of New York and the receivers in the sums already mentioned, but no lien of any kind for either claim. This decree was pronounced on the assumption by the court that the four wire pole line from Freeport to Hammond, and the six strung wires, constituted a single property, and belonged to the Bankers' & Merchants' Telegraph Company of New York. On December 7, 1889, Vane filed another intervening petition. On January 23, 1890, the receivers answered. On September 18, 1890, Vane filed a supplementary petition. This the receivers answered November 17, 1890. Vane then filed a replication, and on November 21, 1890, the matter was again referred to the master. On May 16, 1895, the report of the master came in. On May 23, 1895, exceptions were filed by the receivers. Pending the hearing on the exceptions, and on July 8, 1895, Vane filed a further petition, making parties thereto this appellant and the Farmers' Loan & Trust Company, and calling for an answer from each. The Farmers' Loan & Trust Company was not brought into court, and did not appear. On October 2, 1895, appellant filed its answer, setting up its ownership of the receivers' certificates, and claiming the first and paramount lien on the six strung wires, and, apparently under the impression that such answer on its part might be taken as a cross petition, took some testimony in support thereof. But we find no replication to this answer, nor was any reply to it called for, nor was any filed. Upon this state of the record the court made a decree which is the subject of this appeal. By this decree it was adjudged that the six strung wires last mentioned were still in the custody of the court, that appellant had no lien upon or claim against said property, that the same be sold clear of any lien, and that the proceeds of the sale be applied—First, in liquidation of Vane's claim for the $1,898.33; secondly, in liquidation of Vane's claim for the $13,771.12; and that the remainder of the fund be paid into the registry of the court.

It is insisted, in support of this decree, that the six strung wires in question were not included as part of the property made subject to the receivers' certificates. Counsel for appellee quotes from the order of the court the following language:

"Said issue of said certificates to be secured by a trust deed, in the nature of a first mortgage lien for $150,000, on all of the lines of telegraph at and between Freeport, in Ohio, and Hammond, in Indiana, * * * to be prior as a redemption debt to every other lien, claim, or incumbrance thereon."

It seems that Vane, about the time of the appointment of the receivers, and after the six wires had been strung to the town of Hammond, disconnected the said six wires at their western ends, and grounded the same; that is to say, carried the ends to the ground, so that they could not, for the time being, be used. In view of this fact, the insistence is that the six wires were not "lines of telegraph" between Freeport and Hammond, within the meaning of the order. It will be seen, from the recitals already quoted in this opinion, that the certificates contained on their face the statement that they were to be a lien on all property of the Bankers' & Merchants' Telegraph Company of every kind. In the mortgage securing these certificates, all such property, real and personal, was alienated as security for

these certificates; and, after the certificates and mortgage had been made, an order of the court in Indiana in express terms ratified and confirmed what had been done by the receivers. But, apart from these statements in the receivers' certificates and in the mortgage, we are of opinion that, on the face of the orders, the six wires were made subject to the lien of the receivers' certificates. These wires were none the less "lines of telegraph at and between Freeport, in Ohio, and Hammond, in Indiana," merely because Vane had seen fit to detach and run them into the ground at their western ends.

It is argued, again, that Vane was, at the time of the order, himself in possession of the six strung wires, and that for this reason the said order did not cover these wires as part of the property subjected to the lien of the certificates. If the owner of land contract with a third person to build a fence on that land out of lumber there provided by such owner, the entry of such contractor, and his use of the lumber in building the fence, do not give him the possession either of the land or of the lumber as against his employer. He is a mere licensee for the purposes of entering and doing the work. He has in a certain sense the custody, but as against the owner not the possession, any more than a servant of a householder would have possession, as against his master, of the utensils with which he does his work. In June, 1884, the Bankers' & Merchants' Telegraph Company was in possession of the four wire pole line. That company furnished the six wires, and on the 17th of that month engaged Vane to do the work of stringing these wires. The four wire pole line was real estate. Vane was authorized to enter and put up the six wires. The possession of the entire property, including the six wires, remained in the Bankers' & Merchants' Telegraph Company until such possession became vested in the receivers as officers of the court, and such possession was so in said receivers when Vane assumed to ground the western ends of the wires. Moreover, it had already been decided, on Vane's first petition, that, while his claims were good, he had no lien on the property here in question, either at common law or in equity, or under any statute. To this effect is the opinion of the circuit court in Bankers' & Merchants' Tel. Co. of Indiana v. Bankers' & Merchants' Tel. Co. of New York, 27 Fed. 536, and also the opinion of the supreme court of the United States on the appeal in the same case; said cause being entitled, on such appeal, Vane v. Newcombe, 132 U. S. 220, 10 Sup. Ct. 60. It seems entirely clear that the six wires were in possession of the court by its receivers when the certificates were issued.

It appears that Vane was made a party to the suit in Indiana during the term at which the order was made for the issue of these receivers' certificates, but, as already stated, he did not, during that term, make any objection to that order, or ask the court to vacate or modify the same, or bring his own claims in any way to the attention of the court. After the court had made that order, and the certificates had been disposed of, and the action of the receivers in that behalf confirmed, and the term at which this was done had elapsed, the court could not unfix the lien of the certificate holders. The action of the court in that matter became final, and the power of revi-

sion ceased with the term. In our opinion, the court in Indiana could not in Vane's behalf displace the lien of the certificates held by this appellant, as was attempted to be done in the decree appealed from. There appears to be no contention between the parties upon the validity of these receivers' certificates. The propriety of the action of the court upon the showing made at the November term, 1884, when the order was entered, is not in any way questioned; the only point on behalf of Vane being that the order then made did not comprehend the six wires.

It is further insisted, on behalf of appellee, that this appeal ought to be dismissed, because appellant alone prosecuted the same; whereas, it is said, the receivers and the Bankers' & Merchants' Telegraph Company of New York and the Bankers' & Merchants' Telegraph Company of Indiana were parties to the record, and interested in the decree, and there was no summons and severance whereby appellant acquired the right to prosecute this appeal without joining the others. But, in so far as concerns the subject-matter of this decree, neither the claim of Vane nor that of this appellant is disputed by the receivers, or by either of the corporations mentioned. There was no controversy except between the appellant and the appellee. Upon the question as to priority between the two, it matters not to either of the other parties what is done. So far as the Farmers' Loan & Trust Company is concerned, it was simply the trustee in the mortgage to secure the certificates. If it were present in the case, it could have no interest whatever, except that now represented by this appellant. But the Farmers' Loan & Trust Company was not even a party to the proceeding. It was not summoned, and did not voluntarily appear. The appeal, therefore, was properly brought by this appellant alone. The motion to dismiss the appeal is overruled, the decree is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

BOSWORTH v. TERMINAL R. ASS'N.

(Circuit Court of Appeals, Seventh Circuit. June 8, 1897.)

No. 367.

1. RECEIVERS—RIGHT TO APPEAL—DECREES AWARDING PREFERENCES.
   A receiver has the right of appeal from an order or decree, in the suit in which he is appointed, with respect to any claim asserted by or against the estate which he represents, or respecting his personal rights, but he has not the right of appeal from a decree declaring the respective equities of the parties to the suit. Accordingly, *held*, that a receiver of a railroad had no right to appeal from a decree awarding a preference to a claim for supplies over the debt secured by the mortgage in course of foreclosure.
2. SAME—ALLOWANCE OF APPEAL.
   The allowance, in the usual course of practice, of an appeal taken by a receiver, does not clothe the receiver with an interest which he has not, nor authorize an appeal which he has not a right to take.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

In a suit brought by the Mercantile Trust Company on the 21st day of September, A. D. 1893, to foreclose a mortgage upon the Chicago, Peoria & St. Louis Railway, the court appointed a receiver, with the authority usually conferred upon receivers in the charge and operation of railways and in the general administration of the estate, and required the receiver to pay (1) all past-due taxes; (2) all current operating expenses; (3) all past-due wages; (4) "all claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last past, and all ticket, trackage, and traffic balances due from said railroad." To this last item the Mercantile Trust Company objected, which objection the court overruled. On the 27th day of May, 1895, the Terminal Railroad Association of St. Louis, the appellee, filed its intervening petition, asserting a claim against the railway company, amounting to $8,162.11, for switching, engine and car repairs, etc., done within six months prior to the date of the order appointing a receiver, and asking for the allowance of the claim as a preferential claim under the order of the court appointing the receiver. An answer was filed to this petition by the receiver, asserting that the facts stated might be true for anything known to the contrary, but, being stranger to the matters, he demanded strict proof, and denying that the petitioner was entitled to the relief demanded. The intervening petition, under a general order of reference, went to the master, whose report was to the effect that the claim was a just one, and that the amount is a lien upon the property of the railway company prior and superior to the claims of the mortgage bondholders under the order appointing the receiver, and that it should be paid out of the surplus income, or from a sale of the property of the railway company. To this report the receiver filed exceptions, not impugning the finding of the master that the claim was a just one against the company, but to the finding that the claim should be paid from the surplus income, or from a sale of the property of the railway company, "whereas," the exception proceeds, "the said master should have found that the aforesaid amount is due the said petitioner, but is not a lien upon the property of the railway company prior or superior to the lien of the mortgage bondholders." Upon hearing, the court, on July 30, 1896, overruled the exceptions, and entered a decree allowing the claim at the amount stated, and declaring that it was a claim of the character embraced in the order appointing the receiver, to be paid as a preferred claim, and directing that the receiver pay to the intervener the amount of the claim "out of the income of said receivership, if any such income is in his hands, and, in case he has not the funds in hand for this purpose, it is ordered, adjudged, and decreed that the same be paid out of the proceeds of the sale of the mortgaged premises in preference to the mortgage debt, and, until paid, the same is hereby declared a lien upon the said mortgaged estate superior to the lien of the mortgage herein." To this decree the receiver assigned error, in substance, to the effect that the court erred in adjudging that the claim of the intervening petitioner was entitled to priority to the mortgage debt. The receiver thereupon prayed an appeal, which was allowed.

Bluford Wilson and Philip Barton Warren, for appellant.
Samuel P. Wheeler (Millard T. Watts, of counsel), for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The contention of the receiver is thus stated in the brief of his counsel:

"The question thus presented to this court for determination is one as to the displacement of vested contract liens by unsecured creditors. There is no controversy as to the labor having been performed or the materials furnished within the six months next prior to the appointment of the receiver of the insolvent corporation, nor as to the value of the same. The only controversy is as to whether or not the appellee is entitled, on its petition and proof made thereunder, to have the vested lien of the mortgagee displaced to the extent of his claim."

He insists that the provision in the decree appointing a receiver, providing for the payment of certain claims as preferential, created no vested right; and that, within our ruling in Transportation Co. v. Anderson, 46 U. S. App. 138, 22 C. C. A. 109, and 76 Fed. 164, the decree in that regard was interlocutory, and is not controlling of the subsequent action of the court; and that, within the doctrine declared in Turner v. Railway Co., 8 Biss. 315, Fed. Cas. No. 14,258; Fosdick v. Schall, 99 U. S. 235; Trust Co. v. Souther, 107 U. S. 591, 2 Sup. Ct. 295; Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675; Union Trust Co. v. Illinois M. Ry. Co., 117 U. S. 434, 6 Sup. Ct. 809; Wood v. Deposit Co., 128 U. S. 416, 9 Sup. Ct. 131; Kneeland v. Trust Co., 138 U. S. 509, 11 Sup. Ct. 426; Thomas v. Car Co., 149 U. S. 111, 13 Sup. Ct. 824; Farmers' Loan & Trust Co. v. Green Bay, W. & St. P. Ry. Co., 45 Fed. 664,—before a claim can be deemed to be preferential to the mortgage debt, there must be first established a diversion of income from the payment of operating expenses to the payment of interest; and that, failing diversion, there can be no restoration. The broad ground is taken that a court of equity, assuming, at the request of a trustee, the operation of a railway, has not the right to provide for the payment, out of the income or the corpus of the road, of operating expenses incurred within a limited time prior to the suit, unless there has been diversion of income, and then only to the extent of such diversion.

It is, however, objected by the appellee that with this question the receiver is not concerned, and that, the justice of the debt being conceded, it is none of his affair that it is preferred by the decree to the mortgage debt. This contention, we think, must be sustained. While it is true that a receiver is the instrument of the court for the conservation of the estate which the court has taken into its possession for administration, it is also true that in a sense he represents all parties in interest. His duty is to defend the estate against all claims which he deems to be unjust. His duty is to conserve the estate as a whole for its distribution by the court among those who shall be adjudged to be entitled. He represents the estate, with right to sue to recover demands due to it, with right to defend it against claims asserted. In this respect we concur with the circuit court of appeals for the Fourth circuit that this duty carries with it the right and the duty, in case of doubtful claim, to take the judgment of the court of last resort. Thom v. Pittard, 8 U. S. App. 597, 10 C. C. A. 352, and 62 Fed. 232. This right and duty should, however, be limited in its exercise to those cases in which the estate, as a whole, is interested to enforce a right or to defend against a claim asserted. In respect to many matters the receiver has no right of appeal, while in respect to others his right to appeal may not be gainsaid. Thus, he may rightfully appeal from a decree refusing him compensation, or disallowing his accounts, or establishing a claim against the estate, or denying a claim asserted for the estate. He has no right to appeal from a decree removing him from his position, for that is matter of discretion with the court appointing him, and he holds his position by the sufferance of the court; nor has he the right of appeal from a decree authorizing an issue of receivers' certificates,