

illegal and erroneous; that the return of the sheriff of the list of delinquent sales was not filed and not recorded within the time prescribed by law; that the sheriff did not make the affidavit provided by law, the return and affidavit being annexed, and the affidavit closely resembling that considered in *Hays v. Heatherly*; that the complainants have redeemed according to law, and paid all taxes, including those of 1885; and that Kuhn had actual personal knowledge of such redemption and payment of taxes before the deed was made to him. In the light of the authorities, these averments seem to us sufficient to require an answer. It may be remarked in this connection that the one-eighth claimed by Vinson was derived from the heirs of John Phillips, as appears from his statement of the ownership of the other seven-eighths, and as is charged in the bill in this case, admitted by the demurrer, and not denied by Vinson's answer. The deed to Vinson is referred to as an exhibit to his bill, and made part thereof, but the clerk certified that it was not on file, and it is therefore not set forth in the record. This eighth was one of the five-eighths covered by the tax deed to Kuhn, and in respect of which the alleged redemption was made. No explanation is suggested why the tax deed was allowed effect as to the four-eighths, and not as to the one-eighth, nor does the record indicate the ground for this apparent discrimination. As we do not consider the issues between defendants Vinson and Kuhn to be properly before us on this appeal, we express no opinion upon the controversy between them. The circuit court may deal with that subject after the mandate has gone down. The decree is reversed, and the cause remanded, with a direction to the circuit court to overrule the demurrer, with leave to answer, and for further proceedings in conformity to law.

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## GILLETTE et al. v. DOHENY et al.

(Circuit Court, S. D. California. January 23, 1895.)

## EQUITY—DEMURRER—PLACING ON LAW CALENDAR.

Under equity rule 33, giving plaintiff the right to set down for argument defendant's demurrer, and rule 38, providing that if he does not set it down on the rule day when it is filed, or on the next succeeding rule day, he shall be deemed to admit its sufficiency, and his bill shall be dismissed, unless he is given further time, where plaintiff does not have the demurrer set down for argument on the rule day when it is filed (January 7th), and the next rule day is the first Monday of February, it cannot in the meantime be "ready for argument," so as to be put on the law calendar, within rule 39, requiring the clerk, five days before the commencement of the term, to put on the law calendar all cases ready for argument on demurrer, and to enter causes thereon at any time during the term when ready for argument.

Suit by Frederick J. Gillette and others against Edward A. Doheny and others.

James Burdett, for complainants.

Wellborn & Hutton, Harris & Vickery, and W. T. Cheney, for defendants.

ROSS, District Judge. This is a motion on behalf of the defendants to strike from the law calendar the demurrer filed by the defendants. The suit is one in equity. Rule 33 of the equity rules gives to the plaintiff the right to set down the demurrer to be argued, and rule 38 of the equity rules prescribes the penalty for a failure to do so. So far as applicable to this question, it is as follows:

"If the plaintiff shall not \* \* \* set down any plea or demurrer for argument on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose."

The demurrer in question was filed on the 7th day of January, which was the January rule day of the court, but it was not set down for that day to be argued. The next succeeding rule day will be the first Monday in February. The January term of the court commences the second Monday in January, which, in this instance, was the 14th. Rule 39 of the court, respecting the preparation of the calendar, provides, among other things, as follows:

"Five days before the commencement of every term the clerk shall prepare two calendars, one of which, to be designated the 'law calendar,' shall contain all causes pending before the court and ready for argument on demurrer or exceptions to pleadings, whether causes at law or in equity. \* \* \* Causes will be entered upon the 'law calendar' at any time during the term when at issue or ready for argument."

Rule 42 is as follows:

"On the second day of each term, unless otherwise ordered by the court, and on each subsequent rule day of the term upon which the court is in session, the law calendar will be called and disposed of, and such days shall be known in these rules as 'law days.' Upon the regular call of the law calendar, when no counsel appears to support a demurrer or exception, it will be overruled without any examination of the record, and a motion for new trial, under like circumstances, will in like manner be denied."

The second day of the January term was, in this instance, Tuesday, January 15th, and upon the law calendar for that day the clerk placed the demurrer filed by the defendants on the 7th of January. It is contended by the defendants, and I think rightly, that the demurrer was improperly so placed. As has been seen, the provision of rule 39 is, in effect, that no demurrer shall be placed upon the calendar until the same is ready for argument. Such demurrers as are ready for argument five days before the commencement of the term, the clerk is, by rule 39, required to place upon the law calendar to be prepared by him before the beginning of the term; and such demurrers as become ready for argument during the term are, by the concluding clause of rule 39, to be thereafter entered upon the law calendar by the clerk. When a demurrer in equity becomes ready for argument is to be determined by rules 33 and 38, prescribed by the supreme court of the United States for the government of the United States courts of equity, by the first of which, as has been seen, the plaintiff is given the right to set down the demurrer to be argued, and by the second of which it is declared that if the plaintiff does not do so on the rule day when the demurrer is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and suffi-

ciency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose. What constitutes the setting down of a demurrer for argument is not expressly defined by the equity rules. According to the equity practice in England, a demurrer is set down for argument by an ex parte order, issued on petition of the plaintiff, and served upon the defendant's solicitor two days before the hearing. 1 Daniell, Ch. Pl. & Prac. (5th Ed.) pp. 595, 596. Under the provisions of rule 5 of the equity rules, a motion to set down a demurrer for argument is grantable of course by the clerk. Its provisions are:

"All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers; for taking bills pro confesso; for filing exceptions, and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown."

And by the preceding rule (4) the entry in the order book of any motion grantable of course by the clerk is made sufficient notice to the parties and their solicitors. An observance of these rules of procedure will secure to the plaintiff the option conferred upon the plaintiff by rule 38 of the equity rules, and to the defendant the right of dismissal under the circumstances prescribed by the same rule. An order will be entered striking the demurrer from the law calendar.

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#### FARMERS' LOAN & TRUST CO. v. GRAPE CREEK COAL CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 26, 1895.)

No. 204.

#### MORTGAGES—FORECLOSURE FOR DEFAULT AS TO INTEREST—DEFICIENCY JUDGMENT BEFORE MATURITY OF PRINCIPAL.

On foreclosure of a mortgage for nonpayment of interest, although the proceeds of sale of the property as an entirety are insufficient to pay the whole debt, no judgment for the deficiency can be rendered if the principal is not due and there is no provision in the mortgage, or the bonds secured thereby, that the principal shall become due on default in payment of interest.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

This was a suit by the Farmers' Loan & Trust Company against the Grape Creek Coal Company, Grape Creek Coal & Coke Company, Mason M. Wright, and John B. Brown, to foreclose a mortgage. A decree was rendered for complainant under which the mortgaged property was sold as an entirety, but afterwards, upon defendants' appeal, the decree was reversed in certain particulars, and the cause was remanded to the circuit court. 63 Fed. 891. The circuit court entered a decree, September 12, 1894, in conformity with the opinion of the circuit court of appeals, adjudging \$379,648.56 to be due. From this decree complainant appealed.