

## GRAND TRUNK RY. CO. V. CENTRAL VERMONT R. CO.

(Circuit Court, D. Vermont. October 22, 1898.)

## RAILROADS—PREFERRED CLAIMS IN INSOLVENCY—CAR RENTALS.

A claim against a railroad for car rentals or mileage accruing prior to a receivership is not entitled to payment as a preferential debt.

## On Intervening Petition to Establish a Preferential Claim.

Fred H. Williams, for petitioner.

Charles M. Wilds and Elmer P. Howe, for petitionees.

WHEELER, District Judge. This cause has now been heard upon the intervening petition of the Boston Live Stock Line Corporation for payment of car mileage by the receivers, which accrued within the time allowed before the receivership, as a preferred claim. All debts are not allowable as such claims, but only those which bear such a relation to the property in custody, by conserving it, as makes them an equitable and just charge upon it, within proper limits, by way of preference over mere indebtedness. The supreme court of the United States said in *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, after reviewing prior cases:

"Tested by the principles asserted in these cases, the claim for car rental that had accrued prior to the receivership cannot be maintained, but should have been disallowed."

In *Pullman's Palace-Car Co. v. American Loan & Trust Co.*, 28 C. C. A. 263, 84 Fed. 18, the circuit court of appeals of the Eighth circuit said:

"Notwithstanding the ingenious and able arguments of counsel for appellant, we are unable to perceive in this case other than an effort to establish as a preferential debt a claim for the stipulated compensation for the use of cars, or, as it is generally called, 'car rental.' Under the authority of *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, this cannot be done."

In *Virginia & A. Coal Co. v. Central Railroad & Banking Co.*, 170 U. S. 355, 18 Sup. Ct. 657, the court said:

"In concluding that the claims of the interveners were entitled to priority out of the surplus earnings which arose during the control of the road by the court, we must not be understood as in any wise detracting from the force of the intimations contained in the recent utterances of this court in the *Kneeland Case*, 136 U. S. 89, 10 Sup. Ct. 950, and the *Thomas Case*, 149 U. S. 95, 13 Sup. Ct. 824, as to the necessity of a court of equity confining itself within very restricted limits in the application of the doctrine that in certain cases a court having a road or fund under its control may be justified in awarding priority over the claims of mortgage bondholders to unsecured claims accruing prior to a receivership."

These decisions and declarations seem to preclude the allowance of these car rentals or mileages as preferred claims in this case.

The petitioner insists that the money arising from the use of the cars was received in trust, and so should be paid in priority. The freight earned is understood, however, to have accrued to, and been collected by, the railroad company for itself, and not for the petitioner, and to have belonged to that company; and the car rentals to have accrued to the petitioner as a mere debt. This would not impress

a trust upon any part of the money as collected for and belonging to the petitioner. Demurrer sustained and petition dismissed, without prejudice to debt.

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SAN DIEGO FLUME CO. v. SOUTHER et al.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1898.)

No. 419.

1. CANCELLATION OF INSTRUMENTS—JURISDICTION OF EQUITY—GROUNDS OF RELIEF.

A court of equity will not entertain a bill for the cancellation of a contract unless it appears therefrom that its interference is necessary to prevent an injury for which there is no complete and adequate remedy at law.

2. EQUITY—DISMISSAL OF BILL—EFFECT ON CROSS BILL.

A cross bill which avers additional facts, and asks affirmative relief, containing in itself all the essentials of an original bill, is not affected by the dismissal of the original bill.

3. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The decisions of state courts as to the powers of irrigation companies under the provisions of the state statutes are binding on the federal courts.

4. IRRIGATION COMPANIES — RIGHTS UNDER LAWS OF CALIFORNIA — RIGHT TO CONTRACT FOR SALE OF WATER.

Under the decisions of the supreme court of California, neither the provision of the constitution declaring that the use of waters of the state appropriated for irrigating purposes is a public use, nor the statute of 1885, authorizing boards of county commissioners, on petition of consumers, to fix the rates to be charged by a company supplying water for such purposes, affects the right of such a company to make valid contracts with its consumers for the furnishing of water where the rates have not been so established. Such irrigation companies are private corporations, and, in the absence of statutory prohibition or regulation, have the same right to contract as individuals.

Appeal from the Circuit Court of the United States for the Southern District of California.

John D. Works and Lewis R. Works, for appellant.

Bicknell, Gibson & Trask and James A. Gibson, for appellees.

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

GILBERT, Circuit Judge. C. H. Souther and W. S. Crosby brought this suit against the San Diego Flume Company to cancel a written contract. It was alleged in the bill that the San Diego Flume Company, a corporation engaged in the business of furnishing water for irrigation and other purposes, made two certain contracts with the complainants, to furnish them water for the irrigation of their lands in San Diego county, Cal.; that by each of said contracts the flume company was to furnish 15 inches of water, continuous flow, measured under four-inch pressure; that the first contract was entered into on January 13, 1890, and the second on March 12, 1890; that on or about June 7, 1894, the defendant wrongfully, and without right, diverted from and deprived the complainants of more than one-half