

J. S. Runnells, William Burry and H. B. Turner, for appellant.
C. A. Remy and J. B. Mann, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge. In conformity with our decision when this cause was previously before us (18 U. S. App. —, 63 Fed. 891), the court below, on September 12, 1894, vacated so much of the original decree as adjudged that the principal of the bonds was due, and so much of its decree of March 2, 1893, confirming the sale of the mortgaged premises, as adjudged the balance of the debt, after application of the proceeds of sale, to be due, and rendered judgment to the complainant therefor, and thereupon in all other respects confirmed the original decree, and ratified and confirmed the sale of the mortgaged premises under the original decree before its reversal by this court. The appellant, complainant below, assigns for error that the court erred in not according to it a money judgment for the debt secured by the mortgage remaining unpaid after application of the proceeds of the sale. The refusal to award such a judgment was clearly right. If under the provisions of the trust deed the trustee could, under any circumstances, be entitled to a judgment for the amount of the bonds secured by the trust deed, and if its functions did not cease upon distribution of the proceeds of the sale of the mortgaged premises among the various bondholders,—questions which we do not decide,—it still remains true that the principal of the bonds does not mature until the year 1916, that there is no provision in the bonds or the trust deed securing them that the principal should become due upon default in the payment of interest, and that a sale of the property mortgaged to secure the payment of the bonds could not have the effect of maturing the principal. A judgment for deficiency, before maturity of the principal, would be wholly unwarranted. *Danforth v. Coleman*, 23 Wis. 528.

Affirmed.

DANIELS et al. v. LAZARUS et al.

(Circuit Court, S. D. New York. December 31, 1894.)

1. PROCESS—FEDERAL AND STATE COURTS—PROPERTY IN CUSTODIA LEGIS.

L. brought an action against the W. Co. in a state court, and caused an attachment to be levied upon certain personal property, alleged to belong to the W. Co. The cause was removed to the federal court, and the sheriff, under an order of that court, turned over the attached property to the United States marshal. D., the assignee of the W. Co. for the benefit of creditors, interposed a claim to the attached property, and, upon failure of the sureties upon an indemnity bond, given by L., to justify, the federal court made an order, in accordance with the practice under the state Code, directing the marshal to turn over the attached property to D. This order was entered at 1:15 p. m., and was immediately served upon the marshal. On the same day, after the entry and service of such order, but before actual delivery of the property by the marshal to D., a coroner, under process of the state court, in an action by one I. against L., D., the marshal, and the sheriff, replevied the property. *Held* that,

after the making and entry of the order requiring the marshal to deliver the property to D., such property was discharged from the custody of the federal court, and open to new process of the state court, although the marshal had not actually turned it over to D.

3. INJUNCTION—AGAINST COLLUSIVE PROCEEDINGS AT LAW.

D. filed his bill in the federal court against L., I., the marshal, the sheriff, and the coroner, alleging that the replevin suit was instituted, without foundation, by collusion between I. and L., for the purpose of defeating D.'s right to the property. It appearing that this allegation was probably well founded, *held*, that L. and I. should be enjoined, until final hearing, from receiving or disposing of the property in controversy.

Prior to October 30, 1893, defendant Herbert Lefavour conducted business on his own account at 96 Duane street, New York City. On that day he made a contract with the plaintiff Whitman Shoe Company, of Boston, Mass., under which he thereafter conducted business, at the same place, as its agent, but under his own name, all goods, assets, etc., of the business becoming the property of the Whitman Shoe Company. In August, 1894, the Whitman Shoe Company assigned all its property, including that at 96 Duane street, New York, to the plaintiff William H. Daniels, for the benefit of its creditors. October 31, 1894, Lefavour commenced an action against the Whitman Shoe Company in the supreme court of New York, and caused an attachment to be issued and levied upon the property at 96 Duane street. November 10, 1894, the cause was removed to the United States circuit court, and on November 16th, pursuant to an order of that court, the attached property was delivered by the sheriff to the United States marshal.

On November 2, 1894, Daniels, as assignee, filed a claim of ownership of the attached property, and a demand therefor; and thereupon, in accordance with the state practice, the sheriff demanded and received from the plaintiff in the action, Lefavour, an indemnity bond of \$5,000. The sureties upon this bond were duly excepted to by Daniels, and, having failed to justify, an order was made by the circuit court, after the removal, on notice to Lefavour and on his default, directing the marshal to deliver the attached property to Daniels. This order was entered at 1:15 p. m. on November 20, 1894, and was immediately served upon the marshal. The marshal and Daniels thereupon went to the sheriff to settle with him certain claims for fees, for which he claimed a lien on the property. While so engaged, and before the marshal had delivered the property to Daniels, it was taken possession of by the coroner under a writ of replevin issued from the state court in a suit brought against Lefavour, Daniels, the sheriff, and the marshal by one Isidor Lazarus, who claimed title to the property under an alleged sale of the same to him by Lefavour prior to October 31, 1894. Daniels subsequently made a motion in the replevin suit in the state court to vacate the levy, which was denied; the opinion, written by Patterson, J., holding that the property replevied was not, at the time, in the custody of the federal court. *Lazarus v. McCarthy*, 82 N. Y. Supp. 833. Daniels and the Whitman Shoe Company then filed this bill against Lazarus, Lefavour, the marshal, the sheriff, and the coroner, alleging that the replevin suit was without foundation, and was brought by collusion between Lazarus and Lefavour to defeat plaintiffs' rights, and asking that all the defendants be enjoined from delivering or disposing of the property otherwise than to Daniels.

George H. Adams, for complainants.

Abram Kling, for defendants.

LACOMBE, Circuit Judge. I concur in the opinion expressed by Judge Patterson, namely, that after the order of November 20, 1894,

had been made and entered in this court, the property therein described was discharged from its custody, and open to new process from the state court, although the marshal had not yet actually turned it over to Daniels, the claimant. No order, therefore, should be made interfering with the custody of the property while in the hands of state officers under process of the state court. Examination of the papers, however, has impressed me with the conviction that the replevin suit is a collusive one, gotten up in aid of a fraudulent attempt by Lefavour and Lazarus to obtain possession of property belonging to one or other of the complainants. Diversity of citizenship gives to this court jurisdiction of the controversy, and until the case is tried, and the facts finally determined, upon proofs, after opportunity for cross-examination, these defendants should not be allowed to take possession of the property. Complainants may therefore take an order for an injunction pendente lite against Lefavour and Lazarus, forbidding them from taking, receiving, or disposing of the property in controversy.

WHEELER v. WALTON & WHANN CO. (PENN MUT. LIFE INS. CO.,
Intervener).

(Circuit Court, D. Delaware. February 12, 1895.)

No. 165.

1. JURISDICTION—HOW OBTAINED.

The mere filing of a bill in equity, and giving notice thereof, and of a motion for the appointment of a receiver, to the defendant, does not give jurisdiction of the parties or the subject-matter, but service of process is essential. Therefore, *held*, that a judgment entered in a state court after the filing of a bill in a federal court, but before the service of process and appointment of receivers, was a valid and existing lien prior to such appointment, and that the receiver's possession of the insolvent's property is subject thereto.

2. EXECUTION—WHEN LEVIED ON PROPERTY IN RECEIVERS' HANDS.

On June 5th a bill praying for the appointment of receivers of the W. Co. was filed in a federal court, and a copy thereof and notice of a motion for the appointment of receivers were served on the W. Co. On the same day, and after these proceedings, a judgment against the W. Co. was entered in a state court, upon confession, in favor of the P. Co., upon a bond of the W. Co., secured by mortgage upon part of its property. On June 6th receivers of the W. Co. were appointed, and the subpoena in the suit was served upon it. Subsequently, by leave of the federal court, the P. Co. brought suit, in a state court, to foreclose the mortgage on the W. Co.'s property, which was duly sold, and the proceeds of sale applied on the mortgage judgment, leaving a balance unsatisfied. The P. Co. then petitioned the federal court for leave to levy an execution on the property of the W. Co. in the hands of the receivers. *Held*, that though, at the time of the entry of the judgment, the federal court had not acquired jurisdiction, and the receivers took the property subject to the lien of the judgment, permission would not be given to levy execution without proof of some urgent necessity for selling the property at once, instead of permitting the receivers to administer the estate, and distribute the proceeds, with due regard to priority of claims, among all the creditors.

3. RECEIVERS—PRIORITY OF CLAIMS—TAXES.

Held, further, that the receivers would not be directed to refund to the Co. taxes on the mortgaged property, paid out of the proceeds of its