we must reverse the decree appealed from, and remand the case to be proceeded with in accordance with the views herein expressed.

Ordered that the decree of foreclosure and sale be reversed, and cause remanded

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TOMPKINS v. DRENNEN et al.

(Circuit Court of Appeals, Fifth Circuit. May 22, 1893.)

No. 100.

1. MORTGAGES—POWER OF SALE ON DEFAULT—CONSTRUCTION.
   Where the terms of a mortgage authorize the mortgagee, on default, to sell only for cash, and he accepts notes from the purchaser, he is liable to the mortgagor for the difference between the amounts which, by the terms of the mortgage, are to be applied to the payment of the debt, and the selling price, notwithstanding that the purchaser's notes subsequently became worthless.
2. EQUITY JURISDICTION—RES JUDICATA.
   Defenses to an action at law, which have been adjudicated between the parties, will not constitute a basis for relief in a court of equity.
3. SAME.
   Matters which, if a defense to an action at law, could have been set up therein, cannot, after the determination of such action, be used by the unsuccessful defendant as a basis for equitable relief, where it does not appear that he was prevented from availing himself of such defense by fraud or accident.

Appeal from the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

In Equity. Bill by Henry B. Tompkins against D. M. Drennen and Joseph Smith to enjoin the sale of plaintiff's property under execution. From a dismissal of the bill on demurrer, complainant appeals. Affirmed.

Statement by TOULMIN, District Judge:

The bill in this case was filed to enjoin the sale of appellant's property, levied on under an execution issued on a judgment obtained against him in the state circuit court of Jefferson county, Ala. The facts on which the judgment was obtained were, in substance, as follows: On December 1, 1886, appellant sold a block of land in the city of Birmingham, Ala., to Royster and Martin, making them a deed therefor, and receiving contemporaneously from them a mortgage to secure the payment of the purchase money, evidenced by two notes, each for the sum of $13,333.33, due at one and two years after date. By the terms of the mortgage it was provided that, if there was a failure to pay either of said notes at maturity, appellant was authorized to take possession of the block of land, and to sell the same at public outcry for cash. The note falling due on December 1, 1887, was not paid, and on December 7th appellant duly advertised the property for sale, and on January 7, 1888, offered it for sale at public outcry to the highest bidder for cash. Charles D. Woodson became the purchaser for the sum of $32,000. On the same day appellant executed a deed to Woodson, acknowledging therein the payment of the consideration of $32,000, and also wrote a letter to Royster and Martin, inclosing a statement of account between them, and a check for $42.85, stating that this amount was the balance due them after paying the mortgage debt, with interest, and expenses of sale; and on February 21, 1888, appellant made an entry on the record of the mortgage of the words, "Satisfied in full." Prior to December 7, 1887, and to the advertisement of the mortgage sale, appellee Drennen purchased the block of land from Royster and Martin, and after said sale purchased their claim for the balance of the proceeds thereof. He subsequently entered suit against appellant for such balance in the cir-

cuit court of Jefferson county, Ala., on the common counts in assumpsit, one of which was for money had and received. Appellant appeared and pleaded to the suit, and in due course of proceedings judgment was recovered by appellee for the sum of $2,628.75. From this judgment an appeal was taken by appellant to the supreme court of the state, which affirmed the judgment. In March, 1892, and after Drennen had obtained his judgment, appellant filed the original bill in this case, alleging as the facts constituting the equity of the bill that Woodson never paid any money to him in cash on account of the purchase of said land, but that he executed to him his promissory note for the whole of the $32,000 purchase money, with interest at 8 per cent. per annum; that in December, 1889, appellant filed a bill in the state court to enforce his vendor's lien on said land, and in January, 1890, a decree was rendered in the suit subjecting the land to his lien and authorizing a sale of the same; that the sale was had in March, 1890, and that appellant, for want of a better bidder, was compelled to become the purchaser for the sum of $20,000, leaving a balance due him from Woodson, for which he thereafter obtained a personal judgment against him, on which execution was issued and $273.85 realized, leaving the balance of the $32,000 wholly unpaid; and that said Woodson had since died, hopelessly insolvent. The bill further averred that Drennen had caused execution to be issued on his judgment and to be placed in the hands of the sheriff of Jefferson county, Ala., who had levied the same on appellant's property. The bill prayed for an injunction restraining Drennen from enforcing the collection of his judgment and the sale of appellant's property under the execution.

Drennen filed demurrers to the bill, and also moved to dismiss it for want of equity. On the hearing the bill was dismissed. This was on June 23, 1892. On July 23, 1892, the amended bill was filed, averring in substance and effect that Drennen had no right or title to the claim sued on in the state circuit court, and that said court had no jurisdiction to render any judgment against appellant in that suit on the facts disclosed in the record. A demurrer to the amended bill was filed by Drennen, and sustained by the court. From the decrees sustaining the demurrer and dismissing the bill and amended bill this appeal was taken.

R. C. Brickell and Wm. B. Farley, for appellant.

James E. Webb, (Gillespie & Smyer and Webb & Tillman, on the brief,) for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge, after stating the case as above, delivered the opinion of the court.

A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents. Knox Co. v. Harshman, 133 U. S. 152, 10 Sup. Ct. Rep. 257, and authorities therein cited. The facts averred in the original bill constitute no defense at law or in equity to Drennen's claim as purchaser of the land from the mortgagors and owners of the equity of redemption, and as assignee of their claim against the appellant for the surplus of the proceeds of sale. Although appellant had authority under the mortgage to sell only for cash, he had the right to agree with the purchaser to allow him time for the payment of the purchase money. This was a matter between the mortgagee (appellant) and the purchaser, which they could arrange to suit themselves, (Durden v. Whetstone, 92 Ala. 480, 9 South. Rep. 176; Mewburn's

Heirs v. Bass, 82 Ala. 622, 2 South. Rep. 520;) and whether the purchaser settled the purchase money in cash or by executing a note to appellant was a matter resting exclusively with them, and with which the mortgagors had no concern, (Cooper v. Hornsby, 71 Ala. 62.) The extent of their equity was to have credit for the sum bid as cash, and the appellee, as their grantee, was entitled to recover in an action for money had and received the balance of the purchase money remaining in appellant's hands after deducting the amounts which by the terms of the mortgage were authorized to be applied to the payment of the debt, and of such expenses and charges as were therein provided for. Tompkins v. Drennan, (Ala.) 10 South. Rep. 638.

The averment in the amended bill to the effect that Drennen had no right or title to the claim sued on in the state circuit court shows a good defense at law, but it appears from the record that such defense was fully and fairly tried in that suit. A court of equity will not assume to control a judgment of a court at law for the purpose simply of giving a new trial. Marshall v. Holmes, 141 U. S. 596, 12 Sup. Ct. Rep. 62; Crim v. Handley, 94 U. S. 652; U. S. v. Throckmorton, 98 U. S. 61.

The other facts averred in the amended bill, and relied on as an equitable defense to Drennen's claim, if a good defense to such claim, could have been set up in his suit against the appellant in the state court. That suit was an action in assumpsit for money had and received, which, in its spirit and purposes, has been likened to a bill in equity, and is an exceedingly liberal action. King v. Martin, 67 Ala. 182. In Eddy v. Smith, 13 Wend. 488, the court says:

"It is a most favorable way in which he [the defendant] can be sued. He can be liable no further than the money he has received, and against that may go into every equitable defense upon the general issues. He may claim every equitable allowance; in short, he may defend himself by everything which shows that the plaintiff ex aequo et bono is not entitled to the whole of his demand, or any part of it."

These principles have, ever since their development, been recognized as sound, both in England and here, and are of daily application. It does not appear from the averments in the bill or in the amended bill that appellant was prevented from availing himself of such defense by fraud or accident, without which no equity is shown therein.

We find no error in the record, and the decree is affirmed.

HAGAN et al. v. BLINDELL et al.

(Circuit Court of Appeals, Fifth Circuit. May 29, 1893.)

No. 117.

1. COMBINATIONS IN RESTRAINT OF TRADE—EQUITY JURISDICTION.

The jurisdiction of the circuit court to entertain a suit to enjoin a combination of persons from interfering with and preventing shipowners from shipping a crew may be maintained on the ground of preventing a multiplicity of suits at law, and for the reason that damages at law

for interrupting the business and intercepting the profits of pending enterprises and voyages must, in their nature, be conjectural, and not susceptible of proof. 54 Fed. Rep. 40, affirmed.

2. SAME—INJUNCTION PENDENTE LITE—EVIDENCE.
Evidence that, by reason of the action of a combination of persons, the crew left complainants' ship as she was about to sail, and that another crew could not be procured for nine days, and then only with the assistance of the police authorities and the protection of a restraining order, while other vessels in the vicinity had no difficulty in getting crews, is sufficient to authorize the court to enjoin interference with the business of the complainants by such combination pendente lite. 54 Fed. Rep. 40, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

In Equity. Bill by Blindell Bros. & Co. and others against Charles Hagan and others to enjoin interference with their business as shipowners. From a decree granting an injunction pendente lite, (54 Fed. Rep. 40,) defendants appeal. Affirmed.

John D. Grace and J. Wara Gurley, Jr., (Gurley & Mellon, on the brief,) for appellants.

F. B. Earhart and H. P. Dart, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge. The only practical question presented by the record is whether the court below had jurisdiction of the case, as made by the bill. We concur in the conclusion reached by the learned judge who decided the case below, as expressed in his opinion, and which is made a part of the record, that the jurisdiction of the court is maintainable on general principles of equitable jurisdiction; and a careful examination of the case satisfies us that, under all the facts before it, there was no error in the court awarding a preliminary injunction.

The decree is therefore affirmed.

PENNSYLVANIA R. CO. v. NATIONAL DOCKS & N. J. J. C. RY. CO.

(Circuit Court, D. New Jersey. March 28, 1893.)

1. INJUNCTION—WHEN GRANTED—CONDEMNATION PROCEEDINGS.
Commissioners who are appointed to condemn a right of crossing for one railroad company over the tracks of another will not be enjoined by a court of equity from considering a certain plan of crossing, which is alleged to be different from that described in the petition for condemnation, when the existence of any material difference is denied by the respondent.

2. SAME—ADEQUATE REMEDY AT LAW.
In such case the injunction should also be denied on the ground that equity will not interfere to control proceedings still pending in a special statutory tribunal and (the condemnation proceedings being under the New Jersey statute) on the further ground that there is an adequate remedy at law, by certiorari from the state courts.

In Equity. Bill by the Pennsylvania Railroad Company against the National Docks & New Jersey Junction Connecting Railway

Company for an injunction to restrain the condemnation by defendant of a right of crossing for its railroad through the yard of the complainant company in Jersey City. Heard on a motion for a preliminary injunction to prevent the condemnation commissioners appointed by the state court from considering a plan of crossing different from that described in the petition for their appointment. Denied.

J. B. Vredenburgh, (Mr. Bedle, of counsel,) for complainant.

Dickinson, Thompson & McMaster, (Gilbert Collins and John R. Emery, of counsel,) for defendant railway company.

ACHESON, Circuit Judge. In opposition to the moving papers the defendant company has submitted the affidavit of its engineer, to the effect that the plan complained of in the bill does not involve any substantial departure from the method of crossing the complainant's property set forth in the petition for the appointment of the commissioners to assess the damages, but presents a mode of crossing, and form of construction, within the scope of the condemnation plan, and reasons in support of this view are therein set forth at length. Moreover, it is now shown to us that the parties and their respective engineers differ in their interpretation of the terms of the clause of the petition relating to the clearance between the rails of the defendant's projected road and the top of the walled cut. Now, whether the position taken by the defendant with respect to the plan complained of is tenable, is a question upon which we do not feel called on to express an opinion. It appears that the commissioners themselves have not definitively passed upon the question, for in overruling the objection to the offer in evidence of this plan their decision was expressed thus:

"The commissioners decide that as they have allowed the Pennsylvania Railroad counsel to put in any evidence they saw fit in relation to the different plans, without any curtailment whatever, they shall allow the other side to continue in the same way."

It may be, then, that ultimately, in making their assessment of damages, the commissioners will reject this plan as an unwarrantable change in the method of crossing defined in the condemnation petition. Now, how can it be said that this is a matter not within the cognizance of the commissioners? The inquiry, it will be perceived, is whether a certain suggested mode of crossing and construction is permissible, under the petition. True, the commissioners are not at liberty to adopt as the basis of their assessment a plan of crossing materially different from that described in the petition. But whether such a deviation is proposed is a subject of disputation. While, on the one side, it is affirmed that the suggested mode of crossing is a plain abandonment of the condemnation plan, the other side earnestly contends that it is fairly within the terms of the petition. Such being the issue, can all consideration of the subject be denied the commissioners? We are not prepared so to hold.

But then, again, by what authority can a court, whether of law or equity, interfere with proceedings yet pending before a special

statutory tribunal, for the purpose of controlling there? Nothing is better settled than the rule that in a matter not purely ministerial, but involving judgment and discretion, the courts will not control public officers or inferior tribunals in the exercise of their functions. Gaines v. Thompson, 7 Wall. 347. Only after the final decision of such special tribunal can judicial authority be regularly invoked for the rectification of errors. Id.; State v. Medical Society, 35 N. J. Law, 200.

Furthermore, here not only is there the right of appeal from the report of the commissioners, but an ample legal remedy, by certiorari, is open to the complainant. Vanwickle v. Railroad Co., 14 N. J. Law, 162; State v. Lord, 26 N. J. Law, 140; Swayze v. Railway Co., 36 N. J. Law, 295; Lehigh Val. R. Co. v. Dover & R. R. Co., 43 N. J. Law, 528. Says Chancellor Green in Hoagland v. Township of Delaware, 17 N. J. Eq. 106, 114:

"The supreme court exercises a supervision and control over all inferior tribunals and corporations, and may control the exercise of their powers, so far as may be necessary to prevent abuse, to protect the rights of the citizen, and redress the wrong of every party aggrieved by their irregular and unlawful action."

And because the remedy at law, by certiorari, is adequate and complete, the courts of New Jersey refuse equitable relief in the class of cases to which the present case belongs. Hoagland v. Township of Delaware, supra; Hoboken Land & Imp. Co. v. City of Hoboken, 31 N. J. Eq. 461. But, if the state courts will not afford the complainant relief in equity, neither should the circuit court of the United States, the legal remedy being ample. Ewing v. City of St. Louis, 5 Wall. 413.

For the foregoing reasons, and without considering the other objections urged against the allowance of an injunction, we must deny this motion.

BELDING v. WILLARD et al.

(Circuit Court, D. Minnesota. June 17, 1893.)

No. 94.

GUARDIAN AND WARD—SALE OF WARD'S REALTY.

A man died, leaving real and personal property in Minnesota, and, upon proper proceedings had, the probate court of the county wherein it was situated appointed a guardian for his minor heirs, resident, with their mother, in Wisconsin. The guardian presented a petition averring that the sale of the realty was necessary for the support and education of the minors, and praying license to sell at private sale. The court ordered that notice of the petition be given directly to persons interested residing within the state, and by publication to nonresidents. This was done, in full compliance with the law. License to sell privately was granted. The sale was made and confirmed, and the guardian executed deeds to the purchaser. *Held*, that this divested all the interest of the minors in the property, and their quitclaim deed, subsequently executed, vests nothing in the grantee therein.

At Law. Ejectment by Leslie A. Belding against John A. Willard and George F. Piper. Judgment for defendants.

J. W. Bull, for plaintiff.
J. L. Washburn and W. W. Billson, for defendants.

NELSON, District Judge. This is an action of ejectment to recover an undivided two-sevenths of the S. ½ of the S. E. ¼ of section 29, township 50, range 14, situated in St. Louis county, in this district. The plaintiff's title rests upon a quitclaim deed from Godfrey F. Burg and wife and John Peter Burg, dated July 14, 1891, and duly recorded. The defendants claim to be the owners through a guardian's sale made in 1872, and approved by the probate court of St. Louis county July 11, 1872. To sustain the plaintiff's title, an attack is made upon the proceedings in the probate court of St. Louis county, appointing a guardian, and the subsequent proceedings, culminating in a sale of the property in controversy. The plaintiff is entitled to a judgment in his favor unless the proceedings before the probate court passed the title. All objections by plaintiff's counsel to the evidence offered are overruled.

Special Facts Found.

The facts found are that John Peter Burg and Godfrey Frederick Burg were the only minor heirs of John Peter Burg, the elder, who died seised of an estate embracing the land in controversy, and that the undivided two-sevenths of the quarter section sought to be recovered in this action was inherited by them. That Catharine Burg, the widow of John Peter Burg, deceased, was the mother of the minors, with whom they resided in Wisconsin, and on March 23, 1872, a petition was presented and filed in the probate court of St. Louis county, Minn., in the matter of the estate of John Peter Burg, stating that he left personal property, and two minor heirs, residing with their mother, in Wisconsin, naming them as Peter Burg, age about 7, and Godfrey Burg, age about 9; and John Mallman was duly appointed, on the same day, by the probate court, the guardian of the minors, and letters of guardianship duly issued to him. That on April 18, 1872, a petition in the matter of the estate of John Peter Burg was presented by the guardian, appointed as aforesaid, to the probate court, in which it is stated that he "is the guardian of Peter Burg and Frederick Burg, and that it is necessary to sell the undivided 2-7 of the south half of the southeast quarter (S. ½ of S. E. ¼) of section twenty-nine, (29,) township fifty, (50,) range fourteen, (14,) owned by them, for their support and education, and license to sell at private sale is prayed; and on the same day it is ordered and directed by the probate court that the next of kin to said wards, and all persons interested, appear before the court and show cause on Saturday, May 25, 1872, why a license should not be granted for the sale thereof, as prayed for; and it is further ordered that notice of such hearing be given all persons interested by publication of this order for four successive weeks, (the last publication to be at least fourteen days before said day of hearing,) in the Duluth Minnesotian, a weekly newspaper printed in St. Louis county, and by serving a copy of this order personally on each interested person resident in this state fourteen