

mission that the account is correct, and, if the party to whom it is rendered omits to communicate objections to the other party within a reasonable time, an inference may be drawn that he was satisfied with it. But there is no arbitrary rule of law which renders the omission to object in a given time equivalent to an actual agreement or a consent to the correctness of the account. An account settled is stronger evidence, and requires more proof to overcome it, than a mere account stated. But the parties are never concluded, except by the statutes of limitation, from proving the incorrectness of the account, unless the case is brought within the principles of an estoppel in pais or of an obligatory agreement between them. *Lockwood v. Thorne*, 18 N. Y. 285; *Perkins v. Hart*, 11 Wheat. 237.

Other assignments of error impugn the conclusions of the referee in disallowing the demands of the defendant for the nut-locks and for the forfeiture. There are no provisions in the contract which, expressly or by implication, required the plaintiff, in constructing the railroad, to use the nut-locks, unless found in that provision by which he undertakes to "finish, in every respect, in the most substantial and workmahlke manner, all the work hereinafter specified." The referee did not find that this provision had not been complied with. Nor is there any finding or any evidential facts in the report to authorize the conclusion that the parties, at the completion of the work, had come to an understanding by which the expense of these articles was to be borne by the plaintiff. It is too plain to require discussion that, if the failure of the plaintiff to complete performance of the contract on or before June 1, 1887, was caused wholly by the default of the defendant in failing to acquire the rights of way necessary to be acquired before the work could be completed, the claim of the defendant for the \$40,000 was without foundation.

The fifteenth and sixteenth assignments of error relate to that part of the recovery which proceeds upon the conversion by the defendant of certain bridge timber belonging to the plaintiff,—a cause of action which arose subsequently to the settlement between the parties of March 9, 1888. Neither of these assignments can be considered,—the first because it impugns a ruling of the referee made during the progress of the trial, and the second because the decision of a motion for a new trial is not reviewable.

We find no error in the record, and conclude that the judgment was correct.

It is therefore affirmed, with costs.

In re PRICE et al.

(District Court, S. D. New York. April 5, 1899.)

BANKRUPTCY—COLLECTION OF ASSETS—PROPERTY IN CUSTODY OF RECEIVER OF STATE COURT.

Where a state court, in a suit between insolvent partners for dissolution of the partnership and settlement of its affairs, had appointed a receiver pendente lite, who had collected the assets, but no distribution to creditors could be made, for the reason that no answer had been filed in the suit or decree made therein, and meanwhile both partners were

adjudged bankrupt and a trustee was appointed, *held*, that the court of bankruptcy could not order the receiver to surrender the property to the trustee, but that the latter would be authorized to apply to the state court to be substituted as plaintiff in the action, and to move that court for the entry of a decree in the case, and for an order directing the receiver to transfer the assets to him.

In Bankruptcy.

Mark Ash, for trustee.

Gibson Putzel, for receiver.

BROWN, District Judge. This is an application by the trustee in bankruptcy of the co-partnership firm of B. L. Price & Co., for an order directing William R. Rose, a receiver appointed in the supreme court of the state, to turn over to the trustee certain assets of that firm in the receiver's possession.

The two co-partners composing the firm were adjudged bankrupts on their own petition on December 2, 1898, pursuant to the provisions of the bankrupt law. On January 12, 1899, the petitioner was appointed trustee at a meeting of the creditors and thereafter duly qualified as such. The creditors have proved their claims and are awaiting distribution of assets.

The property and assets which the trustee asks to have turned over to him amount to \$2,245.87, as stated in the petition, being the proceeds of sales of property of the bankrupts and of the collection of debts belonging to them. Mr. Rose was appointed receiver *pendente lite* by consent of the parties in an action in the supreme court of the state, on October 6, 1896, three days after the commencement of the action, which was brought by one partner against the other, on a complaint alleging the insolvency of the firm, and asking for a decree of dissolution, the appointment of a receiver, and the distribution of the effects among its creditors. No answer was put in, and no decree in that suit has ever been entered. The receiver by the order appointing him was authorized to take immediate possession of all the partnership property, to collect the outstanding debts, and to sell the merchandise of the firm; and the parties to that action were directed to execute all necessary transfers to complete the receiver's title to all the firm property.

In November, 1896, J. L. Baily & Co. recovered a judgment against B. L. Price & Co., and in supplementary proceedings upon that judgment they obtained on December 12, 1896, the appointment of William L. Lawrence as receiver in behalf of those judgment creditors alone. In February, 1897, the receiver last named made a motion to supersede the appointment of Rose and that the property in his hands be delivered to Lawrence, as receiver in supplementary proceedings. The effect of this motion, if successful, would have been to give the judgment creditors a preference in the payment of their debts out of the partnership assets. On appeal to the appellate division the motion in November, 1897, was denied, upon condition that the partnership suit should not be discontinued or the partnership receiver discharged "except upon notice to the respondents." 21 App. Div. 597, 599, 47 N. Y. Supp. 772.

The proceeds of the partnership property have now been long in the receiver's hands without any further steps taken towards their distribution among creditors. The state court is not in condition to make such distribution until after a decree in the suit is entered adjudging the insolvency of the firm, and the consequent authority of the court to call on the partnership creditors to make proof of their claims, adjudicate thereon, and distribute the proceeds as equity may require. Before decree the court does not act the part of a litigant, *ex proprio motu*; nor before decree do creditors at large have any status in an ordinary partnership suit for carrying on effective litigation; and owing to the differences between the partners, no progress in that action has been made for upwards of two years; so that while the assets are there impounded, the object of the suit so far as respects distribution is at present thwarted.

In the meantime an adjudication of bankruptcy has been had in this court against both partners; all the creditors have appeared and proved their claims according to law; the trustee has been appointed and qualified, and nothing remains to be done for the immediate distribution of the assets among creditors, *pro rata*, without further delay, litigation or expense, except turning over those assets to the trustee for that purpose.

This court, however, can make no order requiring the receiver in a state court to transfer the assets in his custody to the trustee in bankruptcy. The receiver is an officer of the state court; that court had full jurisdiction of the action to dissolve the partnership, and under its authority the receiver became vested with the title for the purpose of that action, which included a distribution of the property among creditors. The bankruptcy act does, indeed, vest in the trustee the title to all the bankrupt's property and rights of action whether legal or equitable (30 Stat. 565, § 70); but this does not authorize an interference by one court with the property lawfully in possession of another court of competent jurisdiction (Clark v. Bininger, 3 N. B. R. 518, 528, and cases there cited, *s. c.* 38 How. Prac. 341; Sedgwick v. Menck, 1 N. B. R. 675, Fed. Cas. No. 12,616).

The application for the order asked for must therefore be denied. The application should be made to the state court.

As the trustee in bankruptcy, however, represents creditors in the collection of assets or moneys of the estate for purposes of distribution; and as he also represents the bankrupts as regards any rights of action in reference thereto, and under section 11 may be "permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication" (30 Stat. 549), an order may be entered authorizing the trustee to apply to the state court for an order directing the receiver to transfer the fund to him for distribution among the creditors in the bankruptcy proceeding, and to that end, that the trustee may be substituted as plaintiff in the state suit in place of the bankrupt therein, and enter the appropriate decree adjudging the insolvency of the firm, and directing the payment of the funds in the receiver's hands to the trustee for distribution among creditors.

UNITED STATES v. BACHARACH et al.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 57.

CUSTOMS DUTIES—"PLATEAUX."

"Plateaux," which are braids or plaits of straw sewed or woven together into an oval form, and are used for making women's hats, but have to be manipulated into the form desired, and pressed or wired so as to retain that form, and are then trimmed, are properly classified, not under Tariff Act Oct. 1, 1890 (26 Stat. 567) par. 460, § 1, "as manufactures of * * * not specially provided for in this act," but under paragraph 518, § 2, exempting from duty "braids, plaits, laces, and similar manufactures composed of straw * * * suitable for making or ornamenting hats, bonnets and hoods."

Appeal from the Circuit Court of the United States for the Southern District of New York.

Henry C. Platt, for the United States.

Stephen G. Clarke, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The importations in controversy are commercially known as "plateaux," are braids or plaits of straw sewed or woven together into an oval form, are bought and sold by the dozen or piece, and are used for making women's hats. They are not complete hats, but require to be manipulated into the form desired, and pressed or wired so as to retain that form, and are then trimmed with ribbon or other materials. This appeal presents the question whether the importations were properly classified for duty under paragraph 460, § 1, of the tariff act of October 1, 1890 (26 Stat. 567), as "manufactures of * * * straw * * *," not specially provided for in this act," or whether they should have been classified under paragraph 518, § 2, of that act, which exempts from duty "braids, plaits, laces, and similar manufactures composed of straw * * * suitable for making or ornamenting hats, bonnets and hoods." We concur with the circuit court in the opinion that the importations were exempt from duty. They were not braids or plaits of straw, in a commercial sense, according to the testimony; but they were similar manufactures composed of straw, and suitable for making hats. Paragraph 518 supplies the more specific designation of the articles in controversy. The decision of the circuit court is accordingly affirmed.

WARREN FEATHERBONE CO. v. WARNER BROS. CO.

(Circuit Court, D. Connecticut. February 22, 1899.)

No. 966.

1. PATENTS—PLEADING IN INFRINGEMENT SUITS.

It is no ground of demurrer that the bill fails to allege that the inventions set forth and claimed in the patent sued on were not abandoned before the application therefor. The defense must be interposed by answer showing the facts.