

It is insisted that the relation of the complainant and defendant bank was that of principal and agent; that the complainant bank, by its instructions to collect and remit, never agreed, by any implication, to stand on any other than a strictly fiduciary relation; and that such relation is a different one, and one of higher trust, so to speak, than the relation of a depositor or other debtor of the bank. We have seen that the authorities do not sustain this distinction as a ground for a preference in the distribution of the general assets of a broken bank; and, upon principle, can such a preference be maintained? It is common, every-day business for banks to employ each other as collection agencies; and they perform this duty in no exceptional way, but in the same manner in which they do the general business of the bank. A bill is collected by a bank, and the proceeds mingled with the general assets, so as to be entirely undistinguishable, and with no ear-marks or means by which it can be identified or traced into any new investment. The bank breaks. Now, on what principle does he stand on other or higher ground than he who, with faith in the solvency of the bank, deposits his money and loses it? The contention here is not supported either by sound reason or authority.

Another question is made and argued in the case. It is that section 5236 of the Revised Statutes of the United States, in chapter 4, in reference to the dissolution and receivership of national banks, stands in the way of complainant's contention here. If, however, the views expressed are correct, they are decisive of the case, and this question need not be discussed. The bill is dismissed, with costs.

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**CENTRAL TRUST CO. OF NEW YORK v. MARIETTA & N. G. Ry. Co., (HIA-WASSA Co., Intervener.)<sup>1</sup>**

(Circuit Court, N. D. Georgia. July 6, 1891.)

**RECEIVER OF RAILROAD COMPANY—PURCHASE OF ROLLING STOCK.**

Where the property of a railroad company is placed in the hands of a receiver, and rolling stock is found on the railroad, placed there by another corporation, the principal stockholders in which are also controlling stockholders in the railroad company, and the rolling stock is claimed by the corporation placing the same on the road, and no contract of sale is shown, *held*, that the receiver should be authorized to purchase the same and pay the value of the rolling stock when the property went into the receiver's hands.

**In Equity.** Bill to foreclose a railroad mortgage.

*Butler, Stillman & Hubbard* and *H. B. Tompkins*, for complainants.

*Hoke & Burton Smith*, for intervener.

**NEWMAN, J.** When the Marietta & North Georgia Railway was placed in the hands of a receiver by order of this court there was on the

<sup>1</sup>Reversed in circuit court of appeals, 48 Fed. Rep. 850.

road a considerable amount of rolling stock, and as to certain engines and cars the Hiawassa Company, by intervention, brought a claim of ownership. The evidence shows that the manufacturers of the engines and cars sold the same to the Northeastern Improvement Company. The contract between the manufacturers and the Northeastern Improvement Company was a conditional sale, the manufacturers reserving title. There was some question as to execution of papers and record, but that is immaterial here. There appears to be a balance of purchase money on two engines due the makers of the same, which will be controlled and protected in the decree. The rolling stock in question was found, as stated, on the Marietta & North Georgia Railway when the receiver of the court went into possession of the same. It was placed on the road by the Northeastern Improvement Company. No contract of purchase by the railway company was ever made. It was simply placed on the road by the improvement company, without contract whatever with reference thereto. George R. Eager was the contractor to build the Marietta & North Georgia Railway. He was the president and largely interested in the Northeastern Improvement Company. While not himself an officer of the railway company, he and his friends, he states, controlled a majority of its stock. It appears further that the Hiawassa Company was in some way an offshoot of the Northeastern Improvement Company. When the special master, in a former report made to the court, reported in favor of the Hiawassa Company as to its ownership of this property, and recommended, as the property was indispensable to the operation of the road, the purchase of the same by the receiver, the court, in view of the above-stated facts as to Eager's relationship to the corporation in interest, and his further relation to the matter as contractor to build the road, referred the question back to the special master for a thorough investigation and report as to the relation of these corporations to each other, and Eager to them all. The second report made by the special master, now under consideration, finds nothing in the matters alluded to and the relations of the parties to affect the honesty and fairness of the transaction. He finds them to be distinct persons in law, and the evidence taken by him sustains this view, and shows that, while Eager occupied the relation stated to all the corporations, careful accounts were kept between them as to all their dealings; and, so far as can be ascertained, shows that the legal principles applicable to different individuals under the same circumstances should be applied to parties in interest here. The question is, when rolling stock is placed upon a railroad without any contract whatever in reference thereto, and the railroad allowed to use the same in its ordinary operations, is it a sale? If, from the facts stated, the delivery of this property amounted to a sale, it is conceded that the act of the legislature of Georgia of 1889, in reference to conditional sales of property to railroads, and requiring record of the contract within six months in order to make it a valid contract as to third parties, has not been complied with, and the intervener here would have no other rights than that of a general creditor for the value of the property.

The contention for the Central Trust Company, which opposes the claim of the intervener, is that where rolling stock is placed on a railroad, and the railroad proceeds to use the same as its own in its daily business, sending it from one railroad to another, it implies necessarily an intent to sell; that, the rolling stock becoming a part of the railroad itself, and absolutely essential to its operation, no mere contract of bailment will be implied, but a contract of sale. The superintendent of the railroad at the time the rolling stock in question was placed on the same, who is now receiver of the court, testified before the special master that none of this property belonged to the railroad, and Eager testified that it belonged to the Northeastern Improvement Company until it was sold by it to the Hiawassa Company. To hold that this property is the property of the railway company it is necessary to do it upon the presumption arising from delivery and possession, as stated above. No price was ever agreed upon between the railway company and any one else as the sellers of the same. No agreement was ever made on the part of any of its officers to buy the same. The transaction lacks those essential elements of a sale, and such evidence as there is to throw light on the subject I think negatives the idea of any intent to sell or to purchase. The Central Trust Company, the trustees for the bondholders under the mortgage executed in 1887, contends that its mortgage, which embraces not only the property of the railroad in existence at the time, but after-acquired property as well, has attached to the rolling stock in question, and by its counsel the foregoing objections were presented. The lien of the mortgage could only attach to property "acquired" by the railroad, and some title must vest in the railway company of course, in order that the mortgage should cover it. I am unable to find any such title vested in the railroad company under the facts, and presumptions that arise from facts, as would authorize me to hold that any title has been acquired by the railroad company to this property.

The special master has, in his second report, found the value of the property at the time the railway went into the hands of a receiver, and reports that as a proper amount to be paid by the receiver for the same. This report is in conformity with the views of the court as to the time and manner of finding the amount to be paid for this property by the receiver on the purchase of the same, which it is conceded is necessary in order to carry on the operations of the railroad. All the exceptions must be overruled, and the report confirmed.

GROSS v. GEORGE W. SCOTT MANUF'G Co. *et al.*

(Circuit Court, N. D. Georgia. July 6, 1891.)

**1. ACTION TO SET ASIDE DEED—WANT OF EQUITY—DEMURRER.**

A bill to compel defendants to reconvey to plaintiff land which formerly belonged to him is not demurrable for want of equity from the mere fact that it shows that plaintiff conveyed the land to C., who then conveyed to defendants, where plaintiff seeks relief on the ground that defendants secretly employed and paid C. to purchase the land, knowing at the time that he was plaintiff's agent to sell, and that plaintiff relied on him for information and advice as to the value of the land.

**2. SAME—FALSE REPRESENTATIONS.**

The bill alleged that the land was of great value for the phosphate therein; that defendants stated to C. that they did not want to buy the land for phosphate purposes, which statement C. repeated to plaintiff; and that defendants knew this statement was not true, but their object in making it was to deceive plaintiff as to the true value of the land. *Held*, that these allegations are sufficient, as against a demurrer, to show that defendants knew of C.'s statements to plaintiff, and caused them to be made.

**3. SAME—DILIGENCE IN BRINGING SUIT.**

There is no lack of diligence shown on plaintiff's part when the bill alleges that those transactions did not come to his knowledge until October, and the suit is brought in November.

**4. SAME—TENDER—EXCUSING FAILURE.**

Failure to allege tender of the purchase money before suit is not fatal to such bill, where it does allege that tender was not made because plaintiff believed it would be unavailing, and that he is ready to repay the money with interest upon the execution of a deed to him by defendants.

**5. PARTIES—NON-JOINDER—INHABITANTS OF ANOTHER DISTRICT.**

The bill is not demurrable for non-joinder of the agent, C., who is a resident of a different district from defendants. Rev. St. § 737, provides that non-joinder of parties who are not inhabitants of nor found within the district shall not constitute matter of abatement, though the judgment rendered shall not conclude them, and Equity Rule 47 authorizes the court to proceed without parties, otherwise necessary, who cannot be joined because they are out of the jurisdiction of the court.

In Equity. On demurrer.

Bill by Charles H. Gross against the George W. Scott Manufacturing Company and the De Soto Phosphate Mining Company to compel a reconveyance of land.

*Bisby & Rinehart*, for complainant.

*Candler, Thomson & Candler*, for respondents.

NEWMAN, J. The case made by the bill is substantially as follows: Charles H. Gross, complainant, is a citizen of the state of Pennsylvania. The George W. Scott Manufacturing Company and the De Soto Phosphate Mining Company, defendants, are corporations organized and existing under the laws of the state of Georgia, and citizens of that state. That complainant was in October, 1889, the owner of certain lands on Peace river, in the state of Florida. That one John Cross, a resident of the state of Florida, had been continuously for several years prior thereto, and was at that time, complainant's agent to protect and make sales of said lands; under a general contract, he received 10 per cent. of the proceeds of the sales, when other terms were not specially agreed upon; and that complainant relied upon said Cross in these respects. That about the 7th day of October, 1889, Cross