

doubtedly, be proven aliunde, if necessary. The return of the writ to this court in the case before us is evidence to us that it has been filed in the court below. Further evidence is afforded in the affidavit of the clerk which has been filed in this court showing that the original writ was delivered to and lodged and filed with the clerk on the date which it bears. This, in my opinion, constitutes sufficient proof of the fact of the filing of the writ in the court below, and gives this court jurisdiction to entertain the same.



NORTH AMERICAN LOAN & TRUST CO. v. COLONIAL & U. S. MORTG. CO., Limited.

(Circuit Court, D. South Dakota. October 20, 1896.)

1. PROCEEDINGS BEFORE REFEREE—REVIEW.

To obtain a review of the evidence and proceedings, exceptions taken to any order or ruling made by the referee should be embodied in a bill of exceptions signed by him.

2. SAME.

An objection that the findings are against the weight of evidence cannot be considered unless the entire evidence is preserved by a bill of exceptions taken before the referee.

John L. Pyle and A. B. Melville, for plaintiff.  
 F. McNulty and L. B. French, for defendant.

RINER, District Judge. This case is before the court upon the motion of the plaintiff to confirm the report of the referee, and to enter judgment thereon, and upon exceptions filed by the defendant to the findings of fact and conclusions of law made by the referee. A trial before a referee is conducted in the same manner as a trial before the court. To obtain a review of the evidence and proceedings, exceptions taken to any order or ruling made by the referee should be embodied in a bill of exceptions signed by him. He is the proper party to sign a bill of exceptions, and not the judge making the order of reference. It is well settled that an objection or exception based upon the contention that the findings are against the weight of evidence cannot be considered by the court unless the entire evidence is preserved by a bill of exceptions taken before the referee. No bill of exceptions was taken before the referee in this case, and therefore the only question which can be considered by the court is, what judgment should be rendered upon the findings of fact made by the referee? The referee finds that at the time he made his report the plaintiff had in its possession the sum of \$9,445.09, money belonging to the defendant. To this amount should be added the sum of \$769.16, which the plaintiff, by its written stipulation filed herein, conceded was omitted from the referee's report because of clerical errors occurring therein; making a total of the defendant's money in the hands of the plaintiff, at the time the referee's report was filed, of \$10,215.15. Of this amount \$887.70, commissions upon what is designated in the referee's report as the "D & P Loans," it is entitled to retain, leaving a net balance of the defendant's money

in the hands of the plaintiff at the time the report was filed of \$9,327.46. The exceptions to findings designated by the referee as findings of fact Nos. 45 and 73 will be sustained for the reason that the same are not findings of fact, but conclusions of law. Being unable to concur with the referee in the conclusions of law made by him, I am constrained to sustain the exceptions taken thereto, and to enter judgment upon the facts found by him in favor of the defendant for the sum last above named.

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**BLAKE v. PINE MOUNTAIN IRON & COAL CO. et al. SOUTHERN  
LAND-IMPROVEMENT CO. v. MERRIWETHER et al.  
BLAKE v. MERRIWETHER et al.**

(Circuit Court of Appeals, Sixth Circuit, June 22, 1896.)

Nos. 379, 380, 390.

**1. FEDERAL COURT—ANCILLARY JURISDICTION.**

A federal court which has possession of property by receivers, and is engaged in administering the trusts pertaining to it, must take jurisdiction of any claim by any one whose interests would be injuriously affected by the action of the court in dealing with the property and administering the trust.

**2. SAME.**

Whether such ancillary jurisdiction be involved by original bill, by cross bill, or by intervening petition, diversity of citizenship is not essential to its maintenance.

**3. ADMINISTRATION OF TRUST—PLEADING.**

In a suit for general administration of a trust by foreclosure of a mortgage, where the classification of liens and preferences takes place, particularly in the case of commercial mortgages of corporate property, which are essential instrumentalities of corporate enterprises, the usual strictness of pleading is not required of those who come in to assert their claims to the property, or for payment out of it.

**4. CONTRACT—RESCISSION BY COURT.**

The fact that a party has not performed his contract even according to its legal effect does not necessarily entitle the other party to rescission, if either or both have partly performed, and circumstances of embarrassment have thereby arisen which make it impracticable to restore the status quo.

**5. SAME.**

The fact that the parties may voluntarily abandon or rescind the contract, and successfully sue or defend at law for nonperformance, does not necessarily require a court of equity to rescind for nonperformance.

**6. VENDOR'S LIEN—PRIORITIES—SUBROGATION.**

Certain contracts and conveyances made in connection with the transfer by the P. Co. of its property to the I. Co. construed as showing that vendors' liens existing in favor of the previous owners of part of the property were not intended to be kept alive by subrogation in favor of the P. Co., which furnished money with which to pay them off to the I. Co., which assumed them, so as to take precedence of a deed of trust given by the I. Co. to rescue part of the purchase money due the P. Co., containing a general warranty.

**7. VENDOR'S LIEN—IMPLICATION.**

A vendor's lien is never implied against warranties in any case where the circumstances show that the existence of such a lien could not have been intended, and would be in antagonism to the manifest intention to clear the title of such impediments.