Case No. 4,184.

DU PONT ET AL. V. BOSHONG ET AL.

{1 Wkly. Notes Cas. 378.}

Circuit Court, E. D. Pennsylvania. April 17, 1875.

INJUNCTION—RAILROAD—MORTGAGE OF—SHERIFF'S SALE OF—RECEIVER—CORPORATION ACT (OF ASSEMBLY) OF APRIL 7, 1870—JUDICIARY ACTS (OF CONGRESS) OF MARCH 2, 1793, AND MARCH 3, 1875.

1. Whether sheriff's sale is a proceeding in court under Act March 2, 1793, c. 22, § 5, v. 1 (Rev. St. 130), quaere.

[2. A railroad ran between two points in different states, and bonds, secured by a mortgage on its franchise, etc., had been negotiated; semble, that a sheriff's sale of that part of the road lying in one state, under a levy on a judgment obtained by a bondholder on his bonds, would be an unjustifiable abuse of a legal right, and restrained on a bill filed against him by another bondholder.]

Motion for an injunction to restrain sheriff's sale of part of a railroad. The bill, which was brought by a citizen of Delaware, averred that a mortgage upon its franchises, road bed, etc., had been executed by the Wilmington and Reading Railroad Company, which ran from Wilmington, Delaware, to a point near Reading, Pennsylvania, to secure coupon bonds of said company to the amount of $1,750,000, which had nearly all been negotiated. By the terms of the mortgage provision was made for selling the mortgaged property on default of payment of interest on these bonds. Default was made in the payment of the interest of the bonds, which became due January 1,1874. The defendants, citizens of Pennsylvania, who were bondholders, sued the company upon the coupons in the common pleas of Berks county, and obtained judgment thereon, and thereupon issued a writ of fieri facias, under which the sheriff of Berks levied on all that portion of the Wilmington and Reading Railroad lying in his county, its franchises, etc. The bill prayed for an injunction on behalf of the plaintiff, who was a bondholder, and that of other bondholders, to restrain said sale.

Sydney Biddle and Mr. McMurtrie, for the motion.

1. The effect of this sale will be to render the security of the mortgage on the railroad worthless, for it will dissever the ownership of a property, the nature of which will diminish enormously its value when owned by different parties. Moreover, a judicial sale on a judgment on a coupon will, under the doctrine of the Pennsylvania cases, discharge a mortgage, securing the payment of that coupon, on that portion of the railroad sold. McCall v. Lenox, 9 Serg. & R. 302; Com. v. Wilson, 34 Pa. St. 63. And the proviso in the act of assembly of April 7, 1870, § 1 (P. L. 58; Purd. Dig. p. 291, § 52), is unavailing, for it is evident from the above cases that this does not apply where the mortgage is a security for the debt upon which the property is sold. The only security left for the other bondholders will be the mortgage on that part of the road not levied on and sold, and this will be so depreciated as to be practically worthless. The defendants, by becoming holders of bonds secured by the mortgage, must be held to have contracted with the other bond-holders not to use any of their securities, or rather (according to the Pennsylvania doctrine) a portion of the same security, so as to injure them.

MCKENNAN, Circuit Judge. I have no doubt of your equity, if this court has jurisdiction.

CADWALADER, District Judge. The judiciary act of March 2,1793, is a direct bar to our interference, unless that act be repealed by the recent act of March 3, 1875, or the absence in the latter of the restriction contained in the former act be regarded as repealing that restriction.

2. The act of March 2, 1793, provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Rev. St. p. 136, § 720. Now this bill does not seek to restrain a "proceeding in any court of a state," but a private person, for the defendant need not have levied even after obtaining his writ of execution, and he could now order the sheriff to stay the execution. Besides, the act of 1793 was meant to apply only where the person seeking the injunction was or could have been a party to the suit in the state court; and the decisions only go to this extent. The restrictive section, being an exception to the general rule, must be strictly construed. Watson v. Jones, 13 Wall. [80 U. S.] 719, 720.

3. But this provision is absent from the act of March 3, 1875 [18 Stat. 470], and as this act is intended to embrace and take the place of all preceding legislation on the subject, the restriction must be considered as repealed.

Mr. Baer, of Reading, and Mr. Bullitt, contra.

The act of 1793 is a bar to the jurisdiction of the court. Peck v. Jenness, 7 How. [48 U. S.] 625. We admit that the proviso in the act of 1870 does not save this mortgage.

THE COURT (McKENNAN, Circuit Judge,) said that this was a very peculiar case, and, without deciding the question of jurisdiction, asked whether some amicable arrangement could not be made between counsel.

Mr. Bullitt suggested that a receiver should be appointed, and gave notice that he would move to that effect next week, and in the meantime agreed that the sale should be adjourned.

See Chapin v. James, 11 R. I. 86; Osgood v. Chicago, D. & V. R. Co. [Case No. 10,604].