MUNIS V. HERRERA, 1862-NMSC-003, 1 N.M. 362 (S. Ct. 1862)

JOSE MIGUEL MUNIS
vs.
PABLO DE HERRERA et al.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF NEW MEXICO

1862-NMSC-003, 1 N.M. 362

January 1862 Term

Appeal from the District Court of Santa Fe County. The facts appear from the opinion.

COUNSEL

Ashurst, Watts and Jackson, for the appellant.

T. D. Wheaton, for appellee.

JUDGES

Knapp, J.

AUTHOR: KNAPP

OPINION

*{*363}* **{1}** Jose Miguel Munis filed his bill in chancery against Pablo de Herrera, Juan Gallegos, and Francisco Martinez y Belarde, in which it is averred that he had made a contract with Herrera and his wife, Maria Concepcion Romero, for the purchase of a tract of land in Rio Arriba county, and for which he was to pay twenty-eight dollars, and also build a house at a particular place on the land of Herrera. The contract was made with the wife, who owned the land and signed the agreement with the complainant. He had paid the twenty-eight dollars, but had not built the house, because a controversy had arisen concerning the location, but he was ready to build it at the spot he had agreed upon, but not where they required, and so he had refused to build it at all.

{2} Herrera had commenced a suit before Juan Gallegos, a justice of the peace of Rio Arriba county, upon the contract which was tried by a jury, and verdict was rendered, as averred in the bill, in favor of Munis, upon which judgment had been rendered for costs. Herrera had taken no appeal from the judgment, but he and the justice had corruptly and infamously combined together to practice a grave fraud and outrage upon him and

his rights; and the justice had issued an execution purporting to be based upon a judgment *{*364}* against him, and placed the same in the hands of Francisco Martinez y Belarde, the sheriff of the county, who had levied the same upon a horse belonging to Munis, worth one hundred and fifty dollars.

{3} The execution, of which a copy is given, shows that the judgment was that Munis should build the house according to his contract, or that he should pay ninety dollars to Herrera, and commanded the sheriff to compel him to build the house, or, in default thereof, that he be made to pay the sum of ninety dollars, by a levy upon his goods, etc. This execution is not signed or issued by the justice of the peace, but it is signed by the sheriff. The bill then denied the existence of any judgment whatever, and avers that the whole thing had been gotten up to defraud Munis of his property. It also prayed for an injunction restraining the parties from selling the horse; that it be returned to Munis possession, upon his giving a bond for its forthcoming as the court should direct; that "an account be taken and stated as between the said Herrera and Gallegos, upon the one part, and the plaintiff upon the other, of the damages inflicted," and that he have a decree for the amount so found.

{4} These are all the facts stated in the bill which it is necessary to notice. The defendants filed a general demurrer to the bill, which was overruled by the district court. Afterwards all the defendants filed answers, denying the fraud charged, and Herrera filed a cross-bill, demanding damages for the non-construction of the house. To this cross-bill there was a general demurrer interposed, which was sustained. The cause was then set down and heard upon the bill and answers, without replications, and the court found the judgment void, and made the injunction perpetual. From that decree this appeal was taken.

{5} The first question this court is called upon to decide is, did the district court decide correctly in overruling the demurrer of the defendants to the bill of complainant? The bill avers that the execution was void, and being void it had been levied upon the plaintiff's horse, and the sheriff was threatening to sell the same. The copy given with the bill shows several fatal defects upon the face of the execution. *{*365}* The judgment set forth in it shows that it was founded upon a contract to build a house, or to enforce a specific agreement concerning real estate, a matter over which the justice had no jurisdiction. The judgment is in the alternative, to build the house or to pay ninety dollars, which would require further judicial action. The command to the sheriff was in the same alternative form. Authorities need not be cited to show, that the lord chancellor of England could not, with all his power of sequestration of goods and imprisonment of the delinquent, enforce such a decree if rendered by himself, and promulgated from the woolsack. The execution was not signed by the justice of the peace, or any officer authorized to issue such a writ, but by the sheriff who had it in his hands to be executed. The rule is well settled that a writ void upon its face will not protect an officer who undertakes to execute the same, and he will render himself liable to an action of trespass if, in executing such void writ, any damages are sustained: **Savacool** v. **Boughton,** 5 Wend. 170 [S. C., 21 Am. Dec. 181]; **Mills** v. **Martin,** 19 Johns. 9, and the cases referred to in them, and the note to the latter case.

{6} The bill in this case shows clearly that the plaintiff might have recovered the possession of his horse by an action of replevin, or its value in an action of trover or trespass **de bonis asportatis,** together with all damages he might have sustained for its caption and detention. His remedy was, therefore, even more full and complete in an action at law than in a court of chancery. The rule would seem to be too well settled to need a citation of authorities to establish it, that courts of chancery never interfere to prevent a trespass, where there is a full and complete remedy at common law; yet we will refer to the following: Eden on Injunctions; Mitford Pleadings; Story Eq. Jur., secs. 33-39; Lube's Equity, 6, n. 1; **Earl Bathurst** v. **Burden,** 2 Brown Ch. 65; **Wiswall** v. **Hall,** 3 Paige Ch. 313; **Rees** v. **Parish,** 6 S.C. Eq. 56, 1 McCord Eq. 56; **Bussy** v. **McKie,** 7 S.C. Eq. 23, 2 McCord Eq. 23, 26 [S. C., 16 Am. Dec. 628]; **Bell** v. **Beeman,** 7 N.C. 273, 3 Mur. 273 [S. C., 9 Am. Dec. 604]; **Tollison** v. **West,** Harp. Eq. 93; **Samson** v. **Hunt,** 1 Root 207; **Staniford** v. **Dewit,** 1 Root 317; **Beardsly** v. *{*366}* **Curtice,** 1 Root 499; **Fitch** v. **Broomfield,** 1 Root 467; **Strong** v. **M'Donald,** 1 Root 364; **Bird** v. **Holabard,** 2 Root 35; **Pitkin** v. **Pitkin,** 7 Conn. 315 [S. C., 18 Am. Dec. 111]; **Bailey** v. **Strong,** 8 Conn. 278; **Beach** v. **Norton,** 9 Conn. 182; **Davis** v. **Hall,** 4 Monroe 28; **Ferguson** v. **Bullock,** 8 Ky. 71, 1 A.K. Marsh. 71; **Waggoner's Trustees** v. **M'Kinney,** 8 Ky. 479, 480; **Burns's Heirs** v. **Rowland,** 9 Ky. 232; **Cummins** v. **Boyle,** 24 Ky. 480, 1 J.J. Marsh. 480; **Keas' Rep.** v. **M'Millan,** 25 Ky. 12; **Watts** v. **Hunn,** 14 Ky. 267, 4 Litt. 267; **Williams** v. **Patterson,** 2 Tenn. 229, 2 Overt. 229; **Standifer** v. **McWhorter,** 1 Stew. 532; **Andrews** v. **Solomon,** 1 Pet. C.C. 356, 1 F. Cas. 899; **Coe** v. **Turner,** 5 Conn. 86; **Hardwick** v. **Forbes,** 1 Bibb, 212; **United States** v. **Myers et al.,** 2 Brockenbrough, 516.

{7} So, too, courts of equity do not interfere to prevent a trespass, unless it be averred and made apparent that the injury threatened to be committed will be irreparable, as the destruction of real estate, or an heirloom, whose value consists in its identity alone, or that the trespasser is irresponsible and unable to answer in damages in an action at law. Nothing of that kind is alleged in this bill, but, on the contrary, it might be safely inferred from the bill, that any one of the defendants was abundantly able to pay for a horse of the value of one hundred and fifty dollars.

{8} The prayer of the bill is also obnoxious to a fatal objection. It asks a court of chancery to usurp the prerogatives and jurisdiction of the courts of common law, to direct and command the sheriff, one of the defendants, "to restore the said horse to the possession" of the plaintiff, he "entering into bond for the forthcoming of said horse to abide the result of this cause." Courts of equity sometimes require parties in possession of property in dispute to give bonds that they will not commit waste or destroy the property; and at other times receivers are appointed to take charge of and manage the property in dispute during the pendency of the suit; but they do not interfere to take personal property from one party and give it to the other, before a hearing upon the bill. The writ of replevin was invented to accomplish that object, and it is issued only by a court of common law jurisdiction. The bill also prayed an account be taken and stated of the damages inflicted. *{*367}* Passing over the inartistic manner of pleading in the bill, in asking as if the parties were partners in trade in the horse, and seeking a dissolution and settlement of the partnership affairs, it is plain that the remedy for a trespass

committed is far more adequate and perfect at common law, where the jury could give as well exemplary as actual damages for the injury inflicted, than it could possibly be in a hearing before the chancellor, who has no such power. Courts of chancery, as well as those of common law, have sufficient business which legitimately belongs to each of them, without interfering with or usurping the jurisdiction of each other. Nor will the interest of the public be at all promoted by any other blending of the practice of the two courts.

{9} We are of opinion the district court erred in overruling the demurrer to the bill, and for that error the decree must be reversed, and the cause remanded to the district court for further proceedings, in accordance with this opinion.