

use of the defendant, the complainant had no lines upon those streets except a fragment upon South Pennsylvania street, which had been practically, if not legally, abandoned. I do not think the complainant, under the ordinance of 1864 or 1865, had any vested right to commence the construction of a particular line without first obtaining the consent of the common council to "the location, survey, and construction" of such proposed line. Therefore, the complainant, having obtained no consent from the city to occupy the streets in question, has no right to complain of their occupation by the defendant company.

Other questions are presented in respect to the streets occupied by the complainant with the consent of the city. The defendant, by its answer, denies that it sets up any claim to the present occupancy of that part of any street upon which the tracks of complainant's railway are laid, or that it intends or threatens to lay and operate lines of electric railway on any street on which the complainant was operating an electric line, at the time suit was brought, "until after the expiration of its right thereto, if any it has." But from the terms of the contract and ordinance under which the defendant company has acquired the rights which it asserts, from the notice served upon the complainant, from the acts of defendant as disclosed in the record, as well as from the claims of its counsel, it seems apparent that the defendant company has been acting on the theory that the complainant's right to occupy the streets has ceased, and that under its contract it may rightfully take possession of them, and expel the complainant therefrom. In my opinion, the defendant company has no such rights. In so far as the defendant company claims the right to interfere with the complainant's free and unobstructed use of its lines of electric railway on all the streets now rightfully occupied by it, its claim is wrongful and injurious. To the extent necessary to protect its quiet and undisturbed use of these lines against invasion by the defendant company, the complainant is entitled to the aid of the court.

I entertain no doubt that the amended bill presents a federal question which gives the court jurisdiction. I have heretofore expressed my views on this question, and I do not think it needful to add anything to what I have already said on the same subject. *Citizens' St. R. Co. v. City Ry. Co.*, 56 Fed. 746.

HOOK v. AYERS et al.

(Circuit Court of Appeals, Seventh Circuit. December 14, 1894.)

No. 155.

CORPORATIONS—OFFICERS—RAILROAD BONDS—PLEDGE.

A railroad company owning 247 bonds of another company pledged 125 of them to cross complainants, while the president of the company, with the knowledge of cross complainants, pledged the other 122 bonds to a syndicate composed of himself, two of the cross complainants, and others. He afterwards bought out the other members of the syndicate, and attempted to take absolute title to the bonds by crediting a certain amount upon the debt of the railroad company. *Held* that, although the transac-

tion might be voidable at suit of the railroad company, its shareholders, or judgment creditors, it could not be attacked by cross complainants. 63 Fed. 347, affirmed.

On rehearing. For former opinion and statement of facts, see 63 Fed. 347.

JENKINS, Circuit Judge. The petition for rehearing would seem to be presented in misconception of our opinion. We have not held that the original pledge by Mr. Hook of the 122 bonds for the benefit of the syndicate, or the subsequent transfer of them to himself, could not be attacked by the Jacksonville Southeastern Railway Company, its creditors or shareholders. We have not determined that as to the company, its creditors or shareholders, the transaction could be upheld. We did not find it needful to consider that question. We held that the appellees, upon the record here, were in no position to make that attack. With that conclusion we are content. The transaction sought to be avoided could have been ratified by the company, could have been sanctioned by its shareholders, could have been confirmed by its creditors. It was therefore voidable, not void. If without original authority, and in contravention of the rights of the company, it was voidable at the election of the company, its creditors and shareholders,—not of a stranger. The cross bill filed by the appellees proceeds upon the postulate that they, as pledgees of 125 other bonds, not as creditors, can rightfully attack the transaction. This, we think, they cannot do. It is true that it incidentally appeared by the testimony of one witness that a judgment had been rendered in favor of the appellees against the company for the loan for which the 125 bonds were pledged, but the cross bill proceeds upon no such ground. The judgment is not referred to in the bill. In a general sense, it appears from the cross bill that the appellees are creditors of the company, but not that they are judgment creditors; and we have held, following the case of *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, that simple contract creditors are not in position to attack such transactions. *Morrow Shoe Manuf'g Co. v. New England Shoe Co.*, 18 U. S. App. —, 6 C. C. A. 508, 57 Fed. 685,—on rehearing, 18 U. S. App. —, 8 C. C. A. 652, 60 Fed. 341.

The 247 bonds issued by the Louisville & St. Louis Railway Company were the property of the Jacksonville Southeastern Railway Company. The latter pledged 125 of these bonds to M. P. Ayers & Co. as collateral to its debt to them for money borrowed to construct the road of the former company, whereby the bonds were earned. M. P. Ayers & Co. had no equitable or legal right to the remaining 122 bonds. They were content with their collateral security, knowing that their 125 bonds were to share with the remaining 122 bonds in the proceeds of the sale of the road, if default should be made in their payment. Possibly, the 122 bonds remaining the property of their debtor, they might, in the distribution of the proceeds of sale of the mortgaged premises, upon which all of the bonds were secured, equitably insist that their bonds should be awarded priority of payment because the Jacksonville Southeastern Railway

Company was liable for the debt to them. And this we understand to be the theory upon which the cross bill proceeds. But it is shown that at the time of the loan M. P. Ayers & Co. knew that the remaining 122 bonds had been transferred by the railway company to the syndicate composed in part of two of their firm, and with such knowledge they sold to Mr. Hook their interest in the syndicate. This interest was acquired by him upon the strength of the fact that the syndicate held the remaining bonds. They have thus sanctioned the arrangement by which the bonds were transferred by the company to the syndicate. The stockholders of the Jacksonville Company and its creditors might properly object to the transfer of the 122 bonds, but not one who contracted his debt with knowledge of, and who has participated in the avails of, the transfer. Petition overruled.

JENSEN v. NORTON et al.

(Circuit Court of Appeals, Ninth Circuit. November 1, 1894.)

No. 132.

PRELIMINARY INJUNCTION—PRACTICE—CIRCUIT COURT OF APPEALS.

N. brought suit against J. to restrain the infringement of patents belonging to N. Upon the bill, and affidavits supporting its material allegations, to which J. made no reply by answer or counter affidavits, N. obtained a preliminary injunction. On appeal from the order granting such injunction, J. contended that, upon the showing of N.'s own papers, the machine complained of did not infringe N.'s patents. Held, that the circuit court of appeals would not, in advance of a final hearing in the circuit court, attempt to determine, or express any opinion upon, the main question in the case, the complainant having made out a prima facie case entitling him to an injunction, within the rule as laid down in *Blount v. Societe Anonyme*, 3 C. C. A. 455, 53 Fed. 98.

Appeal from the Circuit Court of the United States for the District of Oregon.

This was a suit by Edwin Norton and Oliver W. Norton against Mathias Jensen for infringement of certain letters patent. A preliminary injunction was granted by the court below. Defendant appeals.

Wheaton, Kallock & Kierce, for appellant.

Munday, Eyarts & Adcock, for appellees.

Before ROSS, HANFORD, and MORROW, District Judges.

HANFORD, District Judge. This case brings before us for review an order made by the circuit court for the district of Oregon, the substantial part of which is as follows:

"This cause having come on to be heard upon the motion of complainants for a preliminary injunction, as prayed for in the bill, and the court having duly considered thereon, it is now ordered by the court that, pending the final hearing and decree therein, the defendant, Mathias Jensen, his agents, attorneys, servants and employes, be, and they hereby are, enjoined and restrained from either directly or indirectly making, constructing, using, or vending to others to use, any of the machines, devices, or inventions named or described in either of the following letters patent, the same being the letters