

for him, under recognized chancery practice, to refer such issue of fact to a jury. Of course, if it should turn out on the hearing that the single question between these two corporations is whether or not the defendant corporation, as such, in its dealing with the Citizens' Bank, by mere deceit and fraud obtained possession of the property of the Citizens' Bank, under circumstances which a court of law would declare to be void for fraud in its inception, remedial by a judgment for damages, the remedy at law would be adequate, plain, and complete, and the defendant would be entitled to its trial by jury. But it seems to the court, from a view of the whole bill, looking at the trust relation between these two banks, the one being operated as an adjunct of the other, and this transaction being conducted, in effect, by the managing officer for both banks, it discloses a breach of duty on the part of the trustee, which a court of equity is peculiarly constituted to inquire into, and remove out of the way of securing the ends of exact justice, in favor of the creditors and stockholders of the Citizens' Bank, the legal forms gone through with in the impugned transactions and transfers between the two banks. See *Bank v. Wulfekuhler*, supra; *Railway Co. v. Miller* (Mich.) 51 N. W. 981; *Mor. Priv. Corp.* §§ 1, 227; *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 192, 13 S. W. 822; *Patton v. Glatz*, 56 Fed. 367.

It may further be observed that while the bill alleges that the attempted transfer of the stock of the bank was illegal, for the reason that it was not done on the books of the Citizens' Bank, and by authority of its directors, it does not follow that, as between third parties, a written transfer indorsed on such certificates may not, as between them, have the effect, in equity, if not in law, to invest the transferee with the title and the right to have the formal transfer on the books of the corporation made. *Kortright v. Bank*, 20 Wend. 93, affirmed 22 Wend. 360. See, also, *International Bank v. German Bank*, 71 Mo. 191. Why a court of equity has not jurisdiction to set aside such transfer as between these two banks, in holding the managing officer conducting the transaction to a faithful execution of his trust, is not apparent. The demurrer is overruled, with leave to the defendant to answer the bill if desired.

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FOWLER et al. v. JARVIS-CONKLIN MORTGAGE TRUST CO.

(Circuit Court, S. D. New York. December 27, 1894.)

1. RECEIVERS—APPOINTMENT OF OFFICERS OF CORPORATION — PRIOR MISMANAGEMENT.

Officers of a corporation, appointed its receivers because its business was complicated, intricate, and widely extended, with millions of dollars invested upon small mortgages scattered through several states, will not be removed from the receivership because of former imprudent investments, and other mismanagement of the business of the corporation, as its officers, no fraudulent practices which would disqualify them being shown.

2. SAME—FILLING VACANCY UPON RESIGNATION—NOTICE TO INTERVENER PETITIONING FOR REMOVAL.

After the denial of an application by an intervener for removal of receivers, one of them voluntarily withdrew; and the vacancy was filled by

the court, of its own motion, appointing a new receiver. *Held*, that the fact that such intervener was not notified in advance of the court's action, nor consulted as to the selection of the new receiver, was not ground for vacating the appointment; there being nothing to show unfitness or incompetence in the person selected, or sufficient reason to change the composition of the receivership.

This was a suit by Benjamin M. Fowler and others against the Jarvis-Conklin Mortgage Trust Company, in which Samuel M. Jarvis and Roland R. Conklin were appointed receivers of the defendant corporation. A petition for their removal, filed by Elizabeth Garnett, intervening, was denied. 63 Fed. 888. Thereafter, the intervener again moved for their removal, and the receiver Jarvis having resigned, and the court having, of its own motion, filled the vacancy by appointing a new receiver, the intervener moved also to vacate the order of appointment.

The grounds of removal, on which the application was renewed, were charges of mismanagement of the business of the corporation by the receivers while its officers, of the same nature as the charges previously made, supported by affidavits, part of which had been filed on the first application in reply to affidavits on behalf of the receivers, but contained new averments as to the management of the corporation, which were not then considered, because not matter in reply to the affidavits or argument on behalf of the receivers. See 63 Fed. 889.

Fabius M. Clarke, for the motion.

Arthur H. Masten and Winslow S. Pierce, opposed.

LACOMBE, Circuit Judge. The papers submitted on the original motion, as well as those upon which the present application is based, have been examined, and the opinion heretofore expressed (63 Fed. 888) remains unchanged. No sufficient cause is shown for the removal of the receivers first appointed, nor is any necessity apparent for referring it to a master to take proofs on the points suggested, and already so fully covered by affidavits on both sides. The motion to remove the receivers first appointed is denied.

The new receiver was appointed by the court, *ex proprio motu*, to fill a vacancy caused by the voluntary withdrawal of one of those originally appointed, but whose withdrawal from further administration of the affairs of the receivership in no way relieved himself or his bondsmen from full accountability for all his transactions as receiver, nor himself from like accountability for any action as an officer of the company before its affairs were taken charge of by the court. The fact that the intervening petitioner was not notified in advance of the court's action, nor consulted as to the selection of the new receiver, is no ground for reversing that action, there being nothing to show unfitness or incompetence in the individual selected. If the question of appointing receivers were now before this court as an original application, upon all the papers now on file, the course best fitted to secure a careful and intelligent administration of the extensive and complicated business of winding up the affairs of the corporation would indicate the selection of receivers, one of whom was wholly unconnected with its prior administration, and the other thoroughly familiar with the

same. The receivership is now thus constituted, and no sufficient reason to change its composition is shown. Motion to vacate the order of October 11, 1894, is denied.

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**CLARKE v. CENTRAL RAILROAD & BANKING CO. OF GEORGIA et al. CENTRAL RAILROAD & BANKING CO. OF GEORGIA v. FARMERS' LOAN & TRUST CO. et al. BROWN et al. v. CENTRAL RAILROAD & BANKING CO. OF GEORGIA.**

(Circuit Court, E. D. Georgia, S. D. June 30, 1893.)

**1. RECEIVERS—MAY PROMOTE RAILWAY REORGANIZATION SCHEME.**

It is not improper for the receiver of a railway corporation to promote any reorganization scheme which offers the prospect of securing the largest measure of protection to all persons concerned in or connected with the property and assets in the custody of the court, but in so doing he must not promote one interest at the expense of others equally entitled to the court's protection.

**2. RECEIVERS—REMOVAL—MISLEADING REPORTS.**

The receiver of a railway corporation should not be removed for making reports as to the condition of the property in his care, which are alleged to be misleading, and to depress its value in the estimation of the public, when it appears that he has continued the existing method of accounting and reports, without intentionally misstating or misrepresenting the company's true condition.

**3. SAME—FRAUDULENT ACTS OF AGENT.**

The receiver of a railway corporation should not be removed on motion of a creditor because his agent has fraudulently permitted certain brokers to buy lumber at one price, and bill it to the corporation at a higher price, when it appears that he has used due care in the selection and supervision of his agents, and has discharged the wrongdoer as soon as he heard of the transaction.

**4. SAME—LOW FREIGHT RATE TO INTRODUCE NEW PRODUCT.**

The receiver of a railway corporation may properly, in the exercise of his business judgment, give an unusually low rate, in order to introduce into general use a cheap and valuable article, which, if brought into general demand, would add to the freight receipts of the roads handling it.

**5. SAME—RESPONSIBILITY FOR WRONGFUL ACTS OF OTHERS.**

The receiver of a railway corporation should not be discharged on motion of a creditor because labor paid for by the corporation has been used by private parties for their advantage, when it is not alleged or shown that he either knew of or consented to such use.

**6. SAME—BREACH OF TRUST—CONTRACTS WITH INTERESTED PARTIES.**

It is improper for the receiver of a railway corporation to procure supplies from or enter into contracts with a company composed of the superintendent and other officials of the railway.

**7. SAME—RESPONSIBILITY FOR BREACH OF TRAFFIC AGREEMENT.**

The receiver of a railway corporation should not be discharged on motion of a creditor because a competing line has for a considerable time broken the traffic agreement between the two roads, when it appears that he has upon discovery of this state of facts taken successful steps to put an end to it.

In Equity. Bill by Rowena M. Clarke, the Farmers' Loan & Trust Company, and Alexander Brown & Sons against the Central Railroad & Banking Company of Georgia. For prior opinion, see 50 Fed. 338, and 54 Fed. 556. Heard on motion by Alexander Brown & Sons to remove H. M. Comer from the receivership. Denied.