

tion of the act in the *New Orleans Case* cited above, and hold jurisdiction of actions by assignees, when the assignor was not competent to sue in this court only in cases of foreign bills of exchange and negotiable securities payable to bearer, and made by a corporation. In *Jerome v. Commissioners*, 18 Fed. Rep. 873, county warrants payable to a person named, or bearer, were regarded as of this class of securities. That case was decided under the act of 1875, but the opinion is of equal force under the act of 1887; and it is a full answer to the remarks of counsel and the authorities cited in support of the demurrer in the *Custer County Case*, except on the point, not before raised in this court, that an action cannot be maintained on a county warrant until after such reasonable time from its date, as may be evidence of a refusal to pay on the part of the county. In support of that position a recent decision of the supreme court in *Manufacturing Co. v. County of Otoe*, 8 Sup. Ct. Rep. 582, is cited, from which it appears that some rule of that kind is established in Nebraska. If any such rule obtains in this state, the demurrer in the *Custer County Case* does not call for its application. Some of the warrants are of long standing, and the demurrer is directed against them as well as those of more recent date. In the *Chaffee County Case* the warrants being payable to the order of a person named therein, and passing only by indorsement, in the absence of averment that the assignors were qualified to sue in this court we are without jurisdiction, and the demurrer will be sustained and the suit dismissed at plaintiff's cost. In the *Custer County Case* the warrants being payable to bearer, and made by a corporation, appear to be within the exception of the statute. In that case the demurrer will be overruled, and the defendant will be required to answer.

MISSOURI PAC. RY. CO. v. TEXAS & P. RY. CO. (CARTER, Intervenor.)

(Circuit Court, E. D. Louisiana. February 25, 1888.)

CARRIERS—OF PASSENGERS—CONTRIBUTORY NEGLIGENCE.

Where in an action for damages by one alleging that he had been jolted off a railroad train on which he was a passenger so as to strike a moving freight train and be thrown with his feet under the wheels of the freight train and thus received the injuries complained of, the evidence shows that claimant was injured in attempting without right to mount the freight train while in motion, he is not entitled to recover.

On Exceptions to Master's Report.

The intervenor sought to recover damages for injuries received by being run over by a freight train operated by the receivers of the defendant railroad. The master reported adversely on the claim and intervenor excepted.

E. D. Craig and *B. K. Miller*, for intervenor.

Howe & Prentiss, for receivers.

PARDEE, J. The finding of the master is adverse to the intervenor in several aspects of his case, and is very elaborate, and seems, as to facts, to be supported by the evidence, and, as to law, to be in accord with many adjudged cases. I have given the evidence careful examination and consideration, and my conclusion on one of the findings of fact of the master renders it unnecessary to review any of the authorities cited by the master or by the learned counsel in argument. The master finds that the intervenor was not injured in being jerked off the passenger train on which he was a passenger, but was injured in attempting, without right, to mount the freight train while in motion, and, of course, if this be true, intervenor was injured by his own negligence. That the intervenor was injured by the freight train is undisputed. At the time, between the passenger train and the freight train, there was an open interval of at least seven feet, and between the tracks on which the respective trains stood, the distance was eleven feet. That the intervenor was jerked or jolted off from the steps of the passenger car so as to strike the freight train with his hands, and be thrown backwards, with his feet on the main track under the wheels of the freight train, is sworn to by the intervenor only. No one saw it. It is controverted by the distance apart of the trains and the tracks rendering it extremely improbable, if not impossible; by his statements made to the section hands immediately after the injury to the effect that he was injured in attempting to climb on the freight train; and by the evidence tending to show that the intervenor went to Winchester to get work with a contractor; that he learned before leaving the passenger train that the contractor was not at Winchester, but further east; that he then expressed the determination to return to Donaldsonville, and that for the latter purpose, the moving freight train offered the convenient transportation. That the intervenor was injured while attempting to climb on the moving freight train is in harmony with all the evidence in the case, excepting only the intervenor's own testimony, and this excepted testimony is so opposed by the circumstances and surroundings of the case, and by the testimony of other witnesses that it cannot be taken as true.

The exceptions to the master's report will be overruled, and the said report confirmed.

UNITED STATES BUNG MANUF'G Co. v. ARMSTRONG.

(Circuit Court, S. D. Ohio, W. D. February 29, 1888.)

EQUITABLE SET-OFFS—INDEPENDENT DEBTS—WAIVER.

The voluntary payment by the maker of a promissory note, with a full knowledge of all the facts, operates as an abandonment and waiver of all right to set off cross-demands or independent debts, and a bill disclosing such facts presents no case for equitable relief by way of equitable set-off.

In Equity. On demurrer to bill.

The United States Bung Manufacturing Company, as maker, paid David Armstrong as receiver of the Fidelity National Bank a certain promissory note, and afterwards filed their bill in equity to secure right of offset. The defendants demurred to plaintiff's bill.

M. B. Hagans, for complainant.

E. W. Kittredge and *W. B. Burnet*, for respondent.

JACKSON, J. The demurrer to this bill is well taken, and must be sustained. The complainant's right of offset was waived or abandoned by its payment of the note described in the bill. That payment was made voluntarily, with full knowledge of all the facts. It was made by the maker of the note,—the party legally bound to pay. Such payment does not operate as an equitable assignment of the collecting bank's rights as against the Fidelity Bank or its receiver. If the complainant had intended to rely upon its debts against the Fidelity National Bank as a set-off against its note, it should have declined payment of the note, stood suit thereon, and set up its counter-claim as a set-off. This was not done, but it paid its note voluntarily, and now invokes the aid of this court to enforce what is called its "equitable right of set-off." The facts presented by the bill do not raise any such equitable right.

It is well settled that the mere existence of cross-demands or independent debts does not create any right to an equitable set-off. There must exist a mutual credit between the parties, founded at the time upon the existence of some debt, due by the crediting party to the other. "By mutual credit," says Story, Eq. Jur. § 1435, "in the sense in which the terms are here used, we are to understand a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on and trusting to such debt as a means of discharging it." Mutual credit means something different from mutual debts. Mutual credit, such as will give rise to an equitable set-off, applies only to that class of cases where there has been mutual trust or understanding that an existing debt should be discharged by a credit given upon the ground of such debt. The bill presents no such case. It discloses nothing more than the existence of cross-demands or independent debts, which could have been set off at law, if complainant had asserted its right to do so at the proper time, and in the proper mode. Having voluntarily waived or abandoned this legal right and remedy by paying the note to avoid