

stock of goods and selling them through an agent specially appointed for that purpose. *Good Hope Co. v. Railway Barb-Fencing Co.*, 22 Fed. 635, and *Golden v. Morning News*, 42 Fed. 112, followed.

This was an action by the American Wooden-Ware Company against Arthur Stem and the Oval Wood-Dish Company. Motion to vacate service of summons. The papers on this motion disclosed substantially the following state of facts:

The action was originally commenced in the supreme court for the city and county of New York by the service of a summons upon defendant company's treasurer while temporarily within the state in attendance on United States court in charge of one of the company's causes, and in expectation of testifying as a witness. Defendant company appeared on motion to vacate said service on the circumstances stated, but said motion was denied. Thereafter defendant company removed the cause to the United States circuit court, and there renewed the motion upon additional facts. The papers before the court disclosed that prior to the action the defendant company had bought in, on execution sale, a stock of goods belonging to its judgment debtor, and sold the same to various customers, in the regular course of business, through an agent especially appointed for that purpose, and residing in the state of New York. Also that the defendant company had for many years previously obtained in said state orders for its goods through a traveling salesman resident in Ohio, but that the company had no office or regular place of business, nor did it transact business within the state of New York, except as aforesaid.

Walter D. Edmonds, for defendant company, appearing specially for the purpose of the motion.

Cited *Good Hope Co. v. Railway Barb-Fencing Co.*, 22 Fed. 635, 637; *Golden v. Morning News*, 42 Fed. 112; *Atchison v. Morris*, 11 Fed. 582; *McGillin v. Claffin*, 52 Fed. 657; *Ahlhauser v. Butler*, 50 Fed. 705; *Bentlif v. Finance Corp.*, 44 Fed. 667.

Edward Schenck, for complainant.

Cited *Bryant v. Thompson*, 27 Fed. 881, 883; *Duncan v. Gegan*, 101 U. S. 812; *Estes v. Belford*, 22 Fed. 275; *Davis v. Railway Co.*, 25 Fed. 788; *Carrington v. Railroad Co.*, 9 Blatchf. 468, 469, Fed. Cas. No. 2,448; *Sweeney v. Coffin*, 3 Am. Law T. Rep. U. S. Cts. 18, Fed. Cas. No. 13,686; *Jones v. Andrews*, 10 Wall. 327; *Pope v. Manufacturing Co.*, 87 N. Y. 137; *Ex parte Schollenberger*, 96 U. S. 377.

LACOMBE, Circuit Judge. This case is within the principle of *Good Hope Co. v. Railway Barb-Fencing Co.*, 22 Fed. 635; *Golden v. Morning News*, 42 Fed. 112. Motion to vacate service of process is granted.

NIPP et al. v. PARRISH et al.

(Circuit Court of Appeals, Eighth Circuit. October 8, 1894.)

No. 448.

PLEADING—SUFFICIENCY OF ANSWER—ACTION ON GUARANTY.

An answer to a complaint upon an alleged contract of guaranty, though loosely and inartificially drawn, and pleading the evidential instead of the ultimate facts, held to be sufficient, in substance, where the allegations and denials led to the conclusion that it denied that the written contract of guaranty was ever completely executed, so that it became an

existing agreement, and that it averred that the loans set forth in the complaint were negotiated under a conditional guaranty, the terms of which had not been complied with by the plaintiffs.

In Error to the Circuit Court of the United States for the District of Kansas.

Ben S. Henderson and J. D. Houston, for plaintiffs in error.

John D. S. Cook (A. N. Gossett, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The writ of error in this case was sued out to reverse a judgment upon a guaranty alleged to have been made by J. B. Nipp and Charles Coe, the plaintiffs in error, of the payment of certain mortgage loans made by Dillwyn Parrish and James Brown Potter, the defendants in error, to certain clients of the plaintiffs in error. The defendants in error made the necessary jurisdictional allegations in their complaint, and then averred that in 1887 they were engaged in loaning money on notes and mortgages upon real estate in Kansas; that Edward Austin and Charles Tindal, who formed a copartnership styled Austin & Co., were their agents to negotiate such loans, and to take notes, mortgages, and guaranties to secure the loans for them; that on June 1, 1887, the J. B. Nipp Land, Loan & Trust Company, which was a copartnership composed of the plaintiffs in error, were engaged in the business of soliciting and obtaining loans for borrowers; that on that day they made a written agreement with Austin & Co. to guaranty to them, for the benefit of their principals, the payment of the principal and interest of all mortgage loans negotiated by them through Austin & Co., the guaranty not to be considered in default until after default for 6 months in payment of the principal, or default for 60 days in the payment of the interest, and the mortgage bonds, notes, and coupons representing the principal of any such loan to be assigned without recourse to them upon payment of the principal, interest, and charges upon it in full under the guaranty; that under this guaranty the plaintiffs in error procured various loans, the amounts, terms, and securities for which are fully set out, to be made by Austin & Co. for the defendants in error; that default was made in the payment of principal and interest of each of them more than six months before this action was commenced; that the defendants in error offered to assign the securities representing them to the plaintiffs in error, and demanded payment of the amounts due upon them under the guaranty, but they refused to pay. A demurrer to this complaint was properly overruled. The plaintiff in error J. B. Nipp then answered. In his answer he admits that he and his partner signed the written agreement of guaranty pleaded in the complaint; but he avers that, at the time they signed it, there was an understanding and agreement between them and Edward Austin, who procured their signatures, that each individual member of the copartnerships of Austin & Co. and the J. B. Nipp Land, Loan & Trust Company should sign the agreement of guaranty, and that

it should be inoperative and of no effect until each of them had signed it; that Austin afterwards notified them that his firm could not execute it for some time because his partner, Tindal, was in London, where he resided; that, before it was executed by either Austin or Tindal, they discovered a verbal variance between the oral agreement they had made with Austin & Co. and the written contract of guaranty, and prevented its execution, "at which time it was understood and considered by all of said parties that said partially executed contract was void and of no effect." He then avers that after the 1st day of June, 1887, and before the complete negotiation of any of the loans referred to in the complaint, Austin & Co. claimed that there was a misunderstanding on their part of the extent of the responsibility which the land company would assume as guarantors of the loans they might negotiate with Austin & Co.; and on June 29, 1887, the plaintiff in error Charles Coe wrote Austin & Co. that the conditions on which the land company would guaranty such loans were "that upon the failure of any borrower for whom the J. B. Nipp Land, Loan & Trust Company had negotiated a loan of money from the said Austin & Co. to pay his or their interest or principal when due, after the said Austin & Co. had used reasonable diligence in making demand of said borrower, and after failure to pay on demand, as aforesaid, said Austin & Co. were to immediately notify the said the J. B. Nipp Land, Loan & Trust Company of such failure to pay, and, in addition to such notice, said Austin & Co. were to transfer and assign all bonds or notes, interest coupons and all other papers connected with such loan in default, as herein alleged, to the said the J. B. Nipp Land, Loan & Trust Company, such transfer and assignment being for the purpose of collection, foreclosure, or such other action as the circumstances of each particular case required; that, upon and at the time of, the said transfer and assignment, said the J. B. Nipp Land, Loan & Trust Company, as evidence of their good faith, were to pay said Austin & Co. such sum or sums as were actually due at the time of said transfer and assignment and no more." He avers that in the same letter he notified them that, unless they accepted this offered guaranty with the conditions specified, the land company would at once place their business with some other company. He alleges that after they received this letter, and with such an understanding of the guaranty of the land company as the letter conveyed, Austin & Co. accepted the applications of the several borrowers named in the complaint, and the land company negotiated the loans and procured the securities; that Austin & Co. have failed to give to the land company immediate notice of the defaults of these borrowers as they occurred, and have failed to transfer and assign to the land company the securities as provided in the conditions of the guaranty stated in the letter of June 29th, and that the real estate which secured these loans has depreciated in value one-half. There are other allegations and denials in the answer, but none that essentially modify the effect of those we have recited, or that it is important to consider in the determination of the question now before us. The defendants in error demurred to this answer, on the grounds that it did not

state facts sufficient to constitute a defense to the complaint, and that it was inconsistent and insufficient; and the court below sustained the demurrer, and ordered judgment for the defendants in error. This ruling is assigned as error.

The answer is loosely and inartificially drawn. It pleads the evidential instead of the ultimate facts, and no court would make itself obnoxious to any just criticism if it became bewildered and lost in the wilderness of its words. But a careful examination and comparison of its seven pages of closely printed allegations and denials has led us to the conclusion that it does deny that the written contract of guaranty on which the defendants in error count was ever completely executed, so that it became an existing agreement, and that it avers that the loans set forth in the complaint were negotiated under a conditional guaranty, the terms of which have not been complied with by the defendants in error. It goes without saying that if no contract of guaranty was ever made, or if the contract of guaranty under which the loans were negotiated contained conditions that were required to be complied with by the defendants in error or their agents before any liability would attach to the plaintiffs in error, and those conditions have not been complied with, the plaintiffs in error have a defense to this action. We are of the opinion that the plaintiff in error Nipp has pleaded such a defense, and the judgment is accordingly reversed, and the cause remanded, with directions to grant a new trial.

DUPUY v. DELAWARE INS. CO. OF PHILADELPHIA.

(Circuit Court, W. D. Virginia. September 21, 1894.)

1. AUCTION—SALE OF CORPORATION'S REAL ESTATE—MANAGER AS AUCTIONEER.
The fact that the auctioneer who sells real estate of a corporation at public auction is a stockholder, director, secretary, treasurer, and a general manager of such corporation, does not affect the validity of the sale. *Kearney v. Taylor*, 15 How. 494, distinguished.
2. SAME—PRIOR AGREEMENT BETWEEN AUCTIONEER AND PURCHASER—EFFECT.
Where the conditions of such sale are that the land shall be paid for with stock in such corporation at 80 cents of the par value, an agreement by the auctioneer, made before the sale, to let the purchaser have sufficient stock to make such payment, does not affect the validity of the sale.
3. SALE OF REAL ESTATE—STATUTE OF FRAUDS.
Code Va. § 2840, which provides that no action shall be brought on a contract for the sale of real estate unless the contract, or some memorandum or note thereof, is in writing, and signed by the party to be charged thereby, or his agent, renders a parol contract for the sale of real estate voidable only, and not void.
4. FIRE INSURANCE—INSURABLE INTEREST.
A purchaser in possession of real estate under a parol contract of sale has an insurable interest therein, though the contract provides that the vendee shall complete a building thereon within six months, and the title shall not pass until such building is completed, and the building burns before it is completed; the purchase price being paid and deed executed after the loss occurs, and the loss occurring before the expiration of the six months.

5. SAME—CONDITIONS—FALSE STATEMENT OF ASSURED'S INTEREST.

Where a fire insurance agent has full knowledge of assured's interest in property at the time he issues a policy on it which misstates assured's interest, and he issues the policy on his own knowledge, without any statement or representation by the assured, the policy is not rendered void by a condition that it shall be void if such interest be not truly stated.

6. SAME—VACANCY OF PROPERTY—NEGLIGENCE OF AGENT.

In an action on a policy issued on a building not yet completed or fit for occupancy, it appeared that a vacancy permit for 30 days was indorsed on the policy, and defendant's agent promised assured that he would indorse such a permit on the policy every 30 days until the work of completing the building should be commenced, or until assured was otherwise notified; that after indorsing such permit twice the agent failed to again indorse it at the proper time, by inadvertence; and that the property burned more than 10 days after the permit expired. *Held*, that the condition in the policy declaring it void if the building remained vacant for 10 days was waived.

7. SAME—CONDITIONS IN POLICY—MANNER OF PRINTING—STATUTORY REQUIREMENTS.

Code Va. § 3252, provides that a failure to perform any condition of an insurance policy issued after the statute takes effect shall not be a valid defense to an action on such policy, unless such condition is printed in type as large or larger than that known as "long primer," or is written with pen and ink in or on the policy. *Held*, that such statute is not in conflict with any provision of the constitution of the United States or of the state of Virginia, and is valid.

This was an action in assumpsit by J. A. Dupuy against the Delaware Insurance Company of Philadelphia on a fire insurance policy.

Scott & Staples, for plaintiff.

Peatross & Harris, for defendant.

PAUL, District Judge. This action was originally brought in the circuit court of the state of Virginia for the county of Franklin, and removed into this court upon the petition of the defendant company; the plaintiff being a citizen and resident of the state of Virginia, and the defendant a corporation under the laws of the state of Pennsylvania, and having its principal office in that state. It is an action of assumpsit brought by the plaintiff upon a policy of insurance issued by the defendant on a dwelling house of the plaintiff situate in the city of Roanoke, Va. Its object is to recover damages for a loss caused by the destruction of the said dwelling house by a fire which occurred on the 14th day of October, 1892. By a stipulation between the parties, in writing, it is agreed that the issues of fact involved in this cause may be tried and determined without the intervention of a jury, a jury being expressly waived, and that the finding of the court upon the facts, whether general or special, shall have the same effect in this cause as the verdict of a jury.

The evidence, which is voluminous, discloses the case as follows: On the 1st day of July, 1892, the plaintiff purchased the house and lot involved in this action from the Janette Land Company, a corporation doing business in the city of Roanoke, Va. Several months prior to that date the stockholders of the said company, in general annual meeting, had passed a resolution directing the general managers of the company to offer for sale to the stockholders two houses

in process of erection, with the lots on which they are situated, and to receive in payment for the same the stock of the company at 80 per cent. of its par value; the purchaser to obligate himself to complete said building or building within six months from the date of the sale according to the plans and specifications on file with the general managers of the company, the company to retain title to the property until this condition had been complied with. In accordance with this resolution the general managers of the company fixed upon July 1, 1892, as the time, and the city of Roanoke as the place, for the sale of the two houses and lots mentioned in said resolution, and gave notice thereof to the stockholders by circulars addressed and mailed to each of them; and at this sale the plaintiff, being a stockholder in the said company, became the purchaser of one of the houses and lots mentioned in said resolution, and it is the same that is involved in this action. The price bid and agreed to be paid by the plaintiff for the property was \$6,000, which was equivalent to \$7,500 in the stock of the company. At the date of the sale there had been no scrip issued to the stockholders for the stock held by them, but the plaintiff had subscribed for, and paid the required assessments on, 37 shares, and had purchased from another stockholder 2 more shares, and was in fact the owner of 39 shares of the stock of the company, the par value of which was \$3,900. In order to make up the whole of the amount which he bid and agreed to pay in the stock of the company for the property, the plaintiff purchased of Taliaferro 4 shares, and of W. P. Dupuy, plaintiff's brother, enough more to make up the total of \$7,500, the amount in the stock of the company which the plaintiff bid and agreed to pay for the property. There was no writing made or signed by the plaintiff as purchaser, and no memorandum of the sale in writing at the time the sale was made. The sale was made by way of auction, and took place on the porch of the house sold. At the date of the sale the house was insured by the defendant in a policy issued by it in favor of the Janette Land Company, but, this policy having but a day or two to run, the agent of the defendant, W. P. Dupuy, immediately after the sale, and before the plaintiff had left the premises of the house where the sale took place, solicited from the plaintiff permission to insure the house as his (the plaintiff's) property, and the plaintiff agreed that the same should be done. And thereupon, on the same day, the policy formerly issued by the defendant to the Janette Land Company on the house was canceled, and a new policy issued on the said house to the plaintiff, and for a larger amount than the former policy covered. No written application was made or signed by the plaintiff for this policy, and he made no representation to the defendant as to his title to the property, or his interest in it. W. P. Dupuy, of the firm of Dupuy & Taliaferro, who were the agents of the defendant, was the auctioneer who sold the house and lot to the plaintiff. He was also a stockholder in the Janette Land Company, a director in said company, and its secretary and treasurer. He was also a member of the firm of Dupuy & Taliaferro, who were the general managers of the said company. He was fully acquainted

with the condition of the property, with respect to the title and interest of parties in it, and especially with the title and interest of the Janette Land Company prior to and at the time of the sale, and with the interest of the plaintiff in the property at the time he insured it. The policy was placed, together with other papers belonging to the plaintiff, in a compartment used by him in the safe of Dupuy & Taliaferro, the agents of the defendant. It was never seen by the plaintiff until a short time before the fire occurred, when he examined it to ascertain the amount of the insurance, and the character of the roof, as described in the policy, which he did with a view of giving some information to a party with whom he was endeavoring to negotiate a sale of the property. When this policy was issued to the plaintiff, there was attached to it what is called a "builder's permit" for the period of 30 days. A few days before this builder's permit expired by limitation, the defendant, by its same agents, issued to the plaintiff on this policy what is called a "vacancy permit" for the period of 30 days, and agreed to renew the same every 30 days until work on the uncompleted house should be resumed, or until the plaintiff should be notified otherwise. This vacancy permit was first indorsed on the policy on the 1st day of August by W. S. Ficklen, a clerk in the office of Dupuy & Taliaferro, the agents of the defendant, and on the 1st day of September it was renewed for the period of 30 days. But, in the latter part of September, Ficklen left the employment and office of Dupuy & Taliaferro, the agents of the defendant, and by inadvertence the renewal for another 30 days was not indorsed on the policy on the 1st of October. No notice was given to the plaintiff or to the defendant by Ficklen that such indorsement had not been made. The plaintiff and the defendant's agents both supposed that it had been made until after the fire occurred. It is further shown that on the day he purchased the property, and before leaving the premises after making the purchase, the plaintiff consulted H. H. Huggins, the architect and superintendent of the house, in regard to completing the building, and that he, some time after he had made the purchase, applied for and obtained the keys of the house, and accompanied a prospective purchaser to and through the house, exhibiting the same to him, with a view of inducing him to purchase it. It is further shown that the sale of the house and lot to the plaintiff was reported to the stockholders of the Janette Land Company at their next general annual meeting by the general agents of the company, Dupuy & Taliaferro, and that the sale was ratified by the stockholders, and a deed executed, conveying the property to the plaintiff.

The action is defended on the following grounds: First. That J. A. Dupuy, the plaintiff, had no insurable interest in the property when the policy was issued, and none when the property was burned; that the policy was therefore a wagering policy, and void. Second. That the interest of the plaintiff in the property was not truly stated, and the character of the property not truly described, when the insurance was obtained, and that there was a breach of warranty in this failure, and hence the policy was avoid-

ed. Third. That the house was insured only while occupied as a dwelling; that permission was only given, if at all, for it to remain vacant until 1st of October, 1892; that it was burned after that date, and while vacant; and that, therefore, the policy was void. It was further contended in the argument of counsel for the defendant that whereas W. P. Dupuy, the auctioneer who made the sale, was a stockholder in the vendor company, and hence part owner of the property sold; that he was also a general manager, director, secretary, and treasurer of the said company,—therefore the sale of the property made by him, and his memorandum of such sale, were void. It is not necessary to discuss this question, so far as it relates to any memorandum of the sale made by the auctioneer, for it is conceded by counsel for the plaintiff that no memorandum in writing was made of the sale by the auctioneer at the time of the sale, or afterwards, so as to bring the sale within the requirements of the statute of frauds. The question as to the validity of a memorandum in writing made by the auctioneer is therefore eliminated from this case.

As to the other contention of the defendant, to wit, that the sale was void because the auctioneer was a stockholder, director, secretary, and treasurer, and a general manager, of the company whose property he was selling, the court is of opinion that such a position is untenable. There is no principle of law which inhibits a man who is interested in any property, either as sole or part owner, from selling the same, either privately or at public auction. Counsel for the defendant have cited no authority for the position taken, nor does the court think any can be adduced. The evidence clearly shows that the auctioneer had no interest in the purchase of the property. All the authorities quoted by counsel for the defendant are to the effect that the auctioneer cannot be a purchaser of, or interested in the purchase of, the property which he is selling. This is the doctrine laid down in *Kearney v. Taylor*, 15 How. 494, which is a leading case relied on by counsel for the defendant. In that case it was sought to set aside a sale as void on the ground that the auctioneer who sold the property was a member of or interested in a company that became the purchaser. The failure of the case cited to apply to the case at bar is seen in its statement. Counsel for the defendant, in their brief, do not apply the doctrine to an auctioneer who is interested in a purchasing company, but to one who is interested in the company which is selling the property.

Equally untenable, in the opinion of the court, is the position taken by the defendant, that W. P. Dupuy was disqualified to act as auctioneer to sell the property because of the agreement made between him and the plaintiff, prior to the sale, that in the event the plaintiff should become purchaser of the property the auctioneer would let him have enough of his stock in the selling company to make up the requisite amount of such stock to pay for the property. This agreement was no more than any auctioneer might make with a prospective purchaser,—that, if such prospective purchaser had not money enough in hand to make up the purchase price, he (the

auctioneer) would lend him enough for the purpose. An agreement of this kind would by no means give the auctioneer an interest in the purchase, but would simply establish between him and the purchaser the relation of creditor and debtor. It seems unnecessary to discuss this question further.

The principal question in this case is whether the plaintiff had an insurable interest in the property which was insured. The defendant contends that because there was no contract in writing, signed by the purchaser or his authorized agent, the sale of the house and lot to the plaintiff was absolutely void, and cites in support of this contention the Virginia statute, as follows, from the Code of Virginia:

"Sec. 2840. No action shall be brought * * * upon any contract for the sale of real estate * * * unless the contract * * * or some memorandum or note thereof be in writing and signed by the party to be charged thereby or his agent. * * *"

A void contract is defined as follows:

"An act is void which, when done, was bad or against the law in respect to the whole community, and nobody is bound by it. But it is voidable if only bad as to a particular person, who may or may not avoid it. When void it may be so treated by any person, and without a special plea or motion, but when voidable it is generally otherwise, if it has been executed." 8 Myer, Fed. Dec. § 874.

The court is of opinion that the contract in this case was not void, but only voidable at the option of one of the parties to it; that it remained in full force until one of the parties should take some action or proceeding by which it would be avoided. The language of the statute relied on by the defendant is not that a contract for the sale of real estate shall be void unless made in writing, but that no action shall be brought thereon. The language is similar to that which is used in the Code of Virginia for the limitation of personal actions generally. See Code Va. § 2920. It is well settled that the statute of limitations does not affect the validity of contracts, but only the remedy for their enforcement. By analogy the validity of the contract here is not affected by the failure to reduce it to writing, but only the remedy is affected, and the defense to the binding effect of the contract can be made by no one except one of the parties to it. The current of authorities fully sustains the court in this position:

"Where the terms of the statute are not complied with, no action can be brought to charge a contracting party by reason of the contract, but the statute does not make the contract void." 3 Minor, Inst. p. 156.

"The plea of the statute of frauds is a personal privilege, which the party may waive, and no other can plead for him, or compel him to plead it, as, if he chooses to do so, the party may voluntarily perform the contract." Wood, St. Frauds, p. 877.

"As to what amounts to an insurable interest, there has been much discussion in the courts, without hitherto arriving at any satisfactory definition. It may be said generally, however, that while the earlier cases show a disposition to restrict it to a clear, substantial, vested, pecuniary interest, and to deny its applicability to a mere expectancy without any vested right, the tendency of modern decisions is to relax the stringency of the earlier cases, and to admit to the protection of the contract whatever act, event, or property bears such a relation to the person seeking insurance that it can be said with a reasonable degree of probability to have a bearing upon his prospec-

tive pecuniary condition. An insurable interest is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property,—any *jus in re* or *jus ad rem*. Yet such a connection must be established between the subject-matter insured and the party in whose behalf the insurance has been effected as may be sufficient for the purpose of deducing the existence of a loss to him from the occurrence of an injury to it." 2 May, Ins. § 76. "But insurable interest does not at all depend upon the completeness or validity of the title by which the insured property is held. Thus possession under a contract of sale, upon which partial payment has been made, may give an insurable interest, although the conditions of the contract have been so far violated that if the breach be insisted on the contract cannot be enforced, since the contract, notwithstanding the breach of its conditions, may be carried into effect by the parties in interest. And this is true though the vendor, availing himself of the violations of the conditions by the vendee, has resold the property, and is resisting a proceeding in equity brought by the vendee to compel a conveyance. If this were not so, the property might be destroyed pending the litigation, to the prejudice of the vendee, should he ultimately prevail." Id. § 87.

"The fact that the assured does not hold the absolute title to the property insured does not necessarily prevent him from recovering the full value of the property insured. Thus, a person who has gone into possession of the premises under a contract to purchase, but who has not paid all the purchase money, nevertheless has an insurable interest, to the extent of the full value, and may recover the same upon the policy." 2 Wood, Ins. § 483.

"The contract being one of indemnity, it follows, as a matter of course, that the person insured must have an interest in the property, and be so situated with reference to it that an injury thereto, or its destruction, would result in a pecuniary loss to him. An immediate pecuniary loss need not exist. It is sufficient if there is a reasonable expectation that the insured will derive a pecuniary advantage therefrom." 1 Wood, Ins. § 263. "It is not necessary that the assured should have either a legal or equitable interest, or indeed any property interest, in the subject-matter insured. It is enough if he holds such a relation to the property that its destruction by the peril insured against involves pecuniary loss to him, or those for whom he acts. It need not be an existing *jus in re* nor *jus ad rem*." Id. p. 645.

"But the oral contract to purchase was not void or illegal by reason of the statute of frauds. Indeed, the statute presupposes an existing lawful contract. It affects the remedy only as between the parties, and not the validity of the contract itself; and when the contract has actually been performed, even as between the parties themselves, it stands unaffected by the statute. It is therefore to be treated as a valid, subsisting contract, when it comes in question between other parties for purposes other than a recovery upon it." *Amsinck v. Insurance Co.*, 129 Mass. 185.

"The policy contained a warranty on the part of the assured that he was the sole and unconditional owner of the property covered by the policy, and provided that any breach of the warranties therein contained should render the policy void. The plaintiff was not the unconditional owner of the real estate, but held therefor only a contract for a deed. The contract of insurance was made on the part of defendant by its recording agents at Algona, Hoxie & Reaver, and they issued the policy. When the contract was made, plaintiff fully informed Mr. Hoxie, one of the agents, of the character of his title; and it was fully understood by the agents, and their daily report to the defendant showed the facts in regard to it. Yet, with knowledge of such facts, the agents issued the policy in its present form, and the defendant accepted the premium, and permitted the policy to stand. The failure of the policy to state correctly the title of the plaintiff was due wholly to the fault of the defendant, and it will not be permitted to escape liability on account of it." *McMurray v. Insurance Co.* (Iowa) 54 N. W., 354.

"A right of property in the thing is not always indispensable to an insurable interest. Injury from its loss or benefit from its preservation, to accrue to the assured, may be sufficient, and a contingent interest thus arising may be made the subject of a policy." *Hooper v. Robinson*, 98 U. S. 528.

"That an equitable interest may be insured is admitted. We can perceive no reason which excludes an interest held under an executory contract. While

the contract subsists the person claiming under it has undoubtedly a substantial interest in the property. If it be destroyed, the loss, in contemplation of law, is his. If the purchase money be paid, it is his in fact. If he owes the purchase money, the property is its equivalent, and is still valuable to him. The embarrassment of his affairs may be such that his debts may absorb all his property, but this circumstance has never been considered as proving a want of interest in it. The destruction of the property is a real loss to the person in possession, who claims title under an executory contract, and the contingency that his title may be defeated by subsequent events does not prevent this loss. We perceive no reason why he should not be permitted to insure against it." Insurance Co. v. Lawrence, 2 Pet. 48; Marshall, C. J., delivering the opinion of the court.

But in this case the question of insurable interest seems to be put at rest by the possession of the property by the plaintiff from the day of its purchase by him to the time of its destruction by fire. He, and he alone, exercised acts of ownership over it, and the property was susceptible of no other possession than that which he did exercise over it. The facts, as stated, show this. In addition to this it may be noted that the contract has been fully carried out by both parties to it. The consideration for the property has passed from the purchaser to the seller, and the latter has executed a deed conveying the property to the plaintiff. The plaintiff directed the cancellation of the stock which he held in the land company from which he made the purchase, thus surrendering to the seller its obligation, the surrender and cancellation of which was the consideration for which the land company had offered and agreed to convey the property to the purchaser; such purchaser being a holder of its stock, and obligating himself to complete the building within six months from the date of the purchase. It is true that the last-named condition was not complied with, but it had not been violated at the time the fire occurred. It could not be complied with because of the burning of the house, and was released because it was not possible to comply with it.

In the second place, as to whether the policy was void because the plaintiff's interest in the property was not truly stated, and the character of the property not truly described, when the insurance was obtained. The provision of the policy under which this defense is made is as follows:

"This policy shall be void * * * if the interest of the insured in the property be not truly stated therein, * * * or if the interest of the insured be other than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee simple."

The evidence shows that Dupuy & Taliaferro were the agents of the defendant, and that W. P. Dupuy, a member of that firm, solicited from the plaintiff the insurance of the property for the defendant, and issued the policy on behalf of the defendant; that said W. P. Dupuy was the auctioneer who sold the property to the plaintiff; that he was a stockholder in the land company, the owner of the property; that he was a director, secretary, and treasurer of the company; and that the firm of Dupuy & Taliferro, of which he was a member, were the general agents of the said company. He was fully acquainted with the condition of the property, with respect to the title and interest of all parties, and

especially the land company, prior to and at the time of the sale, and with the interest of the plaintiff in the property at the time he insured it. This brings home to the defendant full knowledge of all the facts in connection with the ownership of the property at the time it issued its policy of insurance upon it to the plaintiff. Besides, it appears from the evidence that the plaintiff made no representation whatever, either in writing or otherwise, as to his interest in the property, but that the agent of the defendant, when soliciting the insurance of the plaintiff, relied upon his own full knowledge of all the facts and circumstances relating to the title and ownership of the property, and issued the policy of insurance to the plaintiff upon his (the agent's) own knowledge of the interest which the plaintiff had in the property at that time, the agent's knowledge being as full and particular as that of the plaintiff. *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 1 Sup. Ct. 582.

"To deliver a policy with full knowledge of facts upon which its validity may be undisputed, and then to insist upon these facts as ground of avoidance, is to attempt a fraud. This the courts will neither aid nor presume; and when the alternative is to find this, or to find that, in accordance with honesty and fair dealing, there was an intent to waive the known ground of avoidance, they will choose the latter. * * * Such an issue is tantamount to an assertion that the policy is valid at the time of the delivery, and is a waiver of the known ground of invalidity. So is the issue of a policy upon an application to a question in which no answer is given." *May, Ins.* § 497.

"It is well settled by the weight of authority that where a policy is issued containing conditions inconsistent with the facts, and the agent knew the facts when the policy was issued, the conditions are waived, so far as they conflict with the facts known to the agent; and this is, peculiarly the case when the agent fills up the application erroneously when the facts were correctly stated to him by the assured. In such cases the doctrine of estoppel is a very just application, as, if it was not permitted to apply, an innocent party could be made to suffer." 2 *Wood, Ins.* § 90.

The doctrine of the liability of insurance companies for the acts of their agents is so well established that the court deems it unnecessary to discuss the question, or to cite authorities to sustain it. The court finds nothing in the facts of this case to distinguish it from the reported cases sustaining this firmly-settled principle.

There was a provision in the policy making it void if the building "be or become vacant or unoccupied, and so remain for ten days," unless otherwise provided by agreement indorsed on the policy, or added to it. It is claimed by the defendant that under this provision the policy is void, because the building was vacant, and so remained for 10 days and longer, without permission of the insurance company indorsed on the policy, or added to it. The evidence shows that at the time the building was insured it had not been completed, and was not fit for occupancy. Because of this fact, there was indorsed on the policy when it was originally issued a builder's permit for the period of 30 days. When this builder's permit was about to expire, the building still remaining incomplete and unoccupied, and no work upon it being in progress, a vacancy permit, instead of the builder's permit, was indorsed upon the policy for the period of 30 days; and it was promised the plaintiff by the agent of the defendant that such vacancy permit should be

indorsed upon the policy by the agent of the defendant at the expiration of every 30 days until the work of completing the building should be commenced, or until the plaintiff should be notified otherwise. This was done in fact for each 30 days up to October 1st, when it was not done only because, through inadvertence, the agent of the defendant failed to do it, and the building was burned within the period of the 30 days next ensuing. Had the agent of the defendant made the indorsement upon the policy of the vacancy permit on the 1st of October, as he promised the plaintiff he would do, and as the plaintiff in good faith relied upon him to do, this question could not have arisen in this case. The evidence clearly shows that the agent of the defendant promised the plaintiff that this indorsement should be made upon the policy every 30 days; that the agent of the defendant had ready access to the policy for the purpose of making such indorsement; that for two of the periods of 30 days each the agent of the defendant did actually make such indorsement upon the policy; and that he failed to do it for the third of such periods only through his own inadvertence, which was his own fault, and for which the plaintiff is in no wise to blame. The agent of the defendant solicited the insurance and issued the policy with full knowledge that the house was not completed, and must remain vacant for an indefinite period. He was fully aware that the house had remained vacant from the day he insured it, and his promise to keep the insured protected from loss or risk by indorsing upon the policy a vacancy permit every 30 days must be taken as a waiver of the condition contained in the policy. His failure to make the indorsement upon the policy as he promised the plaintiff he would do, whether such failure was through inadvertence or otherwise, cannot be used to defeat the plaintiff in seeking the indemnity which the defendant had contracted to secure to him.

"If, at the time the agent of the company received the premium of insurance and delivered the policy, he had knowledge of the vacation of the property, and did not then avoid the policy, but treated it as valid and subsisting, such conduct of the agent was a waiver of the condition, and a breach of it could not be relied on by the defendant to defeat the plaintiff's recovery." *Georgia Home Ins. Co. v. Kinnier's Adm'x*, 28 Grat. 106, 107. "Such waiver or estoppel (for the terms 'waiver' and 'estoppel' may be indifferently used in application to the subject we are now considering) may take place either pending the negotiation for the policy, or after such negotiation has been completed, and during the currency of the policy, and either before or after forfeiture incurred. Such waiver may be made by a general agent, acting within the scope of his powers, needs no consideration to support it, and may be by parol, although the written consent of the insurer is required by the terms of the policy. Nor will the party insured be bound, nor ought he to be bound, by any instructions given by the insurer to his agent, limiting the general powers possessed by the latter in relation to the subject of the agency, unless such instructions are made known to the assured." *Id.* 108.

Further citation of authorities on this point is unnecessary.

The court has discussed and disposed of all the material questions in the case presented in the pleadings and the arguments, except one, which was raised by counsel for the plaintiff, arising under section 3252 of the Code of Virginia. This statute, in brief, provides that the conditions of an insurance policy shall be printed

v.63F.no.5—44

in type as large or larger than that commonly known as "long primer," or be written with pen and ink in or on the policy. The preamble and the act, as originally enacted (see Acts Assem. Va. 1877-78, pp. 80, 81), are as follows:

"Whereas, it is the custom of many insurance companies to issue policies of insurance with conditions and other restrictive provisions printed in small type, difficult to be read and likely to escape the attention of the insured:

"(1) Be it enacted by the general assembly of Virginia, that in any action against an insurance company or other insurer, founded upon a policy of insurance issued after the first day of July, eighteen hundred and seventy-eight, no failure to perform any condition of the policy, nor violation of any restrictive provision thereof, shall be a valid defense to such action, unless it appears that such condition or restrictive provision is printed in type as large or larger than that in which this act of assembly is printed, to-wit: that commonly known as long primer type, or is written with pen and ink in or on the policy."

The conditions and restrictive provisions in the policy sued on here are not printed in compliance with the requirements of the statute, and the policy is dated subsequent to the 1st of July, 1878. The argument of counsel on this statute has not been by any means exhaustive. Counsel for the plaintiff contend for its application to all the grounds raised by the defendant, except as to the question of an insurable interest. Counsel for the defendant insisted in the oral argument of the case that the statute is illegal, as being in conflict with that provision of the constitution of the United States which inhibits a state from passing any act impairing the obligation of a contract, but they do not refer to it in their written brief. The court, as at present advised, sees no ground to question the validity of the act. It is not in conflict with any provision of the constitution of the United States, being prospective in its operation, nor is it in conflict with the constitution of the state of Virginia. Its enactment is within the legislative powers of the state government. The reason recited in the preamble of the act for its passage is a sound one, and the act is in accord with a wise public policy, reasonable and just in its requirements. It is applicable to the conditions of the policy on which this action is based. The court has decided the case on other grounds, but if it were necessary to pass upon this question the court would hold that the said conditions are invalid as a defense to this action, because they do not conform to the requirements of the statute. Judgment will be entered for the plaintiff in the sum of \$3,170.54 with interest from the 20th day of December, 1892, until paid, and the costs of this action.

WINSTON v. UNITED STATES.

(Circuit Court, D. Washington, E. D. October 1, 1894.)

1. DISTRICT ATTORNEYS—COMPENSATION—WHEN FIXED BY STATUTE.

No fixed rate of compensation is provided by law for the services of district attorneys in cases involving the title to land occupied by the United States as a garrison and military post, cases on appeal to the circuit court of appeals against or by the United States, or against a collector to recover money exacted by him as a penalty under a statute of

the United States, or cases against Indian agents and military officers involving the right of the government to prevent the building of a railroad across the lands allotted to Indians.

2. SAME—ALLOWANCE BY ATTORNEY GENERAL—CONCLUSIVENESS.

A district attorney cannot recover, on the basis of a quantum meruit, a sum in excess of the amount allowed by the attorney general, for services rendered, for which no fixed rate of compensation or fees is provided by law.

3. SAME—EARNINGS OF DISTRICT ATTORNEY—DETERMINATION BY TREASURY DEPARTMENT.

The treasury department, in determining whether a district attorney has received earnings in excess of the maximum of personal compensation and emoluments allowed by law for a particular year, cannot include compensation for travel allowed by law on a mileage basis.

4. SAME—REFERENCE OF CLAIM TO COURT OF CLAIMS—EFFECT.

Where a particular item of claims for services by a district attorney, for which the statute fixes no fees, has been allowed by the attorney general, and is part of a case by the district attorney against the government, a recovery for such item will not be denied on the ground that it has been referred to the court of claims by the comptroller of the treasury, under Rev. St. § 1063, and that he desires that court's decision on the questions involved for future guidance, especially where it does not appear that such claim has been regularly transmitted to such court.

5. SAME—SERVICES AFTER REMOVAL—EMPLOYMENT.

Where a district attorney renders services after removal from office, pursuant to arrangements made before notice of his removal, and the attorney general allows him a certain sum, to pay which congress makes a special appropriation, recovery of such sum by the district attorney cannot be defeated on the ground that he was not lawfully authorized to act.

This was an action by Patrick Henry Winston against the United States to recover compensation alleged to be due him for services rendered defendant as United States district attorney.

Alexander M. Winston, for plaintiff.

William H. Brinker, U. S. Atty.

HANFORD, District Judge. The plaintiff held the office and performed the duties of United States district attorney for the district of Washington from the 19th day of February, 1890, to the 30th day of May, 1893; and he has brought this action against the United States, under the provisions of the act of March 3, 1887, entitled "An act to provide for the bringing of suits against the government of the United States" (1 Supp. Rev. St., 2d Ed., 559), to recover compensation for special services rendered by him under the direction of the attorney general, and for mileage in addition to payments made to him. His claim is itemized as follows: (1) For services as attorney for the defendants upon the trial in this court at the July term, 1890, held at Tacoma, of the case of the Catholic Bishop of Nesqually v. General John Gibbon et al., involving the title to the land occupied as a garrison and military post at Vancouver, in this state, \$2,500 in addition to \$2,500 paid to him for said services. (2) For services as attorney for the United States upon the hearing in the United States circuit court of appeals for the ninth circuit, at San Francisco, in April, 1892, of the case of the United States v. The Steam Tug Pilot, on appeal from the district court for this district, \$287.21

in addition to \$212.79 paid to him for said services. (3) For services as attorney for the defendant upon the hearing on appeal in the said United States circuit court of appeals in April, 1892, of the case of *Dunsmuir v. Bradshaw*, as collector of customs for the collection district of Puget Sound, which was an action to recover a sum of money which had been exacted by said collector as a penalty under a statute of the United States, \$500. (4) For services as attorney for the United States upon the hearing in said United States court of appeals in April, 1892, of the case of the *United States v. Gee Lee*, appealed from the United States district court for this district, \$250. (5) For services as attorney for the defendants in the superior court of the state of Washington for King county, and in this court at a term held at Seattle in March, April, May, and June, 1893, in two cases against Edwin Eells, as United States Indian agent, and certain officers of the United States army, involving questions as to the right of the government to prevent the building of a railroad across lands which had been allotted and patented to certain Indians pursuant to a treaty made by the United States with the Puyallup tribe (see *Ross v. Eells*, 56 Fed. 855), \$1,500. (6) For actual and necessary traveling in going from his place of abode to the several places at which terms of the United States courts are held in this district, and returning, and in going to and returning from examinations before United States commissioners of persons accused of violations of laws of the United States, between January 1 and May 30, 1893, a balance of \$1,379.84. (7) For fees and emoluments fixed by statute, earned between February 19 and December 31, 1890, a balance of \$799.71. (8) For the year 1891, a balance of \$810. (9) For the year 1892, a balance of \$490.83.

That the plaintiff rendered the services charged for, as alleged by him, is not denied, and he has proved the value thereof as alleged. If the law authorized a recovery upon a quantum meruit, I should have no hesitancy in awarding to plaintiff the first five items claimed. I hold that the plaintiff's services in the several cases above enumerated were not of the kind for which a fixed rate of fees or compensation is provided by law. In protecting the interests of the government the attorney general often finds occasion to require the district attorneys to take charge of important litigation, and incur expenses in connection therewith, for which the law provides no compensation. It has been usual, however, for the treasury department to audit and pay accounts for such services and expenditures in amounts authorized by the attorney general, and since 1889 congress has recognized the practice by including in each of the annual appropriation bills for sundry civil expenses an item for such special compensation of district attorneys as may be fixed by the attorney general for services not covered by salary or fees. There is no other authority given by law for paying a district attorney for services to the government in his professional capacity, not covered by his salary or fees. The plaintiff is therefore precluded from recovering any sum in excess of the amount fixed by the attorney general as compensa-

tion for any particular service. No allowance can be made by the court upon the basis of a quantum meruit, as the law gives to the attorney general power to pass upon the question as to the value of the service, and his determination is final and conclusive upon the government as well as the claimant. *U. S. v. Bashaw*, 152 U. S. 436, 14 Sup. Ct. 638; *U. S. v. Shields*, 153 U. S. 88, 14 Sup. Ct. 735. On this ground, judgment must go against the plaintiff as to the first item, the sum allowed to him by the attorney general for his services in the Bishop of Nisqually Case, viz. \$2,500, having been paid. The attorney general allowed in the Pilot Case \$400, of which \$212.79 has been paid, and the balance of \$187.21 was credited and retained by the treasury department on account of excess of earnings above the maximum of personal compensation and emoluments which the law permitted the plaintiff to receive for the year in which the money was earned. The attorney general also allowed in the Gee Lee Case \$250, and the same was credited and withheld upon the same account. From the uncontradicted evidence I find that the plaintiff's emoluments, as stated, included compensation for travel allowed by law on a mileage basis, amounting in each year of his incumbency to more than the several sums deducted from his earnings as excess. The opinion of the court of claims, by Chief Justice Richardson, in the case of *Smith v. U. S.*, 26 Ct. Cl. 568, affirms that mileage "is a commutation or substitute for expenses estimated to be necessary for travel, and is fixed by law at ten cents a mile, which ordinarily, or on the average, it is supposed, will cover the actual amount required. It relieves public officers from the trouble of keeping itemized accounts of small disbursements, and avoids controversies between them and the accounting officers upon insignificant matters. The commutation for such expenses can no more be regarded as fees and emoluments than would be items of actual expenditures, if required to be included in the emolument return, which latter, we apprehend, nobody would claim to be either fees or emoluments." I concur in that opinion, and consider all the deductions from the plaintiff's earnings on account of excess above his lawful maximum to be erroneous. Therefore, my findings as to the two items for \$187.21 and \$250 will be for the plaintiff.

The attorney general fixed the amount of the plaintiff's compensation in the case of *Dunsmuir v. Bradshaw* at \$310, and that sum has been neither paid nor credited to the plaintiff. I hold that he is entitled to recover the same in this action. In behalf of the government the court is urged to refuse to consider this item, on the ground that plaintiff's claim has been referred to the court of claims, under section 1063, Rev. St., and the comptroller of the treasury desires to have the decision of that court upon the questions raised by his objections, to guide him in passing upon other claims of a similar kind. This argument would have greater weight if the comptroller would accept the decisions of the court of claims which have not been reversed nor overruled by the supreme court, and follow their guidance in passing upon similar questions. I find, however, from the record in this case,

that in the matter of the mileage allowed by law to district attorneys the comptroller persists in construing the law according to his own ideas, which are at variance with the decision in the Smith Case, above referred to. It does not appear that this claim has been regularly transmitted to the court of claims by the secretary of the treasury or the head of any department; and, if it were, the item is part of a case of which this court has acquired jurisdiction, and I can find no warrant for sending the plaintiff to litigate one part of his case in another forum without his consent. For the services in the Puyallup Indians Cases the attorney general fixed the sum of \$400 as compensation for work done while the plaintiff was in office, and \$600 for continuation of his work under his special employment after his removal from office. Upon grounds already gone over in this opinion, I hold that the plaintiff is entitled to recover in this action the amount of \$400 so allowed by the attorney general.

The other part of the allowance is objected to on the ground that the plaintiff was not lawfully authorized to represent his clients after his official connection with the government had been severed. The court did not permit pending proceedings to be interrupted by the wielding of the political axe, and the plaintiff earned the compensation allowed by the attorney general by remaining at his post, discharging his professional duty, under his special employment as attorney for the defendants, during the actual trial of the cases, pursuant to arrangements made previous to notice of his removal. Congress, at the last session, has made a special appropriation to pay this \$600, and thereby removed all doubts as to the legality of allowing the same. The findings will be in favor of the plaintiff, on account of this item, for the full sum of \$1,000, as allowed by the attorney general; but, as the \$600 appropriated by congress for the purpose has been already paid, that much will be deducted from the amount of the judgment.

As to the sixth item, I find that the total earnings in 1893, including the \$1,000 special compensation for the Puyallup Indians Cases, and mileage amounting to \$1,629.60, is the sum of \$5,164.60. The plaintiff is lawfully entitled to receive and retain the following: Maximum personal compensation in the way of fees and emoluments, \$2,465.75; mileage, \$1,629.60; commissions on proceeds of forfeited opium, \$11.60; clerk hire, printing, and other incidental expenses, approved by the attorney general, \$776.60; aggregating the sum of \$4,883.55. He has been paid, including the \$600 specially appropriated for his services in the Puyallup Indians Cases, \$3,842.35, so that there is a balance yet due him on his account for 1893 of \$1,041.20. I deduct from this the \$400 awarded on account of the Puyallup Indians Cases and find in favor of the plaintiff upon the sixth item in the sum of \$641.20.

The seventh, eighth, and ninth items may be disposed of in a bunch. Of moneys earned during the years 1890 and 1891, there was withheld, as excess of the maximum, the following: In 1890, \$566.38; in 1891, \$750. In each of said years there was an amount of mileage in excess of said sums carried into the emolument

account, without which there would have been no surplus of earnings above the maximum. I therefore find in favor of the plaintiff upon the seventh item in the sum of \$566.38, and upon the eighth item in the sum of \$750. I do not find that any part of the earnings for 1892 was withheld, except part of the special compensation for services in the Gee Lee and Pilot Cases, which amounts will be made up to the plaintiff by the award on account of the second and fourth items. I therefore find in favor of the government on the ninth item.

In re SCHECHTER.

(Circuit Court, D. Minnesota, Third Division. October 13, 1894.)

1. CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATUTORY REGULATION BY STATES.

A state statute requiring every person selling fruit trees or other nursery stock grown outside the state to file an affidavit with the secretary of state, and a bond of \$2,000, and to exhibit to each purchaser a certificate of the secretary that he has complied with these provisions (Laws Minn. 1887, c. 196, §§ 1-3), is unconstitutional, as imposing vexatious and annoying restrictions upon interstate commerce (article 1, § 8, cl. 3), and cannot be upheld on the ground that it is intended to protect the citizens of the state from the fraudulent representations of such dealers.

2. SAME—SPECIAL PRIVILEGES.

"When a state undertakes by statute to deprive citizens of other states who deal in sound articles of commerce produced in those states of that presumption of honesty and good intent which it indulges in favor of its own citizens who deal in its own products, and which the law raises in favor of every man, it effectually deprives the citizens of those states of some of the most valuable privileges and immunities its own citizens enjoy."

This was a writ of habeas corpus to procure the release of C. H. Schechter from imprisonment under commitment of a justice of the peace.

N. Kingsley and W. E. Todd, for petitioner.

Henry A. Morgan and A. L. Hoppaugh, for the State.

SANBORN, Circuit Judge (orally from the bench). The prisoner, a citizen of the state of Iowa, is deprived of his liberty under the commitment of a justice of the peace of the state of Minnesota, on the sole ground that, as the agent of citizens of the state of Illinois, he sold fruit trees that were grown in the state of Illinois in the state of Minnesota, without complying with the provisions of sections 1-3 of chapter 196 of the Laws of Minnesota for the year 1887. There is no claim that any false representations were made or any fraud committed in this sale. Section 1 of this chapter provides that it shall be unlawful for any person to sell or offer for sale any tree, plant, shrub, or vine, not grown in the state of Minnesota, without first filing with the secretary of state an affidavit setting forth his name, age, occupation, and residence, and, if an agent, the name, occupation, and residence of his principals, and a statement

as to where the nursery stock to be sold is grown, together with a bond to the state of Minnesota, in the penal sum of \$2,000, conditioned to save harmless any citizen of this state who shall be defrauded by any false or fraudulent representations as to the place where such stock sold by such person was grown, or as to its hardiness for climate. Section 2 provides that the secretary of state, on compliance with the provisions of section 1, shall give to the applicant a certificate setting forth the facts that show a full compliance by the applicant with the provisions of the act, and that said applicant shall exhibit this certificate, or a copy of it, to any person to whom stock is offered for sale. Section 3 provides that any person, whether as principal or agent, who shall sell or offer for sale any foreign-grown nursery stock within this state, shall furnish to the purchaser a duplicate order, with a contract specifying that such stock is true to name, and as represented. Section 4 imposes a penalty of not less than \$25 nor exceeding \$100, or of imprisonment in the county jail for a term not less than 10 nor more than 60 days, in the discretion of the court, for the sale by any person of any foreign-grown nursery stock within this state without complying with the first three sections of the act. There is no law of the state of Minnesota which imposes any such restrictions upon the sale of any tree, plant, or vine grown in this state.

The third clause of section 8 of article 1 of the constitution of the United States provides that "the congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The effect of this provision of the constitution has been so frequently and forcibly declared by the supreme court of the United States that it is sufficient for the purposes of this case to state a few of the propositions that the decisions of that court have established. The power to regulate commerce among the states was carved out of the general sovereign power held by each state, and granted by the constitution to the congress of the United States. This power was thus vested in congress exclusively, and no state, by virtue of any power not thus granted, whether under the name of the "police power," or under any other name, can lawfully infringe upon this grant. This power to regulate commerce, thus granted to congress, is not subordinate to any of the powers not granted, but paramount to all the powers of the state, and any act of the state which interferes with interstate commerce in a well-known and sound article of commerce is unconstitutional and void. Now, while there are certain subjects in their nature local, such as harbor pilotage, beacons, bridges, etc., regarding which a state may legislate when congress has not, yet when the subject-matter is the sale of a well-recognized article of commerce, such as vines, trees, or shrubs; or any other well-known article of commerce, the product of another state, the subject is in its nature national, susceptible of regulation by rules uniform throughout the nation, and obviously susceptible of wise regulation by such uniform national rules only; and in such a case there can, of necessity, be only one system or plan of regulation, and that congress alone can prescribe. In all cases where congress has passed

no law regulating interstate commerce in any well-recognized article of commerce, that fact is conclusive evidence that it intends such commerce to be free, and any law of the state which prohibits or restricts it must be held to be in violation of the constitution. I do not intend to hold that valid quarantine and sanitary laws may not be passed by the legislature of the state. There is no such question presented in this case. It is not claimed that these trees that were grown in the state of Illinois were deleterious to the health or the comfort, or dangerous to the lives or property, of the citizens of this state. Nor do I intend to hold that a proper inspection law may not be passed by the legislature of this state to prevent the introduction here of any diseased or dangerous article which might interfere with the health, comfort, well-being, or happiness of the people of this state. No questions of that kind are presented in this case. This law imposes a restriction upon the sale of foreign-grown trees by its very terms; and any law which imposes any vexatious or annoying restriction upon the sale of articles that are themselves sound articles of commerce must be held to be an interference with commerce, and thus in violation of the clause of the constitution to which I have referred. To provide that every man who sells a foreign product shall be required to file an affidavit with the secretary of state, and a bond of \$2,000, and to exhibit to every man who purchases the article a certificate of the secretary of state that he has complied with these provisions, certainly imposes a vexatious and annoying obstruction to commerce in the article mentioned. For that reason I think that this law is in violation of this clause of the constitution.

Moreover, article 4, § 2, of the constitution of the United States, provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This provision of the constitution, in my opinion, gives to the citizens of other states the right to introduce and sell the products of those states in Minnesota on the same terms that her own citizens sell like products of this state. The Illinois tree, the Wisconsin vine, the Iowa shrub, that is sound, and is of the same character as that grown in the state of Minnesota, seeking sale in this state, is entitled to be sold by those who deal in it on the same terms and with no greater restrictions than the like article produced in the state of Minnesota; and any restriction which imposes upon the dealers in foreign articles that are themselves sound, burdens that are not imposed on the dealers in like articles produced in the state of Minnesota, in my opinion, violates that provision of the constitution to which I have last referred.

It is said that the bond required here is to prevent the dealers in foreign trees from perpetrating fraud in their sale, and that it is competent for the state to protect its citizens against the fraudulent representations of such dealers. The answer is that when a state undertakes, by statutory regulation, to deprive citizens of other states, who deal in sound articles of commerce produced in other states, of that presumption of honesty and innocence of wrong which it indulges in favor of the dealers in its own products, and which

the law raises in favor of every man, it very effectually deprives the citizens of other states of the most valuable privileges and immunities its own citizens enjoy.

For these reasons, I think the prisoner must be discharged. Let an order be entered to that effect.

CONSOLIDATED VAPOR-STOVE CO. v. ELLWOOD GAS-STOVE & STAMPING CO.

(Circuit Court, W. D. Pennsylvania. September 17, 1894.)

No. 8.

PATENTS—LIMITATION OF CLAIMS—INFRINGEMENT—GASOLINE STOVES.

The Whittingham patent, No. 235,600, for a gasoline stove, if valid, is strictly limited by the terms of its specifications, and by the prior state of the art, to a stove having a burner plate with the vaporizing and "fixing" chambers projecting laterally therefrom, and connected by a conduit extending across the under side thereof, and is not infringed by a stove in which the fixing chamber is located on the under side of the burner plate.

This was a suit for the alleged infringement of a patent.

George H. Christy and Hoyt & Dustin, for complainant.

John R. Bennett, Harold Binney, and Lyon, McKee & Sanderson, for defendant.

BUFFINGTON, District Judge. The Consolidated Vapor-Stove Company of Cleveland, Ohio (assignees of the patent), file this bill against the Ellwood Gas-Stove & Stamping Company of Ellwood, Pa., for alleged infringement in the manufacture of gasoline stoves of letters patent No. 235,600, issued December 14, 1880, to Charles and Joseph Whittingham. The answer denies patentability and infringement. The device described in the Whittingham patent is, in the parts needful to now consider, described as follows: From an elevated oil fount a pipe leads to one of two chambered ears or projections on opposite sides of a burner plate, and connected by a conduit across the lower side and at one side of the central tube of said plate. From the second chamber depends a pipe having an arm with a socket, in which a valve stem is screwed for controlling a jet orifice, which is located directly under, and a short distance from, the central tube. Surmounting the plate is a burner cap, provided with two rows of jet holes, the lower one being just above the upper surface of the chambers. After the burner is initially started,—the mode of doing which is not material to the present inquiry,—its workings are as follows: The upper surface of the chambers being highly heated by direct action of the flames from the lower row of jet holes and the connecting conduit by conduction through the heater plate, the oil passes to the first or vaporizing chamber, where it is vaporized. This vapor then passes through the conduit, where it is superheated, and into the second or "fixing" chamber, where it is still further superheated, and becomes "fixed," or a sort of fixed gas. It then passes through to the jet orifice, and spurts into the central tube, carrying with it a supply