arising under the constitution and laws of the United States; and the said suit between the said parties is believed to be collusive or feigned." In respect to this point the court said (51 Fed. 536):

"It is apparent from the whole record and the conduct of this hearing, that the controversy is not between complainants and the railways, but between the railways and the other defendants."

The court, therefore, conceding the citizenship of the Texas & Pacific Railway Company to be in New York, as claimed by the other defendants, evidently concluded that, although the company was a nominal defendant, yet a proper alignment of the parties, according to their real interests, would place that company with the complainant; thus making the controversy between citizens of different states, and therefore within the jurisdiction of the court. In the present case, however, it is a mistake to suppose that the jurisdiction depends upon diverse citizenship of the parties. The bill presents a federal question, namely, the question whether the ordinance set out in the bill violates those provisions of the constitution of the United States declaring that no person shall be deprived of his property without due process of law, and securing to every person the equal protection of the laws. Reagan v. Trust Co., supra; Central Trust Co. of New York v. Citizens' St. Ry. Co. of Indianapolis, 82 Fed. 1. That a mortgagee has such an interest in the mortgaged property as entitles him to bring suit to restrain injury thereto is, in my opinion, beyond doubt. Such right was distinctly recognized in the cases of Mercantile Trust Co. v. Texas & P. Ry. Co. and Reagan v. Trust Co., supra. The demurrer would, therefore, be overruled, but for the failure of the complainant to make the San Diego Water Company a party to the suit. Because of the absence of that indispensable party the demurrer is sustained, with leave to the complainant to amend the bill within 10 days, if it shall be so advised.

POST et al. v. BEACON VACUUM PUMP & ELECTRICAL CO. et al.

(Circuit Court of Appeals, First Circuit. January 19, 1898.)

No. 216.

1. EQUITY—RESCISSION—SUFFICIENCY OF ALLEGATIONS.
   A bill for a rescission, which will seriously affect the interest of others, must contain clear and positive allegations showing the equitable right of the complainants to the relief asked.
2. CORPORATIONS—TRANSFER OF PROPERTY—ULTRA VIRES.
   The action of a corporation in transferring its property and business to another corporation is not ultra vires except as to creditors prejudiced thereby, or nonassenting stockholders, and their right to a rescission may be waived.
3. SAME—RIGHTS OF STOCKHOLDERS—ESTOPPEL.
   A majority of the stockholders of a corporation, by vote, agreed to a reorganization, and the transfer of its property and business to a new corporation, in consideration of the issuance to the stockholders of a certain amount of the stock of the new company, and the privilege to such stockholders of subscribing for the remainder at a fixed price. The plan was executed, and the transfer made. *Held*, that minority stockholders who opposed the transfer, but who subscribed for their proportion of the

stock of the new company, though under protest, and permitted such company to conduct the business for 18 months, were estopped to then ask for a rescission.

Appeal from the Circuit Court of the United States for the District of Maine.

This is a bill by Louis Post and others, as stockholders of the Beacon Vacuum Pump & Electrical Company, against such company and the Beacon Lamp Company, to rescind a transfer of the property of the former corporation to the latter.

Edward P. Payson, for appellants.

William H. Dunbar, George E. Bird, and Louis D. Brandeis, for appellees.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. The complainants are stockholders of the Beacon Vacuum Pump & Electrical Company, which, for convenience, we will call the "Pump Company." They bring this bill against that corporation and the Beacon Lamp Company, which we will call the "Lamp Company." The capital stock of the Pump Company is $1,000,000, divided into 40,000 shares, of the par value of $25 each, all of which are outstanding. Complainants hold 2,580 shares, being a fraction over one-sixteenth part of the entire issue. They assume to bring their bill in behalf of themselves and of all others in like interest; but, as the case stands, there are no others in like interest. It is maintained that the cause of action which the bill presents exists, if at all, only in the right of the corporation, and not in the right of the stockholders themselves; but we will not find it necessary to determine this proposition.

The bill was demurred to by both respondent corporations, assigning various grounds of demurrer, and, among the rest, a want of equity, which is the only one to which we will have occasion to refer. It shows that the Pump Company is a manufacturing corporation, and had been making electric lamps. It seeks to set aside a transfer from it to the Lamp Company, made pursuant to a scheme of reorganization, and executed in July, 1895. The bill alleges that "on or about March, 1895, the assets of" the Pump Company, "exclusive of letters patent, were shown by the corporation books to be about $130,000"; and that the entire liabilities of that corporation, not including the capital stock, were about $60,000, "leaving the said company with about $70,000 worth of personal property, and said letters patent"; and, further, that, "of said $60,000 indebtedness, over $38,000 had been incurred upon loans for which the corporation issued bonds due and payable about 1902, thus leaving its then current indebtedness, in bills payable and accounts, some $22,000." It also alleges that the Pump Company had in 1895 "sufficient assets to enable it to make further loans, if any such were required, and also the legal right to amend its charter to increase its capital, so as to enable it to issue

more stock"; and that it "was neither insolvent nor without power to obtain the necessary funds to continue in business." It also alleges that, in the event the Pump Company had been wound up and its assets sold to pay its debts, the value of its letters patent would have added "a large sum to the $70,000 of property held above its indebtedness," and that the value of the letters patent appears, from the circular to the stockholders setting out the scheme of reorganization, to have been estimated at over $400,000 for use in exchange for $400,000 of the capital stock of the Lamp Company. There are no allegations showing that the old corporation had any existing available working capital.

It may well be questioned whether there is sufficient in these allegations to show that the Pump Company was financially capable of pursuing its business, or that its assets, if it had been wound up, would have yielded any substantial dividend to its stockholders. For example, the first, which refers to the books of the corporation for values, without any direct allegation about them, is, of course, insufficient on any rule of pleading governing the construction of a bill in equity to receive the consideration of the court. Again, the allegation to the effect that the value of the letters patent, if sold, would have added "a large sum" to the $70,000 of property held above its indebtedness by the corporation, is equally ineffectual, because it is based on the defective statement of values which refers to the books of the corporation. So, also, the allegations that the Pump Company had sufficient assets to enable it "to make further loans," meaning thereby to borrow money, and that it might obtain power to issue more stock, without some definite statement as to its available resources, result in what is purely problematical. The allegation that the corporation was not insolvent, nor without power to obtain the necessary funds to continue in business, might properly, as the bill is framed, be regarded as a mere deduction from the other matters stated in the bill to which we have referred, and not at all as a positive, distinct allegation; and, in view of the insufficient character of the allegations with reference to the assets of the corporation to which we have called attention, it might well be held too general.

A bill seeking a result which may be so disastrous to the interests of other stockholders as this might be if its principal prayer were granted should support itself by decisive allegations. The general rule is that the essential parts of a bill in equity should be stated positively and with precision. Story, Eq. Pl. (10th Ed.) §§ 255, 256. This is especially insisted on where a remedy is sought by an injunction or a rescission, the result of which may not only compensate the party injured, which is all the common law ordinarily gives, but may impair the interests of the adverse party to a vastly disproportionate extent. The underlying principle is stated in the following cases, although applied there from an aspect different from that at bar: Grymes v. Sanders, 93 U. S. 55, 62; U. S. v. American Bell Tel. Co., 167 U. S. 224, 241, 17 Sup. Ct. 809. The common law gives relief on a mere preponderance of proofs; but it is certain that, in cases of the class we are considering, equi-

ty does not act unless the proofs are clear. The underlying reasons which require this require also that the allegations which the proofs are to sustain be clear to the effect that the complainant has suffered, or is threatened with, an injury so substantial as to demand, not only compensation, but also specific relief by rescission, even while this may cause a loss to others as to which his own would be comparatively trifling.

All the shareholders, except the complainants, agreed to a scheme which involved a reorganization of the Pump Company. It provided that a new corporation, the Lamp Company, should be organized; that its capital stock should be $500,000, divided in 50,000 shares of the par of $10 each; that, of these shares, 10,000 should be issued to the stockholders of the Pump Company, without any consideration coming from them; that 32,000 shares should be open to subscription pro rata by such stockholders at $1.25 per share; and that the balance should be issued by the new corporation, as might afterwards be determined by it. It appears that the 32,000 shares had been underwritten; that is to say, that an arrangement had been made by which certain individuals had agreed to take such portion thereof, paying the $1.25 per share therefor, as might not be taken by the holders of the stock of the Pump Company. This arrangement assured a working capital, and was ratified by the stockholders of the Pump Company at a meeting held June 20, 1895, no shareholder voting adversely. The complainants in the present bill had made known their opposition to the plan, but they did not appear at the stockholders' meeting, alleging that they assumed that the meeting would not be held, by reason of certain suits which they had instituted.

It is well to understand the precise nature of the proceedings against which the complainants protest. What was attempted and done by the Pump Company was not ultra vires in every sense of the term. No question of public policy was involved, and it was all permissible with the consent of all the stockholders; and, if it had been once accomplished with their approval, it could not have been rescinded by either the state or any parties in interest, unless by creditors prejudiced thereby, if there were any so prejudiced. Therefore, if the question involved is one of ultra vires, it is so in a modified way only; that is to say, it concerns only the contractual relations between the stockholders and the corporation, as to which the stockholders might waive their rights, either expressly or impliedly; or, under certain circumstances, any stockholder might become estopped from making a denial of a waiver.

The bill further alleges that the Lamp Company was organized "on or before the first day of July, 1895"; that pursuant to the plan of reorganization, "on or about July, 1895," the Pump Company transferred all its assets to the Lamp Company for the considerations named therein; and that the Lamp Company took possession thereof, and commenced to carry on, and is still carrying on, the former business of the Pump Company. It also alleges that the stock of the new corporation had been allotted; that the complainants are not informed whether it had been paid for or issued; and

that the 10,000 shares intended for distribution among the shareholders of the old corporation are held in the custody of its treasurer; and it professes ignorance whether or not the plan of reorganization had been completed in its other details. It prays for relief in various forms: First, for rescission; second, for a valuation of the complainants' interests in the old corporation, and payment thereof; and, third, as follows:

"Or that your orators may be adjudged severally entitled to receive an amount of the capital stock of said Beacon Lamp Company equal to the amount of their stock in said Beacon Vacuum Pump and Electrical Company, due consideration being had of the difference in the total capitalization of the said two companies, and said Beacon Lamp Company ordered to issue the same, upon surrender of their shares in said Beacon Vacuum Pump and Electrical Company to your orators."

We will call attention hereafter to the peculiar pertinency to the case of the last of these various forms of relief prayed for.

The bill also alleges as follows:

"What subscriptions have been made your orators are uninformed, except that your orators have, but only under protest and in order to preserve their rights, subscribed for an amount of stock in said Beacon Lamp Company pro rata to their holdings, but have not received any of the stock in said new company, nor have they ever surrendered their stock in said first-mentioned company; that, as they are informed and believe, the amount of stock in said Beacon Lamp Company to which your orators would have been at liberty to subscribe has been allotted to others, but whether either paid for or issued your orators are not informed."

Whatever rights the majority of the shareholders of a corporation which finds itself in the doubtful pecuniary condition into which the Pump Company had evidently fallen have with reference to the disposal of the assets of the corporation to a new one for a fair value, whether receiving therefor cash or the shares of the new corporation, when the transaction relates to an absolute sale, and amounts to a winding up of the corporate affairs, we must assume it to be the law that, independently of some appropriate statute provision, the majority has no power to involve the minority in a reorganization on the lines of this now in issue, or on any similar lines, without its consent, expressed or implied. The minority has a lawful right to maintain that the contractual relations which it established with a corporation whose shareholders they became does not include a contractual relation with any other corporation; and there is no right in law to compel it to elect between such new contractual relation and the loss of its shares in the old corporation, or compensation for them on any arbitrary basis which a reorganization may give. The underlying principle was stated in Clearwater v. Meredith, 1 Wall. 25, 39, and the rule seems to have been clearly recognized in Mason v. Mining Co., 133 U. S. 50, 10 Sup. Ct. 224; but a rule at law is often one thing, and the right to relief in equity a very different matter. Equity will not raise its hand to give specific relief, and rescind and annul important transactions as to which there is no charge of a dishonest purpose, and which, if not interfered with, may give great profit to parties interested in them, or at least prevent them from suffering great loss, at the demand of a party who does not

show clearly and definitely a valuable and substantial interest, which has been unlawfully disregarded, or is in danger thereof, and who does not, under the circumstances of the case at bar, show that he has consistently maintained a position in protection of his rights adverse to the majority interest, or that he has had no opportunity so to do. Indeed, the rule was well stated by Mr. Justice Field in Dimpfell v. Railway Co., 110 U. S. 209, 3 Sup. Ct. 573, to the effect that the equity courts will not interfere in matters of this character merely because there may be a doubt as to the authority sustaining the proceedings, or as to their wisdom, nor unless a real and substantial grievance exists. A convenient collection of authorities illustrating this proposition will be found in Bassett v. Manufacturing Co., 47 N. H. 426.

As we have already shown, it may well be argued that the bill, which we must presume sets out the best case the complainants can make, nowhere alleges in terms which the equity courts can accept that the complainants have any such grievance, or, in any clear or positive way, that the complainants have brought it for any purpose except that of maintaining their strictly legal rights. On the other hand, the last variation in the prayers for relief, to which we have referred, involves an admission that the complainants make no objection to being put into a contractual relation with the new corporation, but that their real grievance is that they cannot receive their proportion of the 32,000 shares of stock, to be subscribed for, on better terms than their co-shareholders, by being relieved from the payment of the stated $1.25 per share.

But, passing by all these questions, it is clear that the complainants have not maintained that consistent position necessary to relieve them against an equitable estoppel. They admit that they have subscribed for their proportion of the 32,000 shares of stock in the new corporation. They do not state the date when they made the subscription. The transfer of the assets to this corporation was made in July, 1895, and the bill was not filed until the 12th day of January, 1897; so that, although at the outset they protested against the reorganization, yet their subscription, in the absence of any proper allegation otherwise, must be presumed to have been made at such a time as justified the respondents in assuming that the Lamp Company was authorized, so far as the complainants were concerned, to receive the transfer of the property of the old corporation, and to commence and carry on its manufacturing business, thus involving itself in the liabilities and other complications inevitably arising therefrom. That this raised an estoppel in equity as against a bill praying rescission is too clear to need discussion. It is true that complainants allege that this subscription was under protest, and only to preserve their rights; but the bill does not give the court any details which would enable it to perceive that, by any possibility, the effect of the subscription, which of itself would be an accomplished fact, could be overcome by any protest or other formal reservation which might accompany it. The decree of the court below is affirmed, with the costs of this court for the appellees.

WHITNEY v. NATIONAL EXCHANGE BANK OF NEWPORT.

(Circuit Court, D. Rhode Island. December 8, 1897.)

No. 2,515.

1. MORTGAGE FORECLOSURE—SURPLUS PROCEEDS—JUNIOR MORTGAGEE—ESTOPPEL.
Bill in equity by a junior mortgagee for an accounting from a bank, an elder mortgagee, for surplus proceeds of a foreclosure sale by the bank. At the sale the bank's special agent, authorized to bid a sum sufficient to cover the elder mortgage, by mistake exceeded his authority, and bid a larger sum. *Held*, that the bank was not estopped to set up the mistake and lack of authority, or to deny its receipt of the sum bid.

2. SAME—EQUITABLE RELIEF.
That failing to show that the bank had received any actual surplus, or to prove that the junior mortgage had any actual value, or to offer any evidence thereof except the bid made by the agent through mistake, the complainant had shown no substantial title to equitable relief.

This was a suit in equity by Nathan Whitney against the National Exchange Bank of Newport.

William B. Whitney, for complainant.
William P. Sheffield, for respondent.

BROWN, District Judge. The complainant, Whitney, as holder of a fifth mortgage on real and personal estate, prays that the respondent bank, an elder mortgagee, account for a surplus arising upon a sale at auction by the bank under a fourth mortgage. At the sale the property was offered by the auctioneer, subject to three prior mortgages, the amount whereof was not stated. Upon a single bid of $6,000, the property was declared sold to one Milliken, as agent for the bank. The bank has not perfected a paper title under this sale, and denies that Milliken's bid is binding upon the bank, for lack of authority. The evidence of Milliken's lack of authority to bind the bank to the amount of $6,000 is clear. His agency was special, and his authority limited, and gave him no right to bid more than $1 in excess of the amount of the four mortgages prior to the complainant's. Though he correctly understood the extent of his authority, he was led to exceed it by a mistaken belief as to the subject-matter of the sale, supposing that he was bidding upon the property free from incumbrances, instead of subject to the liens of the mortgages. The complainant invokes by his bill the doctrine of equitable estoppel to preclude the defendant "from denying that it did pay to itself, or did set apart in payment, the said sum of $6,000, for which it sold and purchased * * * said * * * land." In my opinion, however, the complainant has failed to make out a case for the application of this doctrine.

In Dickerson v. Colgrove, 100 U. S. 578, it was said concerning equitable estoppel:

"The vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection, and can-

not be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit."

The present case appears to me an attempt to misapply this doctrine to procure for the complainant a large sum, to which he has shown no just or substantial title, and to create out of the unauthorized act of the bank's special agent—the result of a clearly-proven mistake—a wholly inequitable measure of the money value of the complainant's right. The foundation of the complainant's right was his interest as owner of a fifth mortgage of property, upon which were prior incumbrances amounting to about $15,000. The bill fails to allege that the property was of any value over these mortgages, and there is in the case no testimony sufficient to show that the complainant's paper security had any actual value. On the contrary, the course of dealings between the complainant and the bank, and the subsequent sale of the property under the third mortgage, for a price insufficient to satisfy the mortgage liens prior to the complainant's, together with the fact that the respondent bank has failed not only to realize any actual surplus, but also to secure the full amount of its own claim under the fourth mortgage, might well be considered sufficient proof that the complainant's mortgage was a mere paper security, without actual value.

A complainant who seeks the aid of a court of equity must make out by affirmative proofs that he has a substantial right. The sole evidence of such a right in this case is the fact that Milliken made a bid of $6,000, and that the property was struck off to him subject to the prior mortgages. The mistake of Milliken as to the subject-matter of the sale makes his bid entirely worthless as an indication of the value of the property actually offered for sale by the auctioneer. Although the bill alleges that the complainant's conduct was influenced by Milliken's acts, and by his ostensible authority, and that, in consequence, he did not bid at the sale, or attend a subsequent sale under the third mortgage, there is no evidence to support these allegations, and considerable evidence to the contrary. It is very remarkable that the complainant has given no testimony in the case, and that, though many of the matters set forth in the bill are peculiarly within his own knowledge, his failure to testify is unexplained.

The presumption from the unexplained absence of material testimony is entirely unfavorable to the case stated in the bill. Taken in connection with the evidence, which conclusively proves that in making the sale the respondent had no other object than the payment of its own claim; with the agreement of the bank prior to the sale that the complainant might repurchase from the bank at whatever price it should bid the property in for; with the fact that, on the morning following the sale, the bank, in accordance with this agreement, presented the complainant's son and agent with a memorandum of the amount of the incumbrances, as the price for which the complainant might receive a conveyance of the property; this presumption leads to the conclusion that the grounds of estoppel set up in paragraph 9 of the bill are without foundation in fact. Not only does it appear that the bank has not in fact received any benefit which in equity belongs to the complainant, but it is also apparent that the respondent,

both before and after the sale in question, gave the complainant the fullest opportunity to redeem, and offered favorable terms of redemption.

That the complainant understood that his agreement with the bank before the sale was such that his rights were not substantially affected thereby is apparent from his letter to the treasurer of the bank, written after the sale. The letter is as follows:

"Bennington, Nov. 12, 1889.

"Mr. Norman—Dear Sir: We have been thinking the hotel matter over since the sale, and, in the first place, we are a long distance away, and as my foreman on the farm thinks he cannot stay another year with me, so that I will probably have to be out there a longer term next spring than usual, so that it may not be convenient for me to give any time to the Block Island property, I told my son how I should probably be situated, and if he thought best, and could make a sale of it, or, in case we were not able to make a sale before spring, would run it, I would try and fix the security with you. Will graduates late next June, and will necessarily be very busy this winter and spring, and writes that he does not think it best for us to try to have anything to do with it. Under the circumstances, it will be necessary and best for us not to attempt to redeem it.

"Yours, truly, Nathan Whitney."

All that the complainant can claim from a court of equity is just compensation or a restitution of rights. As this complainant fails to show any loss for which compensation should be made, and has deliberately abandoned the opportunity to secure his interest in the property upon just and equitable terms, the present bill can be regarded only as an attempt by a mortgagee whose security was worthless to create, out of the mistake of the defendant's special agent, a fictitious valuation of a worthless security, and to base upon this valuation his appeal for the intervention of a court of equity.

To sustain his bill would be an act of great injustice to the respondent. For the unauthorized act of its special agent, resulting from a mistake, without any proven damage to the complainant, the respondent, in addition to its own loss as a prior mortgagee, would be compelled to pay a large sum, which the complainant on no principle of equity or justice is entitled to receive. The bill will be dismissed, with costs.

MERCANTILE TRUST CO. v. MISSOURI, K. & T. RY. CO.

(Circuit Court, S. D. New York. January 11, 1898.)

1. EQUITY PLEADING—PLEA AND ANSWER.
   Under rule 37, providing that no demurrer or plea shall be held bad on argument because the answer may extend to some part of the same matter covered by such demurrer or plea, pleas in bar and estoppel to the complaint will not be stricken out because they go to the same matter covered by the answer, when such pleas do not cover the whole bill, and, where covering the same ground as the answer, show different grounds of defense.

2. SAME—SCANDALOUS MATTER.
   Parts of an answer, though immaterial as a defense, and scandalous in nature, will not on that account be suppressed, when intended to meet charges of bad faith made in the bill.

This was a suit in equity by the Mercantile Trust Company against the Missouri, Kansas & Texas Railway Company, praying an injunction, accounting, and other relief. The cause was heard on exceptions to the report of a master, to whom were referred the questions arising on certain motions made by the complainant to strike out parts of the answer and pleas.

F. K. Pendleton, for plaintiff.
Simon Sterne and E. Ellery Anderson, for defendant.

WHEELER, District Judge. The bill alleged:

"That on or about the 1st day of June, 1890, and at various dates thereafter, the said defendant railway company made, executed, and issued, and, for value, delivered to various persons and corporations, its 23,000 bonds, certified by your orator as trustee, numbered from 1 upwards, of which bonds, 17,000 were and are of the denomination of $1,000 each, and 6,000 were and are of the denomination of $500 each; amounting, in the aggregate of their principal sum, to $20,000,000. Each and all of said bonds are dated on the 1st day of June, 1890, mature 100 years after the date thereof, and bear interest at the rate of 4 per cent. per annum, payable semiannually, in gold coin of the United States, on the 1st days of February and August in each year." That to secure the payment of the bonds the defendant conveyed all its property to the plaintiff, by second mortgage, dated June 1, 1890, with this proviso in section 4: "But the covenant to pay the interest coupons belonging to said bonds maturing on the first of February, 1891, and each six months thereafter, to and including the coupons to mature August 1st, 1895, is subject to the following condition and agreement: The said company shall render each six months an account of the gross earnings, income, receipts, interest, dividends, or profits received from the said mortgaged property. It shall charge against such gross earnings all operating and maintenancing expenses, taxes, repairs, renewals, replacements, and insurance; and in each statement it shall charge six months' interest on the forty million dollars of first mortgage bonds. Such net earnings as shall remain after the charges above specified shall have been made shall be applied to the payment of the said coupons." And that "if it should, at any time during the said five years, be deemed expedient to apply any portion of the earnings of the said railway company to purposes other than those hereinbefore specified in this section, the said earnings may be so applied: provided, however, the written sanction of the party of the second part shall first be obtained." That the first coupons upon all of the bonds matured February 1, 1891, and the defendant neglected and refused to render any such account for the six months ending that day. "That, as your orator is informed and believes, the defendant railway company claims and represents that there was no net earnings derived from said mortgaged property, as defined by said section 4 of said mortgage, for the six months ending February 1, 1891; but, as your orator is informed and believes, and therefore now avers, the statements and representations of said defendant railway company in this behalf are wholly untrue and false, and, to the contrary thereof, your orator avers, upon its information and belief, derived as hereinafter stated, that net earnings from said mortgaged premises, as defined in said mortgage, for the said six months ending February 1, 1891, were made and received and existed to a very large sum, to wit, a sum in excess of the amount of interest represented by all of the coupons maturing upon that date. That the defendant railway company has never sought or obtained, and your orator has never given, its sanction, written or otherwise, as contemplated in section 4. Your orator, however, avers, upon information and belief, that notwithstanding no such sanction or authorization has been sought or obtained from your orator, or given by it, a large proportion of the earnings for the period ending February 1, 1891, were applied to, and paid out for, expenditures other than those particularly defined in said section 4, * * * and that such excessive expenditures and unauthorized application of said earnings included amounts paid for new

side tracks, new buildings, real estate, fencing, equipment, and other purposes not included within the provisions of said section 4 as aforesaid, and that the earnings of said property during said period, so used and applied without authority in the provisions of said mortgage, and without such sanction of your orator, aggregated, as your orator is informed and believes, a sum upwards of $900,000. And your orator further avers, upon like information and belief, that the said defendant railway company has continued to apply, and threatens to further apply, large amounts of the earnings from the said mortgaged premises to like purposes, not included in the specific provisions of said section 4, and without the sanction of your orator as in said section contemplated. In this behalf your orator avers, upon information and belief, that the said defendant railway company has entered into agreements whereby it has undertaken to pay and guaranty the payment of the following obligations: (1) All of the interest upon two million five hundred thousand dollars of the first mortgage bonds of the Kansas City & Pacific Railway Company. (2) All of the principal and interest of the first mortgage bonds of the Sherman, Denison & Dallas Railway Company, the authorized issue of which is one million six hundred thousand dollars, and of which two hundred thousand dollars have been issued. (3) All of the principal and interest of the first mortgage bonds of the Dallas & Waco Railway Company, of which one million one hundred and seventy-three thousand dollars have been issued, out of a total authorized issue of two millions of dollars. (4) All of the principal and interest on one million of dollars of the first mortgage bonds of the Southwestern Coal & Improvement Company. That in the guaranties of said bonds of the Kansas City & Pacific Railway Company, the Sherman, Denison & Dallas Railway Company, and the Southwestern Coal & Improvement Company, the said Missouri, Kansas & Texas Railway Company assumed excessive obligations, in large part in the interest of its own officers and directors, who were personally and financially interested in the securities so guarantied, and in the properties embraced in said mortgages. That the said Missouri, Kansas & Texas Railway Company proposes and intends to apply the earnings and revenues from the property covered by said second mortgage to your orator as trustee to the payment and accomplishment of said guaranties, in preference to the payment of the coupons of the said second mortgage bonds." And that this suit is instituted in compliance with a request of bondholders.

The prayer is for an injunction restraining application of any net earnings:

"That a writ of permanent injunction may be issued, under the seal of this court, perpetually enjoining and restraining the defendant, the Missouri, Kansas & Texas Railway Company, its officers, agents, and attorneys, from applying (without the written sanction of your orator, as in said mortgage provided) any of the net earnings or income from the premises described in said second mortgage of the Missouri, Kansas & Texas Railway Company, as the same are therein defined, to any other or different use or purpose than the payment of the coupons and interest of said second mortgage bonds as the same have matured or may mature, until said coupons have been paid in full from such net earnings derived during the six-months periods to which such coupons, respectively, apply,"—for an account of the earnings for the six months ending February 1, 1891, and payment over of the net earnings, and for further relief.

The defendant pleaded that, in a suit by the plaintiff against the defendant in the circuit court of the United States for the district of Kansas, the property mortgaged was in the hands of receivers from November 1, 1888, to July 1, 1891, who operated and administered the property, and rendered full account thereof, which was approved and confirmed by the court, in bar and as an estoppel, and as accounts stated, and res adjudicata between the plaintiff and defendant. 41 Fed. 8. "And, for an answer to such parts of the said bill as are not pleaded to and in support thereof," the defendant admits the mortgage, as made pursuant to a re-

organization agreement entered into during the receivership; sets up the settlement and confirmation of the accounts; and "avers that from and by the accounts aforesaid, so rendered, approved, confirmed, and accepted as aforesaid, which said accounts are, as between the complainant and defendant herein, accounts stated, it conclusively appears that there were no net earnings, as in point of fact there were none, derived from the property of the defendant for the period of six months prior to the 1st day of February, 1891, and applicable conformably to the terms and conditions of the mortgage of June 1, 1890"; and "denies that there was or existed any sum whatsoever in excess of the amount of absolute fixed charge, or any sum whatsoever applicable to the payment, in whole or in part, of the coupons of the bonds secured by the said mortgage to the complainant, maturing either on the 1st day of February, 1891, or the 1st day of August, 1891"; and "admits that no application has been made by the defendant, or upon its behalf, to the complainant, for any application of its earnings, other than as authorized by the mortgage of June 1, 1890, but the defendant denies that it has ever made, or has in contemplation the making of, any application of any of its said earnings in any manner inconsistent with the requirements, covenants, and conditions of the said mortgage appended to the complaint"; admits the guaranties, but "denies that it proposes or intends to apply any of the earnings and revenues of its property, except in good faith, and in all respects in conformity with the covenants and obligations imposed upon it in and by the said mortgage of June 1, 1890"; avers complicity of the officers of the plaintiff with others in attempting to injure the defendant; and "avers, and charges the fact to be, that this bill is filed, and this suit brought and prosecuted, not for the purpose of protecting any of the interests of the bondholders secured by the said mortgage of June 1, 1890, to the complainant, but that the filing of the said bill, and the prosecution of this litigation, is to their detriment and injury, and for the purpose of impeding and interfering with the business management of the property of the defendant."

The plaintiff moved to strike out, in substance, so much of the answer as set up complicity of officers, and bad motives in bringing the suit, and moved "for an order striking out the pleas heretofore filed by the defendant to the bill of complaint herein, upon the ground that the answer of the defendant to the said bill of complaint covers and extends to all of the matters embraced in said pleas, and thereby constitutes a waiver of said pleas." On motion of plaintiff, and consent of defendant, it was ordered that it be referred to "one of the masters of this court, to hear and report, with his conclusions and opinion, in respect to all the matters embraced in and covered by the said motions and exceptions of the complainant." The master has reported that in his opinion the pleas should be stricken out, because waived by the answer, and that those parts of the answer should be stricken out as scandalous or immaterial, and not constituting any defenses. Exceptions to this report have now been heard.

These somewhat lengthy extracts from the pleadings show clear-

ly that the pleas do not profess to, and do not in fact, cover the whole bill. They apply to so much of the claim for net earnings for the six months next before February 1, 1891, as the possession and accounting of the receivers would meet, but leave the allegation of net earnings in fact applicable to the coupons of that period, and those charging an intention to divert such earnings in the future, wholly unanswered. The answer denies that there were in fact such net earnings so applicable during that period, and states the receivership at the suit of the plaintiff against the defendant covering that period, and the settlement of the accounts of the receivers, including the earnings in that suit, to show why there were in fact no net earnings to be accounted for here. Perhaps the receivership and accounting would be available, under the answer, as a defense in an accounting here for any period covered by them, as evidence showing nothing to account for, and in that view the answer may be said to cover the same ground as the pleas; but they would not be available to show that no accounting for that period should be had, and in that view the answer would not cover the whole ground of the plea. They are merely included in statements tending to different grounds of defense. Formerly, as pleas raise the question whether the defendant ought to answer the bill, or a part of it pleaded to, an answer to the bill, or to that part, was deemed to be a waiver of the pleas. Stearns v. Page, 1 Story, 204, Fed. Cas. No. 13,339. Equity rule 37 changed this in the federal courts. As to the origin and effect of that rule, Judge Blatchford, in Hayes v. Dayton, 18 Blatchf. 420, 8 Fed. 702, said:

"The plaintiff contends that the putting in of an answer to the whole bill is a waiver of the demurrer. Rule 32 in equity permits a demurrer to a part of a bill, a plea to a part, and an answer as to the residue. If, impliedly, that rule forbids a demurrer to the whole bill, and at the same time an answer to the whole bill, the plaintiff's remedy is by moving to strike out either the answer or the demurrer, or to compel the defendant to elect which he will abide by. By going to argument on the demurrer the plaintiff waives the benefit of the objection now taken, if otherwise he would have it. Moreover, rule 37 in equity provides that 'no demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.' This rule was first made in March, 1842, to take effect August 1, 1842. 17 Pet. lxvii. There was no such rule in the prior rules of March, 1822 (7 Wheat. v.), although rule 18 in such prior rules was the same as the above present rule 32. Under the rules of 1822, not only had it been held (Ferguson v. O'Harra, Pet. C. C. 493, Fed. Cas. No. 4,740) that where there was a plea going to the whole bill, and also an answer to the whole bill, the court would, on the plaintiff's motion, disallow the plea on the ground of its being overruled by the answer, but Judge Story had held in 1840, in Stearns v. Page, 1 Story, 204, Fed. Cas. No. 13,339, that where a plea stated a ground why the defendant should not go into a full defense, and yet the defendant answered, putting in a full defense, it would be held on the argument of the plea that the answer overruled the plea. Then rule 37 was made. It applies to the present case. The demurrer is allowed, with costs."

This is not varied by what was said by him on the same subject, and done, in Grant v. Insurance Co., 121 U. S. 105, 7 Sup. Ct. 841, except, perhaps, "where the answer extends to the whole of the matter covered by the plea"; nor by Huntington v. Laidley,

79 Fed. 865. The "matter" of these pleas is the statement of the same accounts between the same parties for the same time, and a judicial confirmation of them, as a bar to a restatement; and to that, as an effect, the answer does not and cannot extend. The pleas, therefore, should not be stricken out.

As defenses, strictly, the parts of the answer found by the master to be immaterial and scandalous are so; and, if that were all, they should be suppressed. But the bill itself brings forward the motives of the suit, and charges bad motives to the officers of the defendant. The plaintiff has no right to say that its allegations of these things shall not be met. Some of the statements in the answer go further, perhaps, than was justifiable; but as the master divided them by the line of strict defenses, and that cannot be followed, no attempt to distinguish them on any other line is made here. Exceptions to report sustained, and motion to strike out pleas and exceptions to answer overruled.

CHISHOLM et al. v. JOHNSON.

(Circuit Court, D. Delaware. January 4, 1898.)

No. 197.

1. EQUITY PRACTICE—HEARING ON PLEAS.
After a hearing on a plea set down for argument under equity rule 33, the court has power, without passing upon the merits of the plea, to overrule it and direct the defendant to file an answer, without prejudice to his right, subject to all just exception on the part of the complainant, to set forth in the answer the matter contained in the plea, where such course appears to the court best calculated to secure the doing of full justice between the parties.

2. SAME—COSTS.
Where the matter presented by a plea set down for argument is such that it may reasonably be considered by the solicitor filing the plea to be good, although he be mistaken, and the plea is filed in good faith, and not vexatiously or for delay, costs should not be allowed to the complainant under equity rule 34.

(Syllabus by the Court.)

This was a bill in equity by Charles P. Chisholm, John A. Chisholm and Robert P. Scott, doing business under the firm name of Chisholm-Scott Company, against Zachariah Johnson, for alleged infringement of a patent. The cause was heard on a plea filed by the defendant.

C. L. Buckingham, for complainants.
Robert S. Taylor, for defendant.

BRADFORD, District Judge. The bill in this case alleges infringement by the defendant of certain letters patent owned by the complainants, relating to machines and methods for gathering, hulling and separating green peas, and prays for an injunction and an account of profits. The defendant interposed a plea to the whole bill. The plea was set down for argument and has been debated by the solicitors for the respective parties. It sets forth that the defendant