

LOUISVILLE TRUST CO. v. CINCINNATI INCLINED PLANE RY. CO.  
(CITY OF CINCINNATI, Intervener).

(Circuit Court, S. D. Ohio, W. D. January 4, 1897.)

1. STREET RAILROADS — UNAUTHORIZED USE OF STREETS — RECEIVERS — REMOVAL OF TRACKS.

The I. P. Co. operated a street railway in several streets in the city of C. The city brought suit against it, in a state court, to enjoin the operation of the railway in certain streets, and obtained a decree enjoining such operation on the ground that the I. P. Co. had no legal right in such streets; the operation of such decree being, however, stayed for six months. This decree was affirmed on appeal. Before anything was done under it, the L. Trust Co., trustee of a second mortgage on the I. P. Co.'s property, filed a bill in the United States circuit court against the city, alleging that it was about to oust the I. P. Co. from certain streets necessary to the operation of the mortgaged road, and seeking to enjoin it from doing so. Pending this suit the L. Trust Co. also commenced a suit against the I. P. Co. for the foreclosure of the mortgage, in which suit a receiver was appointed, who took possession of the road and operated it. In the L. Trust Co.'s suit against the city, the circuit court reached the same decision as the state court as to the rights of the I. P. Co. in the streets, and it dismissed the bill. The decision of the circuit court as to the rights of the I. P. Co. was affirmed by the circuit court of appeals. The city then filed an intervening petition in the foreclosure suit, asking that the receiver be directed to cease operating the road in the streets in which the I. P. Co. had no legal right, and to restore full possession of such streets to the city. To this petition the L. Trust Co. filed an answer, averring that the I. P. Co. had applied to the proper authorities of the city for a renewal of its right to operate its road in the streets in question, which application was pending, and that it had also obtained from the state court a further stay of that court's injunction, for six months, to enable it to arrange with the city for a renewal of its right. *Held*, that an order directing the receiver to restore possession of the streets to the city, which would amount to a mandatory injunction requiring him to remove the railroad structure from the streets, involving great injury to the I. P. Co. and the mortgagee, would not be granted.

2. SAME—RIGHTS OF CITY.

*Held*, further, that the circuit court should not, by holding possession, through its receiver, of the lines of railroad which both state and federal courts had decided the I. P. Co. had no right to maintain, prevent the city from taking any means which it might have a right to employ to get possession of the streets, by proceedings to abate a nuisance or otherwise, notwithstanding the operation of its injunction had been stayed by the state court, and its right to resort to any other proceedings might be doubtful.

3. SAME—RIGHT OF CONDEMNATION.

*Held*, further, that a possible right of the I. P. Co. to condemn the right of way in the streets in question afforded no reason for continuing the possession of the receiver until such proceedings could be taken; the right not being clear, and the right of way to be condemned not being a mere link, but the major portion of the whole line.

4. SAME—RECEIVER'S POSSESSION.

*Held*, further, that, as the same department of the city government to which the I. P. Co.'s application for a renewal of its right had been submitted must decide whether proceedings should be instituted to remove the railroad from the streets, the court might properly continue the receiver in possession until that department notified him that it desired to take possession of the streets, but that upon such notice the receiver should surrender to the I. P. Co. the possession of the railroad in the streets in question.

This is an intervening petition by the city of Cincinnati praying the court to direct its receiver to deliver over to the city, for occupation

by the Cincinnati Street Railway Company, portions of the route in the streets of Cincinnati occupied by the tracks of the Cincinnati Inclined Plane Railway Company, now in possession of the receiver of this court appointed in the above-entitled cause, and which are being used by him in the operation of the railway of the said inclined plane railway company. In order that the questions which are presented by these intervening petitions should be fully understood, it is necessary to state in a summary way the history of the litigation between the inclined plane railway company and the city, and between the Louisville Trust Company, the second mortgagee of the inclined plane railway company, and the city of Cincinnati:

The Cincinnati Inclined Plane Railway Company was organized in April, 1871, under the provisions of the general corporation act of Ohio of May, 1852, providing for the incorporation of steam railway companies for the purpose of constructing a railroad, the termini of which were to be in the city of Cincinnati and village of Avondale, Hamilton county, Ohio. In 1889 the Avondale terminus was duly extended to Glendale, in the same county. Under the act of 1852, and one of 1877, and certain grants by the city council, some directly from the city to the inclined plane company, and one derived by mesne assignments from other grantees of the city, the inclined plane company has maintained to the present day an inclined plane reaching from the head of Main street, at its intersection with Mulberry street, as its base, to Locust street, on Mt. Auburn, as its top, and has maintained a street railway from the bottom of the incline down Main street to Court, west on Court to Walnut, south on Walnut to Fifth, east on Fifth to Main, north on Main to the foot of the inclined plane, and from the top of the inclined plane north on Locust street to Mason, east on Mason to Auburn avenue to Vine street, north on Vine street to the Zoölogical Garden, and thence beyond the city limits to Carthage; returning from the Zoölogical Garden on Vine street to Auburn avenue, south on Auburn avenue to Mason, west on Mason to Locust, south on Locust to the top of the inclined plane. On December 12, 1890, the city of Cincinnati filed an action in the superior court of that city against the Cincinnati Inclined Plane Railway Company to recover car licenses and percentage of gross earnings, and to enjoin the railway company from maintaining and operating its cars upon more than one track on Auburn street from Mason to Vine streets, and from maintaining its tracks or operating its cars upon any of its tracks on Main, Court, Walnut, or Fifth streets. The cause was heard by reservation in the general term of the superior court, and on October 12, 1893, a judgment was entered which, among other things, found that the company was illegally and without right maintaining its tracks, poles, wires, and other appliances in Main street, Court street, Walnut street, and Fifth street, and that it had no legal right to maintain and operate a railway on more than one track on Auburn avenue from Mason to Vine streets. In accordance with the finding, the court enjoined perpetually the inclined plane company from continuing to maintain and operate a street railway over those portions occupied by it without right. The order of injunction contained the following limitation: "It is further ordered that the operation of this decree be, and the same is hereby, stayed for the period of six months, with liberty on the part of the defendant to apply for an extension of time. To which order staying the operation of this decree the plaintiff excepts." The case was taken to the supreme court of Ohio, and affirmed October 30, 1894. 44 N. E. 327. Nothing had been done under the decree when, on the 6th day of March, 1895, a bill of complaint was filed by the Louisville Trust Company, in this court, against the city of Cincinnati, averring that it was the trustee under a mortgage made by the Cincinnati Inclined Plane Railway Company January 1, 1889, conveying to it all the property of said inclined plane railway company to secure bonds to the amount of \$500,000 issued by that company, \$375,000 of which had been issued, and had gone into the hands of bona fide purchasers; that this mortgage was subject to the priority of a first mortgage on the same property issued to secure bonds amounting to \$125,000, made to William A. Goodman, trustee. The bill averred that the city of Cincinnati was proposing to oust the company from possession of certain streets necessary to the operation of the road mortgaged, and