

confusion in the names of the respective manufacturers or their locations, but the similitude for which infringement or fraudulent appropriation is asserted rests in the use of the word "Country," with the qualifying word "Our," having the same initial letter and the same number of letters as in the word "Old" employed by the complainant; and that blue, which is the sole color printed on the complainant's label, is also made quite distinctive as one of the colors in defendants' label. On the other hand, the label of the defendants, taken as a whole, presents an appearance of contradistinction from the other. Instead of the sober single coloring of blue on the "Old Country" design, the defendants give emphasis to their assumption of patriotism in the title "Our Country" by taking on the national colors, so that the label is made in red, white (or buff), and blue; the stars and stripes being dominant in the general effect, and red, rather than the blue, the dominant color. The design, more effusive than æsthetic, has the effect of a challenge rather than a disguise. Surely, there can be no reasonable presumption that any purchaser of sufficient intelligence to know the want of a special brand, and looking for one marked as an "Old Country" production, would expect to find it under this fervid display of nativity.

I have carefully considered the authorities cited on behalf of the complainant, and not only recognize, but heartily concur in, the doctrine which prevails in this circuit, strongly favoring the equitable remedy against fraudulent means to divert or attract the legitimate trade belonging to another by disguises which impose upon unwary purchasers. *Pillsbury v. Mills Co.*, 24 U. S. App. 395, 12 C. C. A. 432, and 64 Fed. 841; *Johnson v. Bauer*, 27 C. C. A. 374, 82 Fed. 662. See, also, *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 45 U. S. App. 190, 23 C. C. A. 554, and 77 Fed. 869; and note to *Scheuer v. Mueller*, 20 C. C. A. 165. But within the utmost extension of that doctrine no ground is established here, in my opinion, to grant the preliminary injunction prayed for. It must be left to final hearing to determine the weight which may be given to the term "Country," so far as that word may have been appropriated by the complainant to designate its manufacture of soap, especially in view of the showing on behalf of the defendants that the term has long been in popular use as some portion of the trade name of numerous other productions of soap, at least antedating the recording of complainant's trademark, and apparently unquestioned. Therefore the injunction pendente lite is denied.

GENERAL ELECTRIC CO. v. LA GRANDE EDISON ELECTRIC CO. et al.

(Circuit Court of Appeals, Ninth Circuit. May 10, 1898.)

No. 416.

MORTGAGES—FORECLOSURE—TRUSTEES—SECURED BONDHOLDERS.

A holder of bonds secured by a general mortgage to a trustee for the benefit of all the bondholders, although the right to sue belongs to him individually, may not bring a suit to foreclose the mortgage either for the interest or the principal due, without alleging that the trustee has been requested to bring the suit, and has refused, or without showing some other reason why the trustee may not represent him in the suit.

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

Frederick V. Holman, for appellant.

Dolph, Mallory & Simon, for appellee Security Savings & Trust Co.

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

GILBERT, Circuit Judge. The appellant was the complainant in a suit in which its bill was dismissed in the circuit court, upon the ground that, as holder of certain bonds, it had brought a suit for foreclosure, without alleging that it had requested the trustee to commence the suit, or alleging any reason for instituting the suit in its own name, save the fact that the mortgagor has failed to pay certain interest coupons, and the trustee has failed to bring suit or to foreclose the mortgage. The mortgage to the trustee provides that upon default by the mortgagor in payment of interest or taxes or any of the bonds as they should fall due, and the continuance of such default for the period of 30 days after notice by the trustee, the trustee might take possession of and operate the mortgaged property. The trustee was "also authorized, instead of so doing, and with or without taking of said plant, to treat the whole amount of the principal of said bonds, together with all accrued and unpaid interest, as immediately due and payable, and thereupon to proceed to sell and dispose of said property at public auction after due notice and advertisement, as provided therein, and, from the proceeds arising from such sale (after the payment of all taxes, expenses, and charges upon said property, and expenses of such sale, including compensation to said trustee, and reasonable allowance for attorney and counsel fees), to pay the said bonds and coupons." And it was further provided, as one of the conditions of said mortgage or deed of trust, that the foregoing provisions for the sale of said property by the said trustee, under the above-recited powers, should be cumulative upon the ordinary remedies of foreclosure by entry or suit therefor. The appeal challenges the ruling of the circuit court in dismissing the bill.

The rule that a holder of bonds which are secured by a general mortgage to a trustee, for the benefit of all the bondholders, may not bring a suit to foreclose the mortgage either for the interest or the principal due, without alleging that the trustee has been requested to bring the suit, and has refused, or without showing some other reason why the trustee may not represent him in the suit, has been, we believe, so generally acquiesced in that the courts have rarely been called upon either to apply the rule or to consider the reasons on which it is founded.

Said the court in *American Tube & Iron Co. v. Kentucky Southern Oil & Gas Co.*, 51 Fed. 826:

"The preference in favor of a trustee in the absence of a contract giving a preference is because the trustee is presumed to represent all of the bondholders, and its convenience in practice; but, if the trustee has accepted a

position antagonistic to his duty as such trustee, then he forfeits this preference as against a bondholder."

In section 6210 of Thompson on Corporations it is said:

"Ordinarily, such bondholders have no right to bring an action to foreclose the mortgage, but the trustee in the mortgage, as stated in the preceding section, is the proper person to sue. But if he neglects to sue, after the happening of the condition which entitles the bondholders to a foreclosure, and after being requested by them so to do, they may bring the action to foreclose, making him a party defendant,"—citing *Owens v. Railroad Co.*, 20 Fed. 10; *Beekman v. Railway Co.*, 35 Fed. 3.

The appellant earnestly contends that the rule so quoted is not sustained by the authorities. We have carefully considered all the cases to which our attention has been directed, and we will briefly review them.

Alexander v. Railroad, 3 Dill. 487, Fed. Cas. No. 166, was a case in which the bill to foreclose the mortgage contained the allegation that the bondholders, who were the complainants in the suit, brought the same for themselves and all other bondholders similarly situated. The bill alleged that they had requested the trustee of the mortgage to bring the suit, and that it had refused. It contained no allegation that the complainants were a majority of the bondholders, or that a majority had made the request to the trustee. On demurrer to the bill the court said:

"There is no restriction in the deed of trust before us, upon the right of the coupon holder to foreclose for interest upon default, although a majority of the bondholders do not unite in the suit, or request the trustee to bring it. The provision in question gives a majority of the bondholders, on default of the payment of interest, the option or election, after the expiration of a year from the default, to have the whole principal sum become due at once, and the mortgage security enforced accordingly. This is not inconsistent with the unabridged right of any coupon holder to foreclose for interest, in the manner sought in the present bill; and it was not necessary that a majority of the coupon holders should unite in bringing the bill, or in a request to the trustee to bring it. As the bill alleges that the trustee refused to bring suit, the bill was properly brought in the name of the plaintiffs, for themselves and the other coupon holders, making the trustee a defendant."

This authority surely does not sustain the appellant's contention. As we read it, it is clearly in harmony with the rule which we have quoted from Thompson on Corporations. In recognizing "the unabridged right of any coupon holder to foreclose for interest, in the manner sought in the present bill," the court undoubtedly had in view the right of such a complainant to foreclose only after a request to the trustee and the trustee's refusal, for such was the manner pursued in the "present bill."

The case of *Howell v. Railway Co.*, 94 U. S. 463, is cited. That was a case in which the right of a bondholder to foreclose the mortgage for due and unpaid interest was recognized. No question was raised before the appellate court concerning the right of the bondholder to bring the suit. The record is silent concerning the reason why it was not brought by the trustee. It may fairly be presumed that the bill contained the averment that the trustee had, upon request, refused to bring the suit, or some other averment satisfactorily explaining to the court the reason why the suit was brought by the bondholder.

In the case of *Railroad Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. 10, the court said:

"We are of the opinion that, independently of the provisions of the other articles, the trustees, or, in their failure to do so, any bondholder, on nonpayment of any installment of interest on any bond, might file a bill for the enforcement of the security by the foreclosure of the mortgage and sale of the mortgaged property. This right belongs to each bondholder separately, and its exercise is not dependent upon the co-operation or consent of any others, or of the trustees. It is properly and strictly enforceable by and in the name of the latter, but, if necessary, may be prosecuted without, and even against, them."

We search this case in vain for any expression of the court which gives countenance to the appellant's contention. The language above quoted, that the "right belongs to each bondholder separately, and its exercise is not dependent upon the co-operation or consent of any others, or of the trustees," is not pertinent to the question now before us. No issue is raised in the present case to which that language is applicable. It may be admitted that the right of the bondholder to sue belongs to him individually, and, in its exercise, he is not required to obtain the co-operation or consent of other bondholders or of the trustee. All that he is required to do is to give the trustee the opportunity first to bring the suit, in the interest of all the beneficiaries, by requesting him to do so, or to show some reason why the trustee may not represent him in the proceedings.

In the case of *Hammond v. Tarver* (Tex. Sup.) 34 S. W. 729, a collateral attack was made upon the decree of a court foreclosing a trust deed, and confirming the sale of property thereunder, upon the ground that the trustee had not been made a party to the suit. The supreme court of Texas held that in that state the trustee in such a mortgage is not a necessary party to the foreclosure suit. It does not follow from that ruling, however, that a holder of bonds under such a trust deed could foreclose in the courts of Texas without averring in his complaint that the opportunity had first been afforded the trustee to bring the suit.

The case of *Dupee v. Rose* (Utah) 37 Pac. 567, is authority for the proposition that a power to sell, contained in a trust deed, does not divest a court of chancery of jurisdiction to enforce the rights of the parties thereto; that such power is merely cumulative to that granted by law. In that case the plaintiff was the sole beneficiary of the trust deed, and no question was raised of his right to prosecute the suit.

None of the other cases cited by counsel for the appellant are believed to be in point upon the question which the appeal presents. In the main, they support the proposition that a bondholder is not deprived of the usual remedies which a court of equity recognizes as his from the fact that the trust deed contains conditions and recitals prescribing the method in which foreclosure shall be had, and imposing conditions upon the exercise by the bondholders of the right to foreclose.

We find no error in the decree of the circuit court dismissing the bill, and it is accordingly affirmed.

LOUISIANA, A. & M. R. CO. v. BOARD OF LEVEE COM'RS OF TENSAS
BASIN LEVEE DIST.

(Circuit Court of Appeals, Fifth Circuit. April 26, 1898.)

No. 650.

1. APPEAL AND ERROR—SUFFICIENCY OF ASSIGNMENTS OF ERROR.

Assignments of error that in substance amount to only that the court erred in deciding the case for the opposite party are not specific enough to demand consideration.

2. LEVEES—POWERS AND DUTIES OF BOARDS.

The act of July 3, 1886 (Sess. Laws, p. 96), of the Louisiana legislature, creating the Tensas Basin Levee Board, authorizing it to assess taxes, collect and receive funds, and hold and administer the same, and granting to it large tracts of public lands to be expended by it discreetly for the purpose of carrying out the purposes of the act, created not a merely ministerial and executory functionary, but a full-fledged municipal corporation, with large discretion as a fiduciary agent, and with full power to sue in regard to the trust imposed.

3. SAME—POWER OF BOARDS TO CONTRACT.

The constitution of Louisiana (article 214) authorizes the legislature to create levee districts, the boards of which shall have supervision of the levees in said districts. Article 216 gives power with the concurrence of the adjacent state or states to create levee districts composed of territory partly in the state and partly in adjacent states. Act No. 59, 1886, § 17, provides that the Tensas Basin District, in Louisiana, shall have the right to join with any levee district embracing the counties of Chicot and Desha, in Arkansas, for mutual protection. *Held*, that a contract by the Tensas Basin District for the building of a levee in Chicot county, Ark., in opposition to the levee authorities of that state, was ultra vires and void.

4. SAME—CONTRACT BY RAILROAD FOR EMBANKMENT.

Defendant, an Arkansas railroad company, contracted with plaintiff, a Louisiana levee district, to build a portion of its railroad in Arkansas in the form of a levee embankment, of a certain height, which should serve the purpose of a levee as well as a railroad bed. The statutes of Arkansas forbid the building of railroad embankments which will interfere with the natural flow of the water, and the levee authorities in the district where the road was proposed to be built opposed it by legislation. *Held* that, the contract being impossible of performance, it should be rescinded.

5. SAME—WHAT ARE PUBLIC IMPROVEMENTS.

Acts La. 1888, No. 77, § 2, gave the Tensas Basin Levee District all the state lands within the district to be used for the purpose of building a system of levees or other public improvement for the purpose of protecting the district from disastrous floods, and authorized the board to dispose of the lands in such manner as it should deem proper. Const. La. art. 56, prohibits the granting of the property of the state to private enterprise. The board contracted with a railway company for the building of a portion of its road in the form of a levee embankment, which the state engineer reported would be of great value to the district. *Held*, that the railway was, to the extent it would protect the district, a "public improvement," contemplated by the statute, though owned at its completion by private persons, and used for another purpose besides being a mere levee.

6. CONTRACTS—TIME OF PERFORMANCE—RESCISSION.

A railroad company agreed to perform certain work by a stipulated time unless it is "by reason of the elements, litigations, strikes, financial panics, epidemics, or any other cause unforeseen or beyond the control of said railroad company, its successors or assigns, hindered or delayed or otherwise prevented from properly prosecuting said work. In such case, time not being the essence of this contract, the date herein fixed for completion * * * will not be adhered to, but credit for the time so lost shall be given and allowed to said railroad company, its successors or assigns, and the time so lost shall be added to that herein required for