ENGLEMAN TRANSP. CO. *v.* LONGWELL *et al.*

(Circuit Court, W. D. Michigan, S. D. March 23, 1880.)

MORTGAGEE IN POSSESSION—ACCOUNTABILITY FOR RENTS.

Where a mortgagee in possession of an undivided half interest in a milling property forms a partnership with another to carry on the business, she will be charged, on an accounting in equity, with the fair rental value of the half interest, notwithstanding that the business resulted disastrously.

In Equity. On an accounting.

WITHEY, J. Mrs. Longwell, one of the defendants, a mortgagee in the possession of the undivided half of premises, the conveyance being absolute in form, has been required to account for the net rents and profits. It turns out that she has received from one of the two parcels of real estate no rent, and claims, therefore, that she is not chargeable with rent. The title of an undivided half of the property, upon the face of the records of the county where the property was situated, was in Mrs. Longwell. Defendant Sherman owned the other half. She gave him a mortgage on her half to secure one-half of the costs of repairs which he made on one parcel of the property; Sherman agreeing to carry on the business of milling and flouring for five years from September, 1875, and pay to Mrs. Longwell one-quarter of the net profits, she to bear one-half of the losses, if any. Her quarter of profits Sherman was to apply towards paying her share of the advances made by him, secured by the mortgage on her undivided half. The business of milling proved disastrous. Instead of a profit, there was a loss; consequently there was no reduction of the mortgage given to Sherman.

Now it is claimed that Mrs. Longwell is not chargeable with any rents whatever, as she received none. We regard this view to be a misapprehension of the rule under the facts. Mrs. Longwell, as mortgagee in possession of the undivided one-half of the mill property, would not be accountable for rent if she had been unable to lease the property, or had failed, after judicious leasing, to collect rent; but when she entered into a partnership arrangement with Sherman to do a milling and flouring business with this mill property, (the rule would be the same if she had alone carried on the business,) and the venture turned out disastrously, a court of equity will not inquire, under such circumstances, whether there was profit or loss, but will charge her with the fair rental value of the premises over repairs, insurance, etc., and taxes paid. The master is therefore directed to ascertain what the fair net rental value of the undivided half of the mill was during the period of the accounting, in the condition it was after the improvements were made, and credit her with the cost of her share of the improvements beneficial to the freehold.

McCLASKEY *et al. v.* BARR *et al.*

(*Circuit Court, S. D. Ohio, W. D.* November 10, 1891.)

1. FEDERAL AND STATE PRACTICE—LIS PENDENS—PARTITION.
Rev. St. Ohio, § 5055, providing that, "when the summons has been served or publication made, the action is pending, so as to charge third persons with notice of its pendency, and, while pending, no interest can be acquired by third persons in the subject-matter thereof as against plaintiff's title," is a rule of procedure, and not a rule of property, so as to be binding upon the federal courts in suits for partition brought in Ohio.

2. LIS PENDENS—PARTITION—EFFECT OF MAKING NEW PARTIES.
A suit for partition is *lis pendens*, from the time of serving the subpœna, as to all the interests in the lands as they shall be determined in the final decree; and the fact that new parties come in and establish a right to part of the interest claimed by the original complainants gives no ground of complaint to third persons who purchased after service of the subpœna, and before the new parties intervened.

3. PARTITION—NEW PARTIES DEFENDANT—ANSWERS AND CROSS-BILLS.
When, in a suit for partition brought by persons out of possession claiming by heirship a certain interest in the lands, other persons claiming part of such interest are made parties defendant, these latter may set up their claim by way of answer, and cross-bills are unnecessary; therefore any cross-bills filed for this purpose will be considered as answers, and the defendants in possession are not entitled to service of subpœna issued thereon.

4. SAME—COMPENSATION FOR IMPROVEMENTS—CROSS-BILL—FOLLOWING STATE PRACTICE.
When, in a partition suit in a federal court, title to an interest in the lands is established by persons not in possession, and the defendants wish to claim compensation for improvements, such claim must be set up by cross-bill, although the state statutes prescribe a different practice, since the federal courts do not follow the state practice in suits in equity.

5. SAME—DECREE—RECITING FINDINGS.
When, in a partition suit, persons not in possession have established title to a certain interest in the lands by proving heirship to a remote owner, the court may permit the findings as to their pedigree to be recited in the decree, when it deems such a course probably necessary to prevent further question as to the rights of the parties, notwithstanding that equity rule 86 declares that neither any part of the pleadings, "nor the report of any master, nor any prior proceedings shall be recited or stated in the decree."

6. EQUITY PRACTICE—OBJECTIONS NOT RAISED AT HEARING—WAIVER.
In a partition suit, mere formal and technical objections to testimony will not be allowed as taken at the hearing, when in fact they were not then taken, but were first raised as to part thereof in a brief submitted after the hearing, and as to the remainder when the settlement of the decree was under discussion. All such objections will be considered as waived.

In Equity. Suit for partition of lands.

Henry T. Fay, C. W. Cowen, Howard Ferris, and *S. T. Crawford,* for complainants.

R. A. Harrison, J. C. Harper, and *J. L. Lincoln,* for defendants.

Before JACKSON and SAGE, JJ.

SAGE, J. This cause is now before the court on questions arising with reference to the settling of the decree, a draft by complainants' counsel having been submitted, and also a written statement and brief on behalf of the defendants in possession, suggesting their objections and certain modifications desired by them.

The first objection is to the statement in the introductory paragraph of the complainants' draft that "this cause came on to be heard at the