appear to be to the contrary. The rights of the plaintiffs as citizens of foreign countries in the courts of the United States are as extensive as those of citizens of the different states in those courts, and equally without the reach of the laws of the states. 24 Stat. 552; 25 Stat. 433.

Demurrer sustained.

HAGENBECK v. HAGENBECK ZOOLOGICAL ARENA CO. et al.

(Circuit Court, N. D. Illinois. December 23, 1893.)

1. EQUITY JURISDICTION—ACCOUNTING.
   Where the complainant claims from the defendant an exact sum of money, and the defendant admits that complainant is entitled to that sum, less only certain unliquidated damages, there is no ground for an accounting.
2. PLEADING—ALLEGATION OF CORPORATE INSOLVENCY.
   An allegation that the assets of a corporation are insufficient to pay all its liabilities, counting its capital stock as a liability of the corporation to its stockholders, is not sufficient to show that the corporation is insolvent.
3. TRUSTS—EQUITY JURISDICTION.
   Complainant agreed to furnish trained wild animals for exhibition by defendant in its arena, complainant to receive each day a certain proportion of gross receipts. *Held*, that defendant's possession of complainant's share of the receipts constituted a trust cognizable in equity.
4. TRUSTS—SUIT TO ENFORCE—RECEIVER.
   In a suit to compel a trustee to account for trust funds, which he should pay over to the beneficiary, and which he retains because of an alleged claim against the beneficiary for breach of contract, it is proper to appoint a receiver to take charge of the fund.

In Equity. On motion for a receiver. Suit by Carl Hagenbeck against the Hagenbeck Zoological Arena Company and others for a receiver and an accounting. Complainant moves for a receiver. Granted.

Vocke & Healy, for complainant.
Moran, Kraus, Mayer & Stein, for defendants.

GROSSCUP, District Judge. This is a motion for the appointment of a receiver. The bill and answer, taken together, show that certain of the defendants, who subsequently incorporated the Hagenbeck Zoological Arena Company, procured a concession from the Columbian Exposition under which, upon payment of 25 per cent. of the gross receipts, they and their successors were permitted to exhibt, on the grounds of the Exposition, a show of trained animals. Subsequently, an agreement was entered into between them and Carl Hagenbeck, a citizen of Prussia, by the terms of which the defendants were to build and maintain, on the grounds of the Exposition, a suitable arena, and conduct and maintain therein a show of wild animals, and the complainant was to bring to the Exposition his trained animals, and supervise them while here, for which he was to receive, after payment of the stipulated amount to the Exposition Company, one-half of the remaining gross receipts of the show, the balance to be retained by the defendants. In accordance with this agreement, the particular terms of which

are not specially important in this connection, Hagenbeck brought over his trained animals, and installed them in the arena provided by the Hagenbeck Zoological Arena Company. The show was conducted substantially as provided in the contract throughout the summer, and the defendants continued to turn over to the Exposition Company and Hagenbeck the stipulated gross receipts, until the early part of October, 1893, when, upon the pretext that the complainant had not complied fully with the terms of his agreement, the further turning over of the receipts was stopped. Thereafter there accumulated in the treasury of the company a large amount of money, which, under the terms of the contract, would have gone to the complainant, but was withheld, as the defendants say, to recoup them for damages growing out of the complainant's alleged failure to fully perform his contract. These alleged breaches are specifically set up in the bill and answers, together with other breaches alleged by the complainant to have been made by the defendants.

It is apparent from both the bill and answer that, independently of these claims for damages, there is no necessity for an accounting between the parties. The bill shows, and the answer admits, the exact amount of the gross receipts for the period covered, and there is no denial that, subject to the amount paid the Exposition Company, one-half of these are properly coming to the complainant, but for the damages arising from the breaches set forth. These damages are, however, unliquidated, and are in no sense the subject-matter of an accounting proper.

Neither is there, in my opinion, any showing that the corporation is insolvent. Some pretense is made that its assets will not be sufficient to meet its liabilities, including the alleged liability to its stockholders for the return of their subscriptions; but the credit of a stockholder, based upon his subscription, is not to be taken into account in determining the solvency of the corporation.

I am not able to find, upon the facts submitted in the bill and answer, that any partnership existed between the complainant and the defendants. What their liability in that respect to third parties would have been is of no consequence in this case. The evidence does not disclose that, as between themselves, there was any intention to create a partnership, or assume the obligations of such a relation.

The remaining and principal question is whether, under the relation existing, the defendants, from time to time, held one-half of the gross receipts of the show, less 25 per cent., in trust for the complainant, and, if so, what was the nature of the trust. It is plain that, unless the relation is one of essential trust, as distinguished from a quasi trust, or a relation in the nature of a trust only, equity will take no jurisdiction over the subject-matter. A long line of cases has been cited by counsel on either side illustrative of what character of a trust courts of equity will specifically enforce. It is not necessary to review these cases. The test or rule applicable to the case at bar is sufficiently disclosed by a com-

parison of two distinct classes of these cases. It is admitted, for instance, that the intrusting of money to an agent, for a specific purpose, creates a trust in favor of the principal, which will be enforced in a court of equity. On the other hand, the loaning of money upon a promise to repay, though creating a quasi trust between the borrower and lender, does not constitute such a relation as is cognizable in equity. It will be observed that, in the first case, the agent acquires no title in the money possessed, and no right of possession, except for the specific purpose named; while, in the second, a right of possession goes along with the funds, and the lender relies upon a promise, and not upon the thing in specie.

If it were the intention of the parties to this contract that one-half of the remaining gross receipts, after the payment of the sum due the Exposition Company, should belong in specie to the complainant, and should be in the custody of the defendants simply for transmission to the complainant, there would, in my opinion, be created essentially and technically a trust in that fund. If, on the other hand, the complainant had simply the promise of the defendants to pay him each day, for the use of his animals, and the supervision thereof, a sum of money equal to one-half the remaining gross receipts, such would create, at most, only a quasi trust. The contract and its surroundings do not leave this question free from doubt, but, it seems to me, the parties could not have intended that complainant should rely upon a promise only. It is significant that he was not to receive his money at stated intervals of a week or a month, but at the close of each day, and as soon as the gross receipts could be ascertained. This discloses a probable purpose to have his proportion of the gross receipts in specie,—to have, in short, one-half the actual remaining gross receipts, and not merely their equivalent in money.

The show was the joint production of both parties. The plaintiff contributed the animals, and gave to it his personal supervision. The defendants contributed the buildings and necessary equipments, and the personal force needed for performance and maintenance, and the gross receipts were to be divided, practically, at the close of the day's exhibition. The arrangement was essentially the same as if two money takers had been in the box office, and the receipts divided as they came in,—one-fourth to the Exposition Company, and the remainder in halves to the two parties. The defendant and its agents were, in my judgment, simply the custodian of these receipts until the close of the day's exhibition, and had no right of property or possession in them, other than to turn them over to the complainant the moment the convenience of the arrangement permitted. Suppose that a portion of these receipts had been in gold, and the balance in silver, and a premium on the first had appeared during the course of the summer, would it be claimed that the defendants could retain the gold receipts, and turn over to the complainant nothing but the depreciated silver? Such would be their right if their obligation was, not to divide the actual receipts, but to pay only in legal tender one-half the amount of the

receipts. Or, suppose that the agents, at the close of the day's exhibition, and before the division was made, had been overpowered by robbers, or had been overtaken by a fire, which consumed the paper receipts, neither the crime nor the casualty resulting in any degree from their fault, could the complainant, under a fair interpretation of the spirit of the arrangement, have still insisted upon an amount of money equal to one-half of the receipts thus lost or stolen? Such would have been his legal right if the contention of the defendants can be maintained. In my judgment the parties did not intend any such results. Taking this view of the meaning of the parties as expressed in this contract, I am of the opinion that one-half of each day's receipts, after the payment of the Exposition Company, was held in trust for the complainant, and that the defendants, in refusing to transmit to the complainant, at the close of each day, were guilty of a wrongful breach of trust, for which a remedy exists in a court of equity.

The appointment of a receiver is ancillary to this jurisdiction, but seems to me to be essential to a fair enforcement of the complainant's rights. It is true that a court of equity will not appoint a receiver in every case of trust of which it takes jurisdiction, but this case appears to me to be one in which the appointment should be made. The defendants have no right, in law, to arbitrarily seize upon that which belongs to another, even to secure a liquidation of their supposed damages. It does not seem to me that the cause for damages made out by the defendants is strong enough upon the bill and answer to justify the court in depriving the complainant of his prayer for a receiver. The defendants, according to the facts set forth in the bill and answer, did not make any claim for damages until near the termination of the Exposition. So long a delay may not defeat their right now, but certainly does not recommend their cause to the court. The presumption arising from it is that the injury could not have been greatly felt, or some complaint would have been made earlier during the association of the parties. Unless a cause for damages stronger than appears in the mere allegations of these papers existed, the defendants were not justified in withholding the money that belonged to the complainant. The case made out, therefore, is one where the defendants, so far as the court can judge now, wrongfully withhold a trust fund.

The motion for a receiver will therefore be granted.

SOUTHERN PAC. R. CO. v. TEMPLE et al.

(Circuit Court, S. D. California. December 19, 1893.)

No. 169.

EQUITY PRACTICE—DECREE PRO CONFESSO—NOTICE.

A defendant who has appeared by solicitor is entitled to notice of an application for a decree, after entry of an order pro confesso, for the purpose of being heard upon the form and extent of the decree. Thomson v. Wooster, 5 Sup. Ct. 788, 114 U. S. 104, applied.

In Equity. Bill by the Southern Pacific Railroad Company against F. P. F. Temple and others. On motion to vacate a decree pro confesso. Granted.

J. D. Redding and Creed Haymond, for complainant.
J. B. Dunlap, for defendants.

ROSS, District Judge. This suit was brought to obtain certain relief in respect to lands. All of the defendants except F. P. F. Temple and Richard Garvey, as to whom the suit was subsequently dismissed, appeared by their solicitor, who filed, on their behalf, a demurrer to the bill. The demurrer was by the court overruled on February 8, 1892, with leave to the defendants to answer within the usual time. No answer or other pleading having been filed by the defendants within such time, their default was, on application of the complainant, duly entered on April 25, 1892, and an order entered in the order book that the complainant's bill of complaint be taken pro confesso as against the defendants in default. Subsequently, to wit, on September 14, 1892, upon the application of complainant, the court entered thereon a decree pro confesso. Of the application for the decree, no notice was given to the defendants or their solicitor. And now, upon affidavits setting forth that the defendants have, and at all times have had, a meritorious defense to the suit, and setting forth that neither they nor their solicitor ever had any notice of the overruling of their demurrer to the bill, or of the entry of the order pro confesso, or of the application of the complainant for the decree pro confesso, they ask that the decree and default be vacated, and that they be permitted to answer to the merits.

By the equity rules, said the supreme court in Thomson v. Wooster, 114 U. S. 104, 5 Sup. Ct. 788—

"A decree pro confesso may be had if the defendant, on being served with process, fails to appear within the time required; or if, having appeared, he fails to plead, demur, or answer to the bill within the time limited for that purpose; or if he fails to answer after a former plea, demurrer, or answer is overruled or declared insufficient. The twelfth rule in equity prescribes the time when the subpoena shall be made returnable, and directs that 'at the bottom of the subpoena shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise, the bill may be taken pro confesso.' The eighteenth rule requires the defendant to file his plea, demurrer, or answer (unless he gets an enlargement of the time) on the rule day next succeeding that of entering his appearance; and in default thereof the plaintiff may, at his election, enter an order (as of course) in the order book that the bill be taken pro confesso, and thereupon the cause shall be proceeded in ex parte, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, etc. And the nineteenth rule declares that the decree rendered upon a bill taken pro confesso shall be deemed absolute, unless the court shall at the same term set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of the defendant.

"It is thus seen that, by our practice, a decree pro confesso is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it; but that it is made (or should be made) by the court, according to what is proper to be decreed upon the statements of the bill, assumed to be true. This gives it the greater solemnity, and accords with the English practice, as well as that of New York. Chancellor Kent, quoting Lord Eldon, says: 'Where the bill is thus taken pro confesso, and the cause is set down for hearing, the course (says Lord Eldon, in Geary v. Sheridan, 8 Ves. 192) is for the court to hear the pleadings, and itself to pronounce the decree, and not to permit the plaintiff to take, at his own discretion, such a decree as he could abide by, as in the case of default by the defendant at the hearing.' Rose v. Woodruff, 4 Johns. Ch. 547, 548. Our rules do not require the cause to be set down for hearing at a regular term, but, after the entry of the order to take the bill pro confesso, the eighteenth rule declares that thereupon the cause shall be proceeded in ex parte, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from the entry of such order, if it can be done without answer, and is proper to be decreed. This language shows that the matter of the bill ought at least to be opened and explained to the court when the decree is applied for, so that the court may see that the decree is a proper one. The binding character of the decree, as declared in rule 19, renders it proper that this degree of precaution should be taken."

This being so, it results, I think, that the defendant who has appeared by his solicitor to the bill is entitled to notice of the application for a decree pro confesso. In Thomson v. Wooster, supra, such notice was given; and in Bennett v. Hoefner, 17 Blatchf. 341, it was held that a party who has appeared by a solicitor is of right entitled to notice of application for a decree after an order pro confesso, and has the right to be heard as to the form of the decree, and upon such other questions as can be presented upon the complainant's pleadings and proof; this, obviously, to the end that the decree be not allowed to go beyond the case made by the bill, and such proofs as the complainant may make.

It results that the decree must be vacated. I am further of opinion, in view of the affidavits, that the ends of justice will be best attained by setting aside the default, and permitting an answer to be filed, so that the cause may be determined on its merits. An order to that effect will be entered.

OCONTO WATER CO. v. NATIONAL FOUNDRY & PIPE WORKS, Limited.

(Circuit Court of Appeals, Seventh Circuit. November 7, 1893.)

No. 91.

1. MECHANIC'S LIEN—PROPERTY SUBJECT TO—WATER COMPANIES.
   Rev. St. Wis. § 3314, which provides that, in case any person shall purchase machinery to be placed on premises in which the purchaser has not an interest sufficient for a lien, the person furnishing the machinery shall have a lien on it, and a right to remove it, does not apply to the pipes of a water company, laid through the streets of a town, and connected with the pumping works of the company. The plant of the company is an integer, and cannot be separated under a lien.

2. SAME.
   The public policy of Wisconsin is independent of that of other states, and under it the property of quasi public corporations is subject to the