

counsel to insist that the charges are not sufficiently specific. If they are true, the complainant has not received its full share of the joint earnings. Even if the books appear to have been properly kept, (and it is not disputed that the defendant kept books of account,) and the complainant received its full share of the joint earnings thus shown, it has the right to establish by competent evidence, if there be such, that the books are not correct, and that the defendant took credit for more money than it expended or was entitled to retain. It was stated at the argument that the complainant would be satisfied with a reference covering the six months prior to the termination of the agreement, and, if unable to establish its charges for that time, it would not ask a reference covering any of the preceding periods. An order will therefore be entered referring the case to Mr. Henry W. Bishop, one of the masters, to take testimony, and report to the court whether, during the months of April, May, June, July, August, September, October, and November, 1890, without the knowledge or consent of the complainant, the defendant deducted from the gross earnings amounts in excess of actual expenses, or in excess of what it was entitled to deduct and retain under the agreement; and, if it did, that the account between the parties be stated, showing the balance due from one to the other for said months.

SOUTHERN PINE FIBRE Co. v. NORTH AUGUSTA LAND Co.

(Circuit Court, D. South Carolina. April 12, 1892.)

SPECIFIC PERFORMANCE—WHEN MAINTAINABLE—CERTAINTY OF AGREEMENT.

A letter from a land company to a manufacturing company promising that, if they will locate a factory upon their property, they will donate to them a certain amount of land, and will promptly build or cause to be built to it a side track, sets forth the agreement in terms sufficiently certain to support a bill for specific performance.

In Equity. Bill by the Southern Pine Fibre Company against the North Augusta Land Company for the specific performance of a contract. Heard on demurrer to the complaint. Demurrer overruled.

Fleming & Alexander, for complainant.

Jackson & Olive, for defendant.

SMYTON, District Judge. The case comes up on bill and demurrers. The bill seeks specific performance of a contract. The defendant, owner of a tract of land on or near the Savannah river, opposite the city of Augusta, offered inducements to the plaintiff to erect and put in operation a factory on said land. The bill sets out certain negotiations between the parties, which resulted in a letter by the president of the defendant company to the president of the complainant company in these words:

"NEW YORK, June 20th, 1891.

"*J. B. N. Berry, Pres't. Southern Pine Fibre Company*—DEAR SIR: The North Augusta Land Company will donate to your company 3 acres of land,

to be selected by it on its property opposite the city of Augusta, and will promptly build or cause to be built to the land so donated a side track, and when your factory is completed and machinery in successful operation, will buy from you (\$2,500) twenty-five hundred dollars' worth of your treasury stock at its par value, payable in cash when your factory is in successful operation as aforesaid.

Yours, truly,

"PAT CALHOUN, Pres't.

"The above is conditioned upon your beginning work at once.

"P. C."

The three acres of land have been donated, and the deed executed and delivered. The factory has been erected and equipped with valuable and costly machinery. The specific performance of that part of the contract is sought which provides that defendant "will promptly build or cause to be built to the land so donated a side track."

Defendant demurs on several grounds, which may be summed up as follows: That there is no equity in the bill; that, the letter being the only contract in writing, no parol evidence of pre-existing negotiations can be admitted, and that all allegations of such negotiations have no place in the bill; that the terms of this letter are vague and uncertain; that it is not alleged what interest complainant will have in the side track when completed, nor how it is to be completed, nor that defendant has the right, power, or authority to complete it; that the damages alleged are remote and consequential; that complainant has an adequate and complete remedy at law.

We now hear the case on demurrer. For the purposes of this decision we confine ourselves to the letter above quoted, without prejudice of the questions arising under the statute of frauds. In that letter the contract distinctly provides for a side track to be built to the land so donated promptly. The term "side track" has a well-known signification. It means connection with some railroad, affording communication with market. Its value to a factory in operation is self-evident. Its absence would cause great injury to the factory, not only increasing expense upon every article needed for or turned out of the factory, but perhaps operating, in this age of competition, fatal results to its business. There is no want of sufficient certainty in the terms of the agreement, and there is sufficient evidence of continuing and increasing damage which cannot be compensated except by a succession of verdicts. Why the side track was not built does not appear. The court will not assume a want of *bona fides* in a contract. On the contrary, the presumption is that when parties contract they honestly believe that they can carry out the promises they have made. For the present we must assume that when the defendant contracted to build the side track it was able to do so. If this hope has been disappointed, and such circumstances exist as make it impossible, these must appear on a full hearing. The demurrers are overruled, with leave to defendant to answer over.

UNITED STATES v. WESTERN UNION TEL. Co. et al.

(Circuit Court, D. Nebraska. March 30, 1892.)

1. RAILWAY AND TELEGRAPH COMPANIES—GOVERNMENT AID—ALIENATION OF FRANCHISE.

Under the general rule that the grant of a franchise of a public nature is personal to the grantee, and cannot be alienated without the consent of the government, the privilege granted to the Union Pacific Railway Company by the acts of 1863 and 1864 of constructing and operating a telegraph line along its right of way, for public and commercial uses; carried with it a corresponding obligation on the part of the company to itself operate such line, and it had no authority to transfer the franchise to any other corporation.

2. SAME.

Nor could such authority be inferred from section 19 of the act of 1863, which authorized the company, in discharge of its obligation, in the first instance to make an arrangement with the companies owning the then existing telegraph line between San Francisco and the Missouri river, whereby that line might be removed and placed upon the railroad right of way, the company having failed to make such an arrangement, and having accepted the whole franchise by constructing a new line of its own.

3. SAME—CONSOLIDATION OF COMPANIES.

Act Cong. July 2, 1864, providing "for increased facilities of telegraphic communication," and commonly known as the "Idaho Act," granted to the United States Telegraph Company, a New York corporation, a right to construct a line from the Missouri river to the Pacific, and also authorized the railroad companies to make an arrangement with this company for the construction of its line, like that authorized by section 19 of the act of 1863. Under this act part of the line was constructed in conjunction with the Kansas Pacific Company; and then the United States Telegraph Company consolidated with the Western Union Telegraph Company, and the line was finished under an arrangement between the latter company and the railroad. *Held*, that this franchise was granted for the purpose of constructing an independent line, and, although the consolidation was authorized by the laws of New York, the Western Union Company did not thereby obtain any right to acquire the telegraphic franchises granted by the Union Pacific acts.

4. SAME—REGULATION BY GOVERNMENT.

In view of the fact that the telegraphic franchises granted by the Union Pacific acts were inalienable by the grantees, and also of the express reservation therein of the right to "add to, alter, amend, or repeal," congress had full power to pass the act of August 7, 1888, directing the railroad and telegraph companies which received government aid to henceforth operate their telegraph lines by themselves alone, and through their own officers and employees.

5. SAME—CONSTRUCTION ACT.

In a proceeding instituted by the United States to annul a contract whereby the telegraphic franchises of the Union Pacific Railway Company were transferred to the Western Union Telegraph Company, the intention and power of congress to prevent such transfer being clear, the court cannot consider any arguments based upon the alleged fact that the contract is beneficial to the pecuniary interests of both the railway company and the public.

6. SAME—JURISDICTION OF COURTS.

The government, being the creator of the Union Pacific Railway Company, and a large contributor to its finances, and having a pecuniary interest in its successful management, has full supervisory power over it, and may make and enforce through the courts reasonable regulations not interfering with vested rights.

7. SAME—EQUITY JURISDICTION.

Although the main purpose of the act of 1888 is to compel the railroad companies to exercise their telegraphic franchises directly by their own officers and employees, yet, in enforcing this requirement as against the Union Pacific Company, the government may properly proceed by a bill in equity instead of by *mandamus*, since the Western Union Telegraph Company has acquired property along the right of way, and its interests therein can only be properly defined and protected by the flexible procedure of a court of equity.

In Equity. Bill by the United States against the Western Union Telegraph Company and the Union Pacific Railway Company to cancel a contract, whereby the telegraphic franchises of the railroad company