

of two witnesses, to the effect that they used it or saw it used as a brand upon flour before it was adopted by Alexander H. Smith & Co. The testimony of the witness Potter fails to show the use of the word, in the instances to which he refers, prior to 1867, and is therefore valueless. The witness Reamey testifies that he used it for branding the flour of nine different firms as long ago as 1857. None of the persons for whom it was so used have been produced, although many of them were accessible. If Reamey's statement is correct it could have been readily corroborated. The failure to do so is significant. His statement is not supported by any extrinsic evidence, and is not deemed sufficiently reliable to defeat the complainant's right.

Upon the accounting to ascertain damages, the fact is not to be overlooked that, in the instances in which the trade-mark has been used by the defendant in connection with the names of other manufacturers than the complainant's, damages are measured by the extent to which the unlawful use of the word "Champion" has interfered with the sale of their flour. Their right to an injunction is not affected because the appropriation of their trade-mark has been a limited one, and it is not incumbent on them to show that it has been copied in every particular. It is sufficient if his trade-mark has been copied to an extent calculated to mislead purchasers, and cause the article to which it has been applied pass as their article. The cases *Gillott v. Esterbrook*, 48 N. Y. 374; *Newman v. Alvord*, 51 N. Y. 189; *Hier v. Abrahams*, 82 N. Y. 519; and *Walton v. Crowley*, 3 Blatchf. 440, are instructive upon this point.

A decree is ordered for complainant.

LAWLER v. BRETT and others.

(Circuit Court, S. D. Iowa, C. D. October 31, 1883.)

1. TAX SALE—ACTION TO SET ASIDE—PAYMENT OF TAXES—SECTION 897, IOWA CODE 1873.

In an action to set aside a tax sale, when a complainant fails to show that the taxes due on the property have been paid by him or his grantees, as required by section 897, Iowa Code 1873, he cannot recover.

2. SAME—TENDER EQUIVALENT TO PAYMENT.

A tender of the amount of a tax is equivalent to payment.

3. SAME—THE LAW DOES NOT REQUIRE AN IMPOSSIBLE THING.

Where the law requires that taxes shall be paid by a party before he can maintain an action to set aside a tax sale, but it is impossible for him to ascertain the amount of the taxes, he need not make payment or tender before bringing his action, as the law will not require an impossible thing.

4. SAME—CONDITION PRECEDENT—PERFORMANCE.

Where both a statute and the rule of law require the payment of taxes due as a condition precedent to an attack upon a tax title, and the record discloses that the amount due can be readily ascertained, an action to set aside a tax sale cannot be maintained without performance of the condition.

Bill in Equity to set aside certain tax sales and deeds, upon the ground that the sales were not made in accordance with law, and for the further reason that no sufficient expiration notices were given, as required by the statute.

Geo. E. Clarke, for complainant.

Wright, Cummins & Wright, for respondents.

McCARY, J. Section 897 of the Code of Iowa, (1873,) among other things, provides that, in all controversies and suits involving the title to real property claimed and held under a tax deed executed substantially as the statute requires, no person shall be permitted to question the title acquired by a treasurer's deed without first showing that "all taxes due upon the property have been paid by such person or the person under whom he claims title." The complainant has failed to make the showing required by this provision of the statute. It is not averred that he or the party under whom he claims has ever paid the taxes for which the property was confessedly liable, or any part of it. We are therefore required to determine whether he has placed himself in a position to question the respondents' title. Is he not seeking equity without doing equity? The complainant has attempted to relieve himself from the necessity of paying or tendering the amount of the delinquent taxes by certain averments of his bill. He avers that the tax deeds in question were void, and adds that "the plaintiff is entitled to redeem therefrom, but is unable to determine what sum is necessary therefor." And he prays "that the court ascertain and determine what amount, if anything, is due defendants for and on account of taxes paid on said real estate and necessary for the plaintiffs to pay in order to redeem therefrom, and plaintiffs hereby offers and tenders the same and consents that said sum, when ascertained, may be decreed a lien on said real estate respectively until so paid." Although the statute requires payment of the taxes a condition precedent to an attack upon the purchaser's title, I am of the opinion that a tender of the sum due is equivalent to payment. And I think it may also be admitted that, if for any reason the amount cannot be ascertained by the complainant, he may ask the court to ascertain and determine it, averring his readiness to pay when the amount is so ascertained. But in the present case no reason appears, either in the pleading or the proof, why the amount cannot be ascertained by the complainant and paid or tendered. It is sufficient to aver that complainant is unable to ascertain the amount due, without stating any facts showing such inability, and without offering any proof upon the subject.

It has been held, under statutes similar to the one under consideration, that it is a sufficient excuse for not paying or tendering the delinquent tax due to show that the land in controversy was sold in gross, with other land, for one consideration. *Phillips v. Sherman*, 61 Me. 548; *Miller v. Montague*, 32 La. Ann. 1290; *Weber v. Harris*, Id. 1309. In such case the complainant has no means of ascertaining

the amount to be paid or tendered by him, and the law will not require an impossible thing. But where nothing appears to show that the complainant could not ascertain the sum due, and, *a fortiori*, where the record shows that he might readily have ascertained it, I am of the opinion that he cannot recover; and such is the case here. The amount of the taxes delinquent upon the property here in controversy appears upon the tax records, and is shown in the evidence. The amount of the interest and penalty is easily ascertained by a simple calculation. The two tracts were sold separately, for the tax due upon each respectively, and there was no confusion or commingling of the taxes upon this property with that upon other parcels. The dates upon which to calculate the amount due is furnished by the record and the statute, and is definite and certain. The court is therefore obliged to find not only that there is no proof to support the allegation that complainant could not determine the sum to be tendered in redemption, but also that the proof abundantly shows the contrary.

It has been repeatedly held by the supreme court of the United States that a court of equity will not entertain a bill to enjoin a tax sale until the complainant has first paid or tendered any sum justly due on account of the taxes in controversy. *State Railroad Tax Cases*, 92 U. S. 617; *Nat. Bank v. Kimball*, 103 U. S. 732. In the former case the court, speaking through Mr. Justice MILLER, said:

"It is not sufficient to say in the bill that they (complainants) are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted."

It can scarcely be maintained that a less stringent rule should prevail in cases like the present, brought under a statute requiring payment of taxes due as a condition precedent to an attack upon the tax title.

It is clear, therefore, that the complainant cannot recover in the present case, whatever his rights might have been if he had complied with the statute, and it is therefore not necessary to consider the other questions discussed by counsel.

As, however, the complainants may still be in time to make a tender and bring a new suit, he will be allowed to dismiss his bill without prejudice, and at his own costs.

HEUSSER v. CONTINENTAL LIFE INS. Co.

(Circuit Court, D. Connecticut. May 12, 1884.)

1. LIABILITY OF LIFE INSURANCE CORPORATION FOR DIVIDENDS.

Where annual dividends are declared by a life insurance company, in accordance with an established rule, and the acts of the officers show that they are payable on certain classes of policies, a subsequent attempt on its part to limit the meaning of the vote, and make it at variance with the contemporaneous written rules and the acts of the company, is vain, the attempt being evidenced by the erasure of the dividend indorsement from the premium notes, and the company will be liable for the amount of the dividends so erased.

2. POLICIES INCLUDED UNDER TERM "RENEWED."

The office of a renewal of a life insurance is to prevent discontinuance or forfeiture; and the word "renewed," in the vote of the directors of an insurance company granting dividends upon certain policies answering this description, includes participating, limited-payment policies, which have been prevented from forfeiture prior to the passage of the dividend.

At Law.

Charles J. Cole, for plaintiff.

Charles E. Perkins, for defendant.

SHIPMAN, J. This is an action at law, which was tried by the court, the parties having, by a duly-signed written stipulation, waived a trial by jury. The facts which are found to have been proved, and to be true, are the following:

On April 4, 1867, in consideration, among other things, of the annual premium of \$386.90 in hand paid and to be paid to the defendant by Susan Heusser, the wife of the plaintiff, on or before the fourth day of April in each and every year during the term of 15 years, the defendant, a life-insurance company duly incorporated and located in Hartford, Connecticut, made its policy of insurance in writing, and thereby assured the life of the plaintiff, now of Syracuse, New York, in the amount of \$5,000. In and by said policy of insurance, it was agreed that if, after the receipt by said company of not less than two annual premiums, default should be made in the payment of any subsequent premium, said policy should then be binding on said company for as many fifteenth parts of the sum originally insured as there should have been complete annual premiums paid, without subjecting the assured to any subsequent charge, and that if the plaintiff should survive until April 4, 1882, the amount insured should be paid to him, deducting therefrom all his indebtedness to the company, if any, then existing. Five consecutive annual premiums were paid by Susan Heusser to the defendant upon said policy. Said payments of premium ceased on April 4, 1871. On April 4, 1882, Henry Heusser was and still is living. One-half of each annual premium was paid in cash, and one-half was paid by note of Henry Heusser, the interest being paid in advance. On April 4, 1882, the defendant held and still holds four of said notes, each for \$193.45, and dated on April 4th, in the years 1867, 1868, 1869, and 1870, respectively, each payable 12 months after date to the order of the defendant, with interest, and each having been given for one-half of the premiums which were payable at the respective dates of said notes. On the first note the following indorsement had been made, dated April 4, 1872: "Received on the within note one hundred and thirty-five 75-100 dollars, dividend." On the second note the same indorsement had been made, dated April 4, 1873. On the third note the following indorsement had been made, dated April 4, 1874: "Received on the within note thirty 20-100 dol-