

bank makes is an equitable claim, and properly set up and made in the manner it is. Whether it is well founded or not is one of the controversies in the case, and which properly exists between the Bank of Fort Madison and the Black River Lumber Company, and which can be wholly settled and determined, as between them, within the meaning of the second subdivision of section 2 of the removal act of 1875; as it is well settled that the position of the parties on the record, as to being plaintiff or defendant, is not material, provided there is such a controversy.

The lumber company as well as the bank are named in the complaint as defendants. But this controversy is substantially between the bank as plaintiff, and the lumber company as defendant, and may be determined wholly as between them without the presence of the other parties, though, as stockholders, they would have an indirect interest. That interest is legally and fully represented by the corporation.

4. The reference of the petition to take testimony was not a trial of the case in any sense, so as to preclude a removal. Other evidence was to be taken upon deposition, and the final hearing was to be before the court. The petition for removal was made in proper time, and makes a clear case on its face for a removal, and there is nothing in the record to contradict the facts there set forth, and if the plaintiff wishes to put them in issue he can only do it by plea in abatement to the jurisdiction, in this court.

The case will be docketed in this court.

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CANDEE & Co. v. THE CITIZENS' INSURANCE CO.

(*Circuit Court, D. Connecticut.* ———, 1880.)

1. INSURANCE—POLICY—ORAL PROMISE—CUSTOM—EVIDENCE.

Motion for a new trial.

SHIPMAN, D. J. This is a motion for a new trial of an action at law upon an insurance policy. The case was tried

to the jury and a verdict was directed for the plaintiff. As the questions which are actually presented in the bill of exceptions are neither novel nor intricate, it is not necessary, in my judgment, to consider them at length. The questions are fourfold.

1. Was evidence admissible to show an oral promise or agreement, alleged to have been made by the plaintiff prior to the issuing of the policy and not inserted therein, that upon the future happening of a certain event the policy should become void? The policy was issued in accordance with the permission and authority conferred by the defendant. There was no mistake in its terms, which were clear and definite. The defendant did not intend to insert the oral condition in the policy. The policy did contain numerous express conditions, upon the happening of which it should become void. The decision in *Insurance Company v. Mowry*, 96 U. S. 544, is decisive upon the point.

2. Was evidence admissible of an alleged custom of insurance companies, alleged to have been known to the agent of the plaintiff, that upon the happening of a future event the policy should become void, which condition was not inserted among the numerous, detailed, and clearly-expressed conditions subsequent to the policy. This unexpressed condition was, in my opinion, inconsistent with the written terms of the contract, and was excluded therefrom by necessary implication, for the policy apparently fully expresses the terms upon which it was issued, and the conditions upon which it was to become void. It is not admissible to add to the carefully-drawn and accurately-defined provisions of an express contract, like an insurance policy, a new stipulation contained in an unexpressed custom. *Partridge v. Ins. Co.* 15 Wall. 573; *Oelricks v. Ford*, 23 How. 49.

3. Should the question of termination by mutual consent have been submitted to the jury? It is not necessary to consider whether this defence was set up in the notice, for the evidence of termination by consent was so scanty that there was no real question to submit. *Pleasants v. Fant*, 22 Wall. 116; *Commissioners v. Clark*, 94 U. S. 278.

4. Nothing need be said in regard to cancellation, because, upon the defendant's testimony, the policy never was cancelled, even under the usages of insurance companies and agents in the city of New York.

The motion for a new trial is denied, and stay of execution is removed.

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WEST, BRADLEY & CARY MANUF'G CO. v. ANSONIA BRASS & COPPER CO.

(Circuit Court, D. Connecticut. ———, 1880.)

1. CONTRACT—WARRANTY OF QUALITY.

*Assumpsit.*

Charles R. Ingersoll, for plaintiff.

Wooster & Torrance, for defendant.

SHIPMAN, D. J. This is an action of general *assumpsit* which was tried by the court, the parties having by agreement waived a trial by jury. The plaintiff's account, upon which the suit was brought, is for clock springs of various kinds which were furnished by the plaintiff to the defendant between July 8, 1875, and February 23, 1876, upon the defendant's orders. The principal of the account was \$1,552. It is not denied by the defendant that it received the goods which were thus furnished, and that they have not been paid for. The defence is the recoupment of damages resulting from the breach of the plaintiff's warranty of the quality of the clock spring which it sold to the defendant.

In the summer of 1874 the plaintiff, through Mr. Alanson Cary, its authorized agent, solicited from the defendant orders for clock springs. The defendant was largely engaged in the manufacture of clocks. The plaintiff was an extensive steel-spring manufacturer, and had just commenced to make polished clock springs. The defendant had been buying its springs from Edward E. Dunbar, of Bristol. The Dunbar spring was of excellent quality and had a good reputation. Mr. Carey, before any orders were given, showed the defendant