

benefit of creditors, it is not meant thereby that there is a direct and express trust attached to such assets. As was said in *Hollins v. Iron Co.*, 150 U. S. 383, 14 Sup. Ct. 130:

"It is rather a trust in the administration of the assets after possession by a court of equity, than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."

Also:

"Yet all that is meant by such expressions is the existence of an equitable right which will be enforced whenever a court of equity, at the instance of a proper party and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien or a direct trust. \* \* \* As between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor."

To the same effect are *Graham v. Railroad Co.*, 102 U. S. 148; *Railway Co. v. Ham*, 114 U. S. 587, 594, 5 Sup. Ct. 1081; *Fogg v. Blair*, 133 U. S. 534, 541, 10 Sup. Ct. 338.

Since the plaintiff's cause of action, in one aspect thereof, is simply to enforce the individual liability of a stockholder, and as to the other his petition contains no averment that his claim was either reduced to judgment against the corporation or the defendant, or that the corporation was ever legally dissolved, there is nothing presented requiring the exercise of equitable jurisdiction. Under the seventh amendment to the constitution, reserving the right to trial by a jury in suits at common law, where the value in controversy exceeds \$20, the defendant would be entitled to a trial by jury. The right to such a trial cannot be dispensed with without the assent of the parties; nor can it be disregarded or impaired by a blending of a cause of action at law with a demand for equitable relief in aid of the legal action, or during its pendency. While it is true that new equitable rights may be created by state statutes, and be administered as such in the federal courts, the jurisdiction thereof is subject to the limitation prescribed by the constitutional provision mentioned; and the equitable rights thus created by state legislation must be such as in their nature and character are of equitable cognizance, according to the old and well-established principles of equity jurisprudence. It is therefore ordered that the cause remain upon the law side of the docket.

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#### TOMPKINS v. KNUT.

(Circuit Court, D. Kentucky. June 6, 1899.)

**1. TRIAL—DIRECTION OF VERDICT ON PLAINTIFF'S TESTIMONY.**

Where a plaintiff has testified in his own behalf, and fully stated the facts on which he relies to recover, the court may properly, on a motion based on such testimony, direct a verdict for defendant, where the facts testified to would not support a recovery by plaintiff.

**2. ASSAULT AND BATTERY—JUSTIFICATION—DEFENSE OF ANOTHER.**

Plaintiff in an action for assault and battery, by his own testimony, was in a house, engaged in a struggle with defendant's wife, when defendant, who had not been in the house during the controversy, entered. Plaintiff was armed with a repeating rifle, which he had threatened to use,

and was apparently attempting to use, while the woman was attempting to prevent him, and it had once been discharged during the struggle. Plaintiff also had a revolver. Neither defendant nor his wife were armed. On entering the room, defendant, with the assistance of others present, none of whom were armed, overpowered plaintiff, disarmed him, and bound him, afterwards surrendering him to an officer. Both parties were lawfully in the house, and it did not appear that defendant used any more force than was necessary to disarm plaintiff. *Held* that, regardless of the circumstances leading up to the trouble, defendant was justified in his action, and the facts as shown by plaintiff's own testimony did not warrant the submission of the case to the jury.

On Motion of Defendant for Direction of Verdict.

Geo. W. Jolly, Miller & Todd, and W. W. Clark, for plaintiff.  
Powers & Atchison, for defendant.

EVANS, District Judge. In the case of *Oscanyan v. Arms Co.*, 103 U. S. 261, the trial court, after hearing the opening statement by plaintiff's counsel to the jury as to what facts were expected to be proved to support the plaintiff's case, and after verifying the accuracy of the statement, sustained a motion on behalf of defendant on that presentation of the case alone to instruct the jury to find a verdict against the plaintiff upon the ground that, if those statements were true, the contract sued upon was against public policy, and void. Upon a writ of error to the supreme court the proceeding was approved, and the judgment was affirmed. The plaintiff in this action for assault and battery and trespass has testified under oath, and stated the facts upon which he relies in support of his action, and the court is called upon to determine whether, assuming all the plaintiff says to be true, he is entitled to a verdict against the only defendant now remaining in the case, since the death of his wife, the former co-defendant, has abated the action as to her. As the plaintiff was a participant in the entire transaction out of which his action arose, and completely states his case, it is admissible and proper, I think, to bring this question up now, because it would not be competent for him by other witnesses to contradict what he says; and while, on this motion, his statements must be accepted as true in his behalf, they may also, for the reason indicated, be taken as true against him. It appears from his testimony that, having been employed by the defendant and his wife and her brother, the owners of the farms described in the pleadings, up to January 1, 1898, as a manager and overseer, his contract was soon afterwards renewed for the year 1898; that part of the agreement was that the plaintiff, besides his monthly wages, was to have the use of the house on the premises for occupation by himself and family, and also provisions for the support of them all; that on the 24th of January, 1898 (the defendant and wife having come to the farm on invitation of the plaintiff in the preceding December, and having remained there, and all parties having been entirely friendly, up to January 24th), there was some dispute as to whether plaintiff was any longer wanted, or would be permitted to remain, as the employé of defendant and his wife; that on the succeeding day (January 25th), while the defendant was

outside the house to the plaintiff's knowledge, who was also outside, the plaintiff was hastily informed that Mrs. Knut, or some one in the inside of the house, was removing the furniture, and putting his family out, whereupon the plaintiff hurriedly ran into the house, seized a Winchester repeating rifle, and, upon going into the room where the others were, among other things, said, "If they touch any more of my furniture I will kill every son of bitch who does it;" that the rifle was then cocked, and leveled, in the hands of the plaintiff, who also had upon him a revolver, and probably a dirk; that Mrs. Knut, while appealing to him to desist, took hold of the rifle, and while she had hold of it it was discharged; that the defendant also went into the room soon after plaintiff did, and there found his wife struggling with plaintiff, who was armed as indicated, and endeavoring in some way to control the direction of the pointing of the gun; that under these circumstances the defendant, with some persons present (none of whom except the plaintiff appear in any way to have been armed), overpowered plaintiff, bound his hands behind him, took from him his gun and pistol, removed him to the stable lot, and soon afterwards delivered him to a peace officer (a deputy sheriff) who happened to be at the house on other business, and that the plaintiff was then unbound and removed by the officer, accompanied by the defendant and one other person, to Owensboro, the county seat. It is claimed that a kodak picture was taken of some part of the scene, but it does not appear that defendant was concerned with that phase of the case, but that, if it was done by anybody, it was by his wife, now dead. It seems to the court that all parties were lawfully on the premises at the time, and that the whole case must turn, not upon the provisions of the contract, nor anybody's rights thereunder, but upon the facts immediately connected with the affray on January 25th. If this be correct, then the court, upon the plaintiff's own showing, is clearly of opinion that the defendant had reasonable grounds for believing, when he appeared upon the scene, that his wife was apparently in great jeopardy and danger of her life in her struggle with a man so thoroughly armed as was the plaintiff; that if the defendant had then been armed, and had taken the plaintiff's life, the law would have excused him; that if he might, in the then apparently necessary defense of his wife, have taken plaintiff's life, he was certainly excusable in doing for her protection, and probably his own, the lesser things of binding and disarming the plaintiff, so as to prevent further mischief until he could deliver plaintiff to a peace officer, precisely as he might be justified in binding a madman or a dangerous beast, who had as ample power to do mischief as this heavily-armed man had upon this occasion; and that it does not appear that defendant used more force than was apparently necessary to prevent great bodily harm to his wife, and probably others. Whether plaintiff had any right to enforce his claims to the possession of defendant's premises by force of arms may well admit of doubt, as he was only defendant's employé, and not his tenant in the ordinary sense; and, if plaintiff had not such right, then he was a gross violator of the law in seeking to remedy

his supposed wrongs in so violent a manner, and should take the consequences without complaint. Indeed, all things considered, the court is inclined to think that the plaintiff got off quite as well as he could have reasonably expected. Upon the facts stated under oath by the plaintiff, if the jury were to find a verdict in his favor the court would not permit it to stand. For the reasons thus briefly stated, the court will sustain the motion, and instruct the jury to find for the defendant.

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IRVINE v. ANGUS et al.

(Circuit Court of Appeals, Ninth Circuit. May 23, 1899.)

No. 488.

On Petition for Rehearing. For former opinion, see 93 Fed. 629.

George W. Towle, Jr., for plaintiff in error.

Pierson & Mitchell and Garrett W. McEnerney, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. We are satisfied with the general views announced in our former opinion, and with the conclusion there reached, except in one particular, and that relates to the amount of the judgment which the circuit court should be directed to enter in favor of the plaintiff in error. The bill of exceptions recites that:

"It was admitted by defendants that the assessments mentioned in the complaint were, each and all, duly levied upon the shares of stock therein mentioned by said corporation, the Morgan Mining Company; \* \* \* that each of said assessments was paid by Irvine from his own funds at the last moment that the same could be paid before the said shares would otherwise have been lawfully offered for sale."

In our former opinion we inadvertently assumed that the aggregate amount of the assessments so paid by Irvine was \$15,190.06; that being the amount named in the prayer of the complaint, and for which judgment was demanded against the defendants in error. In the petition for rehearing our attention has been called to the fact that this amount is in excess of the aggregate of the sums alleged in the body of the complaint to have been paid by Irvine on account of such assessments, and therefore in excess of the amount admitted by the defendants in error to have been paid by him. This error, however, can be corrected by a modification of our former judgment, without granting the petition for a rehearing. The petition for a rehearing will therefore be denied, and our former judgment will be modified so as to read as follows: The judgment of the circuit court is reversed, and the cause remanded, with directions to that court to render judgment upon the admissions of the parties contained in the bill of exceptions, in favor of the plaintiff in error, for the sum of \$11,527.80, with legal interest thereon from May 21, 1884, and costs.