The point is now made that there was a question of fact, whether the oil in controversy was the oil of the plaintiff, or other oil sold by Leonard & Cummings. The defendant's own witness testified that it was the oil of the plaintiff, and no witness testified to the contrary. It is true that the oil of the plaintiff was sold under the plaintiff's brand, and no testimony was given as to the particular brand on the oil in question; but in the absence of any testimony from the defendant on the subject, or tending otherwise to cause any doubt as to the identity of the oil, a verdict for the defendant would have been contrary to the evidence; and it would have been the duty of the court to set it aside, if the case had been left to the jury, and such a verdict had been found.

Upon the trial the defendant, at the close of the plaintiff's evidence, moved for leave to amend its answer by setting up a breach of warranty of the quality of the oil. It was not an abuse of discretion for the trial judge to deny the application at that time to try a new issue in the cause, in the absence of any showing that the defendant had not been guilty of laches, and especially when the defendant would not be precluded by a recovery for the price of the oil from recovering his damages in a subsequent action against the plaintiff. In any case the granting of the motion rested in the discretion of the trial judge, and his determination cannot be reviewed upon a writ of error. Matheson's Adm'r v. Grant's Adm'r, 2 How. 263; Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426.

The rulings of the trial judge excluding evidence offered by the defendant in respect to the quality of the oil sold by Leonard & Cummings to the defendant was clearly correct, in view of the issues made by the pleadings.

The refusal of the trial judge to direct a verdict for the defendant at the close of the plaintiff's case, the defendant having introduced evidence subsequently, is not the subject of a valid exception. Insurance Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685; Robertson v. Perkins, 129 U. S. 233, 9 Sup. Ct. 279.

We find no error in the rulings on the trial, and the judgment is, therefore, affirmed.

AMERICAN SURETY CO. OF NEW YORK v. HAYNES.

(Circuit Court, E. D. Missouri, E. D. December 24, 1898.)

No. 4,040.

1. ATTACHMENT—GROUNDS—DEBT FRAUDULENTLY CONTRACTED.
An action by the surety in a fidelity bond against the principal to recover the amount paid by the plaintiff on account of an embezzlement by defendant from the obligee is based upon an implied contract to repay such amount, and the debt is not one "fraudulently contracted," within the meaning of the attachment statute of Missouri.

2. SAME—DAMAGES ARISING FROM COMMISSION OF FELONY.
Such action, however, is one within the provision of such statute authorizing an attachment where the damages sued for "arise from the commission of a felony on the part of the defendant," which does not require the action to be technically grounded on the tort.

This was an action at law by the American Surety Company of New York against Daniel Haynes, in which an attachment was issued. Heard on a plea challenging the validity of the attachment.

W. B. Thompson, for plaintiff.

T. B. Harvey and R. P. Williams, for defendant.

ADAMS, District Judge. This is a suit to recover from the defendant a sum of money paid by the plaintiff as a surety on the bond given by the defendant, as principal, to the St. Louis, Arkansas & Texas Railway Company to insure the fidelity of the defendant as one of the employés of the said railway company. At the time this suit was instituted an affidavit for attachment was made and filed in the language prescribed by the twelfth and fourteenth subdivisions, respectively, of section 521 of the Revised Statutes of Missouri of 1889, as follows: First, under the twelfth subdivision, "That he [the plaintiff] has good reason to believe and does believe that the damages for which the said action is brought are for injuries arising from the commission of a felony on the part of the said defendant;" second, under the fourteenth subdivision, "That the debt sued for was fraudulently contracted on the part of the debtor." Thereupon a writ of attachment was duly issued, and the same was executed by seizing sufficient property of the defendant to answer the demand of the plaintiff. In due course the defendant appeared and filed a plea in the nature of a plea in abatement, denying the alleged grounds of attachment. A jury having been duly waived, the issue created by this plea has been submitted on the proofs.

It appears that the plaintiff heretofore executed and delivered its bond in the penal sum of $3,000 to the St. Louis, Arkansas & Texas Railway Company, thereby insuring the fidelity of the defendant in this case, who was then in the employ of the railway company as its claim agent; that while such bond was in force the defendant converted to his own use and embezzled certain moneys in his hands as such claim agent, exceeding in amount the penalty of the bond; that the plaintiff, recognizing its liability on this bond, paid to the railway company, in discharge of the same, the amount of the penalty thereof, and afterwards instituted this suit by attachment against the defendant, whose fidelity it had insured, and on account of whose infidelity it had been obliged to pay the money to recover the same from him. The only question to be determined is whether the plaintiff's cause of action, under such circumstances, is either for damages or injuries "arising from the commission of a felony on the part of the defendant," or for a debt "fraudulently contracted on the part of the defendant," within the true meaning of the Missouri statute already referred to. If plaintiff's cause of action falls within either of these two classifications, the attachment is valid. If it does not, it is invalid, and should be dissolved. It is clear that the defendant did not embezzle any of the plaintiff's money. The plaintiff's relation to the case is fixed by contract. It contracted with a third party to insure the fidelity of the defendant, and when it paid any money on that contract, and not until then, did it have a cause of action against the defendant. In other words, the embezzlement by the defendant of the money of the