

JOHNSON and others v. FLORIDA TRANSIT & PENINSULA R. Co.
and others.

(Circuit Court, N. D. Florida. December 24, 1883.)

STATUTE OF LIMITATIONS—LACHES.

Application to file a supplemental bill of complaint denied, both because of the bar of the statute of limitations and of the laches of the complainants.

In Equity.

J. C. Cooper, Chas. Cooper, John T. Walker, Wilkerson Call, and E. M. L. Engle, for complainants.

Horatio Bisbee, Jr., Geo. Tichnor Curtis, and John A. Henderson, for respondents.

SETTLE, J. Waiving the objection to the new bill, that most of the matters therein stated are not supplemental to the relief prayed for in the original bill, the court is of opinion that the application should not be granted, both because of the bar of the statute of limitations and of the laches of the complainants.

Although it is contended that the bonds are not yet due, and that the complainants were not compelled to assert their rights at an earlier day, yet the acts complained of, and upon which relief is now sought, occurred 17 years since; and the original bill, upon which it is now sought to graft the supplemental bill, was filed 10 years since. Reasonable diligence would have brought to the knowledge of the complainants the material fact now sought to be introduced for the first time into the original litigation. As is well said in a recent decision of the supreme court of the United States:

“The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society.”

The application to file a “bill of supplement, revivor, and amendment,” is denied.

In the suit of *Henry S. Higgins and Charles S. Adams v. J. S. Driggs, Adm'r, and E. Higgins*, demurrer was sustained.

In re LETCHWORTH and others.

(District Court, N. D. New York. November, 1883.)

BANKRUPTCY—MORTGAGEE PROVING DEFICIENCY AFTER FORECLOSURE—REV. ST. § 5057.

Where a mortgage creditor of a bankrupt, after notice to the assignee, asks for and obtains an order of the court allowing him to foreclose his mortgage by proceeding in the state court, the assignee being made a party and the complaint praying that the deficiency arising upon a sale of the mortgaged premises be ascertained and plaintiff permitted to prove the same in bankruptcy, and no objection is made until the creditor files proof of the amount of deficiency in the bankrupt court, his action will be considered a sufficient compliance with section 5075 of the Revised Statutes. *In re Herrick*, 17 N. B. R. 335, distinguished.

In Bankruptcy.

Charles F. Durston, for the assignee.

Richard C. Steel, for the creditor.

COXE, J. A mortgage creditor of the above-named bankrupt applied to this court, on the eighteenth day of May, 1875, for permission to foreclose, to make the assignee a party to the foreclosure proceedings, and to prove the deficiency arising on the sale as an unsecured debt against the estate of the bankrupt. Notice of this application was duly served on the assignee. The court thereupon made an order permitting the foreclosure of the mortgage and the sale of the mortgaged premises. An action was thereafter commenced in the supreme court of the state, the assignee being made a party defendant. The complaint prayed, *inter alia*, for a judgment that the deficiency arising upon a sale of the mortgaged premises be ascertained and that the plaintiff be permitted to prove the same in bankruptcy. Before the foreclosure sale, the mortgagee proved his debt as a secured creditor, the proof stating all the foregoing facts. After the sale he filed a supplemental proof reciting the additional fact that there was a deficiency, amounting at the date of the bankruptcy to \$789.28. The assignee asked for a re-examination of the proof, and the question arising upon his petition, and the answer of the creditor was, upon conceded facts, certified into court by the register.

The question is—Were the creditor's proceedings so irregular as to preclude him from proving his debt for the deficiency? Section 5075 of the Revised Statutes provides:

"When a creditor has a mortgage of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property to be ascertained by agreement between him and the assignee, or by sale thereof, to be made in such manner as the court shall direct," etc.

It is insisted by the assignee that the creditor has forfeited the right to prove his debt for the alleged reason that the deficiency was not ascertained by a sale made pursuant to the directions of the dis-