J.) 8 Atl. Rep. 718. See, also, *Guilmartin v. Urquhart*, (Ala.) 1 South Rep. 897, and note; *Pearce v. Pettit*, (Tenn.) 4 S. W. Rep. 526.