

do business in the state during the coming year, the courts cannot release the companies from the obligation to perform the conditions, if they wish to continue in business during the coming year. If the conditions imposed are onerous, discriminatory, or otherwise inexpedient, relief must come from the legislature, and not from the courts. The argument for complainants is largely based upon the thought that, when foreign corporations are once admitted within the state, they are entitled, under the provisions of the state and federal constitutions, to insist that they shall be subjected to the same burdens of taxation as may be imposed upon similar corporations engaged in the like business. If the license tax provided for in section 1333 was a tax upon property, real or personal, owned by the companies within the state, there would be much force in the argument; but that is not the fact. This license tax is the condition imposed by the state upon the privilege of engaging or continuing in business within the state. It is optional with the companies whether they will subject themselves to the burden or not, but they cannot enjoy the privilege of continuing in business in the state, except upon compliance with the terms which the state has seen fit to impose as a condition to the exercise of the privilege. In the adoption of section 1333 the state was not exercising its right to subject property or persons within the state to a proper burden of taxation, in which event it would have been subject to the provisions of the state constitution requiring equality in the burdens imposed; but the state was exercising its undoubted right to prescribe the terms upon which foreign corporations may be allowed to continue in the business of insurance within the state, and, as the right to impose terms is possessed by the state, it is not for the courts to question the expediency or justice of the conditions enacted by the state.

From these considerations it appears that the bill demurred to fails to show any ground authorizing the court to grant relief in any form to the complainants, and it necessarily follows that the demurrer must be sustained, and the bill be dismissed, at cost of complainants.

WHITAKER v. DAVIS et al.

(Circuit Court, D. Massachusetts. January 24, 1899.)

No. 1,019.

1. RES JUDICATA—DECREE OF DISMISSAL.

An order dismissing a bill for want of prosecution is not a bar to another bill.

2. SAME—IDENTITY OF SUBJECT-MATTER—PLEADING.

A bill for relief in regard to infringement of a patent was dismissed on demurrer. In a subsequent suit, a plea averred that the parties, the letters patent relied on, and the acts of infringement complained of, were the same as in the former suit. *Held*, that it did not show that the matters in suit were *res judicata*.

In Equity.

Frederick L. Emery, for complainant.
William Quinby, for defendants.

BROWN, District Judge. This plea sets up as a bar a decree of dismissal of a former bill. It appears, however, by the plea, that the dismissal was upon the motion of the defendants, made after the filing of a demurrer, and after the expiration of the time in which, under the rules, the complainant could set down the demurrer for argument. In other words, the plea sets forth a dismissal of the former bill for want of prosecution. An order dismissing a bill for want of prosecution is not a bar to another bill. Story, Eq. Pl. § 793; Coop. Eq. Pl. p. 270; 1 Daniell, Ch. Prac. (6th Am. Ed.) 811; *Kempton v. Burgess*, 136 Mass. 192. See, also, *Ryan v. Seaboard & R. R. Co.*, 89 Fed. 397, 403.

The defendants contend that the true effect of a dismissal under equity rule 38 is to sustain the validity of the demurrer. If we concede this, it is still necessary that the plea should show by proper averments that the former judgment determined the rights set up in the present bill. The plea avers merely that the parties are the same, or in privity, that the letters patent relied on are the same, and that the acts of infringement are the same. This does not amount to an averment of the substantial identity of the two suits, nor permit us even to infer that to sustain the former demurrer would result in a conclusive determination of the rights upon which the complainant relies in his present bill. If the former decree was anything more than a dismissal for want of prosecution (which, upon the allegations of the plea, is doubtful), the plea is still open to the objection that it leaves to conjecture what was involved and decided in the former suit, and is therefore insufficient to show an estoppel by record. *Russell v. Place*, 94 U. S. 606, 610. Plea dismissed.

FAYERWEATHER et al. v. RITCH et al.

(Circuit Court of Appeals, Second Circuit. January 5, 1899.)

No. 110.

1. JUDGMENTS—CONCLUSIVENESS AS TO MATTER IN ISSUE.

A testator, after making bequests to his wife and next of kin, bequeathed, by the ninth clause of his will, a certain sum to colleges therein named, and by the tenth clause devised and bequeathed the residuum of his estate to his executors, in trust for the benefit of such colleges. Subsequently he executed codicils revoking the tenth clause, and devising and bequeathing his residuary estate, without condition, to his executors, on their promise to apply the residuum in the manner originally provided by the tenth clause, with certain modifications. After the will had been admitted to probate, the widow and next of kin executed releases to the residuary legatees of all their claims against them, and the latter thereupon executed a "deed of gift," transferring the whole of the residuum to various institutions. Thereafter certain colleges named as legatees in the ninth clause brought an action in the supreme court of New York, making all of the other legatees in the will, the widow, the next of kin, and the donees under the deed of gift defendants, setting up in their complaint, among other things, the releases executed by the widow and next