plead to his counterclaim." The practice act prescribes the due course of proceeding where a party fails to plead. It is to move for judgment as for want of answer. Therefore the court properly declined to make the unwarranted order asked for. No matter what reason the court assigned for its refusal, if the refusal was right its action was not erroneous. But what is a more conclusive answer to the writ of error is, there was no final judgment entered by the court against the complainant to be reviewed on writ of error. Toland v. Sprague, 12 Pet. 331. It was rather the refusal of the court to proceed to judgment that the writ of error was demanded to correct. A writ of error is not the appropriate remedy where a court refuses to proceed to the hearing and determination of a cause. The only final judgment in this record is that complained of by plaintiff below, which is as follows:

"Wherefore it is considered by the court that this suit [i. e. the plaintiff's suit] be, and the same is hereby, dismissed out of this court, and that the defendant do have and recover of and from the plaintiff his costs by him in this behalf laid out and expended," etc.

The defendant below did not, and does not, complain of this judgment.

The writ of error, therefore, sued out by the defendant below, is dismissed, at his cost, and the judgment of the circuit court is reversed, at the cost of defendant in error, and the cause is remanded for further proceeding in conformity with this opinion.

SPRING VALLEY COAL CO. v. PATTING.

(Circuit Court of Appeals, Seventh Circuit. April 21, 1898.)

No. 465.

1. MASTER AND SERVANT—NEGLIGENCE—COMPETENCY OF EMPLOYE.
   Where a cage in which a miner was being lowered into a mine through a shaft 360 feet deep escaped control of the engineer by reason of his failure to expel the water from the cylinder of the small engine, by which the brake and reversing apparatus were operated, and the miner was injured, and the past competency and experience of the engineer were proved by satisfactory evidence, this single act of negligence is not such proof of incompetency as to make the master liable.

2. SAME—FAILURE TO OBEY STATUTE.
   Failure to provide a light at the bottom of a shaft, as required by the Illinois statute, "to insure, as far as possible, the safety of persons getting on or off the cage," does not make the master liable for injuries to a servant who was being lowered through the shaft in a cage, where the absence of the light neither caused nor affected the injury.

3. SAME—DEFECTIVE BRAKE.
   Where a servant is injured while being lowered into a mine in a cage, and the same is caused by the engineer's failure to keep in proper condition the cylinders of the engines operating the brake and reversing apparatus, and the same would have been sufficient except for such neglect, the master is not chargeable with failure to supply a sufficient brake and reversing apparatus.

4. SAME—NEGLIGENCE OF CO-EMPLOYE.
   Where a servant is injured through the negligence of the engineer in charge of the engine operating the cage in which he is being lowered to a mine, such negligence is that of a co-employé, and the master is not liable.

5. SAME—SUBMISSION TO JURY.

Where the court submits a case to the jury upon four propositions, only one of which is proper, it is impossible to say on which proposition the verdict was returned, and it must be reversed.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Henry S. Robbins, for plaintiff in error.

James D. Springer, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges

WOODS, Circuit Judge. Alex Patting, the defendant in error, recovered judgment against the Spring Valley Coal Company in the sum of $10,000 for personal injury suffered on the morning of November 24, 1893, while being lowered through a shaft, 360 feet deep, to the mine of the company, in which for about two years he had been employed to dig coal. The cage in which, with eight or nine other miners, he was being lowered, escaped the control of the engineer, and descended with such rapidity that when it struck the bottom he was thrown out upon the ground beside the cage, and during the rebound one of his legs was caught beneath the cage and broken above the knee. Afterwards amputation became necessary, but, as the plaintiff in error claims on the testimony of "the doctor in charge," by reason of disobedience of the doctor's instructions. The declaration as amended contains a number of counts, but before entering upon the trial it was stipulated by the parties that plaintiff based his right of recovery in the case only upon the following grounds of negligence on the part of the defendant:

"First, that the defendant failed to furnish a sufficient brake; second, that the defendant was negligent in the employment and retention of a competent engineer; third, that there was no light at the bottom of the shaft at the time of the accident, and that this absence of a light contributed to the plaintiff's injury; fourth, that defendant was guilty of negligence in failing to supply a sufficient reversing apparatus and appliances."

At the proper time the plaintiff in error moved for a peremptory instruction that a verdict be returned in its favor, and also moved for an instruction in respect to each of the alleged grounds of recovery, separately, that it should be withdrawn from the consideration of the jury because not supported by the evidence adduced. The court overruled each motion, and submitted the case to the jury for determination upon all of the grounds alleged and included in the stipulation. Exceptions were duly saved, and error has been assigned upon each of the rulings, though it is to be observed that the brief for the plaintiff in error does not contain, after the statement of the case, "a specification of the errors relied on," as required by the second clause of rule 24 of this court (21 C. C. A. xcix., and 78 Fed. xcix.). It is not a compliance with the rule to make a statement of "points." Unless the specifications of error are given substantially as they appear in the record, it is not evident on the face of the brief, as contemplated by the rule, whether "the points of law," which by the next clause of the rule are required to be clearly stated in "a brief of the argument," are properly presented. The supreme court deemed it worth while

to recommend these rules for adoption. This court deems it important that they be respected.

No good purpose would be served by a review of the evidence in the record. We consider it clear beyond reasonable dispute or debate that there was no evidence to justify the court in leaving to the consideration of the jury whether there was a liability on the second, third, or fourth ground. There is no evidence of the engineer's incompetency, unless it be in the circumstances and fact of the accident complained of. In that instance it is clear enough that he was guilty of negligence in not expelling the water from the cylinders of the small engines by which the brake and the reversing apparatus were operated, but in that single act of negligence there is not proof of a want of competency, and, if there were, it was impossible that the master should have known of it before it happened. The competency and experience of the engineer were proved by satisfactory evidence, and before the occurrence in question there was no known reason why the company should not have believed him equal to every emergency of the employment. That the absence of the light at the bottom of the shaft either caused or added to the effects of the injury it is impossible to believe, and the fact that such a light was required by statute "to insure, so far as possible, the safety of persons getting on or off the cage," is irrelevant and without significance.

There was no defect in the reversing apparatus. It did not work with prompt efficiency on this occasion because of the failure of the engineer to expel the water from the engine by which it was controlled, but the company is not responsible for the negligence of the engineer, who was a fellow servant of the plaintiff. In fact, the reversing apparatus is not intended, nor is it well adapted or adaptable, to check a too rapid movement of the cage on sudden emergency, and an attempt to use it in that way probably involves a new danger not less than that to be avoided.

On the first proposition, that the defendants had failed to furnish a sufficient brake, the question discussed in the briefs and at the hearing is whether, in addition to the one "sufficient brake on every drum," which the statute of the state (2 Starr & C. Ann. St. [2d Ed.] p. 2721, c. 93, § 6) requires, the company ought to have provided a brake to be operated by hand in case of the failure for any cause of the one worked by steam power. Whether such a brake, if present, would have been effective to prevent or to mitigate the injury suffered by the plaintiff, and whether the plaintiff in error was at fault in not foreseeing a necessity for it, are questions on which the court need not now express an opinion.

It cannot be said that the error of the court in refusing to withdraw other issues from the jury was harmless. If it were assumed that among the theories asserted there was one on which a verdict for the defendant in error could be upheld, it is impossible to say that the verdict returned was found, or beyond reasonable question ought to have been found, on that theory.

The judgment below is reversed, with direction to grant a new trial.

HATCH v. HEIM.

(Circuit Court of Appeals, Seventh Circuit. April 16, 1898.)

No. 471.

1. BAILMENT—CONTRACT FOR CONTROL OF FARM.
The owner of a farm, on which he then lived and has since lived, agreed with his son that the son should take control and management of the farm, implements, and stock, make repairs, pay taxes, replace stock, and have the net proceeds, each party being free to terminate the agreement at any time. This arrangement continued, with an interval of a few months, for six years. *Held*, that the transaction was a bailment, which did not vest the title of any of the property, or of the proceeds of the farm, in the son, so as to subject it to an execution for his debts.

2. TITLE—POSSESSION—ILLINOIS.
The possession of five years which, under 2 Starr & C. Ann. St. Ill. 1896, p. 2020, § 7, establishes title, is an exclusive and undivided possession, and does not apply to a case where the possession, amounting only to custody, is held for the benefit of the owner, under circumstances which could not be promotive of fraud.

In Error to the District Court of the United States for the Northern Division of the Northern District of Illinois.

Geo. A. Dupuy, for plaintiff in error.
K. M. Landis, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The plaintiff in error, Lewis Hatch, filed in the court below his petition, entitled "Joseph G. Heim, Receiver, &c., v. Frank W. Hatch," averring in substance that he was the sole and absolute owner of certain personal property, consisting of live stock, farming implements, and farm products; that on Saturday, August 21, 1897, the property described was levied upon by virtue of an execution dated August 13, 1897, and issued out of that court, "to enforce the collection of a judgment for four thousand dollars debt and three hundred fifty-one and nine-hundredths dollars damages and costs, entered on July 20, A. D. 1897, in favor of said above-named plaintiff, and against the above-named defendant, Frank W. Hatch, in the above-entitled proceeding"; and that the property had been wrongfully levied upon and taken from his possession. It does not appear in the record, but was assumed at the hearing and in the briefs, that Heim was receiver of a national bank, and that for that reason the case was one of which the district court had jurisdiction. No answer or plea to the petition was filed, but a jury was impaneled and sworn to try "the issue joined," and, after hearing the evidence and the charge of the court, returned a verdict finding the issue for the receiver, and that the property levied upon was the property of Frank W. Hatch when the levy was made. Various errors are insisted upon. Those predicated upon the rulings of the court in admitting and excluding evidence do not seem to merit special consideration. If material error was committed, it is to be found in the court's charge to the jury.

The essential facts of the case are that, in 1883, Lewis Hatch, being the owner of a large and well-stocked farm, on which he then had and

has ever since maintained his home, entered into an agreement with his son, Frank W., then just out of school, whereby the latter was to take the control and management of the farm and of the implements of husbandry and the live stock thereon, maintain repairs, pay taxes, replace stock disposed of, and have as his own the net proceeds; each party being at liberty to terminate the arrangement at any time. The testimony of the father and son to that effect is harmonious, and was not materially affected, so far as we perceive, by other testimony, or by the proof of other facts, such as their returns of property for taxation, and the disposition made by them of wool which had not been levied upon. The court in its charge stated the arrangement as follows:

"Mr. Lewis Hatch was then approaching his seventieth year, according to the testimony, and desired to retire from active work. He says to his son: 'Now, here is the farm [in effect; I am not attempting to quote the language, but in effect]. Now, here is this farm of 700 acres, and here is all of this stock, farming implements, and property on the farm. I want you to take it. I want you to do well by it. You shall receive all of the income or revenue which is derived out of it,—in other words, all the benefits which accrue from the use of the farming property; subject, however, to the payment of all taxes, to the keeping up of repairs, and the property itself, both farm and personal property, shall be kept up, so that at the termination, whenever that shall be, there shall be left here as much of personal property, stock, etc., as I turn over to you.'"

The farm was conducted under this arrangement, the son living with the father, until 1886 or 1887, when, having married, Frank removed to Texas, but after some months returned, at the request of his father, and resumed control, upon the same terms and conditions as before, except that he lived in a separate house built on the farm for his use. In November, 1892, he went away again, going to the state of Washington, where he incurred the liability for which the judgment was taken, for the satisfaction of which the property in question was seized on execution; but whether in that instance there was a complete and intended abandonment of the farm and property thereon, as when he went to Texas, is not clear, but, in the view we take of the case, the question is not important. The natural and reasonable construction of the arrangement, in our judgment, is a bailment, which did not vest the title of any of the property, or of the proceeds of the farm, in Frank Hatch, though, while the arrangement lasted, he had power to sell to others without further authority from his father. Certainly the jury would have been justified in so finding, if, indeed, the court ought not to have so instructed. And, this being the arrangement, it was not necessary that Lewis Hatch, in order to protect his rights in the property, should assert dominion, or in any way interfere with Frank's visible possession and control. The relation between them was not that of landlord and tenant, but was more like that of master and servant. The father, desiring his farm cared for and kept up, and at the same time wishing to afford an opportunity to his son, employed him to take the control and management, as stated; and the possession given the son, being necessary to the performance of the service contemplated and determinable at any time at the will of either party, was not a tenancy, but the possession of a servant. See cases cited in Chatard v. O'Donovan, 80 Ind. 20. The son's possession of the farm, and also of the products thereof and of other property, was the posses-

sion of the father. The same is true, also, of property, implements, or live stock bought and brought on the place, in pursuance of the agreement, as a part of the farm equipment.

It follows that the proposition (for which Story, Bailm. § 439, and Lonergan v. Stewart, 55 Ill. 49, are cited) that when one man turns over personal property to another, under an arrangement by which the latter is not obliged to return the specific articles, but may deliver other property of like kind and value, the receiver becomes the owner of the property delivered to him, is not applicable, and the court erred when, after stating the arrangement, it proceeded to say to the jury:

"Now, then, that is their story of the arrangement. In that there is no word of suggestion by Lewis Hatch that he reserves a control as to how he was to conduct it [the farm], as to whom he would sell this or that produce from the farm, or this or that piece of stock; no suggestion of that is in the agreement as stated. Look over the conduct of the parties subsequently, and see if you can find from that any such understanding."

This is objectionable, because it implies what was afterwards distinctly affirmed in the charge, that, if Lewis Hatch did not "retain the absolute dominion and control over all that property," "the effect of the arrangement was to put the title of the property in F. W. Hatch." This error was emphasized by other equivalent expressions in the charge, and especially by the statement that:

"No man has the right to put into the absolute control and possession of another personal property for a long period of time (in the state of Illinois for the period of five years or more) without taking the consequences which accrue therefrom, namely, that the title must be presumed to be in the person to whom it was given over, if the control is an absolute control. * * * It requires a clear showing of a paramount control in Lewis Hatch; that is, a right to say what shall be done with reference to all this personal property or any of it. Unless that was retained by him, the title passed."

The possession for five years which, under the Illinois statute (2 Starr & C. Ann. St. 1896, p. 2020, § 7), establishes title, is an exclusive and undivided possession, and does not apply, and evidently was not intended to apply, to a case like this, where the possession, amounting only to custody, is held for the benefit of the owner, under circumstances which in no way suggest or could be promotive of fraud. The right of any one circumstanced as was Mr. Hatch to make such an arrangement with a son or with any other whom he should choose is an important right, inconsistent with no principle of public policy, and forbidden by no precept of the law; and if, instead of remaining upon the farm and exercising some measure of control, he had gone away, his right upon returning to assert title to the unsold property remaining upon the farm, whether the increase or bought to supply the place of that which was there when he put his son in control, would not be less clear.

The charge of the court seems also to be subject to the objection urged that the jury was not told that in respect to matters of fact the suggestions of the court were advisory only, and that the jury must finally exercise an independent judgment.

The judgment below is reversed, with instructions to grant a new trial.

CARTER-CRUME CO. v. PEURRUNG.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1898.)

No. 528.

1. REVIEW ON ERROR—SUFFICIENCY OF EVIDENCE.
If there is any substantial evidence upon which the jury could reasonably have based their verdict, it will not be disturbed on appeal, though there may have been a motion for a verdict or a motion for a new trial which was overruled.

2. SAME—CONTRACT IN RESTRAINT OF TRADE—WAIVER OF DEFENSE.
While the court may possibly reverse a judgment involving the enforcement of a contract contravening public policy in the absence of an objection on that ground in the trial court, it will only do so when such illegality appears as matter of law upon the face of the pleadings, the face of the contract, or from the admitted facts.

3. CONTRACTS IN RESTRAINT OF TRADE.
A contract with an independent manufacturer for the entire product of his plant is not in itself a contract in illegal restraint of trade.

4. SAME.
If an independent manufacturer contracts to sell his entire product, without knowledge of similar contracts made by the buyer with other manufacturers, and without any knowledge of the fact that such contract was intended by the buyer as one step in a general scheme for monopolizing the trade in that article and controlling prices, such independent manufacturer cannot be held to have conspired against the freedom of commerce, or to have made a contract in illegal restraint of trade.

5. APPEAL AND ERROR— JURISDICTION OF FEDERAL COURTS — OBJECTION NOT RAISED BELOW.
The objection that the suit was not brought in the district of the residence of either party does not affect the general jurisdiction of the court, and cannot be raised for the first time on appeal.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

Oscar M. Gottschal, for plaintiff in error.
Charles W. Baker, for defendant in error.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

LURTON, Circuit Judge. This is an action at law. The suit was brought upon a written contract made August 14, 1894, between Peurrung Bros. & Co., a firm then engaged in the business of jobbing wooden ware in Cincinnati, Ohio, composed of Joseph P. and Charles J. Peurrung, and the Carter-Crume Company, a corporation of West Virginia. By this contract, for consideration therein recited, which will be hereafter referred to, the Carter-Crume Company became obliged to pay to Peurrung Bros. & Co. $250 on the 15th of each month for the next ensuing 3 years, 6 months, and 15 days, unless the contract should be sooner terminated under a provision contained therein. The installments which became due prior to September 15, 1895, were duly paid. The suit was for installments thereafter falling due, which had not been paid. The petition alleged that the firm of Peurrung Bros. & Co. had been dissolved, and the interest of Charles J. Peurrung in the contract had