

for calling into action the equitable powers of the court in this particular, and that, indeed, it may be exercised at times on the mere suggestion of counsel, in connection with what appears in the record. Nevertheless, no case has gone so far as to grant a petition of this character when the equities in its favor are so weak as they are in the present instance. The observations made by this court in *Cash-Carrier Co. v. Martin*, at page 235, 18 C. C. A., and at page 520, 71 Fed., fully meet the case at bar. The court said that "the distinction must be kept clearly in view between amendments allowable before an appeal, and those for which a cause is to be kept along thereafter." And the court cited from *American Bell Tel. Co. v. U. S.*, at page 597, 15 C. C. A., and at page 570, 68 Fed., where it is said, among other things, as follows: "To grant this motion would, under the circumstances, violate all the rules requiring diligence from parties complainant." Moreover, in the present case we are dissatisfied, as our opinion shows, with the bill throughout; and to ask us to undertake to determine whether or not it can be so amended as to be of any avail would throw upon us the burden of going over the whole case for the purpose of considering several important questions urged upon us by the defendants below (now the appellees), and not decided, and also of scrutinizing the sufficiency of the allegations of the bill at several points. But, however this may be, for the court to grant this motion would be merely to permit a continuance of litigation when there are no apparent equities sufficiently strong to justify it.

Our opinion on this appeal may have been too positive in its assumption that the bill sets out the best case the complainants could make, and we have now concluded that it is equitable to so amend our judgment that the bill shall be dismissed without prejudice. *Hyer v. Traction Co.*, 168 U. S. 471, 481, 18 Sup. Ct. 114, 118.

Ordered: The appellants' petition and motions filed March 7, 1898, are all denied. The judgment entered January 19, 1898, is revoked, and the following judgment is entered: The decree of the court below is affirmed, with a modification amending it so that the dismissal of the bill shall be without prejudice,—the appellees recover the costs of this court,—and the case is remanded to the circuit court for further proceedings accordingly. Ordered, further, that a mandate issue forthwith.

UNION TRUST CO. OF INDIANAPOLIS v. BOKER.

(Circuit Court, S. D. New York. September 6, 1898.)

CREDITORS' BILL—JUDGMENT TO SUPPORT—SUIT IN DIFFERENT DISTRICT.

A judgment and return of execution thereon in a circuit court of one district of the United States will not sustain a creditors' bill filed in a different district.

Demurrer to Bill of Complaint.

John J. Gleason and Seward, Guthrie & Steele, for demurrer.
Crane & Lockwood, opposed.

LACOMBE, Circuit Judge. This is manifestly a creditors' bill to reach alleged partnership assets. As such it cannot be sustained

without judgment at law and execution returned unsatisfied, and these prerequisites are not found in a judgment of the United States circuit court, district of Indiana, with return of such execution as that court had jurisdiction to issue. Demurrer sustained.

TAYLOR v. CLARK.

(Circuit Court, S. D. California. August 8, 1898.)

No. 825.

1. INJUNCTION AGAINST TRESPASS—NECESSITY OF POSSESSION BY COMPLAINANT.

In California trespasses on land will not be enjoined when complainant has been wholly dispossessed, and defendant is in adverse possession.

2. BILL TO QUIET TITLE—EQUITY JURISDICTION OF FEDERAL COURTS—NECESSITY OF POSSESSION BY COMPLAINANT.

A federal court will not entertain a suit to quiet title to land of which defendant is in the actual possession, when the bill is filed, though such suit is authorized by a state statute.

This was a suit in equity by Vincent A. Taylor against Hiram W. Clark to quiet title to land. The cause was heard on an application for a temporary injunction to prevent threatened trespasses on the land by defendant.

G. E. Harpham, for complainant.

Henry W. Nisbet, for defendant.

WELLBORN, District Judge. This is a suit to quiet title to certain lands situated in San Bernardino county, Cal., and for a temporary injunction, as below stated. The case is now before the court on the application for injunction. The bill, which was filed June 2, 1898, is in the usual form of a bill to quiet title, except that it does not show who is in possession of the land, but alleges that the complainant is entitled to the possession. It alleges, further, that the lands have a large quantity of natural grasses and herbage growing on them, valuable for the pasturage of cattle and sheep, and that defendant threatens to go upon the lands, with stock of different kinds, and that said stock, if put upon the land, will destroy and eat up said grasses and herbage; and these threatened injuries the complainant asks the court to enjoin.

The defendant has filed a verified answer, in which he claims the land under a lease for a term of one year, beginning March 10, 1898, and alleges, among other things, that he is now, and has been, continuously, ever since said date, in the actual possession of said land. This allegation complainant has not attempted to controvert on the present hearing. The authorities relied on by complainant in support of his application for an injunction are *Hicks v. Compton*, 18 Cal. 206, and *Reed v. Kimball*, 52 Cal. 325. These cases hold, in substance, that the owner of a growing crop may restrain another, who is insolvent, from harvesting and removing it. In each of these cases the plaintiff seems to have been in possession of the premises. Defendant's contention is that