

The next question presented is, could these checks be considered as a part payment on this sale, if there was one? It is not necessary that the payment should be in money. The statute is complied with if the thing delivered to the person making the sale is worth money, or has a value in money. These checks were not money, but I think, if they were drawn upon a deposit in the bank named therein as the payee, they had a money value. A check given to a person in the ordinary course of business is of such value that the person who receives it cannot look to the drawer of the check for the amount named therein until he has presented the check to the drawee or payee for payment, and payment refused. *Murray v. Judah*, 6 Cow. 484; *Cowing v. Altman*, 71 N. Y. 435, 440; *Little v. Bank*, 2 Hill, 425; *Cruger v. Armstrong*, 3 Johns. Cas. 5. Under the authorities, I think a check, such as those described in this case, must be considered to possess a money value. It is certain they would be so considered by those dealing in such securities.

Before an injunction can be issued pending a suit, it must be made to appear that plaintiff is threatened with great and irreparable injury, from which it is claimed the injunction would protect him. In this case it is claimed the defendant Sherman threatens to dispose of the stock in dispute, so as to prevent plaintiff from receiving the same. There is evidence to support this claim, and evidence which denies any such intention. The said defendant Sherman, however, says in his affidavit that, if a proper opportunity is presented, he will sell this stock, as he has a right to do. The suit is for this 95,000 shares of stock. If the plaintiff cannot have a decree for this stock, his suit will be fruitless, for it is alleged in the bill that a market value cannot be placed upon this stock. One obtaining this stock for value, without notice of plaintiff's rights, would, perhaps, obtain a good title to the same. It does appear that the defendant Sherman is not insolvent. But the very ground upon which the equity of this suit rests is that there is no adequate means of measuring the value of this stock in the market, and hence a suit for damages against said Sherman would not afford adequate relief.

The conclusion I have reached is that the injunction will issue in this case upon the plaintiff executing a proper bond, with two sureties, in the sum of \$50,000, conditioned to save the defendant Sherman harmless on account of the issuing of this injunction.

BAER et al. v. RAINWATER et al.

(Circuit Court of Appeals, Eighth Circuit. September 23, 1895.)

No. 610.

ASSIGNMENTS FOR BENEFIT OF CREDITORS — DISTRIBUTION OF TRUST FUND —
ENFORCEMENT OF DECREE.

Appeal from the United States Court in the Indian Territory.

David Goldsmith, for appellants.

N. B. Maxey, William T. Hutchings, Harrison O. Shepard, and
Clifford L. Jackson, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This is the third time that the question of the distribution of the fund growing out of the assignment made by Smith & French to Johnson Thompson, in trust for their creditors, has been before the court. The previous cases are reported (4 U. S. App. 217, 1 C. C. A. 304, 49 Fed. 406, and 12 U. S. App. 232, 5 C. C. A. 398, 56 Fed. 7), to which we refer for a full statement of the case. When the case was last here, we tried to make it plain that every creditor of Smith & French had a right to participate in the fund arising from the trust property, in proportion to the amount of his debt, upon contributing his proportion of the expense of establishing and enforcing the trust. We intended this rule should be applied without reference to any previous erroneous orders which had been made in the case by the lower court touching the rights of creditors to participate in the trust fund; but the lower court seems not to have so understood our order, which was not as specific as it ought to have been, and debarred the appellants, Baer, Seasongood & Co., who were bona fide creditors of Smith & French, and who proved their debt, from participating in the distribution, on account of some previous erroneous order of that court denying them this right. We are not disposed to go into a history of the details of the litigation growing out of the distribution of this trust fund to those entitled, or to go into any technical discussion of the effect of the proceedings that have been had in the court below from time to time. It is enough to say that the fund arising from the property conveyed to Thompson by Smith & French in trust for their creditors must, after paying costs and fees, including such attorney fees as the court has allowed or may allow to the parties who established the trust and were instrumental in bringing the fund into court, be distributed pro rata among all the creditors of Smith & French, and that no creditor is to be barred of his right to participate in such distribution by any erroneous direction or order of the lower court heretofore made, excluding him therefrom. The order and decree of the United States court in the Indian Territory is reversed, with directions to take such proceedings in the case as are not inconsistent with this opinion.

BERRY v. LAKE ERIE & W. R. CO.

(Circuit Court, D. Indiana. November 1, 1895.)

No. 9,277.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ACTION FOR PERSONAL INJURIES—PLEADING.

In actions for personal injuries, brought in the federal courts, plaintiff is not required to plead or prove freedom from contributory negligence. Such negligence is matter of defense to be averred and proved by defendant.