

*Railway Co.*, 43 Ohio St. 571, 3 N. E. Rep. 907. And the remedies afforded by the act of congress for such practices are cumulative, and not exclusive of the remedies existing at common law. The act declares that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." The law would have been the same independently of this provision. The rule is that when a statute gives a remedy in the affirmative, (without a negative express or implied,) for a matter which was actionable at common law, this does not take away the common-law remedy, but the party may still sue at common law as well as upon the statute. Potter, Dwar. St. 275, note 5. It is highly probable that in the progress of the case it will be found that, as to some of the plaintiff's causes of action, the statute is in some respects more favorable to the plaintiff than the common law. And the learned counsel for the plaintiff enter no disclaimer of their intention to avail themselves of these statutory advantages on the trial of the cause. But if the plaintiff's case was based, in terms, on the common law alone, that fact would not affect the question of removal. The plaintiff may be content to rest his case on the common-law liability of common carriers, but he cannot thereby deprive the defendant, as a carrier of interstate commerce, of any defense it has under the act of congress, which covers the ground of the common law, and much more. It is enough that there is a federal question in the case, whether it is relied on by the plaintiff or the defendant. A case arises under a law of the United States whenever that law is the basis of the right or privilege, or claim or protection, or defense, of the party, in whole or in part, by whom it is set up. *Tennessee v. Davis*, 100 U. S. 257. The motion to remand is overruled.

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BABBOTT *v.* TEWKSBURY.

(Circuit Court, S. D. New York. March 23, 1891.)

EQUITY JURISDICTION—REMEDY AT LAW.

A suit in equity for discovery and accounting will not lie upon a contract to pay complainant commissions on certain sales the amounts of which are unknown to the complainant, since he has a plain, adequate, and complete remedy at law.

In Equity.

A. Dutcher, for complainant.

S. S. Perry, for defendant.

LACOMBE, Circuit Judge. This action is brought upon an alleged oral agreement by which the defendant agreed to pay the complainant (provided complainant would introduce defendant to the person or persons who owned and controlled certain patents) a commission of 5 per cent. on the capital stock of any companies defendant might form, or cause to be formed, for the use of said patents; and, in case of the sale of said patents for any territory by defendant, 5 per cent. of the amount of such sales. The complainant further alleges that he did introduce defendant

to the persons who controlled said patents; that through them, and by means of such introduction, defendant purchased and obtained the right to use said patents, and in part sold the same, realizing therefor a large amount of money, (the precise amount of which is unknown,) and also caused to be organized a corporation for the use of said patents, with a capital stock of \$250,000. The complainant demands his 5 per cent. upon these sums, and, averring that he has asked for an account which has been refused, prays for discovery and for relief. The defendant has demurred, and the demurrer must be sustained. The complainant has a plain, adequate, and complete remedy at law, and therefore, under section 723, Rev. St. U. S., suit in equity cannot be sustained. Upon proof of his contract, and of the sale of the patent and the organization of the company, he can at law recover the full amount of his claim. Such proof can be secured without the aid of a court of equity. If the defendant is within the hundred-mile limit, he can be subpoenaed as a witness, and required by a *duces tecum* to produce his books and papers; if he is beyond that limit, his testimony may in like manner be taken under section 863, Id. All the facts within his knowledge may be thus proved as fully as they could be on an accounting. Moreover, under section 724, Id., he may be required to produce books or writings in his possession which contain evidence pertinent to the issue.

Demurrer sustained.

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HAT-SWEAT MANUF'G Co. v. WARING *et al.*

(Circuit Court, S. D. New York. March 31, 1891.)

DISMISSAL OF BILL—ANSWER FILED.

A complainant is not entitled as of right to dismiss his bill after the answer is filed, setting up that the license to use a patent upon which the suit is brought is fraudulent and void, and showing that defendant is entitled to a decree for its cancellation.

In Equity.

*John R. Bennett*, for complainant.

*Wetmore & Jenner*, for defendants.

LACOMBE, Circuit Judge. Should the defense set up by the defendants be made out by the proof, they would be entitled to a decree not simply denying complainant's right to money damages, or an accounting, but also declaring the license upon which the suit is brought to be fraudulent and void, and directing its cancellation. The complainant is therefore, under the authorities, not entitled as of right to dismiss its own bill at this stage of the case. *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. Rep. 602; *Stevens v. Railroads*, 4 Fed. Rep. 97. Nor, under all the circumstances, should it be allowed to do so. If complainant suffers default, defendants may take a decree dismissing the complaint, declaring the license void, and directing its cancellation; but such decree will, of course, show upon its face that it was entered upon