Upon the cross bill, which shows that the complainants, or some of them, had procured an illegal sale, and had become purchasers of the stock pledged to Ream, West was entitled to have the illegality of the sale declared.

The decree below is therefore reversed, and the cause remanded for reference, on the proofs in the record, to a master, who shall report his conclusions of fact and law upon the several matters in dispute.

DIETZ v. LYMER.

(Circuit Court of Appeals, Eighth Circuit. September 24, 1894.)

No. 351.

APPEAL—TRIAL BY REFERENCE.

An oral consent in open court to an order of reference, made pursuant to a state statute (Code Civ. Proc. Neb. § 298) will not enable the circuit court of appeals (eighth circuit) to review the action of the circuit court on exceptions to the referee's report, where there was no bill of exceptions making that report, or the evidence upon which it was founded, a part of the record. Dietz v. Lymer, 10 C. C. A. 71, 61 Fed. 792, affirmed.

On Rehearing.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. As will appear from our previous opinion in this case (10 C. C. A. 71, 61 Fed. 793, 795), we predicated our ruling that the record presented no questions which could be reviewed by this court on the ground that there was no written stipulation waiving a jury and no bill of exceptions found in the record. The petition for a rehearing does not challenge the facts last stated, on which our previous ruling was predicated. On the contrary, it is inferentially admitted that there was no written stipulation waiving a jury, and that the order of reference was made pursuant to a statute of Nebraska in obedience to an oral consent expressed in open court, that the case might be sent to a referee for trial. Such oral consent, it is said, enables this court to review the action of the circuit court on the exceptions to the referee's report, although there was no bill of exceptions making that report, or the evidence upon which it was founded, a part of the record. We cannot assent to this view under existing decisions.

In Boogher v. Insurance Co., 103 U. S. 90, 95, Mr. Chief Justice Waite intimated a serious doubt, for reasons therein fully stated, whether cases tried before a referee pursuant to state laws can be reviewed in the federal appellate courts under existing acts of congress. That doubt was left unresolved, but it was held that such cases cannot be reviewed on writ of error unless a jury is waived in the mode provided by the act of 1865 (chapter 86, § 4, 13 Stat. 501, now sections 649, 700, Rev. St.); that is to say, by a written stipulation signed by the parties. In that case it was decided that the record sufficiently showed that a written stipulation of the parties waiving a jury had been filed, because, in the state of Missouri, where

that suit originated, a reference could not be ordered without the written consent of the parties to the action. It was therefore assumed by the court that such written consent as the state statute required had been filed in that case. But in a later case, to which we particularly referred in our previous decision (Investment Co. v. Hughes, 124 U. S. 157, 8 Sup. Ct. 377), it affirmatively appeared that no written consent to a reference had been filed, and for that reason it was held that the case differed materially from Boogher v. Insurance Co., and that it could not be reviewed on writ of error. The record in the case at bar, as heretofore stated, shows that the consent to the order of reference was given orally in open court, and that there was in fact no written stipulation waiving a jury, such as the act of congress requires to render a case reviewable on writ of error when the parties dispense with a jury. It is therefore governed by the ruling made in Investment Co. v. Hughes, as well as by the decision in Boogher v. Insurance Co., supra; wherefore the petition for a rehearing must be, and it is hereby, denied.

WILE et al. v. COHN (FARMERS' STATE BANK OF CHARTER OAK, IOWA, Garnishee).

(Circuit Court, S. D. Iowa, W. D. September 17, 1894.)

1. PROCESS—WHAT CONSTITUTES—NOTICE OF GARNISHMENT.

   Rev. St. § 915, gives plaintiff, in common-law causes in the United States circuit court, remedies by attachment or other process against defendant's property, similar to those provided by the state statutes. Code Iowa, § 2962, provides that the clerk shall issue the writ of attachment. Section 2967 provides that property of defendant held by a third person may be attached by giving the latter notice of attachment. Section 2975, as amended by Laws 18th Gen. Assem. c. 58, provides that garnishment is effected by informing the supposed debtor that he is attached as garnishee, and leaving written notice not to pay any sum due, or deliver the property, to defendant, etc. There is no provision in the Revised Statutes or Iowa Code requiring either of such notices to proceed from the clerk. *Held*, that a notice to the garnishee is not a "process," within Rev. St. § 911, relating to process, and that such notice in actions in the United States circuit court in Iowa is properly signed by the marshal, and need not bear the seal of such court or the teste of the chief justice of the United States.

2. GARNISHMENT IN STATE COURT—VALIDITY.

   Where, in an action pending in a United States court in Iowa, it appeared that in certain actions, aided by live writs of attachment, lately pending in an Iowa state court, the main defendant had been duly notified of pendency of such actions, and also of garnishment proceedings thereunder, and judgments had been rendered against him therein, and that the garnishee had appeared in such actions, and filed his answers therein, submitting himself and the goods in his hands to the jurisdiction of the Iowa court, and judgments were rendered, according to the form of the Iowa statutes, against said garnishee, and condemning to sale property in his hands as belonging to such main defendant, *held*, that irregularities in the garnishment notice served on the garnishee do not affect the validity of the judgments thus rendered against him.

3. SAME.

   In garnishment in a United States court in Iowa, against a bank of which J. was cashier, it appeared that J. took possession of defendant's (mortgagor's) stock of goods under a mortgage to the bank, and sold