sion that serious hardship is inflicted. It may be that the city cannot compel the company to erect its poles and stretch its wires in the alley; but it has the power, if the necessity therefor exists, to compel the discontinuance of the use of Main street, and in doing this it is bound to provide, if practicable, a reasonable substitute therefor. This it has done. The result is that the motion must be denied. Let an order be entered accordingly.

RYDER et al. v. BATEMAN et ux.

(Circuit Court, W. D. Tennessee. October 3, 1898.)

No. 526.

1. REMOVAL OF CAUSES—POWER TO REMAND BEFORE TERM AT WHICH RECORD IS RETURNABLE.
   Where, after the filing of a petition for removal, but before the first day of the next term of the federal court to which the record is returnable, application is made to such court for extraordinary relief, such as the appointment of a receiver to preserve the property, and by leave the record is filed, the court may then inquire into its jurisdiction; and if it will be without jurisdiction of the cause when the first day of the next term arrives, and especially if the suspension of jurisdiction until that time is likely to result in injury to the parties, it may at once remand the cause to the state court.

2. RECEIVER—HEARING OF APPLICATION—ANSWER AS EVIDENCE.
   Though a bill waives answer under oath, a sworn answer may be considered as an affidavit, the same as the bill, on an application for a receiver.

3. GROUNDS FOR APPOINTMENT.
   A receiver will not be appointed to take charge of real estate which is in the possession of defendants, and to collect the rents therefrom, on the application of complainants, who are out of possession, and seeking by their bill to establish a claim of ownership, where the only evidence before the court is the bill and the answer, which denies all the material allegations of the bill, and especially where it appears doubtful, on a consideration of the bill alone, whether the complainant is entitled to possession.

4. SAME—RIGHT OF TRUSTEE TO RECEIVER.
   The fact that a complainant is a trustee, and vested with the legal title to property, does not entitle her to the appointment of a receiver therefor, as against the beneficiary, who is a married woman and in possession, where the trustee at the same time denies the trust, and asserts a hostile title to the property.

5. SAME—SUIT TO RECOVER REAL ESTATE—INSOLVENCY OF DEFENDANT.
   A court is not justified in appointing a receiver for real estate, of which the defendant is in the possession and enjoyment under a claim of absolute ownership, on the application of an adverse claimant, unless there is a reasonable probability that complainant's right will be established, and that the property is in danger, both of which conditions should be established to the satisfaction of the court. In the absence of such proof, the insolvency of defendant is immaterial; and it is also immaterial whether defendant has the legal title, or the entire beneficial interest, with the bare legal title vested in a trustee.

In Equity. On application for appointment of a receiver.

The original bill sets out the will of one George P. Cooper as the source of title to the real estate involved; the plaintiff Iris C. Ryder claiming a life estate under that will, and the plaintiff Pauline A. Ryder, who is her daughter,

claiming the reversionary fee in the property under the will of her grandfather. The bill avers that many years ago the plaintiff Iris C. Ryder (in 1878) "signed, sealed, and acknowledged, and caused to be placed on record," a certain deed, conveying the property to a trustee, "for and in consideration of the natural love and affection which she, the said Iris, has and bears to her daughter Marie V. Swingley, and for and in consideration of five dollars cash in hand paid by said Adams," to have and to hold "in trust for said Marie V. Swingley forever, in fee simple, free from any and all debts and liabilities, as well as from the control of any husband she may ever have, to her only benefit and behoof." This Marie V. Swingley is the defendant, and her husband, Bateman, is the co-defendant, to this bill. The bill further alleges that the financial consideration for this deed was never paid; that the deed was never delivered; that the defendant Marie was not the offspring of the said Iris C. Ryder; that she had one child of the marriage to her first husband, A. L. Swingley, but that that child died, and the defendant Marie "was related by blood to the first husband of the complainant Iris C. Ryder, and, when a small child, was taken by complainant Iris C. Ryder and her first husband into their family, and by them raised and cared for"; that such care has been continued, she being supported out of the rents of the property, until her marriage to Bateman. The bill next alleges that by a second marriage the plaintiff Pauline A. Ryder is the only child of the other plaintiff, Iris C. Ryder, the daughter of said George P. Cooper, the testator, and that they are the sole owners of the property, under the will. It further alleges that Bateman and wife are in possession, claiming title under the deed of gift, claiming the rents, refusing, as the agents of the plaintiff, to pay them over to her, and entirely excluding both plaintiffs from all share in them, and that they are endeavoring to sell the property, and are insolvent. It prays for a receiver, for an injunction, and that the deed of gift be canceled, "as a cloud on the title of the plaintiff."

This bill was filed on or about the 28th day of May, 1898, in the chancery court of Shelby county, Tenn., after which certain proceedings were had in that court until the 2d day of July, 1898, two days before the process required the defendants to answer in that court. On that day the defendants filed their petition to remove the case to this court, in which they state "that they are both residents of the state of California, and that their home and residence was in said state of California at the time when this suit was instituted"; that petitioner Marie V. Bateman "is a citizen of said state of California, and was a citizen thereof at the time this suit was instituted"; that petitioner Louis T. Bateman "is a citizen of Great Britain, and was a citizen thereof at the time when this suit was instituted"; "that at the time this suit was instituted the complainants, Pauline Agnes Ryder and Iris C. Ryder, were both residents and citizens of the state of New York, and they both are still residents and citizens of the state of New York"; "that the defendant Louis T. Bateman is merely a nominal defendant, and is only sued in his capacity as husband of Marie V., and petitioners allege that the controversy is separable, and can be fully determined, as between your petitioner Marie V. and the complainants, without the presence of any other defendant." The necessary bond was filed along with this petition, but the record does not show that any order of the state court was ever entered, approving the bond, and directing the removal of the case to the federal court. The term of this court next ensuing after the filing of the petition for removal will occur on the fourth Monday of November, 1898. A transcript of the record was filed in the clerk's office of this court August 4, 1898,—how or by whom does not appear, but certainly without any leave of the court to that end. That transcript shows that, among other proceedings in the state court, on the 1st day of July, 1898, the day before the petition for removal was filed, the plaintiffs were granted leave to amend the bill, and given 10 days within which to file the amendment, and that on the 7th of July, 1898, after the petition for removal had been filed, the plaintiffs filed in that court the amended bill appearing in the transcript. We are informed by the brief of counsel, and the presentation of a copy of the chancellor's order, that, notwithstanding the petition and bond had been filed, the plaintiffs, ignoring the petition for removal, moved in the state court for a pro confesso, and appointment of a receiver by the chancellor. This he refused, as appears by a copy of his order presented by counsel, because the

case had already been removed to the United States circuit court, and because the insolvency of the defendants and injury to the complainants were flatly denied. Immediately after the order of the chancellor refusing the receiver, notice of this application for the appointment of a receiver in this court was served, on the 13th day of August, 1898, after which defendants filed their sworn petition asking for an order compelling the plaintiffs to produce a certain deed, known as "Exhibit D" to plaintiffs' amended bill, which they allege is a forgery, and that it was necessary for them to see the original document before they could file their answer, which they desired to use on the hearing of this application for a receiver. That application of the defendants was refused, for reasons stated in the opinion of the court heretofore filed herein.

The amended bill supplements the original bill with allegations of a somewhat different character. It avers that Nathan Adams, the trustee in the deed of gift, having died, the plaintiff Iris C. Ryder was substituted in his stead by a decree of the chancery court, upon proper proceedings instituted by her for that purpose, by a bill against the defendant Marie and the heirs of the deceased trustee, and that as such substituted trustee she is entitled to all the rights and powers vested in him, and "is alone entitled to collect the rents," etc. It then alleges that after the defendant Marie became of age, and in 1891, she executed "a deed or contract" whereby she "confirmed" the plaintiff Iris C. Ryder's "right to manage and control the said property in as full and complete a manner as she would have managed and controlled it had the deed filed as Exhibit B to the original bill not been made," and "agreed, in consideration of the gifts she had received from complainant Iris C. Ryder," that the plaintiff Agnes P. Ryder "should share with herself the rents and profits derived from the said lands." It next alleges that Bateman, the husband of the defendant Marie, is extravagant and wasteful in his habits, that he entirely dominates and controls the defendant Marie, and that, unless restrained, he will convert the entire rentals and proceeds of sale, if able to sell, to the gratification of his own pleasures, and not to the exclusive behoof, use, and benefit of Marie V. Bateman, his wife. It also alleges, as does the original bill, that Louis T. Bateman and Marie V. Bateman are entirely insolvent, and, if they are permitted longer to collect the rents on the real estate, the complainants will sustain irreparable injury. The amended bill prays for a receiver, for the same relief as the original bill, and "that on the final hearing of this cause the plaintiff Iris C. Ryder be given control and management of the property, and the right to collect the rents therefrom, by virtue of her trusteeship. Both bills waive the oath of defendants to their answer, and both the original bill and the amended bill are sworn to. The original bill alleges that Pauline Agnes Ryder, one of the plaintiffs, is a minor without a guardian, and sues by her mother and next friend, Iris C. Ryder, and that they are both residents of the city of New York, and state of New York, and that the defendants, Louis T. Bateman and his wife, Marie V. Bateman, are residents of the county of Shelby, and state of Tennessee.

After the motion for an order for the inspection of the plaintiffs' exhibit was refused, the defendants, on the 29th of August, 1898, filed their answer to the bill and the amended bill. The answer is sworn to by the defendants, and forwarded along with the transcript from the state court, to be used upon the hearing of this application for a receiver. This answer denies almost every material statement of the bill and the amended bill. It denies that under the will of George P. Cooper there was conferred only a life estate on the said Iris C. Ryder, as charged in the bill, and insists that she acquired a fee-simple title to the property she acquired under that will, and states that on the 30th day of January, 1890, by a proper decree of the chancery court of Shelby county, in the case of Severson against Ryder and others, with all the proper parties before it, and especially with both the plaintiffs and the defendant Marie V. Swingley as parties to the bill, that court construed the will as conferring upon the daughters of George P. Cooper an estate in fee, and not an estate for life, with a remainder over to their children. The answer denies that the plaintiff Pauline A. Ryder is the only living child of the said Iris C. Ryder, and that said Pauline ever became entitled, by her birth, or at any time, to any interest in said property by virtue of the will of her grandfather, as charged in the bill. It emphatically denies that Marie V.

Swingley was taken when a small child and raised and cared for by the plaintiff Iris C. Ryder, and says that she is the lawful child of the said Iris C. Ryder, born in lawful wedlock between her and her deceased husband, A. L. Swingley, and that the "respondents are pained and shocked beyond degree to have such a false assertion made and sworn to by the said Iris C. Ryder." It states that the said Iris C. Ryder has many times, in courts of justice, by her oath declared that she was the mother of the said Marie; that she has always been reputed to be the child of said Iris C. Ryder and her first husband, A. L. Swingley. It admits a deed of trust from the said Iris C. Ryder to Nathan Adams for the use and benefit of the defendant, and avers that it was properly delivered to the trustee, or in some other way, for her benefit, about the date of its execution. It sets up that the plaintiff Iris C. Ryder in February, 1872, was appointed the guardian of the said Marie, upon a bond which was then, and is now, insolvent, and that, shortly after she was qualified as guardian, the plaintiff Iris C. Ryder obtained the sum of $5,000 life insurance on the life of defendant's father, A. L. Swingley, which belonged exclusively to the defendant Marie, as his daughter; that, immediately upon the receipt thereof by the plaintiff Iris C. Ryder, she converted the money to her own use, and has never paid to the respondent any part thereof, either principal or interest, and that said sum of life insurance money, with compound interest, as under the law the plaintiff would be bound to pay, would be in excess of the value of this property; that her father left other property belonging to the respondent, which the said Iris C. Ryder also has converted to her own use. It then states that in March, 1878, immediately after the execution of the deed of settlement to Adams, the plaintiff Iris C. Ryder, as the guardian of the respondent Marie, collected the rents and profits of the real estate in controversy, and has treated the property as the property of the said Marie ever since that time. It alleges that the respondent Marie has had undisputed possession under the said deed from its date up to this time, a period of over 20 years, and pleads the statute of limitations, and the 7 years' continuous possession and 20 years of uninterrupted ownership, as a defense to any claim of title in the plaintiffs. It denies that there were any errors in the description of the property, as alleged in the bill; and, if there were, it would not avail the plaintiffs to set the deed aside. It denies that the financial consideration of five dollars was not paid. It sets up laches on the part of the plaintiffs in so long withholding this bill. It then says that the respondents never knew or heard of the existence of the "forged deed of September 28, 1891," until it was set up in the amended bill; and against any claim under it the answer again sets up the statute of limitations. The answer then denies that the respondents are attempting to sell the property, or put in any way a cloud upon or incumber the title; denies that they or either of them is insolvent, or that plaintiffs will sustain any injury by the defendants' continued possession of the property. The answer alleges that the plaintiff Iris C. Ryder during all the time of her guardianship has collected about $200 per month rent from this property, for which she has never accounted to the defendant Marie V., nor to the court that appointed her, as her guardian and trustee, but that the money has been converted to her own use. The answer then sets up that in June, 1890, the plaintiff Iris C. Ryder conveyed a large amount of property in Shelby county to her co-defendant, Pauline, and that, by a proceeding in the chancery court for that purpose, part of that property was sold, and out of the proceeds thereof the defendant Marie was allowed to borrow the sum of $5,050 upon a mortgage contract signed by the said Marie and her mother, Iris C. Ryder, at an annual interest of about $300,—the property in controversy in this suit having been conveyed under the mortgage as a security for that loan,—and that the plaintiff Iris C. Ryder joined as grantor in the mortgage in order to execute the supposed trust held by her under the provisions of the decree substituting her as trustee for Adams, the original trustee, who had died. The answer then avers that "respondents emphatically deny that the defendant Marie on the 28th day of September, 1891, or at any other time, executed a deed such as is exhibited by the purported copy thereof made Exhibit D to the amended bill." "Respondents deny that such a deed, or any deed of that character, was ever executed," and say that "the said deed is a miserable and bungling forgery, which has been prepared and concocted

by the said Iris C. Ryder with the intent and purpose of using it as a means of cheating, wronging, and defrauding these respondents." The answer pleads, as to the deed, non est factum, and then proceeds to aver "that if such a deed could have been procured from said Marie, as charged, or if the fact be found to be so, then they charge that it was procured through fraud and duress, and without a knowledge of its contents ever having been communicated to respondent Marie." The answer avers that they have made numerous and sundry applications to be permitted to see the original deed, which has been always refused. The answer says that, at the time the deed purports to have been executed, Marie had just come of age a few days previous; that her mother had been her guardian, and had received $5,000 of her interest money, and the accumulated interest thereon, and had never made any settlement with her, and besides was claiming the right to exercise constant dominion and control over the affairs of the respondent, in consequence of her trusteeship, and she thereby dominated Marie and her affairs so as to place her under great duress. The answer then says that the said Iris C. Ryder is totally unfit to act as trustee for any one, and that especially is she unfit to execute any trusts connected with respondent's interests, because "she is given to gambling in futures, and squanders the money she can get, in the bucket shops of New York." It states that she has all these years purported to act as trustee under the decree substituting her for Nathan Adams, without ever having given any bond as trustee, without ever having taken the oath of trustee, and that neither bond nor oath have been waived in the deed creating the trust. The answer denies that she is trustee under that substitution, or can claim any rights against the respondent because of it. It sets up that the plaintiff Iris C. Ryder committed a breach of her trust under that deed and decree of substitution, by conveying all the property in controversy to her co-defendant, Pauline, on the 7th day of June, 1898, and that she is seeking by this deed and proceeding to betray her trust. The answer admits that the defendants are asserting the right to appropriate and collect the rents and profits of the property, and deny that the said plaintiffs have any right or share therein. The answer alleges that the deed to Nathan Adams only created a dry and naked legal title in him, and that they are advised that the trust ceased to be an active one when the defendant Marie became 21 years of age, and, while the deed expresses the consideration of love and affection, yet the grantor, Iris C. Ryder, was then indebted to the defendant Marie, principal and interest, in the sum of seven or eight thousand dollars, and that this indebtedness constituted a part of the consideration for the deed. The answer charges that this proceeding is instituted for the purpose of placing the defendants in financial straits, through the operation of a receivership, so as to force them into terms which they could not otherwise obtain, and to further embarrass the defendants by depriving them of the means of paying the interest on the mortgage debt, so that it may be forced to a sale under that security. It states that the defendants have spent several hundred dollars in repairing the property, and have given great attention to the procurement of good tenants, that the taxes are kept paid, and the interest on the mortgage debt is kept paid, and that the husband of the respondent is not extravagant and wasteful in his habits, but is saving and economical in his conduct; and it closes by saying that the defendants are under the necessity of keeping the interest, taxes, and repairs paid, and to "reimburse themselves for expenses, and maintain their credit and character as reliable and responsible citizens, which said Iris C. Ryder has sought to destroy by a wicked and unfounded criminal prosecution, and by a receivership herein on a pretended claim of right on her part."

L. T. M. Canada, for plaintiffs.
Edgington & Edgington, for defendants.

HAMMOND, J. (after stating the facts as above). No affidavit or other proof has been filed on either side to support the remarkable statements of this original and amended bill, or the not less remarkable statements of the answer which has been filed to it;

and we are left, on this application for a receiver, to determine the question upon these bare statements alone.

The slightest inspection of this record shows that there are the gravest questions of our jurisdiction, both as relates to the parties and the subject-matter, under the acts of congress regulating removals from the state courts of suits between citizens and aliens, and forbidding the federal equity courts to entertain jurisdiction where there is a plain, adequate, and complete remedy at law. Acts 1887-88, cc. 373, 866, § 2 (24 Stat. 552; 25 Stat. 433); 1 Supp. Rev. St. pp. 611, 612; Rev. St. § 723. Nor are these questions any less intricate when complicated with the irregularities of practice that have taken place in this case by filing an amended bill in the state court after the petition and bond for removal had been filed; by filing the record in this court, without any application or leave of the court, before the time prescribed by the removal act for its transmission to this court; by filing the defendants' answer without like leave to file the record here; and by submitting this motion for a receiver upon an irregular record, with no proofs, by affidavits or otherwise, in support either of the bill or the answer, the oath to which is waived; the bill and answer being also flatly contradictory in almost every statement, and especially as to the "residence" of the defendants seeking to remove the case, so essential, under the act of 1887, to be established for purposes of jurisdiction by removal under that act. The bill says they are residents of Shelby county, Tenn., and the petition for removal says they are residents of California,—oath against oath. The petition for removal also avers that the defendant husband is, and was at the time suit was begun, "a citizen of Great Britain," and the wife a citizen of California; and it is by no means certain that this is a sufficient description of his national character, though the case may be distinguished, probably, as to that expression, being the equivalent of the more technical form of ancient usage,—"an alien, and a subject of the queen of the United Kingdom of Great Britain and Ireland," or "an alien, and a subject of the kingdom of Great Britain." Stuart v. City of Easton, 156 U. S. 46, 15 Sup. Ct. 268. Besides this, it has not yet been definitely settled, so far as we are advised, whether or not the defendant wife by her marriage to an alien has not herself become an alien, at least so far as the right to sue, and the liability of being sued, in the federal courts are concerned. Pequignot v. City of Detroit, 16 Fed. 211; Comitis v. Parkerson, 56 Fed. 556. It also appears that the plaintiffs are citizens of New York, so that the suit is one in which none of the parties are citizens, inhabitants, or residents of the state in which the land in controversy lies, and in which the suit is brought, if the removal petition states the truth, but citizens of another state are suing defendants, who are both aliens, it may be; and, while the petition says they are "residents" of California, the bill says they are "residents" of Tennessee. Cooley v. McArthur, 35 Fed. 372; Cudahy v. McGeoch, 37 Fed. 1; Walker v. O'Neill, 38 Fed. 374; Sherwood v. Valley Co., 55 Fed. 1. Is an alien a "resident" of any state, within the purview of this act of congress? Steamship Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526; Railway

Co. v. Gonzales, 151 U. S. 496, 506, 507, 14 Sup. Ct. 401. The petition for removal asserts a separable controversy, and that the husband is only a nominal party; but is that possible, when a husband and wife are charged as joint trespassers, withholding the possession of real estate from the plaintiffs, claiming to be the rightful owners? Starin v. City of New York, 115 U. S. 248, 6 Sup. Ct. 28; Anderson v. Watt, 138 U. S. 694, 11 Sup. Ct. 449.

The questions arising under Rev. St. § 723, as to an adequate remedy at law, are quite as complex as any above noted: Whether, if this be a bill "to remove a cloud" from the title of the plaintiffs, they can sustain it, being out of possession. Lacassagne v. Chapuis, 144 U. S. 119, 12 Sup. Ct. 659; Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712. Whether the filing of an answer has waived this objection. Reynes v. Dumont, 130 U. S. 355, 9 Sup. Ct. 486; Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594; Betts v. Lewis, 19 How. 72; Reynolds v. Watkins, 9 C. C. A. 273, 60 Fed. 824; Wait v. O'Neil, 22 C. C. A. 248, 76 Fed 408; Id., 72 Fed. 348. Whether it is in fact a bill to remove a cloud, and not maintainable, or is in fact a bill to rescind one's deed of gift for want of consideration, or (taking the irregularly filed amended bill into consideration) a bill to enforce the devises of a will, or one to enforce the trusts of a settlement by deed of gift to protect a married woman, or the specific performance of a contract to share the "proceeds" of real estate, and for its "management and control," and therefore maintainable, in some of these aspects, under the general prayer for relief, although not under the special prayer to remove a cloud. Inconsistent as these many-sided claims for relief may be, under a general prayer, there being no demurrer or plea to the jurisdiction, whether or not, again, the filing of the answer has not waived all objections in that behalf; a plea only being appropriate to present the antagonistic facts set up in the answer as against the jurisdiction of a court of equity to entertain the bill in any aspect. This opens a rather wide field of inquiry as to the effect of Rev. St. § 723, on a bill so inartistic as this, and so destitute of any interpretation by its prayer of what is wanted in the way of relief, except that a receiver is wanted, as if that might be the main purpose of the bill, instead of an incidental purpose, dependent upon a fairly made out case of prima facie right to the property, through established methods of equitable relief or remedy, and not a mere action at law to recover a possession wrongfully withheld, which an action of ejectment would remedy, in some of its aspects, at least. Where is the legal title to this property, in the view of the bill? Clearly, in the plaintiffs,—one or both. Then why would not ejectment lie? If one out of possession cannot, in a federal court of equity, maintain a bill to remove a cloud from the legal title, particularly when the alleged cloud is one's own deed, not denied as to its execution, but only as to its effect, there being a failure of consideration, if the question of jurisdiction be open, notwithstanding the answer, shall the case be remanded to the state court, if such a jurisdiction may be exercised there, be docketed here on the law side as an action at law rightfully removed, upon a rule

to replead, or be dismissed without prejudice to bringing an action at law? These are all perplexing questions, not very easy of solution on a record such as is now presented. Yet, under the strict command of section 5 of the act of 1875, still in force, that if at any time it shall appear, no matter how, that the court has no jurisdiction, the suit shall be dismissed or remanded by the court on its own motion, it is always the duty of the court to look to the jurisdiction and determine it. Act 1875, § 5 (18 Stat. 472); 1 Supp. Rev. St. p. 83; Morris v. Gilmer, 129 U. S. 315, 325, 9 Sup. Ct. 289; Cameron v. Hodges, 127 U. S. 322, 326, 8 Sup. Ct. 1154; Graves v. Corbin, 132 U. S. 571, 590, 10 Sup. Ct. 196; Crehore v. Railway Co., 131 U. S. 240, 9 Sup. Ct. 692. So, when an application is made for the appointment of a receiver, it becomes all the more necessary to look immediately to the question of jurisdiction, lest, if one be appointed, other perplexities arise, that might embarrass the court, if it should turn out there was at the beginning no jurisdiction of the case. Electrical Supply Co. v. Put-in-Bay Waterworks, Light & Railway Co., 84 Fed. 740; Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. 379; Compton v. Jesup, 15 C. C. A. 397, 68 Fed. 263.

The question whether the court or judge may or shall remand the case for want of jurisdiction on the occasion of an application for a receiver, or other extraordinary action, made in the time intermediary from the filing of the removal petition in the state court to the first day of the next term of the federal court, to which alone the record is returnable, by the very terms of the statute, has never been authoritatively decided, so far as I am aware. Rev. St. § 639; Act 1875, § 7 (18 Stat. 472); 1 Supp. Rev. St. p. 83; Acts 1887, 1888, § 3 (24 Stat. 552; 25 Stat. 433); 1 Supp. Rev. St. pp. 611, 613; Frink v. Blackinton Co., 80 Fed. 306; Hamilton v. Fowler, 83 Fed. 321.

Nevertheless, it would seem that, if the court within that time may take extraordinary jurisdiction for extraordinary purposes, it might and should then and there remand the case, if it have no jurisdiction, without pretermitting that fundamental inquiry to a later date; especially if the parties were likely to suffer injury by a long delay between terms, as in this case of quite five months between the two dates. The rigid rule that the federal court can acquire jurisdiction only strictissimi juris, that its jurisdiction is defeated unless the record is filed strictly according to the statute, and that it has no power to proceed, or authority over the case, generally, until that date arrives, must, ex necessitate rei, yield to the circumstance that the injury of a suspension of jurisdiction between the two courts, as if between the heavens and the earth, may involve the parties in serious loss, and the court in the embarrassment of appointing a receiver where there is no jurisdiction to do anything at all in the premises, instead of remanding the case at once to a court competent to deal with that question without any embarrassment. Either the relief that comes of remanding the case under such circumstances must be classed with that of granting injunctions, dissolving them, appointing receivers, and the like, as extraordinary relief, which, like the others, the court may grant, within the time, as of necessity, against the general rule, or else section 3 of the act

of 1875, as amended by the acts of 1887 and 1888, requiring the record to be filed at the next succeeding term of the federal court, must be construed, pari passu, with section 5 of the act of 1875, and in the light of the always established rule that the federal court might take intermediate and extraordinary jurisdiction for the purpose of preserving the property, and the like, and for that purpose, if circumstances demand it, may at that time remand the case, if there can be no jurisdiction acquired when the first day of the next term arrives,—if the jurisdiction be impossible by any further action to be taken in the case, and the filing of the record at the statutory time cannot confer or complete it. Why should the case be longer held, if there can be no jurisdiction? True, this question, perhaps, should be asked rather of congress than the courts; but by construing the two sections, as above suggested, for the common good of the general scheme of the statute, we may hold that the one is modified by the other, so that, if, by leave of the court, for some extraordinary purpose, on the application of either party, the record be filed before the first day of the next succeeding term of the federal court, that court also acquires jurisdiction then and there to remand the case, if it can have no jurisdiction of it, and, in obedience to the fifth section of the judiciary act, must remand it. In the case of Respublica v. Betsey, 1 Dall. 468, 478, the word "not," in a statute, was eliminated on this principle of construction, the court remarking that:

"In the construction of statutes, too, judges have sometimes gone contrary to the general words of it. They have expounded the words of an act contrary to the text, to make it agree with reason and equity."

Again, in Levinz v. Will, 1 Dall. 430, 433, while construing statutes, the court observes that:

"In doubtful cases, therefore, we may enlarge the construction of an act of assembly, according to the reason and sense of the lawmakers, either expressed in other parts of the act itself, or guessed by considering the frame and design of the whole." Citing Arthur v. Bokenham, 11 Mod. 161.

If the act, therefore, may be so enlarged as to take jurisdiction before our term for some extraordinary purpose, it may be so enlarged as to effectuate that same purpose by some other extraordinary relief, if need be.

The foregoing questions as to our jurisdiction have engaged, therefore, my serious attention, with the purpose of immediately remanding the case, if it should be found that we certainly were without any jurisdiction of it, and that it ought to be remanded. But, as now advised, it seems that we have jurisdiction both of the parties and of the subject-matter, as a court of equity. However that may be, for the present the jurisdictional questions are reserved for the progress of the case, as the parties may be advised in the premises. For the purposes of this application, the bill will be treated as well filed in equity, at least for the purpose of letting an equitable, if not a legal, joint tenant into the enjoyment of her share of the rents and profits under the deed from the feme defendant to the plaintiffs. It is true that an action of debt or assumpsit might lie for any share of the rents collected and wrongfully withheld, but

this would scarcely be adequate or complete, and would require a constant bringing of suits as fast as the rents were collected. Besides, for the present the answer will be treated as a waiver of all objections on the score of a want of equity in that behalf, as well as to the whole bill. In that view, this would be technically a bill for the specific performance of that deed or contract. Apart from that deed, the suit is a mere struggle over the legal or equitable title by claimants out of possession against one in possession under a deed especially good against the plaintiffs, if it be good at all, as against the averments of the bill. And this is the best attitude of the case as presented for the plaintiffs on their application for a receiver.

The bill is sworn to, and there is not an item of proof otherwise offered in support of the application for a receiver. Concede that it may be used as an affidavit in support of the application, and it is fully met by the sworn answer of the defendants, which flatly contradicts every essential statement of the bill. The oath to the answer is waived, and it is thereby, perhaps, even on an application for a receiver made by the plaintiff, shorn of the ordinary force of an answer in chancery as proof on all the issues of the case. Yet it is as good as the bill, as an affidavit, and then we have an exact equilibrium of proof as to the facts,—oath against oath, and nothing more on either side. But the one is the oath of a claimant of ownership in possession, in support of that possession; and the other, of a claimant out of possession, seeking to establish an adverse claim of ownership. The circumstances of this possession do not distinctly appear. The bill says—incidentally, somewhat—that plaintiff Iris C. Ryder, on account of her devotion to defendant Marie, "has permitted her and her husband to act as the agent" of the plaintiffs "in the collection of the rents, permitting the said Marie Bateman and Louis T. Bateman to enjoy a portion of said rents when so collected"; that this was their only means of livelihood; that they have taken advantage of this "generosity," and now set up an exclusive right to the property under the deed of gift, denying all right of plaintiffs, having "accounted to complainant for an insignificant amount of the rents they have collected." The answer treats this part of the bill somewhat obscurely, and sets up adverse possession in defendant Marie ever since the deed of gift, about 20 years, that the possession of the plaintiff was held as guardian or trustee for the defendant Marie, that she has never accounted to defendant, but has appropriated the money largely to her own use, and misappropriated much of it by "gambling in the bucket shops." The result of this, as evidence, is that the defendants substantially deny any agency, and claim the possession as one in their own right; and again it is only oath against oath, with the burden of proof on the plaintiff. Thus it is with all the important facts,—as to the proof of them, the burden of proof being always on the plaintiffs, it must be remembered. The bill says that the original deed of gift was never delivered. The answer says it was. The fact that it went to record appears, and is not denied, which is a corroborating circumstance, if not a conclusive one, in favor of delivery, standing