

The petition for removal sets forth what this defendant claims to be the matter constituting the separable controversy, and from that it appears that the Edison General Electric Company claims to own part of the property mortgaged. The company claims nothing under the mortgage, but claims an independent or paramount title to the property. The only controversy the company can have in the case, therefore, is to settle the question of title.

I hold that to be a controversy not within the scope of a foreclosure suit, and therefore it is not a matter that can be litigated in this suit. The correct rule of law, as I understand it, is laid down in section 1589, 11 Jones, Mortg. This writer says:

"Where a party has a right under the mortgage, and also a right prior to it, he is not precluded in respect to the prior right by a judgment of foreclosure, though the terms of it are broad enough to cover both rights. Only the rights and interests under the mortgage and subsequent to it can properly be litigated under a bill of foreclosure. One claiming adversely to the title of the mortgagor cannot be made a party to the suit for the purpose of trying his adverse claim. If he has a claim under the mortgage also, his claim prior to it cannot be divested by the decree. This prior claim is not a subject-matter of litigation in the foreclosure suit, and remains unaffected by it. The decree is final only within the proper scope of the suit, which is to bar interests in the equity of redemption."

Now, if this court should entertain jurisdiction, holding the opinion that I do, I would dismiss the case as to the Edison General Electric Company, the party that brought it to this court, and the case should be remanded, instead of pursuing the inconsistent course of going on and determining rights between other parties which they have not sought to litigate or bring into this court. I think that the Edison General Electric Company, having this claim to the property, the property being now in the hands of a receiver appointed by the superior court, will find its remedy, if at all, by getting leave of the court which appointed the receiver to bring a suit—an independent suit—for the purpose of trying the question of title. For this reason I will grant the motion to remand the cause to the superior court.

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ST. LOUIS S. W. RY. CO. et al. v. GRAHAM, Intervener.

(Circuit Court of Appeals, Eighth Circuit. May 15, 1893.)

No. 171.

**APPEAL—REVIEW—MATTERS NOT APPARENT ON RECORD.**

The circuit court, in a suit for the foreclosure of a railroad mortgage, allowed an intervening claim based on a judgment recovered in a state court, and directed its payment out of the proceeds of sale. The decree recited that it was one of those claims theretofore adjudged to be of a preferential character. This latter adjudication was not appealed from, and, on appeal from the decree allowing such intervening claim, the nature of the demand on which the judgment was recovered was not disclosed by the record. *Held*, that it must be presumed that the finding of the lower court as to its character was correct, and its decree will be affirmed. *Railway Co. v. Stark*, 55 Fed. Rep. 758, followed.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

This was an intervention by D. P. Graham in a suit to foreclose a mortgage on the property of the St. Louis, Arkansas & Texas Railroad Company in Arkansas and Missouri. From a decree allowing the intervener's claim, the purchaser under the foreclosure, the St. Louis Southwestern Railway Company, and others, appeal. Affirmed.

J. M. Taylor, J. G. Taylor, and Samuel H. West, for appellants.  
Sol F. Clark, for appellee.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. This is an appeal from an order made by the United States circuit court for the eastern district of Arkansas, allowing an intervening claim in a proceeding to foreclose a mortgage on the St. Louis, Arkansas & Texas Railway Company in Arkansas and Missouri, and directing it to be paid out of the proceeds of the sale of that road. The intervention is founded on a judgment which was recovered by the appellee in the supreme court of Arkansas against the St. Louis, Arkansas & Texas Railway Company in Arkansas and Missouri on the 22d day of February, 1892, in the sum of \$250 and costs. The decree of the circuit court allowing the claim recites that it is one of those claims which the receivers of the St. Louis, Arkansas & Texas Railway Company in Arkansas and Missouri were ordered and adjudged to pay, by an order made by the circuit court for the eastern district of Arkansas in the foreclosure suit on the 31st day of January, 1890. That order is not contained in the present record, and this proceeding is not an appeal from such order. Furthermore, the record before us does not disclose the nature of the claim on account of which a judgment was recovered in the supreme court of Arkansas. We must accordingly presume that the finding of the lower court was correct,—that the intervening claim is one of those claims which it had previously adjudged to be of a preferential character, and had directed to be paid out of the proceeds of the sale of the mortgaged property by a general order made in the foreclosure suit on the 31st day of January, 1890. The case is in all respects identical with the case of *Railway Co. v. Stark*, 55 Fed. Rep. 758, recently decided by this court, and on the authority of that case the decree appealed from is affirmed.

## CITY BANK OF HARTFORD v. PRESS CO., Limited.

(Circuit Court, E. D. Pennsylvania, June 6, 1893.)

No. 52.

## 1. NEGOTIABLE INSTRUMENTS—ACTIONS—AFFIDAVIT OF DEFENSE—EXECUTION.

An affidavit of defense that "the notes sued on do not purport on their face to have been signed by two managers of the defendant company," and that "there is no averment that the persons who signed them are or were" such managers, is not sustained where the notes are signed by the "chairman" and the "treasurer" of the defendant; for Act Pa. May 10, 1889, (P. L. p. 183,) expressly provides that these officers shall be managers.

## 2. SAME—BONA FIDE PURCHASERS—FOREIGN CORPORATIONS.

The defense that the payee of negotiable notes given in Pennsylvania was a foreign corporation which had failed to comply with the conditions prescribed by statute to entitle it to do business therein, and that the contract under which they were given was in violation of that statute, is not available against one who paid value for the notes before maturity, and had no notice of the illegality infecting them.

At Law. Action by the City Bank of Hartford against the Press Company, Limited. Plaintiff took a rule to show cause why judgment should not be entered for want of a sufficient affidavit of defense. Rule absolute.

John Hampton Barnes, Geo. Tucker Bispham, and Wayne MacVeagh, for plaintiff.

Jas. H. Shakespeare, for defendant.

DALLAS, Circuit Judge. This action is brought on three promissory notes made by the defendant to the order of the Thorne Typesetting Machine Company, and by it indorsed. Two affidavits of defense have been filed, which set up—First, that "the notes sued upon do not purport on their face to have been signed by two managers of the defendant company, nor is there any averment that the persons who signed the same are or were managers of the defendant company;" second, that the payee, being a corporation not of the state of Pennsylvania, had not complied with certain requirements of a statute of that state which it was necessary that it should comply with in order that it might lawfully do business therein, and that these notes were given under a contract which was violative of that statute.

The first of these defenses is ineffectual, because each of the notes appears on its face to have been signed by the "chairman" and by the "treasurer" of the defendant association; and the act of the general assembly of Pennsylvania of May 10, 1889, (P. L. p. 183,) expressly provides that these officers shall be managers. In the case of Thorne Typesetting Company v. The Record Publishing Company, (not reported,) Judge Thayer, president of the court of common pleas No. 4 of Philadelphia county, recently sustained the defense last mentioned, as between the original parties to notes like those which are the subject of the present action. I am not disposed to question the soundness of