

TOMBOY GOLD MINES CO. v. BROWN et al.

(Circuit Court of Appeals, Eighth Circuit. March 23, 1896.)

No. 706.

APPEAL—DISMISSAL—SUIT TO ENJOIN TAX SALE.

The payment, whether voluntary or compulsory, of a tax, pending an appeal from a decree dismissing a bill to set aside the tax sale and enjoin the making of a tax deed, removes all grounds for the relief prayed, and requires a dismissal of the appeal.

Appeal from the Circuit Court of the United States for the District of Colorado.

E. T. Wells, M. F. Taylor, and John G. Taylor, for appellant.

H. M. Hogg, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The appellant, the Tomboy Gold Mines Company, filed its bill in equity in the court below against the appellees, I. E. Brown and John B. Frasher, as treasurer of San Miguel county, Colo., seeking the cancellation of certain tax certificates of sale issued by the treasurer of San Miguel county, Colo., for certain real property sold for taxes, belonging to the appellant's grantors, and praying that the assessment of the property upon which the tax sale rested, and the tax sale and certificate thereof, be annulled, and the treasurer of the county perpetually enjoined from issuing tax deeds to the holder of the tax certificates. In the lower court a demurrer to the bill was sustained, and the suit dismissed, and the complainant appealed. In this court a motion has been filed to dismiss the appeal upon the ground that the appellant has, since taking this appeal, paid the taxes, the collection of which the bill seeks to enjoin, and that the tax certificates of the sale of the property for the taxes have been canceled. These facts are fully established by affidavits, and are not disputed. The motion to dismiss must be sustained. It is well settled that the payment, whether voluntary or compulsory, of a tax, to prevent the payment of which a bill in equity has been filed, leaves no issue for the court of equity to pass upon. The equitable ground, whatever it may have been, for the relief prayed, ceased upon the payment of the tax. *Little v. Bowers*, 134 U. S. 547, 10 Sup. Ct. 620; *Manufacturing Co. v. Wright*, 141 U. S. 696, 12 Sup. Ct. 103. The motion to dismiss is sustained.

DREXEL, Sheriff, et al. v. TRUE.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1896.)

No. 680.

1. PRACTICE—CONTINUANCE.

A continuance is not a matter of right, but one resting in the sound judicial discretion of the trial court, whose ruling thereon is not a subject of review in an appellate court.

2. EVIDENCE—TELEGRAMS—PROOF OF AUTHENTICITY.

It is not error to exclude telegrams offered in evidence without any offer to show that they were sent by the parties by whom they purport to be sent or received by those to whom they purport to be addressed.

3. SAME—FORM OF OBJECTION.

An objection to a deposition as "improper rebuttal" is too broad if any part of such deposition is proper in rebuttal.

4. PRACTICE ON APPEAL—QUESTIONS NOT RAISED BELOW.

It is the province of an appellate court to review the rulings of the trial court on questions actually brought to the attention of that court and decided by it. Objections, other than those going to the jurisdiction of the court, not presented to the trial court, will receive no attention on appeal.

5. SAME—VERDICT AGAINST EVIDENCE.

An assignment of error that the verdict of a jury is contrary to the evidence goes for nothing, unless the beaten party asked for a peremptory instruction for a verdict in his favor, at the close of all the evidence, and duly excepted to a refusal to give such instruction.

In Error to the Circuit Court of the United States for the District of Nebraska.

John L. Webster, for plaintiffs in error.

Carroll S. Montgomery (Matthew A. Hall and Dudley R. Horton were with him on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was begun on the 19th day of March, 1894, in the United States circuit court for the district of Nebraska, by Loren W. True, the defendant in error, against John C. Drexel, sheriff of Douglas county, and others, the plaintiffs in error, to recover damages for the alleged conversion of a stock of millinery goods. No exceptions were taken to the charge of the court.

It is assigned for error that the court refused to continue the case upon an application filed by the plaintiffs in error. A continuance is not a matter of right, but is a matter resting in the sound judicial discretion of the lower court, whose ruling thereon is not the subject of review here. *Davis v. Patrick*, 12 U. S. App. 629, 635, 6 C. C. A. 632, 57 Fed. 909; *Woods v. Young*, 4 Cranch, 237; *McFaul v. Ramsey*, 20 How. 523.

Exception was taken to the ruling of the court excluding a certain memorandum or receipt relating to a book containing an inventory of the stock of goods in controversy, and showing their value; but an examination of the record discloses the fact that the paper was afterwards admitted in evidence, and this assignment, therefore, need not be further noticed.

The defendants offered in evidence two telegrams, one purporting to be sent by the defendant in error Park Godwin, and the other purporting to be sent by S. Zeimer & Feldstein to Park Godwin. The defendant in error objected to the introduction in evidence of these telegrams, and the court excluded them. Waiving the consideration of other objections to their introduction, it is enough to say the defendants did not lay, or offer to lay, any foundation for their introduction. They did not show, or offer to show, that they were sent by the parties by whom they purported to be sent, or that

they were received by the parties to whom they purported to be addressed. No offer was made to authenticate them in any manner whatever, and their genuineness was not admitted. They were, therefore, properly rejected. *Burt v. Railroad Co.*, 31 Minn. 472, 18 N. W. 285, 289; *U. S. v. Babcock*, 3 Dill. 576, Fed. Cas. No. 14,485; *Smith v. Easton*, 54 Md. 138, 145.

"Objected to as improper rebuttal" was the objection made by the defendants to the reading of the deposition of the witness Zeimer. The objection was properly overruled, for the reason that it was too broad. It went to the whole deposition, and a part of it was clearly proper matter in rebuttal. *Sigler v. McConnell*, 45 Neb. 598, 63 N. W. 870. Moreover, it is within the discretion of the trial court to admit testimony in rebuttal which ought properly to have been given in chief. *Railroad Co. v. McDonald*, 4 U. S. App. 563, 2 C. C. A. 153, 51 Fed. 178.

Another contention of the plaintiffs in error is that it appears from the state of the pleadings that the defendant Oberfelder had a mortgage on the goods in controversy prior in date to that under which the plaintiff claims. No such defense was set up in the defendants' answer. The claim, now made for the first time, is founded on an averment contained in the plaintiff's reply, which, owing to a clerical misprision, is probably susceptible of the construction contended for. It is stated in the brief of the defendant in error that certified copies of the mortgage disclose that the Oberfelder mortgage is subsequent in date to the mortgages under which the plaintiff claims, and contains a recital that it is made subject thereto. However this may be, it is enough to say that no allusion was made to this point in the trial court as a ground of defense. The contest in the trial court was upon other lines altogether. It is obvious from an inspection of the record that the claim now made for the first time has no foundation in fact, or it would have been brought to the attention of the lower court. It is equally obvious that, if the point had been suggested in the lower court, the ground of it would have been instantly removed by an amendment of the reply. It is the province of an appellate court to review the rulings of the trial court on questions actually brought to the attention of that court, and decided by it. Objections, therefore, other than those going to the jurisdiction of the court, not presented to the trial court, will receive no attention on appeal. *Railway Co. v. Henson*, 19 U. S. App. 169, 7 C. C. A. 349, 58 Fed. 531; *Elliott*, App. Proc. § 470; *Fowler v. Bank*, 113 N. Y. 450, 21 N. E. 172; *O'Neill v. Railway Co.*, 115 N. Y. 579, 22 N. E. 217; *Wilson v. McNamee*, 102 U. S. 572; *Belk v. Meagher*, 104 U. S. 279; *Clark v. Fredericks*, 105 U. S. 4; *Edwards v. Elliott*, 21 Wall. 532; *Pearce v. McKay*, 45 Neb. 296, 63 N. W. 851; *Railway Co. v. Dye*, 16 C. C. A. 604, 70 Fed. 24, 26.

The ruling of the lower court denying a motion for a new trial cannot be assigned for error; and an assignment that the verdict of the jury is contrary to the evidence goes for nothing, unless the beaten party asked for a peremptory instruction for a verdict in his favor at the close of all the evidence, and duly excepted to the refusal of the court to give the same.

The judgment of the circuit court is affirmed.

BAILEY v. MOSHER et al.

(Circuit Court, D. Nebraska. May 7, 1896.)

UNITED STATES COURTS—JURISDICTION—FEDERAL QUESTION—ACTION AGAINST DIRECTORS OF NATIONAL BANK.

An action against directors of a national bank for damages for inducing the plaintiff, by false representations contained in the reports made by them in accordance with the statutes and the regulations of the comptroller of the currency, to loan money to the bank, which he lost through its insolvency, does not present a controversy arising under the constitution or laws of the United States, of which the federal courts have jurisdiction, either originally or by removal.

Pound & Burr and Biggs & Thomas, for plaintiff.
Charles O. Whedon and Deweese & Hall, for defendants.

SHIRAS, District Judge. This action was begun in the district court of Seward county, Neb., it being averred in the petition that the defendants were directors of the Capital National Bank, a corporation doing business in the city of Lincoln, Neb.; that the defendants, for the purpose of inducing the plaintiff and others to do business with and loan money to said corporation, made pretended statements of the condition of the said corporation, its assets and liabilities (the same being in writing, and copies thereof being attached to the petition); that, relying upon said statements, the plaintiff loaned to said corporation various sums of money, amounting in the aggregate to the sum of \$11,500; that said statements were in fact false in many particulars, and were so known to be to the defendants when they signed and put forth the statements in question, and that said bank was at the time wholly insolvent, and in consequence thereof the plaintiff lost the sums of money so loaned as above stated; thereupon a cause of action for damages had accrued to the plaintiff. The exhibits attached to the petition show that the written statements declared on are reports of the condition of the Capital National Bank made by the defendants, as officers and directors of the bank, under the statutes of the United States and regulations of the comptroller of the currency. The defendants, appearing in the state court, filed a petition for the removal of the case into this court upon the ground that the controversy was one arising solely under the provisions of the constitution and laws of the United States, and was therefore removable into the federal court, regardless of the fact that the plaintiff and defendants were citizens of the same state. The state court refused to grant an order of removal, but defendants caused a transcript of the record to be filed in this court, and the case is now before this court upon a motion to remand.

It is now well settled that under the provisions of the act of 1887, as amended by the act of 1888, a case cannot be removed from a state to the federal court, upon the ground that the controversy is one arising under the constitution and laws of the United States, unless it is made clear upon the face of the petition or bill filed by the plaintiff that in fact the controversy sought to be adjudicated is one arising under the federal constitution or statutes. *Metcalf v.*