

under laws not prohibiting them, yet rendered valueless or far less valuable by means of the operation of laws passed by the legislature for the public good, as it supposed. This whole subject of the liquor traffic, and investments precisely like those of the complainants broken up or largely crippled by prohibitory laws, has been a fruitful source of discussion before the courts, and they are all now agreed that such rights and properties as the complainants assert they are about to have injured or destroyed if this law be declared of force are not protected by the constitution of the United States. *Passenger Cases*, 7 How. 504; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Slaughter-House Cases*, 16 Wall. 129; *Stone v. Mississippi*, 101 U. S. 814. This question has been before the supreme court of the United States, the court of the last resort in cases of this kind and that court uniformly and clearly held that rights of the character here set up must yield, however costly and devastating may be the evil, to the will of the legislature in its passage of laws in their judgment for the public good. It is one of the risks that every man takes in entering a business or making an investment, and he cannot complain."

HILTON v. OTOE CO. NAT. BANK and others.

(Circuit Court, D. Nebraska. January 26, 1886.)

1. UNEXECUTED MORTGAGE—FORECLOSURE—PERSONAL JUDGMENT.

In the absence of express prohibition, there is no reason why a personal judgment may not be rendered against a debtor in an action in which a mortgage not executed by the debtor is foreclosed.

2. EXECUTION SALE—CONFIRMATION—ACTION TO CANCEL DEEDS AFTER SUBSEQUENT CONVEYANCES.

As confirmation is a final order, and conclusive upon the regularity of the proceedings in respect to the sale, and as the court had in the case at bar unquestioned jurisdiction of the person as well as the subject-matter, *quære* whether, if the proceedings were erroneous, the validity of the judgment, sale, and deed could be questioned in a collateral action to cancel subsequent deeds.

In Equity.

J. S. Gregory, for complainant.

Harwood & Ames, for defendant.

BREWER, J. On the first day of April, 1869, complainant was indebted to defendants on a promissory note dated October 14, 1868, for \$650, and an acceptance dated November 27, 1868, for \$531.07. On that day he transferred to the bank as collateral security a note and mortgage for \$1,500 executed by Augusta Hilton to himself. On March 8, 1870, these debts being unpaid, the bank brought suit. In the petition, the note and acceptance of complainant, and the note and mortgage of Augusta Hilton, were all set forth, and an assignment of the latter alleged. On April 27, 1871, complainant appeared in open court, and admitted his indebtedness. A personal judgment was rendered against him for over \$1,400, and a decree of foreclosure of the collateral mortgage. On June 13, 1872, an order of sale was issued, and the property described in the mortgage advertised for sale on October 26, 1872. On October 25th, in a suit brought by children of said complainant, a temporary injunction was granted restraining the sale. The order of sale was thereupon returned unexecuted. No relief was asked in the petition filed by the children as respects the personal judgment against complainant;

all that was sought was to restrain the sale of the mortgaged property. An answer was filed in this injunction suit by the bank, but no trial was ever had, and on the first day of November, 1873, the bank, by its attorney, consented that the injunction be made perpetual. On March 27, 1873, an execution was issued on the personal judgment against complainant, and levied on the land in controversy. Sale took place on May 17, 1873, and the bank purchased the land for \$924. On November 6, 1873, the sale was confirmed. No exceptions were taken to this confirmation, and the order thereof was never set aside. Subsequently the bank sold and conveyed the land, and its grantee also sold and conveyed to different parties. The complainant now files this bill, alleging that he is still the owner of the land, and praying to have these various deeds canceled as clouds upon his title.

He bases his action on two grounds: *First*. He alleges that the judgment was paid before the issue of execution. There is not a syllable of testimony to sustain this allegation. He never paid a dollar to the bank; and his testimony, that he is informed and believes that his son-in-law did, of course amounts to nothing. *Second*. He claims that, because in the original action a decree of foreclosure of a mortgage was sought and obtained, no execution could issue until after sale of the mortgaged premises, and then only for the deficiency for which personal judgment should be entered. Counsel cites section 847 of the Nebraska Code as authority for this, and says that no personal judgment was entered. He is mistaken as to the fact, and his law is inapplicable. The record shows that a personal judgment was rendered against complainant on his note and acceptance. Again, the mortgagor was not the principal debtor. The mortgage was not given to secure complainant's debt to the bank, but Augusta Hilton's debt to him. So, in the petition, two distinct causes of action against two different parties were presented: one a cause of action against him on his personal indebtedness to the bank in which the mortgagor was not interested, and the other against a mortgagor to foreclose a mortgage on property in which he had no title. Both causes passed into judgment and decree. So this case does not fall within the section above cited, or the case of *Clapp v. Maxwell*, 13 Neb. 542; S. C. 14 N. W. Rep. 653. In that case it was decided that a leading principle of title 27 of the Code, in which said section 847 is found, is "that, ordinarily, a mortgagor shall not be answerable for a secured debt upon the mortgage, and personally at the same time, and that one of these remedies having been selected, it must be exhausted before the other can be resorted to, unless first specially authorized by the court." Of course, that principle has no application here. There was no attempt to hold the mortgagor personally liable. In the absence of express prohibition I know of no reason why a personal judgment may not be rendered against a debtor in an action in which a mortgage not executed by the debtor is fore-

closed. Further, as confirmation is a final order, and conclusive upon the regularity of the proceedings in respect to the sale, (*Berkley v. Lamb*, 8 Neb. 398; S. C. 1 N. W. Rep. 320; *Taylor v. Courtney*, 15 Neb. 199; S. C. 16 N. W. Rep. 842,) and as the court had unquestioned jurisdiction of the person as well as the subject-matter, it may well be doubted whether, if the proceedings were erroneous, the validity of the judgment, sale, and deed could be questioned in this collateral manner.

The bill will be dismissed at the costs of the complainant.

BOHANAN and others v. GILES and others.

(Circuit Court, D. Nebraska. January 25, 1886.)

1. SPECIFIC PERFORMANCE—CONTRACT OF ANCESTOR—CONSIDERATION—PAYMENT TO EXECUTRIX—RIGHT OF PURCHASER.

When all the right and title of children and their grantees were received from the father of such children, they took such right and title subject to his contracts; and if that father, or his executrix, have received full payment for any land sold by him, they should be required to surrender to such purchaser the legal title.

2. SAME — EQUITY — PROTECTION OF INFANTS CANNOT INCLUDE INJUSTICE TO OTHERS.

Equity will not, even in the interest of minors, be tenacious of technicalities, when thereby gross injustice will result.

In Equity.

Brown Bros., for complainant.

L. C. Burr and *J. M. Woolworth*, for defendant.

BREWER, J. The facts in this case are few, and in the main undisputed, and the question a narrow one. In the spring of 1868 Jacob Dawson owned the lot in controversy. He made a written contract with George McKay by which he sold the lot to McKay for \$300, to be paid in mason work. Two hundred dollars of this was unquestionably paid during Dawson's life-time. He died July 22, 1869, leaving a will, by which he gave to his wife all his property, real and personal; "the same to be and remain hers, with full power, right, and authority to dispose of the same as to her shall seem meet and proper, so long as she shall remain my widow, upon the express condition that if she shall marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike." The widow became executrix. She subsequently remarried. Possession of the entire lot was given to McKay in 1868. During Dawson's life portions of the lot were deeded by Dawson and wife to parties to whom McKay had sold; the legal title to the rest remaining in Dawson at the time of his death. Subsequently, and on January 3, 1870, Mrs. Dawson