

worth several hundred dollars more than the contract price which the vendees paid for them, and they could have lost nothing by taking them. If the company had received payment for the 282 cattle that were rejected, there might have been some ground for the claim of waiver here. Nor is it easy to see how the statement that the vendees might come at some future day for more cattle, or any action the vendor took to gather and ship them, could work a waiver, when the cattle company notified the vendees, before they started to come for these cattle, that they need not do so, and that it would deliver no more cattle to them under this contract. There seems to be nothing in all this that could have induced the vendees to act or omit to act to their prejudice. We have grave doubts whether the evidence in this case is sufficient to sustain a verdict of a waiver of this breach by the cattle company if it were rendered. But it is unnecessary to determine that question here. That question, and the question whether or not the vendees committed the breach in good faith, in the belief that the rejected steers did not comply with the requirements of the contract, were submitted to the jury under instructions to the effect that, if they answered either in the affirmative, the vendees could recover, although they did commit the first breach of the contract. The verdict shows that the jury found that the vendees committed the first breach, and that they must have answered one of these two questions in the affirmative. But it does not show which one. Such a verdict cannot be upheld where there is more than one issue tried, and upon any one of them error is committed in the admission or rejection of evidence, or in the charge of the court, because it may be that the jury founded their verdict upon the very issue to which the erroneous ruling related, and that they were controlled in their finding by that ruling. *Coal Co. v. Johnson*, 6 C. C. A. 148, 56 Fed. 810; *State of Maryland v. Baldwin*, 112 U. S. 490, 492, 5 Sup. Ct. 278.

There are other questions discussed in the briefs, but, as the case must be retried, and these questions may not arise upon a second trial, it is unnecessary now to notice them. The judgment is accordingly reversed, with costs, and the cause remanded, with directions to grant a new trial.

BELT et al. v. ROBINSON.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1894.)

No. 411.

ASSIGNMENT FOR BENEFIT OF CREDITORS — RESERVATIONS — MISTAKE OF ASSIGNOR.

The reservation, by the assignor in a general assignment, to himself, as exempt, by mistake, of property which he does not own or control, does not make the assignment partial, if it in fact conveys, regardless of such reservation, all the property of the debtor not exempt from execution sale; and the assignee may plead and prove the ownership of the property described in the assignment, to establish this fact, and to maintain his right to the property assigned.

In Error to the United States Court in the Indian Territory.

This was an action by J. M. Robinson, doing business as J. M. Robinson & Co., against J. C. Belt, in which an attachment against defendant's property was issued. C. M. King filed an interplea claiming property on which the attachment had been levied. A demurrer to the interplea was sustained, and judgment for plaintiff, as against the intervener, was rendered thereon. The defendant and the intervener brought error.

For report of a former decision, dismissing a writ of error sued out to review the ruling on demurrer before judgment thereon, see 5 C. C. A. 521, 56 Fed. 328.

J. C. Hodges, A. J. Nichols, W. H. H. Clayton, James Brizzolara, J. B. Forrester, and J. H. Koogler, for plaintiffs in error.

W. T. Hutchings (N. B. Maxey and C. L. Jackson, on the brief), for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. December 30, 1891, the defendant in error, J. M. Robinson, commenced an action against his debtor, J. C. Belt, and attached, as his, a stock of general merchandise at Eufaula, in the Indian Territory. Thereupon, pursuant to the practice which prevails in that territory (Mansf. Dig. Ark. §§ 356, 358; 26 Stat. 81, 94, c. 182, § 31), the plaintiff in error, C. M. King, filed an interplea, in which he set out a general assignment to him by Mr. Belt for the benefit of his creditors, dated December 29, 1891, and claimed to be the owner of the attached property as such assignee. A demurrer to this interplea was sustained, and judgment rendered for the defendant in error on the issue between him and the interpleader.

The only substantial ground on which the counsel for the defendant in error claims that this judgment can be sustained is that the assignor reserved to himself, in the assignment, certain household furniture situated in Eufaula, in the Indian Territory, and a pair of mares, a buggy, and a harness, as exempt from forced sale under execution, when none of this property was in fact legally exempt.

This is a preferential assignment, which exacts releases from the creditors as a condition for participating in the preferences; and it is conceded that if it is partial—if it does not convey all the debtor's property not exempt from sale under execution—it is void, and the judgment is right. But the questions whether or not, under a correct construction of the assignment, the assignor did absolutely reserve this property to himself, and whether or not it was legally exempt if he did do it, are zealously contested and exhaustively discussed in the briefs. Upon an examination of the record, however, we find that the interplea does not necessarily present these questions. The assignee there avers that the furniture at Eufaula, and the mares, buggy, and harness, were not, when the assignment was made, and never had been, the property of the assignor, Belt, and that the description of them was written into the

reservation of exempt property in the assignment by mistake. The demurrer admits the truth of this averment, and it is a complete answer to the charge that the assignment was partial because the assignor reserved this property. An assignment that conveys all the debtor's property is not a partial assignment; and one that conveys all his property, and then by mistake reserves or exempts from the conveyance the property of another, that the assignor could not in any way convey, none the less conveys his entire property, and cannot be obnoxious to the objection that it is a partial assignment.

There is nothing in the proposition maintained by *Flower v. Cornish*, 25 Minn. 473; *Clapp v. Nordmeyer*, 25 Fed. 72; and *Rice v. Frayser*, 24 Fed. 464,—that an assignee is not vested with the rights of creditors to attack fraudulent conveyances, and that he is not a bona fide purchaser for value,—to estop this assignee from pleading and proving the fact to which we have referred, to sustain his right under this assignment. He is not thereby attacking, but is sustaining, the assignment. He is not thereby attempting to prove any act or conveyance of his assignor fraudulent, but that this assignment was valid and honest. He is not attempting to contradict or vary any of the terms of the assignment, but to prove by evidence aliunde that one portion of a clause was inoperative because the property it described was not owned by the assignor.

The result is that the reservation to himself, as exempt, of property which he does not own or control, by the mistake of an assignor in a general assignment, does not make the assignment partial, if it in fact conveys, regardless of such reservation, all the property of the debtor not exempt from execution sale; and the assignee may plead and prove the ownership of the property described in the assignment to establish this fact, and to maintain his right to the property assigned.

The suggestion that the allegations of the interplea are insufficient to show that the four lots in Ft. Smith, Ark., claimed as a homestead, were exempt, because there is no averment that Mr. Belt ever occupied or intended to occupy that property as a home residence, is unworthy of serious consideration. Some of the allegations of the interplea are that Mr. Belt, at the time he made the deed of assignment, was the head of a family, and a bona fide resident citizen of the state of Arkansas, and that he was holding and occupying these lots, comprising less than one acre of land, as a homestead for himself, wife, and minor child. These allegations were surely ample. Mansf. Dig. §§ 3006-3013, inclusive.

In our opinion the interplea stated a good cause of action for the recovery of the attached property, and the demurrer should have been overruled. The judgment is accordingly reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

KENTUCKY LIFE & ACC. INS. CO. v. HAMILTON.¹

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

No. 134.

1. REVIEW—SPECIAL FINDINGS BY COURT—OPINION.

The recital in a judgment entry that the court delivered an opinion, and made a finding of all the issues in favor of plaintiff, does not make the opinion a part of the record and a special finding of facts, within Rev. St. § 700, providing that when an issue of fact is tried by the court, and its finding is special, the sufficiency of the facts found may be reviewed.

2. SAME.

An opinion which, so far as it deals with the facts, is a mere statement of part of the evidence, referred to and commented on for the purpose of supporting the judgment, and not the conclusion of court as to facts from the evidence, is not a special finding, within the statute.

3. SAME—BILL OF EXCEPTIONS.

A bill of exceptions embodying the evidence is not a special finding allowing review of the sufficiency of the facts.

On Rehearing.

4. SAME—AGREED STATEMENT.

An agreed statement of facts, on which judgment is rendered, consisting not of the ultimate facts, but of the evidence to be submitted to the court on the issues presented by the pleadings, is not the equivalent of a special finding of the facts, allowing review of their sufficiency.

5. SAME—STATE AND FEDERAL PRACTICE.

Rev. St. § 914, requiring the practice and pleadings in law cases in federal courts to conform to those of the state courts, does not apply to appellate proceedings, so as to require a determination on the merits on a record which would permit it in the appellate court of the state.

6. SAME—SUFFICIENCY OF PLEADING—QUESTION NOT RAISED BELOW.

The sufficiency of the pleadings to warrant a judgment may be passed on in the appellate court, though the question was not raised in the lower court.

7. LIFE INSURANCE—CONDITIONS OF POLICY.

A condition on the back of a life policy, under the title "Assignments," providing that it shall not be assigned without notice, "nor unless a claim hereunder made by assignee be subject to proof of interest, nor unless the amount recoverable hereunder by such assignee, an insurable interest, existing at the time of the assignment or transfer must be shown by all claimants at the time of claim hereunder; and claims by any creditors as beneficiary or assignee shall not exceed the amount of the actual bona fide indebtedness of the member to him existing at the time of said death," and the policy, as to amounts in excess thereof, shall be void, except the assignee be wife, child, parent, brother, or sister of the insured,—applies only to assignees, and, even if it did refer to original beneficiaries, would apply only to one made a beneficiary as a creditor, and not to one who subsequently became a creditor.

8. SAME—BENEFICIARY—INSURABLE INTEREST.

One not the wife, child, parent, brother, sister, or creditor of insured may have an insurable interest in his life.

9. SAME—PLEADINGS—SUFFICIENCY AFTER VERDICT.

An allegation by plaintiff that the policy in suit was not speculative, without affirmatively setting out an insurable interest, is sufficient, after verdict, on motion in arrest, and therefore on writ of error.

Appeal from the Circuit Court of the United States for the District of Kentucky.

¹ Rehearing denied.