present controversy falls within the judicial power of the United States vested in this court. But counsel for defendants insist that, at all events, a preliminary injunction ought not to issue. They say, if the defendant railroad company will obey the law, and reduce its fares to three cents, the damage prior to final hearing will be inconsiderable or nothing. But, suppose the alleged law to be invalid, and suppose the defendant railroad company declines to obey it. In the Reagan Case, above cited, the same argument could have been used, yet there the preliminary injunction was issued. So, also, in Lottery Co. v. Fitzpatrick, wherein is discussed at length the question whether or not the preliminary injunction should issue. How can the point as to the validity of the amendment of 1897 be presented on any subsequent hearing more distinctly than on this? My opinion is that, where proceedings in effect destructive of a vested property right are threatened by a defendant in official position under color of a void statute, the preliminary injunction ought to issue.

The suggestion by the learned attorney general that, in any event, this court ought not to consider the case made by this bill until the supreme court of Indiana has pronounced upon the specific enactment in contention, is one which I have no right to entertain. It is ordered that the injunction issue as prayed.

LONDON & S. F. BANK v. WILLAMETTE STEAM-MILL, LUMBERING & MANUFACTURING CO.

(Circuit Court, S. D. California. March 29, 1897.)

No. 703.

1. RECEIVERS—DIVIDENDS—DELAY OF CREDITOR.
   Delay of a creditor, resulting from proceedings taken at the receiver's request, to reduce his claim to judgment, is not negligence, and will not prevent the creditor from receiving dividends in proportion to those already paid to others, before further dividends are declared.
2. SAME—SECURED CLAIMS—SURRENDER OF SECURITIES.
   In the federal courts, a creditor holding collateral securities cannot be compelled to surrender them before participating in dividends declared by the receiver.
3. FEDERAL COURTS—STATE LAWS.
   State laws relating to insolvency and assignments for creditors do not control the federal courts, in receivership cases, in respect to the right of a creditor holding collateral security to receive dividends without first surrendering the collateral.

This was a suit in equity by the London & San Francisco Bank against the Willamette Steam-Mill, Lumbering & Manufacturing Company, in which a receiver has been appointed for the defendant corporation. The cause is now heard on the motion of a creditor to require the receiver to pay it dividends in proportion to those already paid to others.

Frank W. Burnett, for complainant.
H. C. Dillon, for defendant.
Sheldon Borden, for receiver.

WELLBORN, District Judge. This is a motion of San Gabriel Valley Bank, a creditor of the defendant, and holding certain securities, that the receiver be directed, before paying further dividends to other creditors, to pay to said bank such proportion of its claim, recently filed, as has heretofore been paid, respectively, on the claims of the other creditors. On this motion two suggestions have been made by the attorney for the receiver: First, that payments to said San Gabriel Valley Bank be limited to dividends hereafter declared; second, that said bank be required to surrender to the receiver its securities, before participating in any dividend.

Answering the first suggestion of the receiver, I would say that, in my opinion, the San Gabriel Valley Bank should receive, before further dividends are declared to other creditors, the same proportion of its claim as such other creditors have received on their claims respectively. As I understand the facts, said bank is not chargeable with negligence in presenting its claim, but whatever delay there may have been resulted from proceedings, taken at the request of the receiver, to reduce said claim to judgment.

With reference to the second point, it will be observed that, while circumstances may justify the expectation that the defendant's debts will be ultimately paid in full, yet the pending question must be determined as though the estate now being administered by the receiver were insolvent. The rule applicable to such a case, as recognized by the federal courts, is that the creditor who holds collateral securities cannot be compelled to surrender them until full satisfaction of his debt, and is entitled in the meantime to receive the same dividends as unsecured creditors. Wheeler v. Walton & Whann Co., 72 Fed. 966; Merrill v. Bank, 21 C. C. A. 282, 75 Fed. 148; Bank v. Armstrong, 8 C. C. A. 155, 59 Fed. 372.

Counsel for the unsecured creditors, in his brief, invokes the principle of equity "that, where one of the creditors of an insolvent has two funds against which he can proceed, and the other creditors can proceed only against one of those funds, the former creditor must first exhaust the fund against which the other creditors cannot proceed before he can come in and share pro rata with them out of the fund which alone is available to them." In the case last above cited (Bank v. Armstrong) the court refer to this rule as follows:

"It is a rule of equity that, where a creditor holds two securities, one of which he has in common with others, and the other of which he holds for his sole use, he may be required to collect his debt first out of the security for his sole benefit, so that those who hold in common with him may have more to apply to their debts. But this rule can never be invoked where he who has the two securities cannot pay himself in full out of both. He was given the two securities to pay his debt, and he cannot be deprived of this primary equity for the benefit of some one else, who is less fortunate in his security. 3 Pom. Eq. Jur. § 1414; Story, Eq. Jur. § 564b."

Again, in the same case, and at page 378, 59 Fed., and page 161, 8 C. C. A., it is said:

"The other cases cited, and especially Greenwood v. Taylor, 1 Russ. & M. 185, seem to rest on the rule of equity requiring a creditor with two funds as security, one of which he shares with others, to exhaust his sole security

first. As already said, the rule has no application when its operation would prevent the creditor from paying his whole claim."

Counsel for the unsecured creditors further relies, in support of the point raised by the receiver, on analogies drawn from the statutes of California relating to insolvency and assignments for benefit of creditors. In federal courts, state laws cannot control the question, but it must be determined according to general principles of equity. Said motion is allowed.

NEWMAN v. VIRGINIA, T. & C. STEEL & IRON CO.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1897.)

No. 209.

1. ACTION TO RECOVER LANDS—ADMISSIBILITY OF EVIDENCE—HARMLESS ERROR.
In an action under the North Carolina statute to recover lands, the admission of a will for the purpose of showing title in plaintiff to an undivided one-fourth interest in the lands, even if erroneous because of defective execution of the will, is not prejudicial error where it otherwise appears that plaintiff has title to an undivided three-fourths interest; since, under the state decisions, plaintiff, as owner of such interest, could maintain the suit for its own benefit and that of its co-tenants.

2. SAME—WILL AS EVIDENCE—PRESUMPTIONS ON PROBATE.
When a copy of a will which has been admitted to probate is offered in evidence, the presumption arises that the requirements of the statute have been complied with, and that the evidence given when the will was offered for probate was of such a character as to authorize its admission to record.

3. APPEAL AND ERROR—ASSIGNMENTS OF ERROR.
Assignments of error as to the admission or rejection of evidence will not be considered when they fail to set out the full substance of the evidence admitted or rejected, in disregard of the requirements of rule 11 of the circuit court of appeals. 21 C. C. A. cxii., 78 Fed. cxii.

4. ACTIONS TO RECOVER LAND—ADMISSIBILITY OF EVIDENCE.
In an action to recover lands under the North Carolina statute a bond for title is admissible in evidence in connection with oral testimony showing occupation thereunder.

5. SAME—BOND FOR TITLE—SUFFICIENCY OF DESCRIPTION.
The description in a bond for title, which is offered in evidence, is sufficient where it locates the land on a certain ridge in a particular county, designating the same as a square of 100 acres, and alludes to it as the same land that had been sold to a certain person, and by him transferred to another.

6. SAME—TRIAL—SUBMISSION OF ISSUES.
In an action to recover land under the North Carolina statute the issues to be submitted to the jury are to a great extent in the discretion of the court. No particular form is required, but it is essential that the real matters in controversy raised by the pleading should be fairly presented.

7. APPEAL AND ERROR—EXCEPTIONS—ASSIGNMENTS OF ERROR.
Exceptions which refer to the charge of the court as a whole instead of pointing out only the several matters of law excepted to are insufficient, and the defect cannot be remedied in the assignments of error.

8. SAME.
Assignments of error in relation to instructions asked and refused will be disregarded when they neither quote nor refer to the evidence that shows the relevancy of the propositions of law propounded therein.

9. SAME—BILLS OF EXCEPTIONS.
A bill of exceptions relating to the refusal of instructions must show affirmatively the errors alleged, that they were prejudicial, and that timely objections were made thereto, and the grounds clearly stated; otherwise it is fatally defective.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

Alf. S. Barnard, for plaintiff in error.
Charles A. Moore, for defendant in error.

Before FULLER, Circuit Justice, GOFF, Circuit Judge, and BRAWLEY, District Judge.

GOFF, Circuit Judge. This is a writ of error to the circuit court of the United States for the Western district of North Carolina. The defendant in error instituted its suit in said court against the plaintiff in error, demanding judgment for the possession of a certain tract of land, and damages for its detention. A like suit was also brought in said court by the defendant in error against William Cuthbertson and a number of others for the recovery of the possession of said land, and for damages. These suits were brought under the provisions of the statute of the state of North Carolina, and the complaints filed therein alleged the ownership in fee of the defendant in error in two adjoining tracts of land, situated in the counties of Mitchell and Watauga, in the state of North Carolina, described in the complaints with great particularity, but not necessary to be fully set forth at this time. It was alleged in the complaints that the defendants named therein were wrongfully in the possession of said land, and that they were unlawfully withholding the same from the plaintiff; that they were receiving the rents and profits thereof, and destroying and removing the timber, greatly to the damage of the true owner. Judgment for the possession of the land and for damages was prayed for under the provisions of the statute mentioned. The defendants to said suits duly appeared and filed their answers in both cases, in which they denied each and every of the allegations in said complaints contained, and they demanded judgments that the plaintiff in said suits take nothing by virtue of its writs, and that they, the said defendants, recover their costs. The court then entered an order directing that for the purposes of the trial of the plaintiff's title, and the location of the grants under which the plaintiff claims, the said two cases should be consolidated and tried as one cause, each defendant to be entitled to a separate issue upon his own title after the determination of the issue as to boundary and location of the plaintiff's title. The land sued for in both cases was the same, and the contention was over its true location. The defendant in error claimed that the land was located to the south of the Wilkes county line, while the plaintiff in error insisted that if the land could be located at all, all of it would lie to the north of that line, and that he had never been in the possession of any of the land situated north of said line.

The plaintiff below claimed title to the land in controversy under two deeds, one made by J. Evans Brown, and the other by Dwight M. Lowry and wife, and by certain other conveyances and devises, by

which it connected itself with a grant made by the state of North Carolina to one William Cathcart, dated the 20th of July, 1796, and also by reason of continuous, open, notorious, and uninterrupted adverse possession thereof by it and those under whom it claimed for 20 years and more prior to the commencement of said suits, and by reason of continuous, open, notorious, and uninterrupted adverse possession for 7 years and more under color of title thereto, prior to the commencement of said suits. The defendants below insisted that the grant made by the state of North Carolina to William Cathcart was not so located as to include the land claimed by them; that the plaintiff below could not connect itself by due and proper conveyances with said grant; and that it could not show title by adverse possession, either with or without color of title. The cases so consolidated were, without objection, tried together at the June term, 1896, of said court at Asheville. During the trial the plaintiff below offered in evidence a copy of the said grant to William Cathcart, and also certain deeds, wills, and other evidence, for the purpose of showing a complete chain of title from the state to the plaintiff, and also to establish title by adverse possession, both with and without color of title. The defendants below offered no evidence at the trial, and the issues submitted to the jury by the court were: First. Has the plaintiff shown title to the land embraced in the grant he claims, to the 59,000-acre grant, as therein described? Second. Is the tract described in the grant—the 59,000-acre tract—within the black lines on the official plat in evidence in this case? The jury answered both of the issues so submitted in the affirmative, and on this finding the court entered judgment against the defendants. A writ of error was then sued out, and the assignments of error, 19 in number as shown in the record, are now before us for consideration. However, the plaintiff in error has abandoned all of said assignments except five, which have been fully discussed by counsel.

The first relates to the action of the court in admitting as evidence a copy of the last will and testament of William Cathcart, over the objection of the defendant below. The defendants insisted that the probate thereof "did not show affirmatively that the said will was executed in accordance with the requirements of the laws of North Carolina," and that, therefore, it was not proper evidence. In disposing of this objection it is well to consider the purpose for which the said copy was offered. It was introduced to connect the devisees therein named with a suit in equity that had been instituted and prosecuted to final decree in the court of equity of Buncombe county, N. C., some years before, the object of which suit was to secure the sale of the lands described in the grant for 59,000 acres from the state of North Carolina to William Cathcart, and of other lands in which the heirs at law of said Cathcart were interested, all of whom were parties thereto, as were also the devisees mentioned in said will, or their heirs. Therefore all the parties having an interest in said lands were before the court, which decreed the sale of the same, appointed a commissioner to make such sale, which was duly made, reported, and confirmed. So it appears that the devisees named in the will of William Cathcart were also of the heirs at law of said decedent, and that

they were before the court that directed the sale of the land so devised, and now claimed to be in the possession of the defendants below. Such being the case, we do not see why it was necessary to offer the copy of said will to the jury, and it is also evident that if we should exclude the same, or hold that the court erred in admitting it, nevertheless the plaintiff in error has not been prejudiced, because it plainly appears from the record that the said William Cathcart only owned an undivided one-fourth interest in the lands, and it is not questioned but that the plaintiff below offered a chain of title by which it held the undivided three-fourths of said lands which had been conveyed to the plaintiff by those who were tenants in common with Cathcart; and so, even if the title of Cathcart did not pass by his will, or by the equity suit mentioned, nevertheless the plaintiff, as tenant in common with the heirs of Cathcart, could have maintained in North Carolina its suit, and could have recovered, in its own behalf and for the benefit of its co-tenants, the entire tract of land. Brittain v. Daniels, 94 N. C. 781; Moody v. Johnson, 112 N. C. 810, 17 S. E. 579; Foster v. Hackett, 112 N. C. 546, 17 S. E. 426. Still we are of opinion that there was no error in the ruling of the court below, as the presumption arises that the requirements of the statute had been complied with, and that the evidence given when the will was offered for probate was of such character as to authorize its admission to record. The point insisted on by plaintiff in error concerning the record so offered in evidence has, in effect, been decided against him by the supreme court of North Carolina. Moody v. Johnson, 112 N. C. 798, 17 S. E. 578, and cases cited.

The next assignment of error is as to the action of the court in permitting the witness A. C. Avery to testify concerning the declarations of one W. J. Brown referring to the relationship that existed between the said Cathcart and Dale, the Latimers, and other parties to the partition suit in the court of equity in Buncombe county, N. C., and in the suit in the circuit court of the United States for the Eastern district of that state. The objection was that the proposed evidence was hearsay, and that it did not purport to come from a member of the family with which the relationship was said to have existed. Rule 11 (21 C. C. A. cxii., 78 Fed. cxii.) of this court requires that, when the error alleged is as to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. No effort has been made to comply with this rule, so far as the assignment of error we are now considering is concerned; the evidence admitted, nor its substance, not being set forth; consequently the questions referring thereto as discussed by counsel will not be disposed of by this court.

During the trial the plaintiff below offered in evidence a bond for title or a contract to convey a portion of the 59,000 acres of land in controversy, made to L. Trivett by John E. Brown, through his attorney, W. J. Brown, dated in 1881, a copy of which is made a part of the bill of exceptions. The same was offered for the purpose of showing possession of the land by said Trivett, and that he and those claiming under him had held such possession

continuously from the date of said contract. The defendant below objected to the introduction of the same, because "the paper has no legal effect, as it has no description." The objection was overruled, and the bond or contract was admitted in evidence, and such admission is now assigned as error. The position taken by counsel for the plaintiff in error during the argument of this cause before this court that the said paper was offered as color of title is not sustained by the record, is in fact refuted by the bill of exceptions, which certifies that its purpose was, in connection with other evidence, to show possession of the land by said Trivett and those claiming under him "from the date of the contract ever since." The only objection presented for the consideration of the trial judge was that the paper had no legal effect, for the reason that it had no description. No other point will be considered by this court, as the court below ruled on that alone. An appellate court will only pass upon those questions as to which a foundation was laid by a specific objection on which the court below ruled, and concerning which an exception was not only noted at the time, but fully set forth in the bill of exceptions. Turner v. Yates, 16 How. 14; Hanna v. Maas, 122 U. S. 26, 7 Sup. Ct. 1055; Improvement Co. v. Frari, 8 U. S. App. 444, 7 C. C. A. 149, and 58 Fed. 171.

On the question of possession, the contract for the sale of the land, accompanied by oral testimony showing occupation thereunder, was clearly proper. Such evidence was admitted by the court as competent for the jury to consider, its weight being left for their determination. The evidence of Trivett as to his possession under said contract, as well as of others who testified concerning the time and character of the same, was offered, admitted, and not excepted to. Why the paper under which he entered and so held was not admissible it is difficult to conceive, as the evidence connected his possession with the same. The description was sufficient, as it located the land on a certain ridge in a particular county, designated as a square of 100 acres, and alludes to it as the same land that had been sold to one Timothy Price, and by him transferred to Trivett. Under such circumstances parol evidence as to possession and identity was properly heard by the jury.

The plaintiff below having closed its case to the jury, the defendant introduced no evidence, but tendered the following issues as proper to be submitted to the jury: (1) Is the plaintiff the owner and entitled to possession of the land described in the pleadings? (2) Is the defendant in the unlawful possession of said lands? (3) What damage has the plaintiff sustained? The court refused to submit such issues, and presented the following for the finding of the jury thereon: (1) Has the plaintiff shown title to the land embraced in the grant he claims to the 59,000-acre grant as therein described? (2) Is the tract described in the grant—the 59,000-acre tract—within the black lines on the official plat in evidence in this case? To this the plaintiff in error objected. In order to fully comprehend and properly dispose of the questions raised