And as to the President's action in such matters, and those acting in them under his authority, we refer to the opinions expressed by this court, in the cases of *Martin* v. *Mott*,* and *Dynes* v. *Hoover*.†

For the reasons given, our judgment is, that the writ of certiorari prayed for to revise and review the proceedings of the military commission, by which Clement L. Vallandigham was tried, sentenced, and imprisoned, must be denied, and so do we order accordingly.

CERTIORARI REFUSED.

NELSON, J., GRIER, J., and FIELD, J., concurred in the result of this opinion. MILLER, J., was not present at the argument, and took no part.

DUNHAM *v.* THE CINCINNATI, PERU, &c., RAILWAY COMPANY.

1. A mortgage by a railway company of their "road, built and *to be* built,"—the company, at the date of their mortgage, having built a part of their road, but not built the residue,—has precedence, even as regards the unbuilt part of the claim of a contractor who, in the inability of the company to finish the road, had himself finished it under an agreement that he should retain possession of the road and apply its earnings to the liquidation of the debt due him, and who had never surrendered possession of the road to the company. DAVIS, J., dissenting.
2. Where a mortgage given by a railway company to secure a number of bonds provides that in case of a sale or other proceedings to coerce payment of *interest* or *principal*, all bonds and the interest accrued shall be a lien in common therewith, and the interest accrued thereon shall be equally due and payable, and entitled to a *pro rata* dividend of the proceeds of sale,—with this superadded declaration, however, to wit, "but in *no case* shall the *principal* of any bond be considered as due *until twenty years from the date thereof*" (this being the term which the bonds on their faces had to run)—it is error, after a sale, under the mortgage, within the twenty years, to give precedence to the overdue interest warrants. The superadded clause will be interpreted only as excluding an inference that a bondholder *might bring an action* for the principal before it became due by its terms.

THIS was an appeal from a decree of the Circuit Court of the United States for the District of Indiana, made in a case

* 12 Wheaton, pp. 28 to 35, inclusive. † 20 Howard, 65.

in which Dunham was complainant, and the Cincinnati, Peru, and Chicago Railway Company, with one Walker, a builder of the road, and Ludlow, his assignee, under the insolvent laws of the State, were defendants. The facts were these:

The appellant, Dunham, on the 18th of April, 1860, filed his bill in the court below to foreclose a mortgage given to him as trustee by the said railway company, to secure the payment of certain bonds therein described. The respondent corporation was organized under a general law of the State of Indiana, for the incorporation of railroad companies,* one section of which provides that "such company may from time to time *borrow* such sums of money as they may deem necessary for completing or operating their railroad, and *issue and dispose of their bonds*, for any amount so borrowed, for such sums and such rate of interest as is allowed by the laws of the State where such contract is made, *and mortgage their corporate property and franchises to secure the payment of any debt contracted by such company.*" They were authorized by their charter to construct a railroad from Laporte, in that State, by the way of Plymouth, &c., to Marion in the same State. The whole length of the railroad, as contemplated, was about ninety-seven miles, and for the purpose of constructing, completing, and equipping the entire route, the directors resolved to raise money by loans to an amount not exceeding $1,000,000, and to issue the bonds of the company, not exceeding one thousand in number, for the sum of $1000 each, payable in *twenty* years from date, and bearing interest not exceeding seven per cent. per annum. They also decided to construct the road by sections, and, with that view, divided the route into four parts, designated and numbered as sections one, two, three, and four. Section one extended from Laporte to Plymouth, a distance of about twenty-eight and a half miles: this was the only one that was built, and is the one which constitutes the subject-matter of the controversy in this suit. Intending

* Act of May 11, 1852, § 19; 2 Revised Code, 409.

to construct the road in sections, they apportioned the loan and the bonds to be issued upon the several sections. Three hundred thousand dollars were apportioned to the first section, and the residue to the three other sections. Having arranged these preliminaries, they resolved to *mortgage the road to secure the payment of the interest accruing on the bonds, and for the ultimate discharge of the principal.* The complainant was appointed trustee for the purpose of such a conveyance, and on the 20th of February, 1855, a mortgage was made to him as such trustee, his successors and assigns, of the following property of the company, that is to say, "their road built, *and to be built*," "including the *right of way*, and the *land occupied thereby, together with the superstructures and tracks thereon, and all bridges, viaducts, culverts, fences, depot grounds and buildings thereon, and all other appurtenances belonging thereto, and all franchises, rights, and privileges of the company to the same.*" Pursuant to the previous determination of the company, the proper officers thereof, on the 1st of March following, issued the three hundred bonds apportioned to the first section of the road, and which had been duly set apart for its construction and equipment. They were the only bonds ever issued under the first mortgage. The allegation of the bill of complaint was that the interest warrants had not been paid, and that the railway company had failed to furnish any means whatever for that purpose as stipulated between the parties. The bill also alleged that the company, on the 26th of February, 1855, made to the complainant, as such trustee, another mortgage of their railroad, to secure the payment of bonds proposed by them to be issued for another sum, not exceeding $1,000,000, for the same purpose. An apportionment of that sum also was made upon the different sections of the road in the same manner as was done under the first mortgage, but none of the bonds were issued, except those apportioned to the first section. The railway company did not appear, and as to them the complainant took a decree *pro confesso*. The defendants, Walker and Ludlow, appeared and filed separate answers. The defence of Walker was, that the company being *wholly*

unable to complete the road, he, the respondent, on the 28th of November, 1855, *entered into an agreement with them to complete the first section and furnish all the materials*, and that the company agreed to pay him the full value of the materials so furnished, and a reasonable compensation for his services; that, as *part of the arrangement*, the company engaged to deliver to him, from time to time, ninety-nine of the first mortgage bonds, and two hundred and ninety-nine of the second mortgage bonds, at $400 for each $1000 bond, and that *he*, the contractor, *was to have and keep possession and control of that section of the road and its earnings until the company should make full payment to him of what they should owe him under that agreement.* The answer then averred that he expended for materials and labor in completing the contract, $302,000, and that the company, on the 8th of April, 1858, confessed a judgment in his favor for the balance due him under the contract, amounting to $\$129{,}491\frac{43}{100}$, which, as he insisted, was entitled to *a preference in payment from the earnings and income of the road*, and from the proceeds of the sale of the same *over the first mortgage bonds.*

The stipulations of the contract purported to give to the contractor *the absolute control* of the first section of the road and its earnings, from its opening until the *company should make full payment for its construction*, and the contractor was to disburse its earnings,—

1st. To pay the expenses of operating the road.

2d. *To reimburse himself for all the money which he might advance.*

3d. To pay the *interest on the first and second mortgage bonds*, and if there was any surplus, to apply the same to the other objects therein specified.

The answer of the other respondent, Ludlow, set up the same defence.

The mortgage of the complainants had been duly registered, March 9, 1855, more than eight months before the contract was made with Walker and Ludlow.

The court below rendered a decree directing that the road should be sold, and that the proceeds, after the payment of

costs, *should be paid over to Ludlow, as assignee of the contractor*, to the exclusion of the trustee, and *in preference to the mortgage on which the suit was founded.*

The decree also ordered that coupons past due on the bonds should take precedence over the principal of the bonds; the ground of the decree being a clause in the mortgage held by the complainant as trustee, in these words: "In case of default in the payment of interest or principal of any bonds, and a sale or other proceedings to coerce the same, all bonds which shall then be a lien in common therewith, and the interest accrued thereon, shall be considered, and shall in fact be equally due and payable, and entitled to a *pro rata* dividend of the proceeds of said sale or other proceedings; *but in no case shall the principal of any bond be considered due until twenty years from the date thereof.*"

From this decree, Dunham, a creditor under the mortgagee, appealed, and now sought to reverse the decree.

Messrs. Major and Black for Walker and Ludlow:

1. The question is, whether Walker—having made the road by the expenditure of his own means, without which expenditure the road was worthless to the company and the bondholders, and made it under a written agreement with the company that he should retain possession of the road, and apply its earnings to the liquidation of the debt due him, until such debt was paid; and having never surrendered possession to the company—holds a prior lien upon it, and is entitled in equity to a priority in the distribution of the proceeds on sale of it? We think that he is.

1. Railroad mortgages made to secure the payment of bonds which are sold for the purpose of obtaining means with which to construct the road, are different from mortgages on land, to secure money borrowed. In the latter the *security* is *in esse*, and belongs to the party making the mortgage; in the former, the *road*, which is the only security, is *not in existence* and does not belong to the mortgagor, but on the faith that the company will in future construct it, the bonds are purchased.

There is no evidence that this company owned the soil. No deed is shown. The presumption is against ownership. It is contrary to the policy of the law to allow railroad companies to acquire any greater interest in the land than a right of way.* A grant of a right of way confers no right to the soil. It is but an incorporeal hereditament; a right issuing out of the soil, not a right to or in it. It has been decided in Louisiana,† that a railway is not an "immovable," by nature or destination, if the soil over which it passes belongs to another, and that the rails do not become immovable by being laid down. In an article given to one of our periodicals by Mr. Theron Metcalf, always one of the best lawyers, as now one of the eminent judges of our country, he says,‡ in reference to that case, "As the company has no right of soil to the land embraced by the railroad, but a mere easement, a mortgage by the company cannot pass the right of soil, and consequently timber and iron, afterwards acquired and laid down upon the road, cannot be considered as passing by the mortgage merely because of their being fixed to the soil."

It is a general rule that nothing can be mortgaged that is not *in esse*, and that does not at the time of making the mortgage belong to the mortgagor.§

But equity, it is said, will attach the lien of the mortgage to the subsequent superstructure, when by the terms of the mortgage it is stipulated that the mortgage shall cover it. Still, this result will not attach until the company shall have acquired title to such superstructure; and this title the company cannot acquire so long as the person who made the superstructure keeps possession thereof, unless the company pays to that person the amount due for the work. Especially is this true where, by agreement between the company and such person, he is to keep possesssion of the road and its

* Redfield, 124, 125.

† The State *v.* The Mexican Gulf R. R., 3 Robinson, 514.

‡ 4 American Law Magazine, Jan., 1845, p. 278.

§ Seymour *v.* C. & N. R. R., 25 Barbour, 301; Pierce *v.* Emery and cases cited, 32 New Hampshire, 505.

earnings until the company should pay him all it might owe him. Now, decided cases show that the company could not acquire any right to the road until Walker was first paid all that was owing to him by the company. In a Georgia case, *Collins* v. *The Central Bank*,* certain contractors had constructed a part of the railroad, and the company made them a mortgage thereon to secure to them payment for the work. A bank, which was the holder of bills issued by the company to contractors who built the road, claimed a priority in the proceeds of the road, under a law which authorized the issue of those bills by the company, and created the same a lien on the *road built* by the company. It was held that the contractors had a prior lien on that part of the road which they had built. The court says:

"Nor was the company entitled to the part of the road made by the contractors, until payment was made therefor. It was competent for the company to stipulate, by express agreement, that the contractors should have a lien on that part of the road which they contracted to build, to the extent of the work furnished, until payment was made by the company. This lien, until payment for the work and materials furnished, does not at all conflict with the lien created by the statute on that part of the road built by the company; nor would the company have been entitled to that portion of the road built by the contractors above Griffin until payment made to them therefor. Certainly the billholders, who are the creditors of the company, cannot be considered as standing, at least in a court of equity, in a better condition than the company under whom they claim. If the company could not appropriate the road built by the contractors, to their own use and benefit, until payment for the work and materials, on what principle is it, the billholders, claiming under and through the company, can justly claim in a court of equity to have exclusively appropriated to their benefit the proceeds of the sale of such portion of the road and materials?"†

Thatcher, Burt & Co. v. *Coe*,‡ in the Federal court for Ohio,

* 1 Kelly, 457.

† See Redfield, 574, part 8, for the principle which he deduces from the decision.

‡ MS. report, in possession of a son of McLean, J.

is to the same effect. T., B. & Co. built a bridge for a railroad company upon piers and abutments made by the company, *without any agreement whatsoever as to lien or security* of any kind. When the bridge was completed, T., B. & Co., fearing that the company would not be able to pay them the balance due, refused to give up possession of the bridge to the company until they were paid the balance due them, or a mortgage made to them on the bridge to secure the payment. The company made the mortgage to T., B. & Co., who thereupon gave up the bridge to the company. Coe, the trustee of the first mortgage bondholders, claimed the proceeds of the road in preference to the claims of T., B. & Co. under that mortgage. McLean, J., held that T., B. & Co. were entitled to a *priority*. In his opinion in the case, that judge, replying to an objection that the company had no power to give the mortgage, says:

"The company had the power to make the contract for the bridge on such terms as they believed would best advance the interest of all concerned. This discretion was necessarily exercised by the company in the entire construction and equipment of the road. It was a trust vested in them, and could be exercised by no other power. But it is said the company could do no act to the prejudice of the bondholders represented by the complainant. This assumes that the act done impairs the security of the bondholders. This is not true, either in fact or in law.

"The contractors were not bound to perform the work and deliver it to the railroad company, unless the stipulated compensation was paid or secured to be paid. This they have a right to demand, under the circumstances, and a sense of justice and law induced the railroad company to give the security required. This was not under the mechanic's law, but the common law, which authorizes every man to retain possession of his own work, where no contract has otherwise provided, until he is paid for it, or the payment secured.

"The deed of trust secured to the holders the right of way and the road when constructed with all its equipments. But the equipments, the iron, and the structure of the road, had to be procured by the company with the means under their control, as

the best interests of the road required. If its funds were exhausted, and the company could not procure labor or materials on credit, must the enterprise be abandoned? And if these things could not be procured but by giving a pledge of the work and materials, so as to put the road in operation and enable it to pay an income, has not the company the power to do it? They take nothing from the bondholders, but on the contrary greatly benefit them by adding to the value and productiveness of the road."

McLean, J., further held that T., B. & Co., by keeping the bridge in their possession, preserved a lien on it for their compensation.

"The lien of the bondholders, in no legal or equitable sense, can be considered as paramount to that of the contractors. It was the contractor's labor and money which constructed the things mortgaged, and not the means of the company, so far as regards the balance due." . . . . "In this view, so long as the bridges remained in the possession of the contractors, the lien of the bondholders did not attach. But this right of possession by the contractors was surrendered for the special mortgage given. . . . . Had the contractors delivered the possession of the bridge to the company without a mortgage, the lien of the bondholders would have attached."

II. But suppose the company had the legal title to the land. This would not defeat the lien. A chattel attached to land with the consent of the owner of the land, will remain the property of the person placing it there, as in the erection of houses on another's land. So of the erection of a *fence*, though under an agreement by *parol:* held valid against a purchaser of the land, though without notice.* So of a paper-making machine.† So of salt kettles.‡ So of *iron rails laid in the track*, under an agreement it should not become the property of the company until paid for: held, that the iron was not covered by a subsequent mortgage.§

* Mott *v.* Palmer, 1 Comstock, 564.

† Godard *v.* Gould, 14 Barbour, 662.

‡ Ford *v.* Cobb, 20 New York, 344.

§ Haven *v.* Emery, 33 New Hampshire. 66.

Argument in support of the mortgage.

It is said that the assent of the trustee or bondholders to Walker's contract with the company was necessary to make it valid against them. The answer is, that if such *assent was necessary, the court will presume it*, under the circumstances presented in the case. The construction of the road was the primary object of the organization of the company. It was the purpose for which the bonds were sold, and the agreement was made with Walker. The bondholders and stockholders were the only persons personally interested in making the road. The road being the only security which the bondholders had for the payment of the bonds, they were more deeply interested in the construction than the stockholders. The right of way or right to the land, afforded them no security. The construction of the road was under the control and management of the company, who alone had to provide the means for its construction, and who alone, in its construction, represented the interest of every one concerned. The company was the agent or minister of the trustee, bondholders and stockholders, in the construction; and it was their duty to employ all available resources over which they were competent to exercise control, to prosecute it to completion. This authority may fairly be held to extend to everything which was necessary to the further construction of the road, and which was in no sense prejudicial to the interest of the bondholders.

2. The decree gives priority to overdue coupons. This is right. A clause of the mortgage provides that in "no case shall the principal of any bond be considered due until twenty years after its date."

Mr. Otto, who also filed a brief for Mr. Niles, contra:

1. The mortgage is, in substance and effect, a conveyance of the road as an entire thing. Subsequently acquired property annexed thereto became, by such accession, an inseparable part of the original subject of the mortgage.*

* Pierce *v.* Emery, 32 New Hampshire, 484; Pettingill *v.* Evans, 5 Id., 54; Pennock *v.* Coe, 23 Howard, 117.

Argument in support of the mortgage.

Repeated adjudications have affirmed, on general principles, the validity of such a mortgage by a railroad company against subsequent creditors and incumbrancers with notice. *Pennock* v. *Coe*,* in this court, may be said to be in point. The mortgage was executed in pursuance of a power conferred upon the company, and its validity is not drawn in question by the pleadings.

It is not alleged that the complainant consented to the arrangement in regard to the road for which the contract with Walker provided. That contract was later in date than the mortgage. Walker had full notice of the latter. His title to the possession of the mortgaged property or to the proceeds of the sale thereof cannot, therefore, be enforced so as to displace the prior and paramount lien of the mortgage, or to impair or postpone any of the rights or equities created thereby or arising therefrom.

Counsel on the other side insist that the consent of the complainant should be presumed, if such consent be necessary to the maintenance of Walker's contract. But the court will not presume that a party, whose rights were secured by a valid mortgage duly recorded, consented to waive them, nor that a fact existed, where there is no averment thereof in the record. If Walker relied upon such consent, he should have alleged and proved it.

The doctrine that fixtures attached to the soil at the time of the execution of a mortgage or subsequently acquired, will pass by it, is not controverted on the other side, but its applicability to this case is denied upon the assumption that the company had but a right of way and no title to the land. That assumption, if supported by the facts, would not affect the complainant's rights, but the mortgage does convey, in express terms, "their road built and to be built in the State of Indiana, including the right of way, *and the land occupied thereby*, together, &c., &c." The court will presume that the company had the property which it mortgaged, and Walker's answer does not set up the company's non-ownership of the land, in avoidance of the mortgage.

* 23 Howard, 117.

Neither of the two cases cited on the other side are *authorities* in this court. We think that the case from Georgia went in a large degree on the construction of a local statute. The one decided by McLean, J., is more in point; but it is a circuit case, and of course not binding here. As the case was never published by that judge during his lifetime, being now brought out from his MSS., it would seem that he was not absolutely sure, on reflection, how correctly he had decided it. *Pennock* v. *Coe*, as we have already said, *is* an authority, being in this court.

2. The decree of the court below gives precedence in payment to the *past due coupons*, over the principal of the bonds. This was in violation of a clear provision of the mortgage, in case a default be made in the payment of the principal or interest.

Mr. Justice CLIFFORD, after stating the case, delivered the opinion of the court:

1. Appellant contends that the proceeds of the sale of the road, after paying the costs of suit, should be ratably applied towards the payment of the first mortgage bonds and the overdue interest warrants under the same, instead of being applied, as directed in the decree, to the payment of the judgment in favor of the contractor, and to the overdue interest warrants, to the exclusion of the principal of the bonds. Appellees insist that inasmuch as the contractor completed the road by the expenditure of his own means, under a written agreement with the company, purporting to secure to him the possession of the road and its earnings, he has a right to retain the same, and that the proceeds of the sale should be applied to the liquidation of the indebtedness of the company to him until the same is fully discharged.

Possession of the road having been delivered by the company to the contractor for the purpose of completing the road, the respondents insist that he, the contractor, having never surrendered the possession, now holds a prior lien upon the road, and in equity is entitled to a priority in the distribution of the proceeds of the sale. Attempt is made

to sustain that proposition, chiefly upon two grounds. 1st. It is insisted that the mortgage to the complainant, as trustee for the benefit of the bondholders, does not hold any part of the road except what was built at the time the mortgage was executed and delivered. 2dly. They contend that a contractor, expending money and labor in building a railroad, as in this case, under an agreement with the company that he shall have the possession of the road until he is fully paid, thereby acquires a priority over an elder valid mortgage.

Neither of the propositions is based upon any peculiar circumstances in the case, nor are there any such disclosed in the evidence to take the case out of the general rules of law applicable to similar controversies respecting railroad transactions. Nothing of the kind is pretended, and it is obvious that the pretence, if set up, could not be sustained, as there is nothing in the circumstances to distinguish the case from the ordinary course of events in that department of business. Certain persons procured a charter for a railroad, and wanting means to complete it, decided to issue their bonds as a means of borrowing money, and mortgage their road to secure their payment. Railroads, it is believed, have frequently been built in that way, and if it be true that such a mortgage holds no part of the road except what was completed, it is quite time that the rule should be distinctly announced, that the consequences of further misapprehension upon the subject may be avoided. But we are not prepared to adopt any such rule, or to admit that the proposition has any foundation whatever in the facts of this case. On the contrary, we hold it to be clear law that the complainant, as the trustee for the benefit of the bondholders, took "the road built and to be built," together with all the other matters and things specifically enumerated in the mortgage. Express authority was given to the company by the law of the State to borrow such sums of money as they might deem necessary for completing and operating their railroad, and to issue and dispose of their bonds for any amounts so borrowed. What they wanted was money to enable them to make the road, and the authority was expressly given to

authorize them to mortgage it for that purpose. Authorized as this mortgage was by express statute, the case is even stronger than that of *Pennock et al.* v. *Coe* (23 Howard, 128), where the rights of the parties depended upon the general rules of law.

Terms of the grant in that case were, "all present and future to be acquired property," and yet this court held, in a controversy between the grantees of a first mortgage and the grantees of a second mortgage, that the first took the future acquired property, although the property itself was not in existence at the time the first mortgage was executed. While enforcing the rule there laid down, this court said there are many cases in this country confirming the doctrine, and which have led to the practice extensively of giving that sort of security, especially in railroad and other similar great and important enterprises of the day. Several cases were cited by the court on that occasion, which fully support the position, and many more might be added, but it is unnecessary to refer to them, as the one cited is decisive of the point. 2 *Story Eq. Jur.* (8*th ed.*), §§ 1040–1040 *a.*

2. Failing to sustain that position, the respondents, in the second place, rely upon the terms of the subsequent agreement made by the company with the contractor for the completion of the route. Counsel of respondents concede that the mortgage to the complainant was executed in due form of law, and the case also shows that it was duly recorded on the ninth day of March, 1855, more than eight months before the contract set up by the respondents was made. All of the bonds, except those subsequently delivered to the contractor, had long before that time been issued, and were in the hands of innocent holders. Contractor, under the circumstances, could acquire no greater interest in the road than was held by the company. He did not exact any formal conveyance, but if he had, and one had been executed and delivered, the rule would be the same. Registry of the first mortgage was notice to all the world of the lien of the complainant, and in that point of view the case does not even show a hardship upon the contractor, as he must have known when he ac-

cepted the agreement that he took the road subject to the rights of the bondholders. Acting as he did with a full knowledge of all the circumstances, he has no right to complain if his agreement is less remunerative than it would have been if the bondholders had joined with the company in making the contract. No effort appears to have been made to induce them to become a party to the agreement, and it is now too late to remedy the oversight. Conceding the general rules of law to be as here laid down, still an attempt is made by the respondents to maintain that railroad mortgages made to secure the payment of bonds issued for the purpose of realizing means with which to construct the road, stand upon a different footing from the ordinary mortgages to which such general rules of law are usually applied.

Authorities are cited which seem to favor the supposed distinction, and the argument in support of it was enforced at the bar with great power of illustration, but suffice it to say, that in the view of this court the argument is not sound, and we think that the weight of judicial determination is greatly the other way. *Pierce* v. *Emery* (32 N. H., 484); *Pennock* v. *Coe* (23 How., 130); *Field* v. *The Mayor of N. Y.* (2 Seld. 179); *Seymour* v. *Can. and Niag. Falls Railroad Company* (25 Barb., 286); *Red. on Railways*, 578; *Langton* v. *Horton* (1 Hare Ch. R., 549); *Matter of Howe* (1 Paige, 129); *Winslow* v. *Mitchell* (2 Story, C. C., 644); *Domat*, 649, *art.* 5; 1 *Pow. on Mort.* 190; *Noel* v. *Burley* (3 Simons, 103).

Decree of Circuit Court not only gives precedence to the judgment of the contractor, but also to the past-due coupons or interest warrants over the principal of the bonds. Complainant objects to the decree in both particulars, and we think his objections are well founded. Terms of the mortgage are, that in case of default in payment of interest or principal of any bond, and a sale or other proceedings to coerce the same, all bonds which shall be a lien in common therewith, and the interest accrued thereon, shall be considered, and shall in fact be equally due and payable, and entitled to a *pro rata* dividend of the proceeds of said sale or other proceedings. Reference is made to another clause of

the mortgage, where it is said that in no case shall the principal of any bond be considered due until twenty years after its date; but it is quite obvious, we think, that the latter clause was inserted merely to exclude any possible inference that a bondholder under any circumstances might bring an action for the principal of a bond before it became due by its terms. Such was, doubtless, the intention of the provision, but it does not in any manner conflict with the suggestion already made, that in case of sale on account of default of payment of interest or principal, that all the bonds of the same class, and the interest accrued thereon, shall be entitled to a *pro rata* dividend of the proceeds.

The decree of the Circuit Court is, therefore, reversed, with costs, and the cause remanded for further proceedings, in conformity with the opinion of this court.

DECREE ACCORDINGLY.

Mr. Justice DAVIS dissented.

STURGIS *v.* CLOUGH.

Although the language of a *decree* in admiralty may declare a decision which might not, if it were construed by its exact words, be capable of being supported, still, if it is obvious from subsequent parts of the record that no error has been committed, the court will not reverse for this circumstance.

Ex. Gr. Where a *decree* allowed a certain sum for repairs to a vessel, and rejected (improperly, perhaps,) a claim for demurrage, the decree was not reversed on that account; it appearing from a subsequent part of the record that the judge had in fact considered the sum he allowed for repairs *eo nomine* was too large for repairs simply, but was "about just" for repairs and demurrage together.

ERROR to the Circuit Court of the United States for the Southern District of New York, the case being thus:

The steamer Mabey had injured the steamer Hector in a collision, and had been libelled for damages. It being referred by the court to a commissioner to assess these damages, the owners of the Hector claimed *the whole cost of the repairs*, and also damages for fourteen days' demurrage,