

amended without objection to show that at the time of the bringing of the action the defendant was a citizen of Utah. So that the diverse citizenship necessary to the jurisdiction of the court in fact existed, although, in the first instance, it had not been alleged. That this did not avoid the attachment was held by the circuit court of appeals of this circuit in *Bowden v. Burnham*, 8 C. C. A. 248, 59 Fed. 752. In that case, at page 251, 8 C. C. A., and page 754, 59 Fed., Judge Caldwell, in delivering judgment, said:

"The objection to the jurisdiction of the court is grounded on the fact that the original petition did not disclose that the assignors of the claims which the plaintiffs sued on as assignees were citizens of states other than Kansas, and the further fact that, rejecting these claims, the amount claimed by plaintiffs was less than \$2,000. But the court very properly granted the plaintiffs leave to amend their complaint (section 954, Rev. St. U. S.), and it was amended. Nevertheless, the plaintiff in error asserts that as the complaint, at the time the attachment was issued, did not contain the necessary jurisdictional averments, every step taken in the cause prior to the amendment was void, and that the amendment of the complaint could not impart vitality or validity to anything done before the amendment was made. This contention is wholly untenable. It is every-day practice to allow amendments of the character of those made in this case, and when they are made they have relation to the date of filing of the complaint or the issuance of the writ or process amended. When a complaint is amended, it stands as though it had originally read as amended. The court in fact had jurisdiction of the cause from the beginning, but the complaint did not contain the requisite averments to show it. In other words, the amendment did not create or confer the jurisdiction; it only brought on the record a proper averment of a fact showing its existence from the commencement of the suit."

The motion to discharge the attachment is denied.

HOWARD INS. CO. OF NEW YORK v. SILVERBERG et al.

(Circuit Court, N. D. California. August 22, 1898.)

No. 12,545.

1. CONTRACTS—PLACE OF EXECUTION—UNDERTAKING ON APPEAL.

An undertaking on appeal, given to stay proceedings pending the appeal is not delivered so as to become effective until filed, and hence, though signed in another state, is "executed" in the state where filed.

2. LIMITATION OF ACTIONS—CALIFORNIA STATUTE.

An undertaking given on appeal from a judgment of a court of New York, though signed in California, is "an instrument of writing executed out of the state," within the provision of Cal. Code Civ. Proc. § 339, prescribing the limitation of actions on such instruments.

3. SAME—APPEAL UNDERTAKING—EFFECT OF FURTHER APPEAL.

The running of the statute against an action on an appeal undertaking given on appeal to the general term of the superior court of the city of New York is not affected by the taking of a further appeal from the judgment of the general term to the court of appeals.

Freeman & Bates, for plaintiff.

Lester H. Jacobs and Deal, Tausky & Wells, for defendants.

MORROW, Circuit Judge. This is an action to recover the sum of \$7,485.83 from S. Silverberg and William C. Pease, as sureties on the

bond of Julius Jacobs and George Easton, against whom this plaintiff recovered a judgment in the superior court of the city of New York. The plaintiff is a corporation organized and existing under the laws of the state of New York, and the defendants are citizens and residents of the state of California. A demurrer is interposed to the complaint on several grounds; among others, that the action is barred by the statute of limitations of the state of California as contained in section 339 of the Code of Civil Procedure. A motion is also made to strike out certain parts of the complaint. As the question of the bar of the statute of limitations will be conclusive of the case, it will be unnecessary to consider any of the other objections presented to the complaint.

The complaint shows that the plaintiff in this case recovered a judgment against Julius Jacobs and George Easton on February 1, 1892, in the superior court of the city of New York, for the sum of \$7,485.83; that thereupon, after the entry of said judgment, and before the 10th day of August, 1892, the said Jacobs and Easton appealed from said judgment rendered against them to the general term of the superior court of the city of New York; that by virtue of section 1307 of the Code of Civil Procedure of the state of New York it was necessary, in order to perfect said appeal, "to file with the clerk with whom the judgment appealed from is entered, an undertaking on appeal as prescribed in such Code"; that said Jacobs and Easton desired to appeal from said judgment against them, and to stay the execution thereof pending such appeal, but were unable to procure sureties upon their undertaking on such appeal residing in the state of New York, and said Jacobs and Easton thereupon requested this plaintiff to accept as sureties on such undertaking the defendants hereinbefore named, who then resided in the state of California, and the plaintiff thereupon agreed to accept the defendants as such sureties, notwithstanding they resided in the state of California, and to waive the right to sureties residing within the state of New York; and thereupon, on the 10th day of August, 1892, the said defendants, at the request of the said Jacobs and Easton, and for the purpose of perfecting such appeal and obtaining a stay of execution, did make, execute, and deliver, within the state of California, their undertaking on appeal. The condition of the bond was that the appellants "pay all costs and damages which may be awarded against the appellants on said appeal, not exceeding five hundred dollars, and do also undertake that, if the judgment so appealed from, or any part thereof, is affirmed, or the appeal dismissed, the appellants will pay the sum recovered or directed to be paid by the judgment, or the part thereof as to which judgment shall be affirmed." It further appears from the complaint that after the execution of the undertaking, to wit, on or about the 10th day of September, 1892, the plaintiff stipulated in writing that it would not except to the sureties thereon, and that such undertaking might be filed in said superior court of said city of New York; that no exception should be taken by the plaintiff to the form of the undertaking, or the time of the filing, or its justification of the sureties, and that such undertaking should operate as a stay of proceedings; that thereafter on the same day the said under-

taking on appeal was filed by the said Jacobs and Easton in the office of the clerk of said superior court last named, and a copy thereof served on this plaintiff; that thereafter, on the 15th day of January, 1894, the said general term of the said superior court of said city of New York duly gave, made, and entered its order and judgment affirming in all respects the said judgment so appealed from, and at the same time awarded the plaintiff for costs and damages the sum of \$117.59; that by section 1309 of the Code of Civil Procedure of the state of New York it is provided that an action shall not be maintained upon any undertaking given upon an appeal until 10 days have expired since the service upon the attorney for the appellant of a written notice of the entry of a judgment or order affirming the order or judgment appealed from; that on the 15th day of January, 1894, the plaintiff, by its attorneys, served upon the attorneys in said action of said appellants, Jacobs and Easton, personally, a written notice of the entry of such judgment of affirmance and awarding the sum of \$117.59. It is also further averred that thereafter, on the 17th day of April, 1897, the plaintiff, by its attorneys, in accordance with the provisions of section 1309, above referred to, served upon the defendants in this suit a written notice of the entry of the judgment affirming the judgment so appealed from, which said service was made by mailing to each of the said defendants, in a post-paid wrapper, addressed to each of said defendants at his last-known post-office address, to wit, the city of San Francisco, in the state of California. It is also further averred that on or about the 13th day of December, 1894, the said Jacobs and Easton appealed to the court of appeals of the state of New York from the judgment of affirmance entered as aforesaid by the general term, and the said court of appeals, by its order duly given, made, and entered in the year 1896, affirmed said judgment so appealed from, and said judgment of the superior court of the city of New York thereupon became final.

It is contended by counsel for defendants that the cause of action set forth in the complaint as above stated is barred by the provision of the statute of limitations of this state as contained in subdivision 1 of section 339 of the Code of Civil Procedure of this state, which provides that the period prescribed for the commencement of "an action upon any contract, obligation, or liability, not founded upon an instrument in writing, or founded upon an instrument of writing executed out of the state," is two years. In support of this contention it is maintained that the present action is "founded upon an instrument in writing executed out of the state"; that, although signed in California, the undertaking was delivered in New York; that delivery is as essential to the validity of the execution of an undertaking as signing and justification of the sureties are; and that the undertaking sued on in this case can only be deemed to have been fully executed in law when the contract was given life by delivery in the state of New York. As this action was not begun until December 22, 1897, and the judgment of the general term of the superior court of the city of New York was made and entered on January 15, 1894, more than two years had elapsed before the bringing of this action; and, if the contention of counsel for the defendants be sound,

it follows that the action is barred by the limitation prescribed in subdivision 1 of section 339 of the Code of Civil Procedure of this state, above referred to. On behalf of the plaintiff it is contended that the undertaking was, to all intents and purposes, executed in this state, and that, therefore, the limitation prescribed by subdivision 1 of section 339 of the Code of Civil Procedure of this state is inapplicable; but that, on the contrary, the cause of action is governed by section 337 of the Code of Civil Procedure, which prescribes a period of four years within which "an action upon any contract, obligation, or liability founded upon an instrument in writing executed in this state" may be brought. It is obvious that the controlling question is as to where the undertaking sued upon can be deemed to have been executed,—whether in California or in New York. If in California, then the action would not be barred; if in New York, it would be. We therefore inquire into what constitutes the execution of an undertaking. That delivery is essential to the valid execution of an undertaking is elementary law. 4 Am. & Eng. Enc. Law, p. 622, and cases there cited. Further, it must have been accepted by the obligee. *Id.* p. 623, and cases there cited. In these respects, a bond or an undertaking is like a deed. Section 1626 of the Civil Code of California provides that "a contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent." Section 1933 of the Code of Civil Procedure of California provides: "The execution of an instrument is the subscribing and delivering it, with or without affixing a seal." The importance of a delivery with reference to the valid execution of the undertaking in this case is evident, for it is too plain for question that, had the undertaking been signed in California, but never delivered in New York, and filed with the clerk of the court as required by law, no rights would have been derived under it, and no liability would have been created against the sureties. *Clark v. Child*, 66 Cal. 87, 4 Pac. 1058; *Stetson v. Briggs*, 114 Cal. 511, 46 Pac. 603; *Ivey v. Land Co.*, 115 Cal. 196, 201, 46 Pac. 926. In the latter case the following language was used: "The acceptance and execution of the proposed contract was not complete until such delivery, and the place of delivery, being the place where the last act is performed which is necessary to render the contract obligatory, is the place where the contract is made;" citing *Ford v. Insurance Co.*, 99 Am. Dec. 668; *Milliken v. Pratt*, 125 Mass. 375; *Ames v. McCamber*, 124 Mass. 85; *Insurance Co. v. Tuttle*, 40 N. J. Law, 476; *Shuenfeldt v. Junkermann*, 20 Fed. 357; *Whiston v. Stodder*, 8 Mart. (La.) 95; *Scudder v. Bank*, 91 U. S. 406. See, also, *Hibberd v. Smith* (Cal.) 4 Pac. 473. The undertaking in this case was given to perfect an appeal and to stay proceedings in the state of New York in an action pending in that state. As a matter of law, it could only become operative for these purposes, and the liability of the bondsmen to the plaintiff could only accrue and become fixed, when the undertaking was filed with the clerk of the court. Section 1326, Code Civ. Proc. N. Y. The undertaking had no validity for the purposes for which it was given until it was filed with the clerk of the court, and it is the filing which, in law, must be the delivery of an undertaking. It was held in *Raymond v. Richmond*, 76 N. Y. 106,

that until an undertaking is filed and served there is no appeal. See, further, on the general proposition that there is no appeal until the appeal bond is filed: *Webber v. Brieger* (Colo. App.) 27 Pac. 871; *Holloran v. Railway Co.* (Ind. Sup.) 28 N. E. 549; *Insurance Co. v. Wager*, 37 Fed. 59; *The S. S. Osborne*, 105 U. S. 447, 450. In the case of *Selden v. Canal Co.*, 29 N. Y. 634, it was held that, where a bond had to be filed in the county clerk's office, the acceptance by the clerk constituted the delivery. See, also, *Dore v. Covey*, 13 Cal. 502; *Holmes v. Ohm*, 23 Cal. 268. The undertaking, therefore, having been delivered, and the execution completed, by its being filed with the clerk of the court in New York, where the judgment was rendered, it must, in the eyes of the law, be deemed to have been executed in New York. "Where a contract is delivered, or first becomes a binding obligation upon the parties, is deemed the place of contract for the purpose of distinguishing what law governs." 3 Am. & Eng. Enc. Law, p. 547. The following cases tend to establish this doctrine: *Milliken v. Pratt*, 125 Mass. 374; *Cook v. Litchfield*, 9 N. Y. 279; *Lawrence v. Bassett*, 5 Allen, 140; *Bell v. Packard*, 69 Me. 105; *Lee v. Selleck*, 33 N. Y. 615; *Bruce v. Maryland*, 11 Gill & J. 383; *McPherson v. Meek*, 30 Mo. 345; *Wildcat Branch v. Ball*, 45 Ind. 213; *Bank v. Low*, 8 Abb. N. C. 390; *Duncan v. U. S.*, 7 Pet. 435; *Tilden v. Blair*, 21 Wall. 241; *Shuenfeldt v. Junkermann*, 20 Fed. 357; *Com. v. Kendig*, 2 Pa. St. 448; *Hall v. Parker*, 26 Am. Rep. 540; *Minnesota v. Young*, 23 Minn. 551; *Flanagan v. Meyer*, 41 Ala. 132; *U. S. v. Le Baron*, 19 How. 73. An agreement by the consignor to indemnify his consignees, residing in another state, against liability by their having voluntarily become security to release his vessel from attachment, is to be regarded as a contract governed by the law of the latter place. *Boyle v. Zacharie*, 6 Pet. 635. See, also, *Woodhull v. Wagner*, *Baldw.* 296, *Fed. Cas. No.* 17,975.

The pendency of the appeal from the general term of the superior court of the city of New York to the court of appeals, as set forth in the complaint, could not operate to extend the statute of limitations. The bond was given to abide the decision, on appeal, of the general term of the superior court of the city of New York; not of the court of appeals. It did not purport to relate to the court of appeals. The sureties did not obligate themselves to answer any costs and damages to be adjudicated by that court. Their liability was limited strictly to the decision and judgment of the general term of the superior court of the city of New York. In the following cases in New York it has been held that it is no defense to a statute of limitations on a suit based upon an undertaking to stay proceedings on appeal to the general term of the superior court that the defendant had since appealed to the court of appeals. *Burrall v. Vanderbilt*, 6 Abb. Prac. 70; *Heebner v. Townsend*, 8 Abb. Prac. 234.

There is nothing in the other objections presented by counsel for plaintiff. Upon the whole of the case, I conclude that the undertaking sued upon in the case at bar was executed, in law, in the state of New York, and that any action thereon in this state against the sureties is barred by the provisions of section 339 of the Code of Civil Procedure of this state. The complaint will be dismissed, and it is so ordered.

HARVESTER KING CO. v. MITCHELL, LEWIS & STAVEL CO.

(Circuit Court, D. Oregon. August 25, 1898.)

1. CONTRACT—CONSIDERATION—WANT OF MUTUALITY.

A contract by which one party agrees to order from the other all of certain machines and extras required to supply the trade of a certain territory, which the second party agrees to furnish "without any liability for damages for failure from any cause to furnish such machines and extras," creates no obligation on the part of the second party, and is without mutuality.

2. SAME—PART PERFORMANCE OF VOIDABLE CONTRACT.

Where a contract, voidable for want of mutuality because by its terms it does not bind one of the parties, is performed by such party on demand made by the other, it becomes obligatory.

This is an action for breach of contract, and was heard on a motion to strike out parts of the complaint.

J. R. Stoddard and E. B. Watson, for plaintiff.

Idleman & Webster and Dolph, Mallory & Simon, for defendant.

BELLINGER, District Judge. This action arises out of a contract between the Craver & Steele Manufacturing Company and the defendant. The plaintiff company has succeeded to the rights of the former company under the contract. By this contract the Craver & Steele Manufacturing Company appointed the defendant company their agent for the sale of their harvesting machines in the states of Oregon and Washington and Northern Idaho, for a "term ending December 31, 1893." The defendant company accepted the appointment and agency, and agreed—

"To sell the goods of the first party on commission. To get such commission from the sale of such goods, at prices over and above the prices herein named, such commission to be in full pay for all services and demands or claims under this contract. To order from the first party all machines and extras needed for the trade in said territory; not to order more machines than he has good reason to believe will be needed for said trade. To handle the header of the first party's make exclusively. To promptly receive all machines and extras ordered or transferred to him under this contract. To pay the freight on same, keep the same well housed and properly stored until sold, and all unsold to June 1st, 1894 (or until otherwise disposed of by first party). To make no charge for storage or caring for goods. To pay all taxes and assessments on said goods while in second party's possession. To insure goods in the name and for the benefit of the first party for two-thirds of their net price, and, upon failure to insure, in case of loss to stand indebted to first party for amount for which they should have been insured. First party to be charged with cost of insurance on machines while in Portland, Oregon. To push the sale of said goods by canvassing, exhibiting, and advertising to the best of second party's ability. To do all necessary expert work pertaining to such machines, at their own expense. To sell machines subject only to the conditions of the printed warranty of the first party, and on no other conditions whatever. To deliver to each purchaser copy of such warranty. To order from first party all extras that may be needed for said territory."

In consideration of these agreements on the part of the defendant company, the manufacturing company, party of the first part, agreed to fill the orders of the second party for machines and extras without any liability for damages for failure from any cause to furnish such