

LINCOLN SAV. BANK & SAFE-DEPOSIT CO. v. ALLEN et al.

(Circuit Court of Appeals, Eighth Circuit. August 2, 1897.)

No. 769.

1. APPEAL—REVIEW—ASSIGNMENTS OF ERROR.

Assignments of error relating to the admission of evidence will not be considered where they do not quote the full substance of the evidence admitted, and the brief of plaintiff in error does not point out the pages of the record containing such evidence and the exceptions to its admission.

2. SAME—INSUFFICIENCY OF PRINTED RECORD.

Where the parts of the record designated by the plaintiff in error as necessary to a consideration of the errors assigned and printed by the clerk, under rule 23 of the court (21 C. C. A. xcvi., 78 Fed. xcvi.), do not contain all of the evidence, nor a bill of exceptions, the court of appeals cannot review rulings of the trial court on motions or requests to charge, challenging the sufficiency of the evidence, nor errors assigned on the charge of the court.

3. ASSIGNMENT OF ERRORS—BILL OF EXCEPTIONS.

A statement by counsel, in their assignment of errors, of occurrences and rulings at a trial, is insufficient to warrant a reversal of a judgment. The evidence, rulings, and instructions upon which reliance is placed for a reversal must be embodied in a bill of exceptions before a federal appellate court can consider them.

4. CONTRACT—AGREEMENT TO ACCEPT NOTES IN PAYMENT—CONSIDERATION.

An agreement by a creditor, holding notes as collateral, to accept in payment of the debt a specified sum of money and certain of the collateral notes, and to surrender the remaining collateral, is valid and enforceable, though the face value of the notes agreed to be taken, together with the cash payment, does not equal the debt.

5. SAME—DIVISIBILITY—AGREEMENT TO SURRENDER COLLATERAL.

An agreement by a creditor, holding collateral security, to accept a certain payment in full satisfaction, and to surrender the collateral, is divisible, and, though the agreement for composition may be void, that to surrender the collateral may be enforced on performance by the debtor.

6. CONVERSION — REFUSAL TO SURRENDER PLEDGE — TRANSFER OF TITLE BY PLEDGOR.

A debtor, having a right to the return of collateral notes held by his creditor, after demand and refusal, may, at his option, maintain replevin for them, or sue for their conversion; and, before he has exercised such option, he may transfer title to another, who after demand has the same option.

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

W. A. Selleck (N. C. Abbott, A. W. Lane, L. C. Burr, and Addison S. Tibbets, on the brief), for plaintiff in error.

Walter J. Lamb, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The record in this case is insufficient to warrant a reversal of the judgment below on account of any of the alleged errors assigned. This was an action for the conversion of certain promissory notes, in which the defendants in error alleged that they had a special property. The defense was that the plaintiff in error was the owner of these notes at the time of the alleged conversion, and that the defendants in error had no title or interest in them. There was a verdict and a judgment for the defendants in error. Thirty-six errors were assigned, but counsel for the plaintiff in error

have selected twenty, upon which they say they rely. We shall consider these only.

The first five of these alleged errors are not presented in the brief of the plaintiff in error in the manner prescribed by Rule 24 of this court. 21 C. C. A. xcix., 78 Fed. xcix. They relate to the admission of evidence, and they do not quote the full substance of the evidence admitted. Nor does the brief contain any reference to the pages of the record where any of this evidence, or any exception to its admission, is to be found. Since counsel for the plaintiff in error did not consider their claims relative to these alleged errors of sufficient importance to warrant them in pointing them out in the record, we will not search for them. *City of Lincoln v. Sun Vapor Street-Light Co.*, 19 U. S. App. 431, 8 C. C. A. 253, 59 Fed. 756.

Two of the errors alleged are: (1) That the court overruled the motion of the plaintiff in error, at the close of the testimony of the defendants in error, to dismiss the case because the defendants in error had failed to show that they were the owners of the notes; and (2) that the court refused to instruct the jury, at the close of all the evidence, that the defendants in error could not recover in the action because there was no evidence in the record that they were the owners of the notes. Rule 23 of this court provides:

"The plaintiff in error or appellant may, within twenty days after the allowance of any writ of error or appeal, serve on the adverse party a copy of a statement of the parts of the record which he thinks necessary for the consideration of the errors assigned, and file the same, with proof of service thereof, with the clerk of this court; the adverse party, within twenty days thereafter, may designate in writing and file with the clerk additional parts of the record which he thinks material, and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If the parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record in determining the questions raised by the errors assigned." 21 C. C. A. xcvi., 78 Fed. xcvi.

The plaintiff in error designated the parts of the record which it thought necessary for the consideration of the errors assigned in this case, and they were printed by the clerk under this rule. This court will consider nothing but those parts of the record in determining this case. This printed record does not contain all the evidence that was presented to the court below, nor does it contain any bill of exceptions whatever, if there ever was one. It contains nothing relating to the proceedings at the trial but fragmentary excerpts from the testimony of some witnesses and a few exhibits. After a trial court has submitted a case to the jury, the burden of proof to show that there was no evidence to warrant that course is on him who asserts it. If he would maintain his claim, he must present all the evidence to the appellate court, in order that that court may see for itself what the evidence was. If he fails to do so, he cannot prevail upon that issue. *Railway Co. v. Washington*, 4 U. S. App. 121, 127, 131, 1 C. C. A. 286, 289, 292, 49 Fed. 347, 350, 353; *Railway Co. v. Harris*, 27 U. S. App. 450, 457, 12 C. C. A. 598, 603, 63 Fed. 800, 805; *U. S. v. Patrick*, 36 U. S. App. 645, 20 C. C. A. 11, 18, 73 Fed. 800, 806.

Twelve of the remaining errors are that certain paragraphs of the

charge of the court, which appear to have been wrested from their connection, and quoted in the assignment of errors, and which relate almost entirely to the effect of the evidence which had been produced in the case, are erroneous. But the evidence which was before the trial court has not been presented to us, and the presumption is that there was evidence which warranted the charge. There is no bill of exceptions and no copy of the charge of the court in the printed record. There is nothing in it to show that the paragraphs quoted in the assignment of errors were ever given to the jury by the court, or that any exception was ever taken to any of them by the plaintiff in error. The only information we have upon this subject is contained in the statement which precedes each paragraph in the assignment of errors, and is in these words: "The court erred in giving the following instruction, to the giving of which the defendant duly excepted at the time." But the assertion of the defeated party in his assignment of errors, either that the court erred, or that it gave any instruction, or that the plaintiff in error excepted to that instruction, is insufficient, without more, to warrant an appellate court in reversing a judgment. The facts that portions of the charge challenged were given, and that exceptions were taken to them, must be established by a bill of exceptions, settled and signed in accordance with the act of the congress of the United States, before a federal court can find the errors and reverse the judgment. Rev. St. § 953; *Clune v. U. S.*, 159 U. S. 590, 16 Sup. Ct. 125; *Blake v. U. S.*, 18 C. C. A. 117, 71 Fed. 286; *Mussina v. Cavazos*, 6 Wall. 355, 363; *Origet v. U. S.*, 125 U. S. 240, 8 Sup. Ct. 846. We cannot reverse this judgment on the ground that these alleged errors in the charge of the court exist (1) because there may have been evidence which warranted them, and all the evidence is not presented to us, so that we can see that it was insufficient; (2) because it does not appear from the record that any of the challenged paragraphs were given to the jury by the court; and (3) because it does not appear that any exception was taken to any of them if they were given.

The remaining error assigned is that the court refused to give an instruction which was requested by the defendant. But that instruction relates to the effect of the evidence in the case, and, in the absence of any proof by a bill of exceptions that all the evidence is before us, and that the plaintiff in error excepted to that refusal, there is nothing here for our consideration. The judgment below must accordingly be affirmed.

While the judgment below must be affirmed for the reasons we have stated, we may add that we have carefully read and re-read the briefs of counsel in this case, and we are satisfied that we should not reach a different result if we should assume that the circuit court instructed and refused to instruct the jury as the counsel for the plaintiff in error allege. The facts of the case, which are admitted by counsel for both parties (and we could consider no others, in any event, in the absence of a certificate that all the evidence is before us), were these: F. W. Sears owed the plaintiff in error about \$2,700, and he had pledged the promissory notes for the conversion of which this action was brought and two notes of one Shovelin, upon which there

was from \$320 to \$500 due, to secure his debt. The plaintiff in error was notified that friends of Sears in Wisconsin, the defendants in error, would loan him money to pay a part of this debt, in consideration that the notes on which this action is based should be released by it, and transferred to them as collateral security for their loan. The bank urged Sears to obtain this loan on these terms, and agreed that, if he would get \$1,500 from these friends, and pay it to the bank, and if he would give it in addition the two Shovelin notes, it would release its claim upon the collaterals in suit, and would accept the \$1,500 and the Shovelin notes as full payment of his debt. He obtained the loan of the defendants in error, paid the \$1,500 to the bank, and assigned to it the Shovelin notes, and thereupon the bank refused to release the collaterals, upon the security of which Sears had borrowed the money of the defendants in error, and declined to satisfy the debt of Sears. The money was paid, and the two Shovelin notes were transferred to the bank on February 20, 1895, and on the same day Sears demanded the other collateral notes, and the bank refused to deliver them until the balance of his debt was paid. On the next day the defendants in error demanded them, and, upon the bank's refusal to deliver them, they brought this action for their conversion. The bank took the position that its contract was a mere agreement that a partial payment should be a payment in full, and insisted that it could hold all its collaterals, and collect the balance of Sears' debt, notwithstanding its agreement to surrender the other collaterals. If, as counsel assert, the court below charged the jury that this was a mistake on the part of the bank, and said: "Now, you see the bank got there something that they did not originally contract to get, that is no part of the original contract; they were simply to have the amount of the money due in money; instead of that, now by this new contract they got \$1,500, and got these notes,"—it did no more than to announce a rule of law that has been unquestioned since the foundation of the republic. While an agreement between a creditor and his debtor to accept the payment of less than the full amount due him in satisfaction of an ascertained debt is not legally binding upon the creditor, because it is without consideration (*Pinnel's Case*, 5 Coke, 117; *Cumber v. Wane*, 1 Strange, 426; *Foakes v. Beer*, 9 App. Cas. 605), yet a contract to accept the note of a third person for a greater or less amount than the face of the debt, or to accept any consideration other than current funds in satisfaction of the debt, constitutes a valid and enforceable contract (*Jaffray v. Davis* [N. Y. App.] 26 N. E. 351, 352; *Le Page v. McOrea*, 1 Wend. 164; *Goddard v. O'Brien*, 9 Q. B. Div. 37, 21 Am. Law Reg. [N. S.] 637, and notes; *Boyd v. Hitchcock*, 20 Johns. 76; *Bull v. Bull*, 43 Conn. 455; *Fisher v. May*, 2 Bibb, 448; *Reed v. Bartlett*, 19 Pick. 273; *Bank v. Geary*, 5 Pet. 99, 114; *Brooks v. White*, 2 Metc. [Mass.] 283; *Jones v. Perkins*, 29 Miss. 139, 141; *Hall v. Smith*, 15 Iowa, 584; *Babcock v. Hawkins*, 23 Vt. 561).

If the circuit court refused to instruct the jury that the agreement between Sears and the bank, as shown by the evidence, with reference to the Shovelin notes, amounted in law to a contract that these notes should be taken as cash at their face value, which was \$320, and that in that way the agreement of the bank in fact was to accept

\$1,820 for a debt of \$2,700, we cannot say that its refusal was error, because there is no certificate in the case that all the evidence, or that all the evidence relative to the contract about the Shovelin notes, is before us, and we cannot know what the contract, as shown by that evidence, was. The presumption is, however, in the absence of counter-vailing proof, that the evidence was such that the court's refusal was right. *U. S. v. Patrick*, 36 U. S. App. 645, 20 C. C. A. 11, 18, 73 Fed. 800, 806. If, as counsel for plaintiff in error allege, the court charged the jury that, whatever the effect of the contract between Sears and the bank was upon his debt, the plaintiff in error did agree to surrender the collaterals on which this action was founded for the \$1,500 and the two Shovelin notes, that it received the consideration for this contract, and was bound by it, and that its effect was the real question in the case, it made no mistake. There is no rule of law or of morals which forbids a debtor to make a contract with his creditor for the release of collaterals which he has pledged to secure his debt, and no reason occurs to us why a creditor who has received the full consideration for such a contract should be released from his obligation to perform it. The pledge of collaterals is a contract that the creditor may hold them as security for the debt, and, if the debtor fails to pay it, that then the creditor may sell them, and apply the proceeds, less the expenses of the sale, to the payment of the debt, and return the surplus, if any, to the debtor. An agreement between the creditor and his debtor that the former will surrender one or more of the collateral notes pledged to secure the debt in consideration of a present payment thereon constitutes a valid contract. Such an agreement is not without consideration, even though the principal debt is due, and it is the duty of the debtor to pay it. There is a sufficient consideration to support the contract in the fact that it relieves the creditor of the expense and trouble of a sale of the collaterals under the pledge, and converts them at once into money applicable to the payment of the debt. Nor can a creditor successfully repudiate such a contract, after he has received the consideration for it, on the ground that he also agreed, for the same consideration, and is morally, but not legally, bound, to satisfy the principal debt. It is no defense to a legal obligation that the obligor repudiates his moral obligations whenever they lack the binding force of legal contracts. The bank received the entire consideration for its two covenants,—the covenant to surrender the collaterals and the covenant to satisfy the principal debt. There was nothing immoral or illegal in either of these promises, or in the consideration which it received for them. If the former was valid, and the latter was void, so that it could not be enforced, that was the loss of Sears and the defendants in error. The bank could lose nothing from it. Its only effect on the plaintiff in error was to enable it to obtain the \$1,500 and the Shovelin notes for a less price than it promised to pay for them. Nor was the contract indivisible. The valid covenant was separable from the void one, and could be fully and conveniently enforced without it. It is the settled and the just rule of the law that the valid covenants of a divisible contract which contains both valid and void stipulations may be enforced, if the consideration is tainted with no immorality or illegality.

Navigation Co. v. Winsor, 20 Wall. 64, 70; *Illinois Trust & Sav. Bank v. Arkansas City*, 40 U. S. App. 257, 22 C. C. A. 171, 180, 76 Fed. 271, 280; *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. 1, 4, and cases cited in the note at page 12. If Sears demanded these collaterals after he had paid the \$1,500 and transferred the Shovelin notes to the bank, and the latter refused to deliver them, Sears had the option to recover the collateral notes by an action of replevin, or to sue the bank for their conversion. If, before he exercised his option and sued for the conversion, he transferred his title to the defendants in error, they immediately became vested with his right to the possession of the notes, and if on the next day they demanded them, and the bank refused to surrender them, they then had the option to replevy them, or to sue for their conversion, as they have done in this case. The demand made by Sears was no bar to the maintenance of this action by the defendants in error.

If the court charged the jury, as counsel for the bank allege, that the question whether or not the defendants in error were entitled to the collateral notes in suit as between them and Sears was an issue for the jury to determine under the evidence, and that, if the defendants in error were entitled to them, it became the duty of the bank to deliver them over after it received the agreed consideration for their surrender, the presumption is that the evidence before the court below warranted this charge, and we cannot review it, in the absence of a certificate that all the evidence upon these questions is before us. And, finally, if the circuit court told the jury that the verdict in this case would not affect the liability of Sears to the bank, because he was not a party to this action, it told them the truth. The judgment must be affirmed, with costs, and it is so ordered.

SCHOOLFIELD et al. v. RHODES et al.

(Circuit Court of Appeals, Eighth Circuit. August 2, 1897.)

No. 813.

1. **EJECTMENT—EQUITABLE DEFENSE.**

In the federal courts the distinction between actions at law and suits in equity is not affected by state statutes, under the act of conformity (Rev. St. § 914); and an equitable title cannot be pleaded and proved, against a seasonable objection, to defeat an action of ejectment.

2. **SAME—LEGAL RIGHT OF POSSESSION UNDER EQUITABLE TITLE.**

Where a partner, who, by the articles of agreement, was vested with sole power to make and sign contracts for the firm, made a contract for the sale of land owned by the firm, which provided that the purchaser should have possession so long as he complied with the contract, and the purchaser took and held possession, and has fully complied with the contract, his right of possession is a legal right, and is available as a defense to an action of ejectment, though his title is equitable.

3. **APPEAL AND ERROR—OBJECTION MADE FIRST ON APPEAL.**

In an action at law, where the court has jurisdiction of the parties and subject-matter, an objection that the defense set up was purely equitable comes too late if made for the first time on appeal.

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

This was an action at law, in the nature of ejectment, by W. W. Schoolfield and Henry G. Miller, as surviving partners of Schoolfield, Hanauer & Co., against John F. Rhodes and others. The case was tried to the court without a jury, and judgment was given for defendants. Plaintiffs have brought the case to this court by writ of error.

John J. Hornor and E. C. Hornor, for plaintiffs in error.

R. G. Brown, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This was an action in the nature of ejectment brought by the plaintiffs in error to recover possession of a tract of land in the state of Arkansas from the defendants in error. The case was tried by the court without a jury, and it found the facts that are material here to be these: In 1887 Emilius Buck and N. E. Campbell were merchants and partners, using the firm name of Buck & Trexler, under a written agreement between them which provided "that the said Emilius Buck shall continue in the exclusive management of the firm's business; * * * he, the said Emilius Buck, to have the exclusive right and power to make and authorize contracts, purchases, debts, and sign the firm's name, or authorize same, to drafts, notes, or other instruments of liabilities, or in liquidation." On March 1, 1887, Buck obtained a deed of the land in dispute from its owners in payment of a debt which was due to his firm. That deed recited that the grantors, in consideration of \$2,300 to them in hand paid by Emilius Buck and Nancy E. Campbell, merchants and partners under the firm name of Buck & Trexler, conveyed the land to Buck & Trexler, their heirs and assigns, in warranty forever. All the parties to this action claim under this deed. The title which the plaintiffs pleaded and proved consisted of a deed which was made on October 12, 1892, by C. L. Campbell, as administrator of the estate of N. E. Campbell, who had died on March 23, 1888, of an undivided half of the premises in question, and a deed to them made by Abner Gaines, as United States marshal, on February 7, 1895, under a judgment against Buck, which was rendered on January 31, 1895, of all the interest of Emilius Buck in the premises. The rights of the defendants arose in this way: On February 21, 1888, Buck & Trexler, through Buck, as their sole manager, sold the land in question to Andy White, and put him in possession of it, in consideration of \$2,500,—\$100 in cash, and White's five promissory notes for the balance. They gave him a written contract that upon the payment of that one of his notes which fell due November 1, 1888, they would convey the land to him; and Buck signed this contract with the name of Buck & Trexler, and duly acknowledged it before the proper officer authorized to take the acknowledgment of deeds. On November 1, 1888, White paid his note, and Buck made a deed of the land to him, which was signed and acknowledged in the same way as the contract was. White's notes were all paid as they fell due, and the proceeds of all of them were received and used as a part of the property of Buck & Trexler. The title and rights of White

passed by the delivery of possession and by mesne conveyances to one of the defendants, and the others were his tenants. White and his immediate and remote grantees have been in possession of the land under his agreement and deed ever since February, 1888. Upon this state of facts the court below held that, under the agreement between Buck & Trexler and himself, White and his grantees acquired an equitable title to the land, which, coupled with the possession, was a good defense in ejectment, and that they had been in possession more than seven years, so that the statute of limitations of the state of Arkansas had run in their favor, and it accordingly rendered judgment against the plaintiffs. This judgment is assailed on two grounds: (1) Because an equitable title is not available as a defense in ejectment in the national courts; and (2) because White did not commence to hold adversely to his vendor until November 1, 1888, when he became entitled to his deed, and this action was commenced within seven years thereafter, so that the statute of limitations was not available to him or his grantees. *Mansf. Dig. Ark. St. § 4471*. It is manifest that it is immaterial whether the statute of limitations constitutes a defense or not, if the equitable title coupled with possession did, since in that event the judgment was right, and must be affirmed, whether the action was barred by the statute or not. We accordingly turn to the consideration of the position that this judgment ought to be reversed because the equitable title under the agreement with White could not be pleaded in an action at law in the United States circuit court, notwithstanding the fact that it constituted a perfect defense to the action when pleaded in a bill in equity to enjoin the prosecution of the suit in ejectment.

There is no doubt that an equitable title may not be pleaded and proved, against a seasonable objection, to defeat an action at law in the federal courts. The distinction between actions at law and suits in equity is not a mere matter of form. It inheres in the nature of judicial proceedings, it is strictly observed in the courts of the United States, and it is not affected by the statutes of the several states, nor by section 914, Rev. St., the act of conformity. The strict legal title prevails in ejectment in the national courts, and a suit in equity is the proper proceeding to establish, protect, and enforce an equitable interest in the land in controversy. *Bagnell v. Broderick*, 13 Pet. 436; *Foster v. Mora*, 98 U. S. 425, 428; *Langdon v. Sherwood*, 124 U. S. 74, 85, 8 Sup. Ct. 429; *Davis v. Hargrave*, 30 U. S. App. 723, 18 C. C. A. 438, 72 Fed. 81. There are, however, two reasons why this proposition is not available to the plaintiffs to overturn this judgment: One of them is that a legal right of a defendant in ejectment to the possession of the premises is as complete a defense as the legal title, and the defendants in this case had that right under the agreement with White. The partnership agreement gave Buck unlimited power to make contracts of sale of and to deliver all the property of the firm of Buck & Trexler on such terms as he prescribed, and this land was the property of that firm. The agreement of sale which he made and signed provided that the vendee, White, should have the possession of the land as long as he complied with its terms, and that if he failed to pay his note which fell due on November 1, 1888, the

\$100 which he had paid, and his improvements, should constitute the rent for the year. He did not fail to pay his notes, but he and his grantees complied literally with all the terms of the agreement; and in that way his legal right and that of his grantees to the possession of the property was, after that contract was made, as complete as it would have been if they had held the land under an ordinary lease. In order to recover in ejectment, the plaintiff must have not only the legal title, but the right to the possession of the property. Indeed, the basis of the action is the right to the possession, and not the title. The plaintiff cannot recover when he has granted the right to the possession to the defendant, and it was a perfect defense at law to the plaintiffs' action here that the defendants held both the possession and the legal right to it under a written agreement with the grantors of the plaintiffs, which was anterior and superior to their title.

The other reason why the objection of the plaintiffs cannot be sustained is that it comes too late. It was not made in the court below. The partnership agreement, the agreement between Buck & Trexler and White, his performance of that agreement, and his possession and that of his grantees under it, upon which the equitable title of the defendants rests, were all pleaded, proved, and submitted to the court below for its decision without an objection or exception to any of them on the ground that that title was inadmissible as a defense in this action. This is a court for the correction of the errors of the court below only. When an action at law is tried by the court without a jury, the questions of the jurisdiction of that court, and of the sufficiency of the pleadings and findings to warrant the judgment, are always open for consideration. No other question will be noticed by the appellate court unless it has first been presented to and considered by the court below. No question arises in this case as to the jurisdiction of the trial court over the parties or the subject-matter in controversy. The pleadings and findings of the court were sufficient to warrant the judgment. The answer denied the ownership of the plaintiffs and their right to the possession of the property, and alleged that the defendants held the title, the possession, and the right to the possession. The findings of the court upheld the undoubted right of the defendants to retain the possession of the property. The objection which plaintiffs now urge, therefore, was one which should have been presented to the trial court, in order to warrant a consideration of it here. That court committed no error in ruling upon this objection, because it was never presented to it and it made no ruling upon it; and there is therefore no ruling before us to review, and no error to correct. *Drexel v. True*, 36 U. S. App. 611, 20 C. C. A. 265, 266, and 74 Fed. 12, 14, and cases cited; *Railway Co. v. Harris*, 27 U. S. App. 450, 454, 12 C. C. A. 598, 601, and 63 Fed. 800, 803, and cases cited.

It is urged that the question presented goes to the jurisdiction of the court below to hear and decide upon the equitable defense. The answer is that, inasmuch as it does not go to the jurisdiction of that court over the parties or the subject-matter of the action, it is waived by a failure to present it at the opening of the trial. Any other practice would cause unreasonable expense, and would result in intoler-

able delay. Take the case in hand. This case has been carefully tried without a jury before the same court which would have heard and sustained the equitable title of the defendants if they had pleaded and proved it, as they might have done, on the equity side of the court. The plaintiffs have not been misled or taken by surprise. The equities of the defendants were pleaded, they were proved, they were considered by the court, and their effect was determined after full notice of all these proceedings to the plaintiffs in a case in which they participated without presenting the objection which they now urge. It is plain that these equities are superior to the claims of the plaintiffs, and that they entitle the defendants to retain the possession and to hold the title to this land. If we should reverse this judgment and send the case back for a new trial, the defendants would immediately exhibit their bill, and pray for an injunction against this action, and the establishment of their title, and the court below must grant their prayer. Such a course would produce nothing but expense and the law's proverbial delay. It would impose useless trouble and expense upon the defendants, which a timely objection from the plaintiffs when the answer was filed, or when the evidence in support of it was introduced in this case, would have avoided. They ought not to be permitted now, after experimenting with the trial court until they obtained its decision upon the merits of this equitable title, to repudiate and defeat the judgment which followed that decision, on the ground that the court below has tried, with their silent acquiescence, either an equitable defense at law, or a legal cause of action in equity. The acts of congress provide that suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law. Rev. St. § 723. Yet it is well settled that an appellate court is not required to listen to an objection to a decree in equity on the ground that the complainant had a complete remedy at law, when that objection is made for the first time in that court. *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 340; *Reynes v. Dumont*, 130 U. S. 354, 395, 9 Sup. Ct. 486; *Scott v. Armstrong*, 146 U. S. 499, 512, 13 Sup. Ct. 148; *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127; *Preteca v. Land-Grant Co.*, 4 U. S. App. 326, 1 C. C. A. 607, and 50 Fed. 674. The counter proposition is certainly supported by as much reason, and it is too late for one who has submitted to the trial of an equitable cause of action or defense in an action at law to object to that course for the first time in the appellate court. *Railway Co. v. Harris*, 27 U. S. App. 450, 454, 12 C. C. A. 598, 601, and 63 Fed. 800, 803; *Railway Co. v. Phillips*, 27 U. S. App. 643, 650, 13 C. C. A. 315, 319, and 66 Fed. 35, 40. The judgment below is affirmed, with costs.

METROPOLITAN ST. RY. CO. v. KENNEDY.

(Circuit Court of Appeals, Second Circuit. July 21, 1897.)

1. STREET RAILROADS—COLLISION AT INTERSECTION—NEGLIGENCE.

In the absence of proof that either of two street-railway companies had any right, by usage or otherwise, of precedence at the intersection of their roads, the law presumes that they stood on a footing of equality, each owing to the other the duty of exercising reasonable care.

2. SAME.

The servants in charge of a street car were negligent in attempting to cross the track of another company at the point of their intersection when they saw, or should have seen, that a car of that company, of which plaintiff was in charge, was already in motion, and that a collision would probably result.

3. SAME.

Though the plaintiff's view of defendant's car was temporarily obstructed by an intervening object, plaintiff was not negligent in attempting to cross the intersecting track, as he had the right, having first put his car in motion, to rely on the fact that the servants in charge of defendant's car would not attempt to make the crossing until it should be safe to do so.

4. SAME—DAMAGES—EVIDENCE.

In an action to recover damages for personal injuries it is competent for plaintiff to prove that he was a sober and industrious man.

5. SAME—HARMLESS ERROR.

The error, if any, in permitting plaintiff in an action to recover damages for personal injuries to testify that he was a married man, is harmless where the fact is abundantly proved by evidence to which there was no objection.

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

Henry A. Robinson, for plaintiff in error.

Wm. H. Regan and James L. Bennett, for defendant in error.

Before PECKHAM, WALLACE, and SHIPMAN, Circuit Judges.

PER CURIAM. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury. The action was brought to recover for personal injuries received by the plaintiff in a collision between two street-railway cars, alleged to have been caused by the negligence of the defendant, which took place at the junction of Fourteenth street and Broadway, in the city of New York. The plaintiff was a car driver for the Central Cross Town Railroad. The tracks of that railway run east and west along Fourteenth street, and intersect the double tracks of the railway of the defendant, running north and south upon Broadway. The evidence upon the trial tended to show that as a car driven by plaintiff, bound easterly, approached the point of intersection, it was brought to a stop preparatory to crossing the defendant's railway; that at that time a car of the defendant upon the easterly track of its railway, bound northerly, and approaching the point of intersection, had also been brought to a stop; that the conductor upon the plaintiff's car, observing that the defendant's car had stopped, signaled the plaintiff to go ahead, and the plaintiff thereupon put his car in motion; that about this time a south-bound car of the defendant, upon the westerly track of its railway, passed the point of intersection, thereby momentarily obstructing the view be-