

HIS IMPERIAL MAJESTY, THE SULTAN OF THE OTTOMAN EMPIRE, *v.* PROVIDENCE TOOL Co. and others.

(Circuit Court, E. D. New York. August 22, 1883.)

EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW—REV. ST. § 723.

A bill in equity that asserts that plaintiff is entitled to certain property in the possession of the defendant, and prays that it be delivered up, and that defendant may be decreed to specifically perform his contract to deliver it, and may be enjoined from setting up any claim to it, and that if he has any lien thereon redemption may be allowed therefrom, does not state a case within the equity jurisdiction of a United States circuit court, as plaintiff has an adequate remedy at law by the action of replevin.

In Equity.

Evarts, Southmayd & Choate, for complainant.

Butler, Stillman & Hubbard and *B. F. Thurston*, for defendants.

BLATCHFORD, J. The bill in this case is founded wholly on an assertion of the legal title of the plaintiff to the rifles and equipments in question. Its prayer is for a decree that the plaintiff has the title to such property and the right to its possession, and that the defendants have no title to it, or valid lien on it, or right to retain it, and that it be delivered over by the defendants to the plaintiff. A claim of such a character is, in the courts of the United States, under the distinction maintained by the constitution of the United States between law and equity, and enforced by section 723 of the Revised Statutes of the United States, the subject of a suit at law, and a plain, adequate, and complete remedy is afforded by an action of replevin. This principle is established by numerous cases. *Grand Chute v. Winegar*, 15 Wall. 373; *Root v. Railway Co.* 105 U. S. 189, 212.

The bill prays that the tool company be compelled to specifically perform its undertakings with the plaintiff, and that the defendants be restrained by injunction from setting up any right or title to, or lien on, the property. But these prayers do not change the attitude of the case. The tool company agreed to make the articles and deliver them to the plaintiff. The plaintiff alleges that the articles have been made and paid for, and that the title to them has passed to the plaintiff. The case is one of the enforcement of the legal title to chattels in existence, and has no different legal aspect from what it would have had if the chattels had not been made under a contract, but had come otherwise into the possession of the tool company from that of the plaintiff. As to the injunction, that might be asked for in every case of the assertion of a legal title to property by a plaintiff, and thus every case of the kind be made one of equitable cognizance. The bill is not one recognizing a lien and asking to redeem from it. It asserts title and denies any lien, and prays for a delivery of the property. Then it has a second and alternative prayer,

that, as to any of the property on which there is a lien, redemption therefrom be allowed. But the suit is still a replevin suit in the guise of a suit in equity.

The foregoing considerations proceed wholly on the view that the articles are in existence, and have been paid for and belong to the plaintiff; that he makes no claim for damages for the value of the articles; and that damages would not give him what he is entitled to. If he could be compensated in damages, trover would be a plain, adequate, and complete remedy. It may be that, in the course of a replevin suit, if one be brought, a case for equitable interposition may arise. But one does not now exist. The application for an injunction is denied, and the restraining order of November 3, 1882, is vacated.

ALLEN v. O'DONALD and others.

(Circuit Court, D. Oregon. May 8, 1885.)

1. CREDITOR AND SURETY.

A creditor who has or acquires a lien on the property of his debtor as a security for his debt, is a trustee of the same for the benefit of the surety, if there be one, and if by any willful act of his such lien is lost or destroyed, to the injury of the surety, the latter is so far discharged from liability for the debt.

2. SAME—BURDEN OF PROOF.

When a creditor relinquishes a lien he may have on the property of his debtor, in a suit to collect his debt from the surety, the burden of proof is on him to show that the surety was not injured by such relinquishment.

3. EQUITY PLEADING—CONCLUSIONS OF LAW.

It is sometimes necessary and proper in equity pleadings to make deductions from the facts stated that are more or less conclusions of law.

Suit to Enforce the Lien of a Mortgage.

M. W. Feckheimer, for plaintiff.

William H. Holmes, for defendants.

DEADY, J. On November 1, 1871, Thomas Cross, of Salem, Oregon, gave his promissory note to the firm of Allen & Lewis, of Portland, Oregon, for the sum of \$30,000, payable in three years from date, with interest at 10 per centum per annum, payable semi-annually, and to secure the payment of the same he and his wife, Pluma F., on the same day executed and delivered to said firm a mortgage on 15 parcels of land situate in Marion county, and containing in the aggregate about 3,390 acres; and on January 23, 1872, said Thomas Cross gave his promissory note to said firm for the sum of \$10,000, payable in one year from date, with interest at 1 per centum per month, and to secure the payment of the same he and said Pluma F., on the same day, executed and delivered to said firm a second mortgage on the real property aforesaid, together with the south half of block 30 in Salem, and certain parts of lots 1, 2, and 3, in block