

ST. LOUIS TYPE FOUNDRY and others v. CARTER & GIBSON PRINTING Co. and others.<sup>1</sup>

(Circuit Court, N. D. Texas. May, 1887.)

INJUNCTION—RESTRAINING ORDER—BILL NOT STATING THE FACTS.

An injunction will be refused, and a restraining order previously issued will be quashed, when the bill does not set forth the conceded facts in the case.

On Motion for an Injunction *Pendente Lite*, and upon a counter-motion to dissolve a restraining order.

PARDEE, J. This case is submitted upon a motion for an injunction *pendente lite*, and a counter-motion to dissolve the restraining order heretofore granted *ex parte*. It is submitted upon an unsworn bill, alleging fraud, a sworn answer of Carter & Gibson denying fraud, and two exhibits of chattel mortgages,—one granted by the defendant printing company, dated September 15, 1885, in favor of defendants G. B. Carter and H. K. Gibson and the other chattel mortgage granted by the defendant printing company, November 18, 1885, in favor of the complainants on the same property, covered by the mortgage of September 15th aforesaid, and containing this provision:

“Except or subject, however, to a previous deed of trust given in October, 1885, to secure an indebtedness of nineteen hundred and twenty dollars to Carter & Gibson, parties who were formerly stockholders in the concern.”

In the sworn answer of Carter & Gibson is this averment:

“Further answering, these respondents say that the complainants were fully apprised of the purchase of respondent's said stock by the Carter & Gibson Printing Company, and of the said mortgage given to secure the payment of said notes; and not only were complainants aware of said purchase, but these respondents charge and allege that said complainants approved of said sale. And, further, these respondents would show to the court that before the said mortgage given to the complainants by Carter & Gibson Printing Company was executed, that the whole circumstance of the sale and mortgage to these respondents was fully explained to the complainants, and they had full knowledge of same; and, when complainants drew up their said mortgage to be signed by the Carter & Gibson Printing Company, (and respondents allege that the same was prepared by complainants or their attorneys in St. Louis, Mo.) they, with a full knowledge of respondents' mortgage, and with a full knowledge of the financial condition of the Carter & Gibson Printing Company, they expressly provided and inserted in said mortgage the following clause:—

Then reciting the clause above quoted, as to the mortgage to Carter & Gibson.

This showing of the case is not met by the complainants; who, ignoring the recitals in their own contract, and their alleged consent, seem to place their case upon the admitted allegations that the defendant company is and was insolvent; that part of their debt was contracted prior to the mortgage of September, 1885; and the further charge that the pur-

<sup>1</sup> Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

chase of stock from Carter & Gibson, and the mortgaging of the company's property to secure the indebtedness created by such purchase of stock, was fraudulent as to existing creditors. Without disputing any of these positions, it is sufficient to say that, as the case is presented to the court, the complainants consented to the purchase of stock from and the execution of the mortgage to Carter & Gibson, and as long as the complainants stand upon the mortgage of November, 1885, which is the basis of their bill, they are estopped from attacking the validity of the Carter & Gibson mortgage.

The injunction *pendente* asked for must be refused, and the restraining order heretofore granted upon a bill not setting forth the conceded facts in the case must be dissolved.

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CAMPBELL v. JAMES.

(Circuit Court, S. D. New York. July 14, 1887.)

1. MANDATE ON APPEAL—DISMISSING BILL—AMENDED BILL.

Where a cause was remanded to the circuit court from the supreme court, with directions to dismiss the bill of complaint, *held*, that such mandate included the whole bill upon which plaintiff's case rested, and that a decree of this court dismissing not only the original, but also the amended, bill of complaint, did not go beyond the mandate.

2. SAME—CORRECTING ERROR IN DECREE.

If there was any error in the decree, it could only be corrected at that term, or by proceedings for review under the rules or on appeal, not by motion at a subsequent term.

In Equity.

Marcus P. Norton, for plaintiff.

Stephen A. Walker, U. S. Atty., for defendant.

WHEELER, J. This cause was remanded from the supreme court at its October term, 1881, to this court, with directions to dismiss the bill of complaint. This court, after various delays in the taxation of costs, in its October term, 1883, entered a final decree dismissing the bill and amended bill of complaint, with costs taxed, and awarded execution for the costs. The plaintiff now in this April term, 1887, moves to set aside this decree, and for further proceedings. It is said, in support of this motion, that this court went beyond the mandate to dismiss the bill, by dismissing not only the bill, but the amended bill. It is understood, however, that the bill directed to be dismissed was the whole bill on which the plaintiff's case rested, including the original bill as amended, as well as the original bill as at first filed. Nothing would be accomplished by dismissing the original bill, and leaving the amended bill, on which the cause depended and was tried, still pending. Perhaps it would have been more proper to have made a decree dismissing the bill merely