

BLUE RIDGE CLAY & RETORT CO. v. FLOYD-JONES and others.¹*(Circuit Court, C. D. Missouri. March 17, 1886.)*

EQUITY PRACTICE—FILING SPECIAL REPLICATION OUT OF TIME.

A replication due at the October rules not having been filed, defendants filed a motion to dismiss December 3d. A special replication was thereafter filed. *Held*, that the motion must be sustained.

In Equity. Motion to dismiss.

The motion to dismiss was filed December 3, 1885. A special replication was filed December 5, 1885.

Fag & Hatch and *Davis & Davis*, for complainant.

George H. Shields and *R. H. Floyd-Jones*, for defendants.

TREAT, J., (*orally*.) In the case of the *Blue Ridge Clay & Retort Co. v. Floyd-Jones* there is a motion to dismiss. There are irregularities of practice in this case from the beginning to the end. First, under the statute of the state, where, instead of by regular proceedings to foreclose, the party chooses to proceed under the powers given in the deed of trust to secure a debt, and does so proceed, the right of redemption exists for a year, but it exists on the terms prescribed by the statute, to-wit, the payment of the debt secured by the deed of trust, the costs, etc., that have been incurred. Now, four days before the expiration of the year after the sale a bill was filed in this court, the plaintiff being a New York corporation. In the bill there is no averment anywhere that the amount of the debt, costs, etc., has been tendered as required by the statute, or is intended to be, nor that the amount is now brought into court to be paid. There is an utter failure on the face of the bill to comply with the terms of the statute.

The party respondent has answered elaborately. The replication was due at the October rules. The regulations prescribed by the supreme court concerning equity matters have, I may say, almost the force of statutes in this court. Had application been made, possibly an extension of time might have been granted as to the replication. No application was made. After the motion was filed to dismiss for non-compliance with the rules, the party came in and filed a replication, which is a paper wholly unknown to equity practice, under rule 45. I suppose his mind was resting on the practice which prevails in the state courts. Under rule 66 the party was entitled to have this suit dismissed, as of course, unless the party, for cause shown, applied to the court to escape the consequences of his negligence. No such application was ever made. He filed a paper which is not an equity replication. Now, what shall be done? The motion

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.
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here is grantable, as of course, no application having been made on the other side, for cause shown, with respect to it. I have gone through all the papers in the case, as if the rights of the parties were here to be determined on a controversy which they sought to present. The court must enforce the rule of the supreme court in regard to this matter.

The motion to dismiss will be sustained, (without prejudice).

SCHUMACHER and another v. SCHWENCKE and others.

(Circuit Court, S. D. New York. March 23, 1886.)

TRADE-MARK—JURISDICTION OF CIRCUIT COURT—INFRINGEMENT NOT IN FOREIGN COMMERCE OR TRADE WITH INDIAN TRIBES.

The circuit court has no jurisdiction of a suit for the infringement of a trade-mark by a citizen of the same state as the complainant unless such infringement consists in using the trade-mark by the defendant upon goods intended to be transported to a foreign country, or used in lawful commercial intercourse with an Indian tribe.

In Equity.

Antonio Knauth, for orator.

Louis C. Raegener, for defendants.

WHEELER, J. This suit is brought to restrain infringement of trade-mark No. 9,737, registered October 17, 1882, and consisting of the words "Henry Lee" appropriated for use upon prints, labels, show-cards, calendars, printed cards, and tags. The parties appear from the bill to be all of them citizens of the state of New York. It is alleged that the orator, a corporation, has used this trade-mark on labels in domestic commerce, inter-state commerce, and commerce with foreign countries, and that the defendants have in New York applied it to labels not made or sold by or for the orator, and sold the same, and have sold the same in other states of the United States, "and have sold the same in foreign countries." These are all the allegations there are as to the use of the trade-mark by the defendants in foreign commerce, and all such sales and use are denied by the defendants. There is nothing in the case about use of it in commerce with any Indian tribe. The courts of the United States have no jurisdiction of suits like this unless it is given by statute under which the trade-mark was registered. *Trade-mark Cases*, 100 U. S. 82; *Luyties v. Hollender*, 21 Fed. Rep. 281; 21 St. at Large, 504, c. 138, § 11. That statute limits the jurisdiction under it so that it is not conferred "unless the trade-mark in controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe." It seems to be understood by