simple people, a parol transfer of this interest was as effectual as if it had been in writing.

JUDGMENT REVERSED with costs, and cause remanded with directions to issue

NEW VENIRE.

MINNESOTA COMPANY *v.* ST. PAUL COMPANY.

1. Where a bill in equity is necessary to have a construction of the orders, decrees, and acts made or done by a Federal court, the bill is properly filed in such Federal court as distinguished from any State court; and it may be entertained in such Federal court, even though parties who are interested in having the construction made would not, from want of proper citizenship, be entitled to proceed by original bill of any kind in a court of the United States.

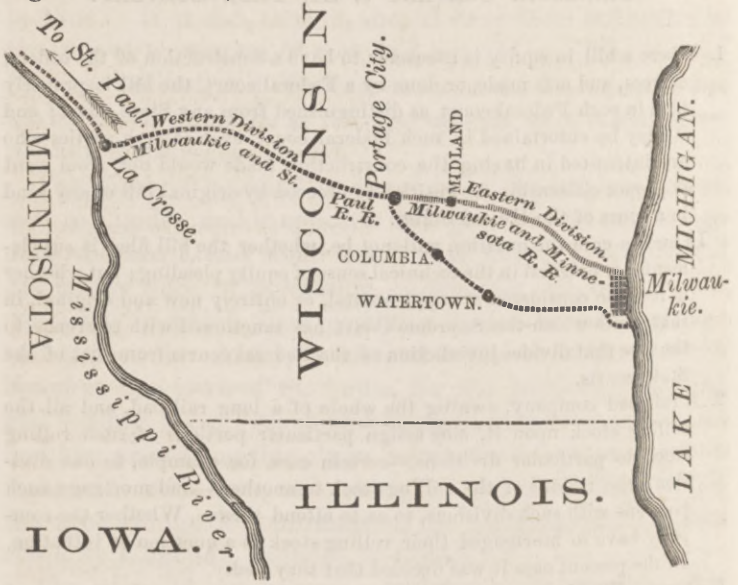
   In such a case the question will not be, whether the bill filed is supplemental or original in the technical sense of equity pleading; but whether it is to be considered as supplemental, or entirely new and original, in that sense which the Supreme Court has sanctioned with reference to the line that divides jurisdiction of the Federal courts from that of the State courts.

2. A railroad company, owning the whole of a long railroad, and all the rolling stock upon it, *may* assign particular portions of such rolling stock to particular divisions,—certain cars, for example, to one division; the residue of the rolling stock to another,—and mortgage such portions with such divisions, so as to attend them. Whether the company have so mortgaged their rolling stock is a question of intention. In the present case it was decided that they had.

3. *Quære:* Whether a marshal's sale is valid in any case, unless supported by a judicial order previously made. It is not valid where made under the marshal's wrong interpretation of an order which the court did in fact make; not valid in such a case even where the court confirmed of record the marshal's sale; the court's attention not being specifically directed to the marshal's mistake, nor any issue raised as to what the court really meant, nor decision made, on such issue raised, that the marshal's act should remain firm.

THE La Crosse and Milwaukie Railroad Company was chartered by the legislature of Wisconsin to build a road across that State from Milwaukie to La Crosse, and began

to build at Milwaukie, proceeding westward. The legislature also gave the company the right to mortgage, for the purpose of raising money, any particular division of their road separately. Under this provision of the statute, and for the purpose apparently of mortgaging them separately, the company divided the main road into two divisions, nearly equal in length, called the Eastern Division and the Western Division; the Eastern Division extending from Milwaukie to Portage City, ninety-five miles, and the Western from Portage to La Crosse, one hundred and five miles. Upon *each*



of these *divisions* of the road, as well also as upon the *entire* road, AND upon the *rolling stock*, either of each division, *or* of the entire road,—this exact matter of whether the rolling stock mortgaged did belong to the road as a *whole*, or to it in its *divided* character, being one of the questions in this suit,—it gave certain mortgages; among them these:

ON THE WESTERN DIVISION.

1856, *December* 31.—A mortgage to Bronson, Soutter and

ON THE EASTERN DIVISION.

1854, *June* 30.—A mortgage to Palmer, sometimes called the

Knapp, commonly called the Land Grant Mortgage. This mortgage conveyed also a road, not important to be here spoken of, from Madison, &c.

The descriptive part of this mortgage was as follows:

"All and singular the several tracts, pieces, or parcels of land which now are, or may *hereafter be*, or constitute the site of the roadway, turnouts, engine-houses, workshops, depots, and other buildings, and all the other lands and real estate which now constitute, or may hereafter constitute, or be a part of the roads of said railroad company from Madison, &c., and *from Portage City to La Crosse;* and also all and singular the superstructure of *said* roads, whether now made, or to be made hereafter, and all the engine-houses, workshops, depots, and other buildings, and all the other improvements on or pertaining to *said* roads, whether now built and made, or to be built and made hereafter; *and also all and singular the locomotive engines and other rolling stock, and all other equipments of every kind and description which have already been, or may hereafter be, procured for or used on said roads, or either of them; and all the materials, tools, implements, utensils*, and other personal property which have been, or may hereafter be, procured for or used in connection with said roads, or either of them; and also all and singular the rights, liberties, privileges, and franchises of *said railroad company*, of every kind and description, relating to said roads."

First, and sometimes the Palmer Mortgage.

The descriptive part of the mortgage was as follows:

"All their said road, from its eastern termination, in the city of Milwaukie, to Portage City, being ninety-five miles in distance, constructed, and to be constructed, together with all and singular the railways, land procured or occupied, or so to be, for right of way *within the limits aforesaid*, together with bridges, fences, privileges, rights, and real estate owned by said company for the purposes of said road, or which may hereafter be acquired or owned by them *within the limits aforesaid;* and all the tolls, income, issues, and profits to be had from the same, and all lands used for and occupied *within the limits aforesaid* by depots and stations, with all buildings standing thereon, or which shall be procured therefor, together with all *locomotives, engines and tenders, passenger cars and freight cars, shop-tools and machinery, now owned or hereafter to be acquired by said company, and in any way belonging or appertaining to said railroad, now constructed or to be constructed within the limits aforesaid*, including all its property, real and personal, pertaining to said railroad, within *said* limits, and all its rights, credits, and franchises *thereunto* appertaining."

The mortgage went on—after the descriptive part above given—to say:

"But nothing herein contained shall be so construed as to prevent the said company from selling, hypothecating, or otherwise disposing of any lands *or other property* of said

company not necessary to be retained for the roadway, depots and stations, nor required for the construction or convenient use of *that part of said road*, nor from collecting moneys due said company on stock subscription or otherwise; nor shall anything herein contained be so construed as to prevent the said parties of the first part from collecting and appropriating towards the construction, use and repair of the remaining parts of said road *westward towards the Mississippi River*, all stock subscriptions, donations, or loans of money, lands or other property which may have been, or may hereafter be, made for that purpose; but said parties of the first part shall have full right so to proceed, without let or hindrance from said party of the second part. And the *remaining portion of the said railroad* which, by the said parties of the first part, may be constructed, shall be held in use by the said parties of the first part, to their own benefit and behoof forever, so far as the claims of the said party of the second part, or his successor, might otherwise be construed as in conflict therewith. It being distinctly understood that the conveyance made by this indenture is only for so much of the present or hereafter to be acquired *rights, interest and property* of the said company, parties of the first part, as are or shall be vested, or belong or appertain *to that part of said railroad extending from Milwaukie to Portage City* aforesaid, and being in distance ninety-five miles."

1857, *August* 17.—A mortgage to G. C. Bronson and T. J. Soutter, commonly called the Second Mortgage. This mortgage also conveyed the Eastern Division and a road not important to be

here spoken of, from Watertown to Midland. Its language was thus:

"And also, all and singular the locomotive engines, and other rolling stock, and all the other equipments of every kind and description, *which have already been or may hereafter be procured for, or used on, said railroads, or either of them;* and all the materials, tools, implements, and utensils, and other personal property, which have been or may hereafter be procured for or used in connection *with said railroads, or either of them;* and also all and singular the rights, liberties, privileges, and franchises of said railroad company, so far as they relate to said railroads from Milwaukie to Portage City, and from Watertown, by way of Columbus, to Midland aforesaid; and it is hereby declared to be the intention of the parties to convey to and vest in said parties of the second part all the property, real and personal, of said railroad company, to be acquired hereafter, as well as that which has already been acquired, together with all the rights, liberties, privileges, and franchises of said railroad company, *in respect to said railroad from Milwaukie to Portage City, and from Watertown, by the way of Columbus, to Midland,* as fully and amply as the same might be conveyed if said railroads had already been fully constructed and equipped."

OVER THE WHOLE ROAD.

1858, *June* 1. *A Mortgage to W. Barnes.*—This mortgage conveyed the whole road from Milwaukie to La Crosse, and all the rolling stock, personal property, franchises, choses in action, and property of the debtor company, real, personal, and mixed. Its descriptive part need not be more fully given.

The Barnes mortgage, though given last, was first fore-

closed. Sale under it was made in May, 1859. The purchasers organized themselves into a company, as the statutes of Wisconsin allow in like cases, and took the name of the *Milwaukie and Minnesota Railroad Company;* often, for brevity, styled the Minnesota Company simply; conceiving and asserting that they had succeeded to all the rights, property, and franchises of the old company,—subject, of course, to prior mortgages.

In December, 1859, Bronson, Soutter, and Knapp, the trustees in the Land Grant mortgage on the Western Division, filed a bill in the District Court of the United States for the District of Wisconsin, having Circuit Court powers to foreclose their mortgage, making the mortgagor company, the Minnesota Company, and others, defendants.

At the same time, that is, in December, 1859, Bronson and Soutter, trustees in the second mortgage (on the Eastern Division), proceeded, in the same court, to foreclose *their* mortgage, making the same defendants.

All the mortgagees in each of these mortgages, the first, or Palmer; the second, or Bronson and Soutter; and in the Land Grant, or Bronson, Soutter, and Knapp, were citizens of the State of New York, *and were entitled, therefore, to sue, as they did sue, their mortgagor company in the Federal courts.*

In 1860, the District Court, in a creditor's suit in favor of one Howard against the old company, appointed Hans Crocker receiver of the whole road and rolling stock, and he entered into possession under this appointment. In the Western Division foreclosure suit, the same person was appointed receiver of the Western Division and rolling stock pertaining thereto; and afterwards, in the Eastern Division suit, an order was made appointing him also receiver of the road from Milwaukie to La Crosse, and all the rolling stock and franchises, "subject, nevertheless, to a previous order of court appointing him to be the receiver of the western portion of said road, from Portage City to La Crosse."

The two foreclosure suits—of the Land Grant on the Western Division, and of the second mortgage on the Eastern—progressed in the District Court to final decrees, and the

orders and proceedings were as follows, the judge who made them having delivered an opinion that the rolling stock was a fixture of the road:

ORDERS OF REFERENCE.

(March 11, 1861.)

WESTERN DIVISION CAUSE.

"That the masters ascertain and report the *whole* amount of rolling stock on the road, and that they specify the quantity thereof that is covered by and included in this mortgage, and also in the first and second mortgages respectively."

EASTERN DIVISION CAUSE.

"That the masters ascertain and report the whole amount of rolling stock on the whole road, and that they specify the quantity thereof *that is covered by and included in* the first mortgage, and also in this mortgage, and in the mortgage of Bronson, Soutter, and Knapp" [*i. e.*, the Land Grant mortgage, or mortgage on the Western Division].

REPORTS OF MASTERS.

(September 1, 1861.)

WESTERN DIVISION CAUSE.

"We have ascertained the whole amount of rolling stock on the whole road at the cost price. The amount thereof was, at the date of the filing of the bill in this cause, $569,635.78; and an additional amount of $53,600 has been purchased since the filing of this bill, making the whole amount to $623,235.78.

"And we have ascertained and report that of the said rolling stock, forty box cars, amounting, at the cost price thereof, to $31,979.64, and numbered 330 [the numbers of forty cars were here given, up to No. 408], &c., are covered by and included in the mortgage executed to the complainants [Bronson, Soutter, and Knapp] as set forth in the bill, the said cars having been purchased by the proceeds of a portion of the bonds to which this mortgage is collateral; and all the *remainder* of the said rolling stock is covered by and included

EASTERN DIVISION CAUSE.

"We have ascertained the whole amount of rolling stock on the whole road. The amount thereof, at the cost price, was, at the date of filing the bill of complaint in this cause, $569,635.78; and an additional amount of $53,600 has been purchased since the filing of the bill, making the whole amount now on the road $623,235.78.

"And we have ascertained, and do further report, that of the said rolling stock, forty box cars, amounting, at the cost price thereof, to $31,979.64, and numbered 330 [the numbers of forty cars were here given, the same cars as mentioned in the left hand column], &c., are covered by and included in the mortgage of Bronson, Soutter, and Knapp, and no other; and all the *remainder* of the said rolling stock is covered by and included in the first mortage upon the said railroad, and in the complainants'

in the first [*i. e.*, the Palmer] mortgage upon the said railroad, and in the mortgage upon the said railroad executed to Bronson and Soutter on the 17th day of August, A. D. 1857."

mortgage specified in the bill of complaint."

These reports, therefore, which found the amount and cost of the rolling stock, gave forty cars, designated by numbers, to the Western Division and to the Land Grant mortgage, and the residue to the Eastern Division and the mortgagees of *it*. The complainants in both suits were apparently dissatisfied. The parties seeking to foreclose on the Eastern Division wanted not only all that the masters gave them, but the forty cars that were allowed to the Western Division; while the parties seeking to foreclose on the Western Division wanted not only the forty cars allowed them, but all the other rolling stock; with some exceptions which they stated. The respective complainants accordingly filed

EXCEPTIONS TO THE MASTERS' REPORTS.

WESTERN DIVISION CAUSE.

"4th. For that the masters have certified that all the rolling stock on said road (except forty box cars, which are specially named in their report) *was covered by and included in the first mortgage* upon the said railroad, *and in the mortgage upon the said railroad executed to Bronson and Soutter*, bearing date on the 17th day of August, A. D. 1857.

"Whereas, the masters ought to have certified that all the rolling stock on said road (except that purchased by the receiver since the commencement of this suit, amounting to the sum of $53,600) was covered by *and included in the mortgage given* to the said complainants, and described in the bill of complaint in this cause; and that said mortgage was a first and prior lien on said rolling stock, superior to all other liens;

EASTERN DIVISION CAUSE.

"For that the masters have certified that of the rolling stock forty box cars, amounting, at the cost price thereof, to $31,999.64, and numbered 330, 332, &c., &c., *are covered by and included in the mortgage to Bronson, Soutter, and Knapp, and no other*; whereas, the said masters should have certified *that the said rolling stock was covered by and included in the mortgage of the complainants* in this action."

and that, as to the rolling stock purchased by said receiver above mentioned, 105-200ths thereof was covered by the mortgage described in the complaint; and that, to that extent, the complainants' said mortgage was a first lien thereon."

The court, having heard the parties, made the following

ORDERS ON THE EXCEPTIONS.

WESTERN DIVISION CAUSE.

"Ordered, *that the fourth exception* of complainants be overruled, except as to the forty box cars *which are covered* by this mortgage.

"And further ordered, that on said exception the said report be so modified that *all the other stock* that was on said road when the receiver was appointed, *except the said forty box cars, is covered by and included in the First Mortgage of the road from Milwaukie to Portage City;* and that all the rolling stock on said road that has been purchased or procured since the court has held possession by its receiver, costing $147,943.62, be applied to the *said first mortgage* and *the mortgage in this bill*, in proportion to the net revenues on such portions of the road said mortgages respectively covered, since the appointment of the receiver."

EASTERN DIVISION CAUSE.

"Ordered, that the report of the masters, allowing forty box cars to be covered by the Land Grant mortgage of said company to Bronson, Soutter, and Knapp, be confirmed.

"And that the said report be so modified that all the other rolling stock that was on said road when the receiver was appointed, except the said forty box cars, is covered by and included in the first mortgage of the said company from Milwaukie to Portage City.

"And that all the rolling stock on said road that has been purchased or procured since the court has had possession by its receiver, be applied *pro rata*, in proportion to the revenues of the road, to the first said mortgage and the said Land Grant mortgage."

In January, 1862, final decrees of foreclosure and sale were made in both causes, as well the one relating to the Eastern Division, as the other relating to the Western.

In the Western Division, the decree says:

"The description of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage above referred to, or from the bill of complaint in this cause, is as follows, viz.:" (Here follows the

description of premises quoted from the mortgage.) "With forty box cars, numbered 330, &c. (the numbers being all set out), and such portion or share of rolling stock purchased and procured by the receiver, costing one hundred and forty-seven thousand nine hundred and forty-two dollars and sixty-three cents, as the net revenues of the portion of road covered by this mortgage bears to the balance or other end of the road since the appointment of the receiver. ☞ *The remaining rolling stock is subject to prior mortgages.*"☜

In the Eastern Division cause, the Bronson and Soutter mortgage, the decree quoted the description of the premises from that mortgage, as given before, but added no direction to sell any rolling stock.

After the decree in the Western Division cause, the marshal advertised that division, and also all the rolling stock on the whole road; the forty box cars, and the proportion of rolling stock purchased by the receiver, mentioned in the decree, to be sold *absolutely;* and the remaining rolling stock "*subject to prior mortgages.*" The sale took place as advertised,—two persons, Pratt and White, *citizens of Wisconsin*, becoming the nominal purchasers. The sale as made, that is to say, with the remaining rolling stock sold, "subject to prior mortgages," was reported to the District Court, and confirmed by that court as reported. Nothing, however, in the record showed specifically, that the attention of the court was called to the fact that the marshal had attempted to sell the *whole* rolling stock. After the confirmation of this sale, Pratt and White organized—as under the laws of Wisconsin it was lawful for them to do—the Milwaukie and *St. Paul* Railway Company; sometimes for brevity called the St. Paul Company, simply; and this company applied by petition to the District Court, in the Land Grant case, showing the purchase by Pratt and White at the foreclosure sale, the organization by them of said company, and asserting that this company had acquired the right to work the

* This sentence in italics and between the indices—or the exact form of it—was the cause of one main difficulty in the case.

Eastern Division as well as the Western, and to exercise all the franchises of the debtor company, "in running, operating, and controlling said railroad in its entire length, from the city of Milwaukie to the city of La Crosse, and that such right so to run, operate, manage, and control the same, is prior and superior to the rights of any of the defendants in this cause, and prior and superior to the rights of the mortgagees in the mortgage to said Bronson and Soutter, on the Eastern Division, under which said Crocker is acting as receiver, inasmuch as the said mortgage to the said complainants is prior in date and lien to the mortgage to said Bronson and Soutter."

Upon this petition the court, May 7th, 1863, made an order, directing the receiver to deliver to the St. Paul Railway Company, the Western Division of said railroad and appurtenances between Portage City and La Crosse, "*and the rolling stock and property specially described in the decree;*" and ordered that the receiver take perfect inventory of all rolling stock other than *the forty box cars specially mentioned in the decree*, and of all personal property belonging to the debtor company, and report the same to the court.

On the 12th of June, 1863, the court made orders in the two causes, as follows,—the reasons for them being stated by the judge who made them, to be a duty which the court owed alike "to the public and the parties, to secure the use of a continuous *route without interruption or deviation of trade or travel between the termini*," *Milwaukie and La Crosse.*

WESTERN DIVISION CAUSE.

"On consideration of the petition of the Milwaukie and *St. Paul* Railway Company, it is ordered by the court that there be delivered over to the said company, all and singular the railroad between the city of La Crosse and Portage City, its roadbed and track, with its depots, station houses, engine houses, and all other property belonging to said railroad

EASTERN DIVISION CAUSE.

After reciting the petition of the St. Paul Co., &c. &c.,

"Ordered by the court, that the order appointing a receiver in this case be modified in the manner following, *subject to any further or other order rescinding, altering, or modifying this order now here made:* That the receiver let the said Milwaukie and *St. Paul* Railway Company into the

between the said points; and the forty box cars mentioned and described in the decree.

"And also the share or proportion of the rolling stock and personal property purchased by the receiver, as mentioned in the decree.

"And also, *subject to other or previous liens or claims*, the possession of the rolling stock on hand when the receiver took the same under the order of the court.

"And it is further ordered by the court, that the said receiver be and hereby is discharged as such from the management and control of the said Western Division of said railroad under the appointment in this case, subject, however, to the final settlement of his accounts, *and subject to the orders* made or to be made in this case, and in the other cases in which he was appointed or may hereafter be appointed."

possession of the Eastern Division of the La Crosse and Milwaukie Railroad from Portage City to Milwaukie, with the appurtenances and property and rolling stock thereto belonging. And that the said railway company, subject to the further order or orders of the said court, operate said Eastern Division of said railroad in connection with the said Western Division thereof, so that one continuous line of railroad between La Crosse and Milwaukie may be operated and conducted as directed in the original charter of the La Crosse and Milwaukie Railroad Co., without hindrance, interruption, or diversion, the same as if the whole line of road continued to be in one company, in pursuance of said charter, and not otherwise."

[The St. Paul Company was ordered to let the receiver see the accounts continually; keep the Eastern Division and its rolling stock in order; pay over to the receiver, at stated times, balances, &c., and give bond to abide orders, &c.]

Under these orders of June 12, 1863, all the rolling stock of the whole road was delivered to the St. Paul Company, who, in consequence, took a general control of all things.

The orders in the Eastern Division cause were brought before this court, December, 1863, and declared void, as having been made after a statute had taken away from the District Court the powers which in making them it exercised.* Still, however, the St. Paul Company kept possession; and a new line of railroad having been made between Milwaukie and Portage City, by way of Watertown (see diagram at page 610), it was obvious that it might carry business and travel through from La Crosse to Milwaukie completely well and yet ruin the Minnesota Company in the process.

* Bronson *v.* La Crosse Railroad, 1 Wallace, 405.

This last-named company now filed a bill on the equity side of the Federal court for Wisconsin, in which, or in the predecessor in law of which, the Land Grant mortgage had been foreclosed against the St. Paul Company,—White and Pratt the purchasers, and Soutter and Knapp (Bronson being dead), to have matters rectified, as it conceived, both generally and particularly.

The bill set forth the different mortgages, the foreclosure of that of Barnes, the Minnesota Company's now ownership, thereunder, of the equity of redemption of all the road, rolling stock, and franchises of the old La Crosse and Milwaukie Company, the foreclosure of the Land Grant mortgage (stating that the Minnesota Company had not answered, though made defendants therein), the marshal's sale and confirmation of it, as already mentioned. It alleged that the Land Grant mortgage left *un*mortgaged over half a million of dollars in value of this rolling stock, that the decree of the court did not order it to be sold, and that the District Court only placed it in possession of the St. Paul Railway Company, as it did the Eastern Division of the road, for the purpose of enabling that company to run the road from Milwaukie to La Crosse as one road. That notwithstanding this, the Milwaukie and St. Paul Company were building and would soon complete a railway from Milwaukie, by way of Watertown, to Portage City (see again the diagram at page 610), independent of and to be used in competition with the said Eastern Division, now owned by the Minnesota Company, complainants in the bill; that they gave out that, by the purchase of Pratt and White, and subsequent organization, they had acquired a right to separate and disconnect the said railroad from Portage City to La Crosse from the said Eastern Division from Portage City to Milwaukie, and on the completion of the road by Watertown would transfer the rolling stock from the Eastern Division to this *southern* connecting line; and by *so* connecting Milwaukie and La Crosse and diverting the rolling stock, render the roadbed of the Eastern Division wholly useless until restocked, which could be done only at great expense; all this being in fraud

of the rights of the Minnesota Company and to their great and irremediable injury.

It stated the character of these two foreclosures, that of the Land Grant on the Western Division, and of the second or Bronson and Soutter mortgage on the Eastern Division, as follows:

"Your orator shows that in the suit to foreclose the mortgage upon the Western Division, no persons or corporations were made parties defendant, except those having or claiming to have an interest in the said Western Division; and that in the suit commenced to foreclose the mortgage upon the Eastern Division, no persons or corporations were made parties, except those having or claiming to have some interest in the said Eastern Division; *and that in neither of the said suits did the said complainants therein pray or claim any relief as against the complainants in the other suit;* but the said two foreclosure suits were in all respects, and in every particular, separate and independent suits, as the respective mortgages, which they respectively were exhibited to foreclose, were separate and distinct mortgages upon separate and distinct premises.

"Your orator further shows that neither the said mortgage upon the Western Division, nor the said mortgage upon the Eastern Division, pretended to specify or particularly describe the amount of rolling stock intended to be thereby conveyed; and that in neither of the suits commenced to foreclose said respective mortgages, did the bill of complaint pretend to enumerate or describe the precise rolling stock, or amount of rolling stock included or intended to be included in and conveyed by the mortgage which it was exhibited to foreclose, or which belonged thereto at the time said bill was exhibited. But your orator, as owner of the equity of redemption of the said Western Division, and the rolling stock and franchises pertaining thereto, was made a party defendant to the said bill of complaint, which was exhibited to foreclose the said mortgage on the Western Division; and your orator in the said Western Division mortgage foreclosure suit, and as against the complainants in that suit, was the owner of and entitled to reserve, claim and have all the railroad rolling stock and franchises which had belonged to said debtor company, except that which was included in and encumbered by the said Western Division mortgage. And your orator,

as the owner of the equity of redemption of the said Eastern Division, and rolling stock and franchises pertaining thereto, was made a party defendant to the bill of complaint in the suit commenced to foreclose the said Eastern Division mortgage; and in that suit, and as against the complainants in that suit, your orator was the owner of and entitled to claim, reserve and have all the railroad, rolling stock and franchises, which had belonged to the said debtor company, except that which was encumbered by and included in the Eastern Division mortgage."

The bill also charged that no proceedings had ever been had in the Land Grant cause or otherwise, to ascertain the relative proportions of the net earnings of the Eastern and Western Divisions, so as to determine what proportion of the rolling stock purchased by the receiver passed under the Land Grant sale; that the St. Paul Company, being in possession of the whole road and rolling stock, claimed ownership of all the rolling stock, or nearly all, and were asserting title and employing their possession, to the great injury of the Minnesota Company.

It has been already mentioned that Bronson, Soutter, and Knapp, the mortgagees in the Land Grant mortgage (as in fact was the case with all the mortgagees), were citizens of New York; they therefore properly foreclosed their mortgage, in which corporations of Wisconsin were the parties in interest as defendants, in the Federal court. *The present bill*, however, being filed by the Minnesota Company, a corporation of Wisconsin, against the St. Paul Railway Company, another corporation of that *same* State, and against White and Pratt, citizens of *it*, as well as against Soutter and Knapp, survivors, stood on a different ground. As an original bill, it would plainly have not lain, under the rules which regulate this subject in the Federal courts.

The bill accordingly represented itself as "supplemental" to the Land Grant foreclosure bill, and claimed the benefit of the proceedings in that cause; praying that the Minnesota Company might be decreed to be the owner of all the rolling stock on the road at the time of the appointment of the receiver, except the said forty box cars; that an account

might be taken to ascertain the relative net earnings of the two divisions; and that thereupon, according to the principle of, and basis fixed by said Land Grant decree, it might be adjudged and definitely determined and declared by this court what proportion of rolling stock purchased by the receiver really and equitably belonged to the Minnesota Company and to the St. Paul Company respectively; and that a separation of said stock purchased by the receiver might be ordered, or that it should be sold, and the avails paid over to the respective companies according to their proportions. It prayed also a proper allowance for rent for the use of their rolling stock on the Western Division, and that the avails might be applied to the interest due on the mortgage. It prayed finally an injunction on the appointment of a receiver, and for other and general relief.

To this bill the St. Paul Company demurred, assigning for cause, want of jurisdiction, want of equity, &c., the fact that the bill was not supplemental, and that the parties were citizens of the same State. The court below having sustained the demurrer, two questions were now presented here:

1. Was this bill, in any sense, supplemental or ancillary, so that it could attach itself to the original proceeding, and thus, according to the practice of the Federal court, be entertained; though in itself and independently,—from want of proper and differing citizenship in the parties,—not capable of being thus treated.

2. If it was, did the complainant present any case calling for equitable relief?

Messrs. Cary and Carlisle, for the appellee.

I. *As to the Jurisdiction.* The complainant is a corporation organized under the laws of Wisconsin and situated in that State. The St. Paul Railway Company, one of the defendants, is in like manner a corporation of that State, and Pratt and White, and other defendants, are also citizens of Wisconsin. It is obvious that from want of proper citizenship in the parties, the suit cannot be maintained in the Federal

court as an original suit. The appellant accordingly relies on the subject-matter of his bill—its character as a supplemental bill—to bring the case within the jurisdiction. Is the bill then a supplemental bill. Plainly not, we think. It does not seek to alter or reverse the original decree; to add to or vary it. It states a new cause of action. It asserts that the St. Paul Railway Company has been guilty of trespass or conversion of certain personal property which the complainant owns, and that it sets up a claim to that property and to the Eastern Division of the La Crosse Railroad, which pretence and claim the complainant insists is unfounded. It therefore asks the aid of the court, in effect, *first*, to declare, settle, and quiet its title to said property; *second*, to have a settlement and compensation by way of damages; and, *lastly*, that the wrong-doer shall be restrained in future.

Are not the grievances for which remedy is here asked, the subject of original bill—all of them? The fact that the St. Paul Railway Company was formed by the purchasers at a sale under a decree of the United States court, does not make the company a ward of that court. The company has no special privileges there, and owes that court no peculiar allegiance. John Doe, of Wisconsin, might have committed the same wrongs against the complainant that are alleged against this defendant. Would it in that case be contended that he could be punished, or that those wrongs could be redressed except by an original suit? If by an original suit, confessedly, on account of the citizenship of the parties, it could not be in the Federal court. So in this case. If the St. Paul Company have no title to this rolling stock, as the complainant alleges, it is liable to an action at law for the taking.*

The pleader has, indeed, styled his bill a "supplemental"

* Mr. Cary stated as an incidental fact in the controversy, that the complainant had brought an action of trespass on the case for this property in the Circuit Court for the District of Wisconsin, which was now pending there; an action not against the St. Paul Company, because the citizenship of the companies would not allow that, but against certain non-resident directors of that company, who had directed the taking.

one; but styling it supplemental, does not make it so; nor is it a "supplemental bill" when tested by any of the definitions which settle the different sorts of equity bills, or when compared with any precedents in books of equity pleadings. The court is, of course, familiar with and will apply them. By settled equity practice, a defendant in an original suit cannot prosecute a supplemental bill. Such a bill can be brought only by the complainant, or by those who stand in his place. Moreover, by equity practice, a supplemental bill cannot be entertained in any case where the decree in the original action has been completely executed, which this decree has been; for the foreclosure suit is ended: Bronson, Soutter and Knapp have performed fully their writ. There can be no supplemental action to a thing which has been completely finished. In short, such a use of equity mechanism as it is here attempted to make, we venture to assert would never have been thought of by counsel possessed of less resources and devotion to his clients than the able one—subtle, bold, and strong alike—opposed to us.

Again. The St. Paul Railway Company, and Pratt and White, are new parties; they have never litigated this question; consequently, as to them, the bill is original, and the court cannot take jurisdiction. The point we here make was raised in a very early case in this court.* Certain aliens had obtained judgment against a citizen of Georgia, and proceedings had been instituted on the equity side of the court to reach his property in the hands of several parties, and a decree entered directing its sale. Subsequently a supplemental bill was filed against Elizabeth Course to reach property in her hands. The supplemental bill did not describe her as a citizen of the State of Georgia. In the Supreme Court it was objected that the court had not jurisdiction as to her for that reason. And in answer to this objection, counsel, in support of the bill, said, *arguendo:* "It is not necessary to describe the parties in the supplemental suit, which is merely an incident of the original bill, and

* Course et al. *v.* Stead et al., 4 Dallas, 22.

must be brought in the same court." But the court held the objection well taken, and reversed the decree. In *Cross* v. *De Valle*,* the same doctrine was recognized no longer ago than the last term.

II. *As to merits.* There are certain facts inferable enough from the case as stated; facts, not in any way denied by the bill, and which go far to settle the question. They are thus:

The La Crosse and Milwaukie Railroad Company was but one corporation, had but one legal existence, and as one entity, owned all its property, both real and personal. Moreover, it was originally chartered to build, and in fact did build, but one line of road, that from Milwaukie to La Crosse; and at the time when the receiver took possession, the road so built was used and worked, and always had been used and worked, as one "through" and continuous line of road; all belonging to one company and all belonging in the same right. All of the company's rolling stock was purchased for and owned by this unit company, and it was *all purchased for and used on* the entire length of road without any division or separation. It is not alleged in the bill—and truth would be violated if it were—that there was ever any division of the road for any purpose whatever, except that the company, for convenience of raising funds, made their first mortgage of the east 95 miles, and subsequently mortgaged the west 105.

The general unity and entirety of the road is admitted; and the fact that a railway company's rolling stock is common to its whole line, and does not belong to a particular part thereof, is a matter of common observation and knowledge, of which the court will take notice, as the common rule in all cases of a continuous and unit way.

Now, all the mortgages cover in express terms the rolling stock of the road. The language in each mortgage is much the same, literally. In spirit and legal effect it is all the same, exactly. There can be no doubt that the descriptions

* 1 Wallace, 14; see also, Dunn *v.* Clarke, 8 Peters, 1.

were copied the one from the other, and that in making the several mortgages the same identical rolling stock was intended to be conveyed, to wit, the rolling stock of the La Crosse and Milwaukie Company used on its road.* The argument of the other side must assume, of necessity, that the rolling stock of this one great company—this integer and unit route — was divided and subdivided; clamped down and affixed to meted and bounded parts; to parts, rather, fractured and severed from a proper whole. How can this assumption be truly made in the case of a great "through route," worked rapidly, night and day, with "Lightning" and "Express" as with other trains,—where speed and "no change of cars" is an object of first importance? How can you—in the case of a road two hundred miles in length, a road which is one of the great roads of the Continent, one on which rolling stock must, of course, be used in values of hundreds of thousands of dollars—assert that but *forty* box cars belong to its Western and largest division, while all the rest are attached as a fixture fastened down immovably to its Eastern? Can counsel tell us how these forty box cars, without a single locomotive, are propelled? Or in what way, with no rolling stock but the forty box cars themselves, the mighty traffic of this road, giving, as a former case exhibits, $800,000 of receipts,† is carried on with expedition and success? Certainly, we are to observe the language of the mortgage deeds; but we are not to strangle all justice and sense in the meshes of a technicality as unmeaning as verbose.

We, therefore, insist,—

1st. That each one of these several mortgages covered and included all the rolling stock belonging to the La Crosse and Milwaukie Company, and which had been procured for or

* Mr. Cary stated, as a fact in the case, and one which, he observed, was inferable enough from the language of the Land Grant mortgage itself, that at the time it was executed no part of the line of road described in it was built. The rolling stock mortgaged could, he thus argued, apply to no stock but that in use on the Eastern Division.

† See *supra*, p. 514.

used on said railroad from Milwaukie to La Crosse; and that there is no sufficient ground to say that it is a fixture to any specific portion.

2d. That these several mortgages became a lien upon the said rolling stock from the date of their execution, and that said liens have priority now in the order of time of their execution.

3d. That the La Crosse and Milwaukie Railroad Company, after giving these mortgages, cannot dispute the right of any one of the mortgagees to all of this rolling stock; and as the mortgage to Barnes is made subject to the other mortgages, the Minnesota Company stands in no better position than would the La Crosse Company; and is, therefore, estopped to dispute our title.

We, therefore, infer, and, inferring, insist that the question before the court below was one—not of the extent of the Land Grant mortgage—but one of the *priority of liens.* Viewed as we thus view the matter, the expression of the decree of sale, which in the statement of the case (p. 618) is signalized by index hands, and which has been the subject of different constructions,—"*the remaining rolling stock is subject to prior liens*,"—becomes both clear and reasonable. The history of the case, then, stands thus: The court below made its decree of foreclosure and sale in the *Land Grant case*, and directed a sale of all the rolling stock on the road, as described in that mortgage. After giving the description as contained in that mortgage, and especially describing this portion, which, by the reference to masters, the Land Grant had been found to be a first lien upon, it followed this with the adjudication that "*the remaining rolling stock is subject to prior mortgages.*" It made, in other words, a decree to sell all the rolling stock specially described, free from incumbrance; for the court had decreed that, as to that, our mortgage was a first lien, and all the remainder of the rolling stock subject to incumbrances prior in date. Thus understanding it the marshal proceeded. His advertisement of sale so expressly stated it. The sale was so made, and reported to the District Court, setting forth that the portion

of rolling stock specially named was sold free from all incumbrance, and all the remainder subject to the lien of prior mortgages. The sale was afterwards, on hearing, confirmed as made. The deed of the marshal to the purchaser, and from the purchaser to the St. Paul Railway Company, was of the property as sold. Can any history be more plain, more probable or apparently just? We think not; and we add that none can be more conclusive. The court must perfectly have known whether the marshal had rightly understood and rightly executed its decrees of sale; and by confirming the sale, it declares that he had rightly done both; rightly *understood* as well as rightly executed them.

But even if the court—in originally making the order of sale, and at the time *when* it made them—did not mean that this other rolling stock should be sold, "subject to *prior* mortgages," but meant, on the contrary, that it should be excluded from sale altogether as being the subject of other mortgage ownerships—admitting this for argument's sake, the only way in which we admit it at all—what is the effect, in law, of the marshal's action, subsequent to the orders, upon the property, his return of that action to the court, and the court's confirmation of it? The case thus supposed is this: The court gives the marshal an ambiguous order; an order capable of two interpretations. The marshal reads it in one way, one natural enough; and proceeds, on this interpretation, to execute it. He reports to the court exactly how he has executed it; and the court, in form, confirms his act. We say nothing about the immense weight which this act of the court, in confirming the order as the marshal interpreted and executed it, has in showing what the court meant *originally*. That point, for argument's sake, we have here abandoned. We are here arguing as to the effect of an interpretation subsequent to and confessedly different from the original. Why may not such a train of thought as this have passed perfectly well through the court's mind? "The marshal, it seems, has misunderstood us. But we did not express ourselves well. His mistake was natural. Our language may mean either of two things,—what the marshal assumed us to

mean, as well as or better than anything else. Moreover, on reflection, we see that for the true interests of all parties, and for the public interests also, it is best that we should have meant this. We will ratify the marshal's interpretation, and so affix the meaning which others have taken as the most natural, and which we ourselves now think would have been the best, had we expressed it." What is there unjudicial, or in any way irregular, in a mental process such as this? What the court did mean was in its own breast; *in petto* wholly. No record is violated; nor anything done but simply interpret an obscure sentence. And if such a process was had, is there not an end of the question? That the operation was had, seems proved by what the court finally did; by the fact, to wit, that in the orders of June 12th, 1863, it did deliver the whole rolling stock to the St. Paul Company, "subject," in effect, only to "prior mortgages;" precisely, in fact, as if it had originally meant, that it should thus be sold. Such is our case.

Under this order, subsequently so made, the St. Paul Railway Company took possession of the Western Division, of the forty box cars, of their proportion of the rolling stock purchased by the receiver, and also of all the rolling stock on the road when the receiver took possession of the same as purchaser. That said division, the forty box cars and the proportion so purchased by the receiver, they took free and clear from all incumbrances. As to the residue of the rolling stock, they took it, they admit, subject to mortgages previously given by the La Crosse and Milwaukie Company; the "prior mortgages" of the decree of sale. They have ever since so held and do now hold it, as they suppose; and they submit that the appellant is not at liberty to question their title so here asserted.

Mr. Carpenter, contra.

Mr. Justice MILLER delivered the opinion of the court.

The first question raised by the demurrer relates to jurisdiction.

For the purposes of this question we are to take the facts set up by the bill [his Honor had stated the main ones] and demurred to, as true, and consider whether they make a case for the jurisdiction of the Circuit Court of the District of Wisconsin, which has become successor of the District Court in that district.

The present suit grows immediately out of and is a necessity which arises from the suit, by Bronson, Soutter, and Knapp, to foreclose the Land Grant mortgage; under the decree in which suit the Western Division of the La Crosse and Milwaukie Road was sold, and also all the rolling stock of the company belonging to both divisions, to the Milwaukie and St. Paul Railway Company. The present suit is really a continuation of that one. The rights of the parties depend upon the construction which is placed upon the acts of the court in it; and the present bill is necessary in order to have a declaration of what was intended by the orders and decrees made in that suit, and to enforce the rights which were established by it.

The road and rolling stock, which are the subject-matter of this controversy, were placed in the hands of a receiver in the progress of that suit; and he was in possession of the rolling stock when, by an order of the District Court, made June 12, 1863, in that suit, and a similar order of the same date, in another suit, it was all delivered to the Milwaukie and St. Paul Railway Company.

At the last term of this court,* we decided that, by the act creating the Circuit Court for the District of Wisconsin, the District Court lost its power to make such orders, and that they were void. The consequence of this ruling is, that in contemplation of law, this property is still in the hands of the receiver of the court. If in the hands of the receiver of the Circuit Court, nothing can be plainer than that any litigation for its possession must take place in that court, without regard to the citizenship of the parties.† If it has been taken illegally from the custody of the receiver, it is

* Bronson *v.* La Crosse Railroad Company, 1 Wallace, 405.

† Freeman *v.* Howe, 24 Howard, 460.

equally clear that the court has not lost thereby the jurisdiction over the property, or the right to determine where it shall go; so far as that right is involved in that suit. This is the very object of this bill, and it is rendered all the more necessary by that which the court has done, as well as that which it has failed to do. In the case of *Randall* v. *Howard*,* these principles are fully stated as applicable to a proceeding in a State court, and are given as reasons why the Federal court would not interfere; although the parties had the right, so far as citizenship could give it, to litigate in the courts of the United States.

It is objected that the present bill is called a supplemental bill, and is brought by a defendant in the original suit, which is said to be a violation of the rules of equity pleading; and that the subject-matter, and the new parties made by the bill, are not such as can properly be brought before the court by that class of bills.

But we think that the question is not whether the proceeding is supplemental and ancillary or is independent and original, in the sense of the rules of equity pleading; but whether it is supplemental and ancillary or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the State courts. No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law, is an original bill in the chancery sense of the word. Yet this court has decided many times, that when a bill is filed in the Circuit Court, to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so, that the court will proceed in the injunction suit without actual service of subpœna on the defendant, and though he be a citizen of another State, if he were a party to the judgment at law. The case before us is analogous. An unjust advantage has been obtained by one party over another by

* 2 Black, 585.

a perversion and abuse of the orders of the court, and the party injured comes now to the same court to have this abuse corrected, and to carry into effect the real intention and decree of the court, and that while the property which is the subject of contest is still within the control of the court and subject to its order.

It is objected that Pratt and White and the Milwaukie and St. Paul Railway Company were not parties to that suit, and cannot therefore be compelled to yield their right to litigate with a citizen of Wisconsin in the courts of that State.

Pratt and White are mere nominal parties, who were the agents and attorneys of the corporators composing the Milwaukie and St. Paul Railway Company, and purchased the property at the marshal's sale for them. They and the company may both be considered as purchasers at that sale; and it is in their character of purchasers, and on account of the possession which they obtained on petition of the company, and the rights they claim under that purchase, that they are now brought before the court. If the court has jurisdiction of the matters growing out of that sale, and order of possession, as we have already shown that it has, then it has jurisdiction to that extent of these parties without regard to their citizenship. It would, indeed, be very strange if these parties can come into court by a petition, and get possession of that which was the subject of litigation, and then when the wrong they have done by that proceeding is to be corrected, they shall be permitted to escape by denying that they were parties to the suit. In the case of *Blossom* v. *The Milwaukie and Chicago Railroad Company*,* this matter was fully discussed, and it was there held, that a purchaser or bidder at a master's sale, subjected himself *quoad hoc* to the jurisdiction of the court, and became so far a party to the suit by the mere act of making a bid, that he could appeal from any subsequent order of the court affecting his interest.†

* 1 Wallace, 635.

† De la Plaine *v.* Lawrence, 10 Paige, 602; Calvert on Parties to Suits in Equity, pages 51, 58, and note to page 61.

The objection to the jurisdiction must therefore be OVERRULED.

We next proceed to inquire whether the bill makes a case calling for relief.

This involves the consideration of the mortgage of complainants in the original suit, and of several orders and decrees of the District Court, all of which are the subject of conflicting constructions by the parties and their counsel.

In reference to the roadbed which is covered by these various mortgages, there is no diversity of opinion; but in reference to the rolling stock, it is contended by appellees that these several mortgages were successive liens on all the rolling stock of the company, and by appellant that they are liens only on the rolling stock belonging to, or in some way identified with, that part of the road included in each mortgage respectively. At first blush it would seem that in a road used continuously as one road, there could be no such definite relation between any particular division of the road and any particular portion of the stock. But as it was competent for the company which owned all the road and all the stock to assign certain stock to one division, and certain other stock to the other division, when the roads were divided for the purpose of making mortgages, we cannot assume as a fact that there was no such allotment of the rolling stock; but must look to the language of the mortgages themselves, to see if any such intention is expressed. If it is not, then obviously the other view prevails, and the mortgages are successive liens on the whole stock.

The language in the descriptive part of the Palmer mortgage, and that in the corresponding part of the mortgage on the Western Division, when considered in reference to the rolling stock alone, may not be free from doubt as to its construction.* But when we consider it in reference to the clear purpose of the parties to make the mortgages distinct, and different as to everything else conveyed by them, we con-

* See them con-columned, at page 611; the former in the right column, the latter in the left.—REP.

clude that it was intended that the rolling stock covered by each mortgage was that which was properly appurtenant to each particular division of the road.

It is not so important that we be right in this, however, as we are satisfied that the District Court in the foreclosure suit decided this question; and as that decision is in full force and unreversed, it must conclude the parties to the present suit, all of whom claim under the decree of the court.

The complainants in the original foreclosure suit made defendants of all the judgment creditors of the company who had liens subsequent to themselves, and made the Milwaukie and Minnesota Company defendant, who held under the subsequent mortgage to Barnes, with a view to cut off their equity of redemption; but they did not make defendants of Bronson and Soutter, who held a subsequent mortgage on the Eastern Division, and a subsequent lien on the rolling stock, which complainants would also desire to extinguish, if they had believed it covered the same rolling stock which theirs did. By omitting these mortgagees they show their own construction that their mortgage, and that of Bronson and Soutter, did not cover the same stock; which could only be because it was appurtenant to the Eastern Division.

About the time that foreclosure suit was commenced, a suit was instituted in the same court to foreclose the second or Bronson and Soutter mortgage on the Eastern Division; but the holders of the Palmer mortgage were not made defendants to either suit. The two suits progressed *pari passu* to a final decree; but while the Western Division went to sale, an appeal stayed proceedings in the Eastern Division case, and no sale has yet been made under that decree. Very shortly after these suits were commenced, the court made an order of reference in each of them to masters in chancery, who were the same masters in both cases. These references were for the purpose of ascertaining the amounts due on the bonds, the amounts due certain judgment creditors, and the amount of rolling stock on the whole road, and the amount included in each mortgage. The language of

the order of reference on this latter point in the original suit in this case is as follows:

"And it is further ordered that said masters ascertain and report the whole amount of rolling stock on the road, and that they specify the quantity thereof that is covered by this mortgage, also in the first and second mortgages respectively."

The reference in the other case is in language almost identical.

Now it is argued that the object of this order was to ascertain and settle the priorities between these different mortgages. No such inference can be made from its language, for it says nothing about priorities in date, or superiority of lien. There was no occasion or reason for ascertaining those priorities in that suit, for the respective parties were not before the court, and could not be bound by its decree. It would not even bind complainants, because there would be no mutuality in the estoppel. It is an impeachment of the legal attainments of the court and of the counsel to suppose that they would make a reference to a master to ascertain a fact which could have no influence on the suit, and if passed upon by the court, could affect nobody's interest in the slightest degree.

But the language of the order clearly implies a different thing. The object is to ascertain, what is covered by one mortgage to the exclusion of the other; an object which had manifest pertinency to the duty which the court was called upon to discharge. The judge who made these orders delivered an opinion at the trial, in which he decides that the rolling stock of a railroad is a fixture; and if we suppose him to have considered that which was mortgaged to Palmer and to Bronson and Soutter as a fixture on the Eastern Division, and that which was mortgaged to Bronson, Soutter, and Knapp, as a fixture on the Western Division, we have a clear idea of what he wished to ascertain, in view of the decrees he was to make in the two suits.

We have next the report of the masters on this subject, which is as follows:

"We have also ascertained the whole amount of rolling stock on the whole road at the cost price. The amount thereof was, at the date of the filing of the bill of complaint in this cause, $569,635.78, and an additional amount of $53,600 has been purchased since the filing of the bill of complaint, making the whole amount $623,235.78.

"And we have ascertained, and do further report, that of the said rolling stock, forty box cars, amounting, at the cost price thereof, to thirty-one thousand nine hundred and seventy-nine dollars and sixty-four cents, and numbered 330, &c. [giving the numbers], are covered by and included in the mortgage executed to the complainants as set forth in the bill of complaint in this cause, the said cars having been purchased, and by the proceeds of a portion of the bonds to which this mortgage is collateral; and all the remainder of the said rolling stock is covered by and included in the first mortgage upon the said railroad, and in the mortgage upon the said railroad executed to G. C. Bronson and J. T. Soutter, and bearing date on the seventeenth day of August, A. D. 1857."

In the foreclosure suit of the Eastern Division, these same masters reported on the same day:

"We have ascertained and do further report, that of said rolling stock, forty box cars, amounting, at cost price thereof, to $31,979.64, and numbered 330, &c., are covered by and included in the mortgage of Bronson, Soutter, and Knapp, and no other;"

and then adds, that the remaining rolling stock is covered by the mortgage to Palmer, and to Bronson and Soutter; that is, the mortgage on the Eastern Division.

It is impossible in examining these reports to doubt that the commissioners understood that they were directed to ascertain what rolling stock was covered by each mortgage, in order that only such might be sold under the decree in that case, and that they reported that of all the rolling stock on the road, forty box cars alone were subject to the mortgage in the present case, and that all the other stock was subject to the mortgage in the other suit. At all events,

they were directed to ascertain what was subject to the mortgage in this suit, and they reported the forty box cars, and did not report any more. This much is beyond dispute from the language of the report in this case.

Counsel for complainant excepted to this report. His fourth exception is that instead of certifying as they did, the masters should have reported,

"That all the rolling stock on said road was covered by and included in the mortgage given to said complainants, and described in their bill of complaint in this cause, and that said mortgage was a first and prior lien on said rolling stock superior to all other liens."

This exception was overruled by the court, and the report of the masters confirmed so far as this branch of the subject is concerned.

We regard this as a judicial decision, that complainant's mortgage did not cover the rolling stock which was covered by the previous mortgage to Palmer, and that it only covered the forty box cars, and such proportion of the rolling stock purchased by the receiver as the net earnings of the Western Division bears to the net earnings of the Eastern Division. This order modifying and confirming the report of the masters settled the rights of the parties, and by that decision, they must stand until it is reversed on appeal, or set aside by some direct proceeding for that purpose.

The final decree ordering the sale proceeds upon the same view of the rights of the parties. After ordering a sale of the property mortgaged, and copying the language given in the mortgage as descriptive of what was mortgaged, the decree adds:

"With forty box cars, &c., and such portion or share of the rolling stock purchased and procured by the receiver, costing $147,942.63, as the net revenues of the portion of the road covered by this mortgage bears to the balance or other end of the road, since the appointment of the receiver. The remaining rolling stock is subject to a prior mortgage."

That is to say, having decided that what is covered by the other two mortgages is not covered by this; it is not subject to sale in this suit.

The marshal, however, who was directed to make the sale instead of a master commissioner, did sell all the rolling stock, and that sale was confirmed by the order of the District Court of May 5, 1863.

It is too clear for argument, that a sale by the marshal, unauthorized by the decree, is without any validity. Does the order of the court confirming the sale make it valid?

Upon principle the question is by no means free from difficulty. We are clear that a sale without a decree to sustain it would be a nullity, and we doubt if a court can make it valid by a mere general order of confirmation. If, however, an issue had been made by exceptions or other proper pleading, as to the question whether any particular piece of property had been included in the *decree, or order of sale*, and the court had decided that it was so included, it might be an adjudication upon the construction of the decree which would bind the parties. Nothing of the kind occurred here. There is every reason, on the contrary, to believe, that the court had no suspicion that the marshal had sold more than the decree authorized.

On the 7th day of May, two days after the order of confirmation, the Milwaukie and St. Paul Railway Company, presented their petition for the discharge of the receiver, and for possession of the property which they had purchased. The court thereupon made an order "that the receiver deliver over to said Milwaukie and St. Paul Railway Company, the said road and appurtenances between Portage City and La Crosse, *and the rolling stock and property specially described in the decree.*" The only rolling stock specially described in the decree was the forty box cars, and the proportion of stock purchased by the receiver. The fact that this was ordered to be delivered to the purchasers and no more, is almost conclusive of two things: first, that the judge understood his decree and previous rulings as we have interpreted them; and, second, that he had no idea that he had con-

firmed a sale of all the rolling stock on the road, to the purchasers at the sale. It is true that over a month later, he ordered the Eastern Division of the road and the remainder of the rolling stock into the possession of the same company. But this was done to enable them to run the whole road as a through route, on the principle of public policy, and that it was better for all parties concerned. This he declared in an opinion delivered at the time, and it is substantially indicated in the orders themselves.

In the light of these facts, we cannot give to the order of confirmation in this case the effect of making valid the marshal's sale, however the rule might be on that subject in other cases. But we do not mean to intimate that in any case a sale by a marshal, or master in chancery, can be valid, when there is no decree to support it. Cases in this court* would seem to decide that it cannot.

The order of June 12, 1863, delivering possession of this property to the Milwaukie and St. Paul Railway Company, has been declared by this court to be void for want of jurisdiction, and has been set aside by the court which made it. It therefore affords no support to defendants in this claim to the rolling stock in dispute.

We have thus examined with care and patience the mortgage, and the various orders and decrees of the District Court, on which the claim of the Milwaukie and St. Paul Railway Company to the ownership of this property depends. There is in all of them some want of clearness and precision, including the mortgage itself. Before the court ordered the sale, it should have made clear all these ambiguities. It evidently attempted to do so, and we think if it has not in all cases effected that purpose fully, it has furnished the criteria by which it can be done. And although the language of its orders is not always free from doubt, we have been able to satisfy ourselves of the court's intentions.

The title of appellant is clear on the record, unless it has

* Shriver *v.* Lynn, 2 Howard, 43; Brignardello *v.* Gray, 1 Wallace, 627.

been divested by these proceedings. We think that they do not confer title to the rolling stock on the Milwaukie and St. Paul Railway Company, nor divest the appellant, except as to the forty box cars, and the proportion of the stock purchased by the receiver, which the net earnings of the Western Division bore to the net earnings of the Eastern Division, and that they also decide that the mortgage under which they claim, did not include any more.

ORDER OF THE CIRCUIT COURT sustaining the demurrer to complainants' bill, and the decree of the court dismissing it, REVERSED, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Mr. Justice NELSON, in whose opinion concurred CLIFFORD and FIELD, JJ., dissenting.

The complainants in this bill, who set up a right to the equity of redemption in the Bronson and Soutter mortgage, insist that the whole of the rolling stock on the old La Crosse and Milwaukie Road, with a trifling exception, is subject to the lien of this mortgage on the Eastern Division, the foreclosure of which is pending; and that a proper allowance of rent for the use of it on the Western Division should be made, and the avails applied to the interest due on the mortgage; and further, that the question involved was litigated and so decided in the foreclosure suit on the mortgage of the Western Division.

We have looked into the position of the counsel for the complainants, and have come to the conclusion that it is not maintained.

For aught that appears, all the rolling stock of the old company was purchased by it for the use and benefit of the whole of the road, out of the common funds of the company, and a lien was given upon it in each and all of the mortgages of that company on the two divisions, the Eastern and Western, and also upon it in the mortgage of the whole road to the complainants. These liens would take effect as matters of law according to priority. Any other disposition

of them would be unjust and in violation of good faith to the bondholders, for the security of the payment of whose bonds the mortgages were given.

The District Court, however, seems to have entertained the idea, that any of the rolling stock purchased by the proceeds of the bonds of a particular mortgage should be exclusively subject to the lien of that mortgage, and made a reference for this purpose; and on the coming in of the report, acting upon this idea, decided that some forty box cars purchased by the proceeds of the bonds of the first mortgage on the Western Division, should be sold and the proceeds applied exclusively to this mortgage, and that all the rest of the rolling stock on the road (meaning the whole road), when the receiver was appointed, was covered by the first mortgage of the road from Milwaukie to Portage (meaning the Palmer mortgage), and all purchased since the appointment of the receiver be applied to this first mortgage, and the mortgage in the bill of foreclosure, in the proportion therein mentioned.

The decree of foreclosure, after describing the property to be sold, and particularly the forty box cars and the share of the stock purchased since the appointment of the receiver, adds, "The remaining rolling stock is subject to prior mortgages."

In the report of the sale by the marshal, he states, that he sold of the rolling stock the forty box cars, and the share of the stock purchased since the receiver was appointed, free and clear of all incumbrances; but the remainder of the rolling stock was sold, subject to the lien of mortgages prior in date to the mortgage under which the sale was made. This report of the sale by the marshal was excepted to, but after argument the exceptions were overruled, and the sale confirmed, and although the complainants here were party defendants in that suit of foreclosure, no appeal was taken from the decree of confirmation.*

We are of opinion, therefore, that the question as to the

* Blossom *v.* Milwaukie, &c., R. R. Co., 1 Wallace, 655-7.

ownership or the liens upon the rolling stock in question were not adjudicated by the court below in the foreclosure suit on the mortgage upon the Western Division, and that the question is open for this court to determine.

We agree that the rolling stock upon this road covered by the several mortgages, and as respects any other valid liens upon the same, is inseparably connected with the road; in other words, is in technical language a fixture to the road, so far as in its nature and use it can be called a fixture. But it is a fixture extending over the entire track of the road from Milwaukie to La Crosse. It is not a fixture upon any particular division or portion; but attaches to every part and portion. It was purchased, as we have before said, for aught that appears, by the common funds of the old La Crosse and Milwaukie Company, and which were derived from its various resources,—subscriptions of stock, sale of bonds secured by mortgages, earnings of the road after a part or the whole line was fitted for the running of the cars; and the mortgages or other incumbrances on the road made by the old company, whether on a portion or on the whole line, take effect according to the priority of lien. These liens, so far as respects the rolling or moving stock, attach to them a right to have the cars run upon the road, upon its entire line, as the value of the lien depends upon this use of the property. The lien was acquired in contemplation of this use, for without it a mortgagee or lienholder of the commonest observation must have seen the security would be next to worthless. The great value of the road and rolling stock, as a security, consists in the use and operation of the same as a railroad line in the carriage of passengers and freight; it is the combined use maintained and enforced that enables the lien creditor to realize the security contemplated when the credit was given.

Our conclusion, therefore, is, that the mortgagees of the Eastern line have by virtue of the liens of their mortgages such an interest in the rolling stock, as to entitle them to the appropriate use of it in running the road for the carriage of passengers and freight; and that the Milwaukie and St

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Paul Company, by reason of their title under the mortgage foreclosed on the Western Division, acquired the same right; and also, that the complainants by virtue of their title under the mortgage foreclosed, acquired a similar right, and that neither has acquired an exclusive right or title to any portion of the rolling stock. We say nothing as to the persons or parties who may be entitled to liens on their property, as these questions are not before us; nor the evidence that would enable us to determine the same, nor could they be determined under this bill. Our conclusion is that the decree below should be affirmed.

NOTE BY THE REPORTER.

IT will be seen in the foregoing report that one of the questions decided in the inferior court was, that rolling stock is a fixture. The question was argued in this court with ability on both sides. But though the decision here is not inconsistent with that idea, but on the contrary, as the reporter supposes, rather affirmative of it, the point was apparently one not necessary to be specifically passed upon, and is not discussed in the opinion. The matter is, however, one of such practical and increasing importance that the reporter supposes he will gratify the profession by giving in this collateral way an extract from the brief of the appellant's counsel, Mr. Carpenter, who endeavored to support the modern view.

IS ROLLING STOCK A FIXTURE?

The term *fixture* was early seized upon by legal writers to supply a deficiency in their technical terminology; but was not entirely reclaimed from its popular use and fixed in that strictness and uniformity of meaning requisite to scientific certainty; and as used by legal writers, it has, continually fluctuated between a technical and a popular use. We have, therefore, many kinds of fixtures; and many exceptions and qualifications to each kind. A fixture is one thing between landlord and tenant; a different thing between vendor and vendee; is one thing in the economy of trade; another for the purposes of agriculture. Originally, the term denoted those movable things which had become immovable by connection with the

freehold. But presently it came to mean those things, which although attached to the freehold, could, under certain circumstances, be removed. In its popular use it meant something affixed or fastened to the freehold; and in the early cases, and many of the later ones, we find the popular definition of the term sweeping everything before it. An article was held to be a fixture or not, from the presence or absence of a screw fastening it to the floor.

By the great majority of cases, ancient and modern, there is no doubt that a fastening was essential to constitute the thing in question a part of the freehold; and nothing kept in place by mere gravitation was held to be a fixture. It is not less true that from the first we have the doctrine of constructive annexation equally well established. In *Liford's Case*,* it is said to have been decided in the fourteenth year of Henry VIII, that a millstone, removed from a mill to be picked, was nevertheless constructively a part of the freehold, and passed by deed conveying the mill. In England, title deeds have been held to be fixtures; and deer in a park, and fish in a pond, to pass with the estate.

The right to remove articles as fixtures has been carried farther in favor of tenants and to encourage trade than in any other cases; yet this right has been somewhat limited; and it has been held that where an engine, in no way attached to the freehold, could not be removed without injury to the building in which it was set up, that the tenant could not remove it. There are cases in England of more recent date, still farther tending to put this subject upon a reasonable, as distinguished from a philological ground; and to hold that a thing is to be regarded as real or personal property, according to its relation to, and connection in use with, the freehold, rather than from the manner in which that connection may be accomplished. And it has been expressly decided that actual fastening is not necessary to make a thing part of the estate.

In the United States we have three different rules established by different States.

1. The thing must be so fastened to the estate that its removal would seriously injure the freehold, beyond the loss of the thing removed.

2. If the chattel is essential to the use of the real estate, and actually, though slightly attached, it will pass with the freehold.

3. If the thing be essential to the use of the real estate, and has uniformly been used with it, then it passes, though not fastened to it.

As an original proposition, the third rule seems the most satisfactory. Take for instance a manufacturing establishment. The building is constructed to receive the various machines necessary for carding wool, spinning yarn, weaving and dressing cloth, and this business is carried on in the building. One machine is so light, or its motion so violent, that it must be steadied by some fastening to the floor; the next is heavy enough to keep in place by its own weight. Now there is no reason in saying that one machine will, and the other will not, pass with the freehold. Both are essential to

* 11 Reports, 50, b.

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the same business, one is useless without the other, and both are in the mind of the purchaser when he buys the establishment. It seems absurd to say that, to be sure of getting all the machinery, he must nail it down to the floor, when perhaps fifty men could not start it a hair. The purpose for which the thing was constructed, and the manner in which it was enjoyed in connection with the freehold, should determine whether it is real or personal estate.

Following this view, it was held, in *Farrar* v. *Stackpole*,* that where machinery was essential to the purposes for which the building in which it was used was erected, that this fact alone constituted it real estate, whether it was nailed down or whether only held down by the laws of gravitation.

Other cases† are to the same effect; although a far greater number of cases could be cited to the contrary, both from England and American reports.

In *Walker* v. *Sherman*,‡ actual fastening was held essential; but in a more recent case, *Snedeker et al.* v. *Warring*,§ this distinction is overruled, and the law of fixtures put upon sensible ground and according to the doctrine in the above cases. In the latter case, a statue and sun-dial were held part of the real estate. The court say, "If the statue had been actually affixed to the base, by cement or clamps, or in any other manner, it would be conceded to be a fixture and to belong to the realty. But as it was, it could have been removed without fracture to the base on which it rested. But is that circumstance controlling? A building of wood, weighing even less than this statue, but resting on a substantial foundation of masonry, would have belonged to the realty. A thing may be as firmly affixed to the land by gravitation as by clamps or cement. Its character may depend much upon the object of its erection. Its destination, the intention of the person making the erection, often exercises a controlling influence; and its connection with the land is looked at principally for the purpose of ascertaining whether that *intent* was that the thing in question should retain its original chattel character, or whether it was designed to make it a permanent accession to the lands."

We come now to give this law of fixtures an application to the present subject-matter.

Suppose a corporation created by law to build, equip, and work a railroad, and for no other purpose. It mortgages its roadbed, between certain limits, all its depots and station buildings, its right of way, and all appurtenances between those limits; and all the franchises, privileges, and rights of the company of, in and to, or concerning the same. The road is useless without the rolling stock. Here is a case then falling fully within the principle of earlier cases;‖ the real estate worthless without the rolling stock,

* 6 Greenleaf, 157.

† Lawton *v.* Salmon, 1 Henry Blackstone, 259; Fairis *v.* Walker, 1 Bailey, 541 (S. C.); Voorhis *v.* Freeman, 2 Watts & Sergeant, 116; Pyle *v.* Pennock, Id. 390; Goodrich *v.* Jones, 2 Hill, 142.

‡ 20 Wendell, 636. § 2 Kernan, 170.

‖ Farrar *v.* Stackpole; Voorhis *v.* Freeman; and Pyle *v.* Pennock.

which has been used *only* upon the road; and the rolling stock, so essential to the use of the road, utterly worthless for any other or different use. We have already seen the senseless fiction of fastening done away with; and we have but to apply the principles of the cases cited, and we shall come to the result that the rolling stock is in the nature of a fixture; and as such must be conveyed by the mortgage conveying the estate. It has not, indeed, *exactly* the same connection with the realty that the statue had in *Snedeker* v. *Warring;* it is not held or kept in *one* place by fastenings, or by its weight. But this circumstance is of no consequence if the principle deducible from the cases above cited is to govern. If a billiard table were fastened to the floor so as to be conceded a fixture, would not the balls and cues pass also? A bucket in a well may be detached, and it is movable, running from top to bottom of the well, yet it is a fixture by common consent. A shuttle in a loom is thrown from place to place by the motive power of the machinery, yet it is an essential part of the machine. It is not inconceivable that rails and cars might be so constructed as that the car should be held upon the rail by certain material contrivances, and yet be propelled from one station to another; from one end of the road to another, by steam power. In such a case none would doubt that the cars were a fixture. Can it be said that the manner of accommodating and adjusting the cars to the rails can make any difference? "The railroad, like a complicated machine, consists of a great number of parts, a combined action of which is essential to produce revenue. And as well might a creditor claim the right to levy on and abstract some essential part from Woodworth's planing machine, or any other combination of machinery, as to take from a railroad its locomotive and passenger cars. Such an obstruction would cause the operations to cease in both cases."*

Then, again, following the principle of *Snedeker* v. *Warring*, the *destination of the rolling stock, the intention of a company* to pass it, will have an influence in determining whether such stock is real or personal property. This consideration would be as conclusive in regard to the furniture of a railroad as it was in regard to the statue, where it was presented; and even more so. The statue might have been sold by the sculptor for the adorning of any residence; though in fact it was made for the particular use. The right to buy and own rolling stock is a franchise, and can only be exercised as an accessory to the operation of a railroad. Any buying or selling of cars, engines, &c., by the company, for the mere purpose of speculation, would be unauthorized and illegal. Here, then, is a consideration showing that a company intends the rolling stock to be used only for the road, or, in other words, to become a permanent accession to the real estate of the company. The intention of the owner, the use for which the property was designed, the connection between the road and the cars, and the essential relation between them, for the purposes of revenue, all combine to declare the rolling stock real estate.

In *Pierce* v. *Emery*,† the Portsmouth and Concord Railroad Company had

* McLean, J., in Coe *v.* Pennock et als. † 32 New Hampshire, 484.

mortgaged all their property, real and personal, and all their franchises. The court held that the rolling stock acquired subsequently to the execution of the mortgage belonged to the mortgagee. The court say, "The object of the act being to give the bondholders a substantial and available security for their money, and a preference over other creditors not previously secured, can only be answered by so construing the law authorizing the mortgage as to give the bondholders security upon the road itself, as the general subject-matter of the mortgage, and upon the changing and shifting property of the road as part and parcel, by accession, of the thing mortgaged."

In *Phillips* v. *Winslow*, in Kentucky, it was held that, in equity, the rolling stock acquired subsequent to the execution of the mortgage, passed as an accession or fixture.

In Redfield on Railways,* it is said, indeed, that rolling stock is an *accessory*, though not a *fixture*. The distinction is, perhaps, one of words. In the strict technical sense of the word, as used in the old cases, rolling stock is not a *fixture;* but within the reason and philosophy of the modern cases it would seem to be so. If it must not be *called* a fixture, in deference to the old cases, it is yet an *accessory of that sort*, which has every element of one; and to be regarded accordingly, however named.

The conclusion is, that rolling stock, put and used upon a railroad, passes with a conveyance of the road, even without mention or specific description.

THE FOSSAT OR QUICKSILVER MINE CASE.

1. An appeal lies to this court from a decree of the District Court for California, in a proceeding under the act of 14th of June, 1860 (12 Statutes at Large, 33), commonly called the Survey Law.
2. If no appeal from such a decree be taken by the United States, they may appear in this court as appellees, but cannot demand a reversal or change of the decree.
3. If a California land claim has been confirmed by a decree of the District Court under the act of 3d of March, 1851 (9 Statutes at Large, 631), and the decree of confirmation fixing the boundaries of the tract stands unreversed, a survey under it is the execution of that decree, and must conform to it in all respects.
4. The Survey Law of 14th of June, 1860, gives the District Court no power to amend or change the decree of confirmation.
5. When the title-papers designate the beginning-place of a straight line, and fix its course by requiring that it shall pass a known and ascertained point to its termination at a mountain, such line cannot be varied by the fact that a rough draft (a Mexican diseño) on which it is

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* Page 576, note.