8FED.CAS.—62

Case No. 4,629.

FALLON ET AL. V. RAILROAD CO.

[1 Dill. 121.][2]

Circuit Court, D. Missouri. 1870.

SPECIFIC PERFORMANCE OF RAILWAY CONTRACTS.

The complainants contracted with the defendant (a railroad company) to furnish and lay down the iron for its road, to erect the necessary buildings, and to build the bridges, &c., and were to be paid in mortgage bonds and stock, but the complainants (in consequence is alleged, of defendants' fault) had not entered upon the work; the road bed to be graded and prepared by the company, was not ready for the iron, nor the route fully located. The court sustained a demurrer to a bill by the contractors, seeking to enjoin the company from making a contract with others to iron and equip the road, and praying a specific execution of their contract with the company, and refused to retain the bill for compensation.

[Cited in Chicago & A. Ry. Co. v. New York, L. E. & W. R. Co., 24 Fed. 521.]

[Cited in St. Louis, I. M. & S. Ry. Co. v. Anthony, 73 Mo. 433.]

On demurrer to the bill. On the 13th day of August, 1869, by written contract of that date, the plaintiffs agreed with the defendant, the Missouri & Mississippi Railroad Company, to furnish and lay down all the iron rails, chairs, and spikes for its railroad from Glasgow to Clark City (a distance of 121 miles), to fill up and surface the track, to furnish all locomotives and rolling stock; and to erect the necessary buildings, all of which was to be done on or before December 31, 1871. The defendant, on its part, agreed with plaintiffs, to obtain the right of way; to grade and construct the road bed and all bridges, to furnish ties, and to have the road in such condition that the iron could be readily laid down, on or before the 1st day of August, 1870. By the contract, the company was to pay the plaintiffs for the iron, rolling stock and work, which they contracted to do, the sum of $40,000 per mile, $20,000 of which were to be paid in the first mortgage bonds of the company, and $20,000 on its capital stock, said payments of bonds and stock to be made from time to time, on the completion of each five miles of track, or earlier or otherwise, as thereafter provided in the contract. It was stipulated that the bonds should be the first and exclusive lien upon the whole road and its equipments; they were to be made to mature in forty years, and draw 7 per cent interest per annum. The capital stock was to be limited to $30,000 per mile, of which the company could only expend $10,000 per mile in preparing the road bed, and for expenses. It was further stipulated that the bonds were to be issued and delivered to a trustee within ninety days, and that the plaintiffs might use or sell the same, or any part of them, for iron or rolling stock, and if sold for cash the proceeds were to be deposited with the trustee in their stead, to be drawn on the order of the company to pay for the iron and materials, which were to be bought and shipped in the name of the company and to be its property; but said iron and materials were to be

used by the plaintiffs, to build the railroad. None of the bonds or stock were to be drawn from the trustee except by consent or order of the company, and only to pay for iron and materials, or labor, or estimates due. The company agreed to pass all orders and do all acts needful to enable the plaintiffs to obtain and sell the bonds and stock, to buy the iron and rolling stock, whenever the plaintiffs should request it to be done. It was stipulated that when the company

should finish the road bed and bridges, and deliver the ties for the road from Clark City to Macon City (which was to be on or before August 1, 1870), and give assurance that it would complete the balance in a reasonable time, that the plaintiffs should commence at both ends to lay down track.

The bill, which was filed October 25, 1870, sets out the contract in extenso, and avers that the plaintiffs have always been ready, willing, and able to perform the same on their part; and alleges that the company has failed to keep it on its part, and has prevented the plaintiffs from complying therewith. It is averred that on part of the route the right of way has not yet been obtained, nor the road located, and no grading been done; that on other parts of the route grading has been done, but the road bed and bridges have not been completed, nor the ties delivered; that the company has never notified the plaintiffs that the road bed was ready for the track; that it has never executed the mortgage or bonds, never issued the stock, nor deposited the same with the trustee. The bill alleges that in September, 1870, the plaintiffs, with their own means and credit, contracted for the purchase of iron, materials and locomotive cars for the defendant's road, to the extent of between twenty-five and fifty miles, and have incurred therefor liabilities in the sum of $900,000, and that a considerable portion of the iron and materials thus purchased has been delivered to the plaintiffs, and fifteen hundred tons of iron on the way to the defendant's road. The bill states that on the 12th day of October, 1870, the plaintiffs, in writing, notified the defendant of their readiness to comply with their contract, and that on the 18th day of October, 1870, the defendant's directors passed a resolution reciting that the plaintiffs had wholly failed to comply with their contract "for the grading, tieing, and bridging the road from Clark City to Edina, and the contract for ironing the road from Clark City to Macon City, and from Glasgow to Salisbury, and thereupon resolving that the company is no longer bound by the contract, but will make other arrangements for the speedy completion of its road;" of which resolution the defendant gave the plaintiffs notice. The bill alleges that it is true that on the 13th day of August, 1869 (the date of the contract before mentioned), the plaintiffs contracted with the defendant to do all the earth work and bridging, and to furnish all the ties for the road from Clark City to Edina, as the same should be surveyed, and to commence within sixty days from the time the plaintiffs should have been notified in writing, by the defendant, that it had all the bonds and stock, mentioned in said contract, in the hands of one A. Bechtel, for the benefit of the plaintiffs, which notice was never given, nor the bonds and stock deposited with Bechtel, nor the route finally located between those points. The bill avers that the defendant is endeavoring to make a new contract with others for ironing and equipping its road, and will do so unless enjoined; that it has determined to, and will, execute a first mortgage on the road to others unless restrained; and will issue, assign, and pass away the stock; to all of which the plaintiffs allege themselves to be entitled. That defendant

will not keep said contract with plaintiffs unless compelled by the court; that unless the plaintiffs are permitted to iron and equip the road and receive the mortgage bonds and stock, they will be without remedy, and if the defendant makes the mortgage to others, as it intends to do, and passes away the bonds and stock, it will be unable to respond in damages to any action at law which the plaintiff might bring. And the prayer of the bill is that the defendant be compelled specifically to perform the contract, and that it be enjoined from preventing the plaintiffs from complying with their contract, when the road bed is ready; that the defendant be ordered to execute and deliver to the trustee, the stipulated bonds, and mortgage, and stock, and to cause the mortgage to be properly recorded; that defendant be preliminarily enjoined from making any contract with others to iron and equip the road; from transferring to others the mortgage, bonds, and stock, and from doing any act to prevent plaintiffs from complying with and completing their contract; and that the injunction be made perpetual on the hearing. The bill also asks for general relief. No preliminary injunction has been allowed, and the bill is now before the court on a general demurrer.

Noble & Hunter and Jas. A. Clark, for the demurrer.

Glover & Shepley, opposed.

Before DILLON, Circuit Judge, andTREAT and KREKEL, District Judges.

DILLON, Circuit Judge. The main purpose of the bill is to compel the defendant specifically to execute the contract of the 13th day of August, 1869. Whether equity will decree a specific performance or leave the parties to their remedy at law, rests in the discretion of the court to be exercised in view of the special circumstances of the particular case. And the settled rule is that equity will leave or remit the parties to law where the remedy in the legal forum is plain, adequate, and complete. But if the remedy there is doubtful or inadequate, or will not so completely effectuate justice, and specific execution be practicable, equity will entertain jurisdiction and decree it.

Upon the case made by the present bill the court is of opinion that it cannot decree the specific execution which the complainant seeks. Bills of the same general character with the one before us, and, in principle, not distinguishable from it, have repeatedly and upon full consideration, been held in England

not to be maintainable. South Wales Ry. Co. v. Wythes, 1 Kay & J. 186; Ranger v. Great Western By. Co., 1 Eng. Ry. Cas. 1, 51; Peto v. Brighton, etc., Ry. Co., 1 Hem. & M. 468; 1 Story, Eq. (10th Ed.) 778a, and note.

The grounds upon which this doctrine rests are so fully set forth in the opinions in these cases that it is unnecessary to re-state them, or enlarge upon them. No cases in this country holding a contrary view, or denying the soundness of the English decisions have been called to our attention. The question upon authority, therefore, is decisively against the complainants.

But if the question be not regarded as controlled by authority the circumstances of the present case are not such, in our judgment, as to call upon the court to decree a specific execution. The proposed road is one of considerable length, and requiring a large sum of money to construct. A large portion of the road bed and bridges is unfinished. For part of the distance the right of way has not yet been secured, nor the route finally located. We cannot know that the resources and credit of the company are such that it would be practicable for it to carry into execution any order we might make to comply with its part of the agreement. Comparatively but a small proportion of the contract has been actually performed by the complainants. The difficulties which the court might reasonably expect to meet in attempting to enforce from both parties a specific execution in all its parts of a work of this nature are many and great. Compensation in damages would, under these circumstances, appear to be a much more plain and practicable and just as adequate and complete a remedy as a specific execution, and less oppressive or injurious in its effects to the defendant. Demurrer sustained.

(Since the foregoing opinion was delivered, the case of Boss v. Union Pac. R. Co. [Case No. 12,080] has been published, in which Mr. Justice Miller, after full consideration of the subject, upon the authorities and upon principle, held that such a contract when principally executory, would not be specifically enforced. In the case of Fallon v. Railroad Co., after the demurrer was sustained to the bill, the question was made and argued by the same counsel, whether the bill ought to be retained for compensation? And upon this subject the opinion of the court was against the complainant, and was delivered by Mr. District Judge TREAT.)

TREAT, District Judge. This case is now before the court on a single proposition, viz. whether the bill should be retained for compensation.

In the opinion delivered heretofore, upon the main object of the bill, viz: to secure a decree for specific performance, it was held that no such decree could be had; but it was suggested that possibly the court could properly retain the cause for the purpose of securing compensation to the plaintiffs for the breach of contract, especially under the averment that certain securities by the terms of the original contract were to be for the benefit of the plaintiffs.

The argument and authorities on this subject are reducible to this proposition: that a court of equity should not "except under particular circumstances" (no where defined), in a case like the present, retain the bill for the purpose of awarding and securing compensation for the breach of the contract. That rule means, that although generally the bill will not be retained for compensation, when the court is compelled on equitable principles to refuse a decree for specific performance, still there may be special circumstances developed which require, in order to prevent gross wrong and injustice to the plaintiff, that compensation should be given, and under those circumstances, it may proceed to do so when no special oppression or injury would thereby be done to the defendant. The judicial discretion involved is, however, to be exercised with due regard to the rights of both parties.

The case presented is, for the purposes of this question, simply this: Instead of proceeding, as they had a right to do, under their contract, to negotiate for the purchase of iron, &c., or to purchase, with the means to be furnished therefor by the defendant, the property purchased to be in the name of, and for, the company, as its own, the plaintiffs chose to buy in their own names and with their own funds, some property of the kind described, and negotiate on their own responsibility for more. It is averred in the bill that some of the property so purchased has been delivered to the defendant, and that outstanding liabilities have been incurred as just stated. What loss or damage they have suffered thereby, if any, does not definitely appear. But those dealings were dehors the contract.

It is stated that the defendant is about to make a new contract on the same subject matter, with other persons, and to execute bonds and mortgages in connection therewith, whereby plaintiffs will be practically remediless at law. It is not necessary to inquire whether the attachment act of the state, or the bankrupt law, would, under the supposed contingency, afford adequate means of redress; for the important facts apparent on the face of the bill must determine the action of this court. What are the damages and how ascertainable with a view to compensation? The road has scarcely been commenced. Here, then, is a railroad yet to be built, and at nearly the inception of the enterprise, a court of equity is asked to retain a bill filed for specific performance of a contract for doing most of the work therefor, which relief cannot be granted in consequence of the intrinsic difficulties of the

case as connected with equitable jurisdiction and administration—to retain that bill for the purpose of ascertaining the amount of damages to be awarded for the alleged breach of the contract. The damages actually sustained thus far, if any, did not occur under the specific terms of the contract. The damages ultimately recoverable depend on many matters which have not yet occurred, and which may never occur, and which if they do occur, may be in such ways as yet unknown, and under such unknown conditions as leave no definite mode of causing such unliquidated and speculative damages to be reduced, before the road is completed, to any ascertainable sum for which a charge can now be made as a lien on the unbuilt road. It may be that, the road, if built by the plaintiffs from the proceeds of bonds and stock as contemplated, the price they would bear in the market being unknown, would cost more than the sum agreed in the contract, and hence instead of a loss of profits to the plaintiffs from the breach, the reverse would follow. If others build the road in the same way, in the most economical manner, even if all the bonds and stock do not have to be sold for the purpose, the value of the remaining stock and bonds contemplated to be paid to the plaintiffs at that time cannot be now ascertained, and consequently there is no practicable way whereby this court can determine for what sum to charge a lien on this road, as security for compensation in the way of possible and unascertainable profits. If the road is not built and equipped, it is of no value, and a charge upon it would be worthless as security to plaintiffs for any sum; and if it be charged in advance under a decree of this court, with an uncertain sum to be hereafter ascertained, the road probably can never be constructed. Hence the intrinsic difficulties presented on equitable rules. If the road were completed or nearly finished, the case might be different, for the court would then have something definite on which to act, without destroying the contemplated enterprise. But a road to be built on credit, when scarcely begun, stands in a strange position as to the question here to be considered.

The security sought for prospective damages, or rather for loss of profits, would necessarily destroy the value of the security; would, if given, make the security worthless, and prevent the defendant from obtaining, by completing the work, the only means of compensating the plaintiffs.

It is in view of these, and like considerations, which must necessarily suggest themselves to the minds of the counsel, that the court is constrained to decide that the bill cannot be retained for compensation. Bill dismissed.

[2] [Reported by Hon. John F. Dillon, Circuit judge, and here reprinted by permission.]