FARMERS' LOAN & TRUST CO. v. NORTHERN PAC. R. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 23, 1897.)

INSOLVENT RAILROAD COMPANIES—PREFERENTIAL CLAIMS—JUDGMENTS FOR PERSONAL INJURIES.

A judgment creditor of a railroad corporation, whose claim originated in the negligent act of the corporation's servants, is not entitled to be paid in preference to the holders of pre-existing liens upon the corporation's property.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

Crowley & Grosscup and John B. Allen, for appellant.

Carr & Preston and S. H. Piles, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. On October 1, 1889, J. B. Irvine, the petitioner, sustained a personal injury, resulting from the negligence of an engineer of the Northern Pacific Railroad. On April 17, 1893, the petitioner recovered a judgment against the railroad company for $600 and costs on account of the injury. On October 30, 1893, the appellant, as the trustee of certain bonds of the railroad company, instituted a suit to foreclose the mortgage liens which had been placed upon the railroad property to secure said bonds. In the foreclosure suit receivers were appointed to take possession of and manage and operate the mortgaged property. On May 13, 1896, the petitioner intervened in said foreclosure suit by filing a petition, in which he alleged that he had recovered the judgment above referred to, and prayed for an order that the receiver pay his claim in full. The trust company answered the petition, alleging that the incumbrances which it sought to foreclose were existing liens upon the railroad company's property at and prior to the time when the negligent act occurred upon which the plaintiff's judgment was based, and alleging that the mortgaged property was insufficient to pay the mortgage debt. The petitioner demurred to the answer, and the court below sustained the demurrer, and made an order directing the receiver to pay the petitioner's judgment out of the funds in his hands as such receiver. The trust company appeals from this order, and contends that the funds out of which the receiver was ordered to pay the judgment were subject to the prior and superior liens of the mortgage bonds and the interest thereon. The question which is presented, therefore, is whether a creditor of a railroad corporation, whose claim originated in the negligent act of the corporation's servant, shall be paid in preference to the holders of pre-existing liens upon the corporation's property. We hold that such a judgment creditor is not entitled to be preferred to the lien holder, under the authority of Trust Co. v. Riley, 16 C. C. A. 610, 70 Fed. 32, Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 74 Fed. 431, and Whiteley v. Trust Co., 22 C. C. A. 67, 76 Fed. 74. The order appealed from will be reversed, at the appellee's costs.

MERRITT et al. v. AMERICAN STEEL-BARGE CO.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1897.)

No. 741.

1. COURTS — CONCURRENT JURISDICTION — POSSESSION OF RES — SUITS IN PERSONAM.
   While, in cases in which a court has taken, or, in order to administer the relief sought, may be compelled to take, possession of specific real or personal property to which the suit relates, the court which first acquires jurisdiction of the cause is entitled to retain it, to the exclusion of any other court, this rule does not apply to suits merely in personam, though involving the same issues; and the pendency of such a suit in one jurisdiction does not prevent a party thereto from bringing a similar suit, involving the same issues, against the other party, in another jurisdiction.

2. CORPORATIONS—CERTIFICATES OF STOCK—SUIT TO ESTABLISH LIEN—SUBSTITUTED SERVICE.
   Though certificates of corporate stock are technically only written evidences of interests in the corporate property, they are so far in the nature of chattels that, when certificates of stock in a corporation of one state are held in pledge or as collateral in another state, the courts of such latter state are authorized to proceed to establish a lien thereon in a suit commenced by substituted service, under a statute authorizing such service in suits to establish liens on personal property within the state.

3. APPEAL AND ERROR—REVIEW—PLEA OF RES JUDICATA—DEMURRER.
   In reviewing a decision sustaining a demurrer to a plea which alleges that a judgment set up in bar of the action was rendered upon due and proper notice, and that the court had and acquired jurisdiction of the subject-matter and the parties, the appellate court must take such allegations as true, and cannot look into exhibits attached to the answer in the case to ascertain whether the judgment does in fact show all the elements of jurisdiction.

In Error to the Circuit Court of the United States for the District of Minnesota.

This case was before this court, at the May term, 1896, on a motion to dismiss the writ of error. Merritt v. Barge Co., 40 U. S. App. 127, 21 C. C. A. 525, and 75 Fed. 813. On the present occasion it is here for determination on the merits. Alfred Merritt and Leonidas Merritt, the plaintiffs in error, who were the plaintiffs below, on April 10, 1894, sued the American Steel-Barge Company, the defendant in error, in the district court for St. Louis county, state of Minnesota, to recover the value of 11,331.3 shares of stock in the Lake Superior Consolidated Iron Mines. The complaint alleged, in substance, the following facts: That in the months of January and February, 1893, the plaintiffs borrowed of Charles W. Wetmore $432,575, giving as an evidence of such indebtedness their five negotiable promissory notes, which were secured by the pledge of certain shares of stock in the Duluth, Missabe & Northern Railway Company and in the Mountain Iron Company and the Missabe Iron Company, the shares of stock in said railway company alone being of the value of $565,000; that at the time said loan was effected it was agreed that said Wetmore "should not repledge, sell, or dispose of" any of said stock, and that, if the plaintiffs so desired, the first four of the aforesaid notes should be extended for a period of six months from their maturity; that on April 24, 1893, said Wetmore, in violation of his agreement, transferred all the shares of stock in said railway company by him held in pledge to John D. Rockefeller, as security for an individual debt which he owed to said Rockefeller, which stock was at the time fairly worth $565,000; that the plaintiffs had elected to waive the tort thus committed by said Wetmore, and to consider the transaction last aforesaid as a sale of the stock by said Wetmore for their benefit; that on March 13, 1893, said Wetmore had further converted to his own use certain bonds belonging to the plaintiffs, which were of the value of $90,000, and