

## PARK v. NEW YORK, L. E. &amp; W. R. CO. et al.

## FARMERS' LOAN &amp; TRUST CO. v. SAME.

(Circuit Court, S. D. New York. November 11, 1895.)

## 1. JURISDICTION OF FEDERAL COURTS—DIVERSE CITIZENSHIP—FAILURE TO DEFEND.

Where a federal court once acquires jurisdiction by reason of the diverse citizenship of the parties to an actual controversy, such jurisdiction is not arrested by the fact that, after the action is begun by service of process, defendant does not continue to resist complainant's demands.

## 2. SAME—APPOINTMENT OF RAILROAD RECEIVERS.

In a suit against a railroad company by a citizen of another state than that of its incorporation, to enforce an express lien on accrued earnings and income, without seeking to disturb any superior liens, a federal court has jurisdiction to take possession of the railroad and appoint receivers, in advance of an application for foreclosure of a mortgage; and it may sell the property subject to all superior liens, and distribute the proceeds equitably among those entitled thereto.

## 3. SAME—CITIZENSHIP OF INTERVENERS.

Where a federal court has acquired jurisdiction, by reason of diverse citizenship, of a suit against a railroad company, and has appointed receivers, it does not lose jurisdiction when other parties interested in the property intervene, and are made parties, even though some of them be citizens of the same state with those whose interests in the property are adverse to the interveners.

## 4. SAME—FORECLOSURE OF INTERVENER'S MORTGAGE.

Suit was brought by a citizen of Vermont to enforce an express lien on income and earnings of a New York railroad corporation. The court took possession of the railroad, and appointed receivers, with the consent of the company. A mortgagee, which was also a New York corporation, intervened, and filed a cross bill for foreclosure, and an independent foreclosure suit also commenced by it was consolidated with the suit in question. *Held*, that the court, having properly acquired jurisdiction of the property in the first place, retained it for the purposes of foreclosure and sale, and to dispose of the claims of all parties, whatever their citizenship.

This was a suit by Trenor Luther Park against the New York, Lake Erie & Western Railroad Company, asking for the appointment of receivers, and for other relief. Receivers were accordingly appointed, and in August, 1893, the Farmers' Loan & Trust Company was permitted to intervene and become a party defendant. 64 Fed. 190. It thereafter filed a cross bill, seeking the foreclosure of a mortgage in which it was the trustee. A decree was entered, directing a sale under foreclosure of the second consolidated mortgage, and the cause is now heard upon a motion to confirm the special master's report of the sale.

Francis Lynde Stetson and David McClure, for motion.

W. W. MacFarland, for New York, P. & O. R. Co.

LACOMBE, Circuit Judge. Motion is now made upon the report of the special master, filed November 7, 1895, to confirm and make absolute the sale of the railroad, property, and franchises of the New York, Lake Erie & Western Railroad Company, under foreclosure of the second consolidated mortgage, of which the Farmers' Loan & Trust Company is trustee. No opposition is made by any

party to the record, but counsel appearing for the New York, Pennsylvania & Ohio Railroad has been heard as *amicus curiæ*, and calls the attention of the court to what, it is suggested, may be a jurisdictional objection to the relief asked for. The suit does not present any federal question, and both the railroad company and the trust company are citizens of this state. Undoubtedly, if jurisdiction to sell the property were sought to be sustained solely by reason of a suit to foreclose, brought by the trustee against the railroad company, this identity of citizenship would be a fatal objection; but in the case at bar jurisdiction was not originally acquired by such a suit. Trenor L. Park, the complainant in the first of the above-entitled consolidated actions, was a creditor of the New York, Lake Erie & Western Railroad Company, demanding payment. The railroad company was his debtor, refusing to pay. Manifestly there was a controversy between them, and, as they were citizens, respectively, of Vermont and of New York, such diverse citizenship gave Park the right to take the controversy to the federal court. The fact that, after action was begun by service of process, the defendant railroad did not continue to resist complainant's demands, did not change the situation. There was a controversy when the court took jurisdiction, and jurisdiction was not ousted because subsequently defendant ceased to oppose the granting of the relief prayed for. To hold otherwise would be to deny to the federal courts the power to enter judgment on failure to answer.

Park claimed that by special contract, made when he loaned to the defendant railroad the money for which he sued, he was given an express lien upon accrued earnings and income. He did not seek to disturb any liens superior to his own, but it was competent for the court, by decree in his suit, to sell the property subject to all superior liens, and distribute the proceeds equitably among all entitled thereto. The jurisdiction of the federal courts to take possession of railroad property, and appoint receivers, under circumstances such as were shown in the Park case, and, in advance of application, to foreclose mortgage, is abundantly supported in the following cases: *Brassey v. Railroad Co.*, 19 Fed. 669, 670; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 29 Fed. 623; *Railroad Co. v. Humphreys*, 145 U. S. 113, 12 Sup. Ct. 795; *Sage v. Railroad Co.*, 125 U. S. 361, 8 Sup. Ct. 887; *Brown v. Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Hollins v. Iron Co.*, 150 U. S. 380, 14 Sup. Ct. 127.

Having acquired jurisdiction of the property, and having appointed receivers with the express consent of the defendant railroad, the court does not lose jurisdiction when other persons interested therein come in, and are made parties, even though some of them be citizens of the same state with those whose interests in the same property are adverse to the interveners; for, when property is in the actual possession of a federal circuit court, this draws to it the right to decide upon conflicting claims as to its ultimate possession and control. *Morgan's L. & T. R. & S. S. Co. v. Texas*

Cent. Ry. Co., 137 U. S. 201, 11 Sup. Ct. 61; *Freeman v. Howe*, 24 How. 460; *In re Tyler*, 149 U. S. 181, 13 Sup. Ct. 785; *Rouse v. Letcher*, 156 U. S. 49, 15 Sup. Ct. 266; *Central Trust Co. v. Bridges*, 6 C. C. A. 539, 57 Fed. 753; *Farmers' Loan & Trust Co. v. Houston & T. C. R. Co.*, 44 Fed. 115.

The Farmers' Loan & Trust Company intervened in the Park suit, and filed a cross bill, and its independent suit to foreclose was consolidated with Park's suit. There seems no good reason, then, why the court which originally acquired jurisdiction to care for and dispose of the property in a controversy between citizens of different states should not retain such jurisdiction to dispose of the claims of all parties appearing, whatever their citizenship.

The motion is granted.

### PETERSBURG SAV. & INS. CO. et al. v. DELLATORRE et al.

(Circuit Court of Appeals, Fifth Circuit. November 19, 1895.)

No. 347.

#### 1. FINALITY OF DECREE—RAILROAD FORECLOSURE.

In railroad foreclosure proceedings a decree of foreclosure and sale was entered, with a reference to a master to ascertain and report the amount of the mortgage indebtedness, the proper allowances to be made to the receiver as compensation and for expenses, the amount of receiver's certificates outstanding, and the proper allowances to the trustee and its solicitors. On the coming in of the master's report a decree was entered confirming the same, though no sale had yet been made. *Held*, that the latter decree, taken in connection with and aided by the former one, terminated the litigation on the merits, and fixed the respective rights of the parties, and that it was consequently a final decree, which could not be modified or altered after the close of the term.

#### 2. RAILROAD FORECLOSURES—PRIORITIES—ALLOWANCES TO TRUSTEE AND SOLICITORS—RECEIVER'S CERTIFICATES.

The trustee in a railroad mortgage and its solicitors in the foreclosure of the same are not entitled to priority in respect to their claims for compensation, over receiver's certificates issued under decretal orders.

#### 3. SAME—ALLOWANCES TO RECEIVERS AND THEIR SOLICITORS.

Allowances to railroad receivers and their solicitors as compensation for services rendered are taxable as part of the costs, and as such are entitled to priority over the receivers' certificates.

#### 4. PRACTICE ON APPEAL—ASSIGNMENTS OF ERROR—MOTION TO STRIKE.

A motion to strike out an assignment of error on the ground that it was not well taken is not proper practice, as the question whether the assignment is well taken is the ultimate question in every contested appeal.

Appeal from the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

The appellants are the holders of receiver's certificates issued by the receiver of the Birmingham, Powderly & Bessemer Street-Railroad Company, appointed in two causes in the court below, in each of which the appellees were complainants and the said street-railroad company was defendant. The last of these causes was a bill filed by the complainants to foreclose two mortgages executed by the defendant to said Mercantile Trust & Deposit Company, as trustee; its co-complainant, Dellatorre, being a holder and owner of bonds secured by both mortgages. In that cause there was entered, on September 29, 1892, a decree of foreclosure and sale, with an order of reference to the master to ascertain and report the amount of the outstanding