

knew both Harvey and the land in controversy; and that during said periods, and while Harvey was so occupying a part of the 5,000-acre tract, he claimed title thereto, made a road for his convenience to and through the premises, cut and used the timber found thereon for staves and other purposes, and grazed his stock thereon, and authorized others to get timber therefrom and pasture their stock on the premises. But notwithstanding this conflict of evidence, which cannot be easily reconciled or explained, the preponderance, we think, as well as presumption of law, is with defendants. Harvey's possession, being in virtue of his superior title, embraced, by construction, the whole tract not in the actual adverse possession of Mathes. But it does not exceed two or three acres, on which defendants have neither entered nor threatened to trespass; and hence there is no necessity for an injunction to protect complainant as to these few acres, to which he has probably acquired a title through Mathes' holding.

Complainant's bill will therefore be dismissed, with costs; but as he may wish to retry the issue in a court of law, the appropriate forum for the trial of such controversies, the same will be dismissed without prejudice.

JOHNSON v. POWERS and another, Ex'rs, etc., and others

(Circuit Court, N. D. New York. August 2, 1882.)

1. EQUITY—CREDITOR'S BILL—TO REACH ASSETS OF ESTATE.

The creditor of a deceased person may go into a court of equity for a discovery of assets and the payment of his debt, and he will not be turned back to a court of law to establish the validity of his claim; and the court being in rightful possession of the cause for a discovery and account, will proceed to a final decree upon all the merits.

2. SAME—MULTIFARIOUSNESS.

A bill which seeks to reach the property, and its rents and proceeds, acquired by one of the defendants through alleged conspiracy and the property acquired by another defendant, also through an alleged conspiracy, is not multifarious.

3. SAME—DISCOVERY OF FRAUD A QUESTION OF FACT.

The defense that the plaintiff discovered the fraud more than six years before bringing suit, must be raised by plea or answer, so that the issue on the discovery may be tried as a question of fact.

Francis Kernan, for plaintiff.

William F. Cogswell, for defendants.

BLATCHFORD, Justice. 1. The bill is filed on behalf of the plaintiff individually, as a creditor of Stewart, and on behalf of other like creditors, and is not brought by him in his capacity of administrator of Stewart.

2. The debt of the plaintiff was *prima facie* established against the estate by the proceedings in Michigan. All the property of the estate everywhere has been reached and applied, except that in this suit. No judgment in any suit, but such a suit as the present, could reach that. No administrator of Stewart could bring such a suit, and no administrator could be appointed in New York. Under such circumstances, the case of *Kennedy v. Creswell*, 101 U. S. 641, is a direct authority that this bill will lie. In that case the plaintiffs were simple contract creditors of the deceased, and filed a bill against his executor and devisees of his real estate for an account of his personal estate and a discovery of his real estate, and the application thereof to the payment of his debts. There was a plea that although there were sufficient assets, the plaintiffs had not enforced their claim against the executor by proper proceedings at law. The court held that a creditor of a deceased person had a right to go into a court of equity for a discovery of assets and the payment of his debt, and would not be turned back to a court of law to establish the validity of his claim, and that the court, being in rightful possession of the cause for a discovery and account, would proceed to a final decree upon all the merits. The case of *Case v. Beauregard*, 101 U. S. 688, holds that where a creditor has a trust in his favor he may go into equity without exhausting legal processes or remedies; that if he avers insolvency, so that a suit at law and the recovery of a judgment would not afford any relief, that is enough to show there is a remedy in equity; and that the same is true where fraudulent conveyances are charged, and a privilege or lien on the property is claimed, and there is a prayer that the conveyances be declared void and the property be made liable to pay the amount due to the plaintiff.

3. It is objected that Powers has no interest in Congress Hall or in Congress Hall barn; that no defendant except Powers has any connection with the Irondequash property; that Mrs. Powers has no concern with the Washington-street property; and that the executors of Craig have no concern with any of the property, except the rents from Congress Hall. The *gravamen* of the bill is the alleged fraudulent conspiracy between Stewart, John Craig, and Powers to defraud the creditors of Stewart. The bill seeks to reach the property, and its rents and proceeds, acquired by John Craig through such alleged

conspiracy, and also the property acquired by Powers through the same. Such a bill is not multifarious.

4. On the allegations in the bill it is not manifest that the widow or heirs of Stewart are necessary parties. There is no allusion in the defendants' brief to this ground of demurrer.

5. The allegations of the bill are such that the defense that the plaintiff discovered the fraud more than six years before this suit was brought, must be raised by plea or answer, so that the issue on the discovery may be tried as a question of fact.

The demurrer to the bill is overruled, with costs, and the defendants demurring are assigned to answer the bill by the rule day in October next.

COURTRIGHT *v.* BURNES.

(*Circuit Court, W. D. Missouri, W. D. November, 1881.*)

1. CHAMPERTY—AS A DEFENSE.

The fact that there is a champertous and illegal contract between plaintiff and his attorney for the prosecution of a cause of action is no ground of defense to the action, and can only be set up by the client against the attorney when the champertous agreement itself is sought to be enforced.

2. CONTRACT—PAROL EVIDENCE.

Parol testimony of a contemporaneous agreement is not admissible to contradict or vary the terms of a written contract.

3. SAME—DEFENSE OF WANT OF CONSIDERATION.

The defense of want of consideration may ordinarily be made at law; but when a determination of the question of consideration depends upon the settlement of the affairs of a partnership, some of the members of which are not before the court, it is a question for equitable jurisdiction.

Action upon a promissory note for \$7,333, executed by defendant to one F. H. Winston, and by him transferred, after maturity, to the plaintiff.

Besides a general denial the defendant answers as follows:

“For further answer to said petition, says that before and at the time of the making of the pretended note in said petition described, said plaintiff, this defendant, and F. H. Winston and George C. Campbell had been and were partners in a contract for building a railroad to a point opposite the city of Atchison, Kansas, from a point on the Chicago & Southwestern Railroad, which road was known as the Atchison branch of the Chicago & Southwestern Railroad. Prior to the date of said pretended note said Winston had been in charge of the construction of said branch road for said partners under said contract, and