

HARRISON v. UNION PACIFIC RY. Co. and others.*

(Circuit Court, E. D. Missouri. September 21, 1882.)

1. CORPORATIONS—BONDS—GUARANTY.

The holder of bonds issued by a company in which he is a stockholder, and guarantied by another corporation, may recover the full amount due upon the bonds from the latter company, in case of default in payment by the former.

2. SAME—CONSIDERATION.

Where one railroad company holds stock in another, and the latter's road, when constructed, will become a feeder to the former's line, there is a sufficient consideration for the guaranty by the former of bonds issued by the latter to aid in the construction of its road.

3. SAME—CONSOLIDATION—LIABILITY OF CONSOLIDATED COMPANY.

A. and B., two corporations, united and formed a consolidated company, which did business under the name of B. A., at the time of the consolidation, was indebted to X. The consolidated company derived sufficient assets from A. to pay the debt. *Held*, that X. could recover the full amount of his claim against A. from B.

In Equity.

The plaintiff, Harrison, is the holder of 20 bonds of the Arkansas Valley Railway Company, guarantied by the Kansas Pacific Railway Company, on which he brought his action at law in this court to recover judgment against the Union Pacific Railway Company, alleging that the latter company is responsible upon said bonds as successor in liability under a contract of consolidation between said two last-named companies, and certain statutory provisions concerning the same. The said railroad companies brought their bill in equity to enjoin the plaintiff, Harrison, from further prosecuting his action and from negotiating said bonds, and also asking for an accounting between Harrison and the Arkansas Valley Railway Company for interest paid by said company to Harrison, as well as for a surrender of the bonds so guarantied, and of two Clay county bonds alleged to be held by him. The plaintiff, Harrison, filed a cross-bill, praying alternative relief, as follows:

(1) If the court holds that the Union Pacific Railway Company is liable directly to Harrison, that the injunction be dissolved, and he be permitted to proceed with his action at law. (2) If, on the other hand, the court holds that the company is liable only to the extent of the property received from the Kansas Pacific Railway Company, then that the trust be fastened on that property, and for a discovery as to its character, identity, and present value.

*Reported by B. F. Rex, Esq., of the St. Louis bar.

The material facts with respect to the 20 bonds sued on are as follows:

(1) In 1873 the Arkansas Valley Railway Company was a corporation existing under the laws of Colorado, and had authority to construct a railroad commencing on the line of the Kansas Pacific Railway at Kit Carson, and extending to Pueblo. (2) The construction of this line was regarded as of great importance to the prosperity and success of the Kansas Pacific Railway Company, to whose line it would become a feeder. (3) In order to accomplish this object bonds were issued by the Arkansas Valley Railway Company, and guaranteed by the Kansas Pacific Railway Company, and it was agreed by the former company that any one subscribing to the scheme \$7,500 should receive \$10,000 first mortgage bonds of the Arkansas Valley Railway Company, guaranteed by the Kansas Pacific Company, \$1,000 of Clay county municipal bonds, and stock of the Arkansas Valley Railway Company, \$7,500, amounting to \$18,500, nominal value, in consideration of a cash payment of \$7,500. (4) Harrison, then being a director in the Kansas Pacific Railway Company, and that company being a stockholder in the Arkansas Valley Company, subscribed to the scheme \$15,000, and accordingly became entitled to and did receive \$20,000 of the bonds guaranteed by the Kansas Pacific Company, \$15,000 stock in the Arkansas Valley Railway Company, together with \$2,000 Clay county bonds. (5) The railroad bonds were secured by mortgage upon the road, and when default in the payment of interest had occurred the trustees on the mortgage sold out the road and its belongings, and the proceeds were divided out among the bondholders, including Harrison, who credited on his bonds the sum he received. The allegations of the cross-bill with respect to the consolidation, in so far as it is deemed necessary to state them, are to be found in the opinion of the court.

The case is before the court on demurrer to the cross-bill of Harrison, which, it is conceded, presents all the material facts.

Dyer & Ellis and *George M. Block*, for Harrison.

J. P. Usher and *H. D. Wood*, for the railroad company.

McCRARY, C. J. The intention of the Arkansas Valley Railway Company was to sell the stock to Harrison for less than its par value; *i. e.*, to give him \$15,000 in stock, 20 bonds of the company, guaranteed by the Kansas Pacific Company, and the Clay county bonds, all for \$15,000 in cash. There is nothing in the statutes of Colorado, where the corporation was created, to forbid the sale of stock at less than par, nor was Harrison forbidden to purchase the stock by reason of the fact that he was already a stockholder and director in the Kansas Pacific Railway Company. The transaction was therefore valid as between the corporation and Harrison, whatever the right of the creditors of the corporation as against Harrison may be. *Scovill v. Thayer*, 4 Morr. Trans. 179; S. C. 11 FED. REP. 198, note.

Such being the case, it cannot be said that Harrison obtained the bonds without consideration. He bought all the securities above mentioned for \$15,000 in cash, and although the face value of the securities purchased is much more than \$15,000, it does not follow that they were intrinsically worth more than that sum; and, in fact, the cross-bill alleges, and the demurrer admits that they were not intrinsically, nor in the market, worth the sum paid for them. It is, at all events, clear that the owner of such paper is at liberty to sell it at any price he pleases, unless prohibited by statute. The Kansas Pacific Company is bound by its guaranty of said 20 bonds. The pecuniary interest which that company had in the Arkansas Valley Company, and in the construction of the road from Kit Carson to Pueblo, was a sufficient consideration for the guaranty. It follows that Harrison may recover upon the bonds unless the railway company has shown some sufficient defense in equity. It is said, and it is true, that if the Union Pacific Railway Company is compelled to pay the sum due on these 20 bonds it will have the right to recover from the stockholders of the Arkansas Valley Company, including Harrison, to the extent of their unpaid stock in that corporation. But in this case there can be no decree for contribution, because the necessary parties are not before us, and the pleadings are not framed with a view to such a decree. If the Union Pacific Company is liable for the sum claimed by Harrison, it must make payment and then proceed against the stockholders, including Harrison, for contribution.

Our conclusion is that no sufficient defense, either at law or in equity, to the bonds in question has been shown, and that as against the Arkansas Valley Company, the maker, and the Kansas Pacific Company, the guarantor, of said bond, the plaintiff, Harrison, has a good cause of action.

The remaining questions are, what is the extent of liability of the Union Pacific Company, and what measure of relief is Harrison entitled to against it? The parties are now in a court of equity; and, if their rights can be determined by a decree in the present case, that is sufficient for our present purpose. It may be that there is a right of action against the consolidated company; but if so, we think it is not exclusive. If a creditor of the original corporation sees fit to proceed in equity to subject the property of that corporation in the hands of the consolidated company, he has a clear right to do so.

By the articles of consolidation it is expressly provided that "nothing herein shall prevent any valid debt, obligation, or liability of

either constituent company from being enforced against the property of the proper constituent company, which, by force of these articles, becomes the property of the consolidated company." The cross-bill alleges and the demurrer admits that the consolidated company has received from the Kansas Pacific Company all its property, amounting to more than \$10,000,000, and that the original corporation has practically ceased to be, and is merged in the consolidated company, having now no officers upon whom service can be made, and no property out of which an execution can be satisfied. We are of the opinion that, under such circumstances, the consolidated corporation is liable in equity for the debts of the original corporation; at least, to the extent of the value of the property received from it. If the new corporation admits (as it does by its demurrer in this case) that it has received to its own use the property of the original corporation to an amount largely in excess of the sum claimed, no inquiry is necessary, and relief may be had in the form of a decree for the sum due. If this be denied, (as it may be by an answer,) the court will hear the proof, and in that case it would become the duty of the Union Pacific Railway Company to answer the interrogatories embodied in the cross-bill.

The demurrer to the cross-bill is overruled, and if the Union Pacific Company stands upon the demurrer, there will be a decree for the sum due upon the bonds, without prejudice to the rights of the said company to proceed against the stockholders of the Arkansas Valley Railway Company, including Harrison, to compel contribution. We do not determine the question whether a creditor of the Kansas Pacific Company may maintain an action at law against the Union Pacific Company to recover his debt. The correct determination of that question depends somewhat upon the construction of certain statutes, state and federal, some of which are not before us, and the decision is not necessary in the present case.

TREAT, D. J., concurring.

FLETCHER v. NEW YORK LIFE INS. Co.²

(Circuit Court, E. D. Missouri. September 28, 1882.)

1. INSURANCE—CORPORATIONS—COMITY.

A foreign insurance company cannot withdraw itself from the operation of the statutes of a state in which it does business, by the insertion of clauses in its policies.

2. SAME—APPLICATION FOR INSURANCE—FRAUD.

Where, by the terms of a policy of insurance sued on, an application signed by the assured is declared to be the sole basis thereof, evidence is admissible to show that false statements contained in the application were inserted without the applicant's knowledge by an agent of defendant, and that the applicant's signature was procured by such agent by fraud.

3. PLEADING—REPLICATION—SURPLUSAGE.

Where sufficient probative facts appear, a reply is not demurrable because it also contains allegations as to mere matters of evidence.

Demurrer to Replication.

This is a suit upon a policy of insurance upon the life of C. S. Alford, deceased, by his executor, Thomas C. Fletcher. Defendant alleges in its answer that it is a foreign corporation; that said Alford made a written application to it for insurance upon his life, and that the application was signed by him, and was attached to and made a part of said policy when issued; that said application contained two false answers to questions material as to the risk, therein printed. and the following clause, viz. :

"And I do hereby agree that the statements and representations contained in the foregoing application and declaration shall be the basis of the contract between me and the said company,—the truthfulness of which statements and representations I do hereby warrant; and that if the same, or any of them, are in any respect untrue, the policy which may be issued thereon shall be void, and all money which may have been paid on account of such insurance shall be forfeited to said company; and inasmuch as only the officers at the home office of the company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, it is expressly understood and agreed that no statements, representations, or information made or given by or to the person soliciting or taking this application for a policy, or to any other person, shall be binding on this company, or in any manner affect its rights, unless such statements, representations, or information be reduced to writing and presented to the officers of the company, at the home office, in the above application."

*Reported by B. F. Rex, Esq., of the St. Louis bar.