

it is well settled, may "be taken as the equivalent of a special finding of facts," presenting for review on writ of error only questions of law; but manifestly it is necessary that the ultimate facts be stated, and not evidence, merely, from which the facts to be established may be inferable. *Supervisors v. Kennicott*, 103 U. S. 554; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481; *Distilling & Cattle-Feeding Co. v. Gottschalk Co.*, 24 U. S. App. 638, 13 C. C. A. 618, and 66 Fed. 609. The motor which the plaintiffs made for the defendant, it is admitted, was not constructed, in all respects, in conformity with the model agreed upon; but on behalf of the plaintiffs it is contended that the defendant, by the use made of the motor after delivery, and by declarations of intention in that respect, had elected to keep the motor, and that such election is deducible from the agreed statement as a conclusion of law. But the question, in our opinion, remains one of fact, or perhaps of mixed law and fact, in respect to which, as it is presented here, it is not competent for the court to declare a legal conclusion, strongly evident as, upon the facts and circumstances stated, the inference of fact may be deemed to be. It follows that the judgment rendered is invalid. It is supported neither by a general finding appropriate to the issue, nor by special finding, nor by an agreed statement of facts which can be regarded as equivalent to a special finding. The agreed statement probably contains sufficient evidence to enable a trial court to determine the disputed questions between the parties, either by a general or a special finding, but the finding that the facts are as set forth in the agreed statement is neither the one nor the other. The statement being one of evidence, the finding does not make it a statement of facts. To what extent, upon another trial, the parties shall be bound by the agreement as a statement of evidence, if that becomes a matter of dispute, will be a question for the circuit court. The judgment is reversed, and the case remanded, with direction to grant a new trial.

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UNITED STATES v. FERGUSON.

(Circuit Court of Appeals, Second Circuit. January 13, 1897.)

1. MONEY WRONGFULLY RETAINED BY FEDERAL OFFICER—CLAIM AGAINST UNITED STATES—STATUTE.

Money taken from one arrested for larceny from a post office was retained by the inspector under the erroneous supposition that it was the money stolen. *Held*, that an order by the prisoner to the inspector to pay it to a third person was not an assignment of a claim against the United States, within Rev. St. § 3477, requiring such assignments to be made in the presence of witnesses, and after the allowance of the claim.

2. SAME—RIGHT OF ACTION—ASSIGNMENT OF.

A written order to an officer to pay to a third party money belonging to the drawer, but retained by the officer without authority, is an assignment of the right of action to recover it.

3. REVIEW ON APPEAL—FINDINGS OF FACT.

Findings of fact will not be reviewed where the evidence is not in the record.

**4. SAME—ASSIGNMENTS OF ERROR—SUFFICIENCY.**

General assignments that the court erred in rendering judgment against the defendant, and in not rendering judgment in his favor, cannot be considered.

In Error to the District Court of the United States for the Northern District of New York.

Action by Frank C. Ferguson against the United States. Judgment for plaintiff (64 Fed. 88), and defendant appeals.

Wm. A. Poucher, U. S. Atty.

Ford & Ferguson, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in error was the defendant in the court below, and seeks to review a judgment for the plaintiff in a suit brought pursuant to the provisions of the act of congress of March 3, 1887, entitled, "An act to provide for the bringing of suits against the government of the United States." Conformably with section 7 of the act, the court below made and filed a written opinion setting forth the specific findings of fact and the conclusions of law involved in the case. There is no bill of exceptions, and none of the evidence or rulings of the court upon the trial are before us. The assignments of error are eight in number.

The suit was brought to recover a small sum of money (\$50.60) in the possession of the government, which had been received by the postmaster general of the United States from a post-office inspector. It appears from the findings of fact that the post-office inspector received the money, and afterwards forwarded it to the postmaster general, under the following circumstances: One Atwood had burglariously entered a post office and stolen postage stamps of the value of \$320.61, and money to the amount of \$50.60, belonging to the government. He was arrested the next day, and postage stamps of the value of \$127.30, and \$113.96 in money, were found upon his person. The stamps and money were turned over by the arresting officers to the post-office inspector in charge of the case. The inspector, apparently assuming that the money found upon Atwood's person was, to the extent of \$50.60, the stolen money, kept that amount in his possession pending the trial of Atwood. In fact, it was not the stolen money, or the proceeds of the stolen postage stamps. The plaintiff, a lawyer, was retained by Atwood to defend him upon the trial, and Atwood gave him a written order, directed to the inspector, for the payment of the \$50.60 in the hands of the inspector. The plaintiff presented this order to the inspector, but the latter refused to pay over the money. Thereafter Atwood was convicted of the burglary, and the inspector transmitted the money to the postmaster general. As a conclusion of law, the court found that the plaintiff was entitled to judgment for the sum of \$50.60, and interest thereon from the time of the demand and refusal.

The first and second assignments of error allege that the court erred in not finding that there was no legal and valid assignment of the money from Atwood to the plaintiff. It is argued in support of these assignments of error that the order given by Atwood

to the plaintiff was an assignment of a claim against the United States, and void by force of section 3477 of the Revised Statutes, which enacts that "all transfers and assignments made of any claim upon the United States \* \* \* shall be absolutely null and void unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof." The obvious answer to this contention is that, when the money in the hands of the inspector was transferred by Atwood to the plaintiff, there was no claim against the United States. As was said in *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870, the section "only refers to claims against the United States which can be presented by the claimant to some department or officer of the United States for payment, or may be prosecuted in the court of claims. The section simply forbids the assignment of such claims before their allowance." At the time when the order was given the inspector had no authority, under the laws of the United States, or no color of authority, to take into his possession and assume to retain money belonging to Atwood, even though Atwood had stolen an equivalent sum of government moneys from a post office. It is not pretended that any statute, or any regulation of the postmaster general made pursuant to a statute, could sanction a transaction of that kind. So long as the money was in the hands of the inspector, or of his superior officer, the postmaster general, there was no claim against the United States, and only one against the officers of the government, who had transcended their authority, and made themselves individually liable for the consequences. No claim accrued against the government until it ratified the acts of these officers by receiving and retaining the money which had been taken from Atwood. Until then, the government could have repudiated their acts, and there would not have been the slightest foundation for an action against it. The order given by Atwood to the plaintiff, being for money then in the adverse possession of another, was but a transfer of a chose in action. It, however, operated as an assignment of his cause of action for the recovery of the money. *Hall v. Robinson*, 2 N. Y. 293; *Waldron v. Willard*, 17 N. Y. 467; *Sherman v. Elder*, 24 N. Y. 381. It is now generally the doctrine in this country that a cause of action for a conversion is assignable. See 2 Am. & Eng. Enc. Law (2d Ed.) p. 1021.

The third, fourth, fifth, and sixth assignments of error impugn some of the findings of fact made by the court. There being no bill of exceptions, we can only review errors apparent upon the record. As the evidence upon the trial is not before us, these findings cannot be reviewed.

The seventh assignment alleges as error that the court erred in rendering a judgment against the defendant; and the eighth, that the court erred in not rendering a judgment in favor of the defendant. These assignments do not comply with the rules, as they fail to point out any particular error asserted and intended to be urged. Whether they mean that a wrong result was reached because the facts were

erroneously decided, or because the court erred in applying the law to the facts, can only be conjectured. *Grape Creek Coal Co. v. Farmers' Loan & Trust Co.*, 12 C. C. A. 350, 63 Fed. 891; *Oswego Tp. v. Travelers' Ins. Co.*, 17 C. C. A. 77, 70 Fed. 225; *Doe v. Mining Co.*, 17 C. C. A. 190, 70 Fed. 455. As was said by the circuit court of appeals for the Seventh circuit in the first of these cases, "an assignment of error cannot be good if it is necessary to look beyond its terms to the brief for a specific statement of the question to be presented." The court, at its option, may notice a plain error not assigned. A careful examination of the brief which has been submitted for the plaintiff in error fails to disclose any such error.

The judgment should be affirmed.

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PRENTICE et al. v. UNITED STATES & C. A. S. S. CO. (two cases).

(District Court, S. D. New York. January 16, 1897.)

PRACTICE—GARNISHEE—STOCK SUBSCRIPTION—TRANSFER FROM DEFUNCT COMPANY.

In an action against a defunct company, a debtor to the defendant upon a stock-subscription note, was garnisheed. In reply to interrogatories he stated that a considerable sum was still owing by him on the note, but that the note had been transferred by the defendant company to a new company that took its assets. The garnishee was president of the defunct company. Upon motion that the garnishee be required to pay into court the unpaid amount of the note, or for other relief: *Held*, that the transfer by the defunct company was apparently void as against its creditors, and that the garnishee should pay the balance remaining due on the note, unless he elected to take a reference, on giving security for costs, to take further proofs of the facts, with further process and notice to the new company holding the note to appear thereon.

This was a libel in personam by Thomas Prentice and others, owners of the steamship *Burnley*, against the United States & Central American Steamship Company, respondent, and C. Robinson Griggs and George F. Shaver, as garnishees; also, a libel by the same parties as owners of the steamship *Arecuna* against the same respondents. This hearing was upon a motion to compel the garnishee to pay into court the balance due on a certain note, or for other relief.

Convers & Kirlin and Mr. Green, for libelants.

Francis E. Burrows and E. H. Benn, for garnishee.

BROWN, District Judge. The answers of the garnishee show that he admits owing the money upon a subscription for the defendant company's stock; but he avers that his debt is represented by a stock note given to the defendant company, payable ten days after demand, which the defendant company, about May 6, 1893, indorsed or transferred to the Central American Steamship Company, another corporation, in which the defendant company practically became merged. The garnishee was the president of the defendant company now defunct, all whose assets were transferred to the American Steamship Company.

This transfer of assets, including the garnishee's note, was evidently void as against existing creditors, among whom were the