

BARRY v. MISSOURI, K. & T. RY. Co. *et al.*

(Circuit Court, S. D. New York. September 28, 1888.)

RAILROAD COMPANIES—BONDS AND MORTGAGES—MISAPPLICATION OF EARNINGS—INJUNCTION.

Where a railroad company has misapplied its earnings as against an income mortgage, and a decree allows the income bondholders to move for an injunction against further misapplication, and the company relies on a bare denial of a charge of misapplication, giving no figures from which the condition of its business or the manner of disposing of its earnings can be determined, and giving no explanation of the shrinkage of its semi-annual net earnings from \$1,449,468 to zero, an injunction will be allowed, though for a cause other than the particular one formerly had in view, and though the charge is in part on information and belief.

In Equity. Application for injunction.

Davenport, Smith & Perkins, for complainant.

Dillon & Swayne, for defendant.

LACOMBE, J. The injunction asked for by complainant is phrased in the precise terms of the eighth clause of the decree of April 26, 1886. That clause reads as follows:

"*Eighth.* And it is further ordered, adjudged, and decreed, that the complainant be at liberty to make application to the court, that the Missouri, Kansas & Texas Railway Company, its officers and agents, attorneys and servants, be enjoined and restrained from applying any of its earnings derived, or to be derived, from the railway and property described in the said mortgage, dated April 1, 1876, to any purpose other than to the payment of the operating expenses of the said railway, as described in the said mortgage, and to the payment of the expenses for keeping in repair its said railway and property, and to the payment of the interest on the several incumbrances which are prior to the said mortgage of April 1, 1876, and which are therein mentioned and described."

It is true that the particular misappropriation of earnings to which the court's attention at that time was directed is not the same as that now charged. There is nothing in that circumstance, however, which should debar the complainant from making, as they do, *in ipsissimis verbis*, the very motion which the decree contemplated. The allegations in complainant's affidavit as to misapplication of earnings are denied in the affidavit submitted by the defendant. That circumstance would, perhaps, ordinarily be sufficient ground for refusing the injunction, or for sending it to a master to find the facts; but in the case at bar other circumstances are entitled to consideration.

1. Although complainant's charge of misapplication is made in part on information and belief, it could not well be otherwise; complainant not being an officer of the company, nor personally familiar with its transactions, nor having free access to its books.

2. The defendant heretofore did misapply its earnings, and in a manner so plainly in violation of the trust created by the mortgage under which the income bondholders hold that this court characterized the theory un-

der which the officers of the road acted as "preposterous." *Barry v. Railway Co.*, 27 Fed. Rep. 1.

3. The last semi-annual period as to which there is definite information before this court touching the amount of earnings is that ending October 1, 1886. The master has reported that the net surplus earnings of that period, even after paying \$619,175, the interest on the earlier mortgages, on which defendant is now defaulting, was \$830,288.38.

4. The secretary of the company, who makes the denial relied on, confines himself to a mere bald contradiction of the charge in complainant's affidavit. With the books at his command and abundant information in his possession, he does not give the figures even of a single month from which the condition of the company's business, and the manner in which its earnings are disposed of, could be determined, and does not suggest a single fact to account for the shrinkage of net earnings from \$1,449,463.38 to zero.

5. The injunction, if granted in the terms prayed for, would only require the road and its officers to refrain from doing what this court has after full argument decided that they have no right to do.

These considerations seem controlling. Injunction as prayed for is granted.

FRELINGHUYSEN v. NUGENT *et al.*

(Circuit Court, D. New Jersey. September 25, 1888.)

1. TRUSTS—CONSTRUCTIVE—EX MALEFICIO.

A bank cashier, who was also financial agent of the defendant, proved a defaulter for more than \$2,000,000, covering his operations by charging on the bank-books drafts of defendant on a third party as sent by another bank for collection, and taking up the drafts by his own check as cashier. He testifies that he loaned the money to defendant for use in the latter's business; that defendant knew he was taking the money wrongfully; furnished blank drafts for the purpose; and kept urging him not to confess it, and assuring him that he would soon square the account. Defendant's testimony squarely denies this; also that any such sum was used in his business; which is corroborated by other proof. He testifies that he thought he was heavily in debt to the bank in the regular course of business; that he trusted the cashier as his agent, but could not get from him a statement of his account with the bank. The evidence shows that the defalcation occurred in 1878, at the time of the stock panics, and that the cashier and his brother used large sums of money, and speculated, and lost heavily. Defendant's present assets were mostly obtained on credit from other *bona fide* creditors. *Held*, that the evidence was not sufficient to establish a trust *ex maleficio* of defendant's assets in favor of the bank as against defendant's other *bona fide* creditors.

2. SAME—EQUITY—JURISDICTION—RETAINING BILL.

The bill seeking to establish the trust was followed by a supplemental bill, praying that, if the original prayer could not be granted, defendant's assets might be divided among all the creditors, including the bank. Issue was made on this bill, and the validity of an assignment made by defendant for the benefit of all his creditors at the instigation of the complainant bank was contested by other creditors, who were made parties to the bill, thus involving in the case much litigation, which must fall with the bill. *Held* that, though the evidence failed to establish the trust, the bill should be retained for the