

circumstances. The Railroad Tax Cases, 13 Fed. 722, 733. The court there, in discussing the prohibitions of the amendment, said:

"Unequal exactions in every form, or under any pretense, are absolutely forbidden; and, of course, unequal taxation, for it is in that form that oppressive burdens are usually laid."

It is idle to suggest that the case in hand is one of proper legislative classification. A valid classification for the purposes of taxation must have a just and reasonable basis, which is lacking here. Railroad Co. v. Ellis, 165 U. S. 150, 165, 17 Sup. Ct. 261. Mr. Justice Brewer, in delivering the opinion of the court there, said:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection."

I am of opinion that the act of assembly of the state of Pennsylvania of June 15, 1897, here in question, is in conflict with the constitution and laws of the United States, and cannot be sustained. The demurrer to the bill of complaint is therefore overruled.

BASS, RATCLIFF & GRETTON v. CHRISTIAN FEIGENSPAN.

(Circuit Court, D. New Jersey. July 31, 1897.)

EQUITY PLEADING—AMENDMENT OF BILL AFTER REPLICATION.

When the substance of the bill contains ground for relief, and the prayer and proofs are in conformity therewith, leave to amend, enlarging the claim of right, and changing the character or quantity of the relief sought, will not be granted after replication filed and proofs taken.

This was a suit in equity by Bass, Ratcliff & Gretton against Christian Feigenspan, a corporation, to restrain the alleged infringement of a trade-mark. The cause was heard on complainant's motion to amend its bill of complaint.

James L. Steuart, for the motion.

Chauncy H. Beasley, opposed.

KIRKPATRICK, District Judge. The complainant in this cause filed its bill of complaint November 8, 1895, and on January 16, 1896, by leave of the court, amended the same by striking out all of the original bill, and substituting therefor an amended bill of complaint. The complainant claims in its amended bill that it has for many years used a red, triangular-shaped figure for the purpose of distinguishing its pale ale, and has used the same on labels on bottled ale, and for the purpose of stamping it on heads of casks containing ale, and that it now has the sole right to use a trade-mark consisting of a red, triangular-shaped figure in connection with the manufacture and sale of pale ale and all other malt liquors; also a claim to the generic right to the exclusive use of the designation "Triangle," and to a figure, mark, or design of triangular shape or outline. The relief

sought is an injunction prohibiting the defendant from making use of said trade-mark in connection with the sale of pale ale, or half and half, or any other malt liquor or combination of malt liquors, or using the word "Triangle" or a red, triangular-shaped figure in connection with packages, casks, or bottles containing any malt liquor whatsoever. Answer and replication have been filed. The complainant has closed its *prima facie* proofs, and now makes application to amend its bill, widening its scope so as to include within its claim of exclusive right any figure or design of triangular shape, whatever color might be included within its outlines, and to specifically charge the defendant with the use of such figure upon bottles, packages, and casks containing other malt liquors than pale ale and half and half. The twenty-ninth equity rule provides that amendment to bill may be made after replication filed "upon proof that the matter of the proposed amendment is material." The purpose of the amendment must be, not to strengthen or enlarge the complainant's case, not to change the character or quantity of the relief for which he has asked, but to enable the court to administer substantial justice. To this end, when a case for relief is made out, but not that shown in the bill, or specifically asked for in the prayer, an amendment will be allowed, even on a final hearing. *Neale v. Neale*, 9 Wall. 1; *The Tremolo Patent*, 23 Wall. 518; *Graffam v. Burgess*, 117 U. S. 194, 6 Sup. Ct. 686. To the same effect are the other cases cited in complainant's brief. Where the substance of the bill contains ground for relief, and the prayer and proofs are in conformity therewith, leave to amend will not be granted after replication filed and proofs taken. "The instances where it will be done are confined to those where it appears from the case made by the bill that the plaintiff is entitled to relief, although different from that sought by the specific prayer. When the object of the proposed amendment is to make a new case, it will not be permitted." 1 Daniell, Ch. Prac. (5th Ed.) 384. There is no defect in the bill filed in this cause which will prevent the complainant from obtaining the relief sought by the prayer. The prayer is general in its nature, and under it the court may grant any appropriate relief consistent with the case made by the bill. If the complainant is entitled to any other relief than that which it shows by and prays for in its bill, its proper course is to file either an original or supplemental bill, as the nature of its relief requires. To expand its claim of right from that set out in its bill to the one which it seeks by amendment to make it, is to make a new and different case. It is admitted by complainant's counsel that the amendment relating to "Burton Ale" raises a new issue, which defendant is entitled to try upon a new bill. As to the other matters the complainant has made its case by its bill. There is no need for amendment to enable it to obtain a proper decree upon the issues raised, or for the court to do substantial justice. The motion to amend will be denied.

BRENDDEL v. CHARCH et al.

(Circuit Court, S. D. Ohio, W. D. September 1, 1897.)

1. EQUITY—JURISDICTION—ACTION FOR LEGACY.

Under the decisions of the supreme court of the United States and of the supreme court of Ohio, a suit for a legacy in that state is of equitable cognizance.

2. FEDERAL COURTS—JURISDICTION OF SUIT FOR LEGACY—PENDENCY OF PROBATE PROCEEDINGS.

Pending the settlement of an estate in the probate court, a citizen of another state, who is a legatee under the will, may maintain a suit in the federal court against the resident executor and the other legatees and heirs to recover such legacy.

Harmon, Colston, Goldsmith & Hoadly, for complainant.

Gunckel, Rowe & Shuey and Oscar M. Gottschall, for respondents.

TAFT, Circuit Judge. The complainant, a citizen of Texas, files her bill to compel the executor of John S. Charch, deceased, to account for and to pay over to her the remainder of a legacy of \$5,000 left to her by will of the testator, upon which she has already received \$3,000, and also the amount due her as her share under a residuary bequest in the same will to herself and others. The executor, and the other legatees under the will, who are all citizens of other states than Texas, are made parties defendant. Demurrers to the bill are filed by the executor and by one of the defendant legatees. The demurrers raise three objections to the bill. The first is that the action is not of equitable cognizance; the second is that the same cause is pending in the state court; and the third is that, as the estate is being settled in the probate court of Montgomery county, the jurisdiction of this court is ousted on principles of comity.

1. It is a question somewhat controverted whether an action for a legacy is of equitable cognizance, and authorities differ. The supreme court of the United States, however, has assumed the affirmative of the question to be correct (*Association v. Hart*, 4 Wheat. 1; *Armstrong v. Lear*, 12 Wheat. 169; *Lewis v. Darling*, 16 How. 1); and such seems to have been the view of the Ohio supreme court before the adoption of the new constitution fusing law and equity and providing for the modern organization of probate courts (*Cram v. Green*, 6 Ohio, 429; *Grosvenor v. Austin's Adm'r*, Id. 104). In this jurisdiction, therefore, it must be held that the cause of action stated in the bill justifies equitable relief.

2. It does not appear from the bill that the complainant is a party to any proceeding in any other court to obtain the same relief here asked. But, if it did, it would not be a ground for abatement of this suit. *City of North Muskegon v. Clark*, 22 U. S. App. 522, 10 C. C. A. 591, and 62 Fed. 694; *Gordon v. Gilfoil*, 99 U. S. 168.

3. The pendency of the proceeding to settle the estate in the probate court of Montgomery county does prevent this court from taking the estate out of the hands of that court, and administering it, and distributing the same according to the old equity practice, but it