

it would have been invalid, because contrary to the articles of association and the Missouri statutes concerning benevolent associations.

Geo. D. Reynolds, for Harman.

Geo. C. Smith, for Lewis.

M. L. Wilcox, for M. L. Funkheuser.

TREAT, J. (*orally*.) Fund paid into court is subject to the ruling of the court as to the respective rights of parties. It is not necessary to enter into an elaborate consideration, in the light of authorities, of the peculiar obligations resulting from certificates of membership in this corporation. Whether such a certificate was assignable admits of extreme doubt. But even if assignable under the terms of the certificate, said terms were never complied with. The result is that the fund in court, less costs, must be paid to John P. Harman, guardian of the child of deceased.

Decree will be entered accordingly.

CENTRAL TRUST CO. v. WABASH, ST. L. & P. R. CO., and BUTLER,
Intervenor.¹

(*Circuit Court, E. D. Missouri.* June 6, 1885.)

1. EQUITY PRACTICE—CONSENT—MORTGAGES—EQUITABLE LIENS.

Where, in a foreclosure suit, a claimant intervenes, and the master, to whom his claim is referred, reports that the demand has not been contested and should be allowed, and that the intervenor is entitled to a lien for the amount due him superior to that of mortgage creditors, and no exceptions to the report are filed, and all parties in interest assent, the report will be confirmed.

2. MORTGAGES—EQUITABLE LIENS—SURETY ON APPEAL—BOND.

Semble, that where a judgment is rendered against a mortgagor before the appointment of a receiver and an appeal is taken, and after the appointment of a receiver in foreclosure proceedings the judgment is affirmed, a surety on the appeal-bond, who has to pay the judgment, is not entitled to any lien, unless the judgment creditor would have been entitled to one in case his demand had remained unsatisfied.

In Equity.

Phillips & Stewart, for complainant.

Wager Swayne, Henry T. Kent, and Green, Burnett & Humphrey, for defendant.

George B. Burnett, for intervenor.

Wells H. Blodgett, for receivers.

TREAT, J., (*orally*.) The intervening petition of John P. Butler was brought to the attention of the court yesterday. There are no exceptions filed either before the master or before this court, yet I thought it my duty to look through the record to ascertain whether it fell within the decision made by Brother BREWER; and if so, though

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

nobody objected to it, the court would reject it. I find, however, that all parties who have any interest, public or otherwise, in the matter have assented to this small demand, and that being the condition of things I confirm the report. But I wish it understood that this decision is not to be drawn into a precedent except under like circumstances. In other words, if a party chooses to go on an appeal-bond in a suit against a corporation,—not a lien demand,—prior to the appointment of a receiver, and the appellate tribunal (it being a state proceeding) affirms the original judgment and gives the necessary judgment against the principal and his sureties, the surety has no right prior to the mortgage. Now, what was the demand? Was it a lien demand? If so, the court would admit the right, as by subrogation, of a surety who paid off that lien, to be reimbursed.

Nothing is disclosed in this particular case with regard to the original demands whether they were lien demands or not. When I asked the counsel yesterday the nature of the original demands, and whether there was any lien for them by statute, he replied he thought not. If not, why, as Brother BREWER said, should a man, who had chosen to become surety on an 'appeal-bond, the litigation extending for a greater or less time, bring his claim in here to override a mortgage, because he had paid as surety a claim at large? The proposition as thus stated, every gentleman of the profession will understand, is an elemental one. A person sues a corporation like this Wabash Company, for illustration, on a demand which is not a lien demand. The company takes an appeal; some one chooses to go on that appeal-bond. The litigation extends for a period of time, more or less, but in the intervening time receivers are appointed. They are not parties to the original litigation; they know nothing about it, and then because that surety has to pay, and in the mean time the corporation is cast into the hands of receivers on an application for a foreclosure of a mortgage, why should such parties be put in any other position, not being subrogated to a lien demand, than that of a creditor at large? Now, I see that Gen. Swayne, who is one of the counsel here, and Mr. Blodgett and others have a different idea. So, also, the counsel for the mortgagee. But Brother BREWER and myself reached a common conclusion that there should be a disclosure to this extent, viz.: If the original judgment was a lien prior in right to the mortgage, and in order to preserve the property the surety become subrogated thereto, he would be in the position of a lien creditor. But how are you prior in right through suretyship on an appeal for accounts that are not liens at all? If so, what would be the result? A man who buys a bond secured by a mortgage on a railroad could not know whether his bond was worth anything. I confirm this report with these remarks, in order that parties may understand that but for the assent of all concerned I would not allow the account.

FULLER and others v. KNAPP and others.

(Circuit Court, S. D. New York. 1885.)

1. EQUITY PRACTICE—DEMURRER.

A defendant cannot be permitted, after a demurrer has been overruled which goes to the whole bill, and leave has been given him to answer, to avail himself a second time of the demurrer.

2. SAME—COMPELLING DEFENDANT TO ANSWER INTERROGATORIES.

A complainant cannot, by motion, compel a defendant to answer certain interrogatories annexed to the bill, but if the answer is insufficient he must present exceptions stating the charges in the bill, the interrogatories applicable thereto to which the answer is responsive, and the terms of the answer *verbatim*, so that the court may see whether it is sufficient or not.

3. SAME—RIGHT OF DEFENDANT TO REFUSE TO ANSWER INTERROGATORIES—EQUITY RULES 39, 44.

A defendant is at liberty to decline to answer any interrogatory, from answering which he might have protected himself by a demurrer, notwithstanding he answers other parts of the bill; and although he submits to answer, he is not compellable to discover other matters than he would be compellable to discover upon filing a plea in bar and an answer in support of such plea.

4. SAME—EXTENT OF INTERROGATORIES—EXCEPTIONS.

A complainant cannot interrogate as to matters which he has not put in issue, although he may expand his interrogatories so as to cover every incident of the facts as alleged. If interrogatories are propounded as to facts beyond the scope of the inquiry to which the bill is legitimately addressed, the defendant may omit to answer and have their propriety tested upon exceptions to his answer, as he might by a demurrer to such interrogatories.

5. SAME—LIFE INSURANCE—RIGHT OF INSURED—INTERROGATION AS TO DIVIDENDS.

Parties to a contract of life insurance do not contemplate that the policyholder is to be permitted to participate in the management of the company, or dictate the amount of the dividend it shall declare, or question the result after the discretion of its managers has been exercised in this behalf. The contract is that the policyholder shall have the benefit of such dividends as are appropriated, not such as the policyholder or the court may think might have been discreetly appropriated by the company.

WALLACE, J. The complainants' motion is, in substance, one to remove a demurrer from the files. The defendants demurred to the bill for want of equity, and the demurrer was set down for argument, and was overruled. The defendants then answered, and at the same time demurred again to the whole bill. A defendant cannot at the same time answer and demur to the whole bill, though he may demur to part and answer to the residue. Equity rule 32. After a demurrer has been overruled, a defendant may insist upon the same matters by way of defense in his answer. This has not been attempted here. The defendants cannot be permitted, after a demurrer has been overruled which goes to the whole bill, and leave has been given them to answer, to avail themselves a second time of the demurrer. The motion is therefore granted. The complainants also move to compel the defendants to answer certain interrogatories annexed to the bill. This is not correct practice. If the answer is deemed to be insufficient, the complainant must present exceptions stating the charges in the bill, the interrogatories applicable thereto,