

PERRY and others v. CORBY and another.¹*(Circuit Court, E. D. Missouri. October 1, 1884.)*

GENERAL ASSIGNMENT BY INSOLVENT DEBTOR—REV. ST. MISSOURI, § 354, CONSTRUED.

A conveyance which is not in terms a voluntary assignment for the benefit of creditors, but is in fact a conveyance of the entire property of an insolvent debtor to one creditor, is, whatever its form may be, within the purview of section 354 of the Revised Statutes of Missouri, and will inure to the benefit of all creditors.

In Equity. Motion to set aside order overruling demurrer to bill. For a statement of facts, and the opinion upon the demurrer, see 21 FED. REP. 15.

Mills & Flitcraft, for complainants.

John D. Johnson and Smith P. Galt, for defendants.

BREWER, J., (*orally.*) In the case of Perry against Corby, in which the demurrer to the bill was overruled by me, after argument last spring, a motion was made to set aside that order, and the question involved was heard before the entire bench. That question is whether a conveyance which is not in terms and according to the old technical definition a "voluntary assignment for the benefit of creditors," and yet which is in fact a conveyance of the entire property of the insolvent to one creditor, is within the purview of that statute of Missouri which provides that every voluntary assignment for the benefit of creditors shall inure to the benefit of all creditors. My own views were expressed in the opinion that I filed; and yet in the decision I followed the ruling which had been laid down by my predecessor in office. The case was argued before Mr. Justice MILLER and the entire bench, and I am authorized by Mr. Justice MILLER to say that he agrees with Judge McCrARY, and holds that such a transfer, although there is technically no assignee, so long as it is made of the entire property of the insolvent, and is not a mere giving of security by way of mortgage, contemplating payment by the mortgagor in the future, and the retention of possession by him, comes within the scope of the statute, and is to be treated as an assignment, and inures to the benefit of all the creditors.

As to the other questions, he agrees with the views I expressed. Therefore the motion to set aside the order overruling the demurrer will be denied.

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

LAFAYETTE Co. and others v. NEELY and others.

(Circuit Court, W. D. Tennessee. October 6, 1884.)

1. EQUITY PRACTICE—CORPORATIONS—NINETY-FOURTH EQUITY RULE—TENNESSEE CODE, §§ 1492-1497.

Where a Tennessee corporation has been dissolved by a foreclosure sale of its franchises, but its existence is continued by statutory provision for a term of five years, during which suit may be brought in its name to wind up its affairs, a bill by stockholders is well filed under the ninety-fourth equity rule, if it appear that the suit is not a collusive one, and that the plaintiffs have applied to such of the late directors as they can reach to bring the suit, and they have refused.

2. SAME SUBJECT—STATUTORY RECEIVER UNDER TENNESSEE ACT, 1852, c. 151—TENNESSEE CODE, § 1101.

But where the corporation was a railroad company, indebted to the state for aid under the internal improvement acts of 1852, and was, at the time of the dissolution, in the hands of a receiver appointed by the governor, the receiver was, under those acts, by operation of law, the manager of the company, and the proper person to bring suits in the name of the dissolved corporation, as required by the Tennessee Code; and if the suit be against the receiver himself to call him to account, the ninety-fourth equity rule would not apply, as it would be unreasonable to ask him to sue himself. The stockholders, therefore, may proceed in their individual right without compliance with the ninety-fourth rule in that respect.

3. EQUITY—TRUSTS—RIGHT OF BENEFICIARY TO AN ACCOUNT—ACCOUNTING WITH EXECUTIVE DEPARTMENT.

It is quite a matter of course that a trustee shall, in a court of equity, pass his accounts whenever demanded by the beneficiary; and he cannot escape an account by showing that the judgment creditors of the beneficiary will absorb the fund, or that he is a statutory receiver, authorized to report to the governor of the state, to whom he has made a satisfactory report. An act of the legislature conferring exclusive power over such account on the executive department would probably be unconstitutional.

4. SAME SUBJECT—UNSATISFACTORY ACCOUNT.

But where it appears that the beneficiary has not been injured by the too general statement of the account, and a failure to file vouchers in the executive department, and there is no showing of false or fraudulent conduct, a court of equity will not, for the mere satisfaction of the plaintiff, require the receiver to account more in detail, and file his vouchers, when the plaintiffs have been foreclosed of their interest in the fund by a mortgage sale.

5. EQUITY PLEADINGS—GENERAL ACCUSATION OF FRAUD.

Mere epithetic accusations of fraud will not suffice in equity pleading, but the facts must be stated which show the conduct complained of to be fraudulent.

6. MORTGAGOR AND MORTGAGEE—ACCOUNT FOR RENTS AND PROFITS—FORECLOSURE SALE—RIGHT OF PURCHASER—SENIOR AND JUNIOR MORTGAGES.

Where a prior mortgagee is in possession, and pending his possession there is a foreclosure sale under a subsequent mortgage, a person buying the property subject to the prior lien, in the absence of any agreement or other circumstance fixing the amount of the incumbrance, is entitled to an account with the senior mortgagor to ascertain the amount due to him at the time of the sale from the mortgagee, and his bid, presumably, included only the amount found due on that accounting.

7. SAME SUBJECT—CREDITS ALLOWED—PERMANENT IMPROVEMENTS.

On such accounting the senior mortgagee will be allowed credits for all permanent improvements and necessary expenditures during his possession, and all incumbrances paid before the sale.

8. SAME SUBJECT—RAILROADS—TENNESSEE INTERNAL IMPROVEMENT ACTS OF 1852—TENNESSEE CODE, § 1101—STATE RECEIVER.

This principle applies to a receiver in possession of a railroad under the Tennessee internal improvement acts of 1852, (Code, § 1101,) during whose