HATCH *et al.* v. FERGUSON *et al.*

(*Circuit Court, D. Washington, N. D.* November 18, 1892.)

FRAUDULENT DECREE—EQUITABLE RELIEF—JURISDICTION.

An independent suit in equity may be maintained in a federal court between parties of diverse citizenship to vacate a decree of a state court, and have a sale of property made pursuant to that decree annulled, and complainants' title to the property established, when such decree is alleged to have been fraudulently obtained, and has been fully executed, and when complainants have no remedy by motion in the same case because the land has passed into the hands of third persons, who claim to be innocent purchasers, and who must therefore be brought in as new parties. *Arrowsmith* v. *Gleason*, 9 Sup. Ct. Rep. 237, 129 U. S. 86, applied. *Cowley* v. *Railroad Co.*, 46 Fed. Rep. 325, distinguished.

In Equity. Suit by Dexter Hatch and others against E. C. Ferguson and others to annul a decree of the state court in a partition suit. On demurrer to bill. Overruled.

James Hamilton Lewis, for plaintiffs.

F. H. Brownell, for defendants.

HANFORD, District Judge, (*orally.*) The complainants, who are minor children of Ezra Hatch, deceased, bring this suit by their mother, as their next friend, asking to have a decree of the superior court of Snohomish county, in this state, in a partition suit, vacated, and a sale of property pursuant to that decree annulled, and their claim of title to the real estate affected by the decree and sale established. The ground alleged is a conspiracy between E. C. Ferguson, who was appointed by their father's will to be their guardian, and the defendant Henry Hewett, Jr., to obtain this property from them for less than its true value, and that those proceedings, by reason of collusion between Mr. Hewett and Ferguson, were hurried through the superior court without a fair investigation and ascertainment of facts, and contrary to the principles of equity. In short, the ground for the proceeding is fraud. They show that the decree which they ask to have vacated has been fully executed. Nothing remains of the case pending in the superior court of Snohomish county. Everything that could be done to completely transfer the title has been done, and since the completion of all the proceedings in the superior court Mr. Hewett, who was the purchaser at the judicial sale, has transferred the property to the defendants the Everett Land Company and Judson La Moure.

In support of this demurrer the defendants claim that this court has no jurisdiction, because the case is still in such a condition in the superior court of Snohomish county that the complainants can go there, and, upon establishing the facts alleged in their bill, have the decree and proceedings vacated by an order of that court. If it appeared to me to be the fact that they could be fully restored to all their rights by a simple motion in the superior court of Snohomish county, I should feel inclined to follow my own decision in the case of *Cowley* v. *Railroad Co.*, 46 Fed. Rep. 325, and sustain this demurrer. In that case I held that

an independent suit in equity to vacate a judgment or enjoin proceedings to enforce a judgment could not be maintained so long as the party had a remedy by motion in the same case and in the court in which the judgment complained of was entered. But in this case, suppose the infant complainants should go to the superior court of Snohomish county, and show the facts alleged in their bill to be true, and have an order vacating the decree and the proceedings in that court, where would they then stand? The defendants, who are now claiming this land, would not be affected. They would retain the land until by a new, original, independent suit it could be recovered from them. This case is one in which something more is sought than a mere vacation of the judgment erroneously and fraudulently obtained, or to enjoin proceedings upon it. There is a new controversy between new parties who were not parties to the suit in the Snohomish county court, who must be brought into court before the complainants can be restored to the rights of which they have been divested. On this ground I hold that the case comes fully within the rule in the case of *Arrowsmith* v. *Gleason*, 129 U. S. 86, 9 Sup. Ct. Rep. 237, and complainants have the right to sue in this court. If an independent suit in equity to establish the rights they claim here can be maintained in any court, this court has no right to say that they shall go to another court. By the express provisions of the act of congress this court is given concurrent jurisdiction with the courts of the state. Its jurisdiction is founded on the fact that the case involves a controversy between citizens of different states. On that ground they have the right to choose this as their forum, and the court has no right to refuse to hear their case.

The Code of this state by an express provision saves the rights of *bona fide* purchasers of land sold under a decree or judgment, even against a party who subsequently to the sale succeeds in a proceeding to reverse the decree or judgment for error, or set it aside for fraud. 2 Hill's Code, § 1437. This case is complicated by the fact that one of the defendants has already filed an answer pleading that he is a purchaser of part of the land in actual good faith, and, under the provisions of the Code, if he maintains this plea, he will be entitled to keep that land, although the proceedings in the superior court of Snohomish county be set aside, and the complainants, if they are wronged, must be remitted to their remedy by an action for damages. The bill itself tenders an issue as to the good faith of the purchases by the defendants, who now claim all of the land.

I therefore overrule the demurrer.

BUCKNER *et al. v.* HART.

(*Circuit Court, E. D. Louisiana.* November 18, 1892.)

1. ELECTRIC STREET RAILWAYS—FRANCHISE—POWERS OF COUNCIL.
The charter of the city of New Orleans (Laws La. 1882, No. 20, § 8) provides, *inter alia*, that the common council shall have power to authorize the use of the streets for "horse and steam railroads." *Held*, that the words "horse and steam railroads" were not words of limitation, and that the council was empowered to grant such franchise to electric railways.
2. SAME.
Laws La. 1888, Act No. 135, provides that the council shall not have power to "dispose of any street-railroad franchise except after at least three months' publication of the terms and specifications of said franchise," and after adjudication of same to the highest bidder at public auction, as provided for by section 21 of the city charter. *Held* that, after a regular adjudication to the defendant of a franchise embracing certain streets, the council could not, by simple agreement with defendant, without readvertisement or any new public auction, change the route so as to embrace 16 blocks not included in the original franchise.
3. SAME.
The provision that the sale shall be made to the highest bidder means the highest bidder in money, and the sale of the franchise is invalid where the specifications call for, and the adjudication is made to the highest bidder in, "square yards of gravel pavement."
4. SAME—INJUNCTION—LACHES.
The interval between the sale of the franchise and filing of complainants' bill to enjoin the construction of the railway in front of their premises was one month and eight days. *Held*, that this was not such delay as amounted to an acquiescence in the grant, such as would preclude complainants from asserting their rights.

In Equity. Bill by Newton Buckner and others against Judah Hart to enjoin the construction of an electric trolley railway in front of complainants' premises on Coliseum street, New Orleans. Heard on motion for an injunction *pendente lite*. Granted.

H. H. Hall and *W. W. Howe*, for complainants.

Farrar, Jonas & Kruttschnitt, for defendant.

BILLINGS, District Judge. This case is before the court upon an application for an injunction *pendente lite*, which has been heard on the bill and amended bill, and upon counter affidavits and exhibits.

The first question presented is as to the power of the common council to grant to the defendant the franchise to lay and operate upon any of the streets of the city of New Orleans a street railroad which shall be propelled by electricity after the trolley method or system. The council have granted such a franchise. Had it the authority to make such a grant? The answer to this question must be found in the present charter of the city of New Orleans, (Act No. 20, 1882.) The provision on that subject is found in the existing charter, (Acts 1882, No. 20, p. 14.) Page 21, § 8, among other things, provides that the common council shall also "have the power to authorize the use of the streets for horse and steam railroads, and to regulate the same; to require and compel all lines of railway or tramway in any one street to run on and use one and the same track and turntable; to compel them to keep conductors on their cars, and compel all such companies to keep in repair