

costs. In case of an adverse decision, such costs as by law are taxable against \* \* \* the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted."

If process in this case is taken out by the receiver of the national bank, plaintiff herein, "by direction of any department of the government," the case will be within the express language of this section, and no security for costs should be required, and, in the event of defendant's success, he may be paid his costs out of the contingent fund of the treasury department. In one sense, the receiver, who, in the language of the supreme court in *Kennedy v. Gibson*, 8 Wall. 498, is "the instrument of the comptroller of the currency," may be said to act under the comptroller's direction in bringing suits against alleged delinquent stockholders; but it would seem as if congress had in mind some more specific direction. To claims by successful defendants in such suits to be paid out of its contingent fund it is altogether probable that the treasury department would reply that it had not specifically directed such suits to be brought, and that the charge was not properly against congressional appropriations for the expenses of the department, but against the funds of the defunct bank, which the receiver might hold for distribution among its creditors. Inasmuch as congress has so carefully provided for the one case, and has failed to provide for the other, it must be assumed that it did not intend to relieve receivers of national banks from the ordinary obligations of nonresident litigants when they do not act under such direction as will make the treasury department contingent fund liable for costs. It is conceded that the right of the court to require security for costs from receivers is discretionary, but there can surely be no doubt as to how such discretion should be exercised. It would be most unjust if a defendant who succeeds in a suit brought here by the receiver could recover his costs only by going to Colorado, and himself suing there upon the judgment in his favor.

Unless, therefore, within 20 days, plaintiff shall file a certificate of the comptroller of the currency to the effect that process in this action is taken out by express direction of the treasury department, he will be required to file security (or deposit) for costs to the amount of \$100 in each case. Defendant may have 10 days after notification of the filing of such certificate or security in which to answer.

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AMERICAN SURETY CO. OF NEW YORK v. WORCESTER CYCLE MFG.  
CO. et al.

(Circuit Court, D. Connecticut. November 28, 1898.)

No. 975.

**SUITS TO FORECLOSE SEPARATE MORTGAGES—RECEIVERS.**

A bill was filed to foreclose a first mortgage on property which in part, at least, was already in the hands of a receiver of the court in a suit to foreclose a later mortgage, and the receiver, by leave of court, was joined as a defendant. *Held*, that the suit was not necessarily an independent one, and, as a decree would not necessarily disturb the receiver's possession, the bill would not be dismissed on demurrer.

This was a bill in equity by the American Surety Company of New York against the Worcester Cycle Manufacturing Company and others to foreclose a first mortgage. The cause was heard on demurrer to the bill.

Watrous & Day, for complainant.

Seymour C. Loomis, for trustee.

C. W. Artz, for receiver.

Butler, Notman, Joline & Mynderse, for Central Trust Co.

Breed & Abbott and others, for attaching creditors.

**TOWNSEND**, District Judge. Bill to foreclose a first mortgage. At least a portion of the property covered by said mortgage is the same as that in possession of the receiver appointed in the suit brought to foreclose a later mortgage to the Central Trust Company of New York. Central Trust Co. of New York v. Worcester Cycle Mfg. Co., 86 Fed. 35, 90 Fed. 584, 91 Fed. —. The parties to the latter suit demur on the ground that it does not appear that leave of the court to file said bill separately has been obtained. Counsel for demurrants claim that this is an independent bill, and that, as the property is in the hands of a receiver appointed by this court, and as the bill prays for a foreclosure, and seeks to interfere with the possession of the receiver, it cannot be maintained; citing the opinion of Judge Wheeler in American Loan & Trust Co. v. Central Vermont R. Co., 86 Fed. 390. If the decision of Judge Wheeler had covered the points involved in this case, I should follow it, but the cases are clearly distinguishable for the following reasons: In American Loan & Trust Co. v. Central Vermont R. Co., supra, the suit was independent. The receivers were not joined as parties, and no leave to so join them was obtained. Here the suit is not necessarily an independent one. The receiver is joined as defendant by leave of the court, and a decree would not necessarily disturb his possession. Let an order be entered overruling the demurrer and directing the defendant to answer within two weeks from the filing of this memorandum.

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**NYBACK v. CHAMPAGNE LUMBER CO.**

(Circuit Court of Appeals, Seventh Circuit. January 3, 1899.)

No. 481.

**1. TRIAL—DIRECTION OF VERDICT.**

Where the evidence leaves substantial ground for doubt upon any material question of fact, the doubt should be resolved in favor of the right to a trial by jury, and a peremptory instruction is not justified.

**2. MASTER AND SERVANT—ACTION FOR PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.**

The fact that an employé, in doing his work, went into a place which was unnecessary to its proper performance, and there stepped into a hole in the floor, and was injured, does not raise a legal presumption of his contributory negligence, where it appears that he was inexperienced, and had not been instructed as to the proper manner of doing the work, nor warned of the presence of the hole; but the question is a proper one for the jury.