

proved up, and the complainants and intervening creditors may take judgment against the respondent company for the amount of their debts respectively.

Decree accordingly.

### CONVERSE v. MICHIGAN DAIRY Co. et al.

(Circuit Court, W. D. Michigan, S. D. February 12, 1891.)

#### 1. MORTGAGES—FORECLOSURE—PARTIES.

A mortgagee can make judgment creditors of the mortgagor's grantor parties to his foreclosure suit when these creditors assert a claim on the ground that the transfer to the mortgagor was in fraud of their rights, and that therefore their executions, levied after the execution of the mortgage, are prior liens on the land.

#### 2. SAME—MULTIFARIOUSNESS—WAIVER.

An objection to a bill of foreclosure that it is multifarious because it brings in parties claiming rights paramount and hostile to the mortgagor comes too late when made at the hearing, if such claim is of equitable cognizance.

#### 3. SAME—JUDGMENT CREDITORS—PRIORITIES.

A mortgage executed to secure notes which are indorsed before due for value and without notice, before the land is levied on by the judgment creditors of the mortgagor's grantor, who claim that the transfer to the mortgagor was in fraud of their rights, is paramount to the executions of such creditors, since, under the Michigan law, a judgment is no lien.

#### 4. SAME—COURTS—STATE AND FEDERAL—JURISDICTION.

Where a mortgagee sues to foreclose in a federal court, and makes judgment creditors of the mortgagor's grantor parties defendant, the suit will not be postponed until the termination of proceedings instituted by these creditors in the state court to establish their liens on the land, to which proceedings the mortgagee is not a party.

#### 5. SAME—INDORSEMENT OF NOTES—ASSIGNMENT OF MORTGAGE.

The indorsement and delivery of the mortgage notes by the mortgagee operates as an assignment of the mortgage to the holder of the notes.

#### In Equity. On final hearing.

The facts in this cause, so far as the same are necessary to an understanding of the subjoined opinion, are as follows: The defendant the Michigan Dairy Company derived its title to the lands involved in this proceeding from the defendant David P. Clay; a portion of such lands having been conveyed to the dairy company in the year 1884, and the remainder on the 13th day of September, 1886. On the last-mentioned day the dairy company executed a mortgage upon said lands to David P. Clay, to secure the payment of 56 notes of \$1,000 each, due six years thereafter. In the mortgage was a clause making the whole debt payable, at the election of the mortgagee, upon default in the payment of the annual interest. All of these notes were afterwards indorsed by Mr. Clay, and delivered to the complainant, as collateral security for the payment of about \$20,000, then borrowed by said Clay of the complainant. This mortgage was recorded October 22, 1886; and this suit was instituted to foreclose said mortgage. The defendants the Fourth National Bank of Grand Rapids, Mich., and the German Bank of Sheboygan, Wis., were made parties under the eleventh paragraph of the

bill of complaint, which, as to the last-named defendants, merely alleged that they had, or claimed to have, some interest in the premises as subsequent purchasers, or incumbrancers, or otherwise. The Fourth National Bank of Grand Rapids in its answer denied the eleventh paragraph of the bill of complaint, and set up that the conveyance from Clay to the dairy company was made in fraud of Clay's creditors, and was, as to such creditors, void; that on the 16th day of December, 1886, said Fourth National Bank recovered three judgments against said Clay, aggregating about \$22,333; and that the interest of Clay in the lands covered by the mortgage in question had been levied upon in its suits against him by attachment about the 6th day of December, 1886, and upon executions issued upon said judgments on or about the 28th day of December, 1886. The German Bank of Sheboygan set up a similar defense, claiming a lien upon the lands for the amount of a judgment in its favor of about \$4,148, recovered against Clay October 13, 1886, upon which execution was issued, and, on or about November 8, 1886, levied upon his interest therein. These defendants also severally set up the pendency of suits in the circuit court of the state, brought to enforce their liens under these levies, and both said banks prayed that the mortgage should be held void by reason of such fraud, and be not enforced as against them. At the hearing it was urged in behalf of these banks that their claim was hostile and paramount to that of the dairy company, and therefore prior, not subsequent, to the mortgage which the complainant sought to foreclose; and that therefore their rights could not be adjudicated under the general allegation of the complainant's bill, which brought them in merely as subsequent purchasers or incumbrancers.

*Fletcher & Wanty*, for complainant.

*Blair, Kingsley & Kleinhaus*, for defendants the Fourth National Bank of Grand Rapids and the German Bank of Sheboygan.

SEVERENS, J. Upon the hearing of this cause the German Bank of Sheboygan and the Fourth National Bank, defendants, urge and insist that the court cannot adjudicate their rights in the lands mortgaged, because their rights, as asserted, are paramount to those of the mortgagor, and hostile thereto; and it is further insisted by them that an attempt to litigate those rights on this foreclosure bill would make the proceeding multifarious. Decisions of the state supreme court are referred to in support of the proposition that upon a bill to foreclose a mortgage only those matters can be litigated which affect the equity of redemption, and that parties claiming titles or liens originating prior to the mortgage cannot properly be made parties to the suit. But I do not understand the rule to be declared inflexible by those decisions. However that may be, the rule in the courts of the United States has long been settled differently, where the mortgage is of the fee, and the sale prayed is of the property so mortgaged. *Finley v. Bank of U. S.*, 11 Wheat. 304; *Hagan v. Walker*, 14 How. 29. In the case of *Dial v. Reynolds*, 96 U. S. 340, there were wholly conflicting titles. Here the banks assert a lien upon the title of the mortgagor's grantor, not in hos-

tility to his title, but in recognition of it, and they claim, at least such is the legal effect of their position, that they have not a paramount title, but, to the extent of their claim, a paramount lien, upon the ground that as to them Clay's deed to the company was fraudulent. As to them, the deed was not wholly void. The title passed and was mortgaged by the dairy company. Bump, Fraud. Conv. (1st Ed.) p. 451. But, independently of this, the lien the banks assert did not originate until after the mortgage was executed. As creditors at large, or having no levy, they had no lien. It is true the facts *in pais* upon which they found their lien, and which they bring forward as evidence, existed previously; but they connect themselves with the property only by the levy subsequent to the mortgage. *Maynard v. Hoskins*, 9 Mich. 485; *Tyler v. Peatt*, 30 Mich. 63; *Griswold v. Fuller*, 33 Mich. 268; *Root v. Potter*, 59 Mich. 498, 26 N. W. Rep. 682; *Bank v. Bates*, 120 U. S. 556, 7 Sup. Ct. Rep. 679.

Under the law of Michigan, there is no lien by judgment merely. I think the complainant has the right to have the validity of this lien determined before the mortgaged property goes to sale; otherwise, the bidding must be for something of dubious title and value, and the satisfaction of the mortgage debt be seriously imperiled by this supervening levy. A mortgagee ought not to be left in such a predicament.

The question whether collateral controversies shall be litigated in a foreclosure suit is in large measure one of convenience, and where the interests of the parties require it, and it is necessary in order to administer adequate relief, the court should take cognizance of the collateral questions. Story, Eq. Pl. § 539; *Shepherd v. Pepper*, 133 U. S. 651, 10 Sup. Ct. Rep. 438. It may be that if the sale by Clay to the company was fraudulent, as alleged, and the complainant had notice of it, the banks have a paramount lien. That is matter for adjudication. The suggestion that the suit is thus made multifarious is late when made at the hearing. The answers of the banks do not present that as a ground of objection, but, at least by strong implication, invite adjudication. It is true they ask postponement until certain proceedings alleged to be pending in the state court shall be terminated, but I know of no principle on which this could be authorized. The pendency of a suit there is no bar to the present. Besides, the complainant is not a party to that suit, and cannot be affected by it. *Cook v. Burnley*, 11 Wall. 659; *Insurance Co. v. Brune's Assignee*, 96 U. S. 588; *Gordon v. Gilfoil*, 99 U. S. 168. These defendants, therefore, knowing, as they must have done, that the object of bringing them in at all was in order that their claims should be cut off by the decree, and not having raised the objection of multifariousness until now, come within the scope of the doctrine repeatedly declared by the supreme court, that, if the matters were of equitable cognizance, the objection must be raised *in limine*, and, if not then made, it should not be entertained. *Oliver v. Piatt*, 3 How. 333; *Nelson v. Hill*, 5 How. 127; Story, Eq. Pl. § 284a.

I incline to think that the allegation, though general, in the bill, that these defendants have, or claim to have, rights and interests in the prem-

ises above described as subsequent purchasers, incumbancers, or otherwise, taken in connection with the averments of the answers in response thereto, and the evidence it affords that the general allegation in the bill was understood to be aimed at the only one specific claim which the defendants assert, is sufficient; but, if not technically so, the bill may be amended in this particular, so as to allege the defendants' levy, and, in a brief way, the claim of the defendants thereunder. The indorsement of the mortgage notes, and the delivery thereof to the complainant, operated as an assignment of the mortgage, and transferred to the holder of the notes the same equitable rights in the mortgage as he had in the notes. *Cooper v. Ulmann*, Walk. (Mich.) 251; *Martin v. McReynolds*, 6 Mich. 70; *Briggs v. Hannowald*, 35 Mich. 474; *Carpenter v. Longan*, 16 Wall. 271; *Kenicott v. Supervisors*, Id. 452; *Ober v. Gallagher*, 93 U. S. 199, 206. One of the rights acquired by the assignment was that of exercising the election to declare the debt due on default in the payment of the interest.

A decree will be entered for complainant to the amount of the sums advanced upon the \$20,000 note, and interest, less the credits which have been stipulated, with the interest thereon from their several dates.

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STEWART v. SIXTH AVE. R. Co.

(Circuit Court, S. D. New York. January 10, 1891.)

**NEW TRIAL—VERDICT—WEIGHT OF EVIDENCE—NEGLIGENCE.**

Under Const. U. S. Amend. art. 7, and Rev. St. § 649, which provide that no fact tried by a jury shall be re-examined otherwise than according to the rules of the common law, a verdict for defendant, in an action against a street railway company for personal injuries, will not be set aside where the evidence as to defendant's negligence is conflicting.

At Law.

*Edwin B. Smith*, for plaintiff.

*David M. Porter*, for defendant.

**WHEELER, J.** The plaintiff was riding as a passenger on the front platform of one of the defendant's cars, to smoke. He fell off. One of his hands was caught under one of the forward wheels, and injured so that it had to be cut off. He testified that the car was going fast and rocking up and down; that, in passing to change sides, he touched the driver, whereupon the driver hit him violently with the driver's shoulder, and sent him against the end of the car, and, with the motion of the car, against the dash-board, so that he fell over. The driver testified that the plaintiff fell off, and that the plaintiff did not hit him, nor he the plaintiff, in any manner. This action is brought for that injury. It has been twice tried before, with disagreements of the jury. On this trial it was submitted to the jury on the question whether the driver hit

the plaintiff violently or not, in a charge to which the plaintiff did not except. The jury found for the defendant, and the plaintiff moved for a new trial because the verdict was against the evidence and induced by passion or prejudice. This motion has now been heard.

The constitution and laws expressly require that in this court trials shall be by jury, unless waived; and provide that no fact tried by jury shall be otherwise re-examined than according to the rules of the common law. Amendments, art. 7, Rev. St. § 649. The verdict may, according to the rules of the common law, be examined to see if it is contrary to the evidence, without evidence, or the result of passion or prejudice. Here is no evidence of the latter unless it arises from comparison of the verdict with that on which it was found, and this affords none if the verdict was well founded. That here was evidence each way on the question submitted is shown by the bare statement of the case, and that it was somewhat evenly balanced is shown by the result of the two former trials. Under such circumstances the case could not be withdrawn from the jury, and a verdict directed for the plaintiff or for the defendant; neither requested or suggested that. *Hickman v. Jones*, 9 Wall. 197; *Manchester v. Ericsson*, 105 U. S. 347. A verdict could be directed if one the other way would be set aside as contrary to the evidence. *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. Rep. 1125; *Robertson v. Edelhoff*, 132 U. S. 614, 10 Sup. Ct. Rep. 186; *Gunther v. Insurance Co.*, 134 U. S. 110, 10 Sup. Ct. Rep. 448. If the case must be submitted upon the evidence, the verdict cannot be set aside as being contrary to the evidence without re-examination of the fact tried by the jury, which is so expressly prohibited. The fact cannot be re-examined in search for passion or prejudice more than for any other purpose. If the court differed from the jury in opinion about the fact, as to which nothing is intimated, that of itself would afford no ground for setting aside the verdict. It would interfere with the exclusive province of the jury secured by the constitution. While the plaintiff was riding on the platform without necessity, voluntarily, he was taking the risk of all ordinary dangers of that situation. Violence of the driver was the only ground for recovery which the evidence tended to show, and the existence of that was the only issue which arose. The plaintiff had the benefit of having every consideration in his favor on that issue laid before the jury, and, as it has thereupon been found against him, no reason is apparent why he must not abide by the result. Motion denied, stay vacated, and judgment on verdict.

LACKETT *et al.* v. RUMBAUGH *et al.*

(Circuit Court, W. D. North Carolina, January 15, 1891.)

## 1. ATTACHMENT—SERVICE BY PUBLICATION—JURISDICTION.

Where an action is commenced in a federal court against three partners, one of whom is not served, and no *alias* summons is issued, the suit as to him is at an end, and a subsequent attachment upon an affidavit of non-residence and order of publication, though authorized by the Code of North Carolina, is void, as the federal court cannot thus acquire jurisdiction without the service of process *in personam* on defendant.

## 2. APPEARANCE—GENERAL—JURISDICTION.

The general appearance of defendant partner not served with process without entering any plea is not a waiver of the lack of jurisdiction of the court in respect to the subject-matter.

## 3. GARNISHMENT—TRUST FUNDS.

Where partners among whom dissensions have arisen finally compromise their differences by two of them agreeing to pay the debts, releasing the third from all liability, in consideration of himself and wife conveying to the others their interest in the partnership realty and being paid \$2,075 out of the insurance money for the buildings destroyed before the compromise, and the partner thus released empowers his attorney to receive the insurance money in trust for his wife, and it is paid to the attorney by the other partners on condition that it shall not be paid to the wife until she and her husband have executed the deeds according to the compromise, the fund in the hands of the attorney is a trust fund, not subject to garnishment by the partnership creditors, prior to a compliance by all of the parties with the conditions of the compromise.

## 4. FRAUDULENT CONVEYANCES—CONSIDERATION—WIFE'S INTEREST IN HUSBAND'S LAND.

The insurance money was collected, and the sum agreed to be paid to the released partner was by his direction paid to an attorney for the benefit of his wife, at the urgent demand of the trustee of her separate estate who had invested part of the wife's property in the partnership realty, though she was never a partner. The consideration for transferring this fund to her was her interest in the property released to the other partners. Partnership creditors sued the firm and garnished this fund. *Held*, that it was not subject to their debts.

## 5. HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—TRUSTEE OF—RIGHTS.

Where a husband and wife purchase an interest in partnership realty, the husband being a partner, but the wife not, and the cash payment is made with funds of the wife's separate equitable estate, a deed being made to the husband and to a trustee for the wife, and a mortgage for the unpaid balance given back by the grantees, which deed and mortgage are afterwards destroyed by the consent of the parties, except the trustee for the wife, and another deed is executed to the husband and wife, who give a deed of trust for the unpaid purchase money, the rights of the trustee for the wife are not affected, but he is entitled as against the husband's creditors to the latter's proportion of the insurance money arising from the destruction of the property by fire.

## At Law.

This is an action at law in which a controversy has arisen between the plaintiffs and persons who have been allowed to interplead and set up title to a fund brought into the custody of the court by attachment proceedings instituted by the plaintiffs.

Moore & Merrick, F. A. Soudley, P. A. Cummings, and Charles Price, for plaintiffs.

Cobb & Merrimon and Joseph S. Adams, for interpleaders.

DICK, J. The counsel of the parties have waived a trial by jury and submitted all questions of fact to trial by the court. In performing this duty I will conform as near as I can to the principles of law and the rules of practice which have been announced by the state and federal