

R. Co. v. Lake Shore & M. S. Ry. Co. 5 FED. REP. 19; *Uphoff v. Chicago, St. L. & N. O. R. Co.* Id. 545; *Nashua & L. R. Co. v. Boston & L. R. Co.* 8 FED. REP. 458; *Johnson v. Philadelphia, W. & B. R. Co.* 9 FED. REP. 6; *Horne v. Boston & M. R. Co.* 18 FED. REP. 50; *St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R. Co.* 9 BISS. 144; *Muller v. Dows*, 94 U. S. 444.

Cause remanded.

HENDRICKSON v. CHICAGO, R. I. & P. RY. CO.¹

WESSINGER v. SAME.

WHITNEY v. SAME.

(Circuit Court, D. Minnesota. December Term, 1884.)

REMOVAL OF CAUSE—APPEARANCE IN STATE COURT—WAIVER OF JURISDICTION
—MOTION TO DISMISS.

Under the act of 1875 a special appearance in the state court for the purpose of removal is not a waiver of jurisdiction, and after removal to the circuit court a motion to dismiss the case for want of jurisdiction may be made.

On Motion to Dismiss.

A. B. Jackson and *C. K. Davis*, for plaintiffs.

J. D. Springer, for defendant.

NELSON, J., (orally.) In the cases of *Hendrickson*, *Whitney*, and *Wessinger* against *Chicago, Rock Island & Pacific Railway Company*, three separate cases against the same defendant, a motion is made on the part of counsel for the railroad company to dismiss, on the ground that the court has no jurisdiction. These suits were instituted in the county of Hennepin, and were brought to recover damages for personal injuries by the respective plaintiffs. The injuries were inflicted in the state of Missouri, and the defendant corporation has no place of business in this state, and transacts no business therein. Service was obtained by a writ of attachment, attempting to attach a debt under the statute, but there was a failure to make proper affidavits, on the part of the plaintiffs, to obtain an order legally for service of process by publication; this is conceded. The suits were brought in the state court of the county of Hennepin, and a motion was filed in that court to dismiss for want of jurisdiction, and immediately petitions were filed and bonds given to remove the cases to this court. The motion is renewed to dismiss the cases here for want of jurisdiction. The claim is made on the part of the plaintiffs, that the defendant, having appeared in the state court, for the purpose of removing the cases and filing a petition, etc., waived all irregularities, and cannot take ad-

¹ Reported by Robertson Howard, Esq., of the St. Paul bar.

vantage of them in this court. I think the decisions are the other way, under the act of 1875, particularly in this circuit and in Michigan. Evidently it was a special appearance for the purpose of removal to this court. It cannot be said that an appearance for the particular purpose of removal is a general appearance so as to give the court jurisdiction of the party, and a waiver of all irregularities. The case cited by Judge BROWN, of Michigan, and the one decided by Judge TREAT in this circuit, are in point, and I think there are one or two others. Under the statute of 1875 a special appearance for the purpose of removal is not a waiver of jurisdiction. The motion for dismissal is granted.

MACK and others v. ADLER and others.

(Circuit Court, E. D. Arkansas. October Term, 1884.)

1. APPROPRIATION OF PAYMENTS—RUNNING ACCOUNTS.

The rule for the appropriation of payments on running accounts is that the first item on the credit side of the account will be applied to extinguish the first item on the debit side of the account; but this rule has no force against an understanding of the parties to the contrary.

2. SAME—WHEN SOME DEBTS DUE AND SOME NOT.

In the absence of an agreement to the contrary, the law will apply credits to extinguish debts which are due, in preference to debts which are not due.

3. SAME—RIGHT BELONGS EXCLUSIVELY TO DEBTOR AND CREDITOR.

The exercise of the right of appropriation of payments belongs exclusively to the debtor and creditor, and no third party can be heard for the purpose of compelling a different appropriation from that agreed upon by them.

4. SAME—MERCHANT'S BOOKS MAY BE EXPLAINED.

A merchant is not estopped from showing an understanding or agreement inconsistent with the deductions the law would draw from the face of his books unexplained.

In Equity.

Cohn & Cohn, for complainants.

U. M. & G. B. Rose, for defendants.

CALDWELL, J. On the ninth of December, 1881, Poe & Co., merchants, doing business at Clinton, in this state, were indebted to Adler, Goldman & Co., commission merchants, doing business in St. Louis, in the sum of \$7,258.21. At this time, Adler, Goldman & Co. had on hand cotton for sale for account of Poe & Co., which it was estimated would reduce the amount due the former to about the sum of \$3,400, and for this amount Poe & Co., on the day named, executed their note, payable to Adler, Goldman & Co., due January 1, 1883, and, to secure payment of the same, executed a deed of trust on lands to Jones, as trustee. After the maturity of the note, the trustee advertised the lands for sale under the deed, whereupon the plaintiffs filed this bill to enjoin the sale, upon the ground that they were