

nal suit (*Clarke v. Matthewson*, 12 Pet. 164), it is not clear that an order or decree thereon would be a final decision, within the meaning of section 6 of the act of congress of March 3, 1891, conferring jurisdiction upon this court to hear appeals. A decision is final, in the sense in which an appeal from it is permitted, when it decides and disposes of the whole merits of the cause as between the parties to the appeal, reserving no further questions or directions for the future judgment of the court; so that to bring the cause again before the court for decision will not be necessary. When a bill of revivor is dismissed, as this would practically determine the original cause by leaving it in a situation in which no further proceedings could be had in it, doubtless an appeal would lie in favor of the party seeking a revival; but, if the revival is allowed, the order or decree allowing it does not finally dispose of the cause, and can be reviewed, if it becomes necessary, by an appeal from the final decree therein. *Buckingham v. McLean*, 13 How. 150; *Railroad Co. v. Soutter*, 2 Wall. 520, 521. In *Fretz v. Stoner*, 22 Wall. 198, upon an appeal from a final decree in a cause in which a bill of revivor had been brought, the court considered the defenses which had been interposed by the answer to the bill of revivor. In *Terry v. Sharon*, 131 U. S. 40, 9 Sup. Ct. 705, the court held that an appeal by a defendant would lie from an order reviving a suit and admitting an executor in the place of the deceased complainant. That case is distinguishable from the present, however, in the circumstance that the original suit had passed to a final decree, and the defendant would have had no opportunity to review the order by appealing from that decree.

In the present case there was no decree upon the bills of review, and the orders are merely interlocutory orders in the cause, and are strictly analogous to an order in a suit at law entered on a suggestion upon the record admitting the legal representative of a deceased party to continue the action. *Hatfield v. Bushnell*, 1 Blatchf. 393, Fed. Cas. No. 6,211.

The appeals are dismissed.

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SHAW et al. v. LYMAN et al.

(Circuit Court, W. D. North Carolina. December 14, 1896.)

FEDERAL AND STATE COURTS—CONCURRENT JURISDICTION—COMITY.

The pendency in a state court of a suit between the same parties, on the same cause of action, is no bar to a creditors' bill in a federal court to fix the personal liability of directors and stockholders in a corporation. Neither will it authorize the court, on the ground of comity, to stay its hand until a decision by the state court, since no conflict of jurisdiction can arise, and the judgment of either court can be pleaded as *res judicata* in the other.

This was a creditors' bill by Milton G. Shaw and others against A. J. Lyman and others to fix the personal liability of certain directors and stockholders in a corporation. Defendants moved the court to dismiss the case, because of the pendency in a state court of a prior suit between the same parties, on the same cause of action.

Jones & Barnard, J. S. Adams, F. A. Soudley, and Geo. Shuford, for the motion.

H. H. Hayden, T. H. Cobb, J. G. Merrimon, and H. B. Walmsley, opposed.

SIMONTON, Circuit Judge. This is a motion to dismiss the case. The ground of the motion is that, when it was instituted, there was an action pending between the same parties, on the same cause of action, seeking the same relief, in the state court of North Carolina sitting for Buncombe county. The proceedings is by a creditors' bill. The relief sought is by fixing the personal liability of directors and stockholders. There is no res in the case. The proceeds of the judgment in case of recovery are to be administered in equity for the benefit of the creditors.

It is well to say in the beginning that a motion to dismiss cannot be entertained. There can be no question that the mere fact of the existence of a suit between the same parties, for the same cause of action, in the state court, is not a bar to a suit in this court, even on plea in abatement. *Gordon v. Gilfoil*, 99 U. S. 168; *Marks v. Marks*, 75 Fed. 321; *Stanton v. Embrey*, 93 U. S. 548. The question really before this court is: Will this court, under the suggestion that the same question is pending in the state court, between the same parties, hold its hand, and leave the decision to the state court? It is a question of comity,—a comity exercised to prevent conflict of jurisdiction. There are classes of cases in which this comity is exercised. One is where the case necessarily involves the taking possession of the res, the subject-matter of the suit. There the court which has first taken possession of the res is entitled to the jurisdiction, and other courts will not interfere. *Gates v. Bucki*, 4 C. C. A. 124, 53 Fed. 961; *Covell v. Heyman*, 111 U. S. 182, 4 Sup. Ct. 355. This case so well expressed the doctrine that its language should be quoted:

"These courts [courts of the United States and of the states] do not belong to the same system so far as their jurisdiction is concurrent, and, although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction in the same territory, but not in the same plane; and, when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty."

An illustration of this doctrine is found in *Foster v. Bank*, 68 Fed. 723, where Judge Paul refused to entertain a suit, begun by certain creditors of a bank, against the bank and trustees of its property, on the ground that the trustees had themselves instituted a suit in the state court seeking the same result as the bill in the United States court, and had thus carried the res into, and placed it in possession of, the state court.

Another class of cases is where a creditors' bill has been filed in the state court by one set of creditors, and that court has assumed jurisdiction. Subsequently other creditors go into the United States court, filing a similar bill, for a similar purpose. The federal court in such a case will not interfere. Such a case is *Howlett v. Improvement Co.*, 56 Fed. 161.

In *Orton v. Smith*, 18 How. 265, we have a statement of the doctrine on this general subject:

"Besides, the decree in this case demonstrates the impropriety of the interference of the court of the United States, and of its entertaining jurisdiction of a question of title then pending in the state court. It is true, if this were an ejectment in a court of law, the pendency of another ejectment between the same parties might not have afforded sufficient ground for a plea of *auter action pendant*; nor would the court have been bound, even by comity, to await the decision of the state court, or suffer the cause pending before them to be in any way affected by it. But a decree of a court of chancery, on a bill of peace, must necessarily operate by way of estoppel as to the title of the land, and conclude all the parties to it, because it should put an end to all litigation between them. If they have suits pending in other courts on the same question of title, they must cease. This bill acts by injunction on the party. No injunction ever goes to the court having a concurrent jurisdiction of the question. The courts of the United States have no such power over suitors in a state court. But a decree on a bill of peace which does not put an end to litigation is a mere *brutum fulmen*. Unless the court can make a decree which it can execute, it is a sufficient reason for refusing to take cognizance of the case."

Judge Thayer, in *Pierce v. Feagans*, 39 Fed. 587, says:

"The suit in the state court is pending in a different jurisdiction. It is now well settled that a suit in a state court cannot be taken advantage of by way of *lis pendens* to defeat a suit of the same nature, and between the same parties, in the federal court. The two courts, though not foreign to each other, belong to different jurisdictions, in such sense that the doctrine of *lis pendens* is not applicable."

Judge Colt, in *Latham v. Chafee*, 7 Fed. 520, says:

"The main question upon this defendant's plea is whether the pendency of a suit in a state court between the same parties, and involving the same subject-matter, can be pleaded in abatement or in bar to a suit in the circuit court of the United States. It is undoubtedly true, as a general rule, that, as between two courts of concurrent jurisdiction, that which first gets control of the litigation will be allowed to prosecute it to an end. \* \* \* But this rule does not extend to courts of foreign jurisdiction. It has often been held that the courts of a state are foreign, in this sense, to the courts of the United States."

He relies on *Loring v. Marsh*, 2 Cliff. 322, Fed. Cas. No. 8,514, a decision of Mr. Justice Clifford. Judge Sawyer, in *Sharon v. Hill*, 22 Fed. 28, holds the same views.

A citation of all the authorities on this point would be endless. It is clear from them that, unless the special circumstances alluded to above exist, a suit—certainly a personal action—can be brought in this court notwithstanding the fact that there is pending at the same time a similar suit, for the same cause of action, in the state court; that the pendency of such suit cannot be pleaded in abatement or in bar. And it follows, absolutely, that the party bringing the action in this court has the right to bring it; and, as the jurisdiction of this court is fixed by the constitution of the United States, he has that right secured to him by the constitution. Under these circumstances, this court cannot exercise the comity suggested, unless action on its part will bring it into conflict with the state court. There can in this case be no such conflict, as no question can arise as to the disposition of any *res*, and a recovery or failure to recover in either court can be pleaded as *res judicata* in the other. The motion is dismissed.

## JOHNSON et al. v. CULBERTSON et al.

(Circuit Court, D. Indiana. March 6, 1897.)

## EQUITY JURISDICTION—SUIT AGAINST DISTRIBUTEES.

Where a creditor has a claim against a deceased debtor, whose estate has been settled and distribution thereof made, he must pursue his remedy against the distributees by a bill in equity, notwithstanding the liability is one which must have been pursued against the decedent at law.

## On Application for Rehearing.

Hord & Perkins and Keatinge, Walradt & Miller, for plaintiffs.  
Addison C. Harris, for defendants.

BAKER, District Judge. It is the general doctrine that, to reach the equitable interest of the debtor in real estate by a suit in chancery, the creditor must first reduce his claim into judgment in an action at law; and, to obtain assistance in equity as to personal property, both a judgment and an execution returned *nulla bona* must be shown. There exists, however, a well-established exception to this rule, where the debtor is deceased, and the satisfaction of the creditor's demand is sought to be charged upon assets of the decedent which have come into the hands of an heir, devisee, or legatee. The history and growth of this equitable jurisdiction is learnedly traced in the opinion of Chancellor Kent in the case of *Thompson v. Brown*, 4 Johns. Ch. 619. This exception is recognized and applied by the supreme court of this state in *Sweny v. Ferguson*, 2 Blackf. 129; *Kipper v. Glancey*, Id. 356; and *O'Brien v. Coulter*, Id. 421. In *Williams v. Gibbes*, 17 How. 239, 254, 255, the supreme court say:

"Now, the principle is well settled, in respect to these proceedings in chancery for the distribution of a common fund among the several parties interested, either on the application of the trustee of the fund, the executor or administrator, legatee or next of kin, or on the application of any party in interest, that an absent party, who had no notice of the proceedings, and not guilty of willful laches or unreasonable neglect, will not be concluded by the decree of distribution from the assertion of his right by bill or petition against the trustee, executor, or administrator, or, in case they have distributed the fund in pursuance of an order of the court, against the distributees. *David v. Frowd*, 1 Mylne & K. 200; *Greig v. Somerville*, 1 Russ. & M. 338; *Gillespie v. Alexander*, 3 Russ. 130; *Sawyer v. Birchmore*, 1 Keen. 391; *Shine v. Gough*, 1 Ball. & B. 436; *Finley v. Bank*, 11 Wheat. 304; *Story*, Eq. Pl. § 106; *Wiswall v. Sampson*, 14 How. 52, 67."

On page 256 the court quote approvingly the observations of Sir John Leach in *David v. Frowd*, *supra*, as follows:

"That if a creditor does not happen to discover the proceedings in the court until after the distribution has been made, by the order of the court, amongst the parties having, by the master's report, an apparent title, although the court will protect the administrator who has acted under the orders of the court, yet, upon a bill filed by this creditor against the parties to whom the property has been distributed, the court will, upon proof of no willful default on the part of such creditor, and no want of reasonable diligence on his part, compel the parties defendants to restore to the creditor that which of right belongs to him."

In *Board of Public Works v. Columbia College*, 17 Wall. 521, 530, the supreme court say: