

proves to be the weaker grounds on which to stand, rather than the stronger, he may, nevertheless, be concluded by the result, which may thus add itself to the many instances in which counsel, after an adverse decision, disturb themselves, often unnecessarily, with the reflection that, if the cause had been tried on different lines, defeat would not have followed.

In each case there will be entered the following order: The decree of the circuit court is affirmed, and the defendant corporation will recover its costs in this court against the appellants.

---

LEWIS et al. v. DILLARD et al.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1896.)

No. 711.

1. EXECUTION—WRONGFUL LEVY—RIGHTS UNDER.

When a marshal, in levying execution, forcibly takes property out of the possession of a constable who has levied thereon under a distress warrant, or of a pledgee for the benefit of third persons, such action is illegal, and the judgment creditor acquires no right to or lien upon the property.

2. SAME—EXEMPT PROPERTY.

The fact that a constable has levied a distress warrant on mortgaged chattels, which by the law of the state cannot be seized on execution against the mortgagor, does not justify a marshal in taking the property out of the possession of the constable, and levying an execution on it.

3. RIGHTS OF CREDITORS—SALE UNDER AGREEMENT—EFFECT ON CREDITOR NOT A PARTY THERETO.

Where property which has come into the possession of parties claiming liens is sold under an agreement between some of them that, after paying a mortgage, the balance of the proceeds shall be paid into court, to await the result of litigation as to which of the claimants is entitled to it, the legal title to such balance vests in the owner of the property, subject to any liens which may have been acquired, and the rights of one of the claimants who was not a party to the agreement cannot be prejudiced thereby.

4. PLEDGES—RIGHTS OF PLEDGEE—SEIZURE OF PLEDGE.

The actual delivery of property by the owner to an agent of his bondsmen, with authority to sell and apply the proceeds to the extinguishment of any liability of theirs as his sureties, constitutes a valid pledge; and the pledgee acquires a superior right to the property and its proceeds, as against all persons except those holding prior liens, which cannot be divested by his being wrongfully deprived of the possession thereof.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

W. F. Werner was the collector of the public revenue of the county of Crittenden, in the state of Arkansas; and, being unable to settle his accounts as such collector in the time and mode required by law, he signed and delivered to his bondsmen on the 26th of July, 1893, the following paper:

"Gayoso Hotel, Memphis, Tenn., July 26, 1893.

"Assets of W. F. Werner.

21 head of mules.....	1,000
Farming utensils.....	100
3 four-horse wagons.....	100
1 buggy.....	75
1 surrey.....	50

2 horses .....	100
25 hogs, more or less.....	60
20 head of cattle, more or less.....	100
1 jackass .....	100
500 acres of cotton, more or less.....	2,000
100 acres of corn, more or less.....	400

"\$500 due me by citizens of Crittenden county, more or less. \$5,000.00 interest in Crittenden county scrip, held by Jno. (mortgaged for \$3,500.00) Armestead. \$500 due me in Crittenden Co. scrip, more or less, by citizens of Crittenden Co. W. F. Werner."

On the 28th of July, 1893, Werner delivered the possession of all the property mentioned in this paper to C. L. Lewis, as trustee and pledgee for Werner's bondsmen, with authority to him to sell the same, and to gather and sell the crops of cotton and corn, and appropriate the proceeds of the sale to the payment of Werner's indebtedness to the school fund of Crittenden county, for which the sureties on his official bond were liable. On the 23d day of August, 1893, a distress warrant was issued by the auditor of the state, addressed to the constable of Jasper township, Crittenden county, which recited, in substance, that there was due to the state from Werner, as collector of the public revenue, the sum of \$16,378.76, and commanding the constable to levy and sell the goods and chattels, lands and tenements, of Werner and his sureties (naming them), to satisfy the sum due the state. The property, the proceeds of which are here in controversy, was duly levied upon by the constable under this distress warrant; and while the same was in his possession by virtue of such levy the possession was forcibly taken from him on the 15th of September, 1893, by the United States marshal, who proceeded to levy on the property an execution issued on a judgment against Werner, and in favor of Cochran. The judgment in favor of Cochran was recovered on March 20, 1893, for \$12,018.30. On July 29, 1893, execution was issued on this judgment, and came into the hands of the marshal the same day, and on the 15th of September, 1893, was levied on the property, the proceeds of which are here in dispute; the marshal taking the property from the possession of the constable for the purpose of making such levy, as before stated. Dillard & Coffin had a deed of trust or chattel mortgage on all the property mentioned, which was prior in date and superior to the claim of all the parties to this suit. At this stage of affairs, Cochran, Lewis (Werner's bondsmen), and Dillard & Coffin entered into an agreement, on the 19th of September, 1893, which, after reciting in substance the foregoing claims of the parties, and also the further fact that the state of Arkansas was asserting a right to subject the property mentioned to payment of the debt due the state from Werner in his official capacity, as collector of the public revenue, provided that the marshal, by his deputy, Bowen, might continue in possession of the property, gather and sell the crops of cotton and corn, and sell the other property, and pay the proceeds, less certain costs and charges and the rent on the land, to Dillard & Coffin, who, after satisfying their own mortgage debt against Werner, were to pay the remainder into the registry of the United States circuit court for the Eastern division of the Eastern district of Arkansas, there "to await the determination as to whom the property belongs; it being hereby expressly agreed that the rights of the parties hereto, respectively, are preserved, it being the intention of this instrument merely to avoid costs and expenses, and obtain the largest amount of money possible, over which the said Cochran, Lewis, and the state of Arkansas may litigate their rights. \* \* \*" The property was sold, and the proceeds applied as provided in the agreement. Dillard & Coffin's debt was satisfied in full, and they paid into the registry of the court the remaining proceeds of the sale of the property, amounting to \$2,069.77. This bill was filed on the 1st of December, 1894, by Cochran, the appellee. Lewis, one Morris, and Werner are made defendants. The bill alleges that the appellee is entitled to the fund in the registry of the court by virtue of the levy by the marshal of the execution issued on the Cochran judgment. Lewis answered, denying the complainant's right to the fund, and setting up a claim thereto as trustee and pledgee for Werner's sureties on his official bond. The state of Arkansas, by leave of the court, intervened, and set up a claim to the fund

by virtue of the issuance and levy of the auditor's distress warrant on the property. So that there are three claimants to the fund in the registry. Cochran claims it upon the ground that he acquired a lien on the property by the levy of his execution thereon, Lewis claims it as trustee and pledgee for Werner's sureties on his official bond, and the state of Arkansas claims it by virtue of the levy thereon of the distress warrant issued by the auditor against Werner as a defaulting collector of the public revenue. The court below decreed that the fund belonged to Cochran, and Lewis and the state of Arkansas appealed.

W. G. Weatherford, for appellants.

John J. and E. C. Hornor, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Under the agreement, the rights and liens of the parties attached to the proceeds of the sale now in the registry of the court, in the same manner, in the same order, and with the same effect as they bound the property before the sales were made. *Markey v. Langley*, 92 U. S. 142, 155; *Astor v. Miller*, 2 Paige, 68; *Sweet v. Jacocks*, 6 Paige, 355; *Brown v. Stewart*, 1 Md. Ch. 87; *Olcott v. Bynum*, 17 Wall. 63. At the time the marshal attempted to levy the Cochran execution on the property, it was either in the actual possession of the constable, under and by virtue of the levy thereon of the auditor's distress warrant, or in possession of Lewis as agent and pledgee for Werner's bondsmen. Whether the constable or Lewis had the possession of the property, the action of the marshal in forcibly taking the possession and levying the Cochran execution thereon was illegal, and Cochran acquired no right to or lien upon the property by virtue of that action. *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, and citations. Conceding that the rule in Arkansas is that mortgaged chattels cannot be seized and sold on execution against the mortgagor (*Jennings v. McIlroy*, 42 Ark. 236), and that there was a mortgage on these chattels at the time the constable took them in execution on the distress warrant, that gave the marshal no right to take the property out of the possession of the constable, and levy the Cochran execution upon it. The distress warrant had the force and effect of an execution issued on a judgment at law. *Sand. & H. Dig. Ark. §§ 6655-6664*. Moreover, if the chattel mortgage prevented the constable from making a valid levy of the distress warrant upon the property, it was equally an obstacle in the way of the marshal making such a levy. The marshal had no jurisdiction to pass upon the validity of the constable's levy. So long as the constable was in the actual possession of the property, holding it under the levy of the distress warrant, the marshal could not disturb that possession, or make any levy upon the property. It does not appear that the mortgagees objected to the levy of the distress warrant. The marshal did not represent the mortgagees, but was seeking to do precisely what it is said the constable had done, namely, levy an execution on the property, regardless of the mortgage. If, therefore, any prior right or lien could be acquired by the levy of an execution on

the property while it was under mortgage, that right or lien was acquired by the state by virtue of the levy of the distress warrant. The rule in Arkansas is that, when there are several executions against the same defendant at the same time, the officer who succeeds in making the first levy thereby obtains priority for his writ, and secures it the right to be first paid out of the proceeds of the sale, without regard to the date of the writs, or the time they came into the officers' hands. *Derrick v. Cole*, 60 Ark. 394, 30 S. W. 760. By wrongfully taking the property out of the possession of the constable, Cochran gained no right, and the state lost none. But it is said that the state was not a party to the agreement for the sale of the property, and therefore could make no claim to the proceeds. It is true, the agreement is not signed by any one on behalf of the state, but it recites that the state of Arkansas is asserting a right to subject the property to the payment of the amount due her from Werner as collector, and contains an express provision that "Cochran, Lewis, and the state of Arkansas may litigate their rights" to the fund derived from the sale of the property. Moreover, if the state had not been mentioned in the agreement, her rights would not have been prejudiced thereby; for an agreement between Cochran and Lewis, two of the rival claimants of the property, could not have the effect to prejudice the rights of the state. The agreement put an end to a further race of diligence between the several claimants. Each claimant to the property was to have the benefit of the rights and liens he had acquired up to that date, and whoever was found, in a proper proceeding instituted for that purpose, to have acquired the prior or better right to the property, would be entitled to the proceeds of its sale, in the registry of the court. After this agreement was entered into, the appellee filed this bill for the purpose of having the rights of the parties to the fund determined. By this act the appellee acquired no new or additional lien or right to the property or its proceeds. It is such a proceeding as the agreement contemplated should be instituted by some one of the claimants to the fund. The judgment creditor who first files a bill and secures service of process in the suit to set aside fraudulent conveyances of the judgment debtor's property, or to discover assets, thereby establishes a lien upon the property mentioned in the bill, and is entitled to priority over other creditors in the distribution of the fund derived from such property. *Kimberling v. Hartly*, 1 McCrary, 136, 1 Fed. 571. But there is no analogy between such a proceeding and the suit at bar. Here the fund was already in court, and the object of the bill was to determine which of the rival creditors had the better right to it. The fund was not brought into court through the action of any single creditor, but by the joint agreement of all. Before the bill was filed, the property had been sold, the mortgage debt discharged, and the surplus proceeds paid into the registry of the court. After the extinguishment of the mortgage debt, the appellee could not maintain a bill in equity to subject the property or its proceeds to the payment of his judgment, on the theory that Werner had only an equitable estate therein, that could not be reached in any

other mode. When the mortgage debt was extinguished, Werner at once became possessed of the legal title to the remaining property, or its proceeds, subject to any valid claim or lien thereon acquired by Lewis, Cochran, or the state.

It remains to consider the rights of Lewis as trustee and pledgee for the bondsmen of Werner. A contract of pledge need not be in writing. It depends for its validity on delivery and possession of the property. The delivery of the property may be to an agent or trustee who may hold the possession for the pledgee, and the pledge may be given to secure the pledgee against a liability as surety for the pledgor, as well as for an existing debt. Jones, Pledges, §§ 5, 34, 35. The actual delivery of the property by Werner to Lewis, as agent for the bondsmen of Werner, to secure them against liability as sureties on his official bond, without authority to the agent to sell the property and apply the proceeds towards the extinguishment of such liability, constituted a valid pledge of the property. That the possession of the property passed to the pledgee is not controverted. It does not appear that the mortgagees objected to this pledge of the property. The learned counsel for the appellee say in their brief that "Lewis, as trustee, was in possession at the time of the marshal's levy." The marshal could not rightfully disturb that possession. At common law, goods held in pledge could not be attached or taken in execution in an action against the pledgor. Jones, Pledges, § 372. The common law on this subject obtains in Arkansas. *Patterson v. Harland*, 7 Ark. 158; *Jennings v. McIlroy*, 42 Ark. 236. From the very nature of the contract of pledge, the pledgee has a right to hold the pledge undisturbed until it is redeemed. *Yeatman v. Savings Inst.*, 95 U. S. 764. It follows from these well-settled principles that Lewis, as trustee and pledgee, had the prior and superior right to the property and its proceeds, as against all persons except the mortgagees; and, the mortgage debt having been extinguished, he now has the right, as trustee and pledgee, to the remaining proceeds of the sale of the property. Having been wrongfully deprived of the possession of the property by the appellee, he did not thereby lose his right in equity, as against the appellee, to the property or its proceeds. If the liability of the sureties of Werner for which the property was pledged has been discharged, the direction given below for the decree to be rendered by the circuit court will not have the effect to deprive the appellee or the state from showing that fact, and subjecting the fund in court to the payment of their demands by a proper proceeding for that purpose.

To conclude, the claimants to the fund are entitled to rank in the following order: (1) C. L. Lewis, as agent and pledgee of the property for the sureties on the official bond of Werner, is entitled to the fund to indemnify the sureties for any sum they have paid, or are liable to pay, as such sureties. (2) If the fund, or any portion thereof, remains after discharging the liability for which the property was pledged to Lewis, the state of Arkansas is entitled to the same on account of the sum due the state from Werner as collector of the revenue for which the distress warrant was levied on the property.

(3) If the fund, or any portion of it, remains after satisfying the claims of Lewis and the state of Arkansas, Cochran, the appellee, is entitled to the same on his execution issued on his judgment against Werner. The decree of the circuit court is reversed, and the case remanded with directions to that court to render a decree directing that the fund be paid to the claimants according to their priority of right thereto as declared in this opinion.

---

UNITED STATES v. TYGH VALLEY LAND & LIVE-STOCK CO.

(Circuit Court, D. Oregon. September 26, 1896.)

1. TRESPASS ON GOVERNMENT LANDS—REMEDY.

The United States has the same right as a private owner to institute legal proceedings to protect its property from threatened injuries.

2. SAME—IMPLIED LICENSE.

There is no implied license to use for pasture purposes public land reserved for the preservation of forests, to the destruction or injury of such forests.

Daniel R. Murphy, U. S. Atty., and Charles J. Schnabel, Asst. U. S. Atty.

Franklin P. Mays and H. S. Wilson, for defendant.

BELLINGER, District Judge. It is contended in support of the demurrer to the complaint that the act of March 3, 1875, "to protect ornamental and other trees on government reservations and on lands purchased by the United States and for other purposes," does not apply to a case like this. That act makes it an offense against the United States to unlawfully cut or injure trees standing upon reserved or purchased lands of the United States, or to break fences inclosing such lands, or to break or open such fences, and drive cattle, horses, or hogs upon such land, for the purpose of destroying the grass or trees thereon, or to knowingly permit such animals to enter, through any such inclosures, upon the lands of the United States. The injury threatened in this case is from the pasturing of sheep upon an uninclosed forest reservation. The act in question, so far as it relates to the pasturage of reserved or purchased lands of the United States, refers only to inclosed lands. The acts complained of are therefore not criminal, under the laws of the United States. It does not follow that the government is without civil remedies to protect its property from the threatened injury. It is held in *Cotton v. U. S.*, 11 How. 229, that the rights of the United States as to its public lands are the same as those of any owner of private property, and that it may therefore maintain trespass against any person trespassing upon such lands, either by cutting and carrying away timber or otherwise. The following quotation embodies the opinion of the court in its main part:

"Every sovereign state is of necessity a body politic, or artificial person, and, as such, capable of making contracts and holding property, both real and personal. It is true that, in consequence of the peculiar distribution of the powers of government between the states and the United States, offenses

against the latter, as a sovereign, are those only which are defined by statute, while what are called 'common-law offenses' are the subjects of punishment only by the states and territories within whose jurisdiction they are committed. But the powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. The restraints of the constitution upon their sovereign powers cannot affect their civil rights. Although, as a sovereign, the United States may not be sued, yet, as a corporation or body politic, they may bring suits to enforce their contracts and protect their property in the state courts, or in their own tribunals administering the same laws. As an owner of property in almost every state of the Union, they have the same right to have it protected by the local laws that other persons have. As was said by this court in *Dugan v. U. S.*, 3 Wheat. 181, 'It would be strange to deny them a right which is secured to every citizen of the United States.' In *U. S. v. Bank of the Metropolis*, 15 Pet. 392, it was decided that when the United States, by their authorized agents, become a party to negotiable paper, they have all the rights and incur all the responsibilities of other persons who are parties to such instruments. In *U. S. v. Gear*, 3 How. 120, the right of the United States to maintain an action of trespass for taking ore from their lead mines was not questioned."

It is argued that there is an implied license from the United States to pasture these lands, growing out of the custom that has existed from the beginning of the government, by which the public lands have been so used. In *Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, it is held that there is an implied license, growing out of the custom of nearly 100 years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them, where they are left open and uninclosed, and no act of the government forbids their use. But there is a clear distinction between public lands and lands that have been severed from the public domain, and reserved from sale or other disposition, under general laws. Such a reservation severs the land reserved from the mass of the public domain, and appropriates it to a public use. *Wilcox v. Jackson*, 13 Pet. 498. It is in furtherance of the policy of the government by which the public domain is held for settlement that it shall be free to such use by the people as serves the convenience of settlers on uninclosed portions of it without public detriment. The reservation of the lands in question is an appropriation to a special public use, and is therefore a disposal of them, so far as the public domain is concerned. This appropriation is for the promotion of the public good. It is claimed for the government that the pasturage of these lands with sheep will injuriously affect the forests of the reservation, and thus tend to defeat the object for which the reservation was made. If this is true, there is no reason why the government should not be entitled to such civil remedy to prevent the threatened injury as is available to any other owner of property. As was said in *Cotton v. U. S.*, supra, "It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they [the United States] were not entitled to the same remedies for their protection." The object of the reservation is the preservation of the

forests of the Cascade range of mountains in Oregon, and there is therefore no implication of a license to use the reserved lands to the destruction or injury of these forests. The government, no less than a private party, is entitled to have its interests protected against the threatened trespass and injury. The demurrer to the complaint is overruled.

---

FITZGERALD v. WEIDENBECK et al.

(Circuit Court, D. Minnesota. September 29, 1896.)

CORPORATIONS—LIABILITY OF TRUSTEES—PENALTY—RIGHT OF ACTION.

The Montana statute providing that, if the trustees of a corporation organized thereunder fail to make a report of its affairs at a specified time, they shall be liable for its debts, creates a joint and several liability to each creditor, which can be enforced by an action at law against one or all of the trustees. This liability is not in the nature of a penalty. The right of the creditor is vested as soon as it accrues, and may be assigned, and cannot be defeated by any subsequent change or repeal of the statute.

Bigelow & Taylor, for complainant.

Cobb & Wheelwright and T. D. Merwin, for defendants.

LOCHREN, District Judge. The demurrer of the several defendants to plaintiff's complaint in this action came on for hearing before the court on the first day of the general term begun and holden at the court room in the federal building in the city of Minneapolis, in said district, on Tuesday, the 1st day of September, A. D. 1896, and the several parties appeared by counsel and were heard. The plaintiff, by his complaint, seeks to hold the defendants, trustees of the Twin City Butte Mining Company during the year 1894 and ever since, liable for the amount of three judgments obtained in the district court of the Second district of the state of Montana against said company, which is a Montana corporation, upon indebtedness of said company arising on contract, and existing and matured on and prior to October 1, 1894; the personal liability of the defendants being claimed to exist under a section of the Montana statute, under which said company was incorporated, which required that every company or corporation organized under the provisions of such statute should annually, within 20 days from the 1st day of September, make a report, which should state the amount of the capital of such corporation, and the proportion thereof actually paid in, and the amount of existing debts, and which report should be signed by the president and a majority of the trustees of said corporation, and be verified by the oath of the president or secretary of such corporation, and be filed in the office of the clerk of the county where the business of the corporation is carried on; and that, if any company shall fail to make or file such report as above stated, all the trustees of the company shall be jointly and severally liable for the debts of the company then existing, and for all that shall be contracted before such report shall be made. And the complaint alleges the fact to be that said Twin City Butte Mining Company did not make or file such report within 20 days from the 1st day of September, A. D. 1894, nor at any other



time prior to the 3d day of February, A. D. 1895. One of said judgments, for the sum of \$1,273.37, was so recovered by the plaintiff against said Twin City Butte Mining Company on December 1, 1894, on causes of action on contract, all existing against said company on and prior to October 1, 1894, in favor of other parties, who thereafter assigned the same to the plaintiff. The other two judgments, for \$1,556.37 and \$163.08, respectively, were so recovered by other persons in February, 1896, on similar causes of action existing and matured before October 1, 1894, and the same two judgments were, after the recovery thereof, assigned to the plaintiff.

1. I think the complaint sufficiently alleges that the defendants were at all the times referred to in the complaint trustees of the said corporation; and that their report was not filed within a reasonable time after 20 days from the 1st day of September, 1894.

2. The liability of the defendants under the statute, being a joint and several liability to each creditor of the corporation, such liability can properly be enforced by each creditor for himself in an action at law against one or all of the trustees. If the liability were strictly of the nature of a penalty, it could not be enforced in a court of equity.

3. But, while the statutory liability of trustees has some of the characteristics of a penalty, and attaches upon such kind of default or omission of duty on the part of the trustees as is frequently in like statutes punished by the infliction of a penalty, yet, under this statute, such liability of the trustees is not a penalty, but the withdrawal, as to them, as a consequence of their failure to perform certain duties, of the exemption from personal liability which the statute allowing the incorporation of the company would otherwise afford them, and an allowance to the creditors of the corporation at the time of such default or during such omission of duty, of the further remedy of having the right to proceed in the collection of their debts directly against the trustees from whom such exemption is withdrawn. There is nothing harsh or oppressive in this. Persons who without franchise engage in a business venture for profit are each held justly liable for all the debts and obligations of the joint concern. If the state grants corporate franchises to persons engaging collectively in business ventures, and includes in such grant exemption from personal liability, such exemption will be upon such terms and conditions, and as to such persons, as the statute prescribes. By the terms of this Montana statute stockholders are personally liable to creditors to the extent of unpaid stock, and, in case the company fails to make the required report, the exemption from personal liability for debts of the corporation then existing or contracted during the default is withdrawn as to the trustees who ought to have caused the report to be made and filed. There is no penalty in the strict and proper sense. These debts are still the debts of the corporation, and, if they are all paid by the corporation in the course of its business, or collected from its assets, the liability of the trustees causes no loss to them. There is no mulct nor forfeiture prescribed against them as punishment for their default. The removal of the exemption from personal liability as to them, simply enlarges and extends the rights and remedies of creditors as to debts of the corporation

existing at the time of the omission of duty, or contracted while such omission continued. Such liability attaches in respect to the debts existing at or during the default, and may be enforced not only by the then creditors, but by their subsequent assigns as well. The right of the creditor to enforce this obligation and liability of the trustees becomes fixed and vested as soon as it accrues, and passes to his assignee, and is not subject to be defeated by any repeal or change of the statute. It is not the case of a right or liability created by statute, and with no other than a statutory basis, resting on the power of the legislature to prescribe forfeiture for disobedience. It is rather a case or condition where the corporate franchise by its own terms and limitations, and for a plain reason, ceases to afford to officers of the corporation who disregard an enjoined duty, the exemption from personal liability which the franchise alone would otherwise afford in respect to specified debts contracted in an enterprise in which they were engaged, with others, for profit.

4. The Montana statute set forth in the complaint has not been repealed. The slight changes in verbiage in the new Code and slight additions leave the conditions affecting this case in force in 1894, still in force.

The demurrers are overruled, with leave to the defendants to answer plaintiff's complaint by the rule day in November, 1896.

---

NATIONAL BANK OF OXFORD v. WHITMAN.

(Circuit Court, S. D. New York. August 18, 1896.)

1. CORPORATIONS—STOCKHOLDERS' LIABILITY—TRANSITORY ACTIONS.

The action given by Gen. St. Kan. par. 1192, to enforce the stockholders' liability when an execution against a corporation is returned unsatisfied, is transitory, and may be brought outside the state against a nonresident stockholder. *Howell v. Manglesdorf*, 5 Pac. 759, 33 Kan. 194, followed.

2. STATE COURTS—CONSTRUCTION OF STATUTES—OBITER DICTUM.

The opinion of a state court upon the construction of a statute of the state is entitled to great weight in the federal courts, even though the question considered was not directly in judgment.

This was an action by the National Bank of Oxford against George C. Whitman to enforce his liability as a stockholder in the Arkansas City Investment Company. Defendant moves to set aside a verdict for plaintiff.

William B. Hornblower, for plaintiff.

William G. Wilson, for defendant.

WHEELER, District Judge. The constitution of Kansas provides (article 12, § 2):

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder."

And the General Statutes of that state (1889, par. 1192, "Execution against Stockholders: Action"):

"Sec. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corpora-