

destruction of the distributive share of the complainant, and, further, that they have mingled the trust moneys of the estate coming into their hands as trustees and executors with their own money and property, instead of keeping the same separate and apart, by reason whereof the money and property of the estate is likely to be confused, so that it cannot be separated from other funds. The averments of the answer to which exceptions are taken are in response to these wholesale charges, with reference to which the respondents have a right to vindicate themselves. It was said, in substance, upon the argument that there was no intention to reflect upon the respondents, and that the bill was drawn in accordance with approved forms, and it was insisted that the averments of the answer excepted to did not touch the merits of the cause, which was not intended to be adversary, but merely for the construction of the will and the ascertainment of the rights of the complainant. Nevertheless the averments are in the bill, and, being there, the respondents have a right to answer them fully. Originally a bill in equity consisted of nine parts, of which there were five principal parts, to-wit, the statement, the charges, the interrogatories, the prayer of relief, and the prayer of process. But all these, according to more recent authorities, may be dispensed with excepting the stating part and the prayer for relief; for, as Langdell in his hand-book on Equity Pleadings states:

"All that was ever essential to a bill was a proper statement of the facts which the plaintiff intended to prove, a specification of the relief which he claimed, and an indication of the legal grounds of such relief." Section 55.

Had the bill been confined to these limits, as it might have been, there would have been no occasion for the answers to which the exceptions are directed; but, as it was not so limited, and as the answers do not go beyond what is responsive to the bill, the exceptions will be overruled, without taking into consideration whether the matters set forth in the portions of the answer to which the exceptions are taken are material to the final disposition of the cause.

HUNTON *et al.* v. EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES.

(Circuit Court, D. Massachusetts. February 9, 1891.)

1. ACCOUNTING—EQUITY JURISDICTION—INSURANCE.

A court of equity has no jurisdiction of a bill by an insured under a tontine policy against the insurance company for an accounting.

2. SAME—FEDERAL COURTS—STATE STATUTE.

Pub. St. Mass. c. 151, § 2, cl. 10, which confers equity jurisdiction in cases where "the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law," does not extend the jurisdiction of the federal courts even in suits removed from the state courts.

In Equity. On demurrer.

Ball & Tower, for complainants.

Robert M. Morse, Jr., and *Charles E. Hellier*, for defendant.

COLT, J. The question raised by this demurrer is, whether a bill in equity will lie for an account against the defendant company for the amount due on a tontine policy, or whether the proper remedy is at law. The policy was for \$5,000, and was issued to the complainant Hunton, and the tontine period expired August 14, 1888. By the terms of the policy, the legal holder had the right at the completion of the tontine period to withdraw, in cash, the policy's entire share of the assets, whether in the reserve fund proper or the accumulated assets. In this case the complainants, being dissatisfied with the amount allowed by the defendant, have brought this bill in equity for an account, and the defendant has demurred, on three grounds: *First*, that the plaintiffs have not stated such a case as entitles them to any relief in equity against the defendant; *second*, that it does not appear that any fiduciary relation subsists between the plaintiffs and defendant, and that, therefore, their cause of action, if any, is cognizable in a court of common law; *third*, that the plaintiffs have not stated such a case as entitles them to demand in equity an account from the defendant. If this bill can be maintained, it must be on the ground that a trust relationship existed between the parties, or that the account is of such a character that equity jurisdiction attaches. That no trust exists between the assured and the insurance company has been held in *Pierce v. Society*, 145 Mass. 56, 12 N. E. Rep. 858, and *Bewley v. Society*, 61 How. Pr. 344, and I agree with the reasoning of the court in those cases. I am also of opinion, upon the authority of *Root v. Railway Co.*, 105 U. S. 189, that, this being merely a suit for an account, and it not appearing that any other ground of equitable jurisdiction exists, a bill in equity cannot, upon general principles governing the jurisdiction of courts of equity, be maintained. The plaintiffs rely, in this case, upon a provision of the Public Statutes of Massachusetts, (chapter 151, § 2, cl. 10,) which confers equity jurisdiction in cases where "the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law." This bill was originally brought in the state court under this provision of the statute, and it was properly removed by the non-resident defendant to this court. The question arises, therefore, whether the United States courts should follow this provision of the Massachusetts statute. In support of the position that the federal courts are bound by the statute, the plaintiffs cite numerous authorities. The general proposition which the plaintiffs declare has been sustained by the supreme court is this: that the federal courts will recognize and enforce any new equitable right or remedy created by state law; and they contend that the present case comes within the principle laid down in these decisions. We are here dealing with a question of procedure or remedy relating to equity jurisdiction, and we must bear in mind the subject-matter to which the statute relates, and what modification or change in the old rule it has brought about. It is well settled that the equitable jurisdiction of the United States courts cannot be changed by state statute. The rules governing the equity jurisdiction of the federal courts are founded upon those of the high court of chancery in England. Now, what is the effect of the Massachusetts statute? It takes a certain

class of cases that under federal procedure would have to be brought on the law side of the court, and transfers them to the equity side. It enlarges the equity jurisdiction of the court in relation to accounts. In this very case, where equity jurisdiction would not attach under the rules which prevail in the United States courts, it permits a party to bring a bill in equity. If the federal courts are to adopt a state law which in part breaks down the distinction between the legal and equitable jurisdiction of the court, I do not see why the same doctrine would not lead to the adoption by the federal courts of the state practice in those states which have a Code, and where no distinction is made between law and equity. The cases referred to by the complainants do not, I think, support the position they contend for. It is true that new equitable rights and remedies may be created by statute, but they must be equitable in their character. In the cases relied upon by the plaintiffs, it will be found that the supreme court has in no way recognized any doctrines looking towards state control of procedure in equity in the federal courts. In *Cummings v. Bank*, 101 U. S. 153, the new remedy created by statute was an injunction to enjoin the illegal levy of taxes; and Mr. Justice MILLER says, (page 157:)

"Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the statute, is to be enforced, and can only be appropriately enforced on the equity side of the court."

In *New Orleans v. Gaines' Adm'r*, 131 U. S. 191, 213, 9 Sup. Ct. Rep. 745, Mr. Justice BRADLEY, in referring to a provision of the civil law of Louisiana as a ground for maintaining the suit on the equity side of the court, says:

"The right thus claimed for the creditor * * * may very properly be pursued in a suit in equity, since it could not be pursued in an action at law in the courts of the United States."

The plaintiffs seem to rely largely upon the suit of *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 495. That was a bill in equity brought to quiet title under a statute of Nebraska. Mr. Justice FIELD, speaking for the court, says, (page 25, 110 U. S., and page 501, 3 Sup. Ct. Rep.):

"It does not follow that by allowing in the federal courts a suit for relief under the statute of Nebraska, controversies properly cognizable in a court of law will be drawn into a court of equity. There can be no controversy at law respecting the title to or right of possession of real property when neither of the parties is in possession. An action at law, whether in the ancient form of ejectment or in the form now commonly used, will lie only against a party in possession. Should suit be brought in the federal court, under the Nebraska statute, against a party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such cases we are speaking."

I do not deem it necessary to refer to the other cases cited by the plaintiffs. It is sufficient to say that in my opinion they do not apply to this case. The Massachusetts statute does not create a new remedy, but it does withdraw a certain class of cases from a court of law into a court

of equity; and the federal courts are to adopt it only so far as it is consistent with the mode of procedure in equity cases established by the courts of the United States. Demurrer sustained.

FARMERS' LOAN & TRUST CO. v. GREEN BAY, W. & ST. P. RY. CO.,
(FRANCK, INTERVEROR.)

(Circuit Court, E. D. Wisconsin. March 23, 1891.)

RAILROAD MORTGAGE—FORECLOSURE—PRIORITIES.

A claim against a railroad company for causing the death of plaintiff's intestate is a demand arising from a failure of duty, and could not by its creation benefit, preserve, or increase the *corpus* of the estate of the company, and is not entitled to priority upon the foreclosure of a mortgage thereof.

In Equity.

Upon the intervening petition of Emily Franck, administratrix, etc. The bill is filed to foreclose a trust-deed executed by defendant to complainant on the 1st day of September, 1881, upon its line of railway, to secure its bonds of even date, aggregating \$1,600,000, maturing in 1911, or at the option of the trustee, upon default in payment of interest. The interest of the bonds was payable semi-annually on the 1st days of February and August in each year. Upon default in the payment of interest, continuing 30 days, the trustee at its election might, and, upon request of the holders of one-fourth in amount of the bonds, should, take possession of the mortgaged premises, and dispose thereof at sale, as provided. Default occurred in the payment of interest due August 1, 1888, continued after default for more than 30 days, and in all subsequently maturing interest. On the 31st of July, 1890, the trustee, after proper request of the bondholders, demanded and received possession of the mortgaged premises, electing to treat as matured the entire principal sum of the bonds, and has since operated the railway. On the 14th August, 1890, the trustee filed this bill to foreclose. On the 18th of August an order of the court, entered by consent of the parties, affirmed the possession of the trustee, authorizing its continuance in possession under the protection of the court, and conferred upon the trustee the usual powers and duties of a receiver. No provision was made by the order with respect to the floating indebtedness of the railway company. On the 5th day of January, 1891, Emily Franck filed her intervening petition, representing that Martin Franck, a conductor in the service of the railway company, lost his life on the 15th day of April, 1890, in the discharge of his duty, without fault on his part, and solely through the neglect of duty of the railway company; that he left a dependent father; that the railway company is insolvent; and that she, as administratrix of the estate of the deceased, prefers this petition to obtain for the father proper indemnity for the loss of the son, rightfully demandable under the laws of Wisconsin. The complainant takes issue with the petition,