

that an action of ejectment cannot be maintained by a party where the legal title is in somebody else. That general proposition is stated by him too strongly. The legal title may be subdivided into several estates. There may be a legal title which is a fee-simple; there may be a legal title which is an estate in remainder; there may be a legal title which is a lease, the leasehold interest being in the lessee, and the title of the fee in the lessor. Any of these is sufficient, if the party out of possession, to maintain an action of ejectment. The proposition is still stronger in most of these western states, where the language of the statute is that any party out of possession of real estate may bring an action to recover. But, conceding that in the United States courts a party can only recover on a legal title, as contradistinguished from an equitable title, I think that counsel for defendant in this case has not considered the fact that the plaintiff in this case, while he has a legal right of present possession, will have an equitable right to obtain the title from the railroad company when the money is all paid up. He has the legal right to the possession of that property if the vendor can give such a legal right, because the vendor has about \$200 of the purchase money, and has agreed that the plaintiff shall go into possession,—take possession of, cultivate, and build, I think, is the language; something to that effect,—which necessarily implies a right of possession.

Now, taking the title of the railroad company, and the right which it has conferred on its vendee to possession, there is in this plaintiff a strict legal right of possession in this property, which does not depend upon any equitable proceedings whatever. If the defendant has a better right to the possession, he can show it; but as the papers stand I am of opinion that the contract between the railroad company (which in this motion is conceded to have a legal title) with the plaintiff in this case, which gives him the right of possession of the property, is a legal contract, and conferred the legal right of possession.

The motion in this case is, therefore, overruled.

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## PITTSBURGH BESSEMER STEEL RAIL CO. v. HINCKLEY.

(Circuit Court, N. D. Illinois. 1883.)

### 1. CONTRACT TO SELL AND DELIVER STEEL RAILS—BREACH.

As, construing the contract, the breach of which is alleged in this case, in the light of the parol testimony, it appears that the giving of directions by defendant, as to how the steel rails which plaintiff was to deliver to him should be drilled, was a condition precedent to be performed by him before plaintiff could proceed with the proper execution of its contract, the neglect and final refusal of defendant to give such directions was of itself a breach of the contract, which excused plaintiff from the actual manufacture of the rails, and an actual tender of them to defendant, and for such breach of contract it is entitled to damages.

## 2. SAME—MEASURE OF DAMAGES—PROFIT.

The rule in awarding damages in such a case for a breach of contract is to make the plaintiff as nearly whole as he can be made in money damages; or, in other words, to leave him as nearly as possible as well off as he would have been if defendant had performed his contract; and he is entitled to recover the actual profit that he would have made had the contract been performed.

At Law.

*Jewett, Norton & Larned*, for plaintiff.

*Geo. W. Cotherin*, for defendant.

BLODGETT, J. This is an action to recover damages for the alleged breach by defendant of a contract made between himself and the plaintiff on the eighteenth day of February, 1882, whereby plaintiff sold to defendant 6,000 gross tons of first quality steel rails, to weigh 52 pounds to the yard, for which defendant agreed to pay plaintiff at the rate of \$58 per ton of 2,240 pounds, delivered free on board cars at Chicago, Illinois; 1,000 tons of which rails were to be delivered in May, 1880, and the balance delivered at the rate of 2,500 tons per month, after July 1, 1882. By the terms of the contract, the rails were to be drilled as directed by the defendant.

It appears from the proof in the case that the plaintiff notified the defendant in the forepart of the month of April that it would be ready to commence rolling, the week ending May 5th, the 1,000 tons of rails which were to be delivered in May, and requested him to forward drilling directions at once. This the defendant neglected to do, but requested the plaintiff to delay rolling the rails for the May delivery. Plaintiff did so delay to roll and deliver any rails in May, but during the month of May again urged the defendant to furnish drilling directions, in order that it might commence the performance of its contract; and from time to time, during the months of May, June, and July, defendant was repeatedly requested to furnish drilling directions, and repeatedly requested to take said rails, but declined to do so, and finally, in the latter part of the month of July, defendant absolutely refused to give drilling directions for the manufacture of said rails, and notified the plaintiffs that he could not and would not accept and pay for them. The proof also shows that immediately after the making of the contract between the plaintiff and defendant the plaintiff purchased the material out of which to manufacture the rails called for by the contract, and was, at all times up to the time of the absolute refusal of the defendant to accept said rails, ready and able to manufacture said rails and deliver the same according to the terms of the contract.

The contract, taken in connection with the parol testimony in the case, satisfies me that the drilling directions—that is, the directions where and how to drill the holes near the ends of the rail by which the fish-plates or splice-bars are bolted to the rails—was an important item in the manufacture of the rails, and that if the plaintiff had made the rails and drilled them without the directions of the defendant, he could legally have refused to accept them on that ground, as

it appears from the proof that drilling is now considered a part of the manufacture of the rails; that a steel rail is usually drilled by the manufacturer; and that the purchaser gives directions as to how it shall be done.

Read, therefore, in the light of the parol proof offered by the defendant at the trial, I think the giving of drilling directions by the defendant was a condition precedent to be performed by the defendant before plaintiff could proceed with the proper execution of its contract, and that the neglect and final refusal of the defendant to give drilling directions was, of itself, a breach of the contract on the part of the defendant which excused the plaintiff from the actual manufacture of the rails and the actual tender of them to the defendant. I think the testimony in the case fully justifies the conclusion that defendant's neglect and refusal to furnish drilling directions was for the mere purpose of delay, and that from early in the month of May defendant did not intend to fulfill this contract. Not only had there been a large decline in the price of steel rails upon the market, but the defendant had failed to make satisfactory financial arrangements to enable him to pay for the rails. For a time, therefore, he asked and obtained from the plaintiff a delay and postponement of the time of delivery; but, finally, when pressed by plaintiff to give the directions for drilling and to take the rails, he frankly told the agents of plaintiff that he could not pay for the rails, and would not receive them. This statement by defendant, that he would not perform the contract by accepting and paying for the rails, was also a breach of the contract by defendant, and entitled plaintiff to damages.

The only question in the case, therefore, as it seems to me, is what damage the plaintiff has sustained by reason of defendant's breach of this contract.

The rule in awarding damages in cases of this character for a breach of contract is to make the plaintiff as nearly whole as he can be made in money damages; or, in other words, as nearly as possible leave him as well off as he would have been if the defendant had performed his contract. Here was a manufacturing corporation, with expensive machinery and plant, and compelled, from the nature of its business, to invest large sums of money in iron ore, pig iron, spiegel, coke, and other material, and in labor, for the purpose of performing this contract. The proof shows that the plaintiff, on making this contract in good faith, purchased the material necessary to fulfill it. The proof as to the cost of these rails to plaintiff rests on the testimony of two witnesses,—H. P. Smith, the manager of plaintiff's mill, and Richard C. Hanna, secretary of the North Chicago Rolling Mill Company. Mr. Smith states that the cost of manufacturing the rails in question, at plaintiff's mill in Pittsburgh, was \$45.12 per ton, and that the freight on them to Chicago, where they were to be delivered to plaintiff, was three dollars per ton, making the total cost of manufacturing and delivering

the rails to defendant, under the terms of this contract, \$48.12 per ton; while Mr. Hanna states that it cost his company \$50 per ton to make such rails in Chicago, and that from information he had derived from his experience in the business plaintiff could make the steel rails called for by this contract in its mill at Pittsburgh, and deliver them in Chicago, at just about what it cost the North Chicago Rolling Mills Company to make them here. Mr. Hanna has no interest in the event of this suit, is not connected with either party, and I conclude that his testimony as to the cost of these rails here is the most reliable, and that it would, in fact, have cost the plaintiff \$50 per ton to have made these rails and delivered them to the defendant, in accordance with the terms of this contract. The proof also shows that steel rails declined rapidly from about the time this contract was made, so that during the months of August and September they were not worth as much by from \$10 to \$12 per ton as the contract called for. The proof, however, further shows that after the plaintiff was informed that defendant would not take and pay for the rails at the time called for by his contract, the plaintiff sold to a railroad company in Michigan 4,000 tons of steel rails, which were manufactured out of the material provided for the fulfillment of this contract with the defendant, for which plaintiff received \$54.60 per ton, delivered at a point on Lake Huron. These were 35-pound rails, and it cost the plaintiff \$49 per ton, as the proof shows, to manufacture them, and \$4 per ton to transport them, leaving a profit of \$1.60 per ton to plaintiff, and this profit should be deducted from the difference between the contract price with the defendant and the cost of making the rails under the defendant's contract; that is to say, the difference between the cost of the rails in Chicago to the plaintiff and the contract price is eight dollars per ton, which on the 6,000 would amount to \$48,000. From this should be deducted the profit of \$1.60 per ton on the 4,000 tons of rails sold in Michigan, amounting to \$6,400, leaving \$42,400 as the loss to which plaintiff has been subjected by this breach of defendant's contract; and it seems to me, in the light of well-settled authorities, that this should be and is the true measure of plaintiff's damages.

In the case of the *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 307, where the opinion was delivered by Mr. Justice CURTIS, it is said:

“But it by no means follows that profits are not to be allowed, understanding as we must the term ‘profits’ in this instruction as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustained, *propter rem ipsam non habitare*. In case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into his contract. For that, he spends his time, exerts his skill, uses his capital, and as-

sumes the risks which attend the enterprise; and to deprive him of it when the other party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Wherever profits are spoken of as not a subject-matter of damages, it will be found that something contingent upon future bargains or speculations or states of the markets are referred to, and not the difference between the agreed price of something contracted for, and its ascertainable value or cost. We hold it to be a clear rule that the gains or profit, of which the contractor was deprived by the refusal of the company to allow him to proceed with and complete his work, was a proper subject of damages."

And the same rule is announced in the late work of Sutherland, Dam. vol. 1, p. 117, where it is said:

"Where a party has attempted to perform labor from which a profit is to spring as a direct result of the work done at the contract price, and he is prevented from earning this profit by the refusal to act of another party, the loss of this profit is the direct and natural result which the law will assume to be the breach of the contract, and he is entitled to recover it, with proper damages; and this he will be entitled to establish by showing how much less than the contract price it will cost to do the work or perform the contract."

And the conclusion just stated by Mr. Sutherland is supported by the citation of numerous recent cases. And in *Masterton v. Mayor, etc., of the City of Brooklyn*, 7 Hill, 61, the same rule was adopted. So, too, in *U. S. v. Speed*, 8 Wall. 77, the court said, by Mr. Justice MILLER:

"And we do not believe that any safer rule, or one nearer to that supported by the general current of authority, can be found than that adopted by the court, to-wit: The difference between the cost of doing the work and what the claimant was to receive for it, making reasonable deduction for the loss of time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract."

The proof in this case abundantly shows that the plaintiff could not have manufactured its material into rails and sold those rails upon the market without sustaining a greater loss than the difference between the price called for by this contract and the cost of making the rails; in other words, if the plaintiff had manufactured the rails in pursuance of this contract, and, on defendant's refusal to receive them, had put them upon the market and sold them at the current market price, the loss to the plaintiff would have been greater than the amount of damages I have arrived at by the rule adopted.

There is, therefore, no allowance or deduction to be made in this case for a "release from the care, trouble, risk, and responsibility attending a full execution of the contract," because the plaintiff was obliged to go upon the general market to find a new customer for its goods, and sell them at a lower price than the difference between the cost of manufacturing and the contract price, instead of receiving the profit which the contract with the defendant entitled it to. The risk, care, and trouble, therefore, devolved upon plaintiff by reason

of the breach of the contract, rather than any which would have followed its performance.

I must, therefore, find the issues for the plaintiff, and assess the damages at \$42,400.

SCHREIBER and others, who sue as well for the United States as themselves, v. SHARPLESS.<sup>1</sup>

(District Court, E. D. Pennsylvania. April 17, 1883.)

1. ABATEMENT BY DEATH OF PARTY—PENALTIES AND FORFEITURES—COPYRIGHT.

An action for the penalty provided by act of congress (section 4965, Rev. St.) for infringement of a copyright, abates by the death of the defendant.

2. FEDERAL JURISDICTION—STATE LEGISLATION—SECTION 721, REV. ST.

Section 721, Rev. St., providing that "the laws of the several states, except where the constitution or treaties of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply," refers to cases where the federal courts obtain jurisdiction by reason of the *citizenship of parties*, and has no application to those cases in which the jurisdiction of the court arises out of the *cause of action*, and consequently involves rights over which the state legislature can exercise no authority, except in so far as the same may relate to the method of proceeding and practice.

Motion to Quash a Writ of *scire facias* against the legal representatives of the defendant, who died after issue joined, but before trial.

This was a *qui tam* action pursuant to section 4965, Rev. St., brought by Francis Schreiber and others, suing as well for the United States as for themselves, against Charles L. Sharpless, to recover the statutory penalty for the copying, printing, publishing, selling, and exposing for sale by the defendant of a photograph copyrighted by plaintiffs, and was for the same matter as the case of *Schreiber v. Sharpless*, 6 FED. REP. 175. After issue joined, but before the trial, the attorney for defendant suggested the death of defendant, and plaintiffs issued a *scire facias* against his executors, whereupon this motion to quash was made.

McKENNAN, C. J., was present and concurred in the following opinion.

H. P. Brown, Asst. Dist. Atty., and John K. Valentine, Dist. Atty., for the United States.

A. Sydney Biddle, for plaintiffs.

E. Hunn, Jr., for defendants.

BUTLER, J. The defendant having died, the plaintiff issued a *scire facias* to bring in his legal representatives. A motion to quash this writ raises the question before us. By agreement of parties, the question was heard before the circuit as well as the district judge.

<sup>1</sup>Reported by Albert B. Guilbert, Esq., of the Philadelphia bar.

That the cause of action terminated with the defendant's death, unless saved by statutory provision, is clear. That no such provision, in direct terms, is made by federal statute, is equally clear. An act of the state legislature preserves personal actions generally against abatement by death of parties, and the provisions of this statute are invoked by the plaintiff in support of his writ. That they are inapplicable, unless the federal legislature has provided otherwise, is also clear. It is urged, however, that such provision has been made; and in support of this position our attention was directed at the outset to the act of 1872 (section 914 of the Revised Statutes) relating to modes of proceeding and practice in civil causes, and to the provisions of the judiciary act of 1789, (Rev. St. §§ 721, 955.) It is now conceded, however, that the act of 1872 falls short of the case, and reliance is placed exclusively on the sections referred to of the act of 1789. The first of these sections reads as follows:

"Sec. 721. The laws of the several states, except where the constitution or treaties of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

That this section does not sustain the plaintiff seems quite plain. The laws of the state are made "rules of decision" in the federal courts, in cases where they apply. That is to say, in cases where the federal courts obtain jurisdiction by reason of the *citizenship of parties*, the statutes and customs of the state, which lawfully affect their rights, shall be regarded as rules of decision in passing upon such rights. The section can have no application to cases in which the jurisdiction of the court arises out of the *cause of action*, and consequently involves rights over which the state legislature can exercise no authority, except, of course, in so far as the section may relate to the method of proceeding and practice, and, in this respect, it is virtually superseded by the clause before referred to, of the act of 1872. Nor does the remaining section, 955, afford the plaintiff any better support. It reads as follows:

"When either of the parties, whether plaintiff, petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend such suit to final judgment."

This simply provides for bringing in the legal representatives, where a party dies pending suit, in cases wherein the "cause of action survives by law." The purpose of the section is to give effect in the federal court to state statutes, preserving causes of action cognizable in the state courts, and over which the state legislature may lawfully exercise authority,—causes of action of which the federal courts obtain concurrent jurisdiction, by reason of the citizenship of parties. In the case before us the cause of action, founded upon a federal statute, is beyond the reach of state legislation. The local law invoked has, therefore, no effect upon it; is consequently inop-

plicable and not within the terms of the section, 955, above cited. All the cases invoked are consistent with this view.

Our conclusion, therefore, is, that the right of action terminated with the death of the defendant. Were it held otherwise, for the reasons urged by counsel, there would be one rule of action in this respect governing suits by the United States for penalties for infractions of its copyright laws in one state, and another in other states, dependent upon local legislation respecting the survival of action.

*Vide U. S. v. Richardson*, 9 FED. REP. 804; *Sarony v. Burrow-Giles Lith. Co.*, *infra*.

### SARONY v. BURROW-GILES LITHOGRAPHIC CO.

(Circuit Court, S. D. New York. April Term, 1883.)

1. CONSTITUTIONALITY OF STATUTE—WHEN COURT WILL DECLARE VOID.

The court should hesitate long, and be convinced beyond a reasonable doubt, before pronouncing an act of congress invalid. The argument should amount almost to a demonstration. If doubt exists, the act should be sustained,—the presumption is in favor of its validity.

2. COPYRIGHT—REV. ST. § 4952—PHOTOGRAPHS AND NEGATIVES.

The act of congress (Rev. St. § 4952) granting copyright protection to photographs, and negatives thereof, is not so clearly unconstitutional as to authorize the court at *nisi prius* to declare it invalid.

3. SAME—INSERTING IN COPYRIGHT, NAME, AND DATE.

The object of inscribing upon copyright articles the word "copyright," with the year when the copyright was taken out, and the name of the party taking it out, (Laws 1874, c. 301,) is to give notice of the copyright to the public; to prevent a person from being punished who ignorantly and innocently reproduces the photograph without knowledge of the protecting copyright.

4. SAME—INITIAL OF CHRISTIAN NAME AND FULL SURNAME.

Inserting in such a notice the initial of the Christian name and the full surname is a sufficient compliance with the law; it does not violate the letter of the law, and accomplishes its object

This was an action at law for the violation of the plaintiff's copyright of a photograph of Oscar Wilde, which the defendant had copied by the process known as chromo-lithography. It was admitted on the trial that the plaintiff had taken all the steps required by law to secure the copyright except to insert his Christian name in the notice, and there was no dispute as to the number of copies printed by the defendant, the value thereof, or the number on hand. The notice of copyright on the plaintiff's photographs was as follows: "Copyright, 1882, by N. Sarony." A jury was waived, and the case was argued upon questions of law only, which appear in the opinion.

*Guernsey Sackett and A. T. Gurlitz*, for plaintiff.

*Stine & Calman and D. Calman*, for defendant.

COXE, J. This is an action to recover—pursuant to section 4965 of the Revised Statutes—for the infringement of a copyright of a pho-