

is justified in proceeding in the case in the absence of Hillis, because a decree may be entered saving his rights. If the complainant obtains a decree for the retransfer of the stock to him, this will not defeat or injuriously affect Hillis' rights in the premises, for he can just as well assert his rights to the stock in the hands of complainant as though the same remained in possession of the defendants.

The objections urged in support of the demurrer based upon the fact that Hillis, trustee, is not made a party in the case are not well taken, nor is there any force in the position that complainant cannot proceed in equity because he has an adequate remedy at law. At law, the complainant would be restricted to asking damages for a wrongful conversion of the stock. What the complainant seeks is a return or retransfer of the stock, and this can only be secured through the aid of a court of equity; and the complainant is not compelled to content himself with a recovery of damages merely, but is entitled to seek a retransfer of the shares of stock in question.

A further point in support of the demurrers is made, based upon the fact that it is averred in the bill that Hillis, trustee, held the stock as collateral security, and it is not averred whether the debt is wholly paid or remains partly due, and therefore it does not appear that complainant has any right to or equity in the shares of stock. According to the averments of the bill, the complainant has always been in fact the owner of the stock, and therefore has always had an interest therein. The mere fact that the stock was pledged to Hillis as a security for a debt did not terminate complainant's interest in or title to the stock, and therefore it is not necessary to aver or prove that the debt due Hillis, trustee, has been paid in full, in order to show that complainant has such an ownership of, or interest in, the stock as will enable him to maintain this suit.

The demurrers to the bill are therefore overruled, with leave to defendants to answer by the January rule day.

WESTERLY WATERWORKS v. TOWN OF WESTERLY et al.

SEAMEN'S FRIEND SOC. et al. v. SAME.

(Circuit Court, D. Rhode Island. December 28, 1896.)

Nos. 2,522 and 2,523.

1. TEMPORARY INJUNCTION—MOTION TO DISSOLVE—COURT RULES.

Rule 16 of the circuit court for the first circuit relates to the rehearing of causes once heard on the merits, and has no application to motions to dissolve temporary injunctions.

2. SAME.

A temporary injunction is at all times subject to motion to vacate or modify, notwithstanding that in granting it the court may have chosen to discuss the merits of the case.

3. SAME—PRACTICE.

By the federal practice, a motion to dissolve an injunction should always, when practicable, be addressed to the judge who granted it; and in case of his death it would seem advisable that two judges should hear the motion to dissolve.

These were two suits brought respectively by the Westerly Waterworks and the Seamen's Friend Society and others against the town of Westerly. The causes were heard on motions to dissolve the temporary injunctions heretofore granted. See 75 Fed. 181.

William C. Loring, Walter B. Vincent, Joseph C. Ely, and James M. Ripley, for complainant.

Francis Colwell, Walter H. Barney, and A. B. Crafts, for respondents.

COLT, Circuit Judge. In these cases the defendants have filed motions to dissolve the preliminary injunctions heretofore granted. The present hearing was had upon the objections of the complainants to setting down these motions for hearing. In No. 2,522 the bill was filed May 22, 1896, and in No. 2,523 the bill was filed May 27, 1896. In both cases the main question presented is the same. On June 25, 1896, Judge Carpenter heard both cases together on motion for a preliminary injunction, and on June 30th directed that a writ of injunction issue in each case. 75 Fed. 181. The defendants appealed from these injunction orders to the circuit court of appeals, and on October 23, that court dismissed the appeals for want of jurisdiction. 76 Fed. 467. In its opinion, the court, speaking through Judge Webb, said:

"As we determine the question of jurisdiction in favor of the appellees, we enter into no consideration of the merits; but the appellants, if they desire a rehearing on the merits, should move in the circuit court to dissolve the injunctions."

As these cases raise a constitutional question, the circuit court of appeals decided that it had no jurisdiction to entertain the appeals under section 7 of the act of March 3, 1891 (26 Stat. 826), and thereupon the defendants have filed the present motions to vacate the injunction orders.

The first objection is to the form of these motions. Whatever may be the precise wording of the motions, they were intended to be, and should be treated as, motions to dissolve a preliminary injunction, and not motions for a rehearing, as that term is generally understood.

The second objection is that rule 16 of the circuit court is applicable to these motions. This rule is based upon a rule of the circuit court for the district of Massachusetts, adopted at the May term, 1879, and equity rule 88 of the supreme court, and relates to the rehearing of cases which have been heard on the merits, and it has no application to a motion to dissolve a purely interlocutory order granting a temporary injunction. Interlocutory orders granting temporary injunctions pending a hearing on the merits are at all times subject to motion to vacate or modify. These orders are not governed by the rules which apply to rehearings, where the merits of a case have been decided upon proper proofs. The granting or refusing of such injunction is addressed to the sound discretion of the court, and is not a determination of the merits of the case, and cannot operate as such except by stipulation of both parties. Accord-

ing to the due course of equity procedure, no hearing can be had on the merits, and no final decree entered, until after answer, replication, and proofs taken in the regular manner. The complainant in the present case seems to have proceeded upon the theory that the hearing before Judge Carpenter on motion for a preliminary injunction was in the nature of a final hearing, and should be treated as such, but this is clearly an error. If the court, in its decision, chose to enter upon a discussion of the merits of the case, that circumstance cannot in any way operate to change the real character of the order. In appeals from interlocutory orders granting preliminary injunctions under section 7 of the act of March 3, 1891, the only question for review is whether such orders were erroneously or improvidently granted.

The third objection is that a circuit judge should not review an interlocutory order granting an injunction of a district judge sitting in the circuit court. It is quite true, as the complainant contends, that by the practice which prevails in the federal courts, a motion to dissolve an injunction should always, when practicable, be addressed to the judge who granted the order, and no other judge will consent to review such order on the same state of facts. But in case of the death of the judge who made the original order it is clear that no such rule of comity can exist, because otherwise it might be impossible to modify or dissolve such injunction order until final decree. Under such circumstances, however, it would seem advisable that two judges should hear any motion to vacate or modify. These motions having been duly filed, I see no valid objection to setting them down for hearing, and they may stand for hearing before Judge BROWN and myself at such time as the court may set upon application of counsel.

BLACK et al. v. BLACK.

(Circuit Court, E. D. Pennsylvania. December 5, 1896.)

No. 31.

RES JUDICATA—EJECTMENT—DEFECTIVE DEED.

Certain land having been sold by the United States marshal under a judgment in a proceeding of scire facias sur mortgage, and an action of ejectment, brought by the purchaser at the marshal's sale, having been decided in her favor after a vigorous defense, the defendant in such ejectment filed her bill against the plaintiff to restrain the enforcement of the judgment in that action, and to set aside the marshal's deed, because in making the sale the marshal had failed to comply with the act of March 3, 1893, to regulate marshals' sales, both parties having been ignorant of that act when the ejectment was tried. *Held*, that the technical defect in the title of the plaintiff in the ejectment having been equally available as a defense in that action, the point was res judicata between the parties, and could not now be made the basis of equitable relief.

Francis Tracy Tobin and Henry Budd, for plaintiffs.
Arthur Biddle, for defendant.

DALLAS, Circuit Judge. This case has been heard upon bill and answer. The bill prays that a marshal's deed, executed in pursu-