

right to bring suits. He has received his appointment under the national banking laws from the comptroller of the currency, and is acting under such authority. In *Frelinghuysen v. Baldwin*, 12 Fed. Rep. 395, it was held, in a carefully considered opinion by Judge NIXON, that a receiver of a national bank is an officer of the United States, and as such may sue in the federal courts; and the same rule was adopted by Mr. Justice GRAY, at circuit, in *Price v. Abbott*, 17 Fed. Rep. 506, so that this plaintiff is entitled, in the light of these decisions, to sue in this court without regard to his citizenship or the amount involved. The demurrer and motion to dismiss are therefore overruled.

GRAND RAPIDS & I. R. Co. *et al.* v. SPARROW *et al.*

(Circuit Court, W. D. Michigan, S. D. October 2, 1888.)

1. CONSTITUTIONAL LAW—RIGHT TO JURY TRIAL—QUIETING TITLE.

Laws Mich. 1887, No. 260, p. 337, extending the jurisdiction of the court of equity to quiet titles to cases where the lands are unoccupied, is not unconstitutional, as depriving the defendant of the right to trial by jury, secured by Const. art. 6, § 27, as such constitutional provision extends only to cases where by the common law trial by jury was customary, and at common law ejectment did not lie where defendant was not in possession.

2. EQUITY—JURISDICTION—FEDERAL COURTS.

When defendant is not in possession, complainant has not a plain, complete, and adequate remedy at law, in which case suits in equity are forbidden by Rev. St. U. S. § 723, but the federal courts may administer the equitable remedy given by such Michigan statute.

In Equity. On demurrer to bill to quiet title.

In this case a bill in equity was filed in the proper state court to quiet the title to certain lands, and it appears upon the face of the bill of complaint that neither party is in possession of the premises in controversy. The defendants, having removed the cause to the United States circuit court, filed therein a general demurrer for want of equity. The Michigan statute regulating proceedings by bill in equity to quiet title, prior to 1887, was as follows:

"Any person having the actual possession and legal or equitable title to lands, may institute a suit in chancery against any other person setting up a claim thereto in opposition to the title claimed by the complainant; and, if the complainant shall establish his title to such lands, the defendant shall be decreed to release to the complainant all claim thereto, and pay costs, unless the defendant shall, by his answer, disclaim all title to such lands, and give a release to the complainant, in which case costs shall be awarded as the court may deem just." 2 How. Ann. St. § 6626.

By act No. 260 of the Session Laws of 1887, the foregoing section was amended so as to read as follows:

"Any person claiming the legal or equitable title to lands, whether in possession or not, may institute a suit in chancery against any other person, not in possession, setting up a claim thereto in opposition to the title claimed by

the complainant; and, if the complainant shall establish his title to such lands, the defendant shall be decreed to release to the complainant all claims thereto, and pay costs, unless the defendant shall, by his answer, disclaim all title to such lands, and give a release to the complainant, in which case costs shall be awarded as the court may deem just." Sess. Laws, 1887, p. 337.

T. J. O'Brien, for complainants.

Isaac Marston, for defendants.

SEVERENS, J., (*after stating the facts as above.*) Respecting the argument that the act of the legislature of Michigan (Laws 1887, No. 260, p. 337) extending the jurisdiction of the court of equity to quiet titles to cases where the lands are unoccupied, is unconstitutional, because it deprives the defendant of the right to trial by jury, secured by the constitution of Michigan, (article 6, § 27,) I think it must be held that this constitutional provision extends only to cases where by the common law a trial by jury was customary. It does not reach those cases where the remedy is given by statute. At common law, ejectment did not lie where the defendant was not in possession, and it is sustainable in such a case only by virtue of the statute in Michigan. The objection, therefore, cannot be sustained. *Tabor v. Cook*, 15 Mich. 322, and cases cited. It is further suggested that the federal court in equity will not take cognizance of such a case, because there is an ample remedy by ejectment at law. But this court will administer the remedies given by local statutes, where it can be done without violation of the principles it is accustomed to regard in the exercise of its jurisdiction. It is argued by the defendant that one of those principles is that the court will not take jurisdiction where there is a plain remedy at law; and it is said that ejectment is such a remedy. But, when the act defining the jurisdiction of the federal courts in equity was passed, and suits were forbidden when a plain, adequate, and complete remedy at law existed, (Rev. St. U. S. § 723,) it was the remedy furnished by the common law which was thereby intended. Supplementary statutes, giving new legal remedies, do not disturb the original equitable jurisdiction, nor supplant it. The courts in equity of the United States have undoubted cognizance of bills *quia timet* when the complainant is in possession. They may also take cognizance where he is not in possession, if local legislation gives the remedy in such a case, and the defendant is not thereby deprived of his right to a jury trial, according to the course of the common law. According to the case of *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. Rep. 496, the circumstance of the complainant's being in possession is not essential to the jurisdiction of courts of equity in such cases, and may be dispensed with. That being so, a bill in equity is maintainable, if there was not by the common law a plain, adequate, and complete remedy. There was no such remedy where the defendant was out of possession. The demurrer must be overruled, and leave be given to answer.

ADAMS *et al.* v. KEHLOR MILLING Co. *et al.*

(Circuit Court, E. D. Missouri, E. D. October 3, 1888.)

1. CORPORATIONS—INSOLVENCY—PREFERENCES—LIABILITY OF DIRECTORS.

The directors of a corporation known to be insolvent granted a preference to the estate of a deceased director and president of the corporation. The board, at the time of the preference, consisted of but three persons, two of whom were brothers of the deceased director, and one of whom was agent of the deceased's estate, and voted his stock at corporation meetings. One of the brothers was also a creditor of the estate. *Held*, that the preference was illegal, and that an unsecured judgment creditor of the corporation was entitled to recover of the two directors, brothers of deceased, who had voted for the preference, such percentage of his debt as he would have received if the sum wrongfully paid by way of preference had been divided *pro rata* among all the unsecured creditors, but was not entitled to such recovery against the other director, who was not present at any of the directors' meetings, and did not vote for any of the resolutions whereby the preference was secured.¹

2. EQUITY—PLEADING—MISTAKE IN RELIEF ASKED.

That complainants erroneously supposed themselves entitled to relief under a statute, when they were in reality entitled to relief on general equitable grounds, does not justify a dismissal of the bill.

In Equity. On petition for rehearing. For former opinion, see 35 Fed. Rep. 433.

Mills & Flitcraft, for complainants.

G. B. Burnett and Dyer, Lee & Ellis, for defendants.

THAYER, J. The matters urged in support of the motion for a rehearing, filed by J. B. M. Kehlor and Duncan M. Kehlor, were fully considered when this case was decided.

1. It did not appear to the court then or now, that the fact that complainants erroneously supposed themselves to be entitled to relief by reason of the provisions of section 744 of the Revised Statutes of Missouri, when they were in reality entitled to relief on general equitable grounds, as both the complaint and the proof showed, would justify a decree dismissing the bill. When it appears from the averments of a bill and from the proof that a complainant is entitled to relief, it is immaterial on what ground he predicates his right; whether it be the provisions of a statute or otherwise. It may be doubtful, however, whether the relief granted in this case was fairly embraced within the prayer of the bill for special relief, and the bill contained no prayer for general relief, as equity rule No. 21 requires. For these reasons complainant will be permitted to amend the bill in support of the decree, by adding a prayer for general relief.

2. Respecting the more important question whether the preference granted to the estate of J. C. M. Kehlor, was granted under such circumstances that it can be supported as a valid exercise of power by the directors, it will suffice to say, that after a careful reconsideration of that

¹See the note to the former report of this case, cited in the opinion, 35 Fed. Rep. 433. See, also, *Bernard v. Barney Myroleum Co.*, (Mass.) 17 N. E. Rep. 837, and note.