

been using the machine in question for covering boxes with two strips simultaneously. For reasons already stated, Metcalf must be charged with the acts of the partnership, so far as his obligations under the contract are concerned, but no account can be taken of profits as against him, in the absence of his copartners as defendants in this suit.

In *Magic Ruffle Co. v. Elm City Co.*, supra, Judge Shipman ordered an account of profits; but in the case at bar the complainant has not proven specific facts sufficient to show that any of the respondents have made any profits on account of the features complained of in the machines which they sell; and, while it is very probable that unrestricted sale would eventually seriously impair the trade of the complainant, which fact is the basis of jurisdiction in this case, yet the proofs also lack specific evidence of actual damage already suffered. On the whole I do not find enough in the record to justify ordering an account or making a reference for the purpose of assessing damages.

Let there be a decree dismissing the bill as against Crosman and the Lynn Box Machine Company, with costs, but for the complainant, against the remaining respondents, for an injunction, with costs, and, further, against Metcalf from continuing in the partnership of Frank & Duston, so long as they are using the machines complained of; the terms of the decree to be settled in accordance with this opinion.

AMERICAN BOX MACH. CO. v. CROSMAN et al.

(Circuit Court, D. Massachusetts. October 6, 1893.)

No. 2,758.

COSTS—TAXATION—EQUITY.

Where a bill is sustained with costs against certain respondents, and dismissed with costs as against others, the latter are entitled, not only to have taxed the items special to their defense, but also to have apportioned in their favor the items which were of a joint character.

In Equity. Bill for specific performance of a contract. Appeal from the clerk's taxation of costs. Appeal allowed subject to correction.

W. A. Jenner, for complainant.

T. W. Clarke, for defendants.

PUTNAM, Circuit Judge. This is an appeal by respondents, Crosman and the Lynn Box Machine Company, from the clerk's taxation of costs. In this case the bill was sustained with costs against certain respondents, and dismissed as against the respondents above named, with costs in their favor. 57 Fed. Rep. 1021. The clerk's taxation gives complainant its entire costs without apportionment, disallowing only items which relate exclusively to the above-named respondents, and allows the latter such items as the clerk held to be special to their defense, but no portion of certain items which were of a joint character.

Theoretically; it would be correct to allow each party full costs, as was done in admiralty in *Simpson v. Caulkins*, Abb. Adm. 539; but the rule seemingly recognized in equity, as well as at law, appears to be that of an apportionment of all items not in their nature severable. This, however, if accepted, ought to be an apportionment of the entire case on each side, and not partial, limited to the costs of any one or more of the respondents. The rule may be found practically worked out in *Heighington v. Grant*, 1 Beav. 230, and in other cases cited in 1 Seton, Decrees, (4th Ed.) p. 129. Without, therefore, undertaking to decide which general rule of taxation is the proper one in equity, it is clear that the above-named respondents are at least entitled to have apportioned in their favor the joint items with reference to which they have appealed, and their appeal is allowed, proportions, nevertheless, to be corrected. As no appeal was taken by complainant, its objections to the allowance by the clerk of the whole of certain items, instead of a proportion, on the ground that all respondents united in their defense, need not be considered at length; but the rule seems to be that the judgment of the court dismissing the bill as to some operated as a severance.

Appeal allowed subject to correction of proportions

THOMPSON v. SEARCY COUNTY.

SEARCY COUNTY v. THOMPSON.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

Nos. 245, 264.

1. COUNTIES—CONTRACTS—VALIDITY—EXCESSIVE PRICE—DAMAGES.

In a suit on county warrants issued pursuant to the orders of the county court, in compliance with the provisions of a valid contract for the erection of a courthouse, and for the precise amount which the county had agreed to pay, the county, in the absence of fraud in obtaining the contract, and of proof that the work was not done in compliance with the specifications, is not entitled to a deduction from the contract price, or to insist that the damages be assessed as upon a quantum meruit, merely because the courthouse when completed was worth only one-third of the contract price. *Shirk v. Pulaski Co.*, 4 Dill. 209, 211, distinguished.

2. SAME—EXCEEDING APPROPRIATION—ARKANSAS STATUTE.

Under Mansf. Dig. Ark. § 1451, providing that no agent of any county shall make any contract on behalf of the county unless an appropriation has been previously made therefor, and is wholly or in part unexpended, a contract for the erection of a county courthouse for an agreed price of \$29,000 is binding upon the county although only \$2,200 had been previously appropriated therefor. *Hardware Co. v. Erb*, 17 S. W. Rep. 7, 54 Ark. 645, followed; *Worthen v. Roots*, 34 Ark. 356, distinguished.

3. SAME—ACTIONS ON COUNTY WARRANTS.

County warrants issued to pay for public works in Arkansas are not negotiable instruments, in the full sense of the law merchant, but are mere prima facie evidences of a valid claim, and the statute of limitations begins to run against them upon delivery. A suit can therefore be maintained on such warrants, whether an appropriation adequate to