against the plaintiffs, unless they can show, under this writ of error, that there was error in some ruling during the trial of that issue. The opinion filed by the judge, after the judgment was entered, was a mere statement of his reasons for refusing the twentieth instruction, or for not granting a new trial, or for some other purpose of his own, and is not before us except as an argument in favor of some ruling he has made during the trial, and before the judgment entered. It is not in the bill of exceptions, and it could not be excepted to. The case was a trial by jury, and only what took place before the jury can be examined. If the case was not properly put before the jury or they were misdirected, we must reverse. What can the judge now do if we send the case back? The term at which the judgment was entered is past. He could not grant a new trial, and he could not now put anything more into the bill of exceptions, and we can never look at anything but what is in the pleadings and the bill of exceptions. The defendant, to succeed, was not obliged to show that the plaintiffs were estopped both by the deed and by their acts and declarations; either one was sufficient. If, irrespective of the construction of the deed, the acts of the plaintiffs estopped them, then the defendant had a right to rely on that estoppel in pais; and, if the jury found for the defendant on that issue, it was entitled to judgment without considering the deed. The judge was of this opinion, and, when the jury found the estoppel, he entered judgment on the verdict. If they had found for the plaintiffs on the question of estoppel, he would probably, as appears from his opinion, have not discharged them, but would have instructed them that the deed was itself an estoppel, and directed a verdict for defendant. The judge says he had reserved that question, and it is plain he thought that the only issue submitted to the jury was the estoppel in pais, and that, when the jury found their verdict on the estoppel in pais, he considered that ended the controversy, and afterwards wrote out his views about the proper meaning of the deed, to show that he was right in refusing the plaintiffs' twentieth instruction.

I think the case is properly before us for examination of all the exceptions taken at the trial, and I am obliged to dissent from the opinion of the majority of the court, holding the judgment is not final, or that the record is incomplete, and that the exceptions and assignments of error are not before us for our examination.

DREUTZER v. FRANKFORT LAND CO. et al.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 204.

CIRCUIT COURT OF APPEALS — JURISDICTION — APPEAL FROM ORDER DENYING MOTION TO VACATE INJUNCTION.

The circuit court made an order on January 23d, restraining defendant from prosecuting certain proceedings at law, upon condition that plaintiffs should file a bond to pay any judgment against them in the suit, in which the injunction was granted, such injunction to continue, if the bond was filed until the further order of the court. The bond was filed in due time.

Subsequently, on March 2d, defendant moved to dissolve the injunction, upon the same grounds upon which he had originally opposed it, and the additional ground that the sureties on the bond were insufficient. This motion was denied by an order entered March 9th. An appeal was taken from this order on April 6th. *Held*, that the order of March 9th was not an order granting or continuing an injunction, within section 7 of the act establishing the circuit courts of appeals (11 C. C. A. xv.), and was not appealable.

Appeal from the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

This was a suit by the Frankfort Land Company and Franklin S. Anderson against G. A. Dreutzer for an accounting. An order was made enjoining the defendant from prosecuting certain proceedings at law. A motion by defendant to dissolve the injunction was denied. From the order denying such motion, defendant appeals.

This is an appeal from an order of the circuit court of the United States for the Northern division of the Eastern district of Tennessee denying a motion to dissolve an interlocutory injunction. Appellees have moved to dismiss on the ground that the appeal was taken too late. The motion and the appeal on its merits have been heard together. The bill was filed by citizens of other states than Tennessee against a citizen of that state to compel an accounting by the defendant for moneys alleged to have come into defendant's hands as agent for the corporate complainant in the subdivision, improvement, and sale of a large quantity of land at Frankfort, Tenn. The bill averred that the transactions were numerous between the parties; that equitable aid was necessary to obtain discovery and to prevent a multiplicity of suits concerning many different items; and prayed that the defendant, who had already obtained a judgment at law as to one item in a state court, and had begun in the same court a suit at law with respect to another, might be enjoined from suing out execution on his judgment, or further prosecuting his suit at law, and might be compelled to litigate all matters of controversy in this cause. On the filing of the bill and affidavit, the court made the following order:

"Let an order issue restraining the defendant from collecting the judgment already obtained, or taking further steps in the suit now pending brought by him in the circuit court of Morgan county against the complainant, the Frankfort Land Company, until further order of this court or a judge thereof. Notify the parties or their solicitors to appear at the customhouse at Knoxville, Tenn., on the fourth Monday of January, 1894, and show cause why an injunction may not issue as prayed for.

"This January 9th, 1894. D. M. Key, Judge."

In accordance with this order the cause came on for hearing as to a preliminary injunction on January 23, 1894. The entry in the record recites that the motion was heard on bill and answer and exhibits, and proceeds: "And said motion being fully argued by both sides, and considered by the court, is disallowed and overruled as to the said judgment, but is allowed and sustained as to said pending suit in said circuit court of Morgan county, provided the complainant shall, within three weeks from this date, execute and file with the clerk of this court a good and sufficient bond, with approved securities in the penalty of $3,000, conditioned to abide the judgment of the court in this cause, and to pay whatever sum may by the final judgment and decree of this court be found to be due the respondent, G. A. Dreutzer, with costs. Said restraining order will remain in force from this date during said three weeks' time, and continue in force until the further order of this court, provided said bond is filed within said time, but will stand dissolved without further order at the expiration of three weeks if said bond is not filed." On the 5th day of February, 1894, a bond was accordingly filed by the complainants, with sureties, whose sufficiency was certified to by the county clerk where they lived. On March 2d following, the solicitors for defendant filed the following motion: "Now comes the defendant above named, and

upon the record in the above-entitled cause, and the affidavits of John W. Hall and G. A. Dreutzer and the certificate of Thos. A. Morris, filed herewith, moves the court to dissolve the injunction in this cause upon the grounds: (1) Said injunction was improvidently and erroneously issued, in violation of the statute in such case provided, and is not warranted by the facts alleged in the bill and before the court. (2) There is no equity on the face of the bill. (3) The alleged equities of the bill are fully met and denied by the answer. (4) The bond filed by the complainants upon obtaining said injunction is not in compliance with the order of the court, but is an intentional evasion of said order, and is insufficient under the order of the court, the sureties thereon being insufficient." The affidavits and certificate referred to in the motion concerned only the sufficiency of the sureties on the bond. After notice, the motion was heard by the court on March 9, 1894, and the following order was then made: "In this cause the motion of respondent to dismiss the injunction is denied and overruled, but it is ordered that complainants proceed to take their proof with diligence, or the injunction will be dismissed hereafter. It is further ordered that Lewis Tillman be, and he is, appointed special master for the purpose of stating the full account between the parties. Said Tillman will appoint time and place for hearing proof, and he is authorized to take the same on giving reasonable notice to parties or their solicitors, and will make and file this report as soon as practicable." An appeal from this order was allowed April 6, 1894, and has been duly perfected.

John J. Tracy and John H. Collier, for appellant.
Templeton & Cates, for appellees.

Before TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge (after stating the facts). Section 7 of the act establishing the circuit courts of appeals is as follows:

"That where upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals. Provided, that the appeals must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal." 11 C. C. A. xv.

The section introduced into federal appellate procedure a novelty. Before its enactment, there was no method of reviewing on appeal an interlocutory order or decree of the district or circuit courts. Congress accompanied this remedial provision with the condition that it should be taken advantage of by the aggrieved party within 30 days after it accrued. This condition is to be given effect, and is not to be made nugatory by a construction which would put it in the power of the aggrieved party to extend the limitation indefinitely. It is clear, therefore, that when, after a hearing of both sides, an injunction has been granted by the circuit court to continue in force for a fixed time,—as, for example, until a hearing on the merits,—the enjoined party cannot, after the expiration of 30 days from the order granting the injunction, acquire a new right of appeal by the filing of a motion to dissolve the injunction, and an order of the court denying the motion. Such an order neither grants nor continues the injunction within the meaning of section 7 of the act. Even if no such order is made, the injunction remains in force until the time fixed in the order granting it for its expiration. And the

denial of the motion to dissolve the injunction adds nothing to its force or effect. The question may be more doubtful when the injunction is granted until the further order of the court. It may be argued, with some plausibility, that the form of the order impliedly invites a further test of the validity of the order by a motion to dissolve, but we are not disposed so to construe it when it appears that a full hearing has been had by the court on affidavits and argument. We think that an injunction until the further order of the court granted after full hearing is, in effect, the same as one granted until the case can be heard on its merits, and that a motion to dissolve such an injunction is, in effect, a mere motion to rehear a question already decided. Unless such motion to rehear is made within the time within which an appeal can be taken, we think it should have no effect to enlarge the limitation. It is not at all difficult to satisfy the meaning of the expression, "order continuing an injunction." It generally happens that a preliminary injunction expires at the entry of a decree on the merits. Such a decree may grant a perpetual injunction, and yet, because of an order referring questions of damages to a master, still be only interlocutory in its character, and not reviewable as a final appeal until the coming in of the master's report, and its confirmation by the court. Blount v. Société Anonyme, 6 U. S. App. 335, 53 Fed. 98.[1] Such a decree would be an interlocutory decree continuing an injunction. So, too, a court may, for good reasons, grant an injunction until the next term of the court. An order giving the injunction force thereafter would be an order continuing an injunction, because, without such order, the injunction would stand dissolved by lapse of the time fixed in the original order. Sections 718 and 719 of the Revised Statutes are as follows:

Section 718. "Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge."

Section 719. "Writs of injunction may be granted by any justice of the supreme court in cases where they might be granted by the supreme court, and by any judge of a circuit court in cases where they might be granted by such court. But no justice of the supreme court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the circuit judge of the circuit or the district judge of the district. And an injunction shall not be issued by a district judge, as one of the judges of a circuit court in any case where a party has had a reasonable time to apply to the circuit court for the writ; nor shall any injunction so issued by a district judge continue longer than to the circuit court next ensuing, unless so ordered by the circuit court."

Thus it appears that an injunction granted by a district judge as a member of the circuit court, after a hearing in chambers, will not continue longer than to the next session of the circuit court. If the circuit court continues the force of the injunction, its action is an order or decree continuing an injunction, and an appeal may

[1] 3 C. C. A. 455.

be taken from it within 30 days therefrom. It is not necessary for us to decide whether a restraining order issued ex parte under section 718 to continue in force till the decision on the motion for a preliminary injunction is appealable, though we are inclined to think that it is not, because appeals are permitted only to orders of injunction; and the foregoing sections suggest a statutory terminology in which a temporary restraining order issued ex parte is to be distinguished from an order of injunction, though, of course, their operation and effect are quite the same. More than this, the appeal is allowed from an order granting an injunction "upon a hearing in equity," which would hardly describe an order made on an ex parte application. An order of injunction, issued on a motion after notice, though preceded by a temporary restraining order issued under section 718, would therefore be an order "granting" an injunction, rather than an order continuing it. In the light of the foregoing construction of section 7 of the circuit court of appeals act, we have little difficulty in holding that this appeal was not brought in time. The order granting the injunction was made, after full hearing, on January 23, 1894, and was operative from that date without further action of the court, though it was liable to be defeated in case the complainant should make default in giving the bond required. That order was certainly appealable under section 7. The time within which the appeal could be allowed expired 30 days thereafter. No motion to rehear the issue decided or to dissolve the injunction was made within that time. The injunction was issued on condition of the execution of a bond with approved sureties. The bond was filed February 5th, with a certificate of the sufficiency of the sureties by the clerk and master of the state chancery court of the county where the sureties lived. A motion to dissolve was then filed, March 2, 1894, on the same grounds upon which the granting of the injunction, January 23, 1894, had been resisted, and on the additional ground that the bond filed did not comply with the order of the court, because insufficient. This last ground was addressed to the discretion of the court, and could hardly be the subject of review here. The bond having been held sufficient, the order of injunction must be considered as in effect from the date of the entry, because the condition of its granting had been complied with. The order denying the motion to dissolve did not continue the injunction. Without such ruling by the court, after the filing of the bond, the injunction would have remained in force. The necessity for the ruling of the court arose, not by reason of the order of injunction, but by reason of the motion to dissolve. It follows that the order of March 9, 1894, was not an order continuing an injunction, and that no appeal lay therefrom under the seventh section of the circuit court of appeals act, and that, though the order of January 23d was appealable, the time for allowing the appeal expired more than 30 days before this appeal was allowed. This requires us to dismiss the appeal without considering the assignments of error, and it is so ordered.

UNITED STATES ex rel. MUDSILL MIN. CO. v. SWAN.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 269.

1. JURISDICTION OF UNITED STATES COURTS—POWER OF CIRCUIT COURT OF APPEALS TO ISSUE MANDAMUS TO TAKE JURISDICTION.
   It seems that where a circuit or district court refuses to hear a cause for want of jurisdiction, and the question thus decided may be heard, on certificate, in the supreme court, under section 5 of the act establishing the circuit courts of appeals (11 C. C. A. vii.), it would not be within the power of the circuit court of appeals by mandamus to compel such circuit or district court to take jurisdiction of the cause, but such power is vested in the supreme court whenever remedy by appeal or writ of error or certificate is not adequate.
2. SAME — WHAT QUESTIONS OF JURISDICTION MAY BE CERTIFIED TO SUPREME COURT.
   It seems that the cases in which the question of jurisdiction of the circuit or district courts may be taken by certificate directly to the supreme court, under section 5 of the act establishing the circuit courts of appeals, are those involving the initial questions of the jurisdiction of such courts, whether in law or equity, over the subject-matter and the parties, and not those in which a question arises as to whether a court of law or of equity is the proper forum for the working out of rights properly within the particular federal jurisdiction for adjudication.
3. SAME—EQUITY—GARNISHMENT.
   The statutes of Michigan (2 How. Ann. St. c. 277) provide that, where any sum remains unpaid upon any judgment or decree, if the plaintiff shall file with the clerk an affidavit that any person has money or property of the defendant, and he is justly apprehensive of loss unless a writ of garnishment issue, such a writ shall issue, upon which such person shall be summoned to appear, and make disclosure of any property of the defendant. The proceeding is declared to be one in trover, or for money had and received, against the garnishee, and a jury may be impaneled, and a judgment rendered for or against him. *Held*, that such garnishment proceedings are proceedings at law, and, whether or not they can be entertained by the courts of Michigan on their equity side, the federal courts in equity cannot entertain such proceedings or issue writs of garnishment.
4. REFUSAL TO TAKE JURISDICTION—ADEQUACY OF REMEDY BY APPEAL.
   It seems that an order quashing a writ of garnishment, under the Michigan statute, for want of jurisdiction, and dismissing the garnishee with his costs, is a final order, an appeal from which would furnish an adequate remedy to the party aggrieved, and a mandamus is unnecessary for the purpose.

This is a petition for mandamus against Judge Swan, United States district judge for the Eastern district of Michigan, to compel him, sitting in the circuit court of the United States for that district, in equity, to take jurisdiction of a proceeding in garnishment, under the statutes of Michigan, instituted by the relator, the Mudsill Mining Company, for the purpose of collecting the balance due on a decree entered in that court in favor of the relator for about $150,000. The original suit was brought by the Mudsill Mining Company against Orville A. Watrous and Stewart A. Van Dusen, to set aside the sale of a silver mine, on the ground of fraud, and to recover the purchase price paid. The circuit court dismissed the bill, and the complainant appealed to this court, where the decree of the circuit court was reversed, and the cause was remanded, with instructions to enter a decree against Watrous for the amount of the purchase money received by him and interest, amounting to about $150,000, and a decree for a less sum against Van Dusen. 61 Fed. 163. The mandate of this court was complied with, and a proper decree entered. Shortly after the decree was entered, the attorney for the complainant filed in the circuit court, in the same cause in equity, an affidavit averring that

Willard I. Brotherton, Henry N. Watrous, and Henry W. Jennison, all of Bay City, Mich., had money and property of Orville A. Watrous in their custody, and that he was justly apprehensive of the loss of the amount due on the decree, unless a writ of garnishment should issue to the persons named. The writ was issued on the affidavit by the clerk of the court in equity, and the three garnishees, being served, appeared, and moved to quash the writ on numerous grounds, one of which was that a circuit court of the United States in equity has no jurisdiction to entertain a proceeding in garnishment under the statutes of Michigan. Upon this ground Judge Swan granted the motion, and quashed the writ in the following order (entered November 7, 1894):

"The Mudsill Mining Co. et al., Complainants, vs. Orville A. Watrous and Stewart A. Van Dusen, Principal Defendants, and Willard I. Brotherton, Henry N. Watrous, and Henry W. Jennison, Garnishee Defendants.

"On reading and filing the motion of the said garnishee defendants to quash the writ of garnishment heretofore issued in this cause, and after hearing counsel for both parties, on motion of Chester L. Collins, Esq., of counsel for said garnishee defendants, it is ordered: That the writ of garnishment issued in said cause at the instance of the plaintiffs be, and the same is hereby, quashed, and held for naught. But the effect of this order is hereby suspended, pending a review of the order, until the further order of this court, directing that it become absolute. Henry H. Swan, District Judge."

Thereupon the present petition for mandamus was filed by the Mudsill Mining Company as relator, in which, after setting out the facts as given above, and averring that the order to quash the garnishment proceeding was made because the court deemed that it had no jurisdiction to entertain it, and that the petitioner has no adequate legal remedy to secure this right save by mandamus, the relator prays that a writ may issue "directed to the circuit court of the United States for the Eastern district of Michigan in equity, requiring said court to vacate and set aside said order of November 7, 1894, quashing the writ of garnishment in the cause above named, and directing said court to proceed with all convenient speed to the execution of such process." The respondent appears and answers, setting out the facts as they appear of record and as they are stated above.

John H. Bissell and Otto Kirchner, for relator.
Chester L. Collins, for respondent.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the case as above), delivered the opinion of the court.

Section 12 of the act of congress of March 3, 1891 (26 Stat. 729), establishing circuit courts of appeals, provides that those courts "shall have the powers specified in section 716 of the Revised Statutes of the United States." Section 716, Rev. St., provides that:

"The supreme court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

In so far as the writ of mandamus is necessary for the exercise of the jurisdiction of this court as conferred by law, we have no doubt of our power to issue it. Where, therefore, a circuit or district court fails to execute a mandate of this court in a cause brought here by appeal or writ of error, it is not to be questioned that we may compel its execution by mandamus. Gaines v. Rugg,

148 U. S. 228, 13 Sup. Ct. 611. It is to be observed, however, that by the fifth section of the circuit court of appeals act, appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court "in any case in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision." By the sixth section [1] of the same act the circuit courts of appeal are given power "to exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the district and the existing circuit courts in all cases other than those provided for" in the fifth section. It would seem to be clear, therefore, that where a circuit court or a district court refuses to hear a cause for want of jurisdiction, and the question thus decided may be heard on certificate in the supreme court under section 5, it would not be within the power of this court by mandamus to compel such circuit or district court to take jurisdiction of the cause, but that such power is vested in the supreme court whenever remedy by appeal or writ of error on certificate is not adequate. Just what is meant by the word "jurisdiction" in the first paragraph of section 5 has not yet been exactly defined by the supreme court. It is a term which is given a varying meaning. Thus a bill which states no ground for equitable relief is often said not to be within the jurisdiction of a court of equity, and yet it would hardly be a reasonable construction of the paragraph referred to that such a question could be carried by certificate of the circuit court direct to the supreme court. There is strong ground for thinking that the first paragraph of that section was intended to apply only to the initial questions of the jurisdiction of a United States district or circuit court, whether in law or equity, over the subject-matter and parties, and not to questions whether a court of equity or of law is the proper forum for the working out of rights properly within the particular federal jurisdiction for adjudication. In the case at bar, Judge Swan refused to enforce under the statutes of Michigan the payment of a money decree by the issuance of a writ of garnishment in equity, because he conceived it not to be within the power and jurisdiction of a circuit court of the United States on its equity side to do so, but he did not deny that such a proceeding could be had on the law side of the court. Could such a question, on his certificate, be carried direct to the supreme court, under section 5 of the court of appeals act? We think not, for the reason suggested above; and, if not, then it is the subject-matter of review in this court by proper proceeding.

If an adequate remedy for Judge Swan's refusal to enforce a writ of garnishment can be had by appeal, there is no ground for the issuance of a mandamus. Ex parte Baltimore & O. R. Co., 108 U. S. 566, 2 Sup. Ct. 876. This depends in part on the question whether the order quashing the writ of garnishment was a final order. It seems to us that it was, because an execution for costs could issue

[1] 11 C. C. A. x.

against the complainant in favor of the garnishees, who were, by his order, finally dismissed from the proceeding. A final decree had already been rendered in the case. This was a proceeding to enforce that by bringing in new parties against whom judgment was asked. The proceeding was dismissed, and they were entitled to their costs. In the case of Ex parte Baltimore & O. R. Co., above cited, it was sought to obtain a mandamus to compel a circuit court to take jurisdiction of a proceeding in replevin in which the circuit court had quashed the writ. It was held that error would lie, and furnished an adequate remedy, and therefore mandamus would not lie. Still the fact that appeal or error will lie does not always prevent the issuance of mandamus, because the former, though it exists, is not always an adequate remedy. Such is generally the case where the appellate court is asked by mandamus to compel compliance with its mandate by the lower court, which has failed to comply because of a misconstruction of the meaning of the mandate. Gaines v. Rugg, 148 U. S. 228, 243, 13 Sup. Ct. 611. It is said accordingly in support of the writ that it is here sought to compel the court below to enforce the mandate of this court. But this court never considered the question whether garnishment under the statutes of Michigan was a proper remedy in equity for enforcing a money decree, and there was nothing in the mandate intended to decide that question. The point considered and decided by Judge Swan was one subsequently arising, and, although his decision thereon is of a class usually controllable by mandamus, namely, refusals to take jurisdiction, we are nevertheless inclined to think that appeal would be an adequate remedy. But we do not propose to rest our decision of the case upon this point, for we are clearly of the opinion that, even if mandamus is the proper remedy, Judge Swan was right in quashing the writ.

The proceeding in garnishment is provided for in Michigan by 2 How. Ann. St. c. 277. The first section of that chapter (8058) as amended (3 How. Ann. St. p. 3751), provides that "in all personal actions arising upon contract, express or implied, brought in the several courts or municipal courts of jurisdiction, whether commenced by declaration, writs of capias, summons, or attachment, and in all cases where there remains any sum unpaid upon any judgment or decree rendered in any of the several courts herein before mentioned, * * * if the plaintiff * * * shall file with the clerk of said circuit court at the time of, or after the commencement of said suit, or at any time after rendition of judgment or decree, an affidavit" that any person has money or property of defendants, and that he is justly apprehensive of loss unless a writ of garnishment issues, "a writ of garnishment shall be issued, sealed and tested in the same manner as writs of summons and directed to the sheriff, reciting the commencement of the suit or the rendition of the judgment or decree against the principal defendant," and commanding the sheriff to summon such person to appear in court to make disclosure of all property or money of defendant held by him, and thenceforth to pay no money or property to the principal defendant. The statute

in further sections provides that, if plaintiff is not satisfied with the disclosure, he may have an examination of the garnishee. Section 8068 provides that the affidavit for the writ of garnishment shall be held and considered as a declaration by the plaintiff in trover against the garnishee as defendant, or for money had and received, and, where examination is had, the affidavit is to be considered denied, except so far as admitted, and "thereupon a statutory issue shall be deemed framed for the trial of the question of the garnishee's liability to the plaintiff." Section 8070 provides for the trial of the issue by a jury duly impaneled, and section 8072 provides for the entry of the judgment on the verdict. In Michigan, the division of jurisdiction between courts of equity and courts of law is still maintained, and, in view of the wording of the statute, it cannot be doubted that the legislature intended the proceedings in garnishment to be tried on the law side of the court. Could implication of this be made stronger than by the direction to consider the action as trover, or assumpsit for money had and received? But the argument is pressed on us that the garnishment proceedings are expressly provided for in all cases where there remains any sum unpaid upon any "judgment or decree," and that the two terms are purposely used, in this juxtaposition, to insure a strict technical construction of their meaning, by which the one includes all determinations of a court of law, and the other those of a court of equity. It may be so, but it does not necessarily follow that the proceeding in garnishment is to be conducted in the same forum where the decree is rendered. There is nothing in the statute to prevent the proceeding in garnishment to collect an amount due on a decree in equity from being instituted and tried on the law side of the court.

But whether the writ of garnishment can issue under the statute from a Michigan court of equity or not, it is very certain that no such writ can issue from the equity side of the federal court. Section 913 of the Revised Statutes of the United States is as follows:

"The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the supreme court, by rules prescribed from time to time, to any circuit or district court, not inconsistent with the laws of the United States."

Rule 8 of the general equity rules adopted by the supreme court of the United States under the foregoing section provides that:

"Final process to execute any decree may, if the decree be solely for the payment of money, be by writ of execution in the form used in the circuit court in suits at common law in actions of assumpsit."

Section 914 of the Revised Statutes of the United States is as follows:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms

and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

Common-law rule No. 40 of the circuit court of the United States for the Eastern district of Michigan provides that writs of execution and proceedings thereunder shall be in conformity with the laws of Michigan, and that "the parties to such execution shall be entitled to the same rights and privileges given to them by virtue of the laws and practice aforesaid."

The argument is that, as the owner of a judgment in assumpsit could, under the foregoing section and rule, have the aid of garnishment proceedings to collect his judgment in the circuit court of the United States in Michigan, equity rule 8 gives him the same remedy to enforce the decree on the equity side of the court. Such a construction of equity rule 8 is not warranted. The constitution of the United States requires that the distinction between common-law and equity procedure shall be maintained, and the two jurisdictions cannot be confused and mixed either by a state statute or rules of the federal court. A proceeding in garnishment under the Michigan statute is a common-law suit. It is true, it is merely an ancillary action, but its procedure is all according to the course of the common law. The verdict of the jury is not merely advisory, as where the aid of a jury is sought by the chancellor in equity, but it has all the force and effect of a verdict at common law, and, if garnishment proceedings are begun in the federal court, the same effect must be given to the verdict as required by the statute in the state court. A state statute cannot confer on a federal court of equity jurisdiction in trover or assumpsit, whether those actions are merely ancillary and auxiliary or are independent suits. No authority has been cited to sustain a contrary view, while the supreme court of the United States has often had occasion to lay down the principle we have above stated. Hurt v. Hollingworth, 100 U. S. 100–103; Bennett v. Butterworth, 11 How. 669; Thompson v. Railroad Co., 6 Wall. 134; Bronson v. Schulten, 104 U. S. 410; Comstock v. Herron, 5 C. C. A. 266, 274, 275, 55 Fed. 803. There is nothing in Clark v. Smith, 13 Pet. 195, Fitch v. Creighton, 24 How. 159, or Broderick's Will, 21 Wall. 520 (cited for relator), which conflicts with the principle that federal courts of equity cannot hear and determine suits to be tried according to the course of the common law. In Clark v. Smith, supra, it was held that, the legislature of Kentucky having created a right by determining what should be a legal title and what should be a cloud upon it, and having at the same time provided a remedy substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, such a right would be recognized and such a remedy enforced in federal courts of equity. And this is as far as any decision has ever gone. An enlargement of equity jurisdiction by state statutes to try issues between suitors according to the course of the common law is impossible in federal jurisprudence.

It is pressed upon us that, if this remedy by garnishment is not available to the petitioner, he is without any. If this were true, it

would not authorize the assumption by the court below of a jurisdiction not conferred by law. But we see no reason why it was not open to the petitioner to obtain relief by supplemental bill in the nature of a creditors' bill. The petition for mandamus is dismissed, at the costs of the plaintiff.

PRESCOTT et al. v. HAUGHEY et al.

(Circuit Court, D. Indiana. February 13, 1895.)

No. 8,950.

1. NATIONAL BANKS—FRAUDULENT REPRESENTATIONS BY DIRECTORS—LIABILITY IN ACTION FOR DECEIT.
   Directors of a national bank who, in the pretended performance of duties imposed upon them by law, use their official station to make false and fraudulent representations, which are believed and acted on by others, are liable to one defrauded thereby in a common-law action of deceit, and the right to maintain such action is not precluded by the liability imposed in the national banking law for violation of its provisions.
2. REMOVAL OF CAUSES—FEDERAL QUESTION—VIOLATION OF NATIONAL BANKING LAW.
   A complaint alleged that defendants, directors of a national bank, published advertisements, statements, and reports representing that the bank was solvent and prosperous, knowing such representations to be false and the bank to be hopelessly insolvent, intending thereby to deceive the public and plaintiffs; that plaintiffs had no knowledge that said representations were false, and the bank insolvent, and, relying on said representations, were thereby induced to deposit with the bank a certain sum; that said representations deceived plaintiffs, and by reason of the premises they had been damaged in said sum. *Held*, that the representations charged, if made by the directors under color of their office, were entirely outside of their official duties, and the cause of action stated was a common-law cause of action for deceit, presenting no federal question which could sustain a removal of the cause from a state court. Bailey v. Mosher, 11 C. C. A. 304, 63 Fed. 488, distinguished.

This was an action by William B. Prescott, president of the International Typographical Union, and others, against Theodore P. Haughey and others, the directors of the Indianapolis National Bank, to recover moneys deposited in said bank by the International Typographical Union, and lost through its insolvency. The action was brought in a court of the state of Indiana, and was removed to the federal court by the defendants, on the ground that a federal question was involved. Plaintiffs moved to remand.

William V. Rooker, for complainants.

Miller, Winter & Elam, Anderson & Du Shane, Hawkins & Smith, Baker & Daniels, R. W. Harrison, Duncan & Smith, and A. J. Beveridge, for defendants.

BAKER, District Judge. This was an action instituted in the superior court of Marion county, Ind., and removed into this court by the defendants, on the ground that it involved a federal question which gave this court jurisdiction. The parties, both plaintiffs and defendants, are all residents and citizens of the state of Indiana, and were such at the time of removal. The ground on which the