

of the property. It may therefore, not without reason, be said that the omission in this bill of any tender to do equity, or of any offer to pay the price demanded for this common stock as a condition of participating in the plan of reorganization, is because, as shown by this record, the share of stock upon which \$10 has been paid to-day, notwithstanding the assured success of the plan, commands less than \$6 in the market. This bill, as was observed, is not to carry out this plan of reorganization, substituting the general creditors for the stockholders, but desires and demands that the court shall formulate a plan of reorganization, giving to the general creditors their appropriate proportion of bonds or stock, and determining the terms upon which that proportion shall be awarded; and it does not offer even to enter into or be bound by any plan of reorganization, but simply that there may be tendered to creditors an opportunity of entering into a plan of reorganization without any sort of obligation or offer upon their part to enter into it, to assume its obligations, or to pay any money. The result would be, if the prayer of this bill were granted, that this reorganization plan would be set aside, and the court would require bondholders and stockholders to reform the plan of reorganization so as to embrace creditors or tender to them an opportunity to join upon such terms as might be thought proper, with leave to the general creditor to accept it or not, as he might think best.

A careful examination of this bill and of the record, in the light of the knowledge which the court has of this whole transaction, satisfies me that the bill is without equity. This conclusion renders it unnecessary for the court to consider the other questions that were argued at the bar,—whether a general creditor, not having placed his claim in judgment, could maintain such a bill as the present, or whether the contract under which the complainants claim to have become general creditors of the company was ultra vires the corporation. The motion will therefore be overruled.

COUDERT v. UNITED STATES.

(Circuit Court, S. D. New York. March 30, 1895.)

TERMS OF COURT—AMENDMENT OF FINDINGS.

A motion to amend findings of fact in an action at law in which final judgment was entered October 24, 1894, is not too late, as made after the term, when made in the United States circuit court for the Southern district of New York on March 15, 1895; for the October term for the trial of actions at law, under Rev. St. § 658, continues until the first Monday in April, and does not expire on the last Monday in February.

Motion to amend findings of fact by making them more specific, and by striking out certain conclusions of law stated as findings of fact proper.

The motion was made in an action at law arising under the Tucker act, in which plaintiff seeks to recover certain deposits from the United States. The facts constituting the cause of action appear more fully in a subsequent decision in this case in the circuit court of appeals, reported as *U. S. v. Coudert*, 19 C. C. A. 543, 73 Fed. 505. Findings of fact were signed by the circuit court and filed on October 24, 1894, and judgment entered against the United

States on November 5, 1894. On March 15, 1895, this motion was made by the United States, on affidavits, to amend these findings of fact. Notice of the motion had been first given to the adverse side on March 5, 1895. It was contended by the United States that the motion was made during the same term at which judgment was entered, and that the motion, therefore, was not too late, as the October, 1894, term for the trial of actions at law in the circuit court for the Southern district, under Rev. St. § 658, does not expire until the first Monday in April, 1895.

Wallace Macfarlane, U. S. Atty., and Max J. Kohler, Asst. U. S. Atty., for the motion.

Joseph Kling, opposed.

LACOMBE, Circuit Judge. The October jury term in this court lasts until the ensuing April term. Jones v. Navigation Co., 11 Blatchf. 406, Fed. Cas. No. 7,485. The motion was therefore in time, and there seems no sound objection to the amendments proposed, which only make the findings more detailed, and conformed strictly to the proofs. The findings are amended as prayed.

HOLLAND v. McGLINN.

(Circuit Court, N. D. California. January 10, 1898.)

LIMITATION OF ACTIONS—LACHES.

An action to recover money intrusted to another as attorney in fact cannot be maintained 12 years after the cause of action accrued, on a complaint which does not show a cause of action based on an express continuing trust, not subject to the statute of limitations.

Fox, Kellogg & Gray, for plaintiff.
Timothy J. Lyons, for defendant.

MORROW, Circuit Judge. This is an action brought by the plaintiff, as the assignee of Susan McMonagle, upon a rejected claim presented by her against the estate of Patrick McGlinn, the defendant's intestate. The claim was for the sum of \$12,575.12, and it recited that said sum was "intrusted by the said creditor [Susan McMonagle] to the said Patrick McGlinn, as attorney in fact for said creditor, together with all proceeds from such portion thereof as may have produced anything by proper investment and interest at the rate of seven per cent. per annum on the balance from August 21, 1882." This is the same money for the recovery of which Susan McMonagle, plaintiff's assignor in this action, has brought a bill in equity in this court against the same defendant, praying that said sum be declared trust funds in the hands of the defendant, and that certain real estate owned by the defendant be charged with the trust. A demurrer to the bill as amended was interposed, and has just been considered, the demurrer being sustained and the bill dismissed. See opinion of this court in McMonagle v. McGlinn, reported in 85 Fed. 88. A demurrer is also interposed to the complaint in this case upon several grounds, the principal ones being the bar of the statutes of limitations of this state and laches. In my opinion, the demurrer is well taken. The claim purports to date from August 21,

1882. When presented as a claim against the estate of Patrick McGinn, deceased, some 12 or 13 years had elapsed. Whatever view be taken of the nature of the claim,—that is, whether it be considered as a deposit, or money due on contract, or balance on account, etc.,—it is barred by the various periods of limitation prescribed by sections 337, 338, 339, 343, and 344 of the Code of Civil Procedure of this state. The action was not commenced until April 9, 1896, a period of nearly 14 years. The contention, by counsel for plaintiff, that the claim presented against the estate and the averments of the complaint show an express, continuing trust in favor of plaintiff with reference to the money in question, is not supported by the most favorable view that can be taken of the language used in the claim, and of the allegations in the complaint. The complaint will therefore be dismissed.

GUNTHER v. LIVERPOOL & LONDON & GLOBE INS. CO.¹

(Circuit Court, E. D. New York. February 23, 1882.)

1. FIRE INSURANCE—PLEADING CONDITIONS—WAIVER OF OBJECTION.

The insurer, in its answer, set out the conditions of the policy, and alleged generally that they were broken, and then specified the particulars in which they were broken, not mentioning, however, a condition against drawing kerosene by any light other than daylight. Evidence was admitted tending to show that kerosene was being drawn by artificial light, and caught fire therefrom. This evidence went in, however, as part of the circumstances attending the fire, and plaintiff had no opportunity to object on the ground that the condition was not pleaded. *Held*, that its admission was not a waiver of the objection, and defendant was not entitled to an instruction that the policy was void for breach of this condition.

2. SAME—BREACH OF CONDITIONS.

A condition, in a policy on an hotel, availing the policy if the premises should be occupied or used so as to increase the risk by any means whatever "within the control of the assured," or if the assured should keep benzine there, is not broken by the act of an agent of the lessee of the hotel in taking benzine there for his own individual purposes, not connected with the running of the hotel.

3. SAME—PERMISSION TO KEEP BENZINE, ETC.—QUESTION FOR JURY.

A policy on an hotel was conditioned to be void if gasoline or benzine were kept on the premises without permission. Written permission was given "to use gasoline gas, gasometer, blower, and generator being underground, about 60 feet, from main building, in vault." *Held*, that the question whether this did not include permission to keep on the premises the necessary gasoline or benzine for making the gasoline gas was properly left to the jury.

This was an action by Charles Godfrey Gunther against the Liverpool & London & Globe Insurance Company upon a policy of fire insurance on an hotel. The jury returned a verdict for plaintiff, and defendant moved for a new trial.

George H. Forster, for plaintiff.

William Allen Butler, for defendant.

¹ This case has been heretofore reported in 20 Blatchf. 362, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases. The judgment of the circuit court was subsequently reversed. See 116 U. S. 113, 6 Sup. Ct. 306.