ment of his age substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition or that, if he had given his real age, the surgeon would have found otherwise. Indeed the surgeon's testimony shows that, save in exceptional cases, defendant, in accordance with its established rules, permits its switchmen to continue in the service until they are 65 years old without any physical examination after they are employed. Plaintiff's physical condition was not shown to be such as to make his employment inconsistent with the defendant's proper policy or its reasonable rules to insure discharge of its duty to select fit employees. The evidence indicates that, under its own interpretation of rule 22 together with the schedule constituting the agreement between defendant and its switchmen, defendant after the final acceptance of plaintiff's application was not free to discharge him on account of the false statement as to his age.

It is clear that the facts found, when taken in connection with those shown by uncontradicted evidence, are not sufficient to bring this case within the rule applied in *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Rock, supra,* or the reasons upon which that decision rests.

Judgment affirmed.

RUDE *v.* BUCHHALTER.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 736. Argued April 28, 1932.—Decided May 23, 1932.

Upon cross appeals from a decree dismissing a suit over a fund deposited in escrow, *Held*—

1. The appellate court went beyond the record and the evidence in holding that the plaintiff depositor was guilty of fraud and

bad faith in bringing and maintaining the suit and that the other depositor should therefore have a lien on the fund for his expenses, including attorneys' fees, in the litigation. P. 460.

2. Nice distinctions as to which of these two parties was the more lacking in good faith or standards, towards others or towards each other, are not sufficient to warrant putting upon one any part of the expenses incurred by the other in waging the contest. P. 461.

3. By the granting of such a lien, when it was not applied for and when the plaintiff had no reason to apprehend that it would be considered, the plaintiff was denied an opportunity to be heard in respect of the authority of the court to make such an allowance and as to the facts touching the propriety or basis for making it. P. 460.

4. Petition for rehearing and its denial upon a reasoned opinion were not the equivalent of a hearing in advance of decision. *Id.*

5. The reasonable expenses, including attorneys' fees, incurred by the depositary in the suit and which are attributable to the discharge of its duty under the escrow agreement, properly may be made a first charge against the fund. P. 461.

6. The depositary is not entitled, as against the plaintiff depositor, to any allowance of expenses or counsel fees incurred to protect its own claim against the fund to secure a debt owing to it by the other depositor. *Id.*

54 F. (2d) 834, modified and affirmed.

CERTIORARI, 285 U. S. 535, to review the reversal of a decree dismissing the bill in a suit by one of two depositors of a fund to obtain judgment against the other and to make it a lien on the fund. Claims of attorneys and of the depositary were also involved.

Mr. Ernest Morris, with whom *Mr. Cass E. Herrington* was on the brief, for petitioner.

In decreeing, without any hearing or opportunity therefor, that the expenses of the litigation and attorney's fees of Buchhalter and the bank shall be paid out of petitioner's share of the funds and bonds in escrow, the Circuit Court of Appeals deprived petitioner of his property without due process of law in violation of the Fifth Amendment. *Hovey* v. *Elliott,* 167 U. S. 409; *Reynolds* v. *Stockton,* 140 U. S. 254; *Munday* v. *Vail,* 34 N. J. L. 418.

The decree awarding such fees and expenses is contrary to principle and to all precedent. "Fee bill" statute, 28 U. S. C., §§ 571–572.

In contemplation of law the fees prescribed in the fee bill are full indemnity for the litigation and, while a court of equity has discretion to award, withhold or apportion costs, the amount of costs which the court may award is limited by the statute. *Henkel* v. *Chicago, St. P., M. & O. R. Co.,* 284 U. S. 444; *Arcambel* v. *Wiseman,* 3 Dall. 306; *Hauenstein* v. *Lynham,* 100 U. S. 483; *The Baltimore,* 8 Wall. 377; *Motion Picture Co.* v. *Steiner,* 201 Fed. 63; *Guardian Trust Co.* v. *Kansas City Sou. Ry. Co.,* 28 F. (2d) 233, reversed 281 U. S. 1.

Lack of good faith in bringing the action is not enough. The case must be one where the plaintiff has made, but failed to sustain, gross charges of fraud and misconduct. *Kansas City Sou. Ry. Co.* v. *Guardian Trust Co.,* 281 U. S. 1.

The rules of the High Court of Chancery of England are no longer followed in this country. Hopkins, Fed. Eq. Rules, 7th ed., p. 42. The new Federal Equity Rules, adopted in 1912, no longer refer us to the English practice for any purpose. It was never the practice of the High Court of Chancery to allow "costs as between solicitor and client where the litigation is false, unjust, vexatious, wanton, or oppressive."

There is no American authority for the allowance of expenses and attorney's fees, or either, in a case of this character. Distinguishing: *Danbury* v. *Robinson,* 14 N. J. Eq. 324; *Thome* v. *Allen,* 70 S. W. 410, 71 *id.* 431; *Trustees* v. *Greenough,* 105 U. S. 527.

The mere fact that the court has control over the fund does not authorize the payment therefrom of counsel fees and other expenses. Such payment is authorized only where the expenses incurred have been for the benefit of all interested. 15 C. J. 105; *Kimball* v. *Atlantic*

States Ins. Co., 223 Fed. 463; *Gund* v. *Ballard*, 80 Neb. 385; *Ryckman* v. *Parkins*, 5 Paige's Ch. (N. Y.) 543.

Where a court of equity grants relief upon conditions, the conditions must not be arbitrary, but must be "warranted by settled principles of equity jurisprudence." Lurton, J., in *Compton* v. *Jesup*, 68 Fed. 263, 316; Pomeroy, Eq. Jur., 4th ed., § 386; *Mantermach* v. *Studt*, 240 Ill. 464, 469; *Lindell* v. *Lindell*, 150 Minn. 295, 299; *Alexander* v. *Shaffer*, 38 Neb. 812, 816.

Even where conditions are proper they may not be absolute. The party should have his option to reject the whole decree. 21 C. J. 688, Equity, § 849; 1 Pomeroy, Eq. Jur., 4th ed., § 385; *Gage* v. *Thompson*, 161 Ill. 403, 407; *Alexander* v. *Merrick*, 121 Ill. 606, 614.

The Circuit Court of Appeals erred in holding that petitioner had not brought his suit in good faith.

Findings of the trial court are presumptively correct and will not be disturbed unless the trial court has either misapprehended the evidence or gone against the clear weight thereof. *Medsker* v. *Bonebrake*, 108 U. S. 66; *Tilghman* v. *Proctor*, 125 U. S. 136; *American Rotary Valve Co.* v. *Moorehead*, 226 Fed. 202; *Fineup* v. *Kleinman*, 5 F. (2d) 137.

Mr. Henry E. Lutz for respondent.

The Court of Appeals did no more than to apply to extraordinary facts the maxim "He who seeks equity must do equity."

The fee bill has never been construed to interfere with the free exercise of accepted jurisprudence or practice in equity. *Trustees* v. *Greenough*, 105 U. S. 527–528; *Guardian Trust Co.* v. *Kansas City Sou. Ry. Co.*, 28 F. (2d) 233; *In re Schocket*, 177 Fed. 583; *United States* v. *Equitable Trust Co.*, 283 U. S. 738.

Rude himself sought equity in the Court of Appeals on a hypothesis completely departing that sought to be

utilized by him in the trial court. The Court of Appeals did no more, no less, under the special facts, than to exact what it conceived to be equity from him who sought it.

State statutes allowing attorney's fees are enforced in the federal courts, and no conflict has been found with the fee bill statute. *Sioux County* v. *National Surety Co.,* 276 U. S. 238; *Henkel* v. *Chicago, St. P., M. & O. Ry. Co.,* 284 U. S. 444; *Dohany* v. *Rogers,* 281 U. S. 362–370.

It is submitted the federal statute relating to costs and attorney's fees has no more relationship to the maxim that " He who seeks equity must do equity," than it has to cases involving the recovery or preservation of trust funds or to any other instance of long established and generally accepted equity jurisprudence. Cf. *Ohio ex rel. Popovici* v. *Agler,* 280 U. S. 379, 384.

Mr. Justice Butler delivered the opinion of the Court.

This suit was brought in the federal court for Colorado by petitioner against respondent, the First National Bank of Denver, and the members of a law firm to obtain judgment against respondent on an oral promise to pay a large sum and to establish and foreclose a lien therefor upon certain bonds and cash held by the bank in escrow. The principal controversy was between petitioner and respondent. The bank claimed a lien on the fund to secure payment of a small sum owing to it by respondent. The lawyers asserted a claim under an attachment to enforce payment of an amount to be fixed as their compensation for services in a proceeding in the state court. After trial at which much evidence was heard the court dismissed the complaint on the merits. Respondent appealed and petitioner took a cross appeal. On respondent's appeal the Circuit Court of Appeals remanded with

instructions for further proceedings in the district court, and on petitioner's appeal affirmed. 54 F. (2d) 834.

This writ brings here for review the part of the decree directing the district court to deduct from petitioner's share of the fund in escrow the expenses, including reasonable attorneys' fees to be fixed by the district court, to which respondent and the bank have been put in this litigation.

The evidence and findings disclose facts, occurring before those alleged in petitioner's complaint, that shed light upon the question presented. In June, 1929, at a state court receiver's sale he and one Bronstine each bought an undivided half of the property of the Colorado Pulp and Paper Company. The purchase price was paid in cash and in bonds of that company. Under an agreement between petitioner and respondent the former furnished $61,000 and the latter $53,922, making the total required to pay for the half interest bought by petitioner. It was transferred to petitioner and later a quarter interest was conveyed by him to respondent. Possession of the property was given to Bronstine who carried on the business for account of all concerned. Petitioner and respondent wanted to sell their interest and, in order to force Bronstine to buy them out, they pursued a course of hostile and threatening criticism of his management. And when a partition suit by Bronstine seemed imminent they, conspiring to embarrass and delay him should he seek relief by that means, falsely made it to appear of record that a quarter interest in the property was subject to a heavy incumbrance. For that purpose they caused to be made and recorded a deed transferring petitioner's quarter interest to respondent and also a trust deed to the public trustee purporting to secure a note made by respondent to petitioner for $67,500. Respondent soon succeeded in selling the half interest to one Binstock, an associate of Bronstine, for $28,080 in cash and $92,500 in

bonds of the Colorado Paper Products Company. Petitioner, as a condition of clearing the title of record, required that all the cash and bonds should be delivered to the bank to be held in escrow until he and respondent should agree in writing as to the disposition of the same. They promptly divided nearly all of the cash, but came to no agreement for division of the remaining money or the bonds.

Later, petitioner brought this suit claiming that the fictitious note and trust deed were valid and alleging that, when the cash was divided, respondent promised to pay him the full amount of the note and $7,500 out of the profits of the venture and that the bonds should be held in escrow until the balance alleged to be owing, $59,699.61, should be paid. And the complaint alleges that the lawyers had attached the interest of petitioner and respondent and claimed a prior lien on the fund. The prayer is that petitioner have judgment against respondent for the amount claimed; that the same be declared a lien upon the fund, and that the bank sell the bonds and apply the fund to the payment of the judgment. Respondent's answer alleges that the note and trust deed were fictitious, denies the alleged promise, avers that he and petitioner had approximately equal interest in the property and that the only agreement between them was that the sale of their half interest be joint and entire and the proceeds be equally divided between them, and prays that the complaint be dismissed on the merits. The lawyers' answer asserts that they have a lien upon the fund, denies that petitioner has any, and prays that he be denied relief. The bank's answer shows that the cash and bonds were deposited with it to be held in escrow until petitioner and respondent agree in writing as to the disposition of the same, sets forth the division of the cash, alleges that respondent assigned his interest in the fund to the bank as security for the payment of $1,250

and prays that it be declared to have a first lien on the fund, be instructed as to disposition of the balance and have costs and attorneys' fees incurred in this suit.

After hearing the evidence and before making findings under Equity Rule 70½, the district court filed a memorandum showing that petitioner had failed to make out his case. Then respondent submitted requests for findings of fact and, in addition to those negativing petitioner's cause of action, asked the court to find that petitioner and he entered into a campaign against Bronstine, including the making of the fictitious note and trust deed, to create difficulties and to force Bronstine to buy their interest in the property; that, by making the note the basis of his suit, petitioner attempted to perpetrate a fraud against respondent and to impose upon the court; and that petitioner's testimony is unworthy of belief. And respondent proposed as conclusions of law that petitioner by reason of the campaign against Bronstine did not come into court with clean hands, and that the bank should be directed to deliver the entire fund to respondent subject to its lien and the claim of the lawyers. The court, refusing to adopt any such condemnatory requests, made findings merely showing the respective amounts invested in the property by petitioner and respondent; that the fictitious note had been canceled; that pursuant to agreement the proceeds of the sale were to be held by the bank in escrow until respondent and petitioner agreed in writing as to the disposition of the same; that cash had been divided and that the escrow agreement had not been modified. As its conclusion of law the court declared that the complaint should be dismissed on the merits as to all defendants with costs to be taxed against petitioner, and entered its decree accordingly.

On his appeal respondent prayed not for reversal of any part of the decree but that it be made to declare that as against petitioner he was the owner of the fund and

to direct the bank to deliver it to him. The opinion of the court clearly shows that claim to be devoid of merit. Petitioner on his cross appeal merely prayed for the relief sought in his complaint. The decree was affirmed and that ruling is not questioned here. In his brief in that court, petitioner suggested that, if it held his suit was rightly dismissed below, it should direct distribution under the agreement.

First to be considered is the command of the Circuit Court of Appeals that the district court deduct from petitioner's share the "court costs and expenses to which Buchhalter" has "been put in this litigation including reasonable attorneys' fees to be determined by the trial court."

This is not a taxation of costs as between solicitor and client. Cf. *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 28 F. (2d) 233; 281 U. S. 1. The only costs allowed to be included in the money judgment against petitioner are those taxable as between party and party; counsel fees or other expenses not so taxable are not to be included. The Circuit Court of Appeals found that, by reason of petitioner's wrongful and fraudulent demands and bad faith in bringing and maintaining this suit, he prevented the distribution of the fund according to the escrow agreement and put respondent and the bank to the expense of making their defense against a groundless claim. It concluded that, because of such inequitable conduct, the decree should impose upon petitioner's share a lien in favor of respondent and the bank for the expenses to which they were so put.

It is significant that the trial court, though specifically requested by respondent so to do, declined to find that petitioner in bringing this suit attempted to perpetrate a fraud against respondent or to impose upon the court or that he came with unclean hands or must have known that the cause of action he alleged was without founda-

tion in fact. Such refusal strongly suggests that the trial court who saw and heard these antagonists upon the witness stand was of opinion that no such condemnation was warranted by the evidence. Its findings appear to have been diligently restrained to those merely sufficient to show that petitioner failed to sustain the essential allegations of his complaint. Indeed, one of respondent's requests for findings reflects unwillingness on the part of petitioner to accept other than cash for his share and that there were reasons, other than matters of mere accounting, for the agreement that the cash and bonds should be held in escrow until petitioner and respondent "have agreed in writing concerning the disposition of the proceeds."

The Circuit Court of Appeals went beyond the issues presented by the record. Its opinion shows that determination of the appeals did not require findings as to the good faith of petitioner. Respondent, claiming the entire fund, necessarily opposed distribution under the agreement. A large part of the work of his attorneys is chargeable to the attempt to enforce his groundless claim to the entire fund. He made no application for a lien upon petitioner's share on account of expenses or attorneys' fees. Such allowances are not made as of course. And petitioner had no reason to apprehend that any such matter would be considered on either appeal. He had no opportunity to be heard in respect of the authority of the court to make such an allowance or as to the facts touching the propriety or basis of the same. Petition for rehearing and denial, as here, upon a reasoned opinion may not in such a matter fairly be regarded as the equivalent of a hearing in advance of decision.

The opinion below condemns the conduct of both parties in various details of the transaction out of which this litigation arose. The record discloses that when acting together in the pursuit of gain they were not governed by

proper standards and that where their interests came in conflict they disregarded considerations making for fair play. Nice distinctions as to which disclosed the greater lack of good faith are not sufficient to warrant a court of equity in putting upon one any part of the expenses incurred by the other in waging such a contest. Assuming that the matter was properly before the court for consideration, we are of opinion that the record does not warrant any such allowance in favor of respondent.

The bank is not entitled as against petitioner to any allowance on account of expenses or counsel fees incurred to protect its claim against the fund to secure the debt owing by respondent to it. But under settled principles applied in equity courts its reasonable expenses including a fair amount to pay the fees of its attorneys incurred in this suit and which are attributable to the discharge of its duty under the escrow agreement properly may be made a first charge against the fund as a whole. *United States* v. *Equitable Trust Co.*, 283 U. S. 738, 744. The decree will be modified in accordance with this opinion, and the costs in this Court will be taxed against respondent.

Modified, and as modified affirmed.

PORTER, AUDITOR, *v.* INVESTORS SYNDICATE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

No. 627. Argued April 22, 1932.—Decided May 23, 1932.

1. The power conferred by the Montana "Blue Sky Law" upon the Investment Commissioner to regulate investment companies and revoke their permits to do business if they fail to comply, is legislative; and the power that the statute grants to the state courts in actions brought within thirty days by any interested person against the Commissioner, "to set aside, modify or confirm" his decisions "as the evidence and the rules of equity may require," is likewise legislative. P. 468.