

of the second mortgage. There is nothing in the case as it now stands to enable me to determine as to the necessity for such an order, or whether if made at all it should be before a sale. That question is therefore left open, to be settled when the details of the decree shall come up for consideration.

A decree may be prepared in accordance with this opinion. The complainants are entitled to a sale of the mortgaged property, subject to the ascertained prior encumbrances, but until such a decree is prepared the injunction heretofore issued in this cause shall remain in force.

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UNITED STATES OF AMERICA *v.* GILLESPIE and another, Executors, etc.

(*Circuit Court, D. New Jersey.* July 20, 1881.)

1. EQUITY—NECESSARY PARTIES—DEVISEE.

One who, in a certain event, may be interested in the disposition of the estate of a decedent, is not a necessary party to a bill brought by a devisee against the executors praying for an account and a construction of the will.

*W. B. Williams*, for the application.

*A. Q. Keasbey*, for the United States.

NIXON, D. J. The bill of complaint was filed in this case by the United States against the executors of Joseph L. Lewis, deceased, substantially, for an account and for a construction of the last will and testament of the testator. The executors only are brought in as defendants. An application is now made in behalf of the official authorities of the city of Hoboken, for an order of the court requiring the complainant to make the city, or the overseer of the poor, a party to the proceedings, that an answer and defence may be put in in behalf the municipality. The complainants oppose the motion, on the ground that the applicant is not a necessary party, and that the court ought not to compel them to introduce a party whose presence is not needed to enable the court to give the full relief prayed for in the bill of complaint. It is not always easy to ascertain who are proper or necessary parties in an equity proceeding. It is sometimes said that every one should be made a party who has an interest in the *subject-matter* of the suit; and again, it is claimed that only those should be included who are interested in the *object* of the suit. The applicant here claims the right to come in under the provisions of section 9 of the act of the legislature of the state of New Jersey, entitled "An act concerning executors and the administration of in-

testate estates." Rev. St. N. J. 395. I express no opinion now on the question so much discussed at the hearing, whether the statute has any application to the case under consideration; but if it does apply, it is quite clear that the applicant can get no relief in the present proceedings, if admitted as a defendant, without materially changing the structure of the bill and introducing into the controversy new issues, which the complainant has not asked the court to consider.

It is not claimed that the applicant is a necessary party to the bill as filed, or that the court cannot give complete relief therein without its presence. No allegation is made against it, and no relief is prayed for in regard to it. The suggestion is that in a certain event, to-wit, in the event of the said Lewis dying and leaving no relations entitled to the administration and the assets of the estate, the surrogate of the county may grant letters of administration to some fit person, who shall hold the property in trust for the poor of the city of Hoboken, if no kin capable of inheriting the estate can be found. This necessarily involves the inquiry into a new question, not at all pertinent to the pending suit, in regard to the right of inheritance of the intestate's kin, and one, which is of no importance to the complainant. Its only concern is to ascertain from some competent tribunal whether the bequest of the testator of his estate for the payment of the national debt is a valid bequest; and if so, what amount of money is in the hands of the executors to be applied for the purpose.

While the United States are not entitled to any greater right in their own courts than the humblest citizen, they are entitled to the same rights; and I know of no principle or precedent which compels litigants, against their express protest, to open the doors of a pending controversy to outside parties, that the latter may incorporate into the suit new matters and issues in which the complainant has no possible interest.

The application is refused.

## PHENIX INS. Co. v. LOUISVILLE &amp; NASHVILLE R. Co.

(Circuit Court, E. D. New York. July 13, 1881.)

## I. GUARANTY OF COLLECTION—PROMISE—CONSTRUCTION.

A promise "that if the plaintiff would endeavor to collect the amount of the loss described from the Grand Trunk Railway Company, they, the defendants, would pay the said claim if the Grand Trunk Railway Company did not do so," is, in legal effect, a guaranty of the collection of the debt.

*Wingate & Cullen*, for plaintiff.

*Foster & Thomson*, for defendant.

BENEDICT, D. J. The plaintiff, suing in his own name as the assignee of a chose in action, cannot maintain the suit except upon the theory that the cause of action sued on is the new promise made to the plaintiff by the defendant set up in the complaint, viz.: that if the plaintiff would endeavor to collect the amount of the loss described from the Grand Trunk Railway Company, they, the defendants, would pay the said claim if the Grand Trunk Railway Company did not do so. This cause of action is, in legal effect, a guaranty by the defendant of the collection of the debt described, and resort to a suit or some other legal proceeding for the enforcement of the debt is a condition precedent to a recovery from such a guaranty. *Taylor v. Burton*, 8 Cow. 628. No suit or other legal proceeding against the Grand Trunk Railway is averred. The allegation of the complaint is that "the plaintiff duly made such endeavor, and went to great trouble and incurred considerable disbursements in endeavoring to induce said Grand Trunk Railway to pay said claim." This allegation is equivalent to saying that the plaintiff endeavored to collect the debt by endeavoring to induce the Grand Trunk Railroad Company to pay the claim, and not otherwise. Upon the face of the complaint, therefore, compliance with the terms of the contract does not appear, and the complaint must be held bad.

There must be judgment for the defendant on the demurrer, with leave to the plaintiff to amend on payment of costs.