

cretal order, a plaintiff can usually obtain a dismissal upon payment of the costs of such of the defendants as have appeared, but not if they, or any of them, would be injured thereby. Leave to dismiss may be refused where the defendant claims affirmative relief by cross bill, or by answer in a case where he is entitled to affirmative relief on an answer."

The defendants in their answer claim affirmative relief. To permit the plaintiffs to dismiss their bill, and compel the defendants to bring a suit to establish against the plaintiffs the claim the defendants assert in their answer, would subject them to serious injury, should the plaintiffs rely on the plea of the statute of limitations, or assert some other defense to which they might resort. There would be neither reason nor justice in putting the defendants to a new suit to establish a claim that can be disposed of in the present litigation. *Stevens v. The Railroads*, 4 Fed. 97. *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. 602; *Chicago & A. R. Co. v. Union Rolling-Mill Co.*, 109 U. S. 702, 3 Sup. Ct. 594. In the last case the supreme court quotes from *Connor v. Drake*, 1 Ohio St. 170, as follows:

"The propriety of permitting a complainant to dismiss his bill is a matter within the sound discretion of the court, which discretion is to be exercised with reference to the rights of both parties,—as well the defendants as the complainants. After a defendant has been put to trouble in making his defense, if, in the progress of the case, rights have been manifested that he is entitled to claim, and which are valuable to him, it would be unjust to deprive him of them merely because the complainant might come to the conclusion that it would be for his interests to dismiss his bill. Such a mode of proceeding would be trifling with the court, as well as with the rights of defendants."

The authorities cited thoroughly sustain the defendants in their objection to a dismissal of these causes, and the motion to do so will be overruled.

PAINE v. UNITED STATES PLAYING-CARD CO.

(Circuit Court, D. New Jersey. December 17, 1898.)

PRELIMINARY INJUNCTION—SUFFICIENCY OF SHOWING.

A preliminary injunction will not be granted where it appears, from the moving papers and answering affidavits, not only that plaintiff's right to the injunction is not clear, but that there are substantive matters of defense, which ought not to be tried on ex parte affidavits, and it is further shown that the defendant is financially responsible.

On Motion for Preliminary Injunction.

Fred L. Chappell, for complainant.

A. V. Brieson, for defendant.

KIRKPATRICK, District Judge. The bill of complaint in this case is filed by Cassius M. Paine against the United States Playing-Card Company, seeking, by way of preliminary injunction, the enforcement of the terms of a contract entered into in 1892 between the complainant and the National Card Company. The clause of the contract under which the relief is sought is as follows:

"Said second party [meaning the National Card Company] contracts and agrees that during the life of this contract it will not, directly or indirectly, handle, manufacture, or sell any other apparatus, method, or system for duplicate whist."

The bill alleges that:

"The said National Card Company, after entering into said contract with your orator, merged itself, with other playing-card companies, into a new corporation, organized under the laws of the state of New Jersey, which is the defendant herein, and known as the 'United States Playing-Card Company.' "

What the terms of the merger were, or whether the contracts and obligations of the National Card Company were transferred or assumed by the United States Playing-Card Company, is not set forth. The answering affidavits of the defendant company deny that any such transfer or assumption of the particular contract was made, and go so far as to deny the merger as set out in the bill and affidavit of the complainant which is annexed to same. An effort has been made to show that the defendant was acquainted with the contents and terms of the contract made with the National Card Company. That may be admitted, and yet the moving papers be free from conclusive proof of its assumption. It may be true that the defendant has manufactured and is manufacturing the complainant's system of duplicate whist, but in so doing it may be but a tortfeasor. If it were otherwise, and it were assumed that the defendant was as much bound by the contract as the National Card Company, a perusal of the contract, and an examination and consideration of the moving papers and answering affidavits, reveal so many substantive matters of defense that I do not feel they ought to be determined upon a motion for a preliminary injunction. Not only is the right of the complainant to hold the defendant herein to a performance of the contract not clearly shown, but serious objections are raised as to the validity of the contract itself,—whether it is not void for failure of consideration, or as being contrary to public policy, and whether, if valid, it has not by its terms expired. These are questions that ought not to be decided upon ex parte affidavits, nor until the parties have had opportunity to present to the court the fullest proof respecting the same. The defendant corporation is represented to be of the largest financial responsibility, and it is questionable whether an action at law would not afford the complainant all the relief to which he may be entitled. To grant an injunction at this time would be to determine in advance, in favor of the complainant, all the disputed questions in the case, without giving the defendant an opportunity to be heard. The interference of the court by way of injunction does not seem necessary to preserve any right which the complainant may have. The injury which might be done the defendant through the stoppage of its business, for which it could recover no compensation, would far exceed any benefit to be derived by the complainant thereby. The motion for a preliminary injunction will be denied.

NATIONAL BANK OF COMMERCE IN DENVER v. ALLEN et al.

(Circuit Court of Appeals, Eighth Circuit. October 31, 1898.)

No. 1,037.

1 CORPORATIONS—POWERS—INDORSEMENT OF NOTES.

A corporation organized to carry on a mercantile business has power to indorse notes of a third person from whom it buys merchandise in payment for such merchandise.

2. SAME—LIABILITY OF ONE CORPORATION FOR ACTS OF ANOTHER—AGENCY.

Neither the fact that a bank held as collateral security a majority of the stock of a mercantile corporation, nor that one of its officers was for a time a director of the mercantile company, renders the latter the agent of the bank, so as to make the bank liable to creditors of the company for misrepresentations as to its financial condition made by its officers.

3. SAME—INSOLVENCY—POWER TO PREFER CREDITORS.

A private business corporation has the same power to prefer creditors as an individual, and, though insolvent, so long as it retains the custody and control of its property may dispose of the same so as to pay the claims of one or more of its creditors, to the total exclusion of other equally meritorious claims.

4. SAME—STOCKHOLDERS—RIGHT OF PLEDGOR TO VOTE.

Under 1 Mill's Ann. St. Colo. §§ 495, 496, which authorize persons holding stock in a corporation as trustees to vote the same, but provide that a pledgor may vote the stock pledged, one to whom stock has been transferred to hold as collateral security for an indebtedness to a third party is not a trustee, but the transaction is, in effect, a pledge, and, in the absence of express agreement, the pledgor is entitled to vote the stock.

5. SAME—PREFERENCE OF CREDITORS—UNDUE INFLUENCE.

A bank is not required to give notice of a claim against a mercantile corporation, or the amount of such claim, nor does the fact that it exercises the moral influence which it possesses over the company as a large creditor, to induce it to grant a preference, render it liable to other creditors for the amount received in payment of its claims, where it had no actual control over the action of the company.

6. JURISDICTION OF FEDERAL COURTS—INTERVENTION IN CREDITORS' SUIT—AMOUNT OF CLAIM.

Where a judgment creditor whose judgment exceeds \$2,000 has filed a creditors' bill in a federal court in behalf of himself and all other creditors who desire to come in, to reach and subject a special fund alleged to have been acquired by a third party in fraud of the rights of the creditors of the judgment defendant, and the court has acquired jurisdiction over such fund, it has jurisdiction to entertain a petition of intervention by another creditor desiring to become a party to the bill, and claiming an interest in the fund, though the amount of his judgment is less than \$2,000.

7. SAME—LIMITATION OF JUDICIARY ACT.

The provision of the judiciary act limiting the right to sue in a federal court to cases which involve \$2,000, exclusive of interest and costs, does not apply to a case where a judgment creditor intervenes and becomes a party to a creditors' bill already filed by a judgment creditor whose judgment exceeds the jurisdictional amount, in behalf of himself and all other creditors similarly situated who desire to come in.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a creditors' bill, which was exhibited by George A. Allen and others, the appellees, composing the firm of Paris, Allen & Co., against the National Bank of Commerce in Denver, the appellant, and against the A. K. Clarke Mercantile Company, hereafter termed the "Mercantile Company." The bill was filed by Paris, Allen & Co., as judgment creditors of the Mercantile Company, for their own benefit, and for the benefit of such other