

The order of sale in the main cause provided that the purchaser thereat should take the property, and pay in addition to his bid, among other things, "all other claims heretofore filed in this case, or in either of the cases consolidated herein, but only when said court shall allow such claims, and adjudge the same to be prior in lien or superior in equity to the mortgage foreclosed in this suit." The purchaser thus stands in the shoes of the creditors whose mortgage is foreclosed in these proceedings, and has no other liability, is subject to no other lien, and is bound by no other equity, than such as the creditors under that mortgage would be subjected to. The principle established in *Fosdick v. Schall*, 99 U. S. 235, and the cases following it, is that current operating expenses, and all other outlays necessary to keep a railroad a going concern, must be paid in full out of the current earnings, before creditors holding a mortgage on the road can be paid. "And, if current earnings are used for the benefit of the mortgage creditors before such current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has thus improperly been applied to their use."

The claim before the court arises from necessary repairs done on the line of the Virginia Midland Railway, held under a long lease by the Richmond & Danville System. This lease is included in the mortgage foreclosed in the main cause. It has been purchased by, and has been conveyed to, the appellant, the order of sale providing that "the purchaser or purchasers at said sale shall not be required to assume or adopt any of the leases described or referred to in said consolidated mortgage, but shall have the right to elect whether or not to assume or adopt the same or any thereof." It goes without saying that this lease was of great advantage to the whole system. An important part of its through line, its only connection with Washington, it contributed immensely to the passenger and freight traffic on all the other parts of the system. Upon examining the lease, it will appear that the lessees bound themselves to pay, at all events, the interest on all outstanding bonds of the lessor, whether the earnings of the leased road, which were made specially applicable thereto, were sufficient for this purpose or not. That provision made the Virginia Midland Railway an integral part of the system, whose earnings were a part of the gross earnings of the whole system, and required that the earnings of the system should be first applied to making it and the rest of the system a going concern. When, therefore, the Richmond & Danville Railroad Company paid the interest on the bonds of the Virginia Midland, and also paid interest on its own bonds, including the bonds secured by the foreclosed mortgage, leaving unpaid this claim for necessary repairs, this was a diversion. The Richmond & Danville Railroad Company received all the earnings of the Virginia Midland. They were bound in any event to pay all the interest on the bonds of the latter. When they used these earnings to pay interest on the mortgage debt, leaving unpaid a claim for necessary repairs, they took moneys applicable to such repairs, and applied them to the discharge of their own obligation. This was a diversion which they must restore. *Trust Co. v. Morrison*, 125 U. S. 612. 8 Sup. Ct. 1004; *Railway Co. v. Wilson*, 138 U. S. 501, 11 Sup. Ct. 405.

We see no error in the conclusion reached by the circuit court, and the decree is affirmed.

MORRIS, District Judge. I dissent on the question of the allowance of interest on the claim in this case.

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PARKER v. MARCO et al.

(Circuit Court, D. South Carolina. October 30, 1896.)

1. CONTRACTS—INSANE PERSONS—CONTRACTUAL CAPACITY.

In examining into contracts made by one whose mind is diseased, to determine his ability to do any particular act, the inquiry should be, what degree of mental capacity is essential to the proper execution of the act in question?

2. SAME—EXECUTION OF FORMER AGREEMENT.

A person whose mind is diseased by drink, but whose business dealings are shown to be conducted with skill, ability, shrewdness, and memory, is not incapacitated to execute a mortgage of his property, in conformity with an agreement entered into when his sanity was unquestioned; and when he, at the time of signing the mortgage, declared his comprehension of the transaction, and impressed others with the fact that he understood what he was doing.

3. SAME—SEPARATE CONTRACT.

If, however, at the execution of such mortgage, one attorney representing and advising both parties, the mortgagor is persuaded to allow, and does allow, such attorney to retain, for the benefit of the mortgagee, a part of other securities, which he is entitled to have restored to him, the transaction should be set aside.

4. SAME—GOOD FAITH—STATUS QUO.

But such transaction should not be set aside, when the attorney's good faith is unimpeachable, unless the securities which were surrendered are returned, or their value replaced, thus putting both parties in statu quo.

This was a special inquiry directed by the court to determine the validity of a mortgage executed by Manuel Marco to Pelzer, Rodgers & Co., and resisted upon the ground that Marco was insane at the time of its execution.

Mordecai & Gadsden, P. A. Wilcox, and A. D. Cohen, for complainant.

Lord & Burke, Boyd & Brown, and W. F. Dargan, for defendants.

SIMONTON, Circuit Judge. This case comes up on a special inquiry directed by the court. Manuel Marco, a defendant in this case, was a merchant of Darlington county, S. C. He was a man of remarkable ability as a merchant, and from a humble beginning, by force of character and business talent, he had acquired a fortune. He had been doing his business with Charleston through James H. Parker the present complainant. For some reason he became dissatisfied with Parker, and desired to change his factor. To this end he sought the good offices of R. W. Boyd, Esq., a member of the bar in Darlington. Mr. Boyd introduced him to the firm of Pelzer, Rodgers & Co., of which firm the defendant F. J. Pelzer was the senior member. After some negotiation this firm