

The exception to this part of the answer is for alleged impertinence, and, according to the argument of counsel, is intended primarily to raise the question whether the burden rests upon the complainant to allege and prove that the work above mentioned was done within the limits of the United States. The act of congress in question does not, in terms or by fair implication, make the doing of this work within the limits of the United States a condition precedent to securing a valid copyright. Section 4956, supra, merely prohibits, "during the existence of such copyright, the importation of any book * * * so copyrighted or any plates of the same, not made from type set * * * within the limits of the United States," etc. It is necessary for the complainant to allege and show that she deposited with the librarian of congress, on or before the day of publication, a printed copy of the title-page of her book, and also two copies of her book, and that she has given the lawful copyright notice. Further than this complainant is not required to go in making out a prima facie case of legal copyright. For another reason, also, this exception ought to be allowed. The bill does not allege that the books in question were printed from type set within the limits of the United States. It contains no allegations on the subject. If the defendant's views are correct, that the burden is upon the complainant to aver and prove such fact in order to establish a copyright, the bill is fatally defective, and the defendant's remedy is by demurrer. The defendant cannot make an issue by denying averments not made. Exception 6 is, therefore, allowed.

CENTRAL TRUST CO. OF NEW YORK v. CHATTANOOGA S. R. CO.
(HARRIS, Intervener).

(Circuit Court, N. D. Georgia. April 23, 1895.)

RAILROAD COMPANIES—INSOLVENCY AND RECEIVERS—CLAIMS FOR SERVICES
RENDERED PRIOR TO RECEIVERSHIP.

One rendering services to a railroad company, as its secretary, within six months prior to the appointment of receivers, is not entitled to priority over the mortgage bondholders, where there has been no diversion of earnings for the benefit of bondholders. *Fosdick v. Schall*, 99 U. S. 235, and *Cutting v. Railroad Co.*, 9 C. C. A. 401, 61 Fed. 150, distinguished.

This was a petition filed by Franklin Harris in the consolidated causes brought, respectively, by Elias Summerfield and the Central Trust Company of New York against the Chattanooga Southern Railroad Company, praying payment of the sum of \$600 for services rendered, and asking that the claim be decreed a prior lien to that of the mortgage bonds, and be directed to be paid either out of the net earnings of the receivership, or out of the proceeds of the sale. The grounds of his claim are thus set out by the petitioner:

"Petitioner further shows that he was employed by said defendant company as its secretary from the year 1890, and continuously acted as such from said date until the appointment of a receiver in this cause, and fully performed and discharged all the duties appertaining to said office, and incumbent upon him as such secretary. Petitioner shows further that his salary

as such secretary was not stipulated nor agreed upon prior to said appointment, nor any time since, but that the sum of one hundred (\$100) dollars per month for the six months next preceding the receiver's appointment is a reasonable compensation for his services as said secretary for said period, and that he has never received from said defendant company or from any one else any compensation whatever for said services, from the time of his original appointment down to this date. * * * Petitioner is advised that he is entitled, by virtue of said services, to a superior lien upon the property and assets of said Chattanooga Southern Railway Company over the lien of the mortgage being foreclosed in this cause, and to payment of said sum of six hundred dollars, or whatever amount the court may adjudge reasonable compensation for said six months' services, either out of the net earnings of said railway company during the receivership, or out of the proceeds of the corpus of its property in case of sale thereof before payment of its bonded debt. * * * Petitioner shows further that said services were rendered for said company after default made by it in the payment of its mortgage debt and accrued interest thereon, and after knowledge of such default by the mortgagee, and while said railroad was still a going concern, and that said services were necessary, proper, and essential to the conduct and management of its business, and to the preservation of its property, and to keep said railway a going concern."

D. Lauck Grayson, for intervener.
Robert C. Alston, for plaintiff.

NEWMAN, District Judge. The only question discussed on this demurrer has been the right of intervener to priority over the lien of the mortgage debt. So far as that question is concerned, I am clear that the intervener does not make a case by his petition such as makes his claim one to be preferred over the mortgage indebtedness. The case of *Cutting v. Railroad Co.*, 9 C. C. A. 401, 61 Fed. 150, decided by the circuit court of appeals for this circuit, following *Fosdick v. Schall*, 99 U. S. 235, decides that, in order to make such a claim preferential, it must appear that there was an order of court, at the time the receivers were appointed, providing for its payment, and evidence that the current earnings before or after the appointment of the receivers were diverted to paying interest on the bonded debt. Neither is shown by this intervening petition. It is true that about a month after his appointment the receiver was authorized to borrow a certain amount for paying the claims of employes within six months. But, even if this petitioner was such an employe as was embraced in the order, and if the order itself is such as comes within the decisions of the supreme court and the circuit court of appeals, there is no pretense that the earnings were diverted from their proper channel for the benefit of the bondholders in any way. So that it is clear that, so far as the petition seeks to establish priority, the demurrer to it is good. I see no objection to the special master ascertaining the amount of the claim, if that will be of any benefit to the intervener. He probably does not care for this, however, from what has been said on the argument, unless given the preference he seeks. The demurrer, so far as it goes to the question of his right to have his claim established as a preferred claim, is sustained.

KOONS v. BRYSON et al.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1895.)

No. 117.

1. PRACTICE—NONSUIT AT SUGGESTION OF COURT.

A judgment of nonsuit, taken in deference to the opinion of the court upon a question of law which disposes of the case, is subject to review on writ of error.

2. EVIDENCE—BOUNDARIES.

In an action of ejectment declarations of a chain carrier as to the location of certain lines in the survey in which he took part, which lines, without regard to the location of others, necessarily include the land in controversy, are sufficient to require the submission of the question of boundary to the jury.

3. SAME—POSSESSION OF LAND.

In an action of ejectment, evidence of a declaration of one of the defendants, made on the premises, that they had dug a mining shaft and cut timber to build a fence and cabin on the premises, to establish their possession, with evidence that the fence and cabin remained on the land and had been kept up by the defendants, who had also employed an agent to sell the land, is sufficient to require the submission of the question of possession to the jury.

4. SAME—PROCEEDINGS IN SUIT—RECITALS IN DECREE.

The recitals in a decree duly entered in a foreclosure suit are sufficient prima facie evidence of the previous proceedings therein, although the original papers showing such proceedings are missing.

In error to the Circuit Court of the United States for the Western District of North Carolina.

This was an action of ejectment by Henry Koons against J. B. Bryson and others. Upon the trial in the circuit court the plaintiff submitted to a nonsuit at the suggestion of the court, and thereupon brings error. Reversed.

Moore & Moore, for plaintiff in error.

Before GOFF and SIMONTON, Circuit Judges, and SEYMOUR, District Judge.

SEYMOUR, District Judge. This was an action of ejectment, tried in the circuit court for the Western district of North Carolina. Upon the conclusion of the plaintiff's evidence, the learned judge who tried the case in the circuit court ruled "that the plaintiff had failed to make out his case as to three material points: He had failed to locate the boundaries claimed; he had failed to make out a chain of title, there being one missing link—the lost record had not been supplied; and he had not shown the defendants in possession of the land claimed." Thereupon, in deference to the opinion of the court, the plaintiff took a nonsuit, and appealed. Judgment of nonsuit was duly signed by the judge.

Being a final judgment disposing of the case, and rendered upon a ruling on matter of law duly excepted to by the plaintiff, it is subject to review by writ of error. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478. It can make no difference, being merely matter of form, whether the plaintiff takes a nonsuit in deference to the opinion of the court, or the court orders a nonsuit. The former is the uniform practice in the state