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Case No. 4,663.

FARMERS' LOAN & TRUST CO. v. CENTRAL RAILROAD OF IOWA.

{4 Dill. 533;[1] 11 West. 428; 23 Int. Rev. Rec. 242; 5 Cem. Law J. 56.}

Circuit Court, D. Iowa. March 12, 1877.

EXECUTION OF DECREE PENDING AN APPEAL.

This court heretofore rendered a decree of foreclosure of a railway mortgage in favor of the plaintiff, as the trustee for all the bondholders; certain bondholders, dissatisfied with the decree, appealed to the supreme court. 93 U. S. 412. The supreme court refused to dismiss the appeal, which is still pending in that court, but vacated the supersedeas; certain bondholders, in March, 1877, applied for an order to compel the trustee to sell, under the decree, pending the appeal, against its judgment of what was best for all the bondholders, and the court refused to interfere with the discretion of the trustee. The same bondholders then applied to the supreme court for a mandamus to compel the circuit court to order the trustee to sell, pending the appeal, which the supreme court (March 27, 1877) refused. The same bondholders now (May term, 1877) renew their application for an order to the trustee to cause the special master to execute the decree, notwithstanding the pending appeal and the protest of other bondholders: *Held,* that individual bondholders, not parties to the decree, had no legal right to have the decree executed, pending the appeal, against the judgment of the trustee as to what was for the best interests of all the bondholders; but that the trustee was at liberty to execute the decree or not, pending the appeal, as in its judgment was best for all the cestuis que trustent.

Mr. Alexander and certain bondholders not parties to the decree of foreclosure heretofore rendered in this cause in favor of the trustee, applied, at chambers, in March, 1877, and again to the court at this (May, 1877) term, for a peremptory order on the trustee to cause the property to be sold under the decree, notwithstanding a pending appeal from that decree, and the protest of other bondholders against such a sale.

The facts material to an understanding of said application are as follows:

1. The Central Railroad Company of Iowa made a first mortgage, or trust deed (July 15, 1869), upon its road and property, to the Farmers' Loan and Trust Company, trustee, to secure certain first mortgage bonds. This mortgage contained a condition, that, upon default in payment of interest, the whole debt should become due, and that, upon request of the holders of a majority of the bonds, the trustee should foreclose. It also contained a condition, that, in case of foreclosure sale, at a like request, the trustee should purchase the property for the benefit of the bondholders secured by said mortgage, pro rata.

2. Afterward two other mortgages, the second and third, were successively executed to the sane trustee, upon the same property, and with like conditions.

3. Default was made in payment of interest, and some of the bondholders (not a majority) having requested the trustee to foreclose, which was declined, Charles Alexander and others, holders of some of the first mortgage bonds, brought their bill (June 2, 1874) in the United States circuit court for Iowa, to foreclose, making the trustee, the railroad

company, and others, defendants. This foreclosure suit was resisted by the action of the officers of said railroad company, and the said company filed two demurrers to the bill of foreclosure, one in July, 1874, and the other in January, 1875, both sworn to by Mr. Pickering, the superintendent of the road, and which were overruled by the court. The ruling of the court on the first demurrer, at the October term, 1874, is reported in Alexander v. Central Railroad of Iowa [Case No. 166]. The second demurrer to the bill of the trustee was on the same ground, and was likewise overruled at the rules, and the defendant company was required to answer, which it did in March, 1875, and the time allowed by the equity rules for taking proofs not having expired at the May term, 1875, of the court, the cause went to the October term, 1875. The bill of foreclosure filed by Alexander and others was consolidated with the bill filed by the trustee,—Alexander v. Central Railroad of Iowa [Case No. 166],—and the issues were made on the bill of the trustee, and the cause proceeded

thereafter in the name of the trustee alone. On January 7, 1875, a receiver was appointed, and took possession of the property, and operated the road.

4. Prior to the October term (1875) of the court, various efforts were made by the several sets of bondholders, the stockholders and creditors, to adjust their rights and differences so as to obtain an early and satisfactory decree. These efforts resulted in an agreement, by counsel representing several sets of bondholders, upon a decree, and the articles of incorporation to be adopted by the new company which should take the property from the trustee, when it should purchase the same at the sale, pursuant to the conditions and the terms of the decree. Messrs. Cowdrey, Sage, Buell, and other bondholders under the first mortgage, did not join in these arrangements, and requested, in writing, the solicitor of the trustee to present to the court their demand for an ordinary decree of foreclosure, for the payment of the bonds in the order of their priority, and if the request was not complied with, to take an appeal. {Sage v. Central R. Co. of Iowa} 93 U. S. 412. This request was presented, but no order was made in respect of it at that time.

5. On the 21st day of October, 1875, the court made uncontested orders for the amount due, and directing the receiver to pay certain creditors for materials and supplies furnished for, and services rendered to, the railroad company during its control by the receiver and prior to that, in effect giving to these claimants a priority over all the mortgages.

6. On the 22d day of October, 1875 (the next day), a final decree was rendered in the name of the trustee, without any actual hearing, adjudicating the amount due upon the several mortgages, directing the sale of the property by the master, and also directing the trustee to bid in the property for the amount due upon the first mortgage, as trustee, for the benefit of the first bondholders, but providing for an ultimate or contingent benefit to the second and third bondholders, general creditors, and stockholders. This decree is claimed by certain bondholders to have been a consent decree, which is denied by Cowdrey, Sage, et al. 93 U. S. 412.

7. On the 16th day of December, 1875, application in the name of the trustee, for the benefit of Sage, Buell, and Cowdrey, was made to the circuit judge, at his chambers in St. Paul, Minnesota, for the allowing of an appeal with supersedeas. This was denied by the judge, who stated, in writing, in connection with such denial, that since the October term had not ended but was adjourned to January 11, the persons for whose benefit the appeal was prayed could appear at that time and ask to be made parties and have the decree corrected. 93 U. S. 412.

8. Accordingly, Sage, Buell, and Cowdrey appeared at the adjourned term, in January, 1876, and moved for leave to intervene as complainants and to have the decree set aside. The motion to set aside the decree was overruled by the court (Dillon and Love, JJ.), but it was ordered that the petitioners be "permitted to become so far parties to the suit as to prosecute, if they so elect, for the protection of their said several interests therein, and

in their own names, an appeal to the supreme court from the decree entered herein on 22d October, 1875." An appeal was allowed, bond fixed at $2,000, and if to operate as supersedeas $1,000,000, and in either case to be given in thirty days.

9. The parties did not file any bond within the thirty days; but after the expiration of that time, they presented a new petition to his honor, Mr. Justice Miller, for an allowance of appeal with supersedeas, and it was allowed February 16, 1876, and bond for supersedeas approved by him in penalty of $20,000.

10. The appeal was perfected, and at the October term, 1876, of the supreme court, on motion therefor, that court vacated the supersedeas (93 U. S. 412), but overruled the motion made by the same party to dismiss the appeal, and the cause is still pending in that court.

11. After the supersedeas was vacated, it was ascertained that "The Financier," one of the newspapers in which the decree directed the notice to be published, had changed its name to "The Public." This fact being shown to the circuit judge, he made an ex parte order at chambers (January 8, 1877), directing the notice of the sale to be published in "The Public," instead of "The Financier." This order was made at the instance of Mr. Alexander and the said committee. The supersedeas was vacated by the supreme court December 18, 1876, and a certified copy of its order was filed in the office of the clerk of the circuit court at Des Moines in vacation, in January, 1877. Thereupon, shortly afterwards, a certain committee of bondholders asked the trustee to order the special master to proceed with the execution of the decree, make sale of the road, etc. The trustee failing to do this, the committee, without the consent of the trustee, directed the master to sell, claiming the right so to direct under equity rules 8 and 10. This the master refused to do. Thereupon the trustee petitioned the court for advice in respect to ordering the sale; and a committee of bondholders moved for an order directing the trustee and master to execute the decree. This petition and motion were presented to the circuit judge, at his chambers in Davenport, in February, 1877, and the hearing fixed, at Davenport for Saturday, March 3d, 1877, and Judge Love was requested by the circuit judge to be present and all parties were notified by telegraph. Judge Love accidentally missed the train, and in consequence was not present at the hearing, and by consent of counsel the papers and arguments were sent to him by the

master, unaccompanied with any opinion of the circuit judge. Judge Love's opinion, which is given below, was transmitted to the circuit judge, who annexed thereto his opinion, also given below, and the same were filed March 12th, 1877. The trustee's counsel (Mr. Turner), in his printed argument, opposed the application of the committee, because of the protest of certain other bondholders, and because, in Its judgment, the sale pending the appeal might lead to grave complications. The counsel for the, committee opposed this contention, and insisted that any bondholder had the legal and absolute right to have the decree executed (equity rules 8, 10) against the will or judgment of the trustee.

H. B. Turner, for the trustee.

R. L. Ashhurst and C. C. Cole, for a committee of bondholders.

LOVE, District Judge. I have gone carefully over the papers, and given them the best consideration I could. I proceed to give my impressions as to the disposition which ought to be made of the case: I have a very decided opinion that the court ought not, at present, and upon the showing made by the majority of the bondholders, to order the trustee to execute the decree.

The case is a peculiar one. The circuit court did not enter the decree upon any independent consideration of the rights and equities of the parties, but solely upon the assumption that the parties to be affected by it assented to the provisions of the decree. Now, it turns out that this assumption was not well founded, so far as the appellants (Cowdrey et al.), who are now resisting the execution, are concerned. The appellants are consequently seeking to get the decree reversed. It must be borne in mind that they have never yet had the judgment of any court upon their rights and equities under the mortgage. If the court had passed its independent judgment upon their rights and equities, and had made a decree disposing of them accordingly, and if they had failed to supersede the decree, I do not see that they would have any reason to complain, even though they could not, in the event of a reversal, be placed, as to their rights under the mortgage, in statu quo. But in the absence of any real adjudication by the court, and by virtue of a consent decree, to which they were not parties, to nave the property in which they are interested disposed of, so that in the event of a reversal they cannot be awarded the very. relief to which they would be entitled by "the terms of the mortgage, would seem to me not at all in accordance with the principles of equity.

Again, it is impossible for us to know what the decision of the supreme court will be, and what complications may consequently arise from the execution of the decree in the meantime. Will the supreme court dispose of the case with reference to the fact that the decree below has been executed, and the trust property placed beyond judicial control; or will it determine the controversy with reference to the state of the case and property at the time when the decree was entered below? I confess I do not see the way clear in the future, if the status quo of the trust property be changed, as required by the terms of

the decree. On the contrary, it appears to me that no complications can possibly arise, if the decree be not executed. Nor can I see clearly that any special injury will result to the parties in interest by reason of the delay. If the majority feel aggrieved by the refusal of the court to grant their present motion, I suppose they have their remedy; they can apply for a mandamus, and thus submit their case to the judgment of the supreme court, and if it be a matter of right in them, and not of discretion in the circuit court, they can thus obtain redress. If the circuit judge feels any embarrassment in regard to the matter, he might consider the propriety of reserving his determination till the regular term in May.

The circuit judge concurred, and annexed to the above opinion of Judge LOVE the following:

DILLON, Circuit Judge. 1. I am of opinion that individual bondholders, not parties to the record, and who are represented by the trustee, have no legal right to demand that the trustee shall order a sale under the decree and have the same executed, if the trustee is of opinion that the interest of all the bondholders would be best subserved by not having a sale made pending the appeal.

2. The question whether a sale should be made under the decree pending the appeal is one which primarily belongs to the trustee to determine, having in view the interest of all the cestuis que trustent. That question the trustee, by the petition, refers to the court Under the circumstances, I am of opinion the court ought not to order the trustee to cause a sale to be made at the present time; such is also the opinion of Judge LOVE, hereto annexed, and in which I concur. An order can be made on the foregoing petitions in conformity with these views, and the special master will cause the order to be entered of record, and the respective counsel to be notified hereof. We decide the matter now, so as to enable the parties who desire a sale to apply to the supreme court, at this term, for a mandamus to compel the execution of this decree, if they shall so desire.

Afterward, and at the May term, 1877, the application was renewed by Alexander and others, original complainants and bondholders, and the following opinion was announced, reported by a short-hand' reporter:

C. C. Cole, for the application.

Grant & Smith, contra.

Before DILLON, Circuit Judge, and LOYE, District Judge.

DILLON, Circuit Judge, in orally denying the application to compel the trustee to sell the road under the decree, said:

Mr. Alexander and certain other bondholders apply here for an order on the trustee, the complainant in this case, in whose favor a decree was rendered, directing the trustee to sell the road under the decree of the court heretofore rendered. That matter has been very fully argued in favor of the application by Judge Cole, and the trustee appears by its attorneys of record and submits the matter on its part for the consideration of the court. This is in reality a renewal of a similar application which was made and considered by Judge LOVE and myself last winter, at chambers. At that time we denied the application, and decided it promptly, so as to enable the parties, if dissatisfied with our judgment in the premises, to apply to the supreme court for a mandamus directing us to execute that decree. The facts are these, in brief: Originally, Mr. Alexander and certain other bondholders commenced this action of foreclosure in their own names, making the trustee a party defendant, on the ground that the trustee had improperly refused to execute the trust Subsequently the trustee came in and was made complainant, and the case of the individual bondholders was consolidated with that one, and thereafter the cause was prosecuted in the name of the trustee, taking no notice of the rights of Mr. Alexander, or the other individual bondholders.

Under a railway mortgage, where it is contemplated that bonds to a large number will be executed and negotiated, and where the holders of these bonds may be scattered over the whole face of the earth, it becomes very important to appoint a trustee, and the trust deed for that purpose usually prescribes the powers and duties of the trustee; and it is so in this case. Now, all the purchasers of these bonds must take under the rights which that instrument gives them; and the effect of this is that the trustee, while acting in the line of his duty, and within the scope of his powers, is a representative of all the bondholders, so that when the trustee in this case procured a decree of foreclosure, he procured it for the equal benefit of all. The court cannot entertain the application of specific bondholders, except where they come in and represent and make a case, showing that the trustee is guilty of a breach of trust or neglect of duty. Such proceedings were had that the court ordered a decree of foreclosure for the trustee, for the benefit of all the bondholders. Subsequently two or three of the bondholders—Sage, Cowdrey, and Buell—were allowed an appeal to the supreme court, and the appeal was directed by Mr. Justice Miller to operate as a supersedeas. 93 U. S. 412.

Afterwards, in the supreme court, the supersedeas was set aside, but the appeal was entertained, and is still pending in that court. While that appeal is pending, an application was made to order the special master to make a sale of the road, which was considered by Judge LOVE and myself. That application was refused. The parties went before the

supreme court, on an application for a mandamus to compel us to execute the decree by a sale of the road under it, and that application was refused. We have not seen the opinion of the supreme court, if one was written, but Judge Miller states to us distinctly that it was refused, on the ground that this trustee was the representative of all the bondholders—that it was for him to determine whether the best interests of all concerned would be promoted by a sale of the road, and that no single bondholder nor any number of individual bondholders, had a legal right to insist upon an execution of the decree. And he says, furthermore, that the supreme court is very strongly of opinion that the individual bondholders ought not to be allowed to become parties to the record in railway foreclosure cases, unless upon strong and clear reasons, for good cause. Their number is legion. One may may want this done, another may want that done; and such is the case here. The majority of the bondholders want a sale of the road, but a very large number in amount oppose that sale. Now, it is for the trustee to determine whether that sale ought to be made. And Judge Miller also states that the supreme court is of opinion that, if these bondholders do not like the trustee, and are dissatisfied, their remedy is to apply to have him removed, under the provision in that behalf contained in the trust deed, and get a trustee to carry out their wishes, if they can.

So far as this case is concerned, we think that what the supreme court has decided is conclusive against the legal right of these parties now applying to have this decree executed; but at the same time we wish to say, for the guidance of the trustee, that there is no restraint in the decree, or in what has been decided in either court against its execution, and that the appeal does not supersede it, and that it is at perfect liberty, whenever it sees fit, to execute that decree. As far as the court is concerned, considering the trouble this road gives us by reason of the controversies and factions among the bondholders, we would be glad if the trustee could see its way clear to execute that decree, and would be glad if it could get the road out of court, and into the hands of parties who could control it to their satisfaction.

As far as the suggestion is made that the trustee incurs any personal liability in so doing, we think there is nothing in that it comes to this—and we want the trustee to understand that—as far as we can see, it incurs no personal liability by executing the

decree. There is simply this question for the trustee to determine, viz., whether the interests of all the cestuis que trustent, or bondholders, would he best promoted by now executing the decree, or by allowing it to stand until the determination of the appeal.

We are, therefore, obliged, in conformity with what we heretofore decided, and for the reasons here stated, and in conformity with the opinion of the supreme court, as we understand it through Mr. Justice Miller, to refuse this application. I have directed the short-hand reporter to take down the substance of what I have said, and send it to the trustee.

There is an application here by certain bondholders to remove the trustee, and the court will entertain that and consider it, if they take the steps necessary to that end.

NOTE. Subsequently (August 31, 1877), Judge Love gave more at large the reasons for refusing to interfere with the discretion of the trustee, in respect to selling under the decree, pending the appeal in the Supreme Court. He said: "No one connected with the court has ever questioned the right of a party having a decree or judgment to have it enforced by execution; in other words, to have the fruits of his judgment or decree. Where the ordinary machinery of the court is sufficient to secure to a suitor the execution of his judgment, he has only to put that machinery in motion. Where the ordinary process of the court is inadequate to that end, the court, whether of law or equity, will undoubtedly give him the requisite assistance. But in the case now in question, it was perfectly competent for the complainant, the trustee, at any time after the vacation of the supersedeas granted by Judge Miller, to proceed with the execution of the decree without any action whatever by this court. This is unquestionable; and it is equally beyond question that neither this court, nor any judge of it, ever opposed the least obstacle to the execution of the decree by the complainant trustee. The court did refuse to order the trustee to proceed with the execution of the decree, but no order was necessary for that purpose. A thousand orders would not have added a scintilla of validity to the trustee's unquestioned right to execute the decree. No one ever denied or questioned its right to proceed. But when application was made to the court to order the execution of the decree, a very different question arose. The question then was, not whether the trustee had a legal right to proceed—which nobody questioned—but whether, under the then existing circumstances, the execution of the decree was a wise thing to be done? There was no necessity whatever for any order to have the decree executed. The bondholders, through their own chosen agents and trustees, had a decree which they could proceed to execute without the aid of the court. They had no right to ask the court to give them a power which they already possessed, in the most solemn form, by virtue of the decree itself. Nevertheless, the court might, by virtue of its power over all trusts and trustees, have ordered the complainants to proceed with the execution, though it would have been, in my judgment, an act of supererogation.

"But I have not the least hesitation in saying that, so far as I am concerned, I considered it unwise, under the circumstances of this ease, to execute the decree pending the appeal in the supreme court. I am still of that opinion.

"I will briefly state the reasons which finally governed the court in refusing the application:

"Let it be remembered that the decree in this cause was not rendered upon the independent judgment of the court upon the rights and equities of the parties under the mortgage contracts. This court never did determine that the decree was one which the terms of the mortgage contracts warranted. The decree was presented to us as a compromise, to which all the counsel before the court, representing various bondholders, assented. As such, the court accepted it, and ordered it to be entered. We know that the parties themselves have a right to waive particular conditions in the mortgages, and, by consent, have a decree entered, which the court might not consider exactly consistent with the terms of the mortgages.

"But in time it came to the knowledge of the court that there were first mortgage bondholders to the amount of $200,000 or $300,000, who had not been represented in the litigation, and who did not assent to the terms of the decree. These dissenting bondholders asked and obtained leave to appeal to the supreme court of the United States, and they are now, with the express leave of that court, prosecuting their appeal. 93 U. S. 412.

"Who does not see that there is more than ordinary ground to apprehend that a decree so entered may possibly be reversed? I trust it will not be, because I regard it upon the whole as equitable, and calculated to promote the substantial interests of all parties. But since I cannot say that it was a decree which the mortgage contracts warranted, and since I know that the appellants were not heard in the court below, I cannot but apprehend that it may be reversed. Now, suppose the decree shall be reversed, and suppose in the meantime it shall have been executed by a sale and conveyance of the property to the complainants, who can foretell what complications may arise? It is proposed by the execution of this decree, not only to transfer the title of the mortgaged property to the complainants as execution purchasers, but to organize a new corporation to take the title, with power to issue a new mortgage and new stock, all based upon the title thus acquired. What will be the character of this title if the decree be reversed? Will the purchasers, who are none other than the very parties to the decree, take a good title as innocent purchasers, notwithstanding the reversal; or will they be held to be purchasers with notice? And, in this case, will their title be of any validity whatsoever, in the event of a reversal of the decree under which they have by their own acts obtained title.

"These are grave questions. It was not for us to decide them, when the application was made to us to enforce the execution of the decree. It is not for us to decide them now. But they were questions to be considered by us when it was our duty to determine

whether it was a wise or unwise thing to order an execution of the decree by a reluctant trustee.

"It was certainly our duty, upon such an application, to consider what value capitalists would be likely to attach to the new securities, to be issued upon the basis of a title affected by the doubts suggested by the questions referred to. What credit would the new organization have, based upon this railroad property with a doubtful title? And would the end not be that the new organization, with the consent of the beneficiaries whom they represent, would, finally, in order to prevent a reversal, or avert the confusion and disorder which would result from it, be compelled to pay the appellants the amount of their bonds, with interest? In addition to those considerations, it occurred to me that no serious detriment could result to the bondholders by continuing the property in the hands of the receiver appointed by the court until the judgment of the Supreme Court could be obtained. It was within our own experience that all the roads which were under the control of receivers appointed by the court, had been operated and managed more economically, and

with decidedly better results, than they had previously been by the agents of the railroad companies. Whatever may have been the cause of this result, it was a fact which had been a matter of general observation and remark. And the court had no reason to suppose that the management of the Central Iowa would prove an exception, nor do we believe it has proved an exception.

"Such were the views which influenced my judgment, in the conclusion that the court ought not to take the responsibility of ordering an unwilling trustee to execute the decree. I proposed to place no obstacle in the way of the trustee, and to utter no word of discouragement; but to leave it, and the parties whom it represented, to take the responsibility which belonged to them. They had full legal right to proceed without the authorization of the court. I did not myself propose to order, or even advise, a step which I considered to be, in its consequences, hazardous and unwise.

"The fact that the trustee did finally proceed with the execution without any order of the court, shows that none was necessary, and that the trustee had been at perfect liberty so to proceed after the discharge of the supersedeas granted by Justice Miller."

[1] {Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.}