

HOLLY MANUF'G CO. *et al.* v. NEW CHESTER WATER CO. *et al.*<sup>1</sup>

(Circuit Court, E. D. Pennsylvania. September 19, 1891.)

**1. CONTRACTS—RIGHTS OF THIRD PERSONS.**

The New Chester Water Company made a contract with B. & Co., water-works contractors, to build its works, agreeing to pay them with its stocks and bonds. These stocks and bonds were, as earned, pledged to W. G. H. & Co., to secure advances. After all the advances had been made, said B. & Co. and W. G. H. & Co. and R. D. W. & Co. made a tripartite agreement, which recited that the stock and bonds pledged to W. G. H. & Co. had been sold to R. D. W. & Co., and that B. & Co. represented that the New Chester water-works and three others could be completed for \$300,000, and by which W. G. H. & Co. agreed to advance that sum to B. & Co., to be applied by R. D. W. & Co., who guaranteed the completion of the works of the four undertakings clear of all liens ahead of securities held by W. G. H. & Co., specifying certain proportions of the \$300,000 to be applied to each work. A less proportion of the money than that specified was employed at the New Chester Company's works, but the whole amount, and \$105,000 additional, was expended on the four works. B. & Co. purchased engines for the New Chester water-works from complainants, but only partly paid for them. *Held* that, complainants not being parties to the tripartite agreement, and being strangers to the consideration therein, R. D. W. & Co. were not personally liable for the price of the engines on account of said agreement.

**2. CORPORATIONS—STOCKHOLDERS—LIABILITY FOR UNPAID ASSESSMENTS.**

Where stock of a corporation has been transferred for labor done, and the good faith of the transaction is not impeached, nor a failure of consideration shown, the holder is not liable personally on the grounds that said stock is unpaid capital stock, and that the unpaid assessments are a trust fund for the payment of the corporation indebtedness.

**3. FIXTURES—PUMPING-ENGINES.**

B. & Co., a firm engaged in fitting up water-works, ordered from an engine building company two pumping-engines, to be set up in the works of a water company they were fitting up at Chester, agreeing to pay for them in installments, and that the engine building company should "have a lien on" the "engines and connections," and "should remain in full possession thereof." The engines were erected on land of which B. & Co. then held the legal title, in such a way that they could readily be taken down and removed; and remained under the control of the engine building company's agents, to whom the engines had been consigned at Chester. *Held*, the engines did not become realty, and a valid lien in favor of the vendors existed against B. & Co. and the water companies.

**4. CORPORATIONS—NOTICE TO OFFICERS OF LIEN.**

The New Chester Water Company transferred all its shares of stock either directly to B. & Co. or to B. & Co.'s employes, and put itself in the "absolute control" of B. & Co., its officers being B. & Co.'s servants. B. & Co. purchased machinery, making it subject to a lien, and placing it in the works of said water company. Some of the directors of the company had actual notice of the lien. *Held*, the company had notice of the lien.

**5. SALE—VENDOR'S LIEN—NOTICE.**

The retention of open control by a vendor's employe over machinery placed in the works of a company which were being fitted up by the vendee, is notice to said company of the existence of a vendor's lien.

**6. SAME—MECHANIC'S LIEN.**

The fact that the land and buildings of a water company are not subject to lien under the mechanic's lien laws of Pennsylvania does not prevent a movable piece of machinery, delivered conditionally to such a company, from being subject to a valid contractual lien. *Foster v. Fowler*, 60 Pa. St. 27, discussed.

**7. JURISDICTION OF CIRCUIT COURTS—CITIZENSHIP OF PARTIES.**

The parties giving a contractual lien on machinery, who, in purchasing the machinery, had acted solely as the agents of the respondents in the suit, and had conveyed away all title to the property, were, subsequently to the filing of the bill, made parties plaintiff by amendment, not for purposes of relief, but to bring all parties before the court. Said parties were citizens of the same state as were the original complainants. *Held*, upon the objection that said parties should have been joined as parties respondent, and, when thus joined, the court had no juris-

<sup>1</sup> Reported by Mark Wilks Collet, Esq., of the Philadelphia bar.

diction, that they, being in the position of mortgagors who had parted with all interest in the property, were merely formal parties, and their joinder did not affect the jurisdiction.

8. TRUSTS—ACTIONS RELATING TO TRUST PROPERTY.

The trustee of a corporation mortgage need not be joined as a party defendant in a suit to enforce a specific lien which does not involve the validity of the trust mortgage, or affect its lien, when all the bondholders are before the court, and the joinder would oust the jurisdiction.

9. EQUITY—ENFORCEMENT OF VENDOR'S LIEN.

A bill in equity is the proper means to enforce a contractual vendor's lien on machinery to secure unpaid purchase money.

**In Equity.** Bill by the Holly Manufacturing Company, a corporation organized under the laws of the state of New York, and having its principal place of business in the city of Lockport in county of Niagara, and a citizen of the state of New York, against the New Chester Water Company; the South Chester Water Company; W. G. Hopper and Harry S. Hopper, trading as W. G. Hopper & Sons; William Bucknell; Richard Wood, George Wood, Walter Wood, and Stuart Wood, trading as R. D. Wood & Co.; the Bienville Water Supply Company, (afterwards, James H. Little, Craig Lippincott, and Harry S. Hopper, trustees, and William Hopper being made parties defendant, and Samuel R. Bullock and J. S. Bullock, trading as S. R. Bullock & Co., being joined as complainants.) Decree for complainants.

*Ronland Evans, Richard L. Ashhurst, and L. F. & G. W. Bowen,* for complainants.

*William C. Hannis,* for respondents W. G. Hopper & Sons.

*W. Ward,* for respondents New Chester Water Company and South Chester Water Company.

*Richard C. Dale,* for intervener, Thomas A. Parott.

**ACHESON, J.** The proofs in this case are unusually voluminous, and the transactions thereby disclosed are many and complicated. Some matters which we regard as immaterial to the real issues we will not discuss or mention. The controlling facts we find to be as follows:

In the year 1885 charters of incorporation were obtained for four water companies, namely, the New Chester Water Company, the South Chester Water Company, the Penn Water Company, and the Upland Water Company, formed for the purpose of furnishing water for public and domestic use to the city of Chester and adjacent boroughs, in Delaware county, Pa. On December 9, 1886, before any work was done by them, a written agreement was entered into between the four companies in their corporate capacity, all the stockholders thereof individually, and Samuel R. Bullock & Co., a firm of water-works contractors. The leading purpose of the parties to this agreement is expressed in the following clause of the preamble:

"And whereas, the stockholders are desirous of selling their said shares of capital stock, and of transferring and surrendering the absolute control of the water companies, and the vendees (Bullock & Co.) are desirous of purchasing and acquiring the same."

Accordingly the stockholders thereby agreed to transfer all the stock of said companies to Samuel R. Bullock & Co., and to deliver to them

"all the charters, certificates of organization, books, papers, deeds, maps, plans, estimates, stock-certificate books, transfer books, minute books, receipts, accounts, contracts, the corporate seals, and all other property of any and every description, kind, or nature belonging to the water companies, or any of them;" and, in consideration thereof Bullock & Co. agreed to enter into a contract with the water companies, on terms to be arranged, for the construction and equipment of a system of water-works for furnishing water to the places which the companies were authorized to supply. The stockholders having complied with their part of this agreement, the following transactions took place and contracts were entered into, all on March 21, 1887: Resolutions were adopted by the stockholders of the Penn Water Company and Upland Water Company to sell and convey the franchises and property of those companies to the South Chester Water Company, and such written transfers were executed. Resolutions were adopted by the stockholders of the South Chester Water Company to increase its capital stock from \$1,000 to \$600,000, and to issue its bonds for \$300,000, to be secured by a mortgage upon its franchises and property. Resolutions were adopted by the stockholders of the New Chester Water Company to increase its capital stock from \$500,000 to \$1,000,000; to issue its bonds for \$500,000, to be secured by a mortgage upon its franchises and property; and that the company guaranty the said bonds of the South Chester Water Company. The New Chester Water Company and the South Chester Water Company entered into an agreement, which, *inter alia*, provided that the former company, by its machinery, and from its reservoirs, would supply water through the pipes of the latter company to its territory. And finally a contract in writing was entered into between Samuel R. Bullock & Co. and the New Chester Water Company, whereby the former agreed to provide the necessary land for an engine and boiler house and a reservoir site, and to furnish all material and labor for and to construct and equip water-works at Chester, to be accepted by the water company after completion and satisfactory inspection and test, for the consideration to the contractors of \$500,000 in the mortgage bonds of the water company and 17,000 shares of its capital stock of the par value of \$50 each. At that date, March 21, 1887, the stockholders of the New Chester Water Company and the number of their respective shares were as follows: Samuel R. Bullock & Co., 9,995 shares; J. L. Forwood, 1 share; W. H. Miller, 1 share; E. F. Fuller, 1 share; Ellis Morrison, 1 share; Charles M. Berrian, 1 share. Each of the last-named five persons then held one share of stock in each of the other-named water companies, Bullock & Co. holding the rest of the stock thereof. The proofs fully warrant the conclusion that these holdings of stock by Forwood, Miller, Fuller, Morrison, and Berrian were nominal and formal, merely to give a legal *status* to the organization. These five persons constituted the board of directors of the New Chester Water Company, Forwood being president, and Miller secretary. Fuller was chief engineer of the company, and an employe of Bullock & Co. Berrian was the attorney of the company, and private counsel of Mr. Bullock. All these five directors were com-

pletely under the control and direction of Samuel R. Bullock & Co. Emil Woltman, the treasurer of the company, was the confidential clerk of that firm.

Samuel R. Bullock has here testified:

"An arrangement was perfected whereby the *personnel* of the New Chester Water Company was subordinated to the management, direction, and control of my firm, based upon the idea that we would carry out the objects for which that company was incorporated."

This statement is true. At the dates of the several transactions to which reference is about to be made, and from March 21, 1887, continuously down until November, 1888, Samuel R. Bullock & Co. had "the absolute control" of the New Chester Water Company, and the organization of that company was wholly under the management and practically in the hands of that firm. The directors acquiesced in whatever that firm did, and practically were but its agents. On April 1, 1887, the New Chester Water Company executed a mortgage of its franchises and property then owned or thereafter to be acquired to the Farmers' Loan & Trust Company, a corporation of the state of New York, to secure payment of \$500,000 of its bonds, payable to Samuel R. Bullock & Co., or bearer; and the South Chester Water Company executed a like mortgage to the same trustee to secure like bonds to the amount of \$300,000. On May 31, 1887, an agreement in writing was entered into between the South Ward Water-Works, a corporation, the city of Chester, and the New Chester Water Company, whereby, for a consideration mentioned, and moving from the last-named company, the first-named corporation agreed to sell, transfer, and convey all its property, real and personal, to the New Chester Water Company. On June 13, 1887, a contract in writing was made between William G. Hopper & Co. and Samuel R. Bullock & Co., whereby, for a specified consideration, the former agreed to furnish to the latter advances of money upon the bonds of the New Chester Water Company, as earned by and delivered to Bullock & Co., and the notes of that firm, with a deposit as further collateral security of all the stock of the New Chester Water Company and the property of the South Ward Water-Works. On July 7, 1887, Hopper & Co. made a special advance of about \$300,000 to Bullock & Co. to enable them to consummate the purchase of the South Ward Water-Works, and as security therefor Bullock & Co. delivered to Hopper & Co. the above-mentioned \$300,000 of bonds of the South Chester Water Company. In pursuance of written authority signed "J. L. Forwood, President," and "W. H. Miller, Secretary," the real estate of the South Ward Water-Works, by the deed of that corporation dated and executed July 7, 1887, was conveyed to Samuel R. Bullock in fee. On July 12, 1887, Samuel R. Bullock, by deed of that date, conveyed the said real estate to H. S. Hopper, who, on July 29, 1887, executed and gave to Bullock an instrument in writing setting forth that the conveyance to him was made as security for advances made and to be made by Hopper & Co. to Bullock & Co. All the advances which Hopper & Co. ever made under their contract of June 13,

1887, were made prior to September, 1887. On August 3, 1887, Samuel R. Bullock & Co. and the Holly Manufacturing Company, a corporation of the state of New York, entered into a written contract, whereby the latter agreed to manufacture two pumping-engines of specified capacity, and set up the same at the city of Chester for the sum of \$50,000, payable \$8,333.33 on each engine when delivered in Chester, and the like sum on each engine when it has been properly run 30 days, and the like sum on each engine 30 days thereafter. The contract contains the following clause:

"When said engines and connections are completed and ready for service, and on notice thereof to the party of the first part (Bullock & Co.) to that effect, the same shall be subjected to a fair trial of their capacity and efficiency for not exceeding twenty-four hours, and, on the successful testing thereof, the liability of the party of the second part (Holly Company) hereunder shall cease and determine; but it is expressly understood and agreed that the party of the second part shall have a lien on all of said engines and connections, and the party of the second part may remain in and have full possession thereof, until the whole amount of the purchase price of said engines and connections shall have been fully paid to the party of the second part or its assigns."

One payment only, namely, the sum of \$8,333.33, was made to the Holly Company under its contract, and at the date of the bringing of this suit the balance, or sum of \$41,667, was due that company on said engines. On October 26, 1887, a tripartite agreement was entered into between Samuel R. Bullock & Co., R. D. Wood & Co., and William G. Hopper & Co., whereby, after reciting contracts between Bullock & Co. and Hopper & Co. for advances by the latter to the former upon a pledge of bonds and stocks of water companies, an assignment by Bullock & Co. to Wood & Co. of the bonds and stock so pledged as collateral security for materials they had furnished, and contracts between Bullock & Co. and Wood & Co., by which the latter had undertaken to complete water-works at Chester, Greencastle, and Mobile, and the representation by Bullock & Co. that \$200,000 would enable them to complete those works, William G. Hopper & Co. agreed to advance to Bullock & Co. \$200,000, the same to be applied by Wood & Co. to the completion of the water-works at the three named places in certain specified proportions; Wood & Co. to present to Hopper & Co. the detailed applications by Bullock & Co. for money as needed, and Hopper & Co. thereupon to furnish such amounts (within the limit stated) to Wood & Co., who should give their checks for the same to Bullock & Co., who should disburse the moneys for the purposes aforesaid; and, in consideration of this advance by Hopper & Co., Wood & Co. agreed to procure the completion of the water-works at the three named places "clear of all liens ahead of the securities held by William G. Hopper & Co." Under this agreement Hopper & Co. advanced the \$200,000, which was all applied to the water-works at the three named places, but not in the proportions mentioned in the contract. The specified amount applicable to the works at Chester was \$129,800, whereas the sum actually applied was \$61,000 only. But the representation by Bullock & Co. that \$200,

000 would suffice to complete the works at the three places proved to be incorrect, for, besides the money so advanced by Hopper & Co., Wood & Co., in the completion of those works, used \$105,000 of their own money, and even then the balance of \$41,667 due the Holly Company on the pumping-engines at Chester was left unpaid, and also \$25,000 due that company on engines at Mobile; and it would seem some other debts remained unsettled. All the advances by Hopper & Co. under the tripartite agreement were made before the latter part of January, 1888, except a trifling sum, which was paid shortly afterwards.

In October, 1887, the Holly Company shipped one of the pumping-engines to Chester, and in February, 1888, the other. Each was consigned to that company itself, and its agents at Chester received the engines, and proceeded, at its expense, to put them in place. They were set on the top of masonry foundations, and were attached thereto by a number of two-inch iron bolts. They could not be operated or tested otherwise. The engines stand in a brick building erected on land which the South Ward Water-Works Company agreed to sell and convey to the New Chester Water Company, but actually conveyed to Samuel R. Bullock, who conveyed the same to H. S. Hopper for the purpose set forth in the paper executed by the latter, as already mentioned. Each engine weighs from about 70 to 80 tons; but they can easily be disconnected from the foundations on which they rest without disturbing the foundations; and can readily be taken apart and through the door of the engine-house without injury to the building.

When the first engine was shipped to Chester, John Lockman, by order of the Holly Company, and as its agent, went there to superintend the erection of the engines and to take charge and control thereof. This he did, remaining constantly in charge. The work of setting them up ready for service was not completed until some time in July, 1888, but for the delay the Holly Company was not responsible. From the time the first engine was got in working order Lockman acted as engineer, and he has maintained the exclusive charge and custody of both engines. He has carried a key of the building. His wages have all been paid by the Holly Company, and he has acted throughout as its agent. No formal test of the pumping capacity of the engines, as provided by the contract, was ever made, nor was there any formal acceptance of them by any one. When ready, they were set to work pumping water into the reservoir, and have continued to do so under Lockman's control. It is shown that explicit instruction was given by the Holly Company to Lockman to hold possession of the engines for that company, but the exact date thereof does not appear. Lockman states it was given about midsummer, 1888. Samuel R. Bullock, referring to conversations he had with the officers or representatives of the Holly Company, testified thus: "They told me that they proposed to have Lockman remain there as their representative in charge of the pumps, but they didn't want to interfere with the operations of the company, so he could act as engineer, and run the pumps right along;" and Mr. Bullock further testified that he consented to Lockman remain-

ing in possession and charge, as desired by the Holly Company. This testimony of Mr. Bullock is uncontradicted, and there is no reason to doubt its truthfulness. The bill in this case was filed September 19, 1888, while Lockman was still in control of the pumping-engines, and he has since maintained his charge and custody thereof in the manner stated, as the representative and under the pay of the Holly Company. In November, 1888, Bullock & Co. assigned their entire remaining interest in the bonds and stock of the New Chester Water Company to Wood & Co., and at the same time delivered to them resignations of the officers of the water company. Thereupon new officers were elected, and the water company then took the actual possession of the works, but Lockman's control of the engines continued. Hopper & Co. and Wood & Co. together hold substantially the entire mortgage bond issue of \$500,000 of the New Chester Water Company. Sixteen bonds of \$1,000 each are, indeed, held by Dyer and Black under a pledge made in July, 1887, but only to indemnify them against a claim which the water company itself may have against them as sureties for Bullock & Co., touching a lien of \$15,000 which they were to remove. All the bonds and stock of the New Chester Water Company which Bullock & Co. were to receive under their construction contract had been delivered to them probably before the first pumping-engine reached Chester, and certainly before its erection began. On March 31, 1890, Samuel R. Bullock and wife executed and delivered to the New Chester Water Company a deed of conveyance of the land upon which the engine-house and pumping-engines stand.

Upon this state of facts two questions are presented for our determination: *First*, whether R. D. Wood & Co. are under any personal liability to the Holly Manufacturing Company; and, *second*, whether that company has a valid lien upon or claim to the pumping-engines at Chester enforceable in this suit.

The first question, it seems to us, is not difficult of solution. The Holly Company was not a party to the tripartite agreement of October 26, 1887. That instrument contains no provision expressed to be in its behalf. Neither was any money thereby specifically set apart to pay for pumping-engines either at Chester or Mobile. The agreement was for the mutual benefit of the three parties who executed it, and to promote a purpose in which they had a common interest. To secure the faithful application to that object of the fund which Hopper & Co. proposed then to advance it was stipulated that it should pass through the hands of Wood & Co., but the paper provided that ultimately the money should be distributed by Bullock & Co. It was then believed that \$200,000 would complete the water-works at Chester, Greencastle, and Mobile. So Bullock & Co. had represented. Confiding in the correctness of that estimate, the paper provided for the apportionment of the fund between the three places. But this did not give third persons any right to control the application of the fund, or any vested interest therein. The parties to the agreement did not relinquish their joint dominion over the fund. As between themselves, the agreed apportion-