GAINES *v.* CITY OF NEW ORLEANS.[1]

(Circuit Court, E. D. Louisiana. May 3, 1883.)

1. EQUITY JURISDICTION.
   A bill for a discovery lies, even when the action to be supported sounds in tort.
2. SAME—ACCOUNTING—RENTS AND PROFITS OF REAL ESTATE.
   In a suit for an accounting as to the rents and profits of real property for a period of 45 years, which must be taken according to the laws of Louisiana, and wherein the defendant must be charged with the rents and profits which have been, or ought to have been, annually received, and credited with the yearly expenditures for reclamations, improvements, and taxes; and when such an account has reference to hundreds of lots of ground,—it is of a most complex and involved character, which could not be dealt with upon a trial at law at *nisi prius*, and the complexity of the account is, therefore, a ground of equity jurisprudence.
3. SAME.
   In a case where the complainant has recovered judgment against several hundred actual tenants for rents and profits for varying portions of a long period, and those tenants are insolvent, and the defendant is the warrantor of all those tenants, and whatever they owe the complainant the defendant owes to them; and when the defendant is not only a warrantor, but a warrantor in bad faith, who has enriched herself by purchasing in bad faith the complainant's property and selling it at a large profit,—the complainant, having no remedy at law upon this warranty for want of privity, has a right of action in equity.
   Riddle v. *Mandeville*, 5 Cranch, 322.
4. SAME.
   Equity will not allow a party, ultimately liable, to keep, for his own advantage, an intermediate and insolvent party in possession, who is, in return, responsible to the lawful owner, and thereby enrich himself out of the property of that owner thus dispossessed, and escape liability to him for want of a mode of action.
5. RENTS AND PROFITS.
   According to all the authorities, both under the common law and the law of Louisiana, a suit for rents and profits could not have been brought until the complainant had recovered possession.
   Gaines v. *New Orleans*, 15 Wall. 633.
6. EJECTMENT—TRUST.
   In an ejectment bill against a party holding by an adverse title, there could be no trust raised up as to the price received by him in case of sale.
7. POSSESSOR IN BAD FAITH.
   The possessor in bad faith is bound to surrender the thing immediately; and the seller and warrantor, who took and conveyed in bad faith, is bound forthwith to restore the price to his vendee, and to acquit, *i. e.*, discharge, for him his liability to the owner for fruits, without suit or condemnation.
8. SAME.
   He who, with a motive to deprive another of that which he knows is justly that other's, employs the process and machinery of the courts, is under obligation to satisfy all damages which that other thereby suffers. The damages springing from the legitimate exercise of legal rights, even when there is an absence of malice, and there is good faith, must, according to the settled law of Louisiana, at least place the injured party in the situation in which he would have been if the disturbance had not taken place.
9. WARRANTY AND WARRANTOR.
   The warrantor is, by the settled jurisprudence of Louisiana, the real defendant. The judgment is binding upon the warrantor if he has been called in warranty, or he is apprised of suit having been brought.

[1] Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

10. SAME—BAD FAITH.
Where a party had, in bad faith, entered upon the property of another and for an enormous price ($500,000) sold and conveyed it with warranty, and to avoid his liability as vendor and warrantor, *i. e.*, to escape being compelled to return to his vendee the price, and repay the fruits which the evicted vendee would be required to pay to the owner, in bad faith, hinders the restitution of the land and its fruits to the owner, and keeps the owner from recovering possession for a period of 50 years, the owner can recover for the rents and profits from the party hindering as a constructive possessor.

11. RENTS AND PROFITS.
In ascertaining the rents and profits of real estate, where the disseizin and possession have been in bad faith, the account must include not only the rents, revenues, and values for use actually received, but also those which the evidence shows would have been received with ordinary good management. Since the law requires the court in such a case to decide from evidence extrinsic to the actual receipts, satisfactory evidence may be found in the rents for the very period in question actually derived from numerous other lots, adjacent, similarly situated, and no better capacitated, and from ground rents during and for the same period.
Pontchartrain R. R. v. *Carrollton R. R.* 11 La. Ann. 258, 259.
McGary v. *City of Lafayette*, 12 Rob. (La.) 668; 4 La. Ann. 440.

12. SAME.
The burden which bad faith places upon the defendant, according to the civil law and the jurisprudence of Louisiana, while it should lead to the assessment of no damages or compensation beyond those actually suffered, requires the court to adopt conclusions fully warranted by evidence, though, through the fault of the defendant, it be derived in part from the rents and profits of other property adjacent and similarly situated, and no better capacitated.

13. SAME.
An account for rents and profits should be taken and stated as follows: The rent or income should be ascertained for each year separately, and upon the amount so ascertained for each year interest should be computed down to the time when the account closes, so that there may be interest upon each yearly sum falling due, but no interest upon interest.
Gaines v. *New Orleans*, 15 Wall. 654.

Wm. Reed Mills and *Alfred Goldthwaite*, for complainant.
J. R. Beckwith and *E. H. Farrar*, for defendant.

BILLINGS, J. This cause is before me on a submission for a final decree upon bill, answer, replication, exhibits, and depositions, and upon exceptions to the report of the master. There can be no doubt but that this cause is one over which a court of equity must take jurisdiction. It is an incident, and, in its nature, a supplemental proceeding, to a litigation as to the heirship and title of the complainant to certain real property, which has been conducted in this court between the parties hereto for upwards of 40 years, and always upon the equity side of the court. It is a suit for a discovery as to the means which have been employed by the defendant throughout this long period to prevent and hinder the complainant from recovering possession of this real property. See Comyn, Dig. "Chancery 3 B 1," where it is laid down that a bill for discovery lies even when the action to be supported sounds in tort. It is a suit for an accounting as to rents and profits of this real property for the period of 45 years, which must be taken according to the laws of Louisiana, and in which, therefore, the defendant must be charged with the

rents and profits which have been or ought to have been annually received and credited with the yearly expenditures for reclamation, improvements, and taxes, and that, too, with reference to hundreds of lots of ground. It is an account, the correct statement of which by the master occupies 300 pages, and upon which the record shows he has been occupied almost three years. It is, therefore, an account of a most complicated and ramified character, which could not be dealt with upon a trial at law at *nisi prius*.

The fact that the constitution of the United States guaranties to all suitors in common-law cases, where more than $20 is involved, a trial by jury, should insure precision on the part of courts in discriminating as to the proper character of causes, but cannot change the answer to the question as to whether a cause is of equitable cognizance. That must depend upon whether it be such a cause as the English court of chancery would have taken cognizance of at the time of the adoption of the constitution of the United States.

The case of *Root* v. *Ry. Co.* 105 U. S. 189, relied on by defendant, by no means excludes this case from the equity courts. On the contrary, while it holds that where there is no element of trust, and where there are no other special circumstances which would authorize jurisdiction in equity, an action for an account is an action at law; it adds the express reservation (page 216) that "an equity may arise out of, and inhere in, *the nature of the account itself*, if it render a remedy in a legal tribunal *difficult*, inadequate, and incomplete."

In *Hipp* v. *Babin*, 19 How. 271, there is the same exception made. That was a suit for a naked accounting as to rents and profits. There were no equity features. The court in declining jurisdiction (page 279) says: "To authorize jurisdiction it must appear that the courts of law could not give a plain, adequate, and complete remedy;" and that that case did not show that justice could be administered with less expense and vexation in a court of equity than in a court of law."

In *Ex parte Bax*, 2 Ves. Sr. 388, Lord HARDWICKE said:

"In an action at law an account is to be taken by auditors. Indeed, where the auditors have taken the account, and on charging and discharging the items issues may be joined, and so many issues then may be tried, actions at law, therefore, for accounts are so few because so long time is required."

In *O'Connor* v. *Spaight*, 1 Schoales & L. 309, Lord REDESDALE said, (this was an action for an account by a landlord against a tenant for rent:)

"The ground on which I think this is a proper case for equity is that the account has become so complicated that a court of law would be incompetent to examine it upon a trial at *nisi prius* with all neccessary accuracy. * * * This is a principle on which courts of equity constantly act by taking cognizance of matters which, though cognizable by courts of law, are yet so involved with a complex account that it cannot properly be taken at law."