

circuit courts. One mode of limiting the jurisdiction was to cut off, by amendment, the authority to entertain jurisdiction of all cases against parties residing out of the district, whether found in the district or not, by omitting the clause quoted from section 1; and another, was, by amending the general language of section 2, by introducing the limitation of the right of removal to suits over which the courts had jurisdiction by section 1; that is to say, to such suits as could be, originally, brought in the circuit court. If this be not the proper construction, then it is difficult to perceive, what office these amendments, making such express limitations, were intended to perform. They were, certainly, introduced for a purpose, and that purpose seems obvious to us. The clause in section 1, "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought *only* in the district of the residence of either plaintiff, or defendant," is prohibitory in form. It does not *enlarge* the jurisdiction, or confer jurisdiction in a case otherwise expressly prohibited.

We are of opinion that the removal of this case is not authorized by the statute, and it was improperly removed. It follows that the case must be remanded to the state court, with costs, and it is so ordered.

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Dow and others v. MEMPHIS & L. R. R. Co.

(Circuit Court, S. D. New York, January 19, 1885.)

RAILROAD COMPANIES—MORTGAGE—COMPENSATION OF TRUSTEES.

A mortgage for \$2,600,000, given to trustees for the security of the holders of the mortgage bonds, provided that the trustees should be allowed a reasonable compensation for executing their trust. *Held* that, in the defense of an action to set aside the mortgage, the trustees were entitled to only 1 per cent., the compensation allowed by Rev. St. N. Y. 8th Ed. pt. 2, c. 6, art. 3, § 58, to trustees for receiving and paying out sums of more than \$10,000.

In Equity.

*Platt & Bowers*, for plaintiffs.

*Dillon & Swayne*, for defendant.

WALLACE, J. The defendant filed a bill to set aside a mortgage for \$2,600,000 to trustees, for the holders of the mortgage bonds. 22 Blatchf. 48, 19 Fed. Rep. 388. The mortgage, among other things, provided that the trustees should receive a reasonable compensation for executing their trust. The trustees filed the present cross-bill, and obtained a decree adjudging the complainant to pay to them the amount of compensation to which they are entitled, and the costs, charges, and expenditures which they have incurred in defending their trust, by reason of the suit brought to set aside the mortgage. It was referred to a master to take an account and report. He has reported that they should be allowed the sum of \$17,000 for counsel fees, and an additional sum

for disbursements actually incurred in defending the suit. He has also reported that they should be allowed the further sum of \$45,000, for their personal compensation in defending the suit. Exceptions have been filed to that report.

Upon the argument of the exceptions it was conceded that the amount which should be allowed them as incurred for counsel fees was fixed by the master at a reasonable sum. It is obvious that any sum paid to the trustees must really come out of the bondholders, because the property of the corporation is not sufficient to discharge the mortgage which is a lien upon it. The trustees are entitled to reasonable compensation for their services in defending the suit brought to set aside the mortgage, and protect the rights of the bondholders, but it is not easy to determine what is a fair compensation in this behalf. Although there were issues of fact in the case, the controversy turned essentially upon questions of law presented by record evidence. The attack upon the mortgage was so manifestly unjust and inequitable that it was apparent that it could never succeed, unless there were inflexible legal rules to justify it which could not be parried. Yet the mortgage was assailed by able counsel, upon technical grounds, which were not without plausibility. The trustees were bound to assume that these grounds might be held to be tenable. It became their duty, therefore, to employ competent counsel, and put them in possession of the facts, and assist them in procuring the necessary evidence. When they had done this, their duties to the bondholders were discharged. Their compensation should be adjusted largely as an equivalent for the responsibility which they were thus obliged to assume. If the result of the suit had been adverse, they would doubtless have been subjected to criticism, although there would have been no reason for it. The amount involved was very large, and the trustees should not be exposed to contingencies, in which their discretion and fidelity might come in question, without an adequate remuneration. The usual commissions allowed to trustees, by the laws of this state, for receiving and paying out sums of above \$10,000 in amount, is 1 per cent., besides their necessary expenses. This is assumed to be a fair return for their time and services, and for the responsibilities which they incur. As the whole trust fund was at stake in the suit brought against them, it would seem to be fair to allow them this commission here. They are, accordingly, allowed the sum of \$26,000.

In apportioning this sum between them, reference should be had to the services rendered by each. Mr. Matthews has not taken an active part in the defense of the suit, but Mr. Dow and Mr. Moran have devoted a great deal of time to it. Mr. Dow has been especially active in the preparation of evidence, and has been unremitting in his efforts from the beginning of the litigation, while Mr. Moran has been active and zealous in consultations with the bondholders and with counsel. Eleven thousand five hundred dollars should be awarded to Mr. Dow, \$8,500 to Mr. Moran, and \$6,000 to Mr. Matthews.

CENTRAL TRUST CO. OF NEW YORK and others v. WABASH, ST. L. & P. RY. Co. and others. (Nos. 2,357 and 2,464. Consolidated Cause.)

(Circuit Court, E. D. Missouri, E. D. September, 19, 1887)

RECEIVERS—INSOLVENT RAILROAD—COMPENSATION.

Tutt and Humphreys, receivers of the Wabash, St. Louis & Pacific Railway Company, allowed \$70,000 each for their services to date.

In Equity.

*Martin, Laughlin & Kern* and *Phillips & Stewart*, for the purchasing committee.

*H. S. Priest* and *Hough, Overall & Judson*, for the receivers.

BREWER, J. The question now presented for determination is the compensation to be allowed to the receivers. The master, upon consideration of the testimony, allowed each \$112,500. Exceptions were taken by the purchasing committee, and these exceptions bring the matter before us for consideration. Heretofore all the principal allowances in this case have been settled by the agreement of the parties, and after such agreement all the court's action has been a *pro forma* approval. But this allowance is contested, and a large volume of testimony taken.

As preliminary I remark that there has been no little implied criticism in the language of appellate courts of the magnitude of the allowances made in foreclosure cases to counsel, receivers, and others. We are admonished by utterances of the supreme court to be cautious in this respect. In the case of *Hinckley v. Railroad Co.*, 100 U. S. 153, the amount allowed to the receiver was \$10,000, for nearly two years' services. He claimed \$1,000 per month. Upon this the supreme court, through Mr. Justice MILLER, made this observation:

"The principal witnesses of appellant to sustain this exception are two gentlemen who were themselves receivers of other roads, and thought they rightfully received \$900 in one case, and \$1,000 in the other, per month. Perhaps they were the best judges of the value of their own services; but such is not always the case, and as there is conflicting testimony, and as this is the first time we have been called on to review the allowance made to railroad receivers by the circuit courts, we do not see that the economical administration of insolvent companies will be promoted, or that justice requires a higher standard of compensation than these courts generally give, to whose discretion the subject must be largely remitted."

In the case of *Trustees v. Greenough*, 105 U. S. 527, certain allowances were set aside by the supreme court, and in respect to this matter of allowances generally this language is to be found:

"In the vast amount of litigation which has arisen in this country upon railroad mortgages, where various parties have intervened for the protection of their rights, and the fund has been subjected to the control of the court, and placed in the hands of receivers or trustees, it has been the common practice as well in the courts of the United States as in those of the states, to make fair and just allowances for expenses and counsel fees to the trustees, or other