CONTINENTAL TRUST CO. OF CITY OF NEW YORK v. TOLEDO, ST. L. & K. C. R. CO. et al.

In re RHODE ISLAND LOCOMOTIVE WORKS.

(Circuit Court, N. D. Ohio, W. D. April 20, 1899.)

RAILROADS—FORECLOSURE OF MORTGAGE—PRIORITY OF CLAIMS FOR EQUIPMENT.

A manufacturer who furnished locomotives to a railroad company in part on credit, taking notes for such deferred payment indorsed by a third person, must be held to have relied on the credit of the company and the indorser, and is not entitled to a lien on the company's property superior to that of a prior mortgage, though the locomotives were needed to enable the company to continue the operation of the road.

In the matter of the intervening petition of the Rhode Island Locomotive Works.

E. C. Henderson, for Continental Trust Co.
Potter & Emery, for Rhode Island Locomotive Works.

TAFT, Circuit Judge. The question is on the exceptions to the report of the master as to the priority over the mortgage bonds of the claim made by the Rhode Island Locomotive Works upon notes given by the railroad company for the last 20 per cent. of the purchase price of certain locomotives furnished to the railroad company, part of them eight months before the receivership, and part of them four months before the receivership. The railroad company was in great need of addition to its locomotive equipment. It applied to the Rhode Island Locomotive Works to furnish them. It had no money with which to pay for them. It was agreed that the Railroad Equipment Company, a third corporation, should take title to the locomotives; should pay to the Rhode Island Locomotive Works 80 per cent. of the purchase price; should enter into a contract of lease and conditional sale with the railroad company, by which, after the company should have paid the 80 per cent. of the purchase price, with interest, the title of the locomotives should be free and unincumbered in the railroad company. The locomotive works received pay for the additional 20 per cent. in notes of the railroad company indorsed by S. H. Kneeland, who was largely interested in the stock of the railroad company. It is contended by the Rhode Island Locomotive Works that it has an equity prior in right to that of the mortgagee, to be paid out of the earnings and corpus of the property, because it furnished this equipment at a time when it was needed to keep the company up as a going concern. The master, after a full hearing and a very satisfactory discussion of the authorities, has reached the conclusion that the locomotive works contracted this loan of 20 per cent. on the faith of the credit of the company and S. H. Kneeland, and that the claim does not come within the class of claims which the supreme court has held may be given priority to a vested mortgage lien. I fully concur in this conclusion, and think it well sustained by the authority of Penn v. Calhoun, 121 U. S. 251, 7 Sup. Ct. 906, and Thomas v. Car Co., 149 U. S. 95, 13 Sup. Ct. 824.

The exceptions to the master's report are overruled, and the report confirmed.

RHOADES v. PENNSYLVANIA CO. FOR INSURANCES ON LIVES & GRANTING ANNUITIES et al.

(Circuit Court, E. D. Pennsylvania. April 7, 1899.)

PARTIES—RIGHT OF INTERVENTION.

A creditor is not entitled to intervene as a co-plaintiff in a suit against his debtor brought by another creditor in his own interest alone, for the purpose of continuing the suit after the plaintiff's claim has been adjusted, but will be remanded to a new action in his own right.

On Petition of Alice Barrett for Leave to Intervene as Co-Plaintiff.

J. W. M. Newlin, for petitioner.
Samuel Dickson and Thomas Hart, Jr., for respondents.

McPHERSON, District Judge. We see no reason for granting the prayer of this petitioner. The suit in which she desires to intervene as plaintiff was an action brought by Rhoades to advance his own interests, and was not intended for the benefit of any other creditor. His claim has been adjusted, and he has assigned the judgment upon which the bill is based to another person, who may or may not intend to proceed with the cause. But, even if the assignee is content to do nothing further, this fact gives the petitioner no right to intrude upon the suit, and to go on with it as if it had been originally brought as well for her benefit as for the benefit of Rhoades himself. If she is entitled to raise the questions referred to on the argument of this motion, she can raise them in a suitable proceeding under her own control. The petition is refused.

DEWEY v. WHITNEY et al.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 68.

1. SPECIFIC PERFORMANCE—SALE OF LAND—MISTAKE OF VENDOR.

Two sisters were the owners of certain land, and one of them clothed the other with power to sell every part of the land of which she had the legal title, except an acre and a third, which carried with it a right of way of necessity to a highway. The purchaser knew from the vendor that the other sister had been consulted, and objected only to the sale of her acre and a third. *Held*, that the fact that the sisters had forgotten the details of the title, and that the sister owning the acre and a third had certain equities in the rest of the land, was not such a mistake as to prevent specific performance by the vendor of the contract.

2. VENDOR AND PURCHASER—RESERVATIONS IN CONTRACT.

Where land of two vendors is sold subject to the right of one of them to an acre and a third, the location of which was not designated, on the failure of the vendee to seek definite information regarding the reserved lot the court will locate it with reference to all the testimony and upon such principles as are equitable, taking the entire situation into consideration.