That a mortgagee has taken possession of the mortgaged premises, does not prevent his foreclosing the mortgage thereon afterwards, *Portland Bank* v. *Fox*, 19 Me. 99; *Harkins* v. *Forsyth*, 11 Leigh 294; or recovering the balance due on the mortgage debt, *Rudge* v. *Richens*, L. R., 8 C. P. 358; *Porter* v. *Pillsbury*, 36 Me. 278; *Weiner* v. *Heintz*, 17 Ill. 259; *Andrews* v. *Scotton*, 2 Bland 668; *Amory* v. *Fairbanks*, 3 Mass. 562; *Hatch* v. *White*, 2 Gall. 152; *Lovell* v. *Leland*, 3 Vt. 581; see *Green* v. *Cross*, 45 N. H. 574; *Biggins* v. *Brockman*, 63 Ill. 316; *Johnson* v. *Lewis*, 13 Minn. 364; or purchasing under his own judgment, *Trimm* v. *Marsh*, 54 N. Y. 599; or taking the body of the defendant, on a *ca. sa.* for the mortgage debt, *Colby* v. *Gibson*, 3 Smith (K. B.) 516; see *Maguire* v. *O'Reilly*, 3 Jon. & Lat. 224.

As to the effect of a mortgagee purchasing the equity of redemption under the execution sale of another creditor of the mortgagor, *Murphy* v. *Elliott*, 6 Blackf. 482; *Crawford* v. *Boyer*, 14 Pa. St. 380; *Ex parte City Sheriff*, 1 McCord 399; *Schnell* v. *Schroder*, Bail. Eq. 334; *Trimmier* v. *Vise*, 17 S. C. 499; *Barnes* v. *Brown*, 71 N. C. 507; see *Cross* v. *Stahlman*, 43 Pa. St. 129.

A statute authorizing an equity of redemption to be sold under execution *at law*, was held not to include a judgment obtained by the mortgagee, on his bond, and a sale of the premises thereunder to himself, *Shaw* v. *Tims*, 19 Grant's Ch. 496; *Kerr* v. *Styles*, 26 Id. 309; see *Vannooman* v. *McCarty*, 20 U. C. C. P. 42; also *Preston* v. *Ryan.*, 45 Mich. 174.

As to the right of a purchaser of the premises from the mortgagor to have a personal judgment against the mortgagor for the debt transferred to him on his redeeming the mortgage, *Greenough* v. *Littler*, L. R., 15 Ch. Div. 93; and similar rights of the mortgagor's sureties on the bond, *Stewart* v. *Clark*, 13 U. C. C. P. 203; *Post* v. *Tradesmens' Bank*, 28 Conn. 420; *Darst* v. *Bates*, 95 Ill. 493; *Cullum* v. *Emanuel*, 1 Ala. 23; *Miller* v. *Musselman*, 6 Whart. 354; *Brewer* v. *Staples*, 3 Sandf. Ch. 579; *Lowndes* v. *Chisholm*, McCord's 455; *Bronston* v. *Robinson*, 4 B. Mon. 142.

A vendor may enforce his lien against a purchaser of the premises under an execution issued on a judgment at law recovered by the vendor on his bond, *Rice* v. *Wilburn*, 31 Ark. 108; *Murphy* v. *Elliott*, 6 Blackf. 482; see *Barker* v. *Smark*, 3 Beav. 64; *Greeno* v. *Barnard*, 18 Kan. 518.

As to the jurisdiction of equity to relieve in case of mistake as to the effect of a purchase at a sheriff's sale on the lien of a mortgage on premises, *Cumming's Appeal*, 23 Pa. St. 509; *Biggins* v. *Brockman*, 63 Ill. 316; *Lowndes* v. *Chisholm*, 2 McCord's Ch. 455.

The case of *Cattel* v. *Warwick*, 1 Hal. 190, seems to have been doubted in *Sloan* v. *Summers*, 2 Gr. 515.

JOHN H. STEWART.

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## LEGAL NOTES.

TWO decisions have lately been rendered on the question of the constitutionality of statutes regulating railroad traffic. The opinions are too long for publication in full, but the following abstracts may be of

interest in connection with Mr. Savage's article in the February number of the Register; and Mr. Hamilton's article in the present number.

The first of these decisions was rendered February 29th 1884, in the United States Circuit Court for the Middle District of Tennessee, in the cases of *Louisville & N. Railroad Co.* v. *Railroad Commission of Tennessee*, and *East Tennessee V. & G. Railroad Co.* v. *The Same.* The Legislature of Tennessee had on March 30th 1883, passed an act to establish a railroad commission. The first section declared that every railroad in the state was a public highway, over which all persons had equal rights of transportation on payment of just and reasonable compensation, and provided that any person or corporation, who should exact more than a just and reasonable compensation, or make an unjust or unreasonable discrimination, should be guilty of extortion, and that the question whether the compensation was reasonable, or the discrimination unjust should be determined by the jury.

The other sections of the act provided that the party injured should have the right to recover ten times the damage sustained, and a reasonable counsel fee, unless the rates charged were such as had been approved by the railroad commission, in which case only actual damages should be recoverable; that it should be the duty of the railroad commission, whenever the provisions of the act were violated, to cause suits to be entered in the name of the State, in which certain pecuniary penalties should be recoverable; that the Governor should nominate three railroad commissioners, who should revise all tariffs of charges, and fix and approve the rates decided by them to be reasonable, and that their approval should, in suits brought under the act, be *prima facie* evidence, that the charges were reasonable, and that charges greater than their rates should be *prima facie* extortionate. The act contained a saving clause to the effect that no rate should be considered extortionate if it appeared from the evidence that the net earnings of the railroad transporting freight, if done without such discrimination on the basis of such rate, together with the net earnings from passenger and other traffic would not amount to more than a fair and just return on the assessed value of the railroad, and that the act should not apply to any railroad then being constructed or which might thereafter be constructed until ten years after the completion of such railroad.

The act further contained a number of regulations for the work of the commissioners, among which was a provision that it should be their duty to confer with the commissioners of other states and with such persons in states having no commissioners as the governor of such states might appoint, for the purpose of agreeing upon a draft of statutes to be submitted to the legislature of each state to secure uniform control of railroad transportation in the several states and from one state into or through another.

The Louisville & Nashville Railroad Company and The East Tennessee V. & G. Railroad Company filed bills to enjoin the commissioners, appointed under this act from revising the freight tariff.

These bills set forth that the Louisville & Nashville Railroad Company was a Kentucky corporation, and was authorized by license of the laws of Tennessee to extend its road into that state, and subsequently, by laws passed for the purpose, to consolidate with other railroad companies and thereby became an extensive system of intercommunication

between the states from the Ohio River to the Gulf of Mexico; that the East Tennessee, Virginia and Georgia Railroad Company was a Tennessee corporation, and by authority of law became a consolidated corporation operating a system of railroads between the states and extending through Tennessee into Georgia, Alabama and Mississippi, forming with its connections a united line of inter-communication, traversing North and South Carolina, Virginia and other states; and that defendants had notified complainants that they would proceed to revise all the tariffs of freight within the state of Tennessee. Defendants by affidavits asserted the validity of the statute. After hearing the court granted the injunction.

Judge BAXTER in his opinion concedes the right of the legislature to protect the public by reasonable regulations against unjust discrimination by railroads, but holds that "the rules prescribed and the power exerted must be within the police power in fact and not covert amendments to their charters in curtailment of their corporate franchises." He further finds that inasmuch as the act gives to each jury the right to determine the whole question as to the proper rate to be charged without fixing a definite or certain standard, the statute was illegal as subjecting the corporations to actions for penalties quasi criminal, under provisions so vague and indefinite that the corporation could not regulate its business with reasonable safety, and that the statute in certain of its provisions discriminated between persons and corporations in violation of a clause of the Tennessee constitution prohibiting discrimination in the granting of rights and privileges, and was also in violation of the fourteenth amendment to the United States Constitution, prohibiting the states from depriving any person of life, liberty or property without due process of law.

Judge HAMMOND in an elaborate opinion, after a review of the authorities, holds the statute unconstitutional as being an attempted regulation of commerce. The general principles on which he bases his opinion are concisely stated in his syllabus, as follows:

"The power of the states to regulate railroad rates by direct action is limited to domestic transportation, which means that carried on exclusively within the boundaries of a state, and transportation can be domestic only when it begins and ends within those boundaries; and this definition cannot, for the purpose of enlarging state authority, be held to include so much of a transportation on a continuous shipment between two or more states as will cover the distance travelled within the limits of any one of those states; for this construction would utterly destroy the exclusive power of Congress over the inter-state transportation, abrogate the constitutional provision and enable the states to restrict, obstruct or impair that freedom of commerce between the states which it was the object of the provision to permanently secure. It can only include the transportation carried on upon roads lying wholly within the state, or else, it may be, to shipments beginning and ending in the state without reference to the character of the road in that regard. This is the utmost reach of state power, and as to this, no decision is now made, because the act itself makes no discrimination, and attempts to control *all* rates."

"Until Congress chooses to exercise whatever power it may have over domestic commerce, as above described, by reason of whatever relation

it may bear to inter-state commerce as an auxiliary or instrumentality thereof, the states may continue their control over it as over any other such instrumentality within their territorial limits, although the inter-state commerce of which it is an instrumentality may be indirectly or incidentally affected by such control, but they can never touch the inter-state commerce itself by direct action upon it or any part of it, by these regulations, and any state law, be it wise or unwise, valid or invalid in other respects, and no matter what its character or the necessity for such a law may be, which acts upon the contracts for inter-state transportation between the carrier and shipper, to regulate the charges for it, or any part of it, or the conditions thereof in any respect, operates directly on the commerce itself, of which the transportation is certainly a part and not an instrumentality of it. These distinctions must be observed in legislation, and that which neglects or overlooks them, or assumes to disregard them, is necessarily invalid. And the courts cannot cure the defect by supplying through judicial decree the necessary qualifications to conform the legislation to constitutional limitation."

"It is as impossible for a state to make a regulation of inter-state commerce by the exercise of its power over the corporations of its creation, as by any other power, if it permits them to engage in inter-state commerce. Possibly, it may bind the corporations permitted to engage in inter-state commerce to schedules of rates *agreed* upon by them; but this is binding only by force of the contract of the carrier to be so bound and not as a regulation of the rates under any municipal power of the state over the commerce. A regulation of inter-state commerce *as such* is as invalid in a charter as elsewhere in a state statute."

The conclusion which Judge HAMMOND reaches from these principles is as follows:

"We hold without the least hesitation after this examination of the subject that an act of the legislature which attempts as this does, to regulate, no matter how, all transportation over the railroads in this state, and to revise all tariffs of charges for transportation over those roads is, so far as it relates to the plaintiffs in these cases before us, an attempt to control the compensation to be charged by them for the transportation of commodities and persons in transit between two or more states for that portion of the route lying within this state, and therefore invalid as a regulation of inter-state commerce acting as it does in the most direct way possible on that commerce itself. This act makes no discrimination whatever in this regard, and we cannot by judicial action insert them in the act by limiting our injunction in respect of the interference of the defendants with the charges by plaintiffs for fares and freights in any way. This would be to legislate by judicial decree, for there is nothing in the act to guide us in fixing our limitations. It does not appear that the legislature would have passed this law or any law confining its powers as we have suggested. * * * Hence we must take the statute as we find it and restrain the defendants from any action under it as to these plaintiffs."

The second decision was rendered in May 1884, in the United States Circuit Court for the Southern District of Mississippi, in the case of The Illinois Central Railroad Company against Stone et al., Commissioners. The legislature of Mississippi had on March 11th 1884, passed