

to discuss. It must suffice that the plea avers that the entire property covered by said mortgage, and a subsequent general assignment, is now in the custody of a state circuit court, and is in the course of administration by it. The case of *Taylor v. Carryl*, 20 How. 583, seems to be conclusive on the point. True, the doctrine announced in that case was brought into apparent doubt in the case of *Payne v. Hook*, 7 Wall. 425, which latter case was so far modified by the subsequent rulings of the United States supreme court in the same case of *Hook v. Payne*, 14 Wall. 252, as practically to leave the prior doctrine, which is more in accord with our systems of jurisprudence, undisturbed. Inasmuch as the state circuit court has full control of the property and funds involved, and is administering the same through its duly-qualified officer, not only comity, but sound principles of law, require that there should be no such conflicts of jurisdiction as are sought in this case.

Demurrer overruled, and bill dismissed.

In re STRAUSS v. MEYER and others.¹

(Circuit Court, E. D. Missouri. December 3, 1884.)

EQUITY PRACTICE—COSTS—ATTORNEY'S FEE.

No attorney's fees for the examination of witnesses, called before a master or special examiner, are taxable as costs.

In Equity.

Suit for the infringement of a patent. Motion to retax costs because of the allowance of an attorney's fee of \$2.50 for each witness examined before the examiner appointed herein to take testimony prior to the granting of a preliminary injunction, and for each witness examined before the master appointed to ascertain the damages sustained by the complainant, and the profits made by the defendant from the infringement complained of.

S. Obermeyer and Taylor & Pollard, for plaintiff.

Lee & Chandler, for defendants.

TREAT, J. The party is not entitled to counsel fees for witnesses called before the master, and I doubt whether he is entitled to fees for witnesses called before the special examiner. Testimony taken before a special examiner is not in the nature of depositions taken at different places where a party may be compelled to go, and I will allow nothing of the kind. I think it is outside of the fee-bill, and outside of the reason of it. The party has to appear and conduct the case before the special examiner who is appointed therefor, and

¹Reported by Benj. F. Rex, Esq., of the St. Louis bar.

to charge fees for the witnesses called before the special examiner is outside of the rule of taking depositions. If such depositions were taken elsewhere than before the special examiner, then you are entitled to \$2.50 for each witness.

DURHAM v. FIRE & MARINE INS. CO.

(Circuit Court, D. Oregon. December 31, 1884.)

1. SUIT TO REFORM A CONTRACT.

In a suit to reform a written instrument it must be shown that the mistake is mutual; and therefore it must appear from the allegations of the bill what the agreement of the parties was, and wherein the writing fails to embody it.

2. FIRE INSURANCE—POLICY—MISTAKE—REFORMATION.

A bill brought to reform a policy of insurance stated that the several owners of a certain warehouse applied to the defendant for insurance against fire on their interests in said property, with loss, if any, payable to one of them; and that "thereupon" the defendant issued its policy on the interest of that one alone, instead of all. *Held*, on demurrer to the bill for want of equity, that it did not appear that the defendant ever agreed to insure the interest of but the one of the owners, and therefore it was not shown that the mistake was mutual.

Suit to Reform a Policy of Insurance.

George H. Williams, for plaintiff, and the latter *in propria persona*.
Paul R. Deady, for defendant.

DEADY, J. This suit is brought to reform a policy of insurance issued by the defendant on July 31, 1883, whereby it undertook to indemnify Theo. H. Liebe against loss by fire, for the period of one year from the date thereof, of his interest, not exceeding \$4,000 in value, in a two-story frame building, then in course of construction and to be occupied as a grain warehouse, and known as the "Dayton Mills Warehouse," in Dayton, Oregon, for the premium of \$100 in hand paid. The bill alleges that on the day the policy issued, and prior thereto, William Burnell, Theo. H. Liebe, E. S. Larsen, Elizabeth Crane, and A. A. Crane were the owners of a certain parcel of real property, on which was situated a grist-mill and the warehouse in question; that on said day said Burnell, "on behalf of himself and co-owners, composing said Dayton Flouring Mills Company," applied to the agent of the defendant at Portland for insurance "on a warehouse, then in process of construction by said company on their said lands," with loss, if any, payable to said Liebe; that thereupon, "in consideration of the payment by the said insured" of the premium, the defendant, by its agent, issued the policy in question, and "thereby undertook to insure the said Dayton Flouring Mills Company against loss or damage by fire, to the amount of \$4,000, upon the said warehouse;" that, "by some oversight, misapprehension, or mistake" on the part of the agent of the defendant, said policy was issued in the name of