

this court have had jurisdiction at the time the suit was instituted? The above statement in the petition does not refer to this time. The amount of damages stated must be considered the damages suffered by the appellant at the date that petition was filed,—January 13, 1890. It must be considered as a statement of the damage suffered by appellant at that date, and not the date of the commencement of the suit. It is a settled rule in the federal courts that their jurisdiction must appear affirmatively in the record. No amount in dispute sufficiently appears in the record in the two cases named to give this court jurisdiction. If I should be mistaken as to the views I have presented as to there being a federal question presented in these cases, there appears to me no doubt but that the causes last named should be remanded, because the damage for the injuries complained of do not appear to be sufficient to have given this court jurisdiction at the time the suits were commenced. All of the cases submitted are remanded to the supreme court of Washington for its consideration.

BOUND v. SOUTH CAROLINA RY. CO. *et al.*, (MAYFIELD, Intervenor.)

(Circuit Court, D. South Carolina. May 20, 1891.)

1. RAILROAD MORTGAGE—FORECLOSURE—PRIVATE SALE OF PROPERTY.

In proceedings to foreclose the liens of the state on railway property as the guarantor of the railroad's bonds, and also the mortgages thereon, the court will refuse to authorize the sale of land, free from such liens, at private sale, unless fully informed as to its selling value. The opinion of one person not shown to be an expert, and who must derive his knowledge from the opinion of others, is not sufficient.

2. SAME—POWER OF SALE—CONSENT.

On foreclosure proceedings, where a receiver has been appointed, but the relative rights of the various parties have not been established, the fact that the mortgages authorize the sale of lands not needed for corporate purposes, and the application of the proceeds by the trustees to the extinguishment of the oldest liens, will not justify such sale by the court, in the absence of consent by all the parties, and the mere absence of counsel from the hearing of a motion for that purpose will not amount to consent.

In Equity.

Samuel Lord, for Mayfield.

Mitchell & Smith, for Bound.

SIMONTON, J. This is an application for leave to purchase a tract of land in Barnwell county, the property of the South Carolina Railway Company. The land is not necessary for any of the corporate purposes of the company. Mr. De Caradeuc, who has for many years been at the head of the civil engineer department of the railway and its land agent, has testified that, in his opinion, the price offered for the land is fair and reasonable. The petition was filed in this cause, and was referred to the special masters heretofore appointed, who have reported the facts connected with it. Notices of the motion to grant the prayer of the

petition have been served on the counsel who represent the several parties. Only the attorneys for the plaintiff appear. They resist the motion. This land is covered by the liens created by statute in favor of the state of South Carolina, guarantor of bonds of the old Louisville, Cincinnati & Charleston Railroad Company and of the South Carolina Railroad Company, its successor. It is also covered by the first mortgage executed by the South Carolina Railroad Company and by mortgages of the South Carolina Railway Company. All these interests are represented in this case. It would not be expedient to sell the land at private sale at a valuation fixed by the opinion of a single witness. When the court departs from the general rule of selling property at public auction, it should be fully informed as to its probable value. This can scarcely be derived from the opinion of one person, who, by the way, as in this case, is not an expert in the selling of land, and who derives his own opinion from the statements of others. Apart from this, however, there is another controlling consideration. This is a bill for foreclosure of the liens on the entire railroad property, brought by the holder of second mortgage bonds. A receiver has been placed in charge of the property. But not a single right has been established by decree. I can find no authority for selling, by piecemeal, *pendente lite*, parcels of the property covered by liens, except by the consent of all persons interested, expressed either in open court or in writing. See, in this connection, *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. Rep. 950. It is said that each of the mortgages permits the trustees to exchange or sell any lands which prove to be of no use for the corporate purposes of the company, and in such case they free the parcel exchanged or sold from the liens, and that, in case of a sale, the proceeds are to be applied to the extinguishment of the oldest liens. For the present, no opinion is expressed whether the court can execute this power in the trustees by its own order, or by directing the trustees to do so. At this stage of the case, it has no judicial information as to the sufficiency of the mortgaged premises to pay off the first mortgage and the older liens. It is impossible to ascertain now what charges, if any, may be imposed on the holders of these liens for their share of the burdens of this case. So, if the receiver be directed to sell property in parcels, and with the proceeds take up any bond covered by such liens for the purpose of canceling it, the holder may, by this act, get an undue preference of his claim. This should not be done without the consent of all the lienholders. In this connection, and as a matter of practice, the mere absence of counsel at the hearing of a motion, for a purpose like this, will not be accepted as equivalent to consent thereto.

SIMON *et al.* v. HOUSE *et al.*

(Circuit Court, W. D. Texas, San Antonio Division. May 4, 1891)

1. FEDERAL COURTS—JURISDICTIONAL AMOUNT.

In a proceeding to set aside certain conveyances as fraudulent and a cloud upon the plaintiffs' title, the "matter in dispute," within the meaning of Act Cong. Aug. 13, 1888, (25 St. p. 494, § 1.) limiting the jurisdiction of the United States circuit court, is the value of the land.

2. SAME—EVIDENCE.

Where, in such a case, the plaintiffs allege that the value of the land is more than \$2,000, but it appears by undisputed testimony in support of a plea to the jurisdiction that it was much less, an order of dismissal must be entered in accordance with the provisions of Act Cong. March 3, 1875, § 5, 13 St. p. 472.

In Equity. On plea to the jurisdiction.

Green & Green, for plaintiffs.

McLeary & Fleming, for defendants.

MAXEY, J. The plaintiffs, Joseph Simon and Joseph Kohn, claiming to be the purchasers at execution sale of a tract of land containing 177 acres, and alleged to be worth the sum of \$2,500, filed their bill of complaint, April 23, 1889, against Alfred House, Fly & Davidson, and H. W. Nott, praying for the cancellation of certain alleged fraudulent conveyances of said land executed by House to Fly & Davidson, and from Fly & Davidson to Nott. The bill also alleges that the deeds referred to operate as a cloud upon the title of plaintiffs, and further prays that the cloud may be removed. A plea to the jurisdiction was interposed by the defendants, June 29, 1889, in which it is, in substance, averred that the valuation placed upon the land by the plaintiffs in their bill is excessive; that the true value of the land is, and was at the time of the institution of the suit, far below \$2,000, and that it does not now, nor did it then, exceed in value \$1,200; that plaintiffs well knew that the matter in dispute, to-wit, the said tract of land, did not exceed in value \$2,000; and that the allegation of value, as contained in the bill, is false, and was fraudulently made, for the purpose of conferring jurisdiction upon this court. On August 1, 1889, replication was filed by the plaintiffs, and issue joined on the plea. In support of the averments of their plea touching the value of the land, the defendants took the depositions of five witnesses, four of whom estimate the value at \$1,062, inclusive of improvements, and the fifth at not exceeding \$1,416, with improvements included. The testimony was published and delivered to the attorney of plaintiffs, October 18, 1889, but no testimony was taken by the plaintiffs to sustain the allegations of the bill. At the November term, 1890, the cause was submitted to the court on the pleadings and proofs, and a ruling requested upon the jurisdictional question thus appearing of record. It is provided by the act of August 13, 1888, "that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, * * * in which