

In Equity. On demurrer.

*William M. Safford*, for complainant.

*Silas M. Stillwell*, for defendant.

LACOMBE, J. The demurrer to the amended and supplemental complaint is filed only by the defendant Turnbull and the Pedernales Company. The sufficiency of the bill as against them only is to be determined. Upon the hearing of the motion for preliminary injunction herein, (32 Fed. Rep. 124,) the question of jurisdiction was considered solely in respect to the case made out, or sought to be made out, at that time, by the complainant. His claim, as shown by the bill and affidavits, then was that the relations of the defendant Turnbull to the Manoa Company (the mortgagor) were of a fiduciary character, and that any title which he might in his own name acquire to its property inured to the benefit of the company and its creditors. In the words of complainant's brief on that motion, his "suit was one to enforce a trust, \* \* \* [in which] the trustee can be decreed to convey the title." Jurisdiction of the court to compel a faithless trustee to disgorge property obtained contrary to the obligations of his trust, to require from him an account of all profits derived therefrom, and to exact the execution of such instruments of conveyance as might be necessary to the protection of his *cestui que trust*, no doubt exists, although the land concerned is situated in a foreign country, when the court obtains jurisdiction of the person and conscience of the defendant. The court may also, in a proper case, and as ancillary to such relief, enjoin the trustee from wasting or interfering with the property, or from asserting title to it. Such, however, as the case is now presented, is not the theory of this bill. It contains some averments as to a lease of the property to defendant Stone, in which lease it is claimed that Turnbull was interested. It also alleges that Turnbull subsequently took (or pretended to take) title to the property, but it does not seek to secure a transfer of his title, or a decree that whatever he took inured to the benefit of the Manoa Company. A naked injunction is asked for against him on the ground that his title is void because Venezuelan officials acted improperly in creating it. In other words, he, it is claimed, holds nothing, not because what he took passed (equitably) through him to the Manoa Company, but because the Venezuelan government could give nothing. Turnbull's position under this bill is no different from that of some stranger to whom the Venezuelan government might have conveyed the rights originally conceded to Fitzgerald; and the court is asked to enjoin waste upon, or interference with, property in a foreign country, because, as it is alleged, certain official acts of the government of that country (annulling one concession and making a new one) are void. Such relief cannot be administered on such ground. The bill is also demurrable for the reason that it neither sets forth copies of the instruments by which the mortgage under which complainant claims was created, nor contains any averment setting forth the terms thereof. The demurrer is sustained, with leave to amend.

BARRY v. MISSOURI, K. & T. RY. CO. *et al.*<sup>1</sup>

(Circuit Court, S. D. New York. May 12, 1888.)

## 1. RAILROAD COMPANIES—BONDS AND MORTGAGES—EXCHANGE OF BONDS.

Where provision is made for retiring a series of secured income bonds of a railroad, and issuing new bonds in exchange, the bonds surrendered to be held by a trust company uncanceled until all are retired, a bondholder who does not consent to render his bonds is not entitled, in an accounting under the mortgage, to claim for interest due him more of the income than his share would have been had no bonds been surrendered.

## 2. SAME—ACCOUNTING.

In an accounting in favor of income bondholders of a railroad, if the company has seen fit to pay a higher rate of interest than needful upon prior incumbrances, it cannot charge the difference against the income to the injury of the bondholders in direct contravention of the provisions of the mortgage securing the income bonds.

## 3. SAME.

*Held* that, under the particular facts of this case, an allowance made by the mortgagor to a connecting road for a diversion of earnings should be rejected from the expense account in ascertaining income applicable to the payment of interest.

In Equity.

*J. A. Davenport*, for complainant.

*Winslow S. Pierce, Jr.*, for defendants.

WALLACE, J. This cause is here upon exceptions filed by the railway company and the Mercantile Trust Company to the master's report. By the interlocutory decree of April 26, 1886, it was adjudged that the complainant and the other owners of income mortgage bonds created by the railway company were entitled to an account of the net earnings of the company for each six months from April 1, 1876, the date of the mortgage; and the railway company was accordingly directed to account before the master, in order to ascertain how much the complainant and others similarly situated should receive from the company as owing for interest earned upon the bonds. The decree directed the master to charge the company with its gross earnings and income derived from all the property covered by the mortgage since the execution of the mortgage, and to credit the company with its operating expenses, its expenses for keeping the property in repair, and the sums paid, or which it was liable to pay, for interest upon prior incumbrances, and for taxes and assessments. Upon the accounting thus directed, the master found and reported that the net earnings of the company which should have been applied to the payment of interest upon the bonds, after rejecting the items which the company had sought without right to charge against income, amounted October 1, 1886, to \$3,547,012. By the exceptions filed the railway company complains that the master improperly disallowed two items charged against earnings in the income account,—one for interest upon prior incumbrances actually paid by the company, and

<sup>1</sup>See 27 Fed. Rep. 1.