## HUNT et al. v. HOWES et al.

(Circuit Court of Appeals, Fifth Circuit. April 14, 1896.)

No. 406.

PRACTICE ON APPEAL—DISMISSAL FOR WANT OF JURISDICTION—COSTS.

Plaintiffs brought an action in the United States circuit court, whose jurisdiction of the case rested wholly upon diverse citizenship, alleging in their complaint that they were residents of the state of Montana, but failing to allege that they were citizens thereof. The defendants answered. There was a protracted trial of the case, resulting in a verdict and judgment for the plaintiffs. The defendants moved for a new trial, upon numerous grounds. This motion was denied. The defendants then presented voluminous bills of exceptions, sued out a writ of error, and presented numerous assignments of error. At no stage of the proceedings, until the hearing in the circuit court of appeals, did the defendants suggest the defect in the allegations of citizenship, nor the want of jurisdiction; but, upon such hearing, they moved to dismiss the writ of error, and remand the cause, with instructions to dismiss it, for want of jurisdiction. It clearly appeared from the record, though not by direct averment, that the necessary diversity of citizenship existed. *Held* that, as the court was without jurisdiction, because of the defective averment, the cause would be remanded for appropriate action by the circuit court, which might, in its discretion, permit an amendment; but, as the writ of error was superfluous, the costs thereof would be taxed against the defendants. Boarman, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This was an action by Howes & Strevell against T. C. Hunt and others. There were verdict and judgment for plaintiffs. Defendants' motion for new trial was overruled, whereupon they bring their writ of error.

W. H. Webster, for plaintiffs in error.

Geo. H. Noyes, for defendants in error.

Before McCORMICK, Circuit Judge, and BOARMAN and SPEER, District Judges.

SPEER, District Judge. The plaintiffs, Howes & Strevell, averring themselves to be residents of Miles City, in the county of Custer, in the state of Montana, sued the defendants, who, it appears, are citizens of the Northern district of Texas. On the trial, verdict and judgment were rendered in behalf of the plaintiffs. Motion for new trial was made by the defendants, which was overruled, and the cause was brought here by writ of error.

When called for disposition, counsel for plaintiffs in error moved to dismiss the writ of error, and to remand the case, with instructions to the circuit court to dismiss it, because the record wholly failed to disclose the proper diversity of citizenship necessary to confer jurisdiction upon the circuit court or upon this court. It is well settled that the necessary diversity of citizenship must appear in the record in order to give jurisdiction to a court of the United States, where such diversity is relied upon for that purpose. Railway Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510; Insurance Co. v. Rhoads, 119 U. S. 237, 7 Sup. Ct. 193. In the latter case, which was an action

in the circuit court of the United States by an administrator against an insurance company, although it appeared that the intestate was a citizen of the state in which the action was brought, and that letters of administration were granted the plaintiff in that state, and that the defendant was a citizen of another state, but where there was a failure to allege the citizenship of the administrator himself, it was held that the circuit court did not have jurisdiction, and that the absent averment could not be supplied by an amendment offered in the supreme court. It was further held, however, that the court below, after the case had been remanded, might, in its discretion, allow the amendment to be made. "The jurisdiction must positively appear. It is not enough that it may be inferred argumentatively." Browne v. Keene, 8 Pet. 112; Robertson v. Cease, 97 U. S. 646. And therefore a statement that the plaintiff is a resident of a state other than that of the defendant will not suffice.

Notwithstanding the absence of jurisdiction, because of the defective averments above specified, we have, as an inherent power of an appellate court, jurisdiction to dismiss the writ of error, and remand the cause for the appropriate action of the circuit court; and, upon the motion of the plaintiffs in error, it will be so ordered.

This brings us to an important consideration, presented by the motion of the defendants in error, viz. that the costs of the appeal should be taxed on the plaintiffs in error. In support of this motion, several important suggestions are presented for the consideration of the court. It is sufficiently made to appear from the record that the defendants reside in the state of Texas. It is otherwise evident that the assignors or original payees of one of the bonds upon which the action was based were, in fact, citizens of the state of Montana. The residence and the place of business of these plaintiffs were for a long time in Custer county, in the latter state. This was well known to the defendants in the circuit court, who are the plaintiffs in error here. Further, the cause was closely contested before the court and jury; and when, after an arduous and protracted trial, verdict and judgment for a large amount were rendered for the plaintiffs, a motion for new trial was made, and 13 distinct grounds were indicated as reasons why the verdict should be set aside, and a new trial granted. These were all overruled. Then the defendants presented to the trial judge 11 bills of exceptions, voluminous enough to compass 42 pages of the printed record. In all of this defensive literature no intimation was given, either to the court or to the plaintiffs, that the fatal want of jurisdiction appeared. No motion in arrest of judgment was made. But this was not all. The defendants in the circuit court, in framing their application for writ of error and supersedeas, presented 16 assignments of error, covering 8 additional pages of the printed record before us; and still no opportunity was offered the plaintiffs to retrieve their inadvertence, or to the court to take the appropriate order. But it is said that it is no part of the defendants' business to make out the plaintiffs' case. It is certain, however, that it was the business of the defendants' counsel to deal openly and fairly with the court. The day for brilliant strategical displays in judicial trials has departed. Nor is a court of the United States a congenial spot for surprisals and

ambuscades. The defendants even now refrain from suggesting that they did not discover this defect while the cause was pending, and yet it is not to be questioned that the citizenship of the plaintiffs, if properly averred, would have supported the jurisdiction. Now, whatever difference of opinion there may be as to the obligation of the defendants to make plaintiffs aware of the technical, but fatal, oversight, the noblesse of the robe—indeed, the moral and legal obligation of frankness and fairness to the court—required that learned counsel should not put the judge himself on trial for error before this court without disclosing to him the attack they would make; and yet no exception for want of jurisdiction in the court below was incorporated in the numerous assignments of error, and for the first time is this objection made when the cause is sounded for argument before this court.

It is settled that, when a decree or judgment of the circuit court is reversed for want of jurisdiction in this court, we make such order in respect to the costs as justice and right may seem to require. Railway Co. v. Swan, supra; Hancock v. Holbrook, 112 U. S. 229, 5 Sup. Ct. 115; Peper v. Fordyce, 119 U. S. 469, 7 Sup. Ct. 287. The courts of the United States are courts of limited jurisdiction. The judges of these courts, in the proper performance of their duty, carefully refrain from entertaining a cause, unless the jurisdiction affirmatively appears. Whenever it appears in a case in these courts that jurisdiction does not exist, the court will, on its own motion, raise the question, and dismiss the cause. This, in numerous cases, has been held to be the duty of the court; and counsel, who are, or ought to be, aware of a palpable absence of jurisdiction, may not sit by during the trial of the cause, and, after all the proceedings in the latter court have been completed, then present their bill of exceptions, and bring the cause on a writ of error to this court, without incurring the consequences of the useless and expensive performance. The objection to the want of jurisdiction should have been made in limine, and, if not presented then, it would have been competent and proper after verdict for the defendants to have made a motion in arrest of judgment. They did not choose to do so, but themselves brought to this court the record, which, at a glance, we are compelled to remand. It cannot be questioned that if the learned judge of the court below had been informed at any stage of the proceedings before him that the plaintiffs merely alleged that they were residents, and failed to allege that they were citizens, of another state than that of which the defendants were citizens, he would have declined to hear the cause. The proceedings by writ of error were therefore superfluous, and order will be taken that plaintiffs in error, who instituted them, should pay the costs therefor.

## On Petition for Rehearing.

(June 9, 1896.)

**The application is stated in the petition for rehearing as follows:**

"The petition of T. C. Hunt, R. F. Olden, C. C. High, J. L. Tindall, E. R. Estes, and Jack Hittson, plaintiffs in error in the above-entitled cause, respect-

fully represents: That your petitioners pray for a rehearing in said cause, and for grounds of said rehearing assign the following, to wit:

"(1) The court erred in dismissing the writ of error herein, and that portion of the decree entered in this cause dismissing the said writ of error is absolutely contradictory to the remainder of the decree, which remands the cause to the circuit court 'with instructions to set aside the judgment and verdict, and to dismiss the cause in that court unless jurisdiction is hereafter made to appear by appropriate pleadings.' This decree distinctly finds error, and distinctly sets aside the judgment and verdict. It is impossible at the same time to dismiss the writ and reverse the case. We respectfully submit that the court has in this matter drifted into an error, and that the proper order to be rendered is to reverse the case, and remand it, with instructions. This is the fixed jurisprudence of this court. See Railway Co. v. Rogers, 13 U. S. App. 554, at top, 6 C. C. A. 403, 57 Fed. 378. And it is also the fixed jurisprudence of the supreme court of the United States. Denny v. Pironi, 141 U. S. 121, 11 Sup. Ct. 966; Peper v. Fordyce, 119 U. S. 472, 7 Sup. Ct. 287.

"(2) The court erred in condemning plaintiffs in error for costs herein when the errors in pleading were those of defendants in error alone, and not of plaintiffs in error.

"Wherefore petitioners pray that your honors will grant a rehearing herein, and upon such rehearing modify your former decree, and render a decree reversing and remanding this cause, with instructions to the circuit court to dismiss the suit unless by proper amendment the jurisdiction of the circuit court is made to appear of record, and that defendants in error be mulcted in costs. And petitioners pray for all further and general relief."

The application for rehearing not only presents the ground upon which the plaintiffs insist that the court has erred, but also the authorities in view of which a reconsideration of its action is requested of the court.

With regard to the first ground, which is to the effect that it was erroneous to dismiss the writ of error and remand the cause, we may remark that it is not necessary to discuss the extreme view on this subject adopted by counsel for the application, for the reason that, before the petition for rehearing had received the attention of the members of the court, it was determined to so change the judgment and mandate as to make it conform to the opinion filed in the cause, and that opinion announced that the writ of error was superfluous. The opinion elsewhere stated that the objection to the want of jurisdiction should have been made in limine, and if not presented there it would have been competent and proper, after verdict, for the defendants to have made a motion in arrest of judgment. They did not choose to do so, but themselves brought to this court the record which, at a glance, we are compelled to remand. It follows, therefore, that it was the purpose of the court to remand the cause with instructions, and we now correct the technical inadvertence of the mandate to the effect that the writ of error should be dismissed.

With regard to the second ground of application for rehearing, namely, that "the court erred in condemning the plaintiffs in error for costs herein when the errors herein were those of defendants in error alone, and not those of plaintiffs in error," we have not been able to concur in the proposition of the learned counsel. In the first place, we are obliged to point out the fact that neither in the opinion of the court nor in the original judgment were the plaintiffs in error mulcted with the costs generally in the lower

court. The penalty imposed on the parties who brought to this court a record which, with absolute facility, might have been disposed of in the circuit court, is not so severe as learned counsel opine. This is easily gathered from the opinion on file. The language is that defendants' "counsel, who are, or ought to be, aware of the palpable absence of jurisdiction, may not sit by during the trial of the cause, and, after all the proceedings in the lower court have been completed, then present their bill of exception, and bring the cause on writ of error to this court, without incurring the consequences of a useless and expensive performance." What useless and expensive performance? Obviously, that of bringing the cause by writ of error to this court. Elsewhere in the opinion it is stated:

"The proceedings by writ of error were therefore superfluous, and order will be taken that the plaintiffs in error, who instituted them, should pay the costs therefor."

Indeed, we think that the judgment, as originally drawn, quite clearly presents the conclusions of the court that the costs in this court, and such costs, only, of the writ of error in the court below as were necessary to perfect it, were made chargeable to the plaintiffs in error, and that it was not the purpose of the court at any time to mulct the plaintiffs in error with all the costs of the court below. Notwithstanding this, however, the amended judgment will carefully guard against the construction that the plaintiffs in error were made liable for all costs, which the counsel for plaintiffs in error seem to adopt, in the ground of their motion above quoted.

We are also unable to adopt the opinion of counsel that their client should not be made to pay the costs resulting from the writ of error. In their astute argument for the rehearing this language is used:

"The court mulcts the plaintiffs in error for the costs of the appeal for the reason, as is stated in the opinion, that it was the business of defendants' counsel to deal openly and fairly with the court, and for the reason, as is further stated, that the moral and legal obligation of frankness and of fairness to the court required that the learned counsel should not put the judge himself on trial for error before this court without disclosing to him the attack they would make."

This, counsel said, they have not the slightest inclination to dispute. To fully comprehend such cogency as this language of the court may possess, it is essential to understand the immediate context in the opinion, with which we have not been favored in the brief, from which the foregoing extract has been taken. The language of the court preceding this extract was:

"But it is said that it is no part of defendants' business to make out the plaintiffs' case. It is certain, however, that it was the business of defendants' counsel to deal openly and fairly with the court. The day for brilliant strategical displays in judicial trials has departed. Nor is a court of the United States a congenial spot for surprisals and ambuscades. The defendants even now refrain from suggesting that they did not discover this defect while the cause was pending, and yet it may not be questioned that the citizenship of the plaintiffs, if properly averred, would have supported the jurisdiction."

Now, since it was apparent that the plaintiffs in the circuit court were really citizens, and not merely residents, of Montana, any suggestion of the defective affirmation in the court below would have saved us all this trouble. The language above quoted in the opinion was written with what was then deemed to be a clear understanding of the position of counsel moving to reverse the judgment of the court below and to dismiss the cause for want of jurisdiction. It was scarcely conceivable that counsel in the circuit court were not aware of the nature and extent of the affirmation as to diversity of citizenship as stated in the record. As stated in the opinion:

"It is otherwise evident that the assignors or original payees of one of the bonds upon which the suit was had were, in fact, citizens of the state of Montana. The residence and place of business of these plaintiffs were for a long time in Custer county, in the latter state. This was well known to defendants in the circuit court, who are the plaintiffs in error here. Further, the cause was closely contested before the court and jury; and when, after an arduous and protracted trial, verdict and judgment for a large amount were rendered for the plaintiffs, a motion for new trial was made, and 13 different grounds were indicated as reasons why the verdict should be set aside, and a new trial granted. These were all overruled. Then the defendants presented to the trial judge 11 bills of exception, voluminous enough to compass 42 pages of printed record. In all of this defensive literature no intimation was given, either to the court or to the plaintiffs, that the fatal want of jurisdiction appeared. * * * The defendants in the circuit court, in framing their application for writ of error and supersedeas, presented 16 assignments of error, covering 8 additional pages of the printed record before us, and still no opportunity was afforded plaintiffs to redress their inadvertence, or to the court to take the appropriate order."

How was it possible for the court to apprehend that they were not aware that the jurisdiction did not exist without attributing to the learned counsel who appeared in the court below some small degree of ignorance of the law? We could not, with due respect to the well-known erudition of the profession, reach that conclusion, and, had we done so, it could not have altered the results. "Ignorantia juris non excusat." Grounds and Rudiments of the Law, p. 141. This is specially applicable to the rules of practice, and any deviation from them will entail consequences detrimental to the suitors. Martindale v. Falkner (Maule, J.) 2 C. B. 719, 720. We happily receive the assurance of the learned counsel in this court that the learned counsel in the circuit court had not noticed the defect of jurisdiction, and that it was observed for the first time when the record received the scrutiny of counsel who appeared here, and after the decision presented this application for rehearing. Unhappily, however, we must regard the conduct of the cause as an entirety. We are now satisfied that no advantage was sought by the failure to disclose the defect of jurisdiction on the trial of the cause in the circuit court. There was, however, even if we regard the proceedings in the most favorable light possible, a mutual mistake. This existed in the fact that the plaintiffs in the circuit court did not allege in their pleadings the essentials of jurisdiction in that court, and, indeed, in this cause of the diversity of citizenship. The defendants' counsel in the circuit court, notwithstanding the fact that they subjected the record to a most searching scrutiny, made necessary by a trial, a motion for a new trial, and the preparation of the exception, did not dis-

cover this obvious but conclusive defect in the pleadings. The "noblesse de robe," for which this court in its opinion, and counsel in the argument for rehearing, expressed the keenest solicitude, is maintained in all of its accustomed luster. And yet we are confronted by the hard condition that there was actually the useless and expensive performance on the part of the plaintiffs in error of bringing the cause by writ of error to this court. Certainly, then, there was a mutuality of mistake, and, we may say, an embarrassing mistake, which has taken up much of the time of this term which might have been appropriated to causes of which we have jurisdiction, and the mutuality of the responsibility therefor imposed by the judgment of the court, we think, was not only proper, but considerate in its leniency.

Peper v. Fordyce, 119 U. S. 469, 7 Sup. Ct. 287, is cited by counsel for the application, somewhat unfortunately for their contention. There the principle is announced that, when a decree or judgment of the circuit court is reversed for want of jurisdiction in that court, this court will make such order in respect to the costs of appeal as justice and right may seem to require. That was a suit brought where there was no jurisdiction because of the want of that diversity of citizenship between the parties which the law requires. Mr. Chief Justice Waite, for the court, observes:

"It only remains to consider the question of costs for in Railway Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, and Hancock v. Holbrook, 112 U. S. 229, 5 Sup. Ct. 115, it was held that, upon reversal for want of jurisdiction in the circuit court, this court may make such order in respect to the costs of the appeal as justice and right shall seem to require. Here the error is attributable equally to both parties. Fordyce sued originally in the circuit court, when, upon the face of his bill, it appeared there was no jurisdiction. Without discontinuing that suit, he sued again in the state court upon what was substantially the same cause of action, and to obtain substantially the same relief. This suit Peper & Latta caused to be removed to the circuit court, and in their petition set forth a state of facts which showed that the cause was not removable. The cause was then entered in the circuit court, and an answer and a cross appeal filed by Peper & Latta, without any attempt on the part of Fordyce or Moore to have the suit remanded, and without even calling the attention of the court to the question of jurisdiction. On the contrary, after the answer and before the cross appeal, Fordyce moved for and obtained an order that the two cases—that which he had brought in the circuit court of the United States, and that which Peper & Latta had removed there—be heard as one, under the title of his own suit in that court. The cases then proceeded without objection by either party until after a final decree below and the appeal by Peper & Latta to this court. Under these circumstances we order that the costs of this court be divided equally between parties, each paying half. The decree of the circuit court is reversed for want of jurisdiction in the circuit court, and the cause remanded, with instructions to dismiss the bill filed originally in that court by Fordyce against Peper & Latta, without prejudice, and to remand the suit removed from the state court; each party to pay his own costs in the circuit court."

There is much similarity between that case and this now before the court. But it is said that we did not impose costs as a penalty in the similar case of Railway Co. v. Rogers, 13 U. S. App. 554, 6 C. C. A. 403, and 57 Fed. 378. Had we done so, it is probable the present controversy would have been avoided. Be this as it may, it is sufficient to say that no such motion was made in that case. We think

that the decision of this court with respect to the costs of the writ of error was that which justice and right seemed to require, and the application for rehearing is denied.

For dissenting opinion of Boarman, District Judge, see 74 Fed. 1008.

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GENERAL ELECTRIC CO. OF NEW YORK v. WHITNEY et al.

WHITNEY et al. v. GENERAL ELECTRIC CO. OF NEW YORK et al.

(Circuit Court of Appeals, Fifth Circuit. April 21, 1896.)

No. 465.

1. RECEIVERS—ADOPTION OF CONTRACTS.
When a court of equity takes control, through a receiver, of a trust estate, in proceedings based on the insolvency and fraudulent management thereof, it is not more bound than in the case of proceedings for the foreclosure of liens to carry out all the contracts of the insolvents. No executory contract is binding on the receiver until adopted by him, and it is the duty of the receiver to refuse to adopt such a contract which would prove so burdensome as to imperil the fund.

2. SAME.
The L. Electric Co. had a contract with the city of N. O. for lighting the streets, under which the city paid it $15,000 a month. In consideration of advances, the L. Co. pledged and assigned to the G. Co. the payments to become due from the city for several months in advance. Thereafter, and before such payments had all become due, receivers of the L. Co. were appointed, in a stockholder's suit, upon allegations of mismanagement of the corporation, and were directed to continue its business. It appeared that, if the payments from the city were not made to the receivers, the income from the business would be insufficient to pay its operating expenses. The court, upon petition of the receivers, enjoined the city from paying to the pledgees the sums accruing after the appointment of the receivers, and directed it to pay all sums thereafter accruing to the receivers or their successors. *Held* no error.

Appeal and Cross Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

E. Howard McCaleb and Thos. J. Semmes, for Electric Co.

Branch K. Miller, for appellee Louisiana National Bank.

Fenner, Henderson & Fenner, Saunders & Miller, and Rouse & Grant, for Whitney and others.

Before McCORMICK, Circuit Judge, and BOARMAN and SPEER, District Judges.

McCORMICK, Circuit Judge. The Louisiana Electric Light Company was chartered under the laws of the state of Louisiana in 1889. Its charter provided:

"All the corporate powers of said corporation shall be vested in a board of directors, without the necessity of any authorization or ratification whatever of their action by the stockholders."

The capital stock was fixed at the sum of $500,000, to be represented by 5,000 shares of $100 each. On June 24, 1890, the corporation made its mortgage to the Loan & Trust Company to secure its first mortgage bonds, in the sum of $700,000, and on December 1, 1892, made its mortgage to the New York Guarantee & Indemnity

Company to secure what it called its "consolidated first mortgage gold bonds," in the sum of $2,000,000. It made a contract with the city of New Orleans to light the streets and public buildings at a specified price for each light, the aggregate of which now amounts to approximately $15,000 a month, payable monthly on the 9th day of the month following that on which the service is rendered. It also furnishes light to private consumers, and power to street-car lines and to other persons, from which its gross earnings aggregate approximately $21,000 a month, making, in all, monthly gross earnings of about $36,000. Its current monthly cost of operation, including necessary temporary repairs and betterments, is about $30,000.

On June 7, 1895, the United Electric Securities Company, a citizen of Maine, exhibited its bill to one of the judges of the circuit court, against the Louisiana Electric Light Company and its directors, showing that the complainant was the owner of 2,125 shares of the capital stock of the Louisiana Electric Light Company and of $435,000 of the $700,000 of its first mortgage bonds, and making such allegations as to its condition and control as, in the view of the complainant, required the interposition of the court and the appointment of a receiver. The court ordered that the defendants named in the bill should show cause on the 13th of June why the receiver prayed for should not be appointed, and that, in the meantime, the officers, agents, and servants of the Louisiana Electric Light Company should be restrained from disposing of or in anywise incumbering its property, otherwise than in the due course of business, and enjoining them to hold the property safely subject to the further order of the court. After the hearing set for the 13th of June, the circuit court declined to appoint a receiver at that time, but retained the bill, with leave to complainant to amend, and issued its injunction controlling and directing the action of the president and directors of the defendant company, and decreeing that the property of the company should be retained in the custody of the court until further orders should be made in the premises. After other proceedings not material on this appeal, the cause came on to be further heard on November 15, 1895, when the court appointed receivers, with the usual powers of receivers in like cases, who immediately qualified and took possession of the property and control of its operation. On November 30th the receivers presented their petition to the court, showing, among other things, that the late officers and directors of the Louisiana Electric Light Company have executed certain pretended acts of pledge, whereby they have undertaken to pledge to certain alleged creditors of the corporation the revenues to be earned by the Louisiana Electric Light Company under its contract with the city of New Orleans for the months of November, December, January, and February, to the full extent of $15,000, and for the month of March to the extent of $6,000, and have executed pretended transfers and assignments of the revenues in execution of the pledge, of which transfers and assignments the city of New Orleans has been notified; that unless restrained it will pay over to the transferees the amounts so to become due by it; that, if the rev-

enues from the city of New Orleans are thus diverted, the revenues derived from the business of the Louisiana Electric Light Company will be totally insufficient to pay the operating expenses, and petitioners, having no other means applicable to such purposes, will be entirely unable to comply with the order of court directing them to continue the operation of the business,—and praying that the city of New Orleans be cited to appear and show cause why it should not be enjoined and restrained from paying any sums which may become due under its lighting contract with the Louisiana Electric Light Company to any pledgees or transferees claiming the same, or to any persons other than petitioners, until the rights of such third persons have been duly recognized by the court, or until the further order of the court, and praying for a restraining order until such hearing, and for all further proper orders and relief in the premises. Thereupon the court ordered that the city of New Orleans and its proper officers should be cited to show cause on the 6th of December why it should not be enjoined and restrained from paying any sums that should become due under its lighting contract with the Louisiana Electric Light Company to any pledgees or transferees claiming the same, or to any persons other than the receivers, until the claims of such persons have been presented to the court and recognized, and restraining them from so doing in the meantime.

The city having answered the rule to show cause, and other parties having intervened, the court ordered that the injunction prayed for be modified so as to exclude from its operation the amount earned under the city lighting contract prior to the appointment of receivers on the 15th of November, 1895, authorizing the city to pay over to the pledgees one-half the amount due for lighting during the month of November, and decreed that the city of New Orleans, its officers, agents, and employés, be enjoined and restrained from paying any sums due or to become due under its lighting contract with the city of New Orleans to any pledgees or transferees claiming the same, or to any persons other than the receivers, until the further order of the court, saving and excepting one-half the amount due for the month of November, 1895. And the court further ordered that the receivers amend their petition by making the General Electric Company and the Louisiana National Bank and any other persons of record as holders of any pledges or transfers of said earnings, parties, and that said parties enter appearance and file answers within five days from date of service on them, and setting the cause down for hearing on January 4, 1896. By proof taken before a master it was shown that the appellant had made advances to the Louisiana Electric Light Company aggregating the sum of $61,000, to secure which that company had, by an instrument dated June 3, 1895, pledged $149,000 of its mortgage bonds, and had attempted to pledge the revenues accruing to the Louisiana Electric Light Company from the city of New Orleans, La., under the contract between the said lighting company and the city of New Orleans, La., for the months of September, October, and November, 1895, and January, February, and March, 1896, formal transfers of which were executed and de-

livered contemporaneously with the execution of the instrument of pledge. After full hearing a decree was passed January 18, 1896, by which it was—

"Ordered that the said city of New Orleans do pay to George Q. Whitney and A. S. Badger, receivers in this cause, the full amount earned and due under said contract for the month of December, 1895, and also the amounts to become due for the months of January, February, and March, 1896, when earned, and that the said city do recognize the right of said receivers or their successors, if any are appointed, to claim and enjoy the full benefit of said contract in the same manner and to the same extent as the Louisiana Electric Light Company might if such receivers had not been appointed. Otherwise than as herein maintained, the injunction pendente lite is dissolved."

From this decree the General Electric Company appealed, and the receivers by leave took a cross appeal.

There is no error in the decree appealed from of which the appellant or the cross appellants can complain. The contract to light the city has no vital connection with the subsequent contract touching the disposition of the revenues. The subject of the second contract could not exist until, and only as far as, there was performance of the first. The parties are different, and the purposes akin in no degree. So far as is material to this litigation, both contracts were executory at the time of the appointment of the receivers, and the execution of the first might be necessary to the protection of the trust estate, while the execution of the second might prove destructive to the estate. The question, therefore, readily resolves itself into this: Did the circuit court acquire jurisdiction in the cause, by the original, supplemental, and amended bills of complaint, to take the custody of the property and the management of the affairs of the defendant corporation, and appoint receivers to hold and exercise such custody and control? There is no suggestion of the want of such jurisdiction. It was the duty of the receivers to use all reasonable efforts to carry out and perform the beneficial contract, and it was also their duty to refuse to adopt an executory contract which they found would prove so burdensome as to imperil the fund. Such a contract was not binding on the receivers until renounced by them, but, on the contrary, was not binding on them at all until adopted by them, and such adoption, however expressed, would not deprive the court of power and discretion to stop the further performance of such a contract.

It is contended that there is a marked distinction between the powers and duties of the court and its receivers in proceedings where no foreclosure of liens is sought and in proceedings for foreclosure; that in the former case, which was this case up to the passing of the decree we are reviewing, the property and affairs of the insolvent and mismanaged corporation must be taken hold of by the court, if at all, with all its burdens. If by this is meant only that all existing liens on, or vested rights in, property must be respected and enforced, the distinction disappears; for in all proceedings a court of equity respects vested rights in property and enforces the existing liens thereon. If, however, it is meant that in such proceedings as do not seek foreclosure, and are founded on the insol-

vency and fraudulent management of a trust estate, the court of chancery cannot take hold of that estate except on the condition of carrying out all of the valid contracts of the insolvent, we are constrained to say that the marks pointing to that conclusion are not legible to us, and we repeat the suggestion that such a contention leads to the denial of the jurisdiction of the court to administer such estate. A distinction, not clearly marked or defined, is referred to in the reported opinions of eminent judges, and does exist. It was duly recognized by the circuit court in this case in the caution exercised on the exhibition of the complainants' original bill, in the effort to prevent the insolvency of the trust estate by controlling the trustee and preventing fraudulent mismanagement through the process of injunction. When it was made to appear that this remedy would not reach the evil condition, the receivership had to be tried or the case abandoned. It cannot be contended that the court should be required to operate the property without funds to meet its necessary running expenses, for the physical impossibility involved is the patent answer to such a contention. On sufficient proof the circuit court has found that the operation of the business of the Louisiana Electric Light Company has been carried on by the receivers, and will continue to be carried on, at a loss to the receivers of about $9,000 a month, unless they are permitted to collect and receive the revenues earned under the contract with the city of New Orleans. We cannot, by reasoning, add to the support which the plain statement of the facts of the case gives to that part of the decree of which the appellant complains.

The cross appeal of the receivers cannot be sustained, because, while neither the appellant nor the Louisiana Bank showed any right in law or equity to demand immediate payment to any extent out of any of the current earnings of the receivers, each did show that its advances were made at a time, and put to such uses, that the court, in the exercise of a sound discretion, might permit them, respectively, to receive the payment the decree allows, without thereby doing any injustice to other creditors.

The decree of the circuit court will be affirmed, at the cost of the appellant, and it is so ordered.

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## WILDING et al. v. CITY OF SAN ANTONIO et al.

(Circuit Court of Appeals, Fifth Circuit. May 19, 1896.)

No. 489.

EQUITABLE LIEN—CONTRACT.

The city of A., being authorized to issue $500,000 of bonds, to provide a sewerage system, of which $100,000 had been sold, and the cash received, made a contract with W. for the construction of the gathering part of the system, which, upon the estimates made by the city engineers of the quantities of different kinds of work to be done, at the prices fixed, amounted to $331,209.45. The contractor subsequently filed a bill, alleging that the quantities of work to be done so varied from the estimates that the cost, instead of amounting to only $331,209.45, would consume all that was available of the sewer fund on hand, claiming an equitable lien on the

whole fund for his payment, and praying that the city be enjoined from making a contract for an outfall system, and setting aside a portion of the fund to pay for it. The contract with W., which was made when only $100,000 of the bonds had been sold, provided that only so much work as that sum would pay for should be done, until more bonds had been sold, and, as additional sums of $50,000 were received, the contract should be carried on, until such sums were absorbed, or the contract completed. *Held*, that this provision, in view of the known circumstances at the time and the amount of the estimate, must have been intended to limit the sums to be absorbed to $331,209.45, and did not give W. a lien on the whole fund.

Appeal from the Circuit Court of the United States for the Western District of Texas.

Oscar Bergstrom and William Aubrey, for appellants.
T. H. Franklin, R. B. Minor, and T. D. Cobbs, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SPEER, District Judge.

McCORMICK, Circuit Judge. This is an appeal from an interlocutory order or decree refusing an application for a writ of injunction. The city of San Antonio was duly authorized to issue her bonds to the amount of $500,000 to raise a fund to provide a sewerage system. She had sold one-fifth of these bonds, and had in her treasury, of the proceeds of this sale, $100,000. She had employed a skilled sanitary engineer to devise a system of sewerage best adapted to her areas and topography, and within the limit of her authorized fund. The scheme he proposed embraced a gathering system, and suggested several provisions for an outfall or disposal of the sewage. When she had adopted a plan only for the gathering system, of which the specifications and estimates were carefully made, she solicited bids for this work, and on January 2, 1895, the bid of J. B. Hindry for $331,209.45 was accepted, and on the 14th day of the same month the city made a contract in writing with him, which on the 8th July, 1895, was, with the consent and express approval of the city, assigned and transferred by Hindry to J. W. Wilding, L. A. Marshall, V. M. Backus, and W. R. Hines, composing the firm of Wilding, Marshall, Backus & Hines, the appellants. By this contract the appellants bound themselves to do all the work and furnish all the materials which "may be required for the construction of sewers and appurtenances in accordance with the specifications herein contained, and in accordance with the plans and directions made and to be made from time to time as the work proceeds." At the time this contract was let, a careful estimate had been made of the work necessary to be done for its completion, and of the cost at the prices specified, according to which estimate the cost was found to be the sum of $331,209.45, the amount of Hindry's accepted bid. About one-third of the work has been done. The contractors have received from time to time 85 per cent. of the contract price of the work done as estimated by the city engineer as the work progressed. A substantial disagreement as to the proper construction of the clauses of the contract classifying the excavations has arisen between the parties, on which rests a vital issue in the bill exhibited

by the appellants in the circuit court. This issue is pivotal in the pleadings and affidavits of the parties and in arguments of their counsel. Touching it we have carefully examined the record and the briefs, and duly considered the earnest and able oral arguments submitted by counsel, but we do not find it necessary to decide this issue on this appeal, and therefore express no opinion on it. The appellants contend that the adopted scheme for a sewerage system, on which their contract was let, embraced only the gathering plant and contemplated crude disposal of the sewage by discharge into the San Antonio river; that the work already done shows that the original estimate of cost was so far defective that, instead of the work let to them amounting in cost to only $331,209.45, it will, at the contract prices, consume all that is available of the sewer fund on hand; that this is the only fund to which the contractors can look, or out of which the city can pay them; that by their contract they have an equitable lien on this fund, and the city is bound to hold it all for their payment. On March 3, 1896, the city adopted an ordinance providing:

"Section 1. That the city treasurer be and is hereby directed to make the following transfers from the sewer fund: Charge sewer fund and credit Wilding, Marshall, Backus & Hines sewer contract account $331,209.45. Charge sewer fund and credit Katz, Crandall & Katz out-fall sewer contract account $98,585.13.

"Sec. 2. That the city treasurer charge Wilding, Marshall, Backus & Hines sewer contract account all payments made Wilding, Marshall, Backus & Hines up to date and credit the amount to sewer fund.

"Sec. 3. That in future no warrants shall be drawn on either Wilding, Marshall, Backus & Hines sewer contract account, or Katz, Crandall & Katz out-fall sewer contract account except for work performed by the respective contractors under their contracts."

The next day—March 4th—the outfall contract in writing was duly signed by the parties thereto, and on the 17th of March the appellants exhibited their bill in the circuit court, embracing much matter not necessary to be considered now, and claiming an equitable lien on the whole of the fund, which the court was asked to protect from the threatened waste by the process of injunction. The city having still on hand in cash of the sewer fund an amount more than equal, with the payments already made the appellants, to the sum of $331,209.45, the amount of Hindry's accepted bid for the work embraced in appellants' contract, and having set apart that amount to be used solely in payment for work performed and to be performed by the contractors, it is as yet immaterial whether the appellants have or have not an equitable lien on that amount of the sewer fund, and we therefore withhold our opinion on that subject. Have the appellants such an equitable lien on the whole of the sewer fund as will require or authorize a court of chancery to enjoin the city from making such disposition of the excess (over $331,209.45) as the legal representatives of the city, in the exercise in good faith of their legal discretion, deem best calculated to secure the object for which the fund was provided? We think they have not shown such an equity. The contract provides:

"It is also mutually agreed by the city of San Antonio, the party of the first part, and the contractor, that, inasmuch as there is at this time only one

hundred thousand ($100,000.00) dollars in the treasury of the city of San Antonio realized from the sale of the sewer bonds for the purpose of building and constructing said sewers, that only so much of the work specified and mentioned in this contract shall be done as will absorb the amount in the treasury at this time; conditioned, however, that as soon as any amount not less than fifty thousand (50,000.00) dollars is realized from the remainder of said bonds and deposited in the city treasury, that then this contract shall be carried on until such sum or sums are absorbed, or said contract is fully carried out and completed, as hereinbefore contemplated and set out."

Viewing this provision in the light of the undisputed fact that at the time of making this contract both of the parties thereto had in mind the amount of the then estimated costs, which was also the amount of Hindry's bid, it is reasonable to conclude that the limit of the sum or sums to be absorbed was $331,209.45. The contention of the appellants is that the plans and specifications covered the whole area of the four districts into which the consulting engineer divided the surface of the city, calling for about 73 miles of sewer of specified dimensions and price for materials and work, which the contractor was bound to do and furnish, and the city was bound to receive if well done, and pay for at the contract price. It was estimated that there would be not more than 100 cubic yards of hard rock excavation, to be paid for at the price of $3 per yard, but the appellants claim that they have already made excavations that should be classed as hard rock excavations to the value at the contract price for that class of $117,095.69, and they have reason to believe that the same disproportion will obtain throughout the two-thirds of the projected work yet to be performed. It would strain the bias of interest or of advocacy to seriously suggest that this result was in the contemplation of either of the parties when this contract was made, in January, 1895. The order or decree of the circuit court refusing the application for a preliminary injunction is affirmed.

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FLORIDA MORTG. & INV. CO., Limited, v. FINLAYSON et al.

(Circuit Court, S. D. Florida. February 24, 1896.)

EQUITY PLEADING—IMPERTINENCE.

Passages in a defendant's answer to a bill in equity, which, without alleging any facts which do not appear in the bill, or denying any allegations of the bill, consist merely of argument as to the effect of facts, already apparent in the bill, as amounting or not amounting to notice or to laches, and as to the legal rights of the defendant under state statutes, are impertinent, and, upon exception thereto, will be stricken out.

This was a suit in equity, brought in the United States circuit court for the Southern district of Florida by the Florida Mortgage & Investment Company, Limited, a corporation organized and existing under the laws of the kingdom of Great Britain, against Daniel A. Finlayson, as administrator of the estate of A. Florida Finlayson, deceased, and against Daniel A. Finlayson in his own right, for the removal of a cloud from title. The bill of complaint alleges that complainant was seised in fee of 800 acres of land, therein described, situated in the county of Hernando, and state of Florida, all of said lands being wild and unoccupied, and no one in actual possession thereof; that complainant derived title thereto from one J. Hamilton Gillespie, whose title was based on a deed executed to him by a master in chancery, dated April 23, 1889, under a final decree and sale in a foreclosure suit instituted by complain-