

## DUDGEON      WATSON.

*(Circuit Court, S. D. New York. March 7, 1885.)*

## 1. EQUITY—PLEADING—COMPLAINANT NON COMPOS MENTIS—PLEA.

A plea alleging that complainant "was at the time of the commencement of the suit *non compos mentis* and incapable to sue," but failing to allege that he has been so found by inquisition or that any committee has been appointed, is bad.

## 2. SAME—PRACTICE—MOTION TO STRIKE BILL FROM FILES—STAY.

The proper practice in such a case is by an application to the court to strike the bill from the files because filed without authority, or to apply for a stay of proceedings until a committee or next friend may be appointed.

## In Equity.

*Edward Wetmore*, for complainant.

*Jas. McKeen*, for defendant.

WALLACE, J. The plea of the defendant alleging that complainant "was at the time of the commencement of the suit *non compos mentis* and incapable to sue," does not allege that he has been so found by inquisition or that any committee has been appointed. In the absence of such an allegation there is no authority for such a plea. Mitf. Pl. (4th Ed.) 229; Mitf. & T. 320. The proper practice in such a case is by an application to the court to strike the bill from the files because it has been filed without authority, owing to the mental incapacity of the complainant, or to apply for a stay of proceedings until a committee or next friend may be appointed. *Wartnaby v. Wartnaby*, 1 Jac. 377; *Attorney General v. Tyler*, 2 Eden, 230; *Norcom v. Rogers*, 16 N. J. Eq. 484. The court can then ascertain whether there is any reasonable foundation for suspending the progress of the suit. It would be intolerable to permit a defendant whenever so disposed to challenge the mental capacity of a complainant by a plea, and the practice might lead to grave abuses. The defendant has no interest in such an inquiry beyond being protected from a vexatious suit. Any person may volunteer to act as a next friend and bring a suit for an insane person when no committee has been appointed, and the court will entertain it and decide its merits. *Jones v. Lloyd*, 43 Law J. (Ch.) 826, against the objections of the defendant. The person thus officiously constituting himself the protector of the lunatic does so at his risk and may be compelled to pay the defendant's costs, and must establish the propriety of his act if called to account by a committee subsequently appointed. The solicitor who files a bill assumes the same responsibility.

The plea is overruled.

v.23F,no.4—11

FISHER v. PORTER.<sup>1</sup>

(Circuit Court, D. Nebraska. February 27, 1885.)

## 1. MORTGAGE—REFORMATION AND FORECLOSURE—MISTAKE IN DESCRIPTION OF PROPERTY.

Where the uncontradicted evidence, in a suit to reform and foreclose a mortgage, shows that there was a mistake made in describing the property intended to be covered by it, the mortgage will be reformed so as to carry out the intention of the parties.

## 2. SAME—USURY—AGENT RETAINING COMMISSION.

When an agent who negotiates a loan, secured by mortgage, bearing 10 per cent. interest, which is legal at the time, retains as a commission 10 per cent. of the amount of the loan, the transaction will not be held usurious when it appears that the mortgagee did not share in the commission retained, or agree to do so, and that the agent was acting solely as agent of the mortgagor.

Suit to Reform and Foreclose Mortgage.

*Mayne & Hunter*, for complainant.

*Geo. S. Smith and Geo. W. Doane*, for respondent.

DUNDY, J. There was a mistake made in the mortgage, in properly describing the land intended to be covered by it. This is uncontradicted. The mortgage must, therefore, be reformed so as to carry out the intention of the parties.

The defense of usury relied on is not sustained by the proof, especially if the later decisions in this court are to be followed in determining that question. The Porters applied to Tullys, of Council Bluffs, to borrow \$1,900. Tullys was a loan broker, whose business it was to procure loans for others, he charging a large commission therefor. The Porters specially employed him to negotiate a loan for them, and agreed to pay him 10 per cent. commission if he procured for them the \$1,900 desired. This he did. The money came into his hands, and he retained his commission according to agreement. This he had a right to do, unless he (Tullys) was the agent of Fisher, the mortgagee. Tullys went to Plattsmouth to look after the matter, prepared all the papers, did all the business for the Porters, received the money, kept his commission, and gave to the Porters the balance. There is no testimony in the record that shows that Fisher, the mortgagee, ever received, or was to receive, anything whatever from the Porters, except the principal of \$1,900, and interest thereon at 10 per cent. per annum. That was lawful at the time. There is nothing that connects Fisher in any way with the commission retained by Tullys, nor is there anything that shows Fisher even knew of that part of the transaction. Tullys expressly says in his testimony that he was not agent for Fisher, and did not represent him, and that he was acting solely for the Porters. If Fisher had shared in the commission retained, or had agreed to do so, or if Tullys had in any sense been agent for Fisher, then Fisher would be

<sup>1</sup> Reported by Robertson Howard, Esq., of the St. Paul bar.