

PER CURIAM. The motion to amend the form of mandate in this case by inserting a clause to the effect that the same is "without prejudice" to an application to the circuit court for a further suspension of the injunction is denied. The affirmance in this court of a preliminary order or an interlocutory decree granting an injunction does not operate to deprive the circuit court of the power, inherent in it, temporarily to suspend such injunction, upon sufficient cause shown, after proper notice, whenever the ends of justice call for the exercise of such power.

HORST et al. v. MERKLEY et al.

(Circuit Court, N. D. California. January 17, 1894.)

No. 11,605.

CIRCUIT COURTS—JURISDICTIONAL AMOUNT—REAL CONTROVERSY.

When it appears from the plaintiff's own testimony that one of the causes of action pleaded never had any existence, and the remaining matters are not of sufficient value to support the jurisdiction, the case must be dismissed.

At Law. Action by Paul R. G. Horst and others against R. J. Merkley and others. Dismissed for want of jurisdiction.

Boyd, Fifield & Hoburg, for plaintiffs.

Robert T. Devlin, for defendants.

GILBERT, Circuit Judge. The plaintiffs bring an action against the defendants for the recovery of moneys advanced, and for damages sustained by reason of the breach of a contract. On the trial the question arises whether or not the matter in dispute is sufficient to bring the case within the jurisdiction of the court. It is alleged in the complaint that the plaintiffs and the defendants entered into a contract whereby the latter were to sell and deliver to the former 24,000 pounds of hops growing upon certain premises, the same to be delivered between August 15 and October 1, 1891, for which the plaintiffs were to pay defendants 17 cents per pound; that under said contract the plaintiffs made advances of money to the defendants, and the defendants delivered to plaintiffs on August 21, 1891, 10,046 pounds of the hops, leaving a balance due the plaintiffs on said advances in the sum of \$775.73; and that the defendants refused to deliver the remainder of the said hops under the contract, to the plaintiffs' damage in the sum of \$1,500; and for both said sums demand is made for judgment. The defendants admit the claim for advances, but deny that they failed to perform the contract, and deny the plaintiffs' claim for damages, and for counterclaim demand damages of \$1,000 against the plaintiffs, alleging that the plaintiffs refused to receive the hops under the contract.

The only evidence offered on the trial concerning the breach of contract alleged in the complaint was that of one of the plaintiffs. He testified that in the latter part of February, 1892, some four or

five months subsequent to the date at which the hops were to have been delivered under the contract, the price of hops rose to such a figure that the excess of the market price at that time over the price contracted for, on the undelivered hops, would have amounted to the gross sum of \$1,500. He admitted, however, that at the time when the hops were to have been delivered, and for some time thereafter, the market price of hops, such as those contracted for, was considerably below the contract price, and that during September and October, 1891, he could readily have bought hops equal in quality and value to those contracted for at 14 or 15 cents per pound. The evidence in the case shows, moreover, that the plaintiffs, at and before the time fixed for the delivery, were contriving to avoid their obligation to receive the remainder of the hops, and that they finally refused to accept the same, alleging as their reasons therefor that no written notice of the time of delivery had been given them, as required by the terms of the contract, and that the delivery, when made, was made after business hours on the last day of the period limited in the contract. At the close of the evidence the plaintiffs waived their claim of damages.

From the plaintiffs' own testimony, it is evident that there was not only no damage to them from the failure—if failure there were—of the defendants to comply with the contract, but that they derived a benefit therefrom. The plaintiffs' claim of damages is therefore clearly fictitious. This is not a case of failure of proof, or of the waiver of a portion of a demand which had been really in dispute. It is a case where the plaintiffs' statement of the facts—the facts upon which the claim of damages was formulated in the complaint—conclusively proves that the cause of action never existed. It is the duty of the court, of its own motion, to dismiss a case, whenever it shall be made to appear that the facts upon which its jurisdiction depends do not exist. Had the facts which the plaintiff now testifies to been specially declared upon, in the complaint, a demurrer to the complaint for want of jurisdiction would have been sustained. Instead of appearing upon the pleadings, the facts are disclosed upon the trial, through the plaintiffs' own admission in open court. The result is necessarily the same.

In an action of tort, it is true the plaintiff may allege his damage in such sum as he may deem proper, and the jurisdiction will be sustained, notwithstanding the fact that a jury may assess the damages at a sum far below the jurisdictional amount. *Gordon v. Longest*, 16 Pet. 97; *Hynes v. Briggs*, 41 Fed. 468. But if it appear from the plaintiff's own testimony, or that of his witnesses, that a verdict for damages in \$2,000 would be so clearly excessive as to require the court to set it aside, the case will be dismissed for want of jurisdiction. *Maxwell v. Railroad Co.*, 34 Fed. 286; *Lee v. Watson*, 1 Wall. 337; *Hilton v. Dickinson*, 108 U. S. 174, 2 Sup. Ct. 424; *Bowman v. Railway Co.*, 115 U. S. 611, 6 Sup. Ct. 192. In *Hilton v. Dickinson*, *supra*, it was said by the court:

"It is undoubtedly true that, until it is in some way shown by the record that the sum demanded is not the sum in dispute, that sum will govern, in all questions of jurisdiction; but it is equally true that, when it is shown

that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail."

In this case the plaintiffs' demand for \$775.73 advances is admitted by the defendants, and the only matter in dispute is the defendants' counterclaim of \$1,000. The cause must therefore be dismissed for want of jurisdiction.

DE CHAMBRUN v. SCHERMERHORN.

(Circuit Court, S. D. New York. January 11, 1894.)

1. TRUSTS—AGREEMENT ABSOLUTE IN TERMS—EVIDENCE.

By a contract between parties in confidential relations, similar to, if not technically, those of attorney and client, one of them, interested in certain litigations, agreed, in consideration of services rendered therein by the other, to pay him a certain sum, which was made a lien on the promisor's interest in the litigation. His interest therein did not exceed the sum named, and the services mentioned were apparently compensated by previous payments and a monthly salary. That the promisor had an interest in the contract was indicated by the subsequent relations of the parties and statements by the other party, who also admitted, after the promisor's death, that he, if alive, would have testified to a trust in his own favor; and there was evidence that he believed in the existence of such a trust. *Held*, that this established a trust as to the balance after payment of the value of the services rendered.

2. SAME—FRAUD AS TO THIRD PARTIES—EQUITY.

In view of the relations between the parties, equitable relief should not be refused in such case because the contract was given to prevent third parties from reaching the fund by means of inequitable contracts previously given to them, for which inadequate consideration had been rendered.

3. RES JUDICATA.

A decree of a state court is not a bar to a suit in a federal court on a question which, although it might possibly have been litigated in the state court if properly pleaded, was in fact neither pleaded nor litigated.

In Equity. Suit by Pierre De Chambrun, as administrator of Charles A. De Chambrun, against George J. Schermerhorn, to establish and enforce a trust. Decree for complainant.

Everett P. Wheeler and Wyllys Hodges, for complainant.

Louis Marshall, George C. Lay, and Arthur H. Masten, for defendant.

COXE, District Judge. The complainant asks for a decree declaring that a contract, in the nature of a mortgage, for \$30,000 made by his intestate, Charles A. De Chambrun, and delivered to the defendant, was in fact made for the benefit of De Chambrun and was held in trust for him by the defendant. This contract grew out of the so-called "Jumel litigation," and was one of several given by De Chambrun to parties who assisted the heirs of Stephen Jumel to recover their property. It is as follows:

"It is hereby stipulated and agreed by and between Charles Adolphe de Chambrun, as attorney in fact of the heirs at law and next of kin of Stephen Jumel, deceased, late of the city of New York, and George J. Schermerhorn, attorney at law, of the city of New York, that in consideration of the services rendered by said Schermerhorn, at the request of said Chambrun, and in behalf of said heirs at law and next of kin of said Stephen Jumel, in litigations involving the title to premises in the city of New York, at one time owned by