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Rights of Purchasers under mortgages

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IN THE SENATE OF THE UNITED STATES.

APRIL 20, 1896.—Ordered to be printed.

Mr. HILL, from the Committee on the Judiciary, submitted the following

REPORT:

[To accompany S. 1832.]

The Committee on the Judiciary, having considered the bill (S. 1832) entitled "A bill to define the rights of purchasers under mortgages authorized by the act of Congress approved April 20, 1871," respectfully report:

By special act of July 27, 1866 (14 Stat. L., 292), Congress incorporated the Atlantic and Pacific Railroad Company, with usual corporate powers, and authorized the company to construct, maintain, and operate a line of railroad and telegraph on prescribed route substantially along the thirty-fifth parallel, from Springfield, Mo., across the Indian, New Mexico, and Arizona Territories, and California to the Pacific. To aid construction thereof grants of public lands, right of way, and material therefor were made (secs. 2 and 3). In addition to the plain purpose of thereby promoting settlement of the country through which the road would pass, the Government use and purpose therein was, as expressed by section 11 of the charter act—

That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.

It was then assumed that the road would be built by popular subscription, and the sole direct authority given to raise funds for that purpose was the authorized issuance of \$100,000,000 of its capital stock. By section 8, construction was to commence within a prescribed period and proceed annually for prescribed distance until entire completion of the road. And by section 9, on default therein and its continuance for one year, "then in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road." It appears that such popular subscription failed to materialize, and there being no express authority in the charter act whereby the company could mortgage its franchises (in addition to its tangible property), and default in construction having occurred, whereby the reserved power of the United States, reserved by section 9, supra, had accrued, the company applied to Congress and obtained the passage of an act, on April 20, 1871, authorizing mortgage of its franchises and property, which act reads as follows:

Be it enacted, etc., That the Atlantic and Pacific Railroad Company, organized under act of Congress of July twenty-seventh, eighteen hundred and sixty-six, is

hereby authorized to make and issue its bonds in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions, and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior: *Provided*, That if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage.

Thereupon the road from Springfield to the eastern boundary of the Indian Territory was constructed, and on subsequent default upon its mortgage that portion of the line was sold years ago, and is now operated as part of the St. Louis and San Francisco Railway. The line constructed in the Indian Territory (some 28 miles), and extending thence to Albuquerque, N. Mex., was mortgaged as the Central Division, and the line extending from Albuquerque into California was mortgaged as the Western Division. The line from Albuquerque westward has since been constructed and is operated through to California, finding its outlet east by connection at Albuquerque through the rails of the Atchison, Topeka and Santa Fe Railway.

Default has been made upon the bonds of both the Central and Western divisions, and foreclosure proceedings are pending.

While the purpose of the mortgage act of 1871, *supra*, was undoubtedly to subject all the franchises of the company thereto, including the right to be a corporation, as the broad terms of the act fully import, the United States Supreme Court has since ruled that the franchise to be a corporation does not so pass, in the absence of positive provision therefor, accompanied by express provisions as to the mode in which such sale and transfer of the right to be a corporation may be effected. (*Memphis Railroad Co. v. Commissioners*, 112 U. S. 609-619; *New Orleans, etc., Railroad Co. v. Delamore*, 114 U. S., 501-508.)

Because of this defect the pending bill is presented.

While all franchises of the company were intended to be thus mortgaged, including the right to be a corporation, the act of 1871 is silent in providing a mode therefor.

The road extends through separate jurisdictions, to wit, the Indian Territory, New Mexico, Arizona, and California.

Your committee is advised that no laws exist in New Mexico, Arizona, or California authorizing such reincorporation and of course, none such exist in the Indian Territory. Hence, the purchasers at these foreclosure sales properly ask further legislation, making the authority to mortgage given by the act of 1871 operative according to its intent, and to enable such purchasers themselves to become a corporation.

If the existing laws in the several Territories and California did authorize such reincorporation, they would be operative only within those respective jurisdictions and would, necessarily, result in making several distinct corporations, operating separate pieces of this national highway.

The embarrassments resulting therefrom to the owners of the property are obvious. But the more important consideration for passage of pending bill lies in the fact that the governmental uses and purposes originally reserved in the charter act should be continued in the hands of new parties for the Government's benefit. Whether they would so

continue in the absence of new Federal incorporation is open to doubt, inasmuch as the duties of transportation and the control of rates and fares for Government service necessarily run in the first instance to the original incorporation. Refusal to observe these duties could only be enforced by proceedings to annul the original charter. All such questions and embarrassments are wholly avoided by authorizing the purchasers at the foreclosure sales to form a new corporation under Federal recognition and control. Thereby the original purpose of Congress is continued unimpaired, and the corresponding benefits and the use of the road for national purposes and regulation of charges therefor are preserved both for the road as now constructed and that which may be hereafter built. As the purchasers at foreclosure sale would beyond question take all of the franchises and property, no rights inimical to the Government are in anywise created or preserved by the legislation asked.

It appears that Congress on July 6, 1886 (24 Stat. L., 123), forfeited the lands granted to this company situated opposite road then unconstructed. The application of this forfeiture act is resisted by the company and its mortgagees, upon the ground that by the act of 1871 Congress provided that, upon any subsequent breach of condition in the original grant, "the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of foreclosure of said mortgage;" and as such foreclosure had not been made, or mortgage default then suffered by the company, it is claimed that this provision postpones all right of the Government, under the power reserved in the original charter act upon such breach, to "do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road," as against the rights of the mortgagees existing at the time of such foreclosure. And to determine that question suit has been brought and is now pending in the United States Supreme Court, upon divided opinion in the supreme court of New Mexico, from which it comes.

The company and its mortgagees properly ask that upon the pending foreclosure and organization of a new company such new company shall take only such rights as lawfully exist at the time of the foreclosure. In other words, if the Supreme Court in the pending case shall determine the act of 1871 to have the effect claimed by the company and its mortgagees, then the forfeiture act of Congress would be held inoperative. Whereas, should the court determine contra, the forfeiture act would have complete effect from its date and be operative upon all lands then situated opposite said unconstructed road.

The bill as introduced has been subjected to the scrutiny of the law officer of the Government charged with land-grant litigation pending with this company and the Southern Pacific Company, and he suggests, in lieu thereof, a substitute which more clearly defines and preserves the rights of the United States. This substitute has been carefully considered and slightly modified in language by the committee in order to most certainly preserve the rights of the United States.

This substitute is also acceptable to the Atlantic and Pacific Company and those representing the bondholders.

It seems to your committee that the proposed substitute if enacted will accomplish all the purposes desired, primarily and fully protecting all interests of the United States and giving to the mortgagees and purchasers at foreclosure sale the right to become a Federal corpora-

tion, taking all the existing rights and franchises of the original company, as well as all its obligations to the Government, as provided for in the original charter act. The provisions limiting issue of stock in the new corporation on taking over the property and future issues for extension of the road, carefully guard all existing rights of such security holders and provide full safeguard to the public.

The committee therefore recommend that the bill be amended by striking out all after the enacting clause and inserting in lieu thereof the substitute as proposed, and that as thus amended the bill be passed.

