

of proper service of process. At no time did the defendants submit themselves to the jurisdiction of the court on the merits of the cases.

It is claimed that the taking of a bill of exceptions by the defendants to the order of the court overruling the motion of the defendants to dismiss these cases was a waiver of objection to the jurisdiction of the court. As laid down by Mr. Foster, (Fed. Pr. § 101,) the doctrine of the law is that:

"After a special appearance for the purpose of objecting to the jurisdiction has been made, and the objection overruled, the right to insist upon this objection on an appeal is not lost by a subsequent appearance and defense to the suit on the merits."

In *Harkness v. Hyde*, 98 U. S. 476, the supreme court of the United States held that—

"Illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; nor, after such motion is denied, by his answering to the merits. Such illegality is considered as waived only when he, without having insisted upon it, pleads in the first instance to the merits."

See, also, *Farmer v. Association*, 50 Fed. Rep. 829.

These cases were properly removed into this court, and the motion to remand them must be overruled.

TALLEY v. CURTAIN et al.

(Circuit Court of Appeals, Fourth Circuit. June 13, 1893.)

No. 33.

APPEAL—REVIEWABLE ORDERS—FINAL DECREE.

A decree of a federal court is final, for the purposes of an appeal, when it ends the litigation on the merits so that, if affirmed, nothing would be left to the trial court but to execute it. A decree setting aside an assignment, and ordering a reference to ascertain the amounts and priorities of creditors' claims, is not final, within the rule.

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

In Equity. Creditors' bill by Curtain & Corner, suing for themselves and others, against Williamson Talley, trustee of Ernest H. Chalkley, to set aside a deed of trust from Chalkley to Talley. A decree was entered setting aside the deed. 46 Fed. Rep. 580. Defendants appealed, and the decree was reversed in part. 4 C. C. A. 177, 54 Fed. Rep. 43. Appellees now move for a rehearing. Denied.

Legh R. Page and James Alston Cabell, for appellants.

Wm. Flegenheimer and A. L. Holladay, for appellees.

Before FULLER, Circuit Justice, GOFF, Circuit Judge, and MORRIS, District Judge.

GOFF, Circuit Judge. In this case the appellees ask for a rehearing. The decree entered by this court, of which a rehearing is desired, was passed during the February term, 1893. Under rule

29, a petition was duly presented, and the matters arising thereon were continued until the present term.

It is claimed that the decree of the court below, rendered August 6, 1891, was a final decree, and that, as no appeal was taken from it within the time prescribed by law, this court is without jurisdiction, and that the appeal should have been dismissed.

This question was fully considered by the court before the decree complained of was entered. We did not consider the decree of August 6, 1891, a final decree. The test of what is a final decree is stated by Chief Justice Waite in *Mower v. Fletcher*, 114 U. S. 128, 5 Sup. Ct. Rep. 799, in the following words:

"That judgment is final, for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered."

In this case the decree of August 6, 1891, sets aside the deed of assignment made by Ernest H. Chalkley to Williamson Talley, trustee, as fraudulent and void; but it then proceeds to provide for a reference to ascertain who are creditors of Chalkley, the amounts and respective priorities of their claims, and directs the master to report such other matters germane to the suit that any party to the record might require. Surely that decree did not terminate the litigation between the parties to said suit. There is some apparent conflict in the cases on this subject, and it is frequently a difficult matter to determine when decrees in equity are final, in connection with the law relating to appeals. But in this case the decree of the court below does not dispose of the property described in the deed and in the possession of the court, nor does it determine who the creditors of Chalkley are, nor find the sum due any of them. In fact, among the numerous prayers for relief asked for in the bill, the only one disposed of by the decree is that relating to the fraudulent character of the assignment. Had this court simply affirmed the decree, would there have been anything for the court below to have done, other than carry into effect the provisions of the decree appealed from? Certainly there would; and this disposes of the question as to it being a final decree.

We see no reason for changing the conclusion reached in the opinion heretofore filed in this case. We see no error in the decree filed herein at the February term, 1893. No one of the judges concurring in the judgment entered desires a rehearing, and the motion is denied.

This conclusion is reached by the court as constituted when the decree complained of was rendered, by whom the petition for rehearing was considered. The court, as so constituted, has been consulted, with the result stated. Motion denied.

Chief Justice FULLER and Judge T. J. MORRIS concur in this announcement.

MERCANTILE TRUST CO. v. KANAWHA & O. RY. CO. et al., (ADAMS
EXP. CO., Intervener.)

(Circuit Court of Appeals, Sixth Circuit. July 12, 1893.)

No. 70.

1. APPEAL—PARTIES—WHO MUST JOIN.

After confirmation of a foreclosure sale of a railroad, a decree was made, declaring certificates issued by a receiver in a former suit a prior lien on the proceeds of the sale, which were less than one-half the mortgage indebtedness. There was no liability for a deficiency on the part of the stockholders, or otherwise. *Held* that, the railroad corporation having become practically defunct by the decree of foreclosure, the sale, and the subsequent decree of confirmation, and having no interest in the proceeds, it need not be joined as an appellant from the decree, but that the appeal might be prosecuted by the complainant alone. *Hardee v. Wilson*, 13 Sup. Ct. Rep. 39, 146 U. S. 179, distinguished.

2. SAME—SEVERANCE.

After confirmation of the sale, stipulations as to evidence were entered into between the holder of the certificates, who had intervened in the suit, and the complainant, and thereafter the court proceeded as if the railway company had no interest in the proceeds. *Held* a substantial severance of the interests of complainant and the defendant railroad corporation.

3. RAILROAD COMPANIES—MORTGAGES—FORECLOSURE—VESTING TITLE FREE FROM LIENS—RECEIVER'S CERTIFICATES.

A final decree in a foreclosure suit against a railroad company, whereby the purchasers at the foreclosure sale are vested with a title free from all liens for receiver's debts, operates to set aside so much of a previous order authorizing the issue of receiver's certificates as made them a paramount lien on the road, and transfers the lien of the certificates, if any, to the proceeds of the sale.

4. SAME—DUTY OF HOLDER OF RECEIVER'S CERTIFICATES.

The holder of receiver's certificates is put upon inquiry as to all that has been done in the litigation in which the certificates were authorized, and is charged with notice of all subsequent proceedings therein, and that by final action of the court the validity or security of the certificates may be prejudicially affected; the holder's duty being to advise the court of his claim at an early day.

5. SAME—LACHES—RES JUDICATA.

An order authorizing a receiver in a foreclosure suit against a railroad company to issue certificates was made ex parte, the issue was without notice to the court or to the parties to the suit, and the proceeds were not used for the purpose specified in the order, or for any other purpose of the receiver, or for the benefit of the property or the parties to the cause. The holder made no demand for three years, until after the foreclosure sale had been confirmed and the debts of the receiver judicially ascertained, the certificates in question not being included, and a final decree of confirmation and distribution had been made. *Held*, that the holder of the certificates was guilty of gross laches, and was estopped by the decree from seeking payment of his claim against the purchasers or distributees. *Vilas v. Page*, 13 N. E. Rep. 743, 106 N. Y. 439, distinguished.

Appeal from the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

In Equity. Suit by the Mercantile Trust Company against the Kanawha & Ohio Railway Company and others for foreclosure of a