

defendants claim that the bill should be dismissed, because they are not alleged to be citizens of New York: It would have been proper to allege that the defendant executors were citizens of New York. The statement that they are of New York is not such an allegation; but, as it is not denied that those who have been served are actually citizens of New York, and no mention is made of this point in the pleas, an amendment should be allowed.

As to the judgments, the fact seems to be that the claims, verified by oath, were duly presented in the insolvency proceedings in Illinois, and, in the absence of any objection, were allowed, and that this is all that is required to establish the debt in that proceeding. A judgment in a court of law is not always indispensable to the bringing of a creditors' bill, and should not be required in the present instance. *Case v. Beauregard*, 101 U. S. 688.

Complainants, at the time they brought this suit, say that they supposed that Wilmot was a citizen of New York, and he has not been served with a process. Unless he is an indispensable party, the court ought not to be ousted of jurisdiction. The estate is in settlement in New York, and the property situated there. I think that the court can have jurisdiction as against the resident executor without the presence of Wilmot, at least so far as to require a discovery and account. *Clifton's Adm'r v. Haig's Ex'rs*, 4 *Desaus. Eq.* 330; *Stewart v. Canal Co.*, 1 *Fed.* 361; *West v. Randall*, 2 *Mason*, 196, *Fed. Cas. No.* 17,424; *Footman v. Pray's Ex'rs*, *R. M. Charl't.* 291; *Shorter v. Hargroves*, 11 *Ga.* 658. If the defendants Lewis S. Baldwin and Isaac P. Baldwin, who cannot be served with process, being out of the jurisdiction, do not choose to submit to the jurisdiction of the court, this will not oust the court of jurisdiction as to the defendant who has been properly served. The pleas will be overruled upon an amendment being filed describing Eli Baldwin as a citizen of New York, and dropping Wilmot as defendant.

ALLEN v. WINDHAM COTTON MFG. CO. et al.

(Circuit Court, D. Connecticut. June 22, 1898.)

MORTGAGE ON AFTER-ACQUIRED PROPERTY—ACCOUNTING—DECREE DECLARING LIEN.

A mortgage covering real estate, machinery, and "all the stock of cotton, raw, in process of manufacture, and manufactured goods," on the mortgaged premises, and all which may be placed thereon, stipulated that until default the mortgagor may use and sell such cotton and goods, and receive the proceeds thereof. *Held*, in a suit for an accounting, that the mortgagee had no rights as to goods sold before the bill was filed, but upon answer showing the amount of cotton and goods on hand, no rights of third persons intervening, she was entitled to a decree declaring her mortgage a lien thereon.

This was a suit in equity by Mary R. Allen against the Windham Cotton Manufacturing Company and others for foreclosure of a mortgage and an accounting.

Arnold Green and W. A. Briscoe, for complainant.

Edwards & Angell, for respondents.

TOWNSEND, District Judge. The mortgage in the present case specified a large amount of real estate and machinery, and added, "Together, also, with all the stock of cotton, raw, in process of manufacture, and manufactured goods, now on said mill estate, and all those which may be placed thereon in lieu of or in addition to what is now there;" and contained the stipulation that, "until default in payment of principal or interest, the mortgagor may use and sell said cotton, stock in process, and manufactured goods, and receive the proceeds thereof." The only question, if there is any question between the parties, seems to be as to the cotton which had been manufactured and sold previous to the filing of the bill. As to this, the complainant has no rights, and is not entitled to an accounting. The intent of the mortgage and the proper construction of its terms is that the mortgagor should go on with its business, buying, manufacturing, and selling, and using the money derived from said sales in carrying on its business, until default in payment of principal or interest, and until the mortgagee signified her intention to enforce the provisions of the mortgage.

A mortgage upon after-acquired property is good, under the laws of Connecticut, as between the mortgagor and mortgagee and as against third parties, provided the mortgagee actually takes possession before any other rights have intervened. *Rowan v. Manufacturing Co.*, 29 Conn. 282; *Walker v. Vaughn*, 33 Conn. 577. No question is made but that the mortgage is valid and effective as to real estate and machinery. The respondents' amended answer admits that they have on hand (presumably at the time of the filing of the bill) raw cotton, cotton in process of manufacture, and manufactured goods of the value altogether of something more than \$12,000. As to this cotton, raw, in process of manufacture, and manufactured, counsel for complainant claims that the provisions of the mortgage amount "to an agreement for a lien on after-acquired property," and says, "Probably the only effective decree in the complainant's favor would be a declaratory one establishing her mortgage lien on this property." Respondent does not seem to dispute complainant's right to such a decree. There is no intimation that the rights of any third party, such as a trustee in insolvency, or attaching creditor, have intervened. The simple bringing of this suit is not a taking possession by the mortgagee, and such rights of third parties would be superior to the complainant's; but, as between the complainant and the respondent, the mortgage has the effect which complainant claims, and a decree as is desired by her, extending to the cotton on hand, may be made. If counsel cannot agree as to the form of said decree, each party may draw and submit one to the court for final adjudication.

WESTERN UNION TEL. CO. v. BOSTON SAFE-DEPOSIT & TRUST CO.

(Circuit Court, S. D. New York. June 14, 1898.)

MORTGAGE—FORECLOSURE—LEASE BY RECEIVER—RIGHT TO PROFITS.

Where a mortgage upon the property of a telegraph company is foreclosed by the trustee named therein, and a receiver appointed, who, with the consent of the court, leases all the mortgaged property to another company, the lessee is entitled to rents accruing to the mortgagor, during the continuance of the lease, for use of the poles and wires, as against the trustee in the mortgage, who is the obligee in a bond given to secure such rents.

This was a suit by the Western Union Telegraph Company against the Boston Safe-Deposit & Trust Company to recover rents received by defendant, as trustee.

Rush Taggart, for complainant.

Wilson & Wallis, for defendant.

TOWNSEND, District Judge. On April 18, 1885, Edward Harland was appointed receiver in suit for the foreclosure of a mortgage of the property of the American Rapid Telegraph Company to the defendant, as trustee for bondholders. The order appointing the receiver authorized him to obtain possession of all the property of the mortgagor, and carry on its business. On July 10, 1885, said receiver made an agreement with the complainant, the Western Union Telegraph Company, which was approved by the court, by which agreement the complainant was authorized to collect and receive all the earnings and revenues of the property vested in said receiver, including all poles, wires, etc., during the period of the receivership, the complainant guarantying the receiver a net income of \$5,000 per month. The Bankers' & Merchants' Telegraph Company was in possession of six lines of wire between Cleveland and Chicago, strung upon poles, which poles, after litigation, were decided to belong to said mortgagor, and to be included in said mortgage; but it was directed that the United Lines Telegraph Company, then using said six wires, might retain them upon said poles until the termination of their appeal, upon their giving bond to the Boston Safe-Deposit & Trust Company in the sum of \$95,000 conditioned for the payment of a rental for the use of said line of poles from Cleveland to Chicago, at the rate of \$4 per mile per wire per annum, from the 23d of March, 1885, so long as they should remain on the said line of poles; provided it should finally be adjudged that the said line of poles was subject to the lien of the mortgage of the American Rapid Telegraph Company. The United Lines Telegraph Company afterwards leased said six lines of wire to the Postal Telegraph & Cable Company, and it was finally determined that the line of poles was subject to the lien of the mortgage. On September 1, 1889, the Postal Company, in accordance with the said final decision, surrendered said six lines of wire to the Western Union, and thereafter paid the sum of \$41,218 for the rental of said poles, at the price specified in the bond, between September 1, 1889, and September 1, 1894.