

## DENVER &amp; NEW ORLEANS R. CO. v. ATCHISON, T. &amp; S. F. R. CO.

(Circuit Court, D. Colorado. July, 1882.)

## 1. CONSTITUTION OF COLORADO, ART. 15, § 4—CONNECTING RAILROADS.

The meaning of the last clause of article 15, § 4, of the constitution of Colorado, which provides that "every railroad company shall have the right with its road \* \* \* to connect with \* \* \* any other railroad," is that such roads are to be connected physically, as distinguished from the business connection between roads which have approximate *termini*. It is a union of tracks admitting of the passage of cars from one road to the other, and not a mere meeting of roads which may admit of continuous traffic in some form. The evident object is the protection of the public, rather than simply to enable corporations to perform their agreement. By the union of tracks, it was intended to make the roads practically continuous for all that may come in the course of business between companies friendly to each other; that the companies are to be brought into harmony when they fail or refuse to agree in the due and proper exercise of their public functions as common carriers; and this court will not hold that a bill that alleges that complainant has connected its road with defendant's road, but that defendant refuses to grant complainant equal facilities in conducting business that it grants to a rival road, does not present a case calling for the consideration of a court of equity, and dismiss such bill on demurrer without first examining such facts as may be developed by proper evidence.

## 2. PRACTICE—EQUITY—PRELIMINARY INJUNCTION.

This court will not, however, grant a preliminary injunction in a case like the present, and the motion, therefore, must be denied.

## On Demurrer.

*Wells, Smith & Macon*, for plaintiff.

*Thatcher & Gast*, for defendant.

HALLETT, D. J. Article 15, § 4, of the constitution of Colorado reads as follows:

"All railroads shall be public highways, and all railroad companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any designated points within this state, and to connect at the state line with railroads of other states and territories. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad."

In this case discussion has arisen as to the meaning and effect of the last clause of the section which declares the right of a railroad company to connect its road with any other railroad in the state. Within the knowledge of all persons, there are several ways of operating railroads in connection. When the trains of different roads arrive at and depart from the same town, although from different depots, between which it may be necessary to transport passengers

and goods by wagon, we say that the roads connect at that place. In the early history of railroads in this country this method was usually pursued, and it is still extensively followed; but, as it involves a change of cars for passengers and goods at considerable expense, a more convenient method of proceeding was soon discovered by uniting the tracks and transferring the cars from one road to the other. In this way closer connections have been made between roads forming continuous lines, so that goods may be sent across the continent without breaking bulk, and passengers make long journeys without change of cars. Of the advantages of this method of operating railroads no doubt is entertained in any quarter. It saves time and money and labor, and serves the public much better than the old way. As before stated, however, the union of tracks and the passage of cars from one road to the other is not an essential element of connection, in the ordinary sense of the word, as applied to railroads. All roads which form continuous lines, and admit of continuous traffic over them in any form, are connected, even where there is no union of tracks or connection of trains.

Referring again to the constitutional provision, it is plain that the word "connect" is not used there in the largest sense, which it may have when applied to connecting railroads.

The language is, "Every railroad shall have the right with its road to \* \* \* connect with \* \* \* any other railroad." The roads are to be connected physically, as distinguished from the business connection always existing between roads which have approximate *termini*. It is a union of tracks admitting of the passage of cars from one road to the other, and not a mere meeting of roads which may admit of continuous traffic in some form. This was not denied at the bar, but it was said that defendant had fulfilled its constitutional obligation by permitting the tracks to be joined at Pueblo. In thus referring to and adopting the most intimate relation that can exist between railroads, what was the object of the framers of the constitution? On behalf of defendant it is contended that their object was to confer on railroad companies power and authority to unite their tracks as convenience or interest may demand, but no right whatever can accrue to either company from such union. The roads are to be firmly united, to await the time when the companies may agree in the use of them. In this view the constitutional convention was much concerned to confer a privilege which has always been enjoyed. No one has ever questioned the right of railroad companies to bring their tracks together in any way that may be acceptable to

them, and we should not assume that the framers of the constitution have studiously provided for what was never denied. It is true that in the preceding clause of the same section there is a grant of power to corporations organized for the purpose, to build roads and to connect with other roads at the boundary line of the state. But if it should be conceded that there is nothing in that clause which may be enforced against a corporation, the same may not be true of the succeeding clause. The regulations of the constitution respecting railroad corporations are, in general, limitations of the powers of those corporations for the protection of the public interests, and to facilitate the transportation business of the country. In the clause under consideration the right of a road to join on to another is declared, certainly, for the protection of the public rather than to enable corporations to perform their agreement. To say that it is an enabling act only, is to divest it of any useful purpose. It is more reasonable to believe that by the union of tracks it was intended to make the roads practically continuous for all that may come in the usual course of business between companies friendly to each other; that the companies are to be brought into harmony when they fail or refuse to agree in the due and proper exercise of their public function as common carriers. The law abhors a vain thing, and therefore it will not unite tracks upon which no car may pass from one to another, or erect a switch which must be left to rust in its socket forever. The constitution requiring that railroad tracks shall be connected, it follows necessarily that some use is to be made of the roads so united, and this we interpret to be such as is usual and customary with connecting lines throughout the country, and may be said to stand with the public convenience and a due regard for the rights of the corporations interested.

Complainant having built a road from Denver to Pueblo, in this state, has united its track with that of the Pueblo & Arkansas Valley Railroad at the place last named.

The Pueblo & Arkansas Valley Railroad is leased to defendant, and, with the defendant's road, it forms a continuous line from Pueblo to Kansas City, where connection is made with many roads traversing the country at large. It is averred that defendant, thus owning and operating a railroad from Kansas City to Pueblo, refuses to transact business with complainant; that it will not deliver to complainant, to be carried, goods and passengers received on its road and destined for points on complainant's road, or receive from complainant goods and passengers carried by complainant to Pueblo and

destined for points on defendant's road. That defendant transacts business freely with the Denver & Rio Grande Railway Company, a rival in business to complainant, which owns and operates a railroad from Denver to Pueblo and various other points, but refuses to complainant the same facilities for business in the country at large. Without going over the bill at length, we are satisfied that some portions of the relief therein asked may be allowed. But we are not called upon at present, nor would it be proper, without evidence of the facts, to define the relief to which a party may be entitled under the constitution. Probably complainant is entitled to deal with defendant on substantially the terms accorded by the defendant to the Denver & Rio Grande Railway Company, in so far as such terms agree with the general usage and practice of railroad companies operating continuous lines. What may be possible or practicable in that direction may be better seen and understood when we come to the evidence. While much of this bill is probably without the support of reason or principle, it is believed that other parts of it rest on the firmest foundation. Great, if not insurmountable, difficulties may be encountered in an effort to regulate passenger travel over roads in the management of companies hostile to each other, but in the carriage of goods the obstacle may not be so great. It seems reasonable to us that a consignor should be allowed to select the road over which his goods may be carried without consulting defendant, and there may be other matters in the bill which call for judicial control.

The demurrer will be overruled; McCrARY, C. J., concurring.

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(July 21, 1882.)

On Motion for Preliminary Injunction.

HALLETT, D. J. In this suit plaintiff seeks to establish a right to connect its road at Pueblo with another road operated by defendant, so that passengers and freight may be transferred from one road to the other in a continuous journey over both lines. It is not shown that plaintiff at any time has enjoyed this right, but it is averred that defendant has refused to recognize it; and therefore the aid of the court is asked.

The object is, not to preserve existing relations between the parties, but to compel defendant to adopt a new course of dealing with plaintiff, as prescribed by the constitution of the state. On demurrer to the bill we had occasion to consider the matters alleged, and

it was thought that on proof thereof the plaintiff would be entitled to some measure of relief. But it was not said that such relief could be given in a summary way by preliminary injunction. That proceeding is adopted to preserve the subject of controversy pending the suit, and it has no office to perform in this instance. If, by a course of dealing or by contract, these parties had established such business relations as are recognized by the constitution of the state, we could, perhaps, maintain the *status* by preliminary injunction during the controversy. That was the course pursued in several suits between express companies and railroad companies in this circuit, following the rule that equity will preserve existing rights until the end of the controversy. But nothing of that kind is presented in this suit. Nothing in the way of provisional and temporary relief is asked in the bill, and, if sought, it could not be allowed in that form. The ultimate rights of parties are to be determined upon issue and full hearing, and the controversy in this suit relates only to such rights.

The English cases referred to were upon a statute which I have not been able to find. That statute may give authority to proceed in a summary way, or the practice of the court may be different in that country. With us I think the rule is as I have stated, to use the provisional writ only to maintain the conditions existing at the commencement of the suit, leaving all other matters to be determined by final decree. 2 Story, Eq. Jur. § 861; 1 High, Inj. § 4.

The motion for injunction will not be entertained.

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### *In re* MURRAY and others, alleged Bankrupts.

(District Court, N. D. New York. 1882.)

#### 1. REFEREE'S FINDING OF FACT.

Upon a consideration of the evidence, *held*, that the finding of the referee that no partnership existed in this case would not be reversed.

#### 2. PARTNERSHIP—BANKRUPTCY—REMEDY IN STATE COURTS.

Even if by failing publicly to disclaim the printed statement that they were directors, and by allowing their neighbors to believe that they were in some manner interested in a bank, parties are estopped from denying their liability to those who trusted such bank, relying upon their supposed connection with it, an appeal to a court of bankruptcy is not proper; as to declare such parties bankrupt would render them liable not only to those actually deceived, but to all who had claims against such bank, whether they were deceived or not, and those who were actually deceived have a perfect remedy in the state court.

*J. B. Brooks*, for petitioning creditors.

*D. B. Hill*, for alleged bankrupts.

COXE, D. J. On the second day of September, 1873, a petition in bankruptcy was filed by which it was sought to have the respondents declared bankrupts, as copartners, doing business under the style and firm name of "The Waverly Bank." The respondents Hugh T. and George Herrick suffered default, the others interposed answers. The issues thus formed were referred to Register Fanton, to report the evidence with his opinion. After proceedings both numerous and complicated, during the progress of which a voluminous mass of testimony was taken, the referee on the tenth day of June, 1882, presented his report, which was adverse to the petitioners. Exceptions were filed, and the controversy is now before the court upon a motion to confirm the report.

The principal contention arises over a question of fact. Were the respondents copartners? The learned counsel for the petitioners conceded, on the argument, that the proof did not establish a partnership in fact. There were no written articles; there was no parol agreement; the necessary incidents of partnership were all absent; no money was advanced for firm purposes by the respondents, or any of them; they did not participate in the profits or share in the losses. *No partnership in fact existed.* But it is asserted that, by failing publicly to disclaim the statement that they were directors, and by allowing their neighbors to believe that they were in some manner interested in the bank, the respondents are estopped from denying their liability to those who trusted the bank, relying upon their supposed connection with it. The proof relied upon by the petitioners may be classed under two heads. *First*, admissions of the respondents; *second*, advertisements that they were directors not disavowed by them. It was proved that cards on which appeared the words, "The Waverly Bank," with the respondents named as directors, were circulated to a limited extent throughout the village. A large card making a similar announcement was hung in the window of the banking house. There was evidence tending to show that the respondents knew of these cards. All this is emphatically denied. Here, then, is a pure question of fact. The referee has carefully considered all the evidence, and, even if this were a doubtful case, I should not feel justified in disturbing his conclusions. He had numberless opportunities of judging of the character, intelligence, and credibility of the witnesses, which personal contact and acquaintance alone can give, and which a court sitting simply to review the written testimony can

never have. The court should be clearly satisfied that the referee was in error before assuming to reverse his findings on the facts. I am not so satisfied.

But there is another serious obstacle in the path of the petitioners. Assume the questions of fact to be found in their favor; assume that by reason of their negligent or disingenuous acts, the respondents are liable as partners to those who trusted the bank, believing them to be directors,—is an appeal to a court of bankruptcy the correct remedy? There were many other creditors who did *not* rely upon respondents, and who never heard of them as being identified with the bank in any way. Should the respondents be held liable to them? And yet, when once declared bankrupts on the ground that they were partners transacting business under the firm name of "The Waverly Bank," the door is opened to every provable debt. They must pay not only creditors of the bank who assert that they were misled, but also those who have no conceivable claim upon them. To illustrate: If A. falsely tells B. that he is a partner in the firm of C. & Co., and B. gives C. & Co. credit, relying upon A.'s representation, A. is most certainly liable to B., and as to *him* is estopped from denying the partnership. But C. & Co., have a hundred other creditors who never heard of A. or of his declarations. Is he liable to them also? Most certainly not. And yet, if on B.'s petition it is judicially established that A. is a member of the firm of C. & Co., and they as partners are adjudicated bankrupts, all the creditors of the firm stand in as favorable a position as B. They can all collect their demands of A. The bankrupt law was never intended to work such injustice. The partnership must be actual, not constructive.

If the petitioning creditors can succeed in establishing the alleged acts of omission or commission on the part of the respondents, their remedy is perfect in the state courts. The report of the referee should be confirmed.

Motion granted.

## BATE REFRIGERATING Co. v. GILLETT and others.

(Circuit Court, D. New Jersey. August 4, 1882.)

## 1. PATENTS FOR INVENTIONS—FOREIGN PATENT PREVIOUSLY GRANTED—REV. ST. § 4887.

Section 4887 of the Revised Statutes expressly requires the commissioner of patents, where a foreign patent has been issued for the same subject-matters, to limit the term of the domestic patent to the period of time that the foreign patent has to run; or if there be more than one, then to make it expire at the same time with the one having the shortest term; and the priority of such patent is to be determined, not by the dates of the applications for the foreign and domestic patents, but by the dates on which the letters patent were granted.

## 2. SAME—CANADIAN PATENT ACT.

Under sections 16 and 18 of the Canadian patent act, a patent takes effect not from its delivery to the patentee, but when it is signed, sealed, and registered.

## 3. SAME—EXTENSION OF FOREIGN PATENT.

An extension of the term of a foreign patent will not operate to extend the term of the domestic patent; such patent expires when the original foreign patent expires.

## 4. SAME—VALIDITY OF DOMESTIC PATENT.

Whether the United States patent is void *ab initio* in this case, because the term was not limited on its face to expire with that of the foreign patent, not decided.

## On Petition to Dissolve Injunction.

*Dickerson & Dickerson*, for complainant.

*George Harding and John R. Bennett*, for defendants.

NIXON, D. J. On the fourteenth of November, 1881, a decree was entered in the above case, sustaining the validity of complainant's letters patent, and ordering an account and an injunction against the defendants, restraining them from further infringement.

The defendants now file a petition setting forth that the letters patent, for the infringement of which the suit was brought, were the letters patent of the United States, numbered 197,314, granted to John J. Bate, of the city of Brooklyn, New York, on the twentieth of November, 1877, for the term of 17 years from that date, for "improvements in the process for preserving meats during transportation and storage;" that prior thereto, to-wit, on the ninth of January, 1877, letters patent of the dominion of Canada, No. 6,938, were granted to the said Bate for the same invention or discovery, for the term of five years from January 9, 1877; that the said term for the foreign patent expired on the ninth of January, 1882, by reason whereof the letters patent of the United States, No. 197,314, expired