

burgh, Cincinnati, Chicago & St. Louis track, the appellant, besides being without authority, can have no motive to relay the switch; and it is not to be presumed that the railroad company, especially in view of its contract, will refuse to permit the connection to be made. If the ordinance permitting the switch to be laid is valid, or can be challenged only in the name of the city or by the public prosecutor, it is not right that the appellant should be enjoined, on the theory that only private aims were to be subserved, from relaying the switch, re-establishing its connection with the railroad track, and securing its operation by the railroad company under the agreement already made for that purpose. He ought not to be forbidden to take the steps necessary to establish the situation on which it was suggested that it would be in order to dissolve the injunction.

The merits of the appeal, it follows, must depend upon the question whether this case comes within the doctrine declared in *Doane v. Railroad Company*. We think that it does. It is true that the switch is described as private, but it was at the same time provided that the privileges granted were to be subject to all ordinances concerning railroads, and when connected, as it must be, with the track of a railroad, it will necessarily become a part thereof. It is common knowledge that in a city like Chicago such structures must be numerous. They are indispensable auxiliaries to the conduct of railroad traffic, and to the convenient doing of the business of a commercial city. They are therefore a proper subject of municipal regulation and control, and, that being so, it follows that the validity of the ordinance can be questioned, on the ground alleged, only by information brought by the attorney general or other officer acting in the name of the people of the state, or by a bill for injunction brought by the city, and that the construction and use of the switch cannot be restrained at the suit of an owner of abutting property. See, also, *Trusdale v. Sugar Co.*, 101 Ill. 561. The appeal is therefore sustained, and the cause remanded, with direction to sustain the motion to dissolve the injunction.

ASPEN MINING & SMELTING CO. v. WOOD.

WHEELER v. SAME.

(Circuit Court of Appeals, Eighth Circuit. December 13, 1897.)

Nos. 942 and 945.

2. PARTIAL SATISFACTION OF JUDGMENT—DIRECTING EXECUTION FOR BALANCE—ASCERTAINING AMOUNT.

Where, on appeal, a final decree fixed the amount due certain heirs, directed that it be distributed according to the laws of descent of the state of Colorado, and that in default of payment executions should issue, and the solicitor thereupon entered satisfaction thereof except as to certain amounts due one heir, an order of the lower court directing the clerk to issue execution thereon to satisfy the decree so far as the right, title, claim, and demand of such heir is concerned, when he or his counsel shall file a præcipe therefor, stating therein the amount claimed, is not an order for an execution for a different amount than that named in such satisfaction, as due to such heir, nor for the amount which may be claimed in such

præcipe, but requires the clerk, from the decree and satisfaction, to compute the amount due, and insert it in the execution.

2. ORDER FOR EXECUTION—AMOUNT OF JUDGMENT—PENDENCY OF OTHER ACTION.

Where the amount the judgment defendants owe one heir is fixed by final decree in a suit to which they were all parties, no claim or bill of another can unsettle it until that decree is modified or a supplemental decree is rendered; and the pendency of such bill or claim is no reason why execution should not issue for such amount.

3. SAME—INTEREST OF ANOTHER IN JUDGMENT.

The fact that a judgment creditor has agreed to pay, or has assigned, part of the judgment to a third person, is no reason why the judgment debtor should not be compelled to pay the judgment.

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

W. H. Tripp (H. L. McNair, C. S. Thomas, W. H. Bryant, and H. H. Lee, on the brief), for appellants.

L. M. Cuthbert (Henry T. Rogers and D. B. Ellis, on the brief), for appellee.

Before SANBORN and THAYER, Circuit Judges.

SANBORN, Circuit Judge. On July 30, 1896, the final decree in this suit which was brought by Margaret Billings, formerly the widow, and James O. Wood, Charles E. Wood, Thomas E. Wood, Hiram H. Wood, and William Wood, surviving sons, of William J. Wood, deceased, against Jerome B. Wheeler and the Aspen Mining & Smelting Company, was so modified by the direction of this court that it adjudged that the widow and heirs of William J. Wood, whom we have named, should recover from Jerome B. Wheeler \$195,252.97, and interest from July 16, 1894, and from Jerome B. Wheeler and the Aspen Mining & Smelting Company \$209,328.95, and interest from July 16, 1894; that Wheeler and the mining company should pay these amounts in 30 days; that in default of payment thereof within that time execution should issue therefor in the ordinary form; and that these amounts should be apportioned and paid to this widow and these heirs according to their respective interests therein as heirs of William J. Wood, deceased, under the laws of descent of the state of Colorado. On the next day the solicitor for the complainants in this decree filed a complete satisfaction of it, signed by himself as such solicitor, "except as to the following amounts remaining due to the complainant James O. Wood: From the defendant Jerome B. Wheeler, \$6,973.32, besides the interest thereon from July 16, 1894; from the defendants Jerome B. Wheeler and the Aspen Mining & Smelting Co., jointly, \$7,476.04, besides interest thereon from July 16, 1894." On February 27, 1897, the court below ordered its clerk to issue an execution to the marshal of the district of Colorado, commanding him "that out of the property, goods, chattels, and effects of the said respondents Jerome B. Wheeler and the Aspen Mining & Smelting Company he make and collect a sufficient amount to pay, satisfy, and discharge" this decree "so far as the rights, title, claim, and demand of said complainant James O. Wood thereunder are concerned, and for the purpose of paying and discharging the amounts justly due thereunder to the said com-

plainant James O. Wood, at and upon the filing with said clerk by the said complainant James O. Wood, or his counsel, of a præcipe for said writ, stating therein the amount claimed by the said complainant James O. Wood to be justly due and owing him" under the decree. From this order Wheeler and the Aspen Mining & Smelting Company have appealed. Their objections to it will be very briefly noticed, for they are entitled to no extended consideration. They are:

1. That the order is erroneous because it directs the clerk to issue an execution for such an amount as the appellee shall claim in his præcipe. But the order contains no such direction. It is that the clerk shall issue an execution for the amount justly due to the appellee when the latter files a præcipe showing the amount he claims. The law, the decree, and the satisfaction which the complainants' solicitor filed are the sources from which the clerk must ascertain the amount to be inserted in the execution, and the order neither directs nor assumes that he will obtain it from any other source. The filing of the præcipe merely fixes the time when the execution shall issue, and indicates the amount which the appellee claims.

2. That the decree is joint, and the satisfaction on behalf of some of the complainants satisfies it as to all. But this proposition has no support either in reason or in authority.

3. That one William H. Wood has filed a supplemental bill against the appellants, that proceedings are to be had under it as a separate and distinct suit, and that until the final determination of the proceedings in that suit the amount due to the appellee will remain unsettled and uncertain. But the amount which the appellants owe James O. Wood has been settled and determined by the final decree in this suit, to which they were all parties, and no bill or claim of another can disturb or unsettle it until that decree is modified or a supplemental decree is rendered.

4. That one J. H. Casserleigh filed a notice in this suit from which it appears that he claims to be entitled under a contract with the appellee to one-third of the amount which he may recover under this decree. But Casserleigh is not a party to this suit, and the fact, if it be a fact, that the appellee has agreed to pay, or has assigned, one-half of the amount of the money which he is to recover from the appellants, is no reason why they should not pay the amount of their debt. When they have paid to the marshal the sum which this decree adjudges them to owe to James O. Wood, he and Casserleigh may litigate the question of its distribution, if they choose, but neither of them can again collect any of that debt from the appellants.

5. That the court had no power to issue executions for any other amounts than those named in the satisfaction filed by the solicitor of the complainants. But the court had both the power and the right to direct its clerk to examine both decree and satisfaction to compute the amounts which remained due to the appellee under them, and to insert those amounts in the executions. It was under no obligation to perform this clerical labor itself. The order below is affirmed, with costs.

WHITEMORE v. PATTEN et al.

(Circuit Court, S. D. California. November 15. 1897.)

No. 687.

1. EQUITY PLEADING—EXCEPTIONS TO ANSWER—AMENDMENT.

Prayers to exceptions taken to an answer being purely matter of form, where objection is made on the ground of their omission leave may be given to supply them by amendment.

2. SAME—ANSWER—IMPERTINENCE.

Allegations by defendants that the plaintiff in a bill for an accounting respecting his employment by defendants as agent to sell machinery on commission violated his contract of agency, by neglecting the business, to the damage of defendants, sets out a purely legal demand, not pleadable in an answer to the bill.

3. SAME—MATTERS FOREIGN TO ISSUES.

An allegation in an answer that plaintiff brought the suit in a state distant from that of defendants' residence for the purpose of harassing them, and involving them in large expense, is impertinent.

Bill for an accounting filed by Charles A. Whittemore against William H. Patten and Norman Stafford, co-partners as Patten & Stafford. Heard on exceptions to answer.

Haines & Ward, for complainant.

Trippet & Neale and Oscar A. Trippet. for defendants.

WELLBORN, District Judge. This is a suit for an accounting as to transactions had under a contract, of which the following is a copy:

"This agreement, made this eighth day of Sept., 1885, by and between Wm. H. Patten, Norman Stafford, and John E. Myer, all of Canastota, in the state of New York, co-partners under firm name of Patten, Stafford and Myer, doing business in said Canastota, and Charles A. Whittemore, of Melrose, Massachusetts, witnesseth: That said Patten, Stafford and Myer, in consideration of the promises of said Whittemore hereinafter set forth, do hereby appoint said Whittemore their general agent for the states of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, and Rhode Island, for the sale of their New York Champion Rakes manufactured by said Patten, Stafford and Myer. Said appointment by said Patten, Stafford & Myer is subject to the following conditions: Said Whittemore is to canvass thoroughly, either by himself or by sub-agents to the above named territory, for the sale of the above-named rakes. He is to use his best possible endeavors to sell said rakes, and to take all possible precautions to sell to responsible parties only. He is to forward all orders taken to said Patten, Stafford & Myer, and to collect and settle all accounts, except as provided below. Said Patten, Stafford & Myer agree to send out to all purchasers of said rakes true and accurate statements of their several accounts, and to use their best endeavors to make collections of all said accounts, to the extent that it can well be done by correspondence from their office. In the event of any litigation being made in the collection of any of said accounts, said Patten, Stafford and Myer agree to bear one-half of the legal costs of such litigation. For said services of said Whittemore, said Patten, Stafford and Myer agree to allow said Whittemore, as compensation, one-half ($\frac{1}{2}$) of the surplus over and above sixteen (\$16.00) dollars for each thill rake, and one-half ($\frac{1}{2}$) of the surplus over and above eighteen (\$18.00) dollars for each rake with pole and whiffletrees; and it is mutually agreed that the prices above stated apply to the said goods free on board the cars at said Canastota. In consideration of the above, said Whittemore agrees to become the general agent of said Patten, Stafford & Myer for the territory above named, and for the purposes above described. He agrees to use his best endeavors to canvass