

use, the party complainant, on the tenth of July last, suddenly took possession thereof, and really occupies no other position than that of a naked trespasser, invoking the aid of the court to protect him in his trespass. Certainly that is not the province of an equity tribunal. The dedication is sufficient either under the statutory requirements or under the ordinary rules of law for such purposes. Here was this property, a continuation (evidently so designed) of Main street. Complainant's original track would cross Main street, and to prevent obstruction of that street in that direction the dedication was made.

I wish to say, and I have the full concurrence of my brother BREWER, that these *ex parte* applications which are made to the court without notice to the other party should be considered as exceptions to the general rule. Prior to the recent statute the courts did not grant a provisional injunction except on notice had, whereby both parties might be heard. This case serves to illustrate. A party comes before the court and states that irreparable mischief will ensue—and it so appeared to the court in this case—by interrupting its action as a railroad, by tearing up its tracks, etc.; consequently it was necessary that a provisional order should be had to prevent that sort of action until the motion could be formally heard upon notice. The court was bound to act in the matter, and it did so act. Now, it turns out that the plaintiff, so far as the case has developed, has no footing whatsoever to stand upon. Therefore, as far as the matter of practice hereafter is to be concerned, the exception must be established by affidavits or otherwise, so as to show that irreparable mischief will happen, before hearing can be had on notice given.

The injunction heretofore granted is dissolved, and the provisional injunction asked for is denied. The party may proceed to final hearing, or take such other course as he deems advisable.

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BLAIR *v.* ST. LOUIS, H. & K. R. Co. and others. (WALKER and another, Interveners.)<sup>1</sup>

(Circuit Court, E. D. Missouri. June 16, 1885.)

RECEIVERS—PROSECUTION OF SUIT TO ENFORCE STATUTORY LIEN ON MORTGAGED PROPERTY IN RECEIVER'S HANDS WITHOUT LEAVE OF COURT.

Where, during the pendency of a suit in a state court to enforce a statutory lien on mortgaged railroad property, for work done and materials furnished, foreclosure proceedings are instituted here, and a receiver is appointed and takes possession, and the plaintiff in the first suit continues to prosecute it without obtaining the leave of this court, and finally obtains judgment and is decreed to be entitled to a lien for the amount due him on such property, this court will not entertain a petition to have such judgment declared a lien on the property in its receiver's hands, paramount to that of mortgage creditors.

<sup>1</sup>Reported by Benj. F. Rex, Esq., of the St. Louis bar.

In Equity. Foreclosure suit. Demurrer to intervenors' petition. The petition states that, prior to the institution of foreclosure proceedings herein, the intervenors brought suit in the circuit court of Pike county, Missouri, to enforce their statutory lien for money due them for work done and materials furnished in constructing trestles, bridges, etc., along the line of the St. Louis, Hannibal & Keokuk Railroad Company's road; that after foreclosure proceedings were instituted herein against said road, and a receiver appointed, they gave notice to said receiver of the pendency of their suit, and continued to prosecute the same until they obtained judgment and were decreed to be entitled to a lien upon said road for the amount due them. And the petitioners pray that said judgment be declared a lien on said company's property now in the receiver's hands, paramount to the mortgage sued on by the complainant.

The trustee and receiver both demur to the petition upon the following grounds, viz.: "(1) That the said petition does not state facts sufficient to constitute a cause of action; (2) that the said petition does not state a cause of action against the property and assets of said railroad company now in the hands of the said receiver superior to the lien of the mortgage now being foreclosed in this court by the said trustee; (3) that the judgment mentioned in said petition was obtained against the said railroad company subsequent to the appointment of the said receiver by this court; (4) that said petition does not state that said trustee and receiver were ever made parties defendant to the said action on which said judgment was recovered in the said Pike county circuit court."

*Biggs & Reynolds, Jas. Carr, and Fogg & Hatch, for petitioners.*

*Walter C. Larned and Theodore G. Case, for trustee.*

*John O'Grady, for receiver.*

TREAT, J., (orally.) In the case of *Walker v. St. Louis, H. & K. R. Co.*, a demurrer was interposed to the intervening petition. The question could have been raised, perhaps, more satisfactorily in the way of practice, on an application for leave to file; but there is enough here to enable the court to say that it will not entertain the petition. The parties preferred to proceed in the state court without the leave of this court, and they must lie in the bed which they have made. This court will not help them. The demurrer will be sustained.

## HAMILTON WOOLEN Co. v. MOORE and others.

(Circuit Court, D. Connecticut. September 25, 1885.)

## SPECIFIC PERFORMANCE—ORAL CONTRACT AS TO RIGHT TO FLOW WATER.

On examination of the facts in this case, *held*, that the bill praying for the specific performance of a parol contract in regard to the right to flow water upon certain mill privilege owned by defendants should be dismissed.

## In Equity.

*Alvan P. Hyde and A. J. Bartholomew*, for plaintiff.

*Mahlon R. West and Dwight Marcy*, for defendants.

SHIPMAN, J. This is a bill in equity praying for the specific performance of a parol contract in regard to the right to flow water upon the mill privilege now owned by the defendants. The facts in the case are as follows:

The averments in the bill in regard to the citizenship of the parties are true. The allegations in paragraphs Nos. 1, 2, and 3 of the bill are true, except that the conveyance to the plaintiff by Albert E. Weld, mentioned in paragraph No. 2, was made on March 30, 1868, instead of soon after January 1, 1865, as stated in said bill.

The plaintiff began to erect its reservoir dam on August 22, 1865, and in November, 1865, decided to build it three feet higher than had been contemplated. Such a height would cause the water to flow back upon the lands of sundry owners in Connecticut, and would cause an overflow of about three feet upon the mill-wheel at the saw-mill of Albert Back, being the premises particularly described in paragraph No. 2. Before deciding to raise said dam to said additional height, Josiah Ballard, Jr., the treasurer of the plaintiff, and thereunto authorized, had an interview with said Back for the purpose of obtaining the right to overflow his mill site. Said Back agreed to sell to the plaintiff the right to flow his land and water-power for a fair compensation, to be determined after the water should come up to the height that the dam should raise it, and consented that the dam should be raised forthwith to the desired height. He stated that he did not wish to put any obstacles in the way of raising the dam, because the value of his mill-power depended largely upon the plaintiff's goodwill, inasmuch as it might impose restrictions in the use of the water, and advised that the work of raising the dam should be proceeded with, and that the necessary authority should be obtained from the owners who would be injuriously affected.

The plaintiff, in November, 1865, in reliance upon this undertaking of said Back, proceeded to take the necessary steps to raise the dam, by making a broader earthwork base and heavier walls, and by making the proper fills in the causeways at a large expense. Subsequently, and in the month of November, 1865, and before the completion of the dam, said Ballard, as treasurer, and said Back made a definite parol agreement that said Back would sell the plaintiff the