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docket under the act of June 26, 1876, which was announced at this term, and is reported in 3 Cent. L. J. 815.

For convenience it may be well to state the following again: The bill was filed in the district court of Boulder county, June 21, 1876; issue was joined July 24, 1876; the Territory of Colorado became a state by proclamation of the president, August 1, 1876, and the last order made at the July term of the Boulder court was entered August 21, 1876. After the motion to docket the case in this court was denied, and on the 7th of December, 1876, plaintiffs filed in the state court a petition alleging that they are citizens of Massachusetts and defendant is a corporation created by a law of the Territory of Colorado, and other facts substantially as required by the act of 1875 concerning the removal of causes from state to federal courts. A bond was also filed with condition as required by that act, the sufficiency of which was not questioned in this court. Afterwards (Dec. 9, 1876) plaintiffs filed in this court a transcript of the files, record and proceedings in the Boulder court and sought to have the cause referred. Thereupon, December 11, defendant moved to dismiss, which is here treated as a motion to remand.

E. L. Smith, for the motion; *A. J Poppleton* and *J. I. Reddick*, *contra*.

HALLETT J.:

This suit was brought in the district court of Boulder county, under the late territorial government, and the question here presented is, whether it may be removed into this court under the act of Congress of March 3, 1875. In terms that act extends to cases then pending or thereafter to be brought in any state court. This suit was not then pending in any court, nor was it afterwards brought in a state court, although it came into such a court by operation of law on the admission of the state sometime after it was begun.

It was ingeniously urged in the argument at the bar that, by assenting to the jurisdiction of the state court, plaintiffs did in fact bring the suit in that court; but this will not bear examination. The bringing of a suit is understood to mean the institution or commencement of it, and so the language is in R. S., § 639, on the same subject. This occurred in this instance in a territorial, not a state court. Pending the suit the character of the court was changed into a state court, and there being nothing in the record to show its federal character, the court retained jurisdiction of it. S. C. 3 Cent. L. J. 815.

Plaintiffs did not in any sense bring the suit in or into the state court. They found it there, where the law had left it in the transition from a territorial to a state government, and they consented to go on with it in that jurisdiction. In that way they elected to remain in the state court; but they did not in any reasonable construction of the act of 1875 bring the suit in that court. This view is enforced by the circumstance that Congress has provided a special way of transferring causes on the admission of a state by general law (R. S. §§, 567, 569, 704), and also in this instance by the act establishing this court, June 26, 1876. This legislation, relating to a particular class of cases and designed to carry out the general purpose of the removal acts, seems to proceed on the theory that the latter are not applicable to cases which originate in a territorial court. If Congress had consigned all federal cases to the state courts, plaintiffs would be within the reason, if not the letter, of the removal acts. But this was not done; and that which was done does not in any way tend to prove that the removal acts are by construction to be extended to cases like this—*i. e.*, to cases not within their terms. If, however, this reasoning is unsound, there is another obstacle to the removal of the cause.

Accepting the act of 1875 as applicable to the case, by the third section it is provided that the petition for removal shall be filed in the state court, "before or at the term at which said cause could be first tried, and before the trial thereof." The term here referred to appears to be that at which the cause may be tried or heard on the merits according to the practice of the court, without regard to the special circumstances of the case, as whether the parties are ready for trial, and the like.

Certainly we can not, in determining a question of this kind, enter into every circumstance that may delay or facilitate the progress of a cause, as whether there are nice points to be decided, which require time for consideration, whether the court was otherwise occupied, and so on. Such an investigation would be in every way embarrassing and uncertain as to the result, and therefore it may be dismissed as impracticable. We are then to inquire whether, according to the practice of the court, this suit could have been finally heard at the July term of the Boulder court, without reference to any of those circumstances that have been mentioned as likely to retard its progress. It appears that issue was joined on the 24th day of July, 1876, and the court remained in session for a period of twenty-eight days thereafter.

No time was allowed by rule of court or otherwise for taking testimony, and we can not assume that any specific time was necessary. It was claimed at the bar that our rule, 69, should govern, but that rule was not of force in the Boulder court. Palmer v. Cowdrey, 2 Col. 1. So far as the record shows, the cause could have been brought on at any time within the twenty-eight days which remained of the term after issue was joined. If the writer may speak from his own knowledge of the course of practice in the territorrial courts, he feels bound to declare that it was entirely regular to bring a cause to hearing at the term in which issue was joined, and this was often done, especially in foreclosure suits. It is true that important suits often went over the term; but this was owing to the press of business, or other extraneous cause, and not to any rule of practice. It seems, therefore, that the application to remove the cause was not in apt time, not being made at the term when a hearing could have been had.

For these reasons the motion to remand will be allowed with costs.

DILLON, Circuit Judge:

I concur. I am inclined to think the first ground sound; but if, under the local law and practice, the case *could* have been finally heard at the July term, then I am clear that the application for removal should have been made at that term, assuming that the act of March 3, 1875, applies to the case.

MOTION SUSTAINED.

MATERIAL TAKEN FROM STREETS IN GRADING—RIGHTS OF ADJOINING LOT-OWNER.

GRISWOLD v. BAY CITY.

Supreme Court of Michigan, January Term, 1877.

HON. T. M. COOLEY, Chief Justice.
" J. V. CAMPBELL, }
" ISAAC MARSTON, } Associate Justices.
" B. F. GRAVES, }

1. RIGHT OF OWNERS OF ADJOINING LOTS TO MATERIAL TAKEN FROM STREETS—SALE OF SAME BY CITY.—In grading a street for the purpose of paving, it was necessary to remove earth which the city had no occasion for, and the

street commissioner sold the same to a party who removed and used it. In an action to recover the purchase-price the purchaser defended, claiming that the city did not own the earth, but that it was owned by the adjoining lot-owners. There was no showing that the earth was of any peculiar value, nor did it appear whether it constituted a part of the original soil, or was earth which the city had previously placed in the street. *Held*, that the defence was not maintainable.

2. RIGHT OF CITY—WAIVER.—Where soil is thus taken from a street in grading it, the city has the right to make use of it in improving the streets in any part of the city. If it is not needed for this purpose, and the city disposes of it by sale without objection by the lot-owners, it will be presumed, such lot-owners waived any objection they might have made.

3. WHETHER SOIL TAKEN FROM A STREET and not needed by the city would rightfully belong to adjacent lot-owners, is not decided.

ERROR to Bay Circuit.

MARSTON, J., delivered the opinion of the court:

Defendant in error brought an action of assumpsit to recover the agreed price for a quantity of dirt sold and delivered under an express contract made by its street commissioner with plaintiff in error.

It was shown upon the trial in the court below that the city, for the purpose of paving one of its streets, lowered the grade thereof, and in doing so it became necessary to make excavations and remove a large quantity of the earth in the street, which, not being needed for city purposes, was sold to plaintiff in error and others. The plaintiff in error also offered to show that the owners of lots alongside of the street never consented to, or had anything to do with removing the dirt, or selling the same; that the expense of paving said street was paid out of the highway funds of the city, and by special assessment on the property along said street. This evidence was rejected. Certain plats were offered in evidence to show that this property had never been legally platted; but it was admitted, that the proprietors had sold and conveyed lots in said city by deeds duly acknowledged, referring to said plats.

It is insisted that the owner of the lands, over which a street not legally platted is laid, retains the fee and all rights not incompatible with the public enjoyment, and that, while the city might use this dirt for city purposes, it could not sell it; that one of the main and leading elements of a sale, viz. title in the city to the dirt, was lacking, and therefore the city could not recover.

There are several difficulties with the defense set up. We can not lose sight of the main features of this case, and dispose of the controversy with exclusive reference to the theory that the owner of the lots adjoining owned to the center of the street subject only to the public easement, that the title to the soil removed was in them, and that the city had no authority to sell the same. If it appeared that the property taken was of special value, it might perhaps be fairly inferred that the owners of the adjoining lots did not consent to a sale or relinquish their rights therein. But where, as in this case, the property does not appear to have had any special or peculiar value, and was taken, used and disposed of by the city without objection, it is but fair to presume that the adjoining proprietors took no interest whatever in the disposition that was being made of it, and made no claim either for the soil or its proceeds. In such a case, where the party has received what he bargained for, in an action to recover the price agreed upon, it is not sufficient for him to show, in order to defeat the action, that the owners of the adjoining lots did not consent to the removal and sale; he should go farther and show that they forbade the sale. And even if he had shown this to have been the fact, it is not at all clear that such would have constituted a valid defense in this action. The record shows the soil to have been taken indiscriminately from all along the line of the street. Under such circumstances it would be very difficult for the several owners to trace into the possession of plaintiff in error that portion of the soil taken from off the street in front of their lots respectively, and maintain an action against him either for the identical soil taken or its value. It may be worthy of serious consideration whether their remedy, if any, would not be against the commissioner who removed the soil, or the city; but upon this point we express no opinion.

It may be a question admitting of some doubt, also, whether there is in fact anything in the record tending to show that the dirt sold and delivered was a part of the soil excavated in grading the streets for pavement. The fact that the person who made the contract with plaintiff in error, was, and had been for a number of years, street commissioner, and as such had charge of this street, would not fully warrant the inference assumed by the plaintiff in error. For ought that appears, the dirt in question may before then have been placed upon this street by the city; certainly there is nothing to show that it ever formed a part of the original soil over which this street passed, or that the owners of property fronting upon said street had or claimed any interest whatever, at any time, therein. We can not assume that any other person having an interest in the dirt sold, or that the city, by its commissioner, did not in fact have full authority to sell and deliver the same to plaintiff in error. But we need not dispose of this case on any such technical reason.

If, in grading this street, it became necessary to remove any soil, the city would have had an undoubted right to use the same in grading that or any other street in the city. In case it did not desire it for such purpose, and the owner of the property from in front of which it has been taken did not, then the city would have a clear right to remove it, and might in so doing sell or dispose of it in any way it considered proper.

The judgment must be affirmed with costs.

NOTE.—Several cases have recently been decided, in which have been involved the respective rights of the public and of adjacent lot-owners in any material that may not be required in its original *situs* in the public way for the purpose of constructing the way, or of keeping it in repair, and the questions are of sufficient importance to justify their being noticed together. It is conceded on all hands that the owner of the land, over which the public passes, retains at the common law the fee and all rights of property not incompatible with the public enjoyment of the easement. Lade v. Shepherd, 2 Str. 1004; Goodtitle v. Alker, 1 Burr. 133; Grose v. West, 7 Taunton, 39; Doe v. Pearsy, 7 B. & C. 304; U. S. v. Harris, 1 Sumner, 21; Harris v. Elliott, 10 Pet. 25; Barclay v. Howell's Lessee, 6 Pet. 498; Chatham v. Brainerd, 11 Conn. 60. "Every use to which the land may be applied, and all the profits which may be derived from it consistently with the continuance of the easement, the owner can lawfully claim." Parsons, C. J., in Perley v. Chandler, 6 Mass. 454, 456; Lane v. Kennedy, 13 Ohio, N. S. 42; Phifer v. Cox, 21 Ohio, N. S. 248; Higgins v. Reynolds, 31 N. Y. 151; Holden v. Shattuck, 34 Vt. 336; Cole v. Drew, 44 Vt. 49; Graves v. Shattuck, 35 N. H. 257; Chamberlain v. Enfield, 43 N. H. 356.

The herbage in the highway belongs to the owner of the adjoining lands, and he may maintain trespass against one whose cattle graze upon it (Stackpole v. Healy, 16 Mass. 33; Cool v. Crommet, 1 Shep. 250; Avery v. Maxwell, 4 N. H. 36; Woodruff v. Neal, 28 Conn. 165), unless the law under which the highway was laid out contemplates the running at large of cattle in the highway. Tonawanda R. R. Co. v. Munger, 5 Denio, 255. The growing trees in the highway also belong to the adjoining owner, except as they are needed for the purpose of making the way (Adams v. Emerson, 6 Pick. 56; Sanderson v. Haverstick, 8 Pa. St. 294; Overman v. May, 35 Iowa, 89; Commissioners, etc., v. Beckwith, 10 Kas. 603), and if the highway officer sell trees growing in the road, and they are cut without necessity, they are liable in trespass for so doing. Clark v. Dasso, 34

Mich. 86. See further, Jackson v. Hathaway, 15 Johns, 447; Babcock v. Lamb, 1 Cowen, 238; Williams v. N. Y. C. R. R. Co., 16 N. Y. 103; Dubuque v. Malony, 9 Iowa, 450; Dubuque v. Benson, 23 Iowa, 248; White v. Godfrey, 97 Mass. 472: Bliss v. Ball, 99 Mass. 597; Makepeace v. Worden, 1 N. H. 16; Woodring v. Forks Town, 28 Pa. St. 355; Read v. Leeds, 19 Conn. 182; Kellogg v. Malin, 50 Mo. 500. In Codman v. Evans, 5 Allen, 308, it was decided that the owner of land might maintain an action against an adjoining owner who built a bay window extending over his line, notwithstanding that portion of the land covered by the bay window was laid out and used as a highway. In Kentucky, it has been decided that the owner of land over which a highway runs, may work mines therein, not interfering with the public use. West Covington v. Freking, 8 Bush. 126.

The question is different somewhat when the public way is a city or village street, and where the law under which it has been laid out appropriates not an easement merely, but the title in fee. It has been decided in Iowa, in such a case, that the complete ownership and dominion passed to the munincipal corporation by such an appropriation, and that, if a deposit of minerals should exist beneath the surface and be worked by the adjoining proprietor, the corporation might recover from him the value of what should be taken from it. Des Moines v. Hall, 24 Iowa, 234; see also Milburn v. Cedar Rapids, 12 Iowa, 246. Compare Moses v. Pittsburg, etc., R. R. Co. 21 Ill. 516; West v. Bancroft, 32 Vt. 367; Ohio, etc., R. R. Co. v. Applegate, 8 Dana, 289; Hinchman v. Patterson, etc., R. Co., 2 C. E. Green, 76; State v. Laverack, 34 N. J., 201.

We do not find that this peculiar question has been passed upon elsewhere under like circumstances; but the view taken in Michigan of the public rights in streets under statutes, which vest the fee in the county where lands are dedicated to the public use by a town plat, seems to be different from that taken in Iowa. It is conceded that a dedication or an appropriation for street purposes is not for purposes of passage merely, but for all the public purposes for which it is customary or proper to make use of city or village streets. Warren v. Grand Haven, 30 Mich. 24. But from this case, as well as others which have not passed explicitly upon the question, the inference is fairly deducible that the public would not be recognized as having the fee, except for public purposes. In Cuming v. Prang, 24 Mich. 514, it was decided that the city authorities had no right to empower a contractor, for the improvement of a street in one part of the city, to take for the purpose gravel from an alley in another part of the city, and that the owner of the lot bounded on the alley might maintain an action for the value of the gravel taken. Compare Delphi v. Evans, 36 Ind. 90. The decision would probably not have been the same, had the *locus* been a street instead of an alley; there are some important differences between the two. See People v. Jackson, 7 Mich. 432; Tillman v. People, 12 Mich. 401. In Bissell v. Collins, 28 Mich. 277, the right of the city, in making a street improvement, to take the natural material within the street limits and distribute it wherever it was needed in completing the work, was fully recognized. But this right would have existed, had the public had an easement only. New Haven v. Sargent, 38 Conn. 50.

The principal case was decided on a somewhat narrow ground, but it approaches a question which there will probably be occasion to consider in future cases.

T. M. C.

BANKRUPTCY—FIDUCIARY DEBTS.

WOOLSEY v. CADE.

Supreme Court of Alabama, December, 1876.

HON. R. C. BRICKELL, Chief Justice.
" A. R. MANNING, } Associate Justices.
" GEO. W. STONE, }

A debt due from a factor for the proceeds of goods sold is not within sec. 33 of the Bankrupt Act (Rev. Stats. § 5117), which provides that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or *while acting in any fiduciary character*, shall be discharged by any proceedings in bankruptcy." *In re* Seymour, 1 N. B. R. 29, disapproved. Cronan v. Cotting, 104 Mass. 245, followed.

BRICKELL, C. J., delivered the opinion of the court:

The first section of the bankrupt law of 1841 provided: "All persons whatsoever, residing in any state, territory, or district of the United States, owing debts, which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity," should, on compliance with its terms, receive a discharge from the payment of debts. The exception was of *debts*, from the operation of the discharge; not of *persons* owing such debts, from the privileges of the law. In Chapman v. Forsyth, 2 How. 202, the Supreme Court of the United States determined that a debt due from a factor to his principal, for moneys received on a sale of cotton, was not a *debt created by defalcation in a fiduciary capacity*, and was within the operation of the bankrupt's discharge. The decision was followed in Austill & Marshall v. Crawford, 7 Ala. 335. It was urged by counsel, in the argument of that case, that the law of this state, the parties residing and contracting, and the agency having been executed here, must fix the character of the relation of factors to their principals, and of the debts due from them in the execution of their agency. The statute punishing criminally a willful conversion, by a factor, of the goods or moneys of his principal, it was insisted, fixed the character of the debt due from him, as created in consequence of a defalcation while acting in a fiduciary capacity. It was said by the court, the pleadings did not disclose the offence punishable by the statute; but, independent of that consideration, the operation and construction of the bankrupt law must be the same all over the United States, not varied by the local laws of the several states; and the meaning of the terms employed in it must be ascertained from the common law.

The 33d section (§ 5117 of the Rev. Sts.) of the present bankrupt law declares: "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy," etc. The current of decision is, that a claim against a factor, for withholding the proceeds of the sales of goods consigned to him to be sold on commission, is a debt contracted by him in a *fiduciary character*, excepted from the operation of a discharge in bankruptcy. The decisions are collected in Bump on Bankruptcy (8th Ed.), 724. See also Treadwell v. Holloway, 46 Cal. 547; s. c., 12 Nat. Bank. Reg. 61. The difference of decision under the present law, from that prevailing under the law of 1841, is founded on the difference in the phraseology, and the reason of it is thus expressed by Judge Blatchford, whose opinion is the authority on which the other and subsequent concurring opinions rely. "The act of 1841 excluded from its benefits 'all persons owing debts created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any fiduciary capacity.' The Supreme Court held, in Chapman v. Forsyth, that a discharge under the act of 1841 did not release the bankrupt from any such debts, and that no debt fell within the description of a debt created by a defalcation while acting in any other fiduciary capacity, unless it was created by a defalcation while acting in a capacity of the same class and character as the capacity of executor, administrator, guardian and trustee. The court held that the language of the act of 1841 was not broad enough to include every fiduciary capacity, but was limited to fiduciary capacities of a specified standard or character. That was clearly so under that act. But, in the act of 1867, the language seems to have been intentionally made so broad as to extend to a debt created by a defalcation of the bankrupt, and while