

the action of ejectment. (4) "That upon either party securing a judgment in the trial court upon said action of ejectment, the prevailing party, upon giving a sufficient bond, payable to the losing party, with security satisfactory to the court, shall be permitted to withdraw all the accumulated royalties from said bank, and shall collect from said W. M. Ritter all subsequent royalties as they become due, pending any appeal that may be taken by the losing party to a higher court, and until the final determination of said action." The construction of these words is the crucial question in this case.

The next step in the case, as shown by the record, is a notice signed by the attorney of the complainant, to the defendants, that he will move on the 1st day of December, 1895, at 10 a. m., before Hon. John Paul, one of the judges of the court, at Harrisonburg, for an order directing the National Exchange Bank of Lynchburg to pay to complainant all moneys deposited by Ritter with said bank under the stipulation. The motion came on to be heard on 5th December, and the order of the court thereon was duly made and filed. It recites the appearance of the parties before the court, the notice served on the defendants, the production by the complainant, in support of his motion, "of a judgment of this court on the law side thereof" in a cause of H. C. King, plaintiff, against the Elkhorn & Sandy River Land Trust et al., defendants, in ejectment, entered on 4th December, 1895, giving the words of the judgment, with a full description of the land found in detail by metes and bounds; and then adds:

"Whereupon the court, considering the said agreement and the said judgment, doth adjudge, order, and decree that the said H. C. King is not entitled to recover the whole of the said fund and the future amounts that may become due from the said W. M. Ritter for timber hereafter cut upon the land in controversy in this cause, but only so much of the said fund so deposited, and which may hereafter accrue from future cutting, as may have accrued or may hereafter accrue from the land which was recovered in the said judgment; and that the defendant the Elkhorn & Sandy River Land Trust is entitled to recover so much of said fund as accrued, or may hereafter accrue, from the residue of the 2,093-acre tract named in said judgment. And thereupon the court doth direct that an account be taken and reported by Samuel M. Graham, who is hereby appointed a special commissioner for the purpose, showing the amount and the value of the timber cut by the said Ritter upon either side of the line of the said land named in the said judgment."

Then we find the report of the commissioner, showing that of the timber cut by Ritter some of it was on the land recovered by complainant in the ejectment suit, and some on the land of defendants, and that of the royalties paid by Ritter \$1,717.02 belonged to complainant, and \$1,839.19 properly belonged to the defendant the Elkhorn & Sandy River Land Trust. This report was confirmed on 6th May, 1896, and the bank, acting as depository, was ordered to distribute the fund in accordance with it. At the request of complainant this order was suspended for 60 days from 9th May, 1896, to give him time to appeal therefrom, and to give a supersedeas bond. It was then suspended for a further period of 30 days from 9th July, 1896, for the same purpose. Soon thereafter complainant moved before Judge Paul for leave

to file a bill of review, and this motion was refused 23d July, 1896. Leave was granted to the complainant to appeal to this court, and the cause comes here on several errors assigned.

As the bill of review seeks to correct errors on the face of the decrees of the 5th of December, 1895, and the 6th of May, 1896, and as a bill of review will lie only for errors of law apparent on the record (*Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811), we will examine the errors assigned to these decrees. The first three assignments of error relate to the decree of 6th May, 1896. They proceed expressly upon the ground that the funds in the hands of the bank were not under the control of the court, were not subject to the orders of the court, and therefore not disposable of by the decree mentioned. The parties mentioned in the record were duly before the court. The complainant wanted an injunction. The defendants wished to go on with the cutting of the timber. The issue between them was undecided. Both were in peril. If the complainant failed, his liability on his injunction bond was a serious one. Delay injured the defendant, and cutting timber exposed it to loss in case the decision went against it. They could each have applied to the court for some sort of relief. They preferred to confer with each other before doing so, and, having conferred and agreed, they put their agreement in writing, and filed it as a part of the cause. Thenceforward it came within the purview of the court. More than this, all the royalty payable by Ritter for the timber both sides had agreed he should cut was deposited in the National Exchange Bank of Lynchburg, subject to the order of the United States circuit court for the Western district of Virginia. The money, even in the event of perfect success, could not be drawn out by the prevailing party except with security satisfactory to the court. Here we see all the parties to this case make their compact between themselves a part of the proceedings of a cause in court, and in that compact provide that it be held subject to the order of the court, not to be drawn out without its supervision and active co-operation. It is difficult to understand how the appellant could say that the funds in the hands of the bank were not under the control of the court, or not subject to the order of the court. His own action in giving the notice of 2d December, 1895, and in making his motion of 5th December, 1895, contradicts his assignments of error. The difficulty in the mind of the appellant shown in these and all the other assignments of error seems to be this: He complains of the proceeding by which the court reached its conclusion. But this proceeding was instituted by himself. He gave notice of his motion, applied to the court for the fund, and produced the evidence upon which he made his application. This evidence was, by the agreement, a part of the record in the suit in ejectment. The agreement had spoken of and had provided for a speedy hearing of the action at law, and had provided that the accumulating fund, subject to the order of the court, should be paid to the prevailing party in the action of ejectment upon his securing his judgment. In order to ascertain who was the prevailing party, it became necessary to know what was at issue in

the action of ejectment, what the plaintiff claimed, and what he obtained. If he succeeded in obtaining all that he claimed, then to him belonged all the fruits of victory. But if he succeeded in obtaining only a part of what he claimed, then surely he could not be entitled to the same result as if he had established his whole claim. The presiding judge saw this. Perhaps he himself, on the law side of his own court, knew exactly what, and how much, the complainant did succeed in recovering by his suit. But he did not use this knowledge on the equity side of his court. He referred it to his commissioner, to ascertain and fix the right of the complainant as found for him by a jury. He did not disregard or annul the fourth clause of the agreement between the parties. He considered it, and put his construction upon it, and acted upon this construction. The appellant stands on the words of his agreement, and insists that, having secured a judgment, he was entitled to all the money on all the royalties on all the timber on all the land he claimed. By the same narrow and technical construction, if, after claiming and suing for 3,010 acres of land, the jury had found that he had a good title to 10 acres, he could demand the value of the timber on the 3,000 acres. The appellant, of his own accord, came into equity, and he must do equity. We see no error in the decree of the court below, and it is affirmed.

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PHENIX INS. CO. v. SCHULTZ.<sup>1</sup>

(Circuit Court of Appeals, Fourth Circuit. May 5, 1897.)

No. 203.

1. RECEIVERS—POWER TO SUE.

A receiver of a corporation, appointed by a state court, with power to collect its assets and to sue therefor, can sue in a federal court to enforce specific performance of an alleged contract of insurance on corporate property. 77 Fed. 375, affirmed.

2. MAILING OF LETTERS—PRESUMPTIONS.

When a party alleges that he duly mailed a letter, the court must presume that the requirements of the law as to stamping, etc., were complied with.

3. INSURANCE—COMPLETION OF CONTRACT.

After extended correspondence between certain insurance agents and the brokers representing a corporation desiring insurance, the agents telegraphed the brokers, "With specific form, can write \$10,000 at 90 cents, if it will help you." On the same day the brokers accepted this offer by mail, saying that they inclose forms, which they "trust will be specific enough and satisfy the companies." Before receipt of this letter and inclosures, the property was destroyed by fire. *Held*, that the mailing of the letter left it unsettled whether the forms inclosed were sufficiently specific to satisfy the agents, and hence there was no meeting of minds, so as to form a binding contract. 77 Fed. 375, reversed. Brawley, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

<sup>1</sup> Rehearing denied May 14, 1897.

T. J. Kirkpatrick and John M. Slaton, for appellant.

Waller R. Staples and B. B. Munford (H. A. Latane and William Beasley, on brief), for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. This is an appeal from a decree entered in the chancery cause of J. C. Schultz, receiver of the Franklin Brass Company, against the Phenix Insurance Company of Brooklyn. The suit was instituted in the circuit court of Botetourt county, Va., on the 9th day of September, 1895, and removed, by appropriate proceedings, to the circuit court of the United States for the Western district of Virginia, by which court the decree complained of was entered on the 26th of September, 1896. The bill alleges: That the Franklin Brass Company was, in the year 1891, the owner of certain real and personal property, which is fully described, situated at Buchanan, Botetourt county, Va. That, being desirous of insuring said property, the company authorized J. B. Moore & Co., insurance brokers, doing business in Richmond, Va., to procure insurance for the term of one year against loss or damage by fire on such property, as follows: \$33,000 on machinery, machines, etc., including patterns; \$18,000 on buildings; and \$5,000 on stock, material, and supplies. That J. B. Moore & Co., in July, 1891, applied to P. J. Otey & Co., insurance agents, doing business at Lynchburg, Va., for such insurance, who, after examination of the matter and inspection of the property, accepted the risks for the amount of \$40,000, and delivered policies for the same to the insured. That, when these policies were reported to the insurance companies by their said agents, several of them objected to the form of the policies, of which J. B. Moore & Co., representing the Franklin Brass Co., were promptly advised. That P. J. Otey & Co. then requested that the policies should be returned, in order that the form might be changed, and that new policies containing the required specific form might be issued. That the Franklin Brass Company authorized their said brokers to make the proposed changes, and to procure the insurance in accordance therewith. That J. B. Moore & Co., on September 1, 1891, representing the Franklin Brass Company, wrote P. J. Otey & Co., representing the insurance companies, returning the old and giving instructions as to the new policies desired; and that this communication was replied to on the 2d of September, 1891, in which correspondence the form of the policies and the sums that could be placed in different companies, as also the rate of insurance, were referred to and discussed, but no agreement was reached. That on September 3, 1891, P. J. Otey & Co. sent the following telegram from Lynchburg to J. B. Moore & Co., at Richmond, having reference to said insurance, viz.: "With specific form, will write ten thousand at ninety cents, if it will help you." That J. B. Moore & Co., in a letter to P. J. Otey & Co., concerning the insurance, dated the 3d September, 1891, referring to such telegram, used this language, viz.: "We also have your telegram that you can place 10,000 at 90c., and trust you will do so, as we would like to get it as low as possible. The amount on the patterns, that

is to be  $\frac{1}{10}$  of the entire insurance, is to be deducted from the amount wanted on machinery. As in our hurry we sent you the total amounts wanted on the different items, we haven't any way of figuring it out ourselves. In sending the policies, we would be glad if you would return the original mem. sent you. We will be glad to receive policies from you as early as convenient. Send us policies for the full amount of the original order sent you." That on the 4th September, 1891, at about 1 o'clock p. m., a fire occurred, by which all of said property was destroyed, the loss upon each item being greatly in excess of the aggregate insurance thereon. That, prior to said fire, P. J. Otey & Co. had indicated their willingness to insure said property, a full description of which, as also a division of the amounts of insurance on the several kinds of property, then being in their possession, with insurance placed amounting to \$10,000, at 90 cents on the \$100, if the assured, through its agents, would prepare a specific form, which it was alleged was duly prepared and deposited in the post office at Richmond, addressed to P. J. Otey & Co., on the 3d of September, 1891. That this form so mailed was satisfactory to said P. J. Otey & Co., as representatives of the insurance companies, and was accepted by them without objection. That, soon after the fire, said J. B. Moore & Co., as agents of the Franklin Brass Company, applied to P. J. Otey & Co. for the policy which they had agreed to furnish, and for the name of the company they had issued it for, tendering at the same time the premium therefor, and that they refused to deliver said policy, and declined to give the name of such company. That the plaintiff had been theretofore, by a decree of the circuit court of Botetourt county, in a cause therein pending, duly appointed receiver of said Franklin Brass Company, and fully authorized to take all necessary steps to collect its assets and discharge its liabilities. It was also set forth in the bill that the plaintiff had been but lately before informed that it was the Phenix Insurance Company of Brooklyn for which said P. J. Otey & Co. so acted in the telegram of September 3, 1891, and that at that time they were the duly-authorized agents of said company, having in their possession policies of insurance signed and executed by its officers, which they were authorized to fill and deliver. The plaintiff therefore charged that in consideration of a premium of \$90, which the Franklin Brass Company, through its agents, agreed to pay, which was acquiesced in by P. J. Otey & Co., the said defendant did, on the 3d day of September, 1891, agree to insure for one year therefrom the Franklin Brass Company against loss and damage by fire to its said property in the sum of \$10,000, in the proportions on said property theretofore agreed upon, and also that the defendant did then and there agree to write out and deliver a policy for the same. The prayer of the bill was that the defendant be required specifically to perform the said agreement to insure the property and deliver the policy; that it be ordered to pay to the plaintiff the sum of \$10,000, the amount insured, less the premium of \$90, with interest on the residue; and for further general relief.

To this bill the defendant filed a demurrer, which, after argument and consideration, the court overruled, for reasons set forth in an

opinion filed and made a part of the record, which so fully and clearly state the questions involved that this court, in disposing of the assignment of error relating to the demurrer, adopts the same, and quotes it in full, as follows:

"First ground of demurrer: That the receiver cannot sue on the contract sought to be enforced in this suit. The decree of the circuit court of Botetourt county, appointing the plaintiff in this suit receiver of the Franklin Brass Company, expressly confers upon him the power to take any necessary step to get in the assets of the company, and for that purpose to bring such suits as may be necessary. This decree is the charter of his powers and authority, and imposes on him the duty of collecting and reducing into possession the assets of the company of which he is made receiver. And as he has succeeded to, and is invested with, all the rights, powers, and authority of the corporation of which he is made receiver, he, in the opinion of the court, is the proper person to bring this suit. The corporation itself, being in the hands of a receiver, could not maintain this suit. The individual stockholders could not do it, and there is no one else but the receiver who could do it.

"Second ground of demurrer: That the bill, while alleging that the letter containing the form of policy was duly mailed by J. B. Moore & Co., at Richmond, to P. J. Otey & Co., at Lynchburg, fails to allege that the said letter was duly stamped. The court thinks that the allegation that the letter containing the said form of policy was duly mailed carries with it the presumption that it was duly stamped, which was a requirement of law and the prerequisite to mailing. When a party alleges that he duly mailed a letter, the court must presume that he complied with the requirements of law, and stamped the letter. If it were material to allege the particulars as to the manner and mode of mailing the letter in question in this suit, such particularity is rendered unnecessary by the allegation in the bill that the said letter was duly received by P. J. Otey & Co.

"Third ground of demurrer: The third ground of demurrer advanced in the argument by counsel for the defendant is that the plaintiff does not file with his bill the contract which he prays to have specifically performed. The bill alleges that the plaintiff, through his agents, J. B. Moore & Co., a few days after the fire which destroyed the property, applied to P. J. Otey & Co., the agents of the defendant, for the policy which they agreed to furnish, and for the name of the company for which they were acting, and at the same time tendered them the premium therefor, but that P. J. Otey & Co. refused to deliver the policy or to give them the name of the company for which they were acting. From this it appears that the only evidence of the agreement to insure which the plaintiff could file is the correspondence between J. B. Moore & Co. and P. J. Otey & Co., which correspondence constitutes the agreement to insure, relied on by the plaintiff in this suit. The defendant demands that the plaintiff shall file with his bill, as part thereof, in order to maintain this suit, the contract of insurance, which is the policy itself. If he were able to do this, there would be no necessity of this suit, the object of which is to compel the defendant to carry out its agreement to insure by executing the policy of insurance contracted for.

"The demurrer is overruled."

The defendant filed its answer, not admitting any of the allegations of the bill relating to the negotiations charged to have taken place between J. B. Moore & Co., representing the Franklin Brass Company, and P. J. Otey & Co., as agents for the insurance companies, and demanding full and proper proof of the same. It denied that any such contract as was set forth in the bill was ever made, and claimed that the negotiations referred to therein were not consummated, and that they never grew into a binding contract between the parties, and insisted that it was well understood between the parties that the correspondence and negotiations mentioned should not be considered as a contract un-

til the entire matter, in form and substance, had been submitted to and approved by the insurance company. Defendant also denied that the plaintiff had lately theretofore become informed that it was the Phenix Insurance Company of Brooklyn for which P. J. Otey & Co. acted and spoke in the telegram of September 3, 1891, and it alleged in its answer that the Franklin Brass Company was fully advised on that subject in September, 1892, and that the delay in bringing the suit was without excuse. To this answer the plaintiff filed the usual replication, and the proofs were duly taken. The testimony of quite a number of witnesses was taken, and all the correspondence, both letters and telegrams, between the insurance agents, relating to the transactions concerning the insurance in controversy, was produced, as were also copies of the policies of insurance first issued, and of the amended "forms," as subsequently prepared for the then proposed insurance. Before the case came on to be heard, the plaintiff filed exceptions to the defendant's answer, which the court overruled, but, as this action of the court is not now before us for review, the same will not be further referred to, and is mentioned only as a proper statement of the history of the case. The defendant then moved the court for permission to file an amended answer, offering in support of the same the affidavit of one of its counsel; but the court, on consideration of the matters involved, overruled that motion, and this action is assigned as error by the appellant, but it will not be necessary to again refer to it, as the conclusion we reach disposes of the case on other grounds also raised by the appellant. The case was then heard on the bill, answer, replication, and testimony, and the court entered a decree directing that the defendant pay to the complainant the sum of \$10,000, with interest thereon from the 4th day of September, 1891, until paid, with the costs of this suit, less the sum of \$90, as of the 3d day of September, 1891. From this decree the appeal we are now to dispose of was allowed.

The contract as relied upon by the plaintiff is claimed to have been made—to have been in fact the result of the letters and telegrams passing—between J. B. Moore & Co., representing the Franklin Brass Company, and P. J. Otey & Co., agents for the defendant; and the object of the suit is to enforce by the decree of the court the contract of insurance so entered into, or, in other words, for the specific performance of the same. The circumstances under which the insurance was originally effected, the reasons why the companies first issuing policies were dissatisfied and recalled them, have already been in substance fully set forth, about which there is no contention. The second effort then was to obtain policies free from the objectionable forms and the blanket provisions of those that had been condemned by the insurance companies. Much of the correspondence between the parties had no direct bearing on the real question at issue, and it was only offered for the purpose of placing fully before the court all the facts bearing upon the insurance of the property,—those relating to the canceled policies as well as those desired,—and as tending

to explain the language used in some of the letters and telegrams, as also in the forms of policies proposed. The main contention between the agents appears to have been as to the "form," which, the testimony shows, has no reference to the printed conditions on the policies, but only to the written part, which sets forth the property insured, its location, and the divisions of insurance on each item. It is also shown that a "specific form" of policy is one that covers a separate amount on each building, and a separate amount on the contents of each building, and that a blanket form of policy covers more than one building under one item of the policy, or a building and its contents, or the contents of more than one building. The first policies were objected to because the form was not specific, because it was in fact blanket in character. Keeping all this in view will enable us to properly understand the language used in the letters and the telegrams, from which it is said that the contract results.

After considerable correspondence between the agents of the parties hereto, in which all of the matters relating to the proposed insurance, and especially the forms of the policies, had been disclosed, P. J. Otey & Co., on the 3d day of September, 1891, sent to J. B. Moore & Co. this message by wire, viz.: "With specific form, can write ten thousand at ninety cents, if it will help you." The reply to this was by letter of the same date, deposited in the mail at Richmond, and directed to P. J. Otey & Co., at Lynchburg. In this letter, J. B. Moore & Co., after referring to other matters connected with the application for insurance, used this language, viz.: "We also have your telegram that you can place 10,000 at 90c., and trust that you will do so, as we would like to get it as low as possible." This, the plaintiff below claims, is the offer to insure, made by the defendant, through its agents, which was accepted by the plaintiff's agent on the same day. Does the evidence support this contention of plaintiff that a contract of insurance was consummated by the writing and mailing of the letter of September 3, 1891? It is insisted that when J. B. Moore & Co. deposited their letter in the post office at Richmond, on the 3d of September, eo instanti the contract was consummated, and could not afterwards be changed or repudiated by either P. J. Otey & Co. or by the company they represented. Where a contract is sought to be established by letters or telegrams, it must appear from the direct terms of the same that both sides have agreed to one and the same set of propositions. If any new matter is introduced into the answer, or anything is left by the offer to further determination, no contract has been entered into. If the reply does not in every particular comply with the offer, it will not make a contract. 1 Chit. Cont. (11th Am. Ed.) 15; 1 Pars. Cont. (6th Ed.) 476; Edichal Bullion Co. v. Columbia Gold Min. Co., 87 Va. 651, 13 S. E. 100; Minneapolis & St. L. Ry. Co. v. Columbus Rolling-Mill Co., 119 U. S. 149, 7 Sup. Ct. 168; Springs Co. v. Harrison (Va.) 25 S. E. 888; Goulding v. Hammond, 4 C. C. A. 533, 54 Fed. 639. If, by the telegram of September 3d, P. J. Otey & Co. did not reserve the right to determine whether or not the "specific form" was



such as had been required by the previous correspondence, then the claims of the appellee that the contract was closed when the letter of J. B. Moore & Co. of that date was deposited in the Richmond post office must be conceded. In such cases the authorities almost uniformly hold that the acceptance dates from the posting of the letter or the sending of the telegram. *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Duncan v. Topham*, 8 C. B. 225; *Tayloe v. Insurance Co.*, 9 How. 390; *Trevor v. Wood*, 36 N. Y. 307; *Sanders v. Fruit Co.*, 144 N. Y. 209, 39 N. E. 75; *Hunt v. Higman (Iowa)* 30 N. W. 769; *Yonge v. Society*, 30 Fed. 902.

In the light of the correspondence and the special objections that had theretofore been raised as to the "form" in the policies, we are unable to hold that it was the intention of the agents of the defendant, in sending the telegram mentioned, for the first time in the history of the negotiations concerning the insurance, to transfer absolutely to the judgment of the agents of the party asking for insurance both the character and the sufficiency of the one matter that had caused, down to that time, the refusal of the defendant to perfect the insurance requested. We find nothing in the record to justify this contention. The letter of J. B. Moore & Co., by which it was insisted that the contract was consummated, does not sustain the position taken by appellee. While it inclosed the "form," the writers were not confident that it would satisfy the companies, but they trusted that it would be specific enough. They evidently recognized that P. J. Otey & Co. had the right to pass upon the question of the specific character of the forms they were inclosing them, and they knew that, if said agents of the defendant did not approve of the same, the insurance would not be perfected. We gather from the evidence that such was the understanding of all the parties concerned, and, independent of that, we think the offer contained in the telegram was one that reserved to the sender thereof the right to take further action after a reply had been received. That the forms inclosed in the letter of September 3d were not "specific," in the sense that that word is used by insurance men, is conclusively shown by the testimony, and is apparent from the correspondence had between the parties; and that such forms were not of the character indicated by the letters of J. B. Moore & Co., especially their letter of September 1st, is so evident as not to admit of question. The claim that such forms were in accordance with the understanding of the parties, and of the kind called for in the telegram of the 3d September, is negatived by the letter of the agents of the Franklin Brass Company, dated September 1st, as well as by other portions of the correspondence, and is based only on a violent presumption. It would be most inequitable to hold that J. B. Moore & Co., by inclosing such forms, could bind the defendant to a contract that was proffered by its agent contingent upon the furnishing of a specific form by the party desiring insurance. Holding, as we do, that P. J. Otey & Co. reserved the right to pass upon the sufficiency of the specific form called for in the telegrams, it follows that the posting of the letter at Richmond did not operate