

transcript, which the clerk deems that he cannot in duty do. A motion is made that he be directed to do this, and has been heard. The transcript of the record is understood to be transmitted from this court, as such, under its seal, to the supreme court, so that the clerk in making and certifying the transcript acts as an officer of, and under the general direction and control of, this court, in the first instance, subject of course to the further order of the supreme court on proceedings on suggestion of diminution of the record. Therefore a direction of this court in a doubtful case, where the clerk is requested to insert in the transcript by one party what he is requested to leave out by the other, would seem to be proper. As argued by the appellant's counsel, the only question before the supreme court will be whether the decree appealed from was right when made, and the opinions or opinion to be annexed are such as bear upon that decree and expound the reasons for making it. The motion in this case was founded largely upon the record as it stood at the time of the first opinion, and went much upon the ground that later decisions of the supreme court would lead to a different conclusion. The second opinion reviewed the case in view of these decisions. The decree was entered in accordance with its reasoning as well as with that of the first opinion. *Hoe v. Kahler*, 25 Fed. Rep. 271. This opinion, therefore, comes within the requirements of the rule of the supreme court. The motion papers, in connection with the record, illustrate the opinion, and the disposition of the motion being referred to in the decree, the whole would seem to be proper parts of the record to be transcribed, within the meaning of the statute and rule taken together. Motion denied.

FARMERS' LOAN & TRUST Co., Trustee, v. CHICAGO & A. Ry. Co. and others.¹

(Circuit Court, D. Indiana. April 8, 1886.)

1. TRUST—DEATH OF TRUSTEE DOES NOT INVALIDATE TRUST.

A trust, valid at its inception, is never permitted to fail for lack of a trustee; *e. g.*, a conveyance in trust to two, one capable of taking and one not, will not become invalid by reason of the death of the competent trustee.

2. SAME—CITIZEN OF NATION HAS RIGHT TO HOLD PROPERTY UPON TRUST IN ANY STATE.

A citizen of the United States has the right to hold real and personal property, absolutely, or in trust for his own benefit, or in trust for the benefit of himself and others, in any state of the Union. So held *arguendo*.

3. SAME—STATE STATUTE CONFINING TRUSTEES TO RESIDENTS, VOID AS TO CITIZENS OF THE UNITED STATES.

A state statute which declares a conveyance in trust of real or personal property to a non-resident, except by will, invalid, is void as to citizens of the United States, as inconsistent with the constitution, art. 4, § 2. cl. 1, which

¹ Reported by Russell H. Curtis, Esq., of the Chicago bar.

provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." So held *arguendo*.

4. SAME—FOREIGN CORPORATION—STATE STATUTE CONFINING TRUSTEES TO RESIDENTS DOES NOT AFFECT SUCH CORPORATION.

A state statute which declares a conveyance in trust of real or personal property to other than "a *bona fide* resident" of the state invalid, and which provides that a trustee's right shall cease upon his removal from the state, *held*, in view of surrounding facts, not to govern a conveyance in trust to a foreign corporation of property within the state.

5. SAME—CONSTRUCTION OF TRUST DEED—RIGHT TO FORECLOSE NOT BARRED.

Provisions in a trust deed made by a railway corporation to secure its bondholders, which prohibit the trustee, without the consent of the holders of a majority of the bonds, to declare the principal due before maturity, to take possession of the mortgaged property, operate, or sell it, or to maintain a foreclosure suit for the principal before the maturity of the bonds, do not abrogate the right of the trustee, at the request of a single bondholder, or the right of a single bondholder himself, if the trustee refuses to act, to foreclose, upon breach of the condition of the deed by the corporation's failure to pay interest.

6. RAILROADS—MORTGAGE—FORECLOSURE FOR INTEREST DUE—FORM OF DECREE.

In a suit by a trustee suing for the benefit of bondholders to foreclose a trust deed against a railway corporation to enforce the payment of overdue interest, complainant, unless restrained by the trust deed, is entitled to a decree *nisi* for the amount due and for a sale of the mortgaged property upon default in payment. Upon payment of the amount due, the foreclosure decree will be suspended until default again occurs in the payment of interest.

7. RECEIVER—HIS APPOINTMENT DISCRETIONARY.

The appointment of a receiver rests in the sound discretion of the court. Defendant's insolvency may or may not be cause for appointing receiver.

In Equity.

B. H. Bristow, J. E. McDonald, H. B. Turner, and C. N. Steele,
for complainant.

J. H. Choate, J. J. McCook, Charles L. Atterbury, Edward Daniels,
C. W. Fairbanks, and Jacob S. Slick, for defendants.

GRESHAM, J. The Chicago & Atlantic Railway Company, on the thirteenth of June, 1881, by its deed of trust, conveyed to the Farmers' Loan & Trust Company, a New York corporation, and Conrad Baker, a resident and citizen of Indiana, its line of railway extending from Marion, Ohio, to Chicago, together with all other property of every character which it then owned or might thereafter acquire, to secure an issue of 6,500 bonds of \$1,000 each, payable on November 1, 1920, with interest at 6 per cent. per annum, payable semi-annually on the first days of May and November. On the fifteenth day of September, 1883, the railway company, by a second trust deed, conveyed the same property to the Farmers' Loan & Trust Company and George J. Bippus, a citizen of Indiana, to secure an additional issue of 5,000 bonds of \$1,000 each, payable on the first day of August, 1923, with interest at the rate of 6 per cent. per annum, payable semi-annually on the first days of February and August. This suit is brought by the Farmers' Loan & Trust Company against the Chicago & Atlantic Railway Company and George J. Bippus, the co-trustee in the second mortgage; Conrad Baker, the co-trustee in the first mortgage, being dead.

Section 2988 of the Revised Statutes of Indiana, which was in force when the trust deeds were executed, provides that "it shall be unlawful for any person, association, or corporation to nominate or appoint any person a trustee in any deed, mortgage, or other instrument in writing, (except wills,) for any purpose whatever, who shall not be at the time a *bona fide* resident of the state of Indiana; and it shall be unlawful for any person who is not a *bona fide* resident of the state to act as such trustee. And if any person, after his appointment as such trustee, shall remove from the state, then his rights, powers, and duties as such trustee shall cease, and the proper court shall appoint his successor, pursuant to the act to which this is supplemental."

It is urged that inasmuch as the Farmers' Loan & Trust Company is a New York corporation it was not capable, under this statute, of acting as trustee in the trust deed or mortgage, and that it cannot, therefore, maintain this suit. The Chicago & Atlantic Company conveyed its property in trust to secure its bonds, and it would not, perhaps, as between itself and the bondholders, be permitted to urge this objection against the validity of its own solemn act. Gov. Baker, the co-trustee, who died before the suit was brought, and whose successor in the trust has not been appointed, was a resident of Indiana when the trust deed was executed. This satisfied the requirements of the Indiana statute. No court would be expected to hold that the trust deed was void because one of the trustees was not a resident of Indiana. If it be true that the Farmers' Loan & Trust Company was not capable of acting as trustee to the extent of taking title to so much of the mortgaged property as was situated within the state, or that its designation as trustee was to that extent inoperative and void, nevertheless the trust deed was valid when executed, and a trust is never permitted to fail for want of a trustee. The trust property was conveyed as an entirety to secure the payment of the bonds and coupons, and it is not claimed that the Farmers' Loan & Trust Company was incapable of acting as trustee so far as the trust embraced property within the states of Ohio and Illinois. Suits between the same parties, asking the same relief, commonly called "ancillary" suits, may be, and presumably have been, instituted in the circuit court of the United States for the Northern district of Ohio and the Northern district of Illinois, and the court in either of those jurisdictions would have authority to decree a sale of the mortgaged property as an entirety. *Muller v. Dows*, 94 U. S. 444.

If, under such circumstances, a court of equity has authority to allow the requesting coupon-holders to be made co-complainants with the Farmers' Loan & Trust Company, it would be expected to exercise it instead of dismissing the bill. The facts of this case would perhaps justify the exercise of that authority. But if the Chicago & Atlantic Company be not estopped from denying that the Farmers' Loan & Trust Company was capable of acting as trustee, and if the court is not