

followed that remark without citing any other authority. That precise question was not involved in that case, but the mere dictum of such a judge of such a court would ordinarily be followed, especially by lower courts. An examination of his reasoning shows that he made the suggestion without much examination, probably, and his reasoning does not cover the whole ground as to all classes of cases. The modes of procedure he suggests would probably be ample in all cases of cross bills brought for discovery in aid of a defense merely to the original bill, but not in cases of those brought for relief, as well as defense, where new parties would be necessary to the relief sought. As in this case, the methods he states as the proper ones, if successfully followed, would enable the defendant in the original bill to defeat the orator therein, but not to reach the affirmative relief prayed in the cross bill, if entitled to it. Weighty as that remark is, it is not thought to be sufficient to control the reasons and authorities to the contrary of it. The result of what is thought to be the soundest reasoning, and the best considered authorities, is that, where a cross bill shows that there is a party to the subject of the litigation, as presented by it, who has not been before made a party, nor appeared to be a necessary one, and then does appear to be such, that party should be brought in by the cross bill."

The distinction referred to in the note to section 399 of Story on Equity Pleading, above cited, and in the authorities there referred to, between a cross bill merely defensive in its character, and one which seeks affirmative relief in respect to matters connected with the subject embraced by the original bill, is a very just and proper one. See, also, *Lodge, etc., v. Swann* (W. Va.) 16 S. E. 462; *Briscoe v. Ashby*, 24 Grat. 464; *Hurd v. Case*, 32 Ill. 45; *Hildebrand v. Beasley*, 7 Heisk. 121; *Blodgett v. Hobart*, 18 Vt. 414.

All of this being true, as I think, and the receivers appointed in the suit of the Mercantile Trust Company having necessarily incurred, in the operation of the road, various obligations, for some of which they have issued, under the authority of the court, receivers' certificates, it is the duty of the court to protect them, as well as the liens of the mortgages. All of this can be well done in the one suit, whereas, to permit the receivers to be sued in an independent suit, and, especially, to permit another and independent receivership of the same property, as is prayed in the bill the United States Trust Company asks leave to bring, would give rise to difficulties and complications, the full extent of which cannot be foreseen.

The application for leave to sue the receivers is denied.

NELSON v. FIRST NAT. BANK OF KILLINGLEY.

(Circuit Court, D. Minnesota. November 30, 1895.)

1. VACATING JUDGMENT—EFFECT OF AFFIRMANCE ON APPEAL.

A judgment which has been affirmed stands in the same position, after the mandate is sent down, that it did before the writ of error was allowed; and may be attacked by an original bill in equity, and vacated and set aside on the ground that it was obtained by fraud or perjury, or through accident or mistake, or for other sufficient equitable reasons.

2. SAME—VERDICT OF JURY—PRESUMPTIONS.

In an action at law against a surety on a note one defense was that certain collateral originally held by plaintiff was exchanged without the surety's consent for other collateral, which was worthless. A verdict was returned for the full amount due on the note, and judgment entered accord-

ingly. Afterwards a bill was brought to enjoin collection of the judgment on the ground of perjury of plaintiff's witnesses in their testimony upon the question whether the surety had consented to the exchange of collateral. It was contended that the rendition of a verdict for the full sum due involved a finding that the surety had consented to the exchange. *Held*, that the verdict might have been based on a finding that the original collateral was worthless, there being evidence to warrant such a finding; and that on a motion for a preliminary injunction the court could not assume that the verdict was based solely on the issue in respect to the surety's consent; for which reason the injunction must be denied.

3. SAME—ENJOINING COLLECTION.

An injunction restraining the collection of a judgment at law will not be granted if there is reasonable doubt of the existence of the facts upon which the application is founded. To warrant such action it must clearly appear that it is against good conscience to permit the creditor to enjoy the fruits of his judgment.

This was a bill by C. N. Nelson against the First National Bank of Killingley to vacate a judgment in favor of defendant. Complainant moved for an injunction pendente lite to stay execution on the judgment.

Warner, Richardson & Lawrence, for complainant.

Munn, Boyeson & Thygeson (John M. Gilman, of counsel), for defendant.

NELSON, District Judge. A bill is filed in equity to vacate and set aside a judgment obtained February 6, 1894, for the sum of \$15,636.52, in the circuit court of the United States, by the Bank of Killingley against C. N. Nelson, an accommodation indorser upon a note of one D. M. Sabin. This note, dated August 20, 1884, was payable to the order of D. M. Sabin, the maker, six months after date, with interest at the rate of 6 per cent. per annum, indorsed by D. M. Sabin, W. S. Goodhue, and C. N. Nelson, and the bank held as collateral thereto special preferred stock of Seymour, Sabin & Co., guarantied by the Northwestern Manufacturing Company. A writ of error was prosecuted to the circuit court of appeals, the judgment was affirmed (69 Fed. 798), and a mandate sent down, before the filing of this bill.

The rule is pretty well settled in a case of this kind that the judgment of the lower court stands in the same position that it did before the writ of error was allowed, and may be attacked by an original bill in equity, and vacated and set aside, on the ground that it was obtained by fraud or perjury, or through accident or mistake, or for any good and sufficient equitable reasons. The principal grounds alleged in the bill of complaint for granting the relief claimed, and also relied upon on the argument, and the only ones I deem it necessary to consider on this motion for an injunction, are: First, alleged perjury committed by plaintiff's witnesses on the trial; and, second, newly-discovered evidence, which it is alleged it was impossible to have obtained knowledge of before or at the trial, which evidence, it is claimed, would have established facts releasing the liability of Nelson. With reference to the alleged charge of perjury as a ground for setting aside the judgment, it appears that on the trial of the case one of the defenses to which testimony was directed was

whether Nelson had given his consent to an exchange of the collateral held by the bank, and one of the main issues litigated was whether the collateral so originally held had any value or not. The law applicable to the facts disclosed by the evidence on these issues was correctly given by the trial judge, and was approved by the appellate court. If Nelson had given his consent to the change, certainly he could not complain that the stock substituted was worthless, no matter what might have been the actual value of the original collateral. It is urged that, inasmuch as the verdict was for the precise amount called for by the note, and inasmuch as there was no evidence that the collateral was of no value when disposed of by the bank, therefore the verdict necessarily proceeded upon the theory and inference that the exchange of the collateral was made with Nelson's consent first had and obtained. It does not appear that the verdict was rendered upon that ground. It may have been rendered upon the ground that the original collateral was wholly worthless. It is a mistake of counsel to say there was no evidence that the original collateral was of no value when disposed of by the bank. Evidence was given on both sides with regard to this matter. It was an issue vital in the case, and the record shows ample testimony upon which the jury could have rendered such a verdict; and, inasmuch as the verdict may have been rendered upon the ground that the original collateral was of no value, this court, upon motion for an injunction on the ground of perjury, cannot hold that the verdict was based solely upon the issue of the consent or nonconsent of Nelson to the exchange.

This brings me to the second question presented,—the claim of newly-discovered evidence in reference to an agreement between the bank and Sabin, the maker of the note, for an extension of time. It is true that when the owner of a note by some affirmative act extends to the maker the time within which he may pay, by an agreement unknown to the surety, founded upon a valuable consideration, and that extension of time is for a definite period, so that the owner of the note cannot proceed to collect from the maker until the additional time granted has expired, the surety will be discharged. It is doubtful whether the alleged agreement comes within this rule; but, if it be conceded that it does, then the question arises upon this motion whether this is not merely a naked statement in the bill, unsustained by legal proof sufficient to justify the court in granting the extraordinary remedy asked for. The proof offered by complainant with reference to the alleged agreement is contained in certain letters from Clemons, the cashier of the bank, to Sabin, Sabin to O'Gorman, and Nelson to Clemons. As far as the alleged agreement claimed to be contained in these letters is concerned, the verification of Nelson to the bill is merely upon information and belief; and on reading the letters I am clearly of the opinion that the matters therein contained in no way refer to an agreement of the character set up in the bill itself. The allegations in the bill that an agreement was entered into as therein set forth are fully met and denied by the affidavits of defendant, and it is only by a forced and strained interpretation of the letters that the significance sought to be at-

tached to them by complainant can be put upon them. A party who has obtained a judgment at law is prima facie entitled to the money thus recovered, and an injunction restraining the collection thereof will not be granted if there is reasonable doubt of the existence of the facts upon which the application is founded. To deprive the bank of the fruits of its judgment by a preliminary injunction, it must clearly appear from the charge in the bill, sustained by accompanying affidavits, that it is against good conscience to permit it to enjoy them; and the equity of the complainant, on motion for the injunction, must be shown to be superior to that of the judgment creditor. Upon careful examination, the proof offered, in my opinion, shows no primary equity in the complainant, and is not of such a character as to entitle him to the writ prayed for. The motion for the writ of injunction is denied, and the order to show cause is vacated.

ELDER et al. v. McCLASKEY et al.

(Circuit Court of Appeals, Sixth Circuit. May 13, 1895.)

No. 224.

1. ADVERSE POSSESSION—LIMITATION OF ACTIONS.

Under the Ohio statute which provides that "an action for the recovery of the title or possession of real property can only be brought within twenty-one years after the cause of action accrues" (Smith & B. Rev. St. § 4977), and the construction placed thereon by the supreme court of the state, an open, notorious, exclusive, and adverse possession of land for 21 years, with or without color of title, whether continuous in the first possessor, or tolled in persons claiming under him, and whether with or without knowledge of the existence of another title, confers upon the original possessor, or those claiming under him, an indefeasible title in fee.

2. COURTS—FOLLOWING STATE DECISIONS—RULE OF PROPERTY.

State decisions construing the state statute of limitations in respect to real property, and declaring what constitutes adverse possession, and the effect thereof when continued for the period of limitation, constitute a rule of property binding on the federal courts of law and in equity in adjudicating upon titles to lands within that state.

3. TENANCY IN COMMON—DISSEISIN.

The rule that a tenant in common in possession is presumed to hold in the right of his cotenants, as well as himself, until notice is brought home to them of an intention to disseise them, has no application to any case except where the possession was avowedly begun as a tenant in common, or under a deed which defined his title as such. 47 Fed. 154, reversed.

4. SAME—WHEN ENTRY IS AN OUSTER.

An entry and possession under general warranty deeds in fee simple, with claim of exclusive ownership in fee, is an ouster of all other persons claiming an interest in the land at and from the time they have a right of entry, and it is immaterial that such deeds actually vest only a life estate or an undivided interest. The extent of the estate purporting to be conveyed characterizes the entry and subsequent possession. 47 Fed. 154, reversed.

5. SAME—OUSTER BY ADVERSE POSSESSION.

Where one having a life estate executes deeds in fee simple, with covenants of general warranty, and the grantees take possession thereunder, claiming exclusive ownership in fee, and continue such possession in the