If there was any sheer to port by the barge shortly before the collision, the evidence does not warrant the finding of any negligence on the part of the barge as the cause of it. All the witnesses who testified on the subject express the opinion that it was the force of the North river ebb upon the stern of the barge, as her bows entered the slacker water to the eastward between the currents of the North and East rivers, that caused the sheer they speak of; and they suggest that it should have been counteracted by a port wheel on the barge. But the barge's evidence leaves no doubt that her wheel was put hard a-port; that the wheelman put the wheel over as soon as he saw the pilot of the tug port his wheel; and that additional men on the barge helped to keep the wheel hard a-port. The witnesses on the barge, moreover, deny that she sheered to port at all, but state that in fact the barge turned one or two points to starboard, although this was less than she would have turned under the same wheel but for the force of the ebb tide on her stern as her bows went into the slack water.

Upon a careful consideration of all the testimony I am satisfied that the account of the men on the barge is substantially true. I am persuaded that what the defendants' witnesses call a sheer was no sheer through any mistake in handling the wheel, and probably no real sheer at all, but only a relative slowness in a change to starboard under a port wheel, by which, as compared with the position and more rapid swing of the tug Carroll Boys, there was such a difference in the pointing of the barge and the tug as to give the witnesses the impression that the barge sheered to port. The place where the collision occurred, taken in connection with the angle of collision and the heading of the schooner at the moment of collision, tend strongly to confirm the statement of the Leonard's witnesses that there was no sheer at all to port, but that they merely came around slowly to starboard, on account of the stronger ebb current at their stern than at their bows.

Nearly all the witnesses agree that the collision occurred in the slack water to the southwest of the Battery wall, and the place of collision is pretty accurately fixed from the position of the sunken schooner, which the witness Timmons testifies was about 600 feet from the Battery wall and about 50 feet easterly from a line drawn from the bath house (which is between the barge office and Castle Garden) to the easterly side of Liberty Island. This point was about three hundred feet to the eastward of the line where the North river ebb is sensibly felt, which, according to the witness Windsor, is at that stage of the tide about on a line from the end of pier 1 to a point on Governor's Island 300 feet easterly from the easterly side of Fort William.

Considering that the hawser was 150 feet long and the barge 105 feet long; that their progress was at the rate of about three or four knots through the water, and that they were heading, at the time when the signal of one whistle was exchanged, nearly directly across the North river, and about for the barge office, there can be no doubt that at the time when the whistles were exchanged the barge was drawing very near to the slack water and very soon entered it, and that the effect of the gradual slackening of the current at her bows while the current at her stern was stronger was to retard the action of her port wheel.

The great majority of witnesses do not place the angle of collision at above five points, and the heading of the schooner at that time, according to the testimony of the pilot of the Laughlin, must have been one or two points to the north of a line from the schooner to the Pennsylvania Railroad Ferry at Jersey City. An angle of five points from this course would make the barge heading at least two or three points to starboard of any possible course by which the tug and tow could have arrived off Castle Garden from the Central Ferry in the ebb tide. The master of the schooner, however, says that at the time of collision he was heading towards the New York shore, above Castle Garden, and that the angle of collision was seven points. This would make the heading of the barge at the collision about the same as the above; while if the heading of the schooner is correctly given by her master, and the angle of collision was only five points, the barge at collision must have turned to starboard about three to four points from the heading by which the river must have been crossed; and this indicates that there was no actual sheer by the barge to port, but only a slower turning to starboard than the tug, giving the deceptive appearance of a sheer to persons upon other moving vessels. The Sam Sloan, 65 Fed. 125, and cases there cited.

The two witnesses from the shore who speak of a sheer, did not see any actual sheer, and probably spoke from the great divergence between the direction of the tug and the barge.

The responsibility for the collision seems to me to lie with the Carroll Boys alone. It was the Carroll Boys that was bound to keep out of the way. When the signal of one whistle was given, viz., when the tugs were from 300 to 500 feet apart, it became the duty of the Carroll Boys not only to keep to the right, as her whistle indicated she would do, but to keep far enough to the right, and to direct her tow to take that course early enough, to prevent any swing by the barge upon the course of the Laughlin and the schooner, which were already quite near the shore. The barge was a long boat, and not quickly handled like a tug. Her wheelman was not chargeable with knowledge of the tide currents to the same extent as the pilot of the tug, and cannot be charged with negligence for not porting until he had some notice that he was required to do so, either by some direction from the tug or by seeing the tug port. He was watching the tug, and he ported as soon as he saw the tug port; and no signal at all was given to him by which he might have been apprised of the need of porting earlier. The true cause of the collision was that the Carroll Boys delayed her own porting, and omitted signaling to the other tug, or to give directions to her own tow until it was too late for the tow to clear. She was going towards the left-hand side of the East river for the benefit of the slack water there, and no doubt miscalculated or neglected to consider the space necessary for the turn of the barge in going through the slack water. This evidently was a risk of the tug and not of the tow.

I do not see any sufficient reason for charging the Laughlin with fault. The evidence seems to show that as soon as her pilot perceived that the barge was not swinging to starboard as much as the tug, giving the appearance of a sheer, he did all he could do to prevent a collision between the barge and the schooner, by putting his wheel hard a-port, shouting to the schooner to do the same, and pulling to starboard full speed. This was the only chance of escape.

Decree for the libelant against the Carroll Boys, with costs; dismissal of the libel as against the barge and the Laughlin, with costs; and an order of reference to compute damages if not agreed upon.

Samuel Park, for appellant, The Carroll Boys.
Nelson Zabriskie, for The M. G. Leonard.
Lawrence Kneeland, for The M. E. Laughlin.
Stewart & Macklin, for Elizabeth Sweeney.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We do not find in the record sufficient reason to reverse the decision of the district judge, who heard and saw the witnesses. The testimony indicates quite clearly that they differed greatly in intelligence. While we do not in all respects agree with the theory of the movements of the vessels as set forth in his opinion, we concur in the conclusion of the district judge that the proximate cause of the collision was the navigation of the Carroll Boys, which was evidently making for the left-hand side of the East river, and "miscalculated or neglected to consider the space necessary for the turn of the barge in going through the slack water" of the Battery. The decree of the district court is affirmed, with interest, and costs to the Leonard against the appellant.

ZIMMERMAN v. SO RELLE.

(Circuit Court of Appeals, Eighth Circuit. April 26, 1897.)

No. 862.

1. STATE AND FEDERAL COURTS — CONCURRENT SUITS BETWEEN SAME PARTIES FOR SAME CAUSE OF ACTION—QUIETING TITLE.
Suits between the same parties to quiet title to the same land are of such a nature that when one is pending in a state court, and the other in a federal court, and the state court first acquires jurisdiction by service of process, the federal court should stay its hand until the cause in the state court is determined. But it should not dismiss the suit where the state court may leave some matters at issue undetermined, which may properly be adjudicated by the federal court.

2. EQUITY PLEADING—SETTING DOWN PLEA FOR ARGUMENT—DEMURRER.
The filing of a demurrer to a plea, instead of setting the plea down for argument, is contrary to equity procedure; but, if no substantial rights have been affected thereby, the irregularity may be ignored. The filing of the demurrer, therefore, may be treated as the equivalent of setting the plea down for argument, and an order overruling the demurrer may be regarded as, in effect, an order that the plea be allowed; and in such case the plaintiff will be entitled to then take issue with the facts stated in the plea.

3. EQUITY PRACTICE—PENDENCY OF ANOTHER SUIT.
The former practice of referring to a master a plea of the pendency of another suit between the same parties as to the same matter, instead of setting it down for argument, has no application where the former suit is not in the same court, but in one of a different jurisdiction.

Appeal from the Circuit Court of the United States for the District of Colorado.

This suit was brought by Eugene Zimmerman, the appellant, against Wiley E. So Relle, the appellee, in the circuit court of the United States for the district of Colorado, on December 27, 1895. For present purposes, it is unnecessary to state the averments of the bill in detail. It showed, substantially, that a controversy had arisen between the parties to the suit, relative to the ownership of certain real estate situated in the town of Aspen, Pitkin county, Colo., to wit, the southerly 75 feet of lots R and S in block 88, which had at one time been sold by Zimmerman to So Relle, and had thereafter been reacquired by Zimmerman at a trustee's sale, under a power of sale contained in a deed of trust, that had been executed by So Relle to secure the payment of a part of the purchase money; that in equity the property belonged to Zimmerman, although it was at the time in the possession of So Relle; that the complainant's title derived through the aforesaid trustee's sale was defective, because the notice under which said sale had been made was not published for the requisite length of time; that, by virtue of such defect in the notice of sale, the complainant had not acquired at such sale a good legal title, under which a recovery could be had against the defendant by a suit in ejectment; that the defect in said notice of sale was due to the negligent and fraudulent conduct of the defendant, So Relle, who was an attorney by profession; and that, by virtue of such fraud and negligence, he was in law estopped from taking advantage of the defect in the plaintiff's legal title, and from further retaining possession of the property. In view of the allegations of the bill, the complainant prayed that "the defendant may be decreed to be forever estopped from setting up or claiming any right, title, or interest whatsoever in and to said premises, or from in any manner claiming that said foreclosure, and the sale of said property thereunder, was illegal or insufficient, and that your orator may be decreed to have a good and perfect title to said premises, * * * and that any cloud may be removed which may rest upon the title of your

orator to the said property, by virtue of any defect in said foreclosure sale or in the notice thereof." To the aforesaid bill the defendant below filed the following plea: "And this defendant further says: That at the time of the commencement of said suit, and at the time when service of the writ of subpœna issued thereunder was attempted or pretended to be made upon this defendant, another suit was, and at all times herein mentioned has been, and now is, pending in the district court of Pitkin county, state of Colorado (No. 1,718), between the said Eugene Zimmerman and the said Wiley E. So Relle, involving the same subject-matter, and wherein similar relief was sought. That the said suit in the said district court of Pitkin county was commenced by filing a bill in equity on the 4th day of October, 1895, and wherein said Wiley E. So Relle is plaintiff, and the said Eugene Zimmerman, the Mortgage Trust Company of Pennsylvania, and Biddle Reeves are defendants. That summons and complaint was served upon each of the said defendants on the 5th day of October, A. D. 1895. That the subject-matter in said suit in said district court of Pitkin county is the title to the southerly seventy-five (75) feet of lots R and S in block 88 of the town site and city of Aspen, in Pitkin county, Colorado. That the relief sought therein is to quiet the title of said premises in the said Wiley E. So Relle, and for general relief, by injunction and otherwise. That on the 26th day of October, 1895, the said Eugene Zimmerman filed therein a notice of application to remove the said cause to the federal court, together with a petition and bond for removal. That on the 4th day of November, 1895, the separate answer of the said Reeves and the said Mortgage & Trust Company of Pennsylvania was filed therein. That on the 4th day of November, 1895, the said Eugene Zimmerman filed a demurrer to the complaint therein. That on the 14th day of November, 1895, the said Wiley E. So Relle filed a motion to make the answer of Reeves and the said Mortgage & Trust Company of Pennsylvania more specific. That on the 18th day of November, 1895, said Zimmerman filed therein his motion to withdraw his demurrer. That on the 12th day of December, 1895, a motion to dissolve an injunction issued in said cause was heard and overruled. That on the 30th day of December, 1895, said Zimmerman filed his separate answer therein. That on the 20th day of January, 1896, the said So Relle filed a demurrer therein. That on the 25th day of January, 1896, the said So Relle filed replications to the answers of the said Zimmerman, Reeves, and the said Mortgage & Trust Company of Pennsylvania. That on the 28th day of January, 1896, the said Zimmerman filed his motion to strike out the said replication. That on the 8th day of February, 1896, the motion of said Zimmerman to strike out the said replication was heard and overruled by the said district court in said Pitkin county. That on Wednesday, the 13th day of November, 1895, a motion of the said Eugene Zimmerman to docket the cause pending in the said district court of Pitkin county, and to file in the circuit court of the United States for the district of Colorado a transcript of the record from the said district court of Pitkin county, was heard by this honorable court, and, after the court was fully advised in the premises, the last aforesaid motion was overruled. That the said suit in the said district court of Pitkin county, Colo., is still pending, and is now at issue; and that adequate relief may be had by all parties therein. * * * Wherefore this defendant prays the judgment of this honorable court whether he ought to be required to appear in accordance with any writ of subpœna issued in said suit." To the foregoing plea, the defendant below interposed a demurrer, on the ground that it did not state facts showing any reason why the suit might not be prosecuted by the plaintiff, and for the reason that the plea was uncertain, defective, and ambiguous in stating the matters alleged to be involved in the litigation pending in the district court of Pitkin county, Colo. The trial court overruled said demurrer, whereupon the complainant asked leave to file a replication to said plea, which leave was denied, and the bill of complaint was thereupon ordered to be dismissed. The present appeal was taken from such order of dismissal.

Robert G. Withers and Charles J. Hughes, Jr., for appellant.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

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

The plea which was filed by the defendant below, who is the appellee here, shows, we think, with sufficient certainty that the suit at bar and the suit previously brought in the district court of Pitkin county, Colo., by So Relle against Zimmerman, are substantially of the same character, the parties thereto being simply reversed. In the case pending in the state court So Relle is attempting to quiet his title against Zimmerman, who is claiming title to and possession of the premises in controversy by virtue of a trustee's deed, executed under a power of sale contained in a mortgage that was made by So Relle; while in the suit at bar Zimmerman seeks to quiet his title and gain possession of the property, by enjoining So Relle from asserting that the sale by the trustee was insufficient to pass the legal title. Both suits concern the same property, and necessarily involve a consideration of the same evidence and a decision of the same questions. Such being the state of facts disclosed by the defendant's plea, we think that the case pending in the state court was of such a nature that the trial court was not at liberty to proceed with the hearing of the suit at bar, within the doctrine which was recently applied by this court in the case of Merritt v. Steel-Barge Co., 79 Fed. 228. We held in that case that when a suit is brought to enforce a lien against specific property, or to marshal assets, or administer a trust, or liquidate an insolvent estate, and in all other cases of a similar kind where, in the progress of the case, the court may find it necessary or convenient to assume control of the property in controversy, the court which first acquires jurisdiction of such a case by the issuance and service of process is entitled to retain it to the end, without interference on the part of any other court of co-ordinate jurisdiction. We held, further, that a rigid adherence to this rule, both by the federal and state courts, is necessary in order to prevent unseemly conflicts which might otherwise arise. The doctrine in question has been so recently and fully considered both in the case last referred to and in Gates v. Bucki, 12 U. S. App. 69, 4 C. C. A. 116, and 53 Fed. 961, that a further discussion of the subject seems to be unnecessary. It is manifest, we think, that the suit brought in the state court by So Relle against Zimmerman is of such a nature that that court may see fit at any time to issue an injunction against Zimmerman restraining him from prosecuting a suit to recover the possession of the property in controversy in any other forum, and we cannot doubt its right to make such an order; whereas in the case at bar, if the trial court had permitted it to proceed, it may be that at some stage of the proceedings it would have been found necessary to appoint a receiver of the property to collect the rents thereof, and otherwise care for it, pending the litigation as to the title. Possibly, the state court may deem it proper to make a similar order. The controversy, then, is of such a nature that the pendency of the two suits at the same time, in different jurisdictions, is liable at any moment to create a conflict of authority, and give rise to conflicting titles. No court ought to proceed with the hearing of a case under such circumstances so long as the prior suit remains pending and undetermined. We concede, as a matter of

course, that two suits, involving the same questions and between the same parties, may be pending at the same time, the one in a state and the other in a federal court, and that in such event a plea of lis pendens may not be available as a defense to the suit which was last brought. This is always the case where the two suits are strictly in personam. Stanton v. Embrey, 93 U. S. 548. And in Orton v. Smith, 18 How. 263, 265, it was said, in substance, although the question was not strictly involved in that case, that the pendency of a suit in ejectment in one jurisdiction will not serve to stay prosecution of a later suit in ejectment for the same land brought in another court of co-ordinate jurisdiction. But when, as in the case at bar, two suits in chancery are pending between the same parties, the one in a state and the other in a federal court, the object of both suits being to quiet the title to the same tract of land, that court which first acquires jurisdiction by the issue and service of process must be allowed to proceed with the hearing and determination of the case; and, so long as the first suit remains pending and undetermined, the action of the court in which it is pending should not be embarrassed by proceedings taken or orders made in the case which was last brought. Orton v. Smith, supra. It would be manifestly improper, however, to order a dismissal of a second suit because of the pendency of a prior suit between the same parties in those cases where the bringing of the second action was a necessary or proper step, either to create or preserve a lien, or to avoid the bar of the statute of limitations, or to give due notice by lis pendens of the plaintiff's rights, or to guard against the results of a possible dismissal of the first suit before its determination upon the merits. Heidritter v. Oil-Cloth Co., 112 U. S. 294, 304, 5 Sup. Ct. 135; Gates v. Bucki, 12 U. S. App. 69, 4 C. C. A. 116, and 53 Fed. 961. In all such cases the proper practice is to suspend further action in the second suit until the first suit is tried and determined, instead of dismissing it. Indeed, considering the numerous reasons which may render it advisable and not improper to commence a second suit, although a prior suit is pending in which the plaintiff's rights may be fully adjudicated, we think it is the better practice in all cases to pursue the course last indicated, when a plea of lis pendens is interposed and sustained. The mere pendency of a second suit, if no action is taken therein, does not affect the orderly prosecution of the first suit; and the court is much better able to determine, after the first suit has ended, whether it is necessary or proper to grant further relief in the action which was last brought. In our opinion, therefore, the trial court, when it overruled the demurrer to the plea, should have entered an order staying all further proceedings until the case in the state court was determined, instead of entering a final order of dismissal. It may be that the judgment of the state court will leave some matters at issue between the parties undetermined, which may properly be adjudicated by the federal court. If not, an order dismissing the action should then be entered.

Complaint is further made that the trial court did not allow the plaintiff below to file a reply to the plea, after the demurrer thereto had been overruled. With respect to this contention, it should be ob-