FARMERS' LOAN & TRUST CO. v. LONGWORTH et al.

(Circuit Court of Appeals, Ninth Circuit. October 19, 1896.)

No. 288.

APPEALS—PARTIES.

An insolvent railroad company in the hands of a receiver appointed in foreclosure proceedings is a necessary party to an appeal from an order giving to certain judgments against it priority over the mortgages, and directing the receiver to pay such judgments. Davis v. Trust Co., 14 Sup. Ct. 693, 152 U. S. 590, followed.

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

Struve, Allen, Hughes & McMicken and Herbert B. Turner, for appellant.

Carr & Preston, S. H. Piles, James Hamilton Lewis, Stratton, Lewis & Gilman, and Frederick Bausman, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. In a suit pending in the circuit court for the district of Washington, in which the Farmers' Loan & Trust Company, as complainant, sought to foreclose its mortgage against the Northern Pacific Railroad Company and other defendants, Henry Ives, Henry Rouse, and H. C. Payne were appointed receivers of the railroad company, and thereafter Andrew F. Burleigh was substituted as sole receiver, in their stead. During said receivership the appellees in this case, Longworth, Bellinger, and Raskey and wife, obtained three several judgments against the Northern Pacific Railroad Company on liabilities incurred by the company before the foreclosure suit was commenced. On the 11th day of August, 1894, they intervened in the foreclosure suit, and united in a petition to the court for an order requiring the receiver to pay them their respective judgments. Upon this intervention the Farmers' Loan & Trust Company answered the petition, setting forth its mortgage liens upon the property of the Northern Pacific Railroad Company; alleging that the judgments against the railroad company in favor of the petitioners were obtained upon liabilities that attached subsequently to the date of the mortgage liens, and that from and after August 1, 1893, the Northern Pacific Railroad Company had been insolvent, and that its property in the hands of the receiver was inadequate to pay the mortgage debt, and that the judgments were not entitled to priority over the mortgages. On the 18th of December, 1895, a final order was made by the court, directing Andrew F. Burleigh, as receiver, to pay the judgments. On January 20th the Farmers' Loan & Trust Company presented in the circuit court its petition for an appeal, and the appeal was allowed. Upon the same date it filed its three separate bonds to said Longworth, Bellinger, and Raskey and wife, for the costs and damages that might be awarded them on the appeal. Citation was issued, directed to Longworth, Raskey and wife, and Bellinger, and was served upon them on the 21st day of January,

1896. Neither the Northern Pacific Railroad Company, nor Andrew F. Burleigh, receiver, joined in the appeal; nor were they, or either of them, served with the citation. After the appeal was perfected in this court, and after a motion had been filed by the appellees to dismiss the same, the receiver, by his attorney, entered in this court his appearance and consent to the appeal. On this state of the record, the question is presented whether or not this court has jurisdiction to entertain the appeal.

In the case of Owings v. Kincannon, 7 Pet. 399, a decree had been entered in the court below, directing the defendants to release to the complainant their right and title to certain real estate. A portion only of the defendants appealed. The court said:

"Upon principle, it would seem reasonable that the whole cause ought to be brought before the court, and that all the parties who are united in interest ought to unite in the appeal."

And referring to the act of 1803 (2 Stat. 244), providing for appeals in equity cases, the court said:

"The language of the act which gives the appeal appears to us to require that it should be prosecuted by the same parties who would have been necessary in a writ of error."

In Masterson v. Herndon, 10 Wall. 416, a bill of peace, and for the conveyance of a pretended title to a tract of land, was filed against one Maverick and one Herndon; and the decree was that complainant have and recover from the said Maverick and the said Herndon the said tract of land, and quieted the complainant's title to the same. From this decree Herndon appealed, and, in his petition for appeal, alleged that his co-defendant refused to prosecute the appeal with him. In ordering the appeal dismissed in the supreme court, Mr. Justice Miller said:

"In chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: (1) That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed; (2) that the appellate tribunal shall not be required to decide a second or third time the same question, on the same record. * * * We do not attach importance to the technical mode of proceeding called 'summons and severance.' We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of appellant, does not prove this. We think there should be a written notice, and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made to permitting one to appeal without joining the other; that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and it would estop that party from bringing another appeal for the same matter. The latter point is one to which this court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed, and also to the general proposition that no decree can be appealed from which is not final, in the sense of disposing of the whole matter in controversy, so far as it has been possible to adhere to it without hazarding the substantial rights of parties interested."

In Hardee v. Wilson, 146 U. S. 179, 13 Sup. Ct. 39, Wilson, the complainant, filed his bill against Minor and his wife and Hardee, alleg-