

on, and a citizen and resident of the state of Kentucky was the owner.

If all of the allegations be taken as true, the bill does nothing more than seek to have the present judgment set aside, and defendant be allowed to raise an issue as to the ownership of the coupons, with a view to deprive this court of jurisdiction. This is not sought because any injustice has been done the complainant in obtaining the judgment, or because, if this judgment be set aside, another judgment of a like import should not be entered by another court, but because the defendant in the common-law suit has neglected its suit, and has not made the issue of ownership of the coupons by a plea to the jurisdiction, and produced testimony on the issue thus made to sustain it. If this kind of practice was tolerated, there would never be an end of litigation. This bill is not before me on demurrer, but it should be considered on the motion to allow substituted service on it, so as to bring the Evansville National Bank before this court. On such a motion the court should not allow a party to be brought before it on substituted service, unless on the face of the bill there be some legal or equitable merit. Prior to the act of 1875, if the diverse citizenship of the plaintiff and defendant was properly alleged by the plaintiff, the jurisdictional question could only be raised by plea in abatement, and, if there was no such plea, the question could not be raised at all. Congress, by the fifth section of the act of 1875, gives the court authority to dismiss the suit at any time during its pendency, if it appeared the requisite diverse citizenship did not exist, or that the title in the plaintiff was only colorable, to give the court jurisdiction. Broad as the language of this section is, it does not extend beyond the pendency of the suit, or after judgment; hence does not aid the purpose of this bill. This view makes it unnecessary to consider whether substituted service of the subpoena against the Citizens' National Bank of Evansville should be had by its execution upon Messrs. Brown & Rodman, who presumably ceased to be the attorneys of said bank when the judgment was collected and paid over. The motion to file amendment to bill will be sustained, but the motion to direct subpoena to be executed on Brown & Rodman will be overruled.

FRONT ST. CABLE RY. CO. v. DRAKE, Marshal, et al.

(Circuit Court, D. Washington, N. D. January 21, 1895.)

No. 469.

1. EXECUTION—REAL ESTATE—RIGHT OF POSSESSION.

As, under the laws of Washington, a levy of execution on real estate gives no right of possession, where an officer levies on and takes possession of all the property of a street railway, its real estate as well as the personal property used in connection therewith, the levy will be considered an entirety and wholly wrong; and the operation of the road being stopped, and the franchise therefore being in danger of forfeiture, and the company being insolvent, all the property will be taken from the officer's possession.

2. JURISDICTION—FEDERAL QUESTION.

Where a United States marshal, under authority assumed by virtue of his office, and under an execution from a United States court, wrongfully takes possession of real estate, a federal court has jurisdiction of a suit to redress the wrong, as a case arising under the laws of the United States.

Suit by the Front Street Cable Railway Company against James C. Drake, marshal, and others.

Joslin, Denny & Bailey, for complainant.
Shank & Smith, for defendants.

HANFORD, District Judge. The bill shows that the complainant is a street-railway corporation; that it was granted a franchise for operating a cable road in the streets of the city of Seattle; that it is the owner of a street railway, a power plant, and rolling stock, and was, up to the time of the levy of the execution, operating a street railway with that property and under that franchise. Under a writ of execution issued in favor of the defendant the Washburn & Moen Manufacturing Company out of this court, for the satisfaction of a judgment of this court, in favor of said manufacturing company, the marshal made a levy on all this property. The bill then goes on to allege that, assuming the right by virtue of that levy, the marshal took possession of all this property, and dispossessed the complainant of its power house and its street railway, as well as its rolling stock, and stopped the operation of the road. The bill shows that there is a prior lien on all this property under a mortgage given to secure a bonded indebtedness of \$300,000. The corporation has other creditors, and is unable to pay its debts; and it shows that it is practically in a condition of insolvency, and unable to help itself, with this property in the hands of the marshal. Now, the laws of this state are invoked by this judgment creditor, and we are told that the court has no right to set aside the statutes of this state, which give the creditor the right to have its execution levied, and to sell the interest of the judgment debtor in the property. Conceding that proposition, a party invoking the laws of the state must be judged by the laws of the state. This case may be rested upon the laws as to the right of possession of this property; and, instead of this court having disregarded the laws of this state in wresting the property from the possession of the marshal, the marshal has gone contrary to law in taking immediate and forcible possession of the property from the corporation. That invasion of the rights of the corporation is ground of complaint, upon which it may come into this court, and ask for protection; and the duty of the corporation to its bonded creditors and its unsecured creditors requires that it should seek for proper relief, because, by seizing its property, the marshal jeopardized their interests, which are not subject to execution for the debt of the corporation. One effect of stopping the railway is likely to be a forfeiture of the franchise for use of the public streets of the city, which means a total destruction of the most valuable part of the security of the bondholders, as well as great inconvenience to the public. The main part of this prop-

erty consists of real estate. The power house and street railway is certainly real estate, and it is a question that I will not assume to decide now whether the rolling stock is real estate or not; but it is certain that only a small fragment of the property that has been taken from the possession of the corporation by the marshal (according to the allegations of the bill) consists of personal property, which the marshal had the right to take into his possession, and dispossess the corporation of, in making a levy. The law of this state prescribes that the manner of making a levy under a writ of execution shall be the same as that prescribed for making a levy under a writ of attachment. Under a writ of attachment, a levy on real estate is made by filing a copy of the writ, and a description of the property attached, with the county auditor. After such levy by virtue of an execution the officer can sell the interest of the judgment debtor in the property, and, after the sale, if the interest sold includes a right to the possession, the purchaser becomes entitled to possession from the day of the sale. An execution upon a judgment against the owner of a building would not require nor authorize the officer, in making a levy on such real estate, to take actual possession and interrupt the business of tenants occupying stores and offices therein by closing their doors. Such a proceeding would not be tolerated. By reason of this unlawful invasion of the complainant's right of possession in the property, there is a cause of complaint. The amount and value involved is sufficient to bring the case within the jurisdiction of this court. It is a case arising under the laws of the United States, because the wrong was done by an officer of the United States, under authority assumed by virtue of his office and process from the United States court. All the facts essential to give jurisdiction are stated in the bill of complaint. If the defendants have any ground of complaint at all, it is in going to the extent of taking out of the marshal's hands personal property which could have been properly levied upon, by taking possession. But all the personal property is connected with the real estate, and I think, in view of the wrongful proceedings of the marshal, the court is justified in treating the levy as an entirety, and wholly wrong. On that ground the court is warranted in exercising its power to the extent of dispossessing the marshal entirely of all he took under the writ, and putting it into the hands of the receiver for the benefit of whoever has any right, whether the bondholders or other creditors or the Washburn & Moen Manufacturing Company. If they are entitled to have this property sold, upon a proper showing the court will sell it, and distribute the proceeds to whoever has the right to take it under the law. If they have acquired any lien by this levy, that lien has been protected so far, and will be; but the case is one that appeals strongly to the conscience of the court on account of the manifest destruction that is imminent if, under the levy of this writ, the marshal should be allowed to continue in possession, and, by stopping the operation of the railway, work a forfeiture of the franchise, and then sell this plant and the cars and tools for what

they will bring as old junk. The demurrer will be overruled, and the petition to repay the complainant its disbursements for fees of the clerk and marshal will be granted. The receiver will be directed to pay all the clerk's fees and marshal's fees charged in connection with the commencement and prosecution of this case up to this time.

GERMAN SAV. & LOAN SOC. v. CANNON et al.

(Circuit Court, D. Washington, E. D. January 28, 1895.)

1. MORTGAGE—DEATH OF MORTGAGOR—RIGHTS OF EXECUTOR AND MORTGAGEE.
The rights of a mortgagee, under a mortgage making special provisions for foreclosure and a receiver, are not affected by death of the mortgagor, but may be enforced against the executor.

2. COMMUNITY PROPERTY—DEATH OF WIFE—ADMINISTRATION.

As property mortgaged by husband and wife will, in the absence of any claim that it was the separate property of either, be presumed to have been their community property, and as, under the decisions of Washington, on the death of a married woman administration of her separate property is distinct from that of the community property of deceased and her husband, it will not be presumed that her administrator has acquired lawful authority over the property thus mortgaged and presumed to be their community property, or that a court through its proceedings in admitting her will to probate, and in administering her estate, has drawn such property into its custody.

In Equity. Suit by the German Savings & Loan Society, a corporation, to foreclose a real-estate mortgage. Heard on application for the appointment of a receiver. Application granted.

Cyrus Happy, for complainant.

George Turner, for defendants.

HANFORD, District Judge. The complainant shows, as ground for the appointment of a receiver, that in May, 1892, it loaned to the defendant A. M. Cannon, and his wife, Jennie F. Cannon, \$80,000, and they gave, as security therefor, their promissory note and a mortgage upon real estate situated in the city of Spokane, whereby they promised to repay the amount of said loan, and to pay interest thereon at the rate of 7 per cent. per annum, quarterly, and to pay all taxes on the mortgaged property, and to keep the improvements insured for the benefit of complainant for at least \$40,000, and agreed that, in case of default in the payment of any quarterly installment of interest, the whole debt should become due if the mortgagee should elect to have it so, and that, in case of a foreclosure suit being commenced, the court should appoint a receiver, to take immediate possession, collect the income from said property, and apply the same in payment, pro tanto, of said debt; that complainant has been compelled to pay off a prior incumbrance upon the property amounting to \$886.46; that taxes on said property amounting to \$1,980.30 have become delinquent, and the same, with accrued interest, remains unpaid; that complainant has been compelled to pay the insurance premiums, and has not received the interest on