finished work had been neglected, and was falling into decay. There had long been nothing more, if anything, than a mere constructive possession in the Chicago & South Atlantic. Such a possession is fictitious. It ceases with the legal ownership. In 1876 a committee was sent by the Delphi Company to inquire of the officers of the Chicago & South Atlantic whether or not, and when, if at all, the Chicago & South Atlantic proposed to go on with the work. One Gould, a member of the committee, testified that at the interview between the representatives of the two companies the statement was distinctly made on behalf of the Delphi Company, in effect, that if the work were not speedily resumed, the latter company would displace the Chicago & South Atlantic, and itself resume exclusive and active control. The vice president of the Chicago & South Atlantic testified that he did not remember any declaration so strongly put on the occasion in question. The testimony of Gould was not otherwise disputed. It makes nothing upon the rights of these corporations, as defined in the contract, that after ownership thereunder by the Chicago & South Atlantic had ceased by limitation, the Delphi Company for a time might have been still willing that the Chicago & South Atlantic should take up the work again. The original bill and the amended bill each contains the following statement: "Your orator further shows that all subscriptions, bonds, subsidies, and assets of every kind and description obtained by the Chicago & South Atlantic Railroad Company, as stated in this bill, were obtained under and in pursuance of either the original agreement or supplemental agreement * * * or both of them,"—meaning the writings of 1873 and 1875. In other words, within the scope of the bill, the subject-matter contended about in this litigation is the property of the Delphi Company on hand when the writing of 1873 was executed, everything which was subsequently given, contributed, or subscribed in aid of the franchise to build the road in Indiana, which franchise always remained, as originally vested, in the Delphi Company, and all construction work done with the means aforesaid. The master found that some portion of the construction work included by him, as already stated in the valuation of $168,922.88, had not been paid for by the Chicago & South Atlantic. How much he does not state. He does not find any lien on this work in favor of any laborer or contractor or specify any sum as due to any one. He does not show any sum raised by the Chicago & South Atlantic for, or expended on, the work in Indiana, which did not come to that company by virtue of its contract with the Delphi. He shows that donations and subscriptions aggregating some $300,000 were made in Indiana pending the contract. He does not show that the $168,922.88 was in excess of the amount actually received by the Chicago & South Atlantic from such donations and subscriptions in Indiana. Moreover, the distinct and specific purpose of the bill, as already said, was to recover the "assets * * * obtained by the Chicago & South Atlantic Railroad Company under and in pursuance of either the original agreement or the supplemental agreement, * * * or both of them" (meaning the writings of 1873 and 1875); and the distinct ground of such re-

covery is stated in the bill to be that the displacement of the Chicago & South Atlantic on September 29, 1877, was on the false and fraudulent pretense that the latter company had failed to prosecute the work of building the road in Indiana. The argument on behalf of appellee proceeds at times on the unconscious assumption that the donations, subsidies, and subscriptions by Indiana municipal corporations and people were never the property of the Delphi Company, but were initially and at all times the property of the Chicago & South Atlantic. These donations, subsidies, etc., in Indiana were, as repeatedly stated herein, in aid of the franchise to build the road. This franchise was vested in the Delphi Company. Building operations were carried on by the Chicago & South Atlantic pursuant to the Delphi franchise, and solely by force of the contract with the latter company. The initial ownership over every aid to the road is, in effect, declared as a term in the contract. Every donation or subsidy, whether pending or in futuro, is by the contract transferred from the Delphi to the Chicago & South Atlantic. The latter company got nothing of the kind except as coming from the former. It had no right, as between itself and the Delphi, to treat anything in aid of the construction work in Indiana otherwise than as initially given to the Delphi Company, and thence transferred to itself by force of the contract. One may not assert a contract and at the same time evade any term in it. A devisee who elects to take under a will must not claim adversely to the testator anything disposed of by such will. The contract between these two corporations is avowedly the foundation of the claim here sued on. The receiver cannot assert, contrary to the section marked 2 of the writing of 1873, that any "thing of value" thereafter "donated * * * for the purpose of constructing * * * said road" in Indiana was not, by force of said section, given to the Delphi Company, and by force of said section transferred from the Delphi Company to the Chicago & South Atlantic. The property here in controversy belonged in the first instance to the Delphi Company. The Chicago & South Atlantic derived its ownership from the contract, and such ownership was subject to the limitations expressed in the contract. One of the conditions of such ownership was "the prosecution of the work of building" said road. The Chicago & South Atlantic failed to prosecute the work. Its ownership, therefore, ceased and determined. The decree is reversed, and the cause remanded, with the direction that as to this appellant the bill be dismissed for want of equity.

Mr. Justice BROWN, dubitante. Upon the argument of this case, I was strongly inclined to the opinion that the cancellation of its contract by the Delphi Company was not made in good faith, particularly in view of the fact that there was a personal consideration passing to Mr. Haymond, and that he appeared to have acted in excess of his authority. While the cessation of the work might have authorized the Delphi Company to put an end to the contract by legal proceedings in the nature of a foreclosure, or perhaps even by notice, it did not seem to me that it could be legally done by a summary seizure and appropriation of the unfinished road, by which it

acquired property of the value of $168,000, without having paid anything for it, unless the subscriptions made by the Indiana people could be construed as having been made for its benefit. There was no provision in the contract for a forfeiture of the property acquired or the work done by the South Atlantic Company in case the contract were rescinded; and I had assumed the law to be that where a party to a contract for the construction of a building, railway, or other similar work elected to rescind such contract for failure to perform within the stipulated time, he could not take to himself the fruits of a part performance without making compensation in the nature of a quantum meruit. While the application of this rule may be subject to modification to the extent to which the Delphi Company had contributed of its own means to the construction of the work, it seemed to me that, if the receiver was not entitled to recover the whole value of the property appropriated, he was equitably entitled to recover at least to the extent of the claims of the creditors of the South Atlantic Company for the work done or the materials furnished in the construction of the road.

But as my brethren have placed a different construction upon the contract and the acts of the parties, and as the case depends largely upon the view taken of the testimony, which is very voluminous, and no question of law is involved which is likely to become important as a precedent, I am disposed to acquiesce in the opinion of the majority.

ROGERS v. RILEY et ux.

(Circuit Court, D. Kentucky. May 2, 1896.)

1. RECEIVERS—POWERS OUTSIDE OF JURISDICTION.
   The general rule that a receiver has no extraterritorial jurisdiction is subject to the exception, arising out of comity, that where the receiver is appointed to collect the assets, pay the debts, and wind up the affairs of a corporation, he may sue for that purpose in another jurisdiction, when by his bill he shows that all the corporate debts have been paid, so that there are no domestic creditors requiring protection, and that there is no infringement of the public policy of the state where the suit is brought.
2. FEDERAL COURTS—JURISDICTIONAL AMOUNT.
   Where, by express stipulation, valid in the state where made, a debtor becomes liable for a reasonable attorney's fee in case the debt is collected by suit, such fee may be added to the amount of the debt, for the purpose of making up the jurisdictional amount. Such a fee is not a part of the costs which are to be excluded under the judiciary act of 1887-88.

This was a suit in equity by C. H. Rogers, receiver of the New South National Building & Loan Association, against F. B. Riley and Sarah Riley, his wife. The cause was heard on demurrer to the cause of complaint.

Jesse L. Rogers and R. H. Hill, for plaintiff.
J. A. Craft, for defendants.

BARR, District Judge. This cause is submitted on demurrer to the bill of complaint, and it presents two important questions touching the jurisdiction of this court:

1. The complainant sues as a receiver appointed by a chancery court in the state of Tennessee, and the first question is whether he

can, as such receiver, maintain an action in this court. The general rule is, undoubtedly, that a receiver appointed by a court has no extraterritorial jurisdiction. Booth v. Clark, 17 How. 322. But we think there is a well-established exception to this general rule, and the inquiry here is whether the allegations of this bill are sufficient to bring it within that exception. It appears from the allegations of the bill that the New South National Building & Loan Association was a corporation organized under the laws of the state of Tennessee, and that in a suit in the chancery court of Claiborne county, Tenn., the complainant was appointed and qualified as receiver of all the property, business, and assets of said corporation, and that the defendants were shareholders in said company; that a suit was brought by R. N. Nesterson and others against C. E. Boyden and others in said chancery court, and the proceeding was to declare the corporation insolvent and put it into liquidation. It is also alleged in the bill that said chancery court had jurisdiction of the subject-matter and the parties in said cause; that it had jurisdiction of said corporation and of all of its shareholders, whether formally made parties thereto or not; and that said proceedings were sustained and a decree rendered in March, 1892, adjudging said corporation insolvent, and its affairs were directed to be wound up, to the end that its assets might be distributed first in the payment of its debts, and whatever remained to be distributed pro rata among its shareholders; and the complainant, Rogers, was appointed receiver, and was fully authorized and directed to execute said decrees, and to bring any and all suits necessary to be brought for the collection of the assets of said corporation. It is alleged that Riley was and is a shareholder in said corporation. It is also alleged that all of the debts of said association have been paid. These allegations being taken for true, we think that the present proceeding is within the exception to the general rule which limits the powers of a receiver to the jurisdiction of the court appointing him. This because of the comity between the states of the Union, which will allow the maintenance of a suit by a receiver appointed by a court of another state, where there are no domestic creditors, and where it is not against the public policy of the state in which the suit is brought. 2 Beach, Mod. Eq. Prac. § 727; Hurd v. Elizabeth, 41 N. J. Law, 1; Metzner v. Bauer, 98 Ind. 427; 20 Am. & Eng. Enc. Law, 242, and cases cited. I had occasion in a case pending in this court to examine the record of the suit of Nesterson v. Boyden in the chancery court of Claiborne county, and have there maintained the right of Receiver Rogers to maintain an action like this one.

2. It is insisted that as the note sued on is only for $2,000, and as there are some payments which are allowed as credits in the bill, the amount in controversy does not exceed $2,000, exclusive of costs and interest, and that, therefore, this court has not jurisdiction. It is true, from an examination of the bill, and a calculation of the credits given for payments which are stated in the bill, that the amount sued on the note is a little over $1,900. But the bill avers that the contract sued on is a Tennessee contract, and that, by the laws of the state of Tennessee, valid and binding contracts can be entered into between the debtor and the creditor, whereby a debtor agrees