

take. Whatever may be justly due from the Creek Nation, in view of its advanced position among Indian nations, and its independent powers, may properly be left to itself to adjust and pay." By the act of March 1, 1889, the Creeks were authorized to pay, and Gov. Crawford was authorized to receive, the sum of money named in the act. He, or any other person who might receive it, was to receive it on one condition alone: in obedience to the direction of the national council of the Creek Nation. This, as already remarked, is a condition entirely different from those upon which he could receive the money under sections 2103 and 2104 of the Revised Statutes. This is a *qui tam* action, brought as provided for in section 2103, and because said section has been violated. If the section does not apply to the state of case existing, but the same has been taken out of its terms by the act of March 1, 1889, there is, of course, no violation of said section, and no subject-matter to which jurisdiction can attach in this action. If the money was paid by officers of the government, without the direction of the Creek national council, it would be a payment of the money, not in violation of section 2103 of the Revised Statutes, but of the act of March 1, 1889; and it would be a case where the government should sue the party who wrongfully received the money for money had and received, or, if the same was wrongfully paid to a Creek Indian, the Creek Nation might sue for money had and received for its use and benefit. But these suits would not be based upon a cause of action arising under section 2103. Then, as far as this suit is concerned, there is no subject-matter to which the jurisdiction of the court can attach. The questions passed on by the court are decisive of the case, and it is therefore unnecessary to examine the many other questions discussed by counsel in their argument, and the order will be that the motion to quash the writ of summons served upon Samuel J. Crawford in the District of Columbia be sustained, because the court had no authority to issue such writ, and that the court, of its own motion, dismiss the case, because of the want of subject-matter necessary to constitute jurisdiction.

YOUNKIN v. COLLIER *et al.*, (SMITH, Garnishee.)

(Circuit Court, S. D. Iowa, E. D. June 24, 1891.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—WHAT CONSTITUTES—MORTGAGES.

A mortgage executed by insolvents to a trustee to secure certain of their creditors, containing a defeasance in express terms, is not a general assignment, within the meaning of the Iowa assignment law, (Code Iowa, §§ 2115-2128,) although it covers all their available property; and hence it does not come within the operation of section 2115, which invalidates all general assignments not made for the benefit of all creditors in proportion to the amount of their respective claims.

2. GARNISHMENT—LIABILITY OF TRUSTEE FOR CREDITORS—SURPLUS.

The trustee in such mortgage is not liable as garnishee to a creditor of the mortgagors when it is not shown that a surplus will remain in his hands after payment of the debts secured by the mortgage and the expenses of the trust.

3. SAME—PROPERTY EXCEPTED FROM TRANSFER.

Such trustee is not liable to the garnishing creditor for the value of shares of stock belonging to the mortgagors which the terms of the mortgage were broad enough to include, where both parties to the mortgage testify that such shares were not intended to be transferred thereby.

4. SAME—TRANSFER BY GARNISHEE—STOCK—ATTACHMENT.

Where the certificates of such stock have come into the possession of the trustee, the fact that, after service of the writ of garnishment, he delivered them to the mortgagors' general assignee, will not render him liable to the garnisher, who has failed to conform to the method prescribed by Code Iowa, § 2967, for attaching stock in a company.

At Law.

Code Iowa, § 2115, relating to general assignments, provides that—

“No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid, unless it be made for the benefit of all his creditors, in proportion to the amount of their respective claims.”

John P. Hornish and James H. Anderson, for plaintiff.

F. T. Hughes and James C. Davis, for garnishee.

SHIRAS, J. From the record in this cause it appears that December 16, 1890, the plaintiff, Joseph Younkin, brought suit in this court, aided by the issuance of a writ of attachment, against Alexander Collier, Hugh Robertson, and B. F. Hambleton, partners under the firm name of Collier, Robertson & Hambleton, the attachment being levied by garnishing J. F. Smith. On or about January 21, 1891, judgment was entered in the main cause against the defendants therein for the sum of \$9,963.38 and costs, and, the answer of the garnishee having been duly taken and filed, issue thereon was taken by the plaintiff according to the method provided in the statutes of Iowa, and the questions thus presented are those now before the court for determination. From the evidence submitted by the respective parties, it appears that on and prior to the 10th day of December, 1890, the firm of Collier, Robertson & Hambleton was engaged in the wholesale grocery business at Keokuk, Iowa; that on said 10th of December, 1890, two chattel mortgages were executed by said firm upon the stock in trade, fixtures, notes, accounts, and other choses in action of said firm, to secure payment of the sums due various creditors named in each mortgage, the conveyances being in form to J. F. Smith, trustee; that on the same day said firm executed a mortgage to J. F. Smith, trustee, upon the westerly 40 feet of lot 4, in block 25, in the city of Keokuk, Iowa, to secure the amounts due the creditors therein named; that on the 16th day of December, 1890, the said firm executed a deed of general assignment to J. W. Summers, as assignee, for the benefit of their creditors; that on the 10th day of December, 1890, and prior to the execution of the mortgages above named, the said firm was insolvent; that immediately on the execution of said chattel mortgages the trustee therein named took possession of the personalty therein described, and has since converted the same, or a large portion thereof, into money. On the part of plaintiff, it is contended that the mortgages executed to J. F. Smith, as trustee, in effect covered all the available property be-

longing to the firm of Collier, Robertson & Hambleton, and therefore in fact constituted a general assignment of their property, but, being made for the benefit of a part only of their creditors, it is void under the Iowa statute, because it thus gives a preference to certain creditors, instead of being for the common benefit of all.

Assuming, without so deciding, that the mortgages were intended to cover all the available property of the firm, that fact does not necessarily make them in effect a general assignment, even if the mortgagors were then insolvent, and executed these instruments in view of that fact. The rule of construction to be followed in determining the character of the conveyances in question is that to be derived from the decisions of the supreme court of Iowa. It is not to be denied that if the language used in *Burrows v. Lehdorff*, 8 Iowa, 96, is to be construed without limitation, it would justify the contention of plaintiff that these mortgages should be held to constitute a general assignment; but the rule laid down in this case has been greatly limited by the subsequent decisions of the supreme court of Iowa. In *Lampson v. Arnold*, 19 Iowa, 479, the whole subject is discussed at length, and the conclusion reached that—

“This statute, it will be observed, does not limit or affect the right of an insolvent debtor, or one contemplating insolvency, or, indeed, any other, to sell or mortgage a part or all of his property to one or more of his many creditors, in payment or security of a particular debt or debts; but this is true, although such sale or mortgage may, practically, defeat all other creditors than the grantee from collecting their demands. Nor does the statute prohibit or interfere with the right of the debtor as it existed before the statute to execute a partial assignment: in other words, the statute does not expressly or by implication extend any further or apply to any instrument or conveyances other than a general assignment, and therefore it is still competent for any debtor to pay a part of his creditors in full, to secure another part by mortgage or deed of trust upon a part of his property, to execute a partial assignment of stock or other property for the benefit of certain other creditors, with or without preference, and afterwards to make a general assignment. The statute simply provides that such general assignment shall not be valid unless it is made for the benefit of all the creditors *pro rata*. * * * Now, the statute does not declare general transfers invalid, but it relates to general ‘assignments,’ and uses the latter word, as held in *Cowles v. Ricketts*, 1 Iowa, 582, in its technical sense.”

There is nothing to be found in the subsequent decisions of the supreme court of Iowa which changes the general principles laid down in *Lampson v. Arnold*. The point of inquiry is whether, in legal intendment, the instrument of conveyance is to be held to be merely a transfer of property in payment or security, or to be a deed of general assignment. In determining this question, the form of the conveyance has great and controlling weight, although it will be read in the light thrown upon it by the accompanying circumstances and acts of the parties thereto. Thus, if the instrument conveys the property of the debtor absolutely, without a defeasance or right of redemption expressed or implied, it will be construed to be a deed of assignment; but, if the form of the instrument is such that there is reserved to the debtor an interest in the prop-

erty or right of redemption, so that, in effect, it only creates a lien on the property as security for the debts named therein, then ordinarily it will be deemed to be a mortgage, or deed of trust in the nature of a mortgage. *King v. Gustafson*, 80 Iowa, 207, 45 N. W. Rep. 565; *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. Rep. 1013.

The instruments executed to J. F. Smith, as trustee, contain a defeasance in express terms, and, under the rule laid down in the authorities just cited, they must be held to be deeds of trust in the nature of mortgages. There is nothing to be found in the acts of the parties or other circumstances which would justify the court in holding them to be, in effect, a deed of general assignment. On the contrary, the acts of the parties interested show that it was not the purpose in executing these mortgages to make thereby a general assignment for the benefit of creditors. It must therefore be held that these instruments are merely mortgages executed for the purpose of securing the debts therein named. This being so, then they are not void because they do not meet the requirements of the statute regulating general assignments in the state of Iowa, nor has there been anything shown in the evidence which would justify the court in holding them void as mortgages as against attaching creditors. It does not appear that there is or will be a surplus left in the hands of the garnishee after paying the debts secured by the mortgages in which he is trustee, and the cost and expenses connected therewith, so that it does not appear that the garnishee is liable for any amount to plaintiff.

It is further claimed on behalf of plaintiff that the garnishee is liable to respond upon the writ of garnishment for the value of certain shares of stock in the Rocky Mountain Smelting Company, it being claimed that these shares of stock were included in the chattel mortgages executed to the garnishee, and that the certificates thereof came into his possession, and that it was his duty to retain the same in his possession, whether included in the mortgages or not, in obedience to the writ of garnishment. It appears from the evidence that the shares of stock in question belonged to the firm of Collier, Robertson & Hambleton, and therefore it may be well said that the terms used in the chattel mortgages are broad enough to include these shares of stock, in that they formed part of the personal property owned by the firm at the date of the execution of the mortgages. It clearly appears, however, from the evidence, that, as between the parties to the mortgages, it was understood that the stock was not to be included therein, and, in pursuance of such understanding, the trustee therein did not assert any claim to the shares of stock, but the same were delivered over to the assignee named in the deed of general assignment executed by the firm some days after the delivery of the chattel mortgages. The court is not now justified in holding that the shares of stock were in fact intended to be included in the mortgages, when the parties in interest therein do not so claim, but in fact aver, by word and deed, that such was not the intent of the parties in executing such instruments.

It is argued, however, that, if this be so, nevertheless the certificates of stock, being in the safe belonging to the firm, passed into the possession of the garnishee, when he took possession of the store and contents under the mortgages, and that, when the writ of garnishment was served upon him, he should have retained in his possession the certificates of stock, instead of permitting the delivery thereof to J. W. Summers, the assignee named in the deed of general assignment. By the service of this writ of garnishment, the plaintiff did not obtain or create a lien upon the shares of stock in question. If the garnishee had retained in his possession these certificates, that would not have prevented the transfer of the title in the shares to the assignee. The deed of general assignment conveyed all the property of the assignors not exempt from execution; and the mere fact that the certificates evidencing their right to the stock were at the time in the safe, which was in the possession of the garnishee, would not defeat the transfer of the title to the assignee. Code Iowa, § 2967, provides a method by which stock in a company may be attached by giving notice to the president, secretary, or other managing officers of the company of the fact of the attachment; and in the case of *Mooar v. Walker*, 46 Iowa, 164, the supreme court of the state expressly hold that, "in order to obtain a lien on stock in an incorporated company, and prevent a valid transfer of the same, the creditor must follow the mode pointed out in the third subdivision of said section 2967," etc. As the plaintiff did not follow the mode thus provided for, he obtained no lien by service of the writ of garnishment which would prevent a valid transfer of the shares of stock, and hence the general deed of assignment conveyed the title thereof to the assignee. Under these circumstances, the plaintiff has no claim against the garnishee by reason of the delivery of the certificates to the assignee. It not appearing, therefore, that any ground exists for holding the garnishee liable for any sum to plaintiff, the garnishee is entitled to be discharged, and to judgment for costs against the plaintiff.

UNITED STATES v. SIMMONS.

(Circuit Court, S. D. New York. September 1, 1891.)

BAIL—INDEMNIFIED SURETIES.

A bail-bond, pending appeal from a conviction in a criminal case, should not be accepted where the sureties thereon have indemnified themselves by taking bonds from the accused and others; and the fact that such bonds are against public policy, and could not be collected, is immaterial.

At Law. Indictment of James A. Simmons for embezzlement.

John J. Joyce, for defendant.

Edward Mitchell, U. S. Dist. Atty., and *Maxwell Evarts*, Asst. U. S. Dist. Atty.

BENEDICT, J. The above defendant, having been convicted of aiding and abetting Peter J. Classen, president of the Sixth National Bank, in embezzling the funds of that institution to a large amount, was on the 26th day of June, 1891, sentenced to be imprisoned for a term of six years. Thereupon, by virtue of the recent statute providing for appeals to the circuit court of the United States in criminal cases, the accused sued out a writ of error from the supreme court of the United States, and upon such writ obtained a *supersedeas* and stay of execution pending his appeal. Afterwards an order was made admitting him to bail in the sum of \$50,000, and now, on the 25th day of August, he presents for approval as his bail, pending his appeal to the supreme court of the United States, the following named persons: Cornelius H. Tallman and Jacob B. Tallman. The district attorney objects to the acceptance of the above persons as bail for the accused, upon the ground that it appears by an examination of the proposed bail that by an instrument in writing signed by the defendant, and also by Siegmund T. Meyer, Aaron Raymond, Kaufman Simon, and Helen E. Howell, the persons proposed as bail have been indemnified against any loss or damage by reason of their becoming bail for the accused in case he fails to appear to undergo his sentence in the event of his appeal being unsuccessful. The precise question thus presented is new in this court. It is said to have been decided elsewhere in accordance with the contention of the district attorney, but I have not been able to find the point adjudged in any reported case. Contracts indemnifying bail in criminal cases have, however, on more than one occasion, been before the courts, and by the courts they have been declared to be illegal and against public policy. *Herman v. Jeuchner*, 15 Q. B. Div. 561, was an action to recover back bail money deposited with the bail to indemnify the bail against loss by reason of having signed a bail-bond for the good behavior of the plaintiff. The court refused to permit a recovery; and, speaking of the contract of indemnity, BRETT, J., says:

"It is illegal, because it takes away the protection which the law affords for securing the good behavior of the plaintiff. When a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound at his peril to see that his principal obeys the order of the court,—at least, this is the rule in the criminal law; but, if money to the amount for which the surety is bound is deposited with him as indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognizance is performed."

In *Jones v. Orchard*, 16 C. B. 614, MAULE, J., says:

"The public has a right that the bail should be persons of ability and vigilance sufficient to secure the appearance, and prevent the absconding, of the delinquent."

In *U. S. v. Ryder*, 110 U. S. 729, 4 Sup. Ct. Rep. 196, where it was held that the sureties on a recognizance given to the United States are not entitled on a forfeiture thereof, and, upon payment of the amount secured, to be subrogated to the rights and remedies of the United States against the principal, the doctrine that a contract to indemnify bail is

contrary to public policy is approved by the supreme court of the United States; and it is said to permit sureties to be subrogated would be to aid the bail to get rid of their obligation, and to "relieve them of the motives to exert themselves in securing the appearance of the principal." In none of these cases was the precise question under consideration decided, but the reasons given for the decisions referred to are equally valid reasons for a decision in this case that persons indemnified by the accused ought not to be accepted as bail for the accused after conviction; for if, as these cases hold, the contract to indemnify bail in a criminal case is against public policy, it follows as a matter of course that no court can be asked to approve and give effect to such a contract by accepting persons who propose themselves as bail in pursuance of such a contract. The cases that I have referred to seem to me, therefore, to furnish authority for a decision adverse to the approval of the sureties presented by the accused.

Upon principle, also, the approval of indemnified persons as bail in a case like this should not be granted. Were it not for rule 36 of the supreme court of the United States, it might well be argued that no bail should be accepted from a person already convicted under sentence to be imprisoned for a term of six years. But assuming, as must be assumed, that, by virtue of the rule referred to, the accused is entitled to be admitted to bail, it is nevertheless the duty of the court to exercise extreme caution, both as to the amount of the bail and the persons proposed as sureties, because of the extraordinary temptation to flee that will be presented to the accused in the event of his appeal proving unsuccessful, when flight alone will save him from incarceration in the penitentiary for a term of six years. Surely it would show a lack of caution to accept as bail, under such circumstances, persons who have taken from the accused a bond of indemnity, whereby, so far as within their power, they have relieved themselves from all responsibility for the accused. Bail, when accepted in criminal cases, become in law the custodians of the prisoner for the court. They have the right and are charged with the duty to arrest the prisoner in case he contemplates flight. The court looks to their vigilance to secure the attendance and prevent the absconding of the delinquent. The object of accepting them as bail is not to enable the prisoner to escape punishment by paying money to his bail, but to secure his appearance at the proper time, in order that he may receive punishment. When persons offering themselves as bail have entered into a contract of indemnity with the accused, they have endeavored to relieve themselves of responsibility for him. It is true that the contract of indemnity which they have secured will not be enforced by the courts, but nevertheless they have made themselves parties to such a contract, they stand before the court relying upon the performance of the contract of indemnity by the defendant, and by taking such a contract they have disclosed an intention to avoid, so far as in them lies, any pecuniary loss on their part, in case the accused should flee, and to deprive themselves of any motive for vigilance to prevent his flight. The possibility of flight by the defendant has been a subject of contem-

plation by them, and they have done all that they can do to enable him to flee without notice to them, and to relieve him from all sense of obligation towards them, to avoid making them responsible upon their recognizance. Not only have they contemplated the possibility of flight by the prisoner, but they have also contemplated a defense on their part to an action by them on the recognizance; for, while the amount of their proposed obligation as bail is \$50,000, they have taken a bond of indemnity, signed by the accused and by four other persons, each bond in the sum of \$50,000, which bond in terms provided for their costs and counsel fees. It seems to me entirely plain that it is my duty to decline to accept a bail so situated in a case like this.

In re LAU OW BEW.¹

(Circuit Court, N. D. California. September 14, 1891.)

CHINESE RESTRICTION ACT—MERCHANT'S CERTIFICATE OF IDENTITY.

Under the act of congress of 1882 as amended by that of July 5, 1884, providing that Chinese persons other than laborers, who are about coming to this country, must procure from the government which they are about leaving a certificate of their occupation, all Chinese merchants, whether coming for the first time, or having before lived here and returning after a temporary absence, must, before they can be admitted, procure such certificate.

(Syllabus by the Court.)

Application for Writ of *Habeas Corpus*.

Harvey S. Brown and Thos. D. Riordan, for petitioner.

Chas. A. Garter, U. S. Atty., for intervener.

BEATTY, J. The petitioner is a subject of the empire of China, whence he arrived at the port of San Francisco on the 11th day of August, 1891. The master of the vessel on which he sailed having refused to land him, a writ of *habeas corpus* was issued in his behalf, and in answer thereto it is alleged that the cause of his detention upon such vessel is that he had not procured from the government of China the certificate required by the act of congress. From an agreed statement of facts it appears that the petitioner for the last 17 years has been a merchant and a member of a prominent Chinese mercantile firm of Portland, Or., where he has during that time resided; that on September 30, 1890, he went to China, intending shortly to return to this country and to his business, which he did on said 11th day of August, but without procuring from the Chinese government the certificate required by the act named.

The only question for determination is whether a Chinese person, who has been domiciled in this country as a merchant, and temporarily leaving it, can re-enter without such certificate. In consequence of the indefinite legislation and the incompatible adjudications on this subject, it is not one of easy solution. To briefly review both may not be

¹ For appeal to court of appeals, see 47 Fed. Rep. 641; for certiorari to supreme court, see 12 Sup. Ct. Rep. 43.