

would naturally suppose that, in view of evidence which could not but be considered as damaging, the defendant would have made such statements and explanations as might tend to satisfy a trier that the inferences which were sought to be drawn from the evidence were unfounded. He made, however, but little explanation; and, when his case was known to be in danger, he apparently furnished his able and ingenious counsel with no theory which they could press upon the attention of the court.

There should be a final decree in accordance with the findings of the master as modified in this opinion.

KIRBY, Executor, etc., v. LAKE SHORE & MICHIGAN SOUTHERN R. Co. and others.*

(Circuit Court, S. D. New York. March 9, 1881.)

1. PLEADING—JOINT CLAIM.

On a joint claim a joint action must be brought.

2. PARTNERSHIP—EXECUTOR OF DECEASED PARTNER—SUIT ON PARTNERSHIP CLAIM.

A bill, brought by the executor of a deceased partner to recover such partner's share in a partnership claim, is demurrable, though the surviving partners were made defendants in the bill, and though the bill alleged that they had been requested to join as complainants but had refused to do so.

George Norris, for plaintiff.

John E. Burrill, for defendants.

BLATCHFORD, C. J. By the death of John T. Alexander, the sole and exclusive right and remedy to reduce into possession the claim which is the subject-matter of this suit survived to the surviving partners of the firm. The claim is a claim which belonged to the partnership as such. It was a joint claim, and not a claim in which, as respected the defendants, or any suit against them to recover the claim, the members of the copartnership had a several interest, or an interest which would have authorized any one of them to maintain a suit to recover his aliquot share of the claim before the death of any one of the partners. The two surviving partners are made defendants. The suit is brought by the executor of the deceased partner to recover only the share of the deceased partner in the claim. The claim is a unit. The surviving partners are the only proper persons to sue for the claim. If, on any allegations, the executor of the deceased partner could be allowed to sue, making the two surviving partners defendants, he could not do so without alleging that the

*See 14 Fed. Rep. 261.

surviving partners refused to sue when they ought to sue. There is no such allegation in this bill. The only allegation is that the plaintiff requested them to "join him as complainants herein," and that they refused to do so. It was proper for them to refuse to join with the plaintiff, as he is not a proper party plaintiff, and his suit is only to collect his own share. The defendants, against whom a recovery is sought, have a right to demand that the whole claim, being a partnership claim, shall be sued for in one suit by the proper plaintiffs. To allow this suit would be to sanction as many separate suits in respect to portions of the claim as there were partners.

The demurrers must be allowed, with costs, with liberty to the plaintiff, under rule 35 in equity, to move for leave to amend his bill.

MISSOURI FURNACE Co. v. COCHRAN, Adm'x, etc.

(Circuit Court, W. D. Pennsylvania. August 26, 1881.)

1. FORWARD CONTRACT TO FURNISH COKE TO PROPRIETOR OF BLAST FURNACES — BREACH BY VENDOR, AND NOTICE THAT HE WILL NOT DELIVER — NEW FORWARD CONTRACT BY VENDEE — MEASURE OF DAMAGES.

Defendant's intestate sold and agreed to deliver to plaintiff, the proprietor of blast furnaces for smelting iron, 36,621 tons of Connellsville coke, at \$1.20 per ton, deliverable, in equal daily quantities, on each working day during the year 1880. After delivering 3,765 tons, the vendor, without valid excuse, notified plaintiff, on February 13, 1880, that he rescinded the contract, and there-after delivered no coke. The vendor persisting in his refusal to deliver, the plaintiff, on February 27, 1880, made a substantially similar forward contract with H. for the delivery, during the balance of the year, of 29,587 tons of such coke at four dollars per ton, which was the then market rate for such a forward contract, and rather below the market price for present deliveries. The market price of coke declined in May, 1880, to \$1.30 per ton. The plaintiff brought suit on February 26, 1880. *Held*, (1) that the plaintiff was not entitled to recover the difference between the price stipulated in the contract sued on and the price which the plaintiff agreed to pay H. under the contract of February 27, 1880; (2) that the measure of damages was the sum of the differences between the price stipulated in the contract sued on and the market price of Connellsville coke, at the place of delivery, on the several days when the several deliveries should have been made under the contract.

Sur motion *ex parte* plaintiff for a new trial.

Henry Hitchcock, George Shiras, and S. Schoyer, Jr., for plaintiff.

C. E. Boyle and D. T. Watson, for defendant.

ACHESON, D. J. This suit, brought February 26, 1880, was to recover damages for the breach by John M. Cochran of a contract for the sale and delivery by him to the plaintiff of 36,621 tons of standard Connellsville coke, at the price of \$1.20 per ton, (subject to an