No. 13946.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY WYNN,

Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION, TREASURE COMPANY, SAMARKAND OIL COMPANY, EMPIRE OIL COMPANY, TRUST OIL COMPANY, and SOUTHERN CALIFORNIA GAS COMPANY and G. DE BRETTEVILLE,

Appellees.

REPLY BRIEF OF APPELLANT HARRY WYNN.

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ARGUMENT.

The Courts Always Interpret and Declare the Legislative Intent in Construing a Statute, Especially When Such Statute Is Expressed in Simple and Unambiguous Language.

When Congress enacted the statute creating the Reconstruction Finance Corporation, *it knew* that the United States Government would own all of the capital stock.

Congress also knew that Section 1349 of Title 28 of the United States Code entitled "Corporation organized under federal law as party," was worded in the *negative* and hence conferred *in itself* no jurisdiction upon federal courts.

Congress *then* wrote into the act creating the Reconstruction Finance Corporation that it could *"sue and be sued in a state court."*

Congress thereby declared its statutory directives that the Reconstruction Finance Corporation Was Subject to suit in the state court.

We submit that *if* appellees' argument on pages 9 to 16 of their brief was sound, then it would be *an useless act* to sue Reconstruction Finance Corporation in any state court. The case could immediately be removed to the federal court and *thus nullify* the legislative intent as expressed by Congress, that it was subject to suit in a state court.

This State Court Complaint Discloses No Cause for Removal, Hence the Federal Court Has No Jurisdiction.

> "If plaintiff's pleading does not disclose a removable suit, the suit *may not be rendered removable* by allegations in subsequent pleadings, including the answer or plea, demurrer of defendant, or a reply; by the allegations of the petition for removal; by *evidence* of defendant; or by an order of the court on any issue tried on the merits."
>
> 76 C. J. S., Sec. 74, p. 967.

> "To bring a case within the statute, a right or immunity created by the constitution or laws of the United States *must be an element,* and an essential one, *of the plaintiff's cause of action.* (Cases cited.) * * * and the controversy *must be disclosed* upon the *face* of the complaint; *unaided* by the answer or

by the petition for removal." (Cases cited.) (Emphasis added.)

Gully v. First National Bank, 57 S. Ct. 96, 299 U. S. 109, 81 L. Ed. 70.

"(282) The obvious principle of these decisions is that, in the absence of a fraudulent purpose to defeat removal, the plaintiff may, by the *allegations* of his *complaint, determine* the *status* with respect to removability of a case *arising under a law of the United States,* when it is commenced, and that this power to determine the removability of his case *continues* with the plaintiff throughout the litigation, so that whether such a case, *non-removable when commenced,* shall afterwards become removable, depends *not upon* what the defendant *may allege* or *prove, or what the court may,* after hearing upon the merits, *in invitum, order,* but *solely* upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion.

The result of the application of this principle to the case at bar is not doubtful.

The plaintiff did not at any time admit that he had failed to prove the allegation that the deceased was employed in interstate commerce when injured, and he did not amend his complaint, but, on the contrary, he has contended at every stage of the case, and in his brief in this court still contends, that the allegation was supported by the evidence. The first holding to the contrary was by the state supreme court; and the most that can be said of that decision *is that the defendant prevailed in a matter of defense which he had pleaded;* but, as we have seen, this *does not convert a non-removable* case into a re-

movable one, in the absence of voluntary action on the part of the plaintiff, and it therefore results that the defendant *did not* at any time have the right to remove the case to the Federal court, which it claims was denied to it, and that therefore, there being no substance in the claim of denial of Federal right, this court is without jurisdiction to review the decision of the Supreme Court of Montana, and the writ of error must be dismissed." (Emphasis added.)

Great Northern Railway Company v. J. C. Alexander, 38 S. Ct. 237, 246 U. S. 276-282, 62 L. Ed. 713.

"(8) But it is equally well settled that, where there is no claim of a fraudulent attempt to evade a removal, a case not removable when commenced cannot be converted into a removable one by evidence of the defendant or by an order of the court upon an issue *on the merits;* but can only be accomplished by the voluntary action of the plaintiff. Great Northern Railway Co. v. Alexander, 246 U. S. 276, 281, 38 S. Ct. 237, 62 L. Ed. 713; Southern Ry. Co. v. Lloyd, 239 U. S. 496, 500, 36 S. Ct. 210, 60 L. Ed. 402; American Car & Foundry Co. v. Kittelhake, 236 U. S. 311, 315, 316, 35 S. Ct. 355, 59 L. Ed. 594; Whitcomb v. Smithson, 175 U. S. 635, 637, 20 S. Ct. 248, 44 L. Ed. 303; Kansas City Suburban, etc. v. Herman, 187 U. S. 63, 70, 23 S. Ct. 24, 47 L. Ed. 76; Lathrop, Shea & Henwood Co. v. Interior Constr'n Co., 215 U. S. 246, 251, 30 S. Ct. 76, 54 L. Ed. 177; Alabama Great Southern R. Co. v. Thompson, 200 U. S. 206, 26 S. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147."

Halsey v. Minnesota-South Carolina Land & Timber Co., 54 F. 2d 933, p. 935.

Whether a Suit Arising Under a Law of the United States Is Within the District Court's Jurisdiction Must Appear From Plaintiff's Pleading, Not the Defenses Which May Be Interposed to, or Anticipated by It.

The above ruling was made in the following cases:

Peyton v. Railway Express Agency, 316 U. S. 350, 62 S. Ct. 1171, 86 L. Ed. 1525;

Tennessee v. Union & Planters Bank, 152 U. S. 454, 14 S. Ct. 654, 38 L. Ed. 511;

Louisville & N. R. R. v. Mottley, 211 U. S. 149, 29 S. Ct. 42, 53 L. Ed. 126;

Gully v. First National Bank, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed. 70;

Federal Savings & Loan Insurance Corporation v. Third National Bank, 60 Fed. Supp. 110-116.

In the case at bar, appellees claim federal jurisdiction *because* of *their defense* of a condemnation judgment.

This is an erroneous ruling and an erroneous claim.

Had the Plaintiff, Harry Wynn, Brought This Action in the Federal Court, the Five California Corporations and the One Individual (These Defendants) Would Have Removed the Case to the State Courts as a Matter of Jurisdiction.

Machine Tool & Equipment Corporation v. Reconstruction Finance Corporation, 131 F. 2d 547 (cited by appellees at page 10 of brief) was the *sole* defendant in that case, *hence* it has *no application* here.

In *Sabin v. Home Owners Loan Corporation,* 147 F. 2d 653 (Appellees' Br. p. 10)—the only defendants which

the trial court allowed to remain in the case as party litigants were the sheriff and the owner of the transfer and storage company, both of whom acted as agents of the Home Owners Loan Corporation and *under the directions* of said Home Owners Loan Corporation in enforcing its judgment.

They were not separate and individual party litigants as in the case at bar.

> "It is also well settled that statutes relating to the jurisdiction of United States Courts are to be strictly construed. Elgin v. Marschall, 106 U. S. 578; Grace v. American Central Ins. Co., 109 U. S. 278; Healy v. Ratta, 292 U. S. 263."
>
> * * * * * * * *
>
> "The matter of jurisdiction of the district courts of the United States is not to be considered a special privilege *conferred upon Governmental agencies* or others, and jurisdictional statutes are not to be construed *in any protective sense.*
>
> "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined. Healy v. Ratta, 292 U. S. 263, 54 S. Ct. 700, 703, 78 L. Ed. 1248."
>
> *Federal Savings & Loan Insurance Corporation v. Third National Bank,* 60 Fed. Supp. 110-114.

Appellees Ended Their Quotation (Br. p. 9, From 14 A. L. R. 2d p. 1020), Short of the Law Applicable to the Case at Bar.

At page 1022 of 14 A. L. R. the same quoted article states as follows:

> "The purpose of the 1925 Act was not to enlarge, but to limit, Federal jurisdiction. If a cause is not otherwise removable because of defect of parties defendant seeking removal in actions involving multiple defendants, the 1925 statute does *not make* the action removable at the behest of *only one* defendant merely because it is a Federal corporation of which the United States owns more than one-half the capital stock."
>
> 14 A. L. R. 2d, pp. 1022-1023.

We quote from *Belcher v. Aetna Life Ins. Co., et al.,* 3 Fed. Supp. 809, p. 811:

> "The court has been unable to find, and counsel for the removing defendant, although filing a most admirable and forceful brief, has failed to cite, any case which would indicate that defendant in this case is excepted from this general rule. Counsel contends, however, that the proviso contained in the latter part of the Act of February 13, 1925, indicates an intention on the part of Congress to confer an absolute federal jurisdiction in cases in which corporations of this character may be involved. The act, however, is not susceptible of this construction. *The obvious purpose of the statute is to further restrict the jurisdiction of the federal courts.* Con-

gress, having in mind the uniform holding of the courts that cases to which corporations having federal charters were parties arose under the Constitution and laws of the United States, desired to change this rule, with the proviso that the law as it then existed should remain in effect as to such corporations wherein the United States was the owner of more than one-half of the capital stock. The effect of this enactment was to leave these corporations just where other federal corporations had been before, and *not to increase* the jurisdiction of the federal courts *with regard to these corporations.*

If the Congress had intended not only to give such corporations the right to originally invoke the jurisdiction of the federal courts, but to remove every case to which they might be a party to the federal courts, without regard to the limitations provided by the removal statute, *then it certainly would have used more apt and conclusive language.*

It may be, as counsel very forcefully contends, that it is desirable for this federal jurisdiction to exist in the case of corporations such as this, where the record shows the government not only owns more than one-half, but all of the capital stock. If this be true, it is a matter for legislative and not judicial declaration.

"Accordingly, the motion to remand will be granted."

Federal Incorporation Does Not Confer Federal Jurisdiction.

"The Plaintiffs' position is that the only thing done by the Act of 1925 (and the preceding Act of January 28, 1915, Sec. 5, 38 Stat. 804) was to take away jurisdiction so far as it depended upon the existence of a constructive federal question arising from the mere fact of federal incorporation; and that, since a genuine controversy as to the interpretation of the act incorporating the American Legion is here involved, jurisdiction remains. The trouble with this is that there never has been any ground of jurisdiction of suits by or against federal corporations other than that an actual question of interpretation of the act of incorporation was involved in each case. Hence, when the acts of 1915 and 1925 eliminated federal incorporation as a ground of jurisdiction, they eliminated the only ground which had ever existed."

Anthony Wayne Post No. 418, et al., v. American Legion, 5 Fed. Supp. 395.

In *Rhodes v. National Iron Bank of Pottstown,* 35 Fed. Supp. 650 it was held that

"A case is not deemed one 'arising under Constitution or laws of United States or otherwise properly within Federal Courts' jurisdiction *merely* because a party to it is incorporated under the Act of Congress."

(N. B.: This sustains the proposition that Sec. 1349 of Title 28 of United States Code is in the negative and confers no jurisdiction.)

The District Court Did Make and Direct the Entry of a Final Judgment in so Far as the Complaint Sought Relief Against Any Property Involved in the Condemnation Action and Said Court Made an Express Determination of That Fact.

The Court (Honorable Peirson Hall) signed Findings of Fact and Conclusions of Law, fully setting forth the determination that the condemnation judgment placed the title of certain realty in the Reconstruction Finance Corporation and beyond the reach of the plaintiff in his complaint to set aside this fraudulent contract. [R. pp. 113-117.]

The Honorable Peirson Hall concluded:

> 'That the condemnation judgment is final—no appeal lies therefrom—the statute of limitations has run against any attempt to dispute the Government's possession.
>
> Whatever interest plaintiff (Wynn) had was terminated by operation of law on October 26, 1942, the effective date of seizure.
>
> The validity of Treasure Company's assignment to Reconstruction Finance Corporation cannot be contested and is *res judicata.*
>
> Said assignment is not a transfer in fraud of creditors.' [R. pp. 117-118.]

Judge Hall expressed a final determination of the issues, as follows:

> "If all the property described in paragraph II of plaintiff's complaint were the subject of the condemnation proceeding, No. 2454-B of this Court, *then it*

would seem to me that the defendants' motion for summary *judgment should be granted.*

* * * * * * * *

"Thus there is *no* genuine issue as to any material fact concerning *that* portion of the property." [R. p. 109.]

If this Court believes that the partial summary judgment *means what it says,* then this Court should determine this appeal and thus avoid prolonged litigation and another appeal on the same point *now* involved.

If there is a technical point involved under Rule 56(d) then this Court can easily make the same ruling as was done in *Kaufman & Ruderman v. Cohn & Rosenberger,* C. A. N. Y., 1949, 177 Fed. 2d 849, as follows:

"Where order of federal district court dismissing one of two causes of action was affirmed, and it was subsequently contended that the Order was not appealable because the district judge did not make an express determination that there was no just reason for delay, Court of Appeals would allow district judge 10 days in which to make such an express determination which would be treated as made *nunc pro tunc.*"

Appellant is satisfied that Judge Hall has finally ruled and determined that the partial summary judgment is final and bespeaks his final decision on that matter thus involved.

There Is a Genuine Issue of Material Fact With Respect to Property Rights Contrary to the Assumption of Appellees at Page 27 of Their Brief.

The appellees are relying upon a condemnation judgment which was made *before* this fraudulent contract came into existence.

Reconstruction Finance Corporation knowing full well that the evidence in Reconstruction Finance Corporation's jury trial distinctly obligated Treasure Company *before* making any assignment of this leasehold to submit a copy of said assignment to the California Corporation Commissioner, so he could make the usual orders protecting the royalty holders, and knowing full well of the royalty holders' claims of $96,543.35 against this leasehold for unpaid royalty income, nevertheless Reconstruction Finance Corporation took a full assignment of these property rights and agreed to and did pay $150,000.00 to corporations and persons designated by de Bretteville and his corporations *without* the approval of the California Corporation Commissioner.

We submit that there is a genuine issue of *knowledgeable fraud* against the Reconstruction Finance Corporation.

Conclusion.

The complaint in the case at bar discloses no cause for removal to the Federal court.

The question of jurisdiction can always be raised at any stage of the proceedings.

Congress created the Reconstruction Finance Corporation and provided that it could be sued in the state courts.

Federal incorporation does not confer federal jurisdiction.

The district court made an expressed and final determination in its summary judgment, and said judgment should be reviewed by this appeals court even if a *nunc pro tunc* order is required of the trial court.

There is a genuine issue of the Reconstruction Finance Corporation entering into a fraudulent transfer of assets to it by a debtor wishing to defraud his creditors.

Respectfully submitted,

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