

upon condition that I am only to be liable when they are performed ; that is, when \$118,000 new stock is subscribed, and when thirty per cent of the old stock is called in and cancelled, as per resolution of the company of this date."

We are of opinion that the Circuit Court properly construed this instrument ; and, as it is not proved or asserted that this stock ever was so reduced, the defendant was not liable on that contract.

But, when we come to look for the judgment of the Circuit Court which should be affirmed on these considerations, we find that there was in that court no *final* judgment. There exists in the record only an order reversing the judgment of the District Court. But, supposing a more formal entry to have been made, it could only be that the judgment and verdict in the District Court be set aside, and a new trial awarded.

We have so repeatedly decided that such an order as this is not a final judgment from which a writ of error lies to this court, that it needs no further discussion. *Parcels v. Johnson*, 20 Wall. 653; *Macomb v. Commissioners of Knox County*, 91 U. S. 1.

But the case was fully argued by counsel on the merits. The court, in conference, came to the conclusion (which was unanimous) indicated in this opinion ; and we have concluded to let the opinion accompany the only judgment which we can render on this record.

*Writ of error dismissed.*

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BURBANK v. BIGELOW ET AL.

1. A bill in chancery was filed in the Circuit Court of the United States for the District of Louisiana by a citizen of Louisiana, the executrix of a deceased member of a firm, against the surviving partner, a citizen of Wisconsin, for an account as part of the partnership assets of the proceeds of a judgment recovered by the latter in said court, in his individual name, for a debt which she alleged was due the firm. The defendant, prior to the service of process on him, had on his petition been declared a bankrupt by the District Court of the United States for the District of Wisconsin ; but, answering to the merits, he denied that the debt was due to the partnership. An amended and supplemental bill was afterwards filed, making a defendant the assignee in bankruptcy, who adopted in a separate answer the defence set up by the original defendant. He, in an answer subsequently filed, claimed

that the said District Court had exclusive jurisdiction in the cause. During its progress, a receiver was appointed, who collected the amount due on the judgment. The Circuit Court dismissed the cause for want of jurisdiction. *Held*, that notwithstanding the proceedings in bankruptcy, and although the assignee thereunder may have been appointed and the assignment made to him prior to filing said bill, the Circuit Court, having possession of the subject-matter in controversy as well as jurisdiction of the parties, had jurisdiction of the cause, and should have decided it upon its merits.

2. Under sect. 4979 of the Revised Statutes, the Circuit Court of the United States has, without reference to the citizenship of the parties, jurisdiction of a suit against an assignee in bankruptcy, brought by any person claiming an adverse interest touching any property, or rights of property, transferable to or vested in such assignee.
3. *Lathrop, Assignee, v. Drake et al.*, 91 U. S. 516, and *Eyster v. Gaff et al.*, id. 521, cited and approved.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

*Mr. Benjamin F. Butler* for the appellant.

*Mr. Thomas J. Durant* for the appellee.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court of the United States for the District of Louisiana.

The appellant is the widow and executrix of Thomas S. Burbank, deceased, late of New Orleans, and tutrix of his minor children. She was complainant below, and filed her bill on the 8th of February, 1869, against Edmond B. Bigelow, of Wisconsin, for an account of a certain partnership which she alleges existed between her husband and said Bigelow; and, amongst other things, she specially prays that Bigelow may account for, as part of the partnership assets, the proceeds of a certain judgment for \$13,864.34, which he recovered in his individual name against one Edward W. Burbank, on the twenty-seventh day of February, 1866, in the said Circuit Court. The complainant alleges that this judgment was for a debt due the partnership, and ought to be applied to the payment of the partnership debts, a portion of which, to a large amount, are pressing against her husband's estate.

The court below did not pass upon the merits of the case, but dismissed the bill for want of jurisdiction; upon what ground, there being no written opinion in the case, does not

distinctly appear. The only ground alleged in support of the decree is, that Edmond B. Burbank, the original defendant, together with one Hancock (a former partner of his), shortly before the filing of the bill in this case, filed their joint petition in the District Court of the United States for the District of Wisconsin to be declared bankrupts, and a decree of bankruptcy was rendered against them on the twenty-third day of January, 1869; but no assignment was made by the bankrupts until the 11th of February, 1869 (three days after filing the bill), when an assignment was made to George W. McDougall, of Wisconsin. In his schedule of assets in bankruptcy, Bigelow refers to the judgment recovered by him against Edward W. Burbank, but states that it had been assigned to W. W. Bigelow, and conditionally assigned to one Porter for the benefit of creditors.

The court below is supposed to have dismissed the bill for want of jurisdiction, on the ground that the controversy belonged exclusively to the Bankrupt Court in Wisconsin, as an incident to the proceedings in the bankruptcy of Burbank. It is not pretended that the court had not jurisdiction of the person of the defendants. Edmond B. Bigelow, the original defendant, was duly served with process in New Orleans, and put in an answer to the merits on the 1st of March, 1869. Thereupon an amended and supplemental bill was filed; and W. W. Bigelow, the alleged special assignee, and George W. McDougall, the assignee in bankruptcy, were made defendants, and duly appeared. W. W. Bigelow formally adopted the answer of Edmond B. Bigelow; and McDougall exhibited the proceedings in bankruptcy, and, having by order of the court been subrogated to the rights of Edmond B. Bigelow, filed a separate answer, adopting the defence set up by him. Subsequently he filed another answer, in which he claimed that the District Court of Wisconsin alone had jurisdiction of the case.

During the progress of the cause, on application of the complainant, a receiver was appointed by the court, who collected the amount due on the judgment referred to in the pleadings. The court, therefore, had possession of the subject-matter in controversy, as well as jurisdiction of the parties: so that the

only question remaining is, whether it had jurisdiction of the cause, or controversy.

Of this there does not seem to be the slightest doubt. What possible advantage could be gained by sending the parties to Wisconsin to litigate the questions raised in this suit we cannot perceive. A right of property is controverted. The complainant contends that the fruits of the judgment recovered by Bigelow, the bankrupt, against Edward W. Burbank, belong to the firm of which her husband was a partner. The bankrupt and his assignees deny this. It is a controversy, the determination of which is clearly embraced within the jurisdiction conferred upon the circuit courts by the second clause of sect. 2 of the original Bankrupt Act, now sect. 4979 of the Revised Statutes. We recently decided, in the case of *La-throp, Assignee, v. Drake et al.*, 91 U. S. 516, that this jurisdiction may be exercised by any circuit court having jurisdiction of the parties, and is not confined to the court of the district in which the decree of bankruptcy was made. Therefore the time when the bankruptcy occurred or when the assignment was made is totally immaterial. The court, under the Bankrupt Act, has jurisdiction of the cause as between the assignee in bankruptcy and the complainant, without reference to the citizenship of the parties. As between the other parties and the complainant, of course, citizenship is material. But no objection to the jurisdiction exists on that account in point of fact, as the residence of the parties is such as is required in order to give it. Therefore, though the suit had not been commenced until after the appointment of the assignee, and after the assignment to him, the complainant might still have instituted the suit in the Circuit Court in Louisiana, if process could have been served upon the defendants.

But, inasmuch as the parties were citizens of different States, she might have done this without the aid of the section referred to. We recently held, in the case of *Eyster v. Gaff et al.*, id. 521, that the Bankrupt Law has not deprived the State courts of jurisdiction over suits brought to decide rights of property between the bankrupt (or his assignee) and third persons; and, whenever the State courts have jurisdiction, the circuit courts of the United States have it, if the proper citizenship of the

parties exists. In the case last referred to, a suit to foreclose a mortgage was commenced before the mortgagor went into bankruptcy; but the decree was not rendered until after that event and the appointment of an assignee. We decided that the validity of the suit or of the decree was not affected by the intervening bankruptcy; that the assignee might or might not be made a party; and, whether he was or not, he was equally bound with any other party acquiring an interest *pendente lite*.

As no other ground was assigned affecting the jurisdiction, we are of opinion that the court had jurisdiction of the case, and ought to have decided it upon its merits.

*Decree reversed.*

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#### SMITH ET AL. v. VODGES, ASSIGNEE.

In order to defeat a settlement by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or those whose rights may and do supervene.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

*Mr. N. H. Sharpless* and *Mr. Richard C. McMurtrie* for the appellants.

*Mr. William A. Manderson* for the appellee.

MR. JUSTICE SWAYNE delivered the opinion of the court.

The law of this case is too well settled to admit of doubt. In order to defeat a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do supervene; the settler purposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable. *Sexton v. Wheaton*, 8 Wheat. 229; *Mullen v. Wilson*, 8 Wright, 413; *Stileman v. Ashdown*, 2 Atk. 481.