

the ground to the exact boundary fixed by the description. *Norcross v. Griffiths*, 65 Wis. 599, 27 N. W. 606. It is there ruled that the owner of the bank is presumed to be the owner of the stream, and that, while the ownership of the bed of the stream may be separated from the ownership of the bank, such intention must explicitly appear by the grant, to overcome the presumption. In the light of these authorities, we have no difficulty in reaching the conclusion that the bed of the stream passed with the conveyance of the upland. We have shown that the undivided acre deeds constitute the grantees tenants in common with the other owners in this section. It is clear that the extent of their ownership was in proportion to the whole number of acres within the meander line. We do not overlook the fact that the meander line is not the boundary of the lot, but it was a line within the contemplation of the parties, by which to designate and ascertain the extent of the interest conveyed. There are no words of reservation which exclude the bed of the stream. The presumption must therefore obtain that it passed with the bank, and the evidence is clear that it was designed so to pass. The decree is affirmed.

BAYNE et al. v. BREWER POTTERY CO.

(Circuit Court, N. D. Ohio. June 16, 1897.)

RECEIVERS—APPOINTMENT AND REMOVAL—ANCILLARY APPOINTMENT—NONRESIDENCE.

A receiver appointed by a federal court in New Jersey for a New Jersey manufacturing corporation whose plant and business are located in Ohio, and subsequently appointed on the commencement of an ancillary suit, by a federal court in Ohio, will not be removed by the latter court on the application of mortgage creditors who have subsequently become parties, merely on the ground that he is a nonresident of Ohio, where it appears that he is a fit person to manage the business, and intends to give it his personal supervision.

John K. Rohn and E. W. Tolerton, for the motion.

Hoyt, Dustin & Kelley and Edwin Robert Walker, opposed.

SAGE, District Judge. Samuel B. Sneath, trustee of the first mortgage bondholders under the mortgage made by the defendant, was, upon his own motion of the 26th of April, 1897, made party defendant in this cause, and on the 1st of May, 1897, filed an answer and cross bill upon the mortgage made to him to secure 60 bonds of \$500 each, with 6 per cent. interest, and prayed for a decree of foreclosure. The bill in this case was filed on the 10th of April, 1897, setting up the filing of a bill in the circuit court of the United States in and for the district of New Jersey by the complainants against the defendant, a corporation existing under and by virtue of the laws of the state of New Jersey, having its principal office in the city of Trenton, in that state, seeking a discovery of the goods and chattels, rights and credits, moneys, effects, and real estate, of every kind and description, belonging to the defendant, setting up also the insolvency of the defendant, and praying the appointment of a receiver; and that such proceedings were had in said circuit court upon the

filing of said bill that an order was thereupon made by said court appointing Frederic A. Duggan, of the city of Trenton, county of Mercer, state of New Jersey, receiver of the defendant, to take possession of all its goods and chattels, moneys and effects, land and tenements, books and papers, choses in action, bills, notes, and property of any and every description, and to sell, convey, or assign all its real and personal estate, and pay into court all of the proceeds; also generally to do and perform all the duties imposed upon him required by law and by the course and practice of the court. A copy of said bill is made an exhibit to the bill herein filed, which, although not so designated, was intended to be an ancillary bill. Upon the filing of the bill in this district, said Duggan was, upon motion, appointed receiver; but the court then intimated that, inasmuch as the property within this district was entirely separate and distinct from whatever there might be in the district of New Jersey, this court would proceed upon its own orders and decrees with reference to the sale or other disposition thereof.

On the 6th of May, being 11 days after Sneath was made a party, he filed a motion for the removal of Duggan, receiver, for the reasons:

"(1) That he was originally appointed by order of the circuit court of the United States for the district of New Jersey, and that the defendant, although incorporated under the laws of that state, has no office or place of business or property in that state. (2) That the receiver is a resident of the state of New Jersey, and that all the property, real and personal, of the defendant, is situate in the city of Tiffin, Seneca county, Ohio. (3) That he was appointed without notice to petitioner, who was trustee of the first mortgage bonds, as set forth in his cross bill herein, and without notice to the directors, managers, officers, or other persons interested in the management of said business, and they had no opportunity to be heard. (4) That his appointment was suggested by complainants, who were largely interested in the pottery companies located in New Jersey, competitors of said defendant company, and that he is, and will be, if permitted to remain as receiver, entirely controlled by complainants in the management of said business. (5) That the receiver has no interest in the business of the defendant company, and has no knowledge or experience in the conduct thereof, and since his appointment has taken no interest in the business, and is not qualified to act as such receiver in any respect. (6) That, if the receiver should devote to the business the attention which is required, the expenses incident thereto by reason of his being a nonresident of the state of Ohio, and far removed from the locality of said business and its property, would be greatly increased. (7) That the complainants have a very small interest in said business; and that the petitioner represents, as trustee and otherwise, most of the indebtedness of the defendant company."

On the 22d of May the receiver filed a full and complete inventory of the estate, property, and effects of the defendant company, their nature and value; also an account of the debts due from the defendant company and to the defendant company. It appears from the inventory that the defendant company has on hand manufactured goods of the value of \$19,937.76, goods unmanufactured of the value of \$3,334.54, goods in process of manufacture of the value of \$389.73, and accounts receivable to the amount of \$21,167.05, of which \$10,129.50 are considered collectible; and that the indebtedness, exclusive of the principal sums secured by mortgage, is \$41,447.31.

The receiver filed with these papers a petition in which is set forth the condition of the real estate of the defendant company, and of its

pottery plant situate thereon, which, it is averred, was closed down and ceased to be a going concern in April, 1897.

The petition further sets forth that for a long time prior to the receiver's appointment the business at the pottery plant at Tiffin was much run down. Its reputation as a business concern was seriously impaired, owing to the making of goods therein poor, crazed, defective, and otherwise imperfect; that the output became practically unsalable; and the pottery, by reason of its having a bad name in the trade, would not sell to advantage to the creditors and stockholders thereof.

After setting forth in detail the condition, and also the possible prospects, of the pottery, to which he claims there is now open a large and unusual market and field of operation in the Western and Southern states, and the opportunity for making said plant and premises, if rehabilitated, a going concern of the first order, with large and quick sales of its goods and output, and profit for the creditors and stockholders, whereas, if the works should be indefinitely shut down, and the property forced to a sale, great loss and sacrifice would result to creditors and stockholders, the receiver prays for an order authorizing and directing him to run and operate the plant and works, and for that purpose that he be authorized and empowered to raise money upon receiver's certificates, not to exceed in the aggregate at any one time \$25,000.

Upon consideration of the affidavits filed pro and con, and of the briefs of counsel, my conclusion is that the motion must be overruled. It was urged upon the oral argument that the appointment of the receiver was an improvident one; that is to say, that the presumption was that Judge Kirkpatrick made the appointment upon the suggestion of counsel, without personal knowledge regarding the qualifications or fitness of the appointee. There is no evidence whatever to that effect. The presumption is altogether the other way, and it is supported by abundant evidence that the receiver is thoroughly competent for the position, having practical knowledge of the pottery business, and having had large experience. As to his being a nonresident of the district, that is something which not infrequently happens in cases wherein receivers are appointed; but it appears from the affidavits that the pottery at Tiffin was so unsuccessfully conducted by the parties interested there prior to the receivership that serious losses were entailed; and that both Mr. Sneath, who is now proposed as receiver, and Mr. Brewer, who was then in charge, and is now active in support of the motion, expressed their conviction that it would be better for the interests of all concerned that the New Jersey parties should take charge of and manage the business. It is said to be conceded that no notice was given to the defendant company of the appointment of the receiver. That is wholly incorrect. The record in the case shows that due service was made upon the company through its proper officers in New Jersey prior to the appointment, and that like notice was given of the application to be made in this district for an ancillary appointment.

The claim that the receiver has no interest in the business of the defendant company is not only in itself no objection, but is, on the

other hand, a strong recommendation. By the statute of Ohio, parties interested are ineligible. Although they are not strictly ineligible in equity, disinterested parties, who are competent, are preferred. The overwhelming testimony of the affidavits is that there is nothing in the claim that Mr. Duggan is under the control of persons who have an adverse interest. It does appear that the stockholders in the Trenton Pottery Company are largely interested in the Brewer Pottery Company, but it also appears that they have the most friendly feeling towards that company. There are affidavits containing direct offers to turn over the overflow orders of the Trenton Pottery Company to the Brewer Pottery Company in case Mr. Duggan is permitted to operate the plant of that company, and the true version of the testimony is that there is no hostility nor clashing of interests between the two companies.

It is also claimed that the complainants have no interest in the business as creditors, and a very small interest as stockholders. On the contrary, the bill shows that the complainants have an interest in the business as creditors, sufficient, at least, to give them a standing in this court. The affidavits show that the holders of over \$127,000 of the entire one hundred and seventy odd thousand of the capital stock are directly interested in this suit, and in full accord with the complainants.

As to the objection that all the property, both real and personal, belonging to and owned by the defendant company, is situate in the city of Tiffin, Ohio, Mr. High, at page 43 of the third edition of his work on Receivers, says:

"It would seem to be unnecessary that the property constituting the subject-matter of litigation should be within the jurisdiction, provided the parties in interest are subject to its control; and there are frequent instances where the English court of chancery has appointed receivers over assets or property situated in foreign countries."

To the same effect, see Kerr, Rec. p. 124; Beach, Rec. (Alderson's Ed.) § 247. In *Bidlack v. Mason*, 26 N. J. Eq. 230, the chancellor said:

"On principles of comity the aid of this court will be extended to a receiver of a foreign corporation seeking to obtain possession of the property of the corporation here as against the officers of the corporation who may be endeavoring by fraud or subterfuge to withhold it."

In that case the receiver was appointed by the supreme court of the state of New York for a manufacturing company formed and existing under the laws of that state, and was permitted to take possession of property in Camden, N. J. All the property of the company was in the state of New Jersey, in the company's factory in Camden. See, also, *Phoenix Iron Co. v. New York Wrought Iron Railroad Chair Co.*, 27 N. J. Law, 484. In *Bank v. McLeod*, 38 Ohio St. 184, Judge Johnson, delivering the opinion of the court, said:

"It is not necessary that the property should be within the jurisdiction of the court. Thus, courts of England have appointed receivers to manage landed property in India, Canada, China, Ireland, South American states, and other places."

See, also, 2 Daniel, Ch. Pl. & Prac. *1731, and cases cited, and *Gluck & B. Rec.* (2d Ed.) pp. 34, 36. In ancillary proceedings, the

custom and practice is to appoint as receiver the person originally appointed.

"The proceedings attending such ancillary or auxiliary proceedings are those of comity, rather than of compulsion, and invoke harmonious action between courts of different territorial jurisdictions in administering the same estate. The doctrine is one of necessity, occasioned because a court cannot, by its order or decree, affect and control property in another jurisdiction. A feature of ancillary receiverships is that the same person is generally, though not always or necessarily, appointed receiver. Thus his power becomes co-extensive in every jurisdiction wherein he is appointed, and a complete and uniform management of the property is secured." Beach, Rec. (Alderson's Ed.) p. 40. § 28a.

In *Rust v. Waterworks Co.*, 17 C. C. A. 16, 70 Fed. 129, the circuit court of appeals, Eighth circuit, said:

"When the receiver of a foreign corporation, appointed by a court of the state of its creation [New Jersey], presents a petition to a court in another jurisdiction [Colorado] to have a judgment against such corporation opened, and an opportunity to defend the suit, such court has power to authorize him to defend such action in its jurisdiction, as it would have power to appoint him receiver, and authorize him to bring and defend suits generally."

So, in *Fost. Fed. Prac.* p. 399:

"When a receiver has been appointed by one federal circuit court, the others, through judicial comity, will usually appoint the same person an ancillary receiver of so much of the same estate as is within its jurisdiction."

In *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.*, 58 Fed. 279, Judge Lurton uses the following language:

"We are not prepared to say that circumstances might not arise which would justify and demand independent action in the appointment of receivers by each court of independent jurisdiction, and even the removal of receivers once appointed. But the respect due by courts of co-ordinate power and jurisdiction to each other, and especially that due by a court whose jurisdiction in a large part is in some sense ancillary to the court of primary jurisdiction,—the court where the rights and equities of all must finally be aggregated, and the accounts of the receivers be adjusted,—demands that a strong case should be made before independent and divergent orders should be made tending to bring on conflict between courts endeavoring to administer the same property in such manner as will best subserve the interests of all interested in it."

As to the increased expenses resulting from the nonresidence of the receiver, that matter will be entirely in the hands of the court, which will see to it that no unreasonable or extravagant charges or expenses shall be allowed.

The defendant company, although operating and having its property in the state of Ohio, is a corporation existing under and by virtue of the laws of the state of New Jersey. That sovereignty having been sought for the purpose of the creation of the corporation with whatever advantages or exemptions have been thereby secured, neither the stockholders, nor the creditors who dealt with it as a New Jersey corporation, ought now to be heard to object to the jurisdiction of the courts located in the state of which it is legally a resident.

Mr. Sneath, who is suggested as receiver, is without practical knowledge or experience in the business. He is president of a bank, and has other matters in charge, which, it would seem, would make it practically impossible for him to give the attention to the business

which would devolve upon the receiver. I am disposed to give a thorough and impartial trial to a new management which promises a favorable and successful outcome, rather than to commit the business to essentially the management which was, up to the time of the receivership, altogether unsuccessful and unprofitable. I do not intend, however, to throw the reins over the neck of the receiver. It is averred that he has declared he would not be able to give his personal attention to the business. This is, however, denied by him. The court relies upon his promise to the contrary. The motion will be denied at the costs of the mover.

An order will be made requiring the receiver to proceed at once to take charge of and operate the plant, to file in court monthly reports showing the state and progress of the business, receipts and disbursements, the number of hands employed, the number of days each month of his presence at Tiffin in the care and supervision of the business, and, generally, whatever may be necessary to enable the court to keep an eye intelligently on his operations.

LEONARD v. MARSHALL et al.

(Circuit Court, W. D. Missouri. May 21, 1897.)

1. EQUITABLE ASSIGNMENT—WHAT CONSTITUTES.

One procuring a loan from an agent of the lender for the purpose of discharging a debt of the same amount due by him to a third party, on executing the note and mortgage verbally directed the agent to pay over the money, when received from his principals, to such third party; and the latter, on learning of the arrangement, assented to it. *Held*, that this was an equitable assignment of the fund.

2. LACHES.

Plaintiff, through one T., made a loan to G., secured by a trust deed. When the loan became due T., who was an agent of certain eastern money lenders, engaged to procure for G. a loan from them with which to pay off plaintiff's loan. T., therefore, who was the trustee in plaintiff's trust deed, procured from him the note, in order that he might release the trust deed, so that G. could make a new mortgage to the new lenders. The trust deed was accordingly released of record, and a new note and trust deed executed by G., and forwarded by T. to his principals. The latter, instead of forwarding the full \$5,000, the amount of the new loan, rendered to T. a statement showing that he owed them \$2,600, consisting of two items of \$1,000 and \$1,600 each, and remitted him the balance, with directions to apply it, together with the \$2,600, upon the loan. T. in fact owed them only \$1,600, but he did not make any objection to the statement. G. had directed him, on receiving the amount of the loan from his principals, to pay it over to plaintiff; but T., without the knowledge either of his principals or of G., applied the money to his own use, continuing to pay the interest to plaintiff as if the same were coming from G., and leaving plaintiff to suppose that G. had not yet obtained the new loan. Plaintiff, although he had surrendered his note, made no effort to find out the real reason why he did not receive his money, and did not even examine the county records to discover whether his trust deed had been released. Some two years later, T. became a fugitive, and plaintiff, learning the true state of affairs, sued the eastern money lenders for the amount which they had charged against T. in the account rendered to him, and which they had not forwarded to be applied on the new loan. *Held* that, in view of plaintiff's laches, he, rather than defendants, must suffer the loss to the extent of the \$1,600 actually

due from T. to defendants when they rendered him the account, but that defendants were liable for the \$1,000, which in fact T. did not owe them.

This was a suit in equity by M. W. Leonard against T. W. Marshall and William Chalfant, Jr., to recover the sum of \$2,600, with interest thereon to March 1, 1892. The facts were as follows:

On October 16, 1885, the plaintiff, a resident of Howard county, Mo., loaned, through one J. C. Thompson, to one M. O. Green, a farmer of Pettis county, Mo., \$5,000, and took his note, due in three years, secured by deed of trust on 640 acres of Pettis county farm lands. After this note became due, Thompson suggested to Green that he could get him an eastern loan at a lower rate of interest, with which he could take up and pay plaintiff's note. Thompson for a long time had been making loans for defendants, T. W. Marshall & Co., in Pettis and adjoining counties, and had general charge of their loan business there. Green assented to this arrangement, and on July 8, 1891, Thompson, having prepared Green's application for a loan of \$5,000, forwarded the same to defendants, who thereafter agreed to make the loan. Thompson prepared the note and deed of trust securing the same upon the same land on which the plaintiff's note was secured. The note was payable to the order of T. W. Marshall & Co., and the deed of trust was made to J. C. Thompson as trustee for them; and on August 1, 1891, Green executed the note and deed of trust, and delivered them to Thompson for defendants. At the same time he directed Thompson to pay plaintiff's note with the proceeds of the loan he was getting from defendants. Thompson placed the note and deed of trust with his private papers, where they remained until September 30, 1891, when he filed the deed of trust for record in the county recorder's office; but he still retained the note in his hands. On August 14, 1891, defendants wrote, inquiring of Thompson about the Green loan, to which he replied that he had the papers already executed, but was waiting for Green to make up the difference between this loan and the old loan with accrued interest. Nothing further seems to have been done in the matter until about the 25th day of February, 1892, when Thompson wrote to the plaintiff, Leonard, stating that Green had secured a loan, and was ready to take up plaintiff's note, and directing plaintiff to indorse it, so that he (Thompson) could release the deed of trust, as the legal holder of the note; which plaintiff accordingly did, sending the note to Thompson for collection and remittance. Accordingly, on February 27th, Thompson released plaintiff's deed of trust, and on the same day wrote to defendants, T. W. Marshall & Co., forwarding to them all the papers connected with their Green loan, making excuses for the delay, and asking them to remit the full amount of the loan, less the commission agreed upon. To this the defendants replied, inclosing a statement of their account with Thompson, as follows:

"We credit you M. O. Green loan.....	\$4,875 00
We charge you on acc't of Janney loan.....	\$1,000 00
On acc't of David McNair loan.....	1,600 00
Remittance to New York.....	2,275 00
	<hr/> \$4,875 00"

They accordingly remitted, instead of the full \$5,000, less their commission, as requested by Thompson, the balance shown by this account, namely, \$2,275. The McNair loan referred to in the account was a loan made by defendants through Thompson, and which had become due, and had been paid to Thompson for the defendants; and it seems that it had been understood between defendants and Thompson that he should retain the amount to be applied upon the Green loan when the transaction should be completed. In regard to the Janney loan of \$1,000, charged to Thompson in this account, the facts were as follows: One McGruder owed defendants \$2,000, secured by mortgage. Janney also owed defendants \$2,000, and was ready to pay \$1,000 thereof, and have the remainder extended. McGruder owed Janney \$1,000, and an arrangement was made, and carried out through Thompson, whereby McGruder's loan was increased to \$3,000, and Janney's debt was decreased by \$1,000, which satisfied McGruder's debt to Janney. The result was that the defendants stood, in respect to Thompson, in the same condition as before; but they had charged Thompson with the \$1,000 due from Janney, though Thompson had in fact never

received it. Thompson was an officer of the First National Bank of Sedalia, Mo., and kept therein the account of the defendants, T. W. Marshall & Co., they apparently trusting this matter entirely to him. As a matter of fact, this account was overdrawn at the time of the transactions in question, Thompson presumably having otherwise appropriated the money. He never paid the principal of the plaintiff's note, or any part of it. Some time after sending the note to Thompson for collection, plaintiff demanded the money therefor, but was informed by Thompson that Green had failed to get his loan. Plaintiff then demanded back his note, but Thompson informed him that it had been lost or misplaced, and that he would look it up soon, and send it to him. Thompson continued to pay the interest on plaintiff's note as if it were coming from Green, up to October, 1893, plaintiff supposing all the time that Green was in fact paying it, and that the note was a valid and subsisting lien on Green's real estate; and he did not learn the real facts until Thompson's bank failed, on May 4, 1894, and Thompson disappeared. Green also was ignorant of the real state of affairs. He knew that his deed of trust had been released, and supposed that Leonard had received from Thompson the amount due thereon. When the bank failed, the defendants' account was still largely overdrawn. Immediately on discovering the actual condition of affairs, plaintiff sued the receiver of the bank for the \$2,275 that Thompson obtained from defendants for the purpose of the Green loan, and recovered a judgment for the same. Plaintiff, having learned that defendants had deducted the \$2,600 which they claimed Thompson owed them from the amount of the Green loan, instituted this suit to recover the same, claiming that in equity it belonged to him, and was wrongfully withheld.

James T. Montgomery, for complainant.
Montgomery & Montgomery, for defendants.

PHILIPS, District Judge. The first question of importance lying at the threshold of this controversy is one of law: If it were conceded that defendants had not paid over the money on the Green loan to Thompson, what right of action would complainant have to recover the fund in defendants' hands? He could not sue at law therefor, on the ground that defendants owed Green, for the want of privity of contract. This is conceded by complainant's counsel. The only ground, therefore, upon which he can recover is that asserted in the bill and argument,—as an assignee in equity under Green. I shall not undertake to review the authorities discussing the doctrine of equitable assignments, illustrating the varying circumstances under which such assignments may or may not be sufficient. The field is broad, presenting some incongruities, and much refinement in discussions. I am content with the rule laid down in the text by Pomeroy on Equity Jurisprudence (volume 3, § 1280):

"It is an established doctrine that an equitable assignment of a specific fund in the hands of a third person creates an equitable property in such fund. If, therefore, A. has a specific fund in the hands of B., or, in other words, B., as a depositary or otherwise, holds a specific sum of money which he is bound to pay to A., and if A. agrees with C. that the money shall be paid to C., or assigns it to C., or gives to C. an order upon B. for the money, the agreement, assignment, or order creates an equitable interest or property in the fund in favor of the assignee, C.; and it is not necessary that B. should consent or promise to hold it for, or pay it to, such assignee. In order that the doctrine may apply, and that there may be an equitable assignment creating an equitable property, there must be a special fund, sum of money, or debt actually existing, or to become so in futuro, upon which the assignment may operate; and the agreement, direction for payment, or order must be, in effect, an assignment of that fund, or of some definite portion of it. The sure criterion is whether the order or direction to the drawee, if assented to by him, would

create an absolute personal indebtedness, payable by him at all events, or whether it creates an obligation only to make payment out of the particular designated fund."

—From which it is clear that it is not essential to such assignment that it should have been in writing, or characterized by any special formulary, or indicated by any set phrase or ceremony. The text is that, if A. has a specific fund in B.'s hands, "which he is bound to pay to A., and if A. agrees with C. that the money shall be paid to C., etc., the agreement, etc., creates an equitable interest or property in the fund in favor of the assignee; and it is not necessary that B. should consent or promise to hold it for, or to pay it to, such assignee." An agreement is the coming together, in accord, of two minds, on a given proposition. This may be shown by evidence, direct and indirect, as any other fact may be satisfactorily established in court. It may arise by positive expression or necessary implication. Did Green consent and intend that the money borrowed through Thompson of defendants should be paid by Thompson directly over to complainant? Thompson was to receive and apply the money. That such was Green's purpose and understanding there can be no question, and as little question that Thompson so understood the matter. It is true that when Green was critically examined and cross-examined as to the particular words employed between him and Thompson he could not repeat them, but did depose that such was the understanding. And as persuasive proof thereof he acted thereafter for a year and a half on the assumption that Thompson had received and paid the money over to complainant. And so reliant was he thereon that he never made inquiry thereof, thus signifying that he, as assignor, had no further interest in the fund.

Equity, regarding that as done which should have been done, will, in its eagerness to see that exact justice be done according to the very right and conscience of the matter, effectuate the intention and understanding of these parties. Especially should the court lean to this view where both the creditor and the claimed assignee insist that such was the agreement. Thompson, being complainant's agent to receive the money for him from Green, could bind the arrangement in favor of Leonard, when assented to, as it was, by Leonard. I do not attach much importance to the fact that Leonard did not assent thereto until after the failure of the bank and flight of Thompson, for the reason that he had no notice of the fact that the loan had ever been consummated, and he did assent thereto as soon as he was advised of the fact. This aspect of the case is only important as it affects the conduct of the defendants, and the changed relation of the parties, within that lapse of time, which will be considered hereafter.

A more serious question as to the right of complainant's recovery, in considering the relative equities between these litigants, arises out of the laches of the complainant. The defendants were entire strangers to the complainant and Green in the inception of the transaction in question. Complainant demanded, through Thompson, that Green should pay his debt to them. He authorized Thompson to

collect it, and was advised by Thompson that Green proposed to raise the required money by effecting another loan on the mortgaged land. He was also advised that, to enable Green to effect this second loan, it was necessary that the record in the recorder's office of Pettis county should show a clear title in Green. That this might be accomplished, he assigned his note against Green to Thompson, thus making Thompson the apparent owner thereof, for the express purpose of enabling him to satisfy of record the mortgage. That was done by Thompson. The legal effect of this was to notify all persons subsequently dealing with the land that this particular debt was satisfied against the property; the very object of which was to satisfy the person who should make another loan to Green that the complainant's debt was not in the way. Thompson sent on to defendants the abstract of title, showing satisfaction of the mortgage, before the loan was made by defendants to Green.

The contention of complainant's counsel that Thompson was the general agent of defendants in Pettis county, through whom they transacted in that locality the business of their loans, and therefore the defendants are bound by all the information Thompson had respecting the conduct of this particular business between Thompson and complainant, or between Thompson and Green, is wholly untenable. In effecting this particular loan, Thompson was the agent of Green, and therefore the advancement of the money by defendants to Thompson discharged them from any liability therefor to Green. *Robinson v. Jarvis*, 25 Mo. App. 421-427. The defendants had a right to deal with Thompson upon the assumption that complainant's debt had been taken care of by Green and Thompson. They demanded an abstract showing a clear title to the land in Green, before the loan was closed. After that they had a right, so far as complainant was concerned, to deal with Thompson as between two independent contracting parties. When they accounted with Thompson in respect of the \$5,000, no person, so far as defendants were advised or concerned, had a right to complain thereof, except Green, who made no objection. As Thompson was then indebted to defendants, they had a right, Green not objecting, to settle with Thompson by paying over to him, or under his direction, the balance of the \$5,000 after deducting the sums Thompson owed them. It is true, Thompson directed them to deposit the \$5,000 in the New York bank, to the credit of the First National Bank of Sedalia, of which Thompson was cashier. Defendants deposited only \$2,275, the balance claimed by them as due to Thompson after an accounting with him. As early as March, 1893, they rendered Thompson their account. No objection was made thereto, so far as the evidence discloses, after that, by either Thompson or Green. From that time until the failure of the Sedalia bank, and the published insolvency and flight of Thompson, in May, 1894, the defendants were left in a sense of security respecting the malfeasance of Thompson, or the fact that the complainant had not received his money. During all that time the bank and Thompson had unimpaired credit, and were responding to all demands asserted against them. So, at any time for over a year after defendants settled with

Thompson, had they been advised of complainant's claim, they could have protected themselves against loss on account of this transaction.

The question to be answered by a court of chancery is, who shall bear the loss—the defendants or the complainant—resulting from the malfeasance of Thompson? It is answered by the wholesome rule of equity that, “where one of two innocent persons must suffer by the wrong of another, the one who enables such other to commit the wrong must bear the consequences.” *Sprights v. Hawley*, 39 N. Y. 441–448; *Whittemore v. Obear*, 58 Mo. 280, 286; *International Bank v. German Bank*, 71 Mo. 197; *Cummings v. Hurd*, 49 Mo. App. 140. The complainant, by transferring his note to Thompson, and investing him with the apparent ownership thereof for the express purpose of enabling him to satisfy his mortgage against Green, put it in the power of Thompson to perpetrate the fraud. Not only that, but for 18 months he left the note, indorsed over to Thompson, in his hands, with the knowledge that thereby he had clothed Thompson with the power to satisfy the deed of trust, or otherwise to use the note, without taking the precaution, although within two hours' ride of the recorder's office, to look to see if the mortgage had been satisfied; nor did he ever, during all this time, make inquiry of Green as to whether he had paid the money to Thompson. Surely he ought not, under such circumstances, to visit the loss of his supineness, and overconfidence in Thompson, upon the defendants, who dealt with Thompson upon the reasonable assumption that the complainant's debt had been cared for. The equity of the case, it seems to me, demands that the defendants in this controversy should be acquitted of any liability to the complainant as to not only the \$2,275 it placed to the credit of Thompson's bank with the bank in New York (for which amount the complainant has obtained judgment against the receiver of the First National Bank of Sedalia), but also for the sums actually in Thompson's hands, owing to the defendants, and for which the defendants accounted with Thompson, as before stated.

Another question, however, arises in this connection,—as to whether Thompson in fact owed to the defendants the amount of credits so claimed by them against Thompson. Among the items charged by defendants in said accounting against Thompson was the sum of \$1,000, claimed to have been collected by Thompson from one Janney, belonging to defendants. The evidence in this case shows the facts respecting this item: One McGruder owed the defendants \$2,000 on a matured note, secured by mortgage on McGruder's land. Janney also owed the defendants \$2,000, secured by mortgage on his land. Janney was ready to pay \$1,000 on his loan, and to have the loan extended. McGruder owed Janney the sum of \$1,000, and the arrangement agreed upon, and carried out through Thompson, was that McGruder's loan was increased to \$3,000, and a mortgage taken on his land to the defendants to secure this \$3,000 loan. Thereupon Janney's debt was decreased by the sum of \$1,000, which satisfied McGruder's debt to Janney; the result of this arrangement being that defendants stood, in respect of

the money they were out, and the security they then had, precisely where they were before the conventional arrangement. It was, therefore, simply a matter of bookkeeping, by which the defendants charged up to Thompson the \$1,000 on Janney's account. As a matter of fact, Thompson never received the \$1,000 from Janney, nor did the defendants advance to McGruder in kind. It was simply a rearrangement of the \$4,000 they had loaned to Janney and McGruder; and when the new arrangement was perfected the defendants still held claims against Janney and McGruder to the extent of \$4,000, satisfactorily secured by mortgages on real estate. If it was deemed necessary to charge up the \$1,000 against Thompson, they should have credited him with a like increase in the McGruder debt.

It thus becomes apparent that the defendants did not, in fact, pay over to Thompson the amount of the Green loan by the sum of \$1,000; and the complainant, as the equitable assignee of this fund, is entitled to a decree therefor against the defendants, unless the contention of defendants' counsel be sustained, that by reason of the allegations of the bill the complainant is precluded from asserting the right to a decree therefor. It is contended by defendants' counsel that complainant's bill avers, in effect, that Thompson did have in his hands, on account of collections made for defendants, the sums credited to him in the account rendered by defendants to Thompson. The allegations of the bill respecting this matter are that the defendants sometimes allege and pretend that they have paid the full amount of the said \$5,000 loan to said Thompson, and at other times that they have paid the same to said Green; but the bill then charges the fact to be that defendants have only paid out of said loan the sum of \$2,400, for which the orator makes no complaint against defendants (this having reference evidently to the sums paid by defendants to the New York bank, with commissions, etc.). The bill then proceeds in the same connection to state that "they allege that the First National Bank of Sedalia, or said J. C. Thompson, or both, were indebted to them, the said defendants, in the sum of \$2,600 on account of the collection of certain notes, made either by said bank or by said Thompson," and that in remitting to said Thompson for said Green loan the defendants deducted out of the \$5,000 the said \$2,600. It is to be observed that the words above quoted, "they allege," evidently have reference to what defendants claimed, and, taken in its context, it ought not to be construed as an admission by the pleader that Thompson had collected the said \$1,000 from Janney. And as the court, in furtherance of justice, if it were necessary, would permit the complainant to make this part of his bill clear to meet the state of the actual facts, I am not disposed, upon such a technicality, to permit the defendants to cover up, after the fashion they have attempted, the \$1,000 which they should have paid over to Thompson for Green. One unfamiliar with the distress of mind into which Thompson's frauds and concealments had brought him might wonder how it was that Thompson acceded to a charge against him of this \$1,000 in the account rendered by defendants. But the facts disclosed by the

depositions in this record show that the defendants had reason to suspect the integrity of Thompson, and that he was in no condition to maintain any controversy with them; and he deemed it, in his straitened condition, better to submit to this specious bookkeeping of the defendants respecting this \$1,000 than to protest or resist. It results that decree is ordered against the defendants for the sum of \$1,000, with interest thereon from the date of the institution of this suit.

HEKKING v. PFAFF.

(Circuit Court, D. Massachusetts. August 24, 1897.)

No. 584.

1. DIVORCE—SUBSEQUENT AWARD OF ALIMONY—JURISDICTION.

A decree of divorce was entered by a circuit court of South Dakota in favor of plaintiff, a resident of that state, against defendant, a resident of Massachusetts; the court having no jurisdiction of defendant. Defendant afterwards married, and subsequently, on an amended bill filed by plaintiff, by leave of the court, without notice or attempted notice to the defendant, a decree was entered awarding plaintiff alimony. *Held*, that such decree was void, and an action based thereon to recover the alimony could not be maintained.

2. SAME—EFFECT OF MARRIAGE OF DEFENDANT.

Where, in accordance with the laws of the state, a court renders a decree of divorce in favor of one of its own residents against a resident of another state without acquiring jurisdiction over the latter, his subsequent marriage will not prevent him, either as a ratification, waiver, or estoppel, from denying the jurisdiction or authority of the court to open the decree and award alimony against him.

D. F. Kimball, for plaintiff.

Jabez Fox and Gerard Bement, for defendant.

PUTNAM, Circuit Judge. April 20, 1893, the plaintiff, who was then a resident of the state of South Dakota, obtained a decree for a divorce against the defendant in the circuit court of that state for the county of Lincoln. In the original complaint she prayed for alimony, but no alimony was granted in connection with the decree of divorce. The entire decree was as follows:

"It is ordered and adjudged that the bonds of matrimony heretofore and until now existing between the said plaintiff and the said defendant be, and the same are, dissolved, and that plaintiff have leave to resume her maiden name of Christine Hekking."

No reservation whatever was made of record with reference to further proceedings in the cause, although it may be that it was in the power of the court to have entered on the heel of such a decree a further decree for alimony against parties over whom it had jurisdiction. In July, 1893, defendant married again. In his answer to this suit he admits that he married in reliance on the decree of divorce. Subsequently, in March, 1896, the plaintiff prayed that the decree entered might be opened. Leave was granted, and thereupon the plaintiff filed an amended bill alleging grounds for alimony which had arisen since the original decree, and praying therefor anew. In