

Notwithstanding the fact that the receiver was thus directed to pay \$16,036 on the Sears judgment prior to the payment by him of any part of the indebtedness secured by either the first or second mortgage, and prior to all unsecured debts of the railway company, including the indebtedness to Fuller, yet neither the Central Trust Company of the City of New York, holder of the second mortgage, nor Fuller, nor the receiver was in any way made a party to the appeal. The receiver himself asked to be allowed to appeal, which petition the court below denied on the ground that it appeared "that the complainant desires and intends also to appeal from said decision, and that it is unnecessary for the receiver to appeal." Upon that ground the court below denied the petition of the receiver, but, in the language of the order of denial, "without prejudice to the right of the complainant or any other party therein who is interested and adversely affected by said order to appeal therefrom; and the complainant or any such other party is hereby allowed to appeal separately from said order allowing said claim and requiring the receiver to pay the same in the manner stated in said order." The receiver made no other application to be allowed to appeal, but the complainant in the foreclosure suit brought the appeal now here, serving therewith only Annie and Frank Sears, Thompson, Edson & Humphreys, Kilbourne and wife, and Porter and wife; and to those parties only was the citation addressed. The receiver was clearly entitled to be heard upon the question as to whether there should be any change in the decree. So, also, were the holder of the second mortgage upon the property, and the unsecured creditors, whose claims were, by the decree appealed from, subordinated to the Sears judgment to the extent of \$16,036. But that amount was not the limit of the claim of the intervening petitioners, and the setting aside of the decree appealed from might result in a larger allowance to those petitioners, and a corresponding decrease in what the holder of the second mortgage and the unsecured creditors may receive. Manifestly, therefore, those parties to the record were necessary parties to the appeal, and their absence is fatal to it. *Davis v. Trust Co.*, 152 U. S. 590, 14 Sup. Ct. 693; *Sipperley v. Smith*, 155 U. S. 86, 15 Sup. Ct. 15. Appeal dismissed.

FLORENCE OIL & REFINING CO. et al. v. INTERSTATE NAT. BANK
OF KANSAS CITY.

(Circuit Court of Appeals, Eighth Circuit. October 19, 1896.)

DEMURRER OUT OF TIME—COLORADO CODE.

Under Code Civ. Proc. Colo. §§ 74, 168, where a demurrer to a complaint is allowed to be filed out of time, and is then overruled, it is necessary to apply to the court for leave to file further pleadings, and the granting of such leave is discretionary with the court.

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

This was an action upon a promissory note by the Interstate National Bank of Kansas City, Kan., against the Florence Oil & Refining Company and William E. Johnson. From a judgment entered in favor of plaintiff after the overruling of a demurrer to the complaint, defendants brought error.

T. M. Patterson, E. F. Richardson, and H. N. Hawkins, for plaintiffs in error.

John A. Perry and Carlton M. Bliss, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The Interstate National Bank of Kansas City, Kan., the defendant in error, sued the Florence Oil & Refining Company and William E. Johnson, the plaintiffs in error, on a promissory note executed by the last-named parties for the sum of \$10,000, which was dated November 25, 1893, and was made payable 180 days after the date thereof. The summons in said action was served on the defendants below, respectively, on July 13, 1895, and on August 10, 1895. The summons required the defendants "to appear and demur or answer to the complaint filed in said action * * * within ten days * * * after this summons shall be served." The record shows that on September 3, 1895, the defendants below filed a motion to strike out the affidavit attached to the plaintiff's complaint, which affidavit was as follows:

"John A. Perry, being first duly sworn, upon his oath deposes and says that he is the attorney for the plaintiff; that he has read the foregoing complaint, and knows the contents thereof, and that the same is true to the best knowledge and belief of the affiant.
John A. Perry."

The motion addressed to the affidavit was heard on October 1, 1895, and was on that day overruled. On the same day the defendants asked leave to file a demurrer to the complaint, which was granted, and a demurrer in the following language was filed:

"Come now the defendants, the Florence Oil & Refining Company and William E. Johnson, by their attorneys, Patterson, Richardson & Hawkins, and demur to the plaintiff's complaint in this cause, and for cause of demurrer say that said complaint does not state facts sufficient to constitute a cause of action."

The demurrer was forthwith heard and overruled, whereupon the defendants asked leave to file an answer to the complaint, which leave was denied. Thereupon the plaintiff below moved the court for a judgment against the defendants by default, which motion was granted.

The record having been removed to this court by a writ of error, it is here urged that a reversible error was committed by the trial court in refusing to grant the defendants below leave to answer the complaint after the motion to strike out the affidavit and the demurrer had been overruled. It is not claimed in this court as a ground for reversal that either the motion or the demurrer was well founded in point of law, but it is insisted that, notwithstanding the fact that both pleadings were obviously without merit, the trial court was, nevertheless, bound to grant permission to file an answer, and this without any precedent showing that the defendant had a meritorious defense. We are of opinion that the record

fails to show any error of which this court can take cognizance. The case discloses, we think, that when the motion to strike out the affidavit was filed, on September 3, 1895, the defendants were then in default for failure to demur or answer to the complaint within the time specified in the summons, and that they were likewise in default on October 1, 1895, when they asked and obtained leave to file a demurrer to the complaint. Neither of these pleadings would seem to have been filed in time. The following sections of the Colorado Code of Civil Procedure are the only ones bearing upon the question which have been called to our attention:

"168. Judgment may be had if the defendant fails to answer the complaint as follows: First, in an action arising upon contract for the recovery of money or liquidated damages only, if no answer, demurrer or motion has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk upon the application of the plaintiff, shall enter the default of the defendant, and immediately thereafter, if the complaint shall have been or shall then be properly verified, enter judgment for the amount specified in the summons, including the costs against the defendant or defendants, who are so in default."

"74. When a demurrer is decided, either in term time, or vacation, the court or judge shall immediately cause the decision thereof to be entered in the record, and may proceed to final judgment thereon in favor of the successful party, unless the unsuccessful party shall plead over or amend upon such terms as shall be just, and the court or judge may fix the time for pleading over and filing amended pleadings; and if the same be not filed within the time so fixed, judgment by default may be entered as in other cases. * * *"

These sections of the Code seem to imply that where a demurrer to a complaint is not filed in time, but is allowed to be filed out of time, and is then overruled, it is necessary to apply to the court for leave to file further pleadings, and that the granting of such leave is discretionary with the trial court. In the present case we think that it appears with sufficient certainty that leave to file an answer was denied because the trial court was satisfied by the previous action of the defendants that an opportunity to answer was sought merely for the purpose of delay. We have not been able to discover any defect in the complaint which furnished a fair pretext for the demurrer, and it is conceded that the objection taken to the affidavit was utterly groundless. So far as the record shows, the application for leave to answer was not accompanied by any showing, either oral or written, that the defendants had a meritorious defense, and, in the absence of such a showing, we cannot say that the court abused its discretionary powers in refusing leave to file an answer: much less that it committed a reversible error. When it is necessary to apply to a trial court for leave to file an answer to a complaint or declaration, we must concede to it the power to deny such leave, if it is satisfied that no real defense to the cause of action exists, and that the purpose of the application is merely to prolong the litigation. The judgment below is affirmed.

CONE v. TUSCALOOSA MANUF'G CO.

(Circuit Court, S. D. New York. November 24, 1896.)

SERVICE OF PROCESS—CORPORATIONS—DOING BUSINESS IN FOREIGN STATES.

A corporation organized to manufacture and sell goods, which conducts its manufacture in the state where it is organized, but regularly sells some of its goods through a selling agent in another state, is doing business within such other state, so as to render valid a service of process made upon one of its officers while casually in such latter state on other business.

This was a suit by Moses H. Cone against the Tuscaloosa Manufacturing Company. The cause was heard on a motion by the defendant to set aside the service of summons.

William J. Gibson, for the motion.
Samuel H. Guggenheimer, opposed.

LACOMBE, Circuit Judge. The circumstance that the president of defendant corporation is here casually to discharge his duties as a public officer, and not on any business for the corporation, is immaterial, if the papers show that the corporation does business here. The cause is a removed one; service on the president is undoubtedly sufficient, under the state law; and, if the defendant corporation has come into the state to do business, it will be assumed to have assented to be bound by the state law. The business of defendant corporation is twofold. It manufactures cotton goods, and then sells them. The manufacture is wholly conducted in the state of Alabama. The sale, however, of so much of its product as is known in the trade as "plaids, checks, and stripes," has been, since 1891, conducted here through another corporation as selling agent. Examination shows that defendant does not sell its entire product to the selling agent, which thereafter resells, and thus makes its profit or loss. The selling agent is strictly an agent who sells defendant's goods for the account of said defendant, and, for its services in effecting such sales and guarantying the solvency of the purchasers, receives a commission. The goods, even when sent to the selling agent, remain the property of defendant until sale is effected with some third party. The defendant thus offering for sale and selling its goods here is "doing business within the state," quite as much as if it offered and sold them through a salaried officer resident here.

The suggestion that a few months prior to service of the summons the defendant made a general assignment of all its property for the benefit of creditors, in accordance with the law of Alabama, does not change the situation, in view of the decision of the supreme court in *Société Foncière et Agricole des Etats Unis v. Milliken*, 135 U. S. 309, 10 Sup. Ct. 823. Motion to set aside service is denied.

THOMPSON v. GERMAN INS. CO. et al.

(Circuit Court, D. Nebraska. November 24, 1896.)

1. **CIRCUIT COURT—JURISDICTION—NATIONAL BANKS—STOCKHOLDERS' LIABILITY.**
The circuit court has jurisdiction of an action to ascertain or fix the liability upon shares of an insolvent national bank which are alleged to have been transferred with a fraudulent intent to escape such liability, when the amount of the assessment exceeds \$2,000, exclusive of interest and costs.
2. **LIMITATION OF ACTIONS—STATE STATUTES.**
The right of the receiver of an insolvent national bank to enforce the liability of stockholders, though created by United States statute, may be barred by the running of a state statute of limitations. *Campbell v. City of Haverhill*, 15 Sup. Ct. 217, 155 U. S. 610.
3. **SAME—EQUITY.**
The bar of a statute of limitations will be enforced, when applicable, in equity as well as at law.
4. **SAME—ASSESSMENT—RIGHT OF ACTION.**
The action of the comptroller in making an assessment against the stockholders of an insolvent national bank creates a right of action against the stockholders, but is not the institution of a suit to enforce it, so as to stop the running of limitation. The statute begins to run from the date the assessment becomes due.

This was a suit in equity by S. B. Thompson, receiver of the Central Nebraska National Bank, against the German Insurance Company and others, to recover the amount of an assessment upon certain shares of stock. Demurrers to the bill were sustained and the bill dismissed. Complainant thereupon filed an amended bill (77 Fed. 258), which upon demurrer was also dismissed.

Harry E. O'Neill, for complainant.

Greene & Breckenridge and James McNeny, for defendants.

SHIRAS, District Judge. From the allegations of the bill filed in this case, it appears that the complainant is the receiver of the Central Nebraska National Bank, of Broken Bow, duly appointed to that position by the comptroller of the currency; that on the 13th day of July, 1892, the comptroller made an assessment of 90 per cent. upon the face value of the shares of the capital stock of said national bank, the same being declared to be due and payable on the 3d day of August, 1892. The bill in this case was filed on the 5th day of October, 1896, more than four years after the assessment was made, and after the amount thereof was declared to be due and payable by the terms of the assessment order. The bill, in substance, charges that the German Insurance Company was one of the original shareholders in said bank, having subscribed for and taken 100 shares of the capital stock, of the par value of \$100 per share, and that subsequently, with knowledge of the insolvent condition of the bank, the insurance company had transferred said shares to other parties, made defendants herein, for the express purpose of escaping the statutory liability existing against the shareholders of insolvent national banks. The purpose of the bill is to ascertain and fix the liability for the assessment made by the comptroller, the several parties to whom the stock has been transferred being made parties defendant. The amount of the assessment sought to be collected is \$9,000.

To this bill demurrers have been interposed, and in support thereof it is first urged that the circuit court of the United States has not jurisdiction of the matter. The controversy is clearly one arising under the laws of the United States, the liability sought to be enforced being one created by the statutes of the United States; and, as the amount involved exceeds \$2,000, exclusive of interest and costs, jurisdiction exists in this court, under the express provisions of the acts of congress of 1887 and 1888. The next ground urged in support of the demurrers is that the bill, upon its face, shows that the proceeding is barred by the lapse of time under the provisions of the statutes of the state of Nebraska, which provide that, except in cases for the recovery of real property, actions upon contracts not in writing, express or implied, and actions upon a liability created by statute, other than a penalty or forfeiture, must be brought within four years after the right of action has accrued. Comp. St. Neb. 1895, §§ 5599-5601.

The first question for decision is whether the provisions of the state statute can be relied upon as a bar to a liability created by a statute of the United States. This question, it seems clear to me, has been finally and fully answered by the ruling of the supreme court in *Campbell v. Haverhill*, 155 U. S. 610, 15 Sup. Ct. 217. It had long been an unsettled problem whether an action for the infringement of a patent was subject to be barred by the statute of limitations of the state wherein the suit was brought, and the circuit courts were divided in opinion thereon. The supreme court, in *Campbell v. Haverhill*, held that the state statute was applicable, although the right of action was created by the statute of the United States, and the federal courts alone had jurisdiction over actions based upon the statute. Relying upon the doctrine announced in that case, I hold that the fact that this proceeding is based upon a federal statute does not except it from the operation of the state statute of limitations. The fact that this is a proceeding in equity is likewise of no avail against the applicability of the state statute, it being settled, by repeated decisions of the court of appeals in this circuit, that the bar of the statute will be enforced, when applicable, in equity as well as at law. *Railway Co. v. Sage*, 1 C. C. A. 256, 49 Fed. §15; *Rugan v. Sabin*, 3 C. C. A. 578, 53 Fed. 415; *Hayden v. Thompson*, 17 C. C. A. 592, 71 Fed. 60.

On behalf of complainant, it is further suggested that, in substance, this is a proceeding in which the United States is interested, in such sense that the statute will not be held applicable, upon the familiar doctrine that the statute of limitations is not usually held applicable to suits brought by the sovereign power. The proceeding is not in the name of the United States. It is not brought, on behalf of the United States, to enforce any sovereign or governmental right or claim. The proceeding is in the name of the receiver, and is brought to enforce collection of the assessment made upon the stockholders for the benefit of the creditors of the insolvent bank; and the rule sought to be invoked cannot be applied, because the United States is not a party to the pro-

ceeding. In cases of this character the receiver is acting as the trustee and representative of the creditors of the bank, and, as against the creditors, the statute is available. *Case v. Terrell*, 11 Wall. 199; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148.

It is also claimed, on behalf of complainant, that the running of the statute was ended when the insolvent bank was put in liquidation,—the thought being, if I correctly apprehend counsel, that the whole process of liquidation, including suits to collect the assets of the corporation, and including therein the assessments made upon the stockholders, is to be deemed to be one proceeding, the same being of a nature to interrupt the running of the statutory period; and in support of this view the case of *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, is cited. In that case a bill was filed by a judgment creditor of an insolvent bank to enforce his rights as a creditor, and it was in form a bill for the benefit of all the creditors who might come in and join in the proceeding, and the bill expressly prayed that the liability of the stockholders might be ascertained and enforced. It was held by the supreme court that, when other creditors made themselves parties to this proceeding, it must be deemed to be, in their behalf, one continuous suit, so that the running of the statute was interrupted when the original bill was filed. The difference in the facts of that case and one at bar makes the ruling in the former case inapplicable to the question arising on the present record. In *Richmond v. Irons* the bill was, in effect, filed on behalf of all creditors, to reach the assets of the bank; and the court held that, so long as any portion of these assets remained undistributed, any creditor could make himself party to the proceedings, so as to share in future distributions, and that, as the bill filed sought to enforce the liability of certain stockholders, the filing thereof prevented the running of the statute in favor of all creditors who subsequently became parties to the bill. In that case the suit in equity to enforce the statutory liability was filed before the bar of the statute had accrued, and the ruling of the supreme court is simply to the effect that the bill was filed for the benefit of all creditors who subsequently joined in the proceeding. In the case at bar no suit was commenced until after the expiration of four years after the assessment was made by the comptroller. It is well settled that the statute begins to run from the date the call or assessment becomes due and payable. *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739; *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. 867; *Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. 914; *Liggett v. Glenn*, 2 C. C. A. 286, 51 Fed. 381.

The contention of complainant is that the putting of the bank into liquidation, and the act of the comptroller in making the assessment of 90 per cent. upon the capital stock, is the equivalent of the filing of the creditors' bill in the case of *Richmond v. Irons*, and that thereby the running of the statute was prevented. The act of the comptroller in making the assessment created a right of action against the stockholders, but it was not the institution of a suit for the enforcement of the right of action thus called into

being. When the assessment became due and payable the receiver possessed the right to enforce payment thereof by the appropriate proceedings in court. As soon as this right of action accrued to the receiver, the statute of limitations began to run in favor of the stockholders, and the full period to complete the bar had terminated before this suit was brought. In *Richmond v. Irons* the creditors' bill filed in the court was for the purpose of enforcing the right of action against the stockholders. In the case at bar the act of the comptroller in making the assessment created a right of action against the stockholders, but the comptroller did not nor could he grant an order enforcing this right of action. The remedy for the enforcement of the right was by an appropriate action in court, and it is this remedy which may be barred by the lapse of time, and in my judgment the bar has become effectual in this case, in that it appears that under the statute of Nebraska actions of this character must be brought within four years from the time the right of action accrues, and the bill shows that this proceeding was not commenced within that period after the assessment became due and demandable. Upon this ground, therefore, the demurrers are sustained, and the bill is dismissed, at cost of complainants.

UNITED STATES v. JOINT TRAFFIC ASS'N.

(Circuit Court, S. D. New York. May 28, 1896.)

1. RAILROADS—JOINT TRAFFIC ASSOCIATIONS—INTERSTATE COMMERCE LAW.

A combination of railroad companies into joint traffic associations, under articles of agreement by which each road carries the freight it may get, over its own line, at its own rates, and has the earnings to itself, though providing proportional rates, or proportional division of traffic, is not a pooling of traffic on freights, or division of net proceeds of earnings, within the prohibitions of the interstate commerce law, nor of the act of 1890 (26 Stat. 209) against unlawful restraints and monopolies.

2. SAME—JURISDICTION OF FEDERAL COURTS.

The United States cannot maintain a bill in equity to restrain an association of railroads from carrying into effect an agreement alleged to be illegal under the interstate commerce law, when it appears that it did not grant the charter of, and has no proprietary interest in, any of the roads. Its right is to prosecute for breaches of the law, not to provide remedies.

This was a bill in equity, filed by the United States against the Joint Traffic Association to enjoin alleged violations of the interstate commerce law.

Wallace Macfarlane, U. S. Atty.

James C. Carter and Edward J. Phelps (George F. Edmunds, on brief), for defendants.

WHEELER, District Judge. The interstate commerce law (24 Stat. 379) provides:

"Sec. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any