Syllabus.

GALVESTON RAILROAD *v.* COWDREY.

1. *Bonâ fide* holders of railroad bonds, executed in due form and by the proper officers, cannot be prejudiced by the fact that the mortgage given to secure the same was executed out of the State, or by virtue of a resolution of directors, at a meeting held out of the State. The company and its privies are bound thereby.
2. One who purchases railroad bonds in open market, supposing them to be valid, and having no notice to the contrary, will be deemed a *bonâ fide* holder.
3. Where the trustees of a railroad mortgage or deed of trust are dead, a bill of foreclosure and sale may be filed against the company by one or more of the bondholders on behalf of themselves and all other bondholders, secured by the same mortgage; or, if there be several successive mortgages, the trustees of which are dead, and the complainants hold bonds secured by each mortgage, the bill may be filed on behalf of themselves and all the bondholders under each mortgage.
4. In such case no injustice could be done, because any bondholder, not made a party, would have a right to intervene and contest the priority of a mortgage earlier in date than that by which his bonds are secured; or the validity of bonds held by any other bondholder.

A railroad company of Texas made four successive mortgages, in 1853, 1855, 1857, and 1859, and issued bonds under each; the road and its appendages were then sold under judgments in 1860; the purchasers operated the road until 1867, and realized large receipts therefrom. In 1857, after the making of the first three mortgages, the legislature passed a law subjecting the road and chartered rights of all railroad companies to sale for their debts, either under mortgages, deeds of trust, or judgments. *Held:*

First. That this law enured to the benefit of the three first mortgages, as well as to that made and as to the judgment recovered after its enactment, and in the order of priority due to each.

Second. That the sale under the judgment did not disturb the priority of the mortgages.

Third. That although the three first mortgages covered and conveyed the tolls, income, and profits, yet the purchasers under the judgment were not accountable for the tolls and income received by them from the road before they received notice to pay them over to the bondholders.

Fourth. That although part of the road was entirely built by the money raised on the fourth mortgage, yet that fact did not give it priority over the first three mortgages, even on that portion of the road; provided it was a part of the chartered route.

Fifth. A railroad mortgage, as against the company and its privies, although given before the road is built, attaches itself thereto as fast as it is built, and to all property covered by its terms as fast as it comes into existence as property of the company.

Sixth. The principle applicable to maritime cases, which gives priority of lien to the last creditor furnishing supplies and repairs for the conservation of the ship or voyage, does not apply to railroads. As to them the common law rule prevails, *qui prior est in tempore, potior est in jure.* Mechanics' lien laws have not been extended to railroads in Texas.

APPEALS from decrees in the Circuit Court for the Eastern District of Texas on bill and cross-bill.

The bill was filed by Cowdrey and others, citizens of New York, against the Galveston, Houston, and Henderson Railroad Company; another company of the same name (the "successor company" of the one just mentioned); the Galveston and Houston *Junction* Railroad Company; one Nichols, and fourteen other persons, all citizens of Texas (except one, who was a citizen of Massachusetts), for the foreclosure and sale of the railroad of the said Galveston, Houston, and Henderson company, with all its appurtenances, and all the property of said company, to pay in due order the several outstanding bonds issued under certain mortgages which it had made, to wit, its first, second, and third mortgages, and to call the defendants to account for the tolls, income, and profits of the said railroad and property whilst in their possession. The bill was filed on the 12th of February, 1867, on behalf, not only of the complainants, who alleged that they were large holders of the said bonds, but of all other holders thereof, who might come in and contribute to the costs and expenses of the suit.

It appeared from the pleadings and proofs that the Galveston, Houston, and Henderson Railroad Company was chartered by an act of the legislature of Texas, on the 7th of February, 1853, for the purpose of constructing and operating a railway from the city of Galveston to the city of Houston, and thence to Henderson,* with such branches as they might deem expedient; with power, amongst other things, to take lands by condemnation, and to acquire, by purchase, donation, or in payment of stock, such real estate as the directors should think desirable to aid in the con-

* See the diagram, *infra*, page 464.

struction or maintenance of said road; and to alienate or *mortgage the same for the constructing or maintaining said road;* such alienation or mortgage to be signed in the name of the president and countersigned by the treasurer; also, with power *to borrow money on their bonds or notes*, at such rates as the directors should deem expedient; and, *generally, to do and perform all such acts as might be necessary and proper for, or incident to, the fulfilment of their obligations and for the maintenance of their rights.* And it was expressly declared by the charter that all conveyances and contracts executed in writing and signed by the president and countersigned by the treasurer, or other officer duly appointed by the directors under the seal of the company and in pursuance of a vote of the directors, should be valid and binding. By virtue of supplements to the charter, and by general laws of the State of Texas, the company became entitled to grants of the public lands of the State, in virtue of which they subsequently acquired land certificates for 512,000 acres of land.

The company was duly organized under its charter and began operations for constructing its road.

On the 1st of December, 1853, the company made an issue of bonds—its first issue—consisting of fifteen hundred bonds, each for £100 sterling, payable in London, at the expiration of ten years, with interest at the rate of 6 per cent. per annum. To secure these bonds the company executed a deed of trust, or mortgage, to trustees, upon its railroad, constructed *and to be constructed*, from Galveston to Houston, and its *privileges, rights, and real estate, owned, or that should thereafter be owned*, by the company, in connection with its said railroad; and *all tolls, issues, and profits, whenever default should be made in paying the bonds, and all the franchises* of the company, and all depots, stations, and buildings, and lands, occupied *or to be occupied therefor.* The terms of the deed were that it should be held in trust for the bondholders: that so long as no default was made by the company in payment of principal or interest, the property should remain in the company's possession; *but if it should be in default for the space of three months in payment of either, and on*

request in writing by any holder of the bonds, the trustees might take actual possession of the railroad and all the property mortgaged, take the receipts thereof, and, on due notice, sell the same to pay the principal and interest due, after paying expenses of management and all costs and charges incident to the trust.

On the 1st of June, 1855, a second issue of bonds was made by the company to the amount of $750,000, payable in ten years, with interest at 10 per cent. per annum, convertible, after three years, into stock of the company, and secured by a second mortgage of similar import to the first, except that it conveyed, "in addition to what was conveyed by the first mortgage, all the lands which shall or may belong to said company by virtue of any act of the legislature of the State of Texas in connection with said road from Galveston to Houston." This mortgage contained a declaration that it was "to take the place of" the former one, which was for an equivalent sum in sterling money, and it had a clause thus:

"And the issue of the bonds referred to in this instrument can take place only by the cancelling of a like amount of the said 6 per cent. sterling bonds, so that this instrument is and shall be a first lien upon all the property donated thereon to the amount of bonds issued."

On the 8th of October, 1857, a third issue of bonds was made to the amount of $2,625,000, in $100 bonds, payable in 1879, with interest at 8 per cent. per annum; and these bonds were secured by a third mortgage to the same trustees as the last, on the same property as the second mortgage, except that it purports to cover the railroad from Galveston for the full distance of 75 miles. This mortgage declared that it was executed in part "to take the place of" the preceding one; particulars being stated.

The trustees named in the first mortgage were the Honorable William Kent, of New York, and certain London bankers. These last, however, refused to accept the trust. The trustees under the two later mortgages were Mr. Kent

of New York, already named, and Mr. C. B. Haddock, of that city or State. Both these trustees were dead at the time the bill was filed, and there were then no trustees acting under the mortgages.

All the mortgages were executed under the corporate seal, were signed by the president, and countersigned by the treasurer. They did not declare in what place they were executed, but the execution of them was proved in the city of New York, before a commissioner for Texas, it being stated in the affidavit of probate that the president and treasurer resided in that city. The evidence tended also to show that the meetings of the directors, by which the mortgages were authorized to be executed, were held in New York; where the company had an office where its fiscal arrangements chiefly originated and were accomplished.

The bill stated that these bonds were issued to raise money to construct, equip, and supply the railroad; and that the company, by the aid thereof, did complete its road from Galveston to Houston, a distance of 52 miles. It further stated that the company, after the issue thereof, took up and cancelled about £100,000 of the first issue, leaving outstanding only about £50,000, of which the complainants held £32,600, with a large amount of coupons thereon for unpaid interest; that only about $700,000 of the second issue were outstanding, besides the coupons thereon, of which the complainants held $250,000, besides a large amount of unpaid coupons; and that about $2,000,000 of the third issue were outstanding, of which the complainants held a large amount. The bill averred the entire insolvency of the original company.

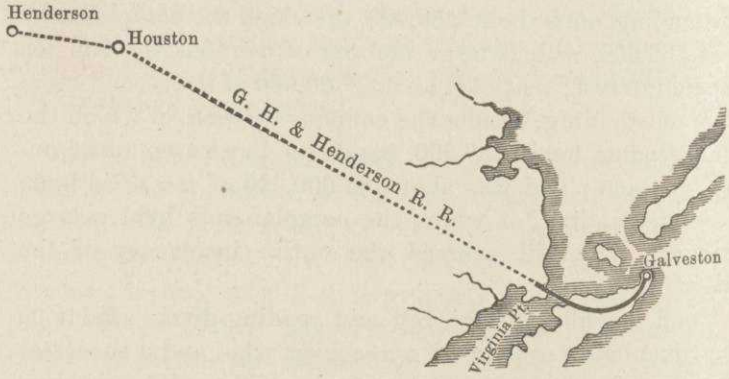
Upon the filing of the bill and reading divers affidavits, the court below appointed a receiver, who, and a successor since appointed, during the pendency of the suit, carried on the operations of the road and received all the emoluments thereof for the benefit of the parties entitled thereto.

Answers and replications being filed, testimony was taken.

During the examination the complainants produced and scheduled the bonds of the several classes held by them, to

the amounts nearly corresponding with those above alleged; the amount of the third issue so produced being $21,800, besides coupons. They were examined as to the manner in which they obtained possession thereof, and proved that they had purchased them of various parties and at various prices, from 30 to 70 per cent. on the par value.

It further appeared that on the 21st of May, 1859, the company executed to one Tucker, as trustee for Robert Pulsford, a fourth deed of trust to secure the payment of £9600 sterling, previously lent to the company by Pulsford on a number of bonds of the third issue, together with other securities, delivered to him to hold as collateral security, and £10,000 advanced at the time of the execution of the deed. This deed covered the same property which was covered by the other trust deeds. It was besides agreed, in a separate article, that Pulsford should have a special lien on a lot of railroad iron which was pledged to him, and which *was to be used for completing the track of the railroad between Galveston City and Virginia Point, a distance of about five miles;* indicated on the diagram inserted here by a heavier line than the rest of the road.



The bill did not advert to this deed; but Pulsford and his trustee, on their petition for that purpose, were permitted to intervene as defendants, and filed an answer and a cross-bill, claiming a first lien *on the portion of road laid with the aforesaid rails.* The ground on which Pulsford claimed pri-

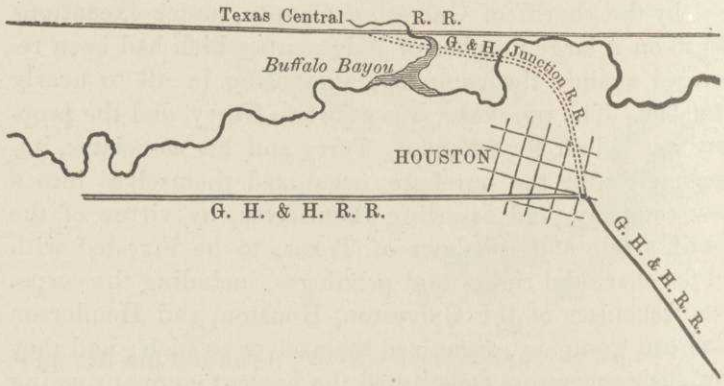
ority on that portion of the road which was laid with his iron, was that when the mortgages of the complainants were executed that part of the road was not in existence and could not have been conveyed by them, and could only be embraced in them on a principle of equitable estoppel, which was met and paralyzed when it came in conflict with a superior equity; secondly, because the company having become bankrupt and unable to finish the road, the work previously done had become worthless, and the pledge given by the mortgage was without value; and because his iron, applied to the road, saved it, and rendered it capable of being used, which it would not have been otherwise; hence, on the principle adopted by the civil and maritime laws of awarding priority to the last creditor who furnished necessary repairs and supplies to a vessel, that he was entitled to priority in this case. It appeared from vouchers produced on the examination that over $30,000 had been paid to Pulsford on his claim.

It further appeared that *on the 6th of March*, 1860, the road-bed, track, franchises, chartered rights and privileges of the Galveston, Houston, and Henderson Railroad Company, and the rolling stock thereof, consisting of two locomotives, fourteen platform cars, one passenger car, &c., were sold by the sheriff of Galveston County, under executions issued on a large number of judgments which had been recovered against the company, amounting in all to nearly $120,000. The purchaser was a certain Terry, and the property was bid off for $28,000. Terry and his associates, immediately after the purchase, organized themselves into a new company, and asserting themselves, by virtue of the sheriff's sale and the laws of Texas, to be invested with all the chartered rights and privileges, including the corporate franchises of the Galveston, Houston, and Henderson Railroad Company, organized themselves as such; and they and their successors constituted the present company acting under that name, "the successor company," already mentioned. This new organization took possession of the railroad and all its works and property and began to operate it.

The last directors of the old company were interested in this purchase and continued in the new company.

It further appeared that Terry and his associates formed themselves into a voluntary company called the Real and Personal Estate Association, for the purpose of raising money to pay some of the pressing claims against the railroad company, which were regarded as assumed by the new company, and for the further purpose of procuring real estate for depots, and rolling stock machinery, and tools needed for the use of the railroad; that in this way they laid out a large sum of money, over $150,000, and leased the property thus acquired to the new railroad company. The rents reserved were stated in the answer of the defendants.

It further appeared that, in order to build a short railroad at the city of Houston, to connect the railroad of the defendants with the Texas Central Railroad, the same persons procured a charter from the legislature, on the 8th of April, 1861, by which they were incorporated as the Galveston and Houston *Junction* Railroad Company; and were, as such, authorized to construct and operate a railroad to connect the Galveston, Houston, and Henderson Railroad with the Texas Central Railroad. This road was constructed accord-



ingly, and was less than two miles in length, with a bridge over the Buffalo Bayou. (See the diagram above.)

Statement of the case.

The cost of the road was stated to have been about $51,000. The company also purchased $12,000 worth of cars from a yet different railroad company,—the Houston, Trinity, and Tyler Company. These cars were leased to the Galveston, Houston, and Henderson Company at $600 per month.

About the 1st of May, 1865, the Real and Personal Estate Association sold and transferred all its rolling stock, tools, and machinery to the Galveston and Houston *Junction* Railroad. So that, when the bill in this case was filed, the latter company asserted itself to be owner of all the rolling stock, tools, and machinery in use on the Galveston road, except the old stock that was in existence in March, 1860; the whole being rented to the Galveston Company for rents, which were charged by the complainants to be exorbitant, and intended to absorb all the earnings of the Galveston Railroad. The evidence showed clearly enough that, by means of the rents paid by the Galveston Company to the Real Estate Association for real estate, depot grounds, &c., and for rolling stock, tools, and machinery, and of similar rents paid to the Junction Company, and of the proportion of the gross receipts retained by said company, the Galveston Company received but a very small portion of the earnings of the works for its share.

It was admitted by the defendants that the stockholders of the new Galveston Railroad Company, the stockholders of the Junction Railroad Company, and the members of the Real and Personal Estate Association were identically the same persons, and that their several interests were proportionally the same in each concern. It was evident, therefore, that the bargains made with the Galveston Railroad Company were bargains made with themselves, and were what they were pleased to make them; and the design manifestly was to make them on such terms that the Galveston Railroad Company should get but a small share of the proceeds. The complainants charged that all this was a fraud; that the tolls and income of the railroad were mortgaged to them, as well as the road-bed itself, and that the individual defendants were bound to account for them.

Statement of the case.

It was admitted by the defendants that these "outside companies" were formed because they apprehended difficulty from the creditors of the old company. They did not deem it safe to purchase new property, either real estate or rolling stock, or to construct the connecting road at Houston in the name of the Galveston Railroad Company. The mortgages held by the trustees of the complainants and other claims were clouds hanging over the title of the railroad, and, therefore, they were unwilling to invest their money in the company's name or to invest it with the title to any new property acquired. They urged these circumstances in justification of their mode of proceeding, though they insisted that the rents and the division of the receipts were fair and right.

Among the defences set up, either generally or specifically, by the answer or course of the defendant's testimony, were:

1st. That the mortgages sued on were created without authority by the charter of the railroad company, or by the laws of Texas, and were illegal and void; the argument here being that though the company might have power, under the language of its charter, to mortgage such "outside" real estate as it was authorized to acquire to subserve to the main design of building its road, yet that there was obviously no express authority, nor any authority by any implication of the particular language in the corporation to mortgage its right of way, track, and franchises; and that without some such power a private railroad corporation could not mortgage these; a point, it was said, determined by numerous State courts,* and approved of in this.†

* Steiner's Appeal, 27 Pennsylvania State, 315; Susquehanna Canal Co. *v.* Bonham, 9 Watts & Sergeant, 28; Troy & Rutland Railroad Co. *v.* Kerr, 17 Barbour, 601; State *v.* Mexican Railroad, 3 Robinson's Louisiana, 513; Robins *v.* Embry, 1 Smede & Marshall's Chancery, 269; Coe *v.* Columbus Railroad Co., &c., 10 Ohio State, 372; Commonwealth *v.* Smith, 10 Allen, 455; Richardson and others *v.* Sibley, 11 Id. 65; Pierce *v.* Emery, 32 New Hampshire, 508; State *v.* Rives, 5 Iredell, 297.

† York & Maryland Railroad *v.* Winans, 17 Howard, 30; Gue *v.* Tidewater Canal, 24 Id. 257.

2d. That even if such power existed, it could only be exercised through meetings of the directors in proper places, and that all the meetings of this company, including those which authorized these mortgages, were held in the city of New York, where the company was organized; where its office records and seals were kept; where the president and treasurer resided; where probate of the mortgages to enable them to be recorded in Texas was made; all outside of the limits of Texas. The argument here being that a corporation must dwell in the place of its creation, and cannot migrate to another sovereignty; that legislative acts ought to receive a reasonable interpretation, and that it could not be presumed that a legislature authorized an act beyond the reach of its proper jurisdiction; the case of *Hiles* v. *Parrish*, in the 14th volume of the New Jersey Chancery Reports, p. 383, with other cases,* being here relied on. The case specially named says:

"It is a rule of law that a private corporation, whose charter has been granted by one State cannot hold meetings and pass votes in another State. It exists by force of the law that created it, and where that law ceases to exist and is not obligatory the corporation can have no existence. It appears that the resolutions of the board of directors which authorized the transfer of the stock in question were passed at a meeting held, not in this State, but in the city of Philadelphia. *They are therefore void.*"

3d. That the bonds sued on had not issued upon a consideration which brought them within the security of the trust-deeds; and that whatever their effect, as bonds or debts of the old company, they were not covered by the lien of those deeds; evidence on this point (not, however, clear) being given, tending (or so alleged by the defendants) to show that the bonds under the second mortgage had been issued, not to take up those under the first, but as a new and independent way of borrowing money; and the argu-

* Warren Man. Co. *v.* Ætna Ins. Co., 2 Paine, 501; Bank of Virginia *v.* Adams, 1 Parsons' Equity Cases, 534; Freeman *v.* Machias, 38 Maine 345.

ment upon an assumption of that fact, as proved, being, that if a corporation executed a mortgage on its property, on its face, to secure bonds to be issued (only by the cancelling of a like amount of previous bonds), and people bought them without seeing that such like amount had been cancelled, they could not come into equity and claim the security of the mortgage for such second bonds, though they might become bond creditors of the company.

4th. That these complainants could not maintain this bill to foreclose the three mortgages. The casual fact that each of them happened to hold bonds said to have been issued under each of the three mortgages, was not, it was argued, material. This was a suit, it was urged, by four complainants, in behalf of themselves, *and all others having a common interest with them.* But no one had a common interest with them who did not hold bonds issued under each of the three mortgages, and of the same proportionate amounts as the complainants; and there was no evidence, or any reason even to conjecture that any one did. There was no community of interest between those who held bonds under the several successive mortgages. Each incumbrancer under the second mortgage had a direct interest to show the first invalid, and to reduce the amount secured by it; and so with the third mortgage, in reference to the first and second. There could be no community of interest, and no right of representation, a matter which could exist only by reason of community of interest, where consecutive incumbrances are held by different persons, each of whom has rights adverse to all who precede him. In its foundation and structure, the bill was therefore inconsistent with fundamental principles which govern courts of equity, and it could not be maintained.

The Circuit Court made a decree, amounting in effect to a foreclosure of the three first mortgages, for the sum then found to be due in the aggregate, $5,263,039. The decree included £49,600, issued under the first mortgage, and £41,664 of unpaid coupons, and the whole $750,000 included in the second mortgage and unpaid coupons $675,000.

Statement of the case.

The decree contained this clause:

"As this decree cannot, on account of the reference hereinafter ordered to a master, be made final as to all matters in controversy, and as certain of the defendants have given notice of their intention to appeal from a final decree, when rendered, the court does not direct a sale of said mortgaged property, but will do so in said final decree; and this decree is without prejudice to the right of the defendants, or any of them, to an appeal, with supersedeas, from this decree and all matters herein, within the time appointed by law, after the final decree which may be made in this cause."

A reference to a special master (directed by the decree for the information of the court) was had, and documentary and other evidence collected. *But there was no reference ordered in this decree for taking the proof of the various bonds that might be produced.*

The evidence collected before the master was submitted to the court below, which now made a further or final decree.

By this the original decree was confirmed, so far as related to the foreclosure of all the mortgages, fixing their priorities according to date, and subjecting to their lien the whole road from Galveston to Houston, with the original rolling stock and equipments. But the decree refused any remedy by account, or an enforcement of the lien against any of the property acquired and used in connection with the road since March 6th, 1860, when, as already mentioned,* the road-bed, track, franchises, chartered rights, and rolling stock of the company were sold by the sheriff.

The cross-bill of Pulsford for a superior equity was dismissed.

The decree contained this direction:

"And to ascertain more exactly such proportion, and the amount of the several series of bonds and coupons now outstanding, it is hereby ordered that all holders of such bonds or coupons claiming a participation in the distribution of the proceeds of any sale of the property claimed to be mortgaged to

* *Supra*, p. 465.

secure them in this cause, shall present their bonds and coupons to this court (to be deposited in some National bank to be designated on such presentation, there to remain subject to further order, and to such directions as the court may make to ascertain their genuineness and to classify them), within one year from the date of this decree. And after any such sale, as hereinbefore directed, has been duly made and confirmed, and the amount of the successful bids paid as before stated, the said marshal shall execute in due form a conveyance of the property bought to the purchaser."

From this decree the "successor company" appealed to this court. The complainants, Cowdrey and the other bondholders, took a cross-appeal. Pulsford also prayed an appeal.

In this court the same grounds were taken in behalf of the "successor company" as in the court below, and were urged at length. It was urged additionally that the original decree—the decree of foreclosure—was erroneous, because there had been no reference to a master to ascertain what parties holding bonds *would* come in and make themselves parties to the *suit;* and that only the bonds held by parties so coming in, and those held by the complainants in the bill could be included in the decree of foreclosure *nisi.* All others were excluded from the benefit of the decree. And though the complainants in such a bill might have made proof at the hearing of some bonds, so as to entitle them, in the opinion of the court, to a decretal order of reference, yet that it was settled on sound reasons and by the highest authority, that the complainants themselves in such a bill, must go before the master and prove their claims.*

And it was said that it would be difficult to find a case which demanded more imperatively than did this one the application of this rule of procedure; for that plainly many of the bonds—as appeared by the prices paid for them—had been bought at prices from 30 to 70 per cent. below their par, with notice of the way in which they had been

* Owens *v.* Dickenson, Craig & Phillips, 48–56; Field *v.* Titmuss, 2 Law & Equity, 89; S. C., 1 Simons (N. S.) 218; Whitaker *v.* Wright, 2 Hare, 310.

issued; that is to say, with notice of the fact that they had been issued in violation of the provisions of the two later mortgages; a matter, however, it was urged, not regarded in the decree.

The claim of Pulsford for a superior equity was pressed anew with much learning of the Roman law and continental jurists, as well as by some authorities in other courts, including *Collins* v. *The Central Bank*, in Georgia.*

For Cowdrey and the other bondholders it was argued against the view of the court below (that the defendants being in the position of mortgagors of real estate, were not to be held accountable for the income of the road), that while it was a general rule that the mortgagor, while in possession, with the consent of the mortgagee, was not liable for rents, the rule did not apply here; for here the old company had made a specific mortgage of "the tolls, incomes, issues, and profits of said railroad, whenever the company should make default in making payment," and after default in interest for three months, had authorized the trustees to take possession, receive the rents, and apply them in payment of the interest; that it was the duty of the agents of the mortgagors to have applied the income in payment of the interest; that they had not only violated this duty, but had undertaken to set up an adverse title and to defeat the mortgagors' title. And that the general rule did not apply here, for the farther reason that trustees who were authorized to give notice and take possession were dead, and that in such case the persons who intruded themselves into the dead men's estates were bound to account for the whole of the property.

Messrs. B. R. Curtis, C. B. Gooderich, and W. P. Ballinger, for the railroad company; Messrs. Albert Pike and R. W. Johnson, for Pulsford; Messrs. Grant and W. G. Hale, for Cowdrey and others.

Mr. Justice BRADLEY delivered the opinion of the court.

The first objection made by the defendants to the decree

* 1 Kelly, 435.

is, that the mortgages under which the complainants claim are not valid for want of capacity in the railroad company to make them. It is admitted that the charter authorizes the company to mortgage certain real estate, which it was authorized to acquire for the purpose of aiding in the construction or maintenance of the road. But they insist that this power applies to outside real estate procured as ancillary to the main design of building the road, and does not apply to the right of way and track of the railroad. But we think it is general, and applies to any real estate which the company might acquire in any way. This construction is aided by the other powers conferred by the charter, as that of borrowing money on bond or note, and of doing all acts necessary and proper for or incident to the fulfilment of their obligations. And it is expressly declared that all conveyances and contracts executed in writing, signed by the president and countersigned by the treasurer, or any other officer duly authorized by the directors, under seal of the company, and in pursuance of a vote of the directors, shall be valid and binding. If it were necessary to look into the charter for express power to borrow money and mortgage its property to secure the payment thereof, we think the power is found therein.

But the defendants contend that if the power to mortgage mere real and personal estate be conceded, still there is no power to mortgage, or in any way to assign the railroad as such, or the franchise of operating it and taking tolls, or any other franchise, much less that of exercising corporate powers; and hence the decree is erroneous in authorizing a sale of these rights and franchises under the mortgages.

Without examining how far the operative effect of a mortgage executed by a railroad company upon its road, works, and franchises may extend, *per se*, without statutory aid, it is sufficient to say that, in our opinion, the legislature of Texas has validated the mortgages, and given them the effect which, by their terms, they were intended to have. By the act of December 19, 1857,* section 4912, it is expressly provided that

* Paschal's Digest, art. 4912.

"The road-bed, track, franchise, and chartered rights and privileges of any railroad company in this State shall be subject to the payment of the debts and legal liabilities of said company, and may be sold in satisfaction of the same, but . . . shall be deemed an entire thing, and must be sold as such; and in case of the sale of the same, whether by virtue of an execution, order of sale, *deed of trust, or any other power*, the purchaser or purchasers at such sale, and their associates, shall be entitled to have and exercise all the powers, privileges, and franchises granted to said company by its charter, or by virtue of the general laws of this State; and the said purchaser or purchasers and their associates shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges, and benefits thereof, in the same manner and to the same extent as if they were the original corporators of said company."

The following section, 4913, enacts that

"Whenever a sale of the road-bed, track, franchise, and chartered rights and privileges of any railroad company is made by virtue of any deed of trust or power, the same shall be made at the time and place mentioned in the deed of trust or power, and in accordance with the provisions of the same, as to notice and in other respects; and if the same be not specified, such sale shall be made as hereinafter provided for sales under execution or order of sale."

The following section, 4914, gives the like effect to sales under execution issued upon a judgment. Indeed, it is by virtue of the latter section that the defendants claim to be the present owners of the road and its franchises. This law is not prospective, but general in its operation. It is a remedial law for the benefit of creditors, and should be liberally construed. It should especially be applied to a case in which, by the very terms of the trust-deed, all the franchises and rights of the company are expressly embraced therein. It cannot be claimed, as is done by the defendants, that a sale under one mortgage or judgment, by virtue of this law, nullifies and destroys all prior mortgages. Such a doctrine would work the greatest injustice, and would open

the door to the grossest frauds. A sale under a junior security must be subordinate to one that is prior and paramount. Successive sales of the same franchises can no more be deemed incompatible than successive sales of the same property; and we all know that a sale of land under a judgment does not, in the slightest manner, affect a prior mortgage. A subsequent sale of the same land may be made by virtue of the latter.

It is next objected that the mortgages were not properly executed, because the meetings of the directors by which the mortgages were authorized to be executed were held in the city of New York. It is not denied that the mortgages were executed in good faith under the corporate seal, and signed by the president and countersigned by the treasurer of the company, and duly recorded in the proper offices of registry in the State of Texas. Supposing the complainants to be *bonâ fide* holders of the bonds held by them, the question raised by this objection amounts to this: Can a corporation repudiate a mortgage, given to secure its bonds held by *bonâ fide* holders, on the ground that its directors authorized its execution by a resolution passed outside of the limits of the State, the mortgage being, in other respects, executed and recorded in due form of law? Can it take all the benefit of the transaction, get off its bonds on the business community, and then repudiate its mortgage for such a cause? We have not been referred to any case like this. It would seem, at first blush, to be a very hard rule, if such a rule exists. No doubt it may be true, in many cases, that the extra territorial acts of directors would be held void, as in the case cited from the 14th New Jersey Chancery Reports, 383, where a set of directors of a New Jersey corporation met in Philadelphia, against a positive prohibitory statute of New Jersey, and improperly voted themselves certain shares of stock. And other cases might be put where their acts would be held void without a prohibitory statute; and it is generally true that a corporation exists only within the territory of the jurisdiction that created it. But it is well settled that a corporation may, by its agents, make contracts

and transact business in another territory, and may sue and be sued therein. It may hold land in another territory so long as the local authorities do not object. And we see no reason why it should not be estopped by the action of its directors in another territory, when that action is the basis of negotiations by which third parties have *bonâ fide* parted with their money and the company has received the benefits of the transaction. A contrary doctrine would authorize a company to take advantage of its own wrong, and would seriously impair the negotiability and value of such securities. Must a person, purchasing railroad bonds in Wall Street or Walnut Street, first send to Illinois, California, or Texas, to see whether the meeting of the directors which authorized the mortgage given to secure the bonds was held in a proper place? Whoever may, under supposable circumstances, raise an objection of this kind, it ought not to lie in the mouth of the company to raise it. And, if the company are estopped, then those who purchase the property of the company at an execution sale must be estopped. It has frequently been held that such a purchaser takes only the right, title, and interest which the debtor had, subject to the equities which existed against the property in his hands when the judgment was recovered.

But it is objected that the complainants are not *bonâ fide* holders of the bonds in their possession; that many of the bonds were issued improvidently, and against stipulations contained in the mortgages, to the effect that they should only be issued to retire the previous issue of bonds. If this were true with regard to some of the bonds, it is not pretended to be true with regard to all of them; and the question, what particular bonds were wrongfully issued, if a material question, is properly examinable in the master's office, where all bonds are to be presented and passed upon, if not already done. And the decree will stand only for the benefit of such bonds as appear to be entitled to its benefit; and this benefit will not be confined to the complainants' bonds, but will be extended to all bonds that may be presented by other holders. But it does not appear, so far as we have

been able to scrutinize the evidence, that the complainants are not *bonâ fide* holders of their bonds. They have been examined, and have produced their bonds, and have told how they procured them, namely, by purchase, and what they gave for them; and they allege that they purchased them in good faith in the open market, supposing them to be valid obligations of the company, and being told that they were. If such is the fact, and no proof to the contrary occurs to us, we do not see why the complainants must not be held to be *bonâ fide* holders for value of the said bonds.

The next objection we shall notice is, that the complainants have no right to sue for themselves and in behalf of the several classes of bondholders under the different mortgages, because the interests of these classes are antagonistic to each other. They are no more antagonistic to each other than the several bondholders of the same class are. It is the interest of each bondholder to have as few prior claims to his, and as few participants with him as possible. Every co-bondholder is, in one sense, an antagonist. But the objection is entirely without foundation. The complainants do, in fact, hold bonds of the three different classes, and they have a perfect right to state that fact in their bill, and to pray relief suitable to the fact, and no possible harm or inconvenience can arise in their suing in behalf of themselves and all other bondholders in each class according to their several priorities. If any class of bondholders wish to contest the precedency of a prior mortgage, they have a perfect right to intervene in the suit and file a cross-bill setting up the matter of objection. All bondholders, including the complainants themselves, have to establish their claims in the case before it is finally closed, and before a distribution of the assets can be made. And any bondholder proving his claim may contest the claim of any other bondholder. It has even been held that a mortgagee may sue on behalf of himself and all other creditors, notwithstanding he claims a right to prior satisfaction out of the mortgaged property.*

* See Story's Equity Pleading, §§ 101, 158.

And Judge Story says that, on principle, it is not easy to see why it might not be sufficient, in a suit by incumbrancers, to file the bill on behalf of all the creditors and incumbrancers; thus making them all, in a sense, parties to the extent of asserting their own rights, or of enabling them to contest the matter before a master. He says that this seems to be the true doctrine inculcated by the more recent authorities.* But the case before us is much stronger than this. The complainants *must* set out their own claims under the different mortgages, and it would be impossible to make all the bondholders of either class parties, for they could not be discovered; and the rights of all are protected by the opportunity given to all to contest the claim of any. We consider the bill as properly conceived, and the objection as untenable.

In connection with this objection it is proper to notice an objection to the original decree, that it undertook to declare and find the amount of bonds outstanding and due under each mortgage before the bonds had been regularly produced and proved. That decree, of course, is not to be regarded as final and conclusive on this point. The remarks of Vice-Chancellor Wigram, in *Whitaker* v. *Wright*,† are germane to this subject: "With respect to the form of a decree in a creditor's suit," says he, "the court does not treat the decree as conclusive of the debt. It is clear that it is not so treated for all purposes, for any other creditor may challenge the debt, and it is equally clear that in practice the executor himself is allowed to impeach it. If, in a case where the plaintiff sues in behalf of himself and all other creditors, and the defendants, who represent the estate, do not admit assets, it is objected at the hearing that the debt is not well proved, the court tries the question only whether there is sufficient proof upon which to found a decree; and however clearly the debt may be proved in the cause, the decree decides nothing more than that the debt is sufficiently proved to entitle the plaintiff to go into the master's office,

* See Story's Equity Pleading, § 158; Equity Jurisprudence § 549.
† 2 Hare, 310.

and a new case may be made in the master's office, and new evidence may be there tendered."* In this case, it is true, no reference to a master was made in the first decree for taking the proof of the various bonds that might be produced; but the final decree directed that to ascertain the proportion and amount of the several series of bonds and coupons outstanding, all holders thereof claiming participation in the distribution of proceeds of any sale of the property should present their bonds and coupons to the court, to be deposited in some bank to be designated, there to remain subject to further order, and to such directions as the court may make to ascertain their genuineness, and to classify them. This has not yet been done, all proceedings being stayed by the appeal. But the action of the court, as far as it has gone, is substantially correct. It only remains to complete the proceeding in accordance with the proper practice applicable to the case.

On the part of Robert Pulsford it is objected that the decree does not give him a priority on that portion of the road which was laid with his iron. He contends that he is entitled to this, first, because when the mortgages of the complainants were executed it was not in existence, and could not have been conveyed thereby, and can only be embraced therein on a principle of equitable estoppel, which is rebutted when it comes in conflict with a superior equity; secondly, because his capital applied to the road conserved it, and rendered it capable of being operated, which it would not have been otherwise; hence, on the principle adopted by the civil and maritime laws of awarding priority to the last creditor who furnished necessary repairs and supplies to a vessel, he is entitled to priority. The counsel for Pulsford has furnished us with a very ingenious and learned argument on these points; but we cannot yield to their force.

As to the first point, without attempting to review the many authorities on the subject, it is sufficient to state that, in our judgment, the first, second, and third deeds of trust,

* See Story's Equity Jurisprudence, § 549, note.

or mortgages, given by the Galveston Railroad Company to the trustees, estops the company, and all persons claiming under it and in privity with it, from asserting that those deeds do not cover all the property and rights which they profess to cover. Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures, and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. To hold otherwise would render it necessary for a railroad company to borrow money in small parcels as sections of the road were completed, and trust-deeds could safely be given thereon. The practice of the country and its necessities are in coincidence with the rule. The precise case arose in New Jersey thirty years ago. The Morris Canal Company mortgaged its canal, appurtenances, and chartered rights to secure a loan. When the mortgage was given, one section of the canal, that between Newark and Jersey City, although authorized, was not constructed. It was constructed afterwards. Two other mortgages were given upon that part of the canal, one of which was held by the State of Indiana. A bill of foreclosure was filed on the first mortgage, and after argument by very able counsel, Chancellor Pennington held that the first mortgage took priority. The objection was raised that the company did not own any of the land on which the contested portion was constructed when the mortgage was given. "Can it be possible," said he, "that if on the line of the route at any place it should turn out that a deed was obtained for a piece of land since the execution of the mortgage, that such part of the canal is not embraced within it?"* Mr. Pulsford, as holder of the fourth mortgage, is

* 3 Green's Chancery, 402.

an assignee of the railroad company, claiming under it, with full notice of the other mortgages. He is in privity with the company, and is bound by the estoppel.

As to the other point, giving priority to the last creditor for aiding to conserve the thing, all that is necessary to say is that the rule referred to has never been introduced into our laws except in maritime cases, which stand on a particular reason. We do not understand that it is a part of the general law of Texas. By an act of the Congress of Texas, passed 20th January, 1840, the common law was made the rule of decision, where not inconsistent with the Constitution and acts of Congress. By the common law it is an inflexible rule, that whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by tenants, which do not affect the question here. The rails put down on the company's road became a part of the road. The road itself was included in the mortgages of the complainants. Pulsford, by allowing his property to go into or become part of the road, consented to its being covered by the mortgages in question. He acquired no lien which can displace them. In certain States a lien is created by statute in favor of mechanics, called the mechanics' lien, by which a person furnishing materials or work on a building acquires a lien on the property to secure the payment of his claim. But this kind of lien did not exist in Texas in favor of those who supplied materials or money for constructing railroads. We have no hesitation in saying that Pulsford's claim to priority cannot be maintained.

Some other minor points have been made by the defendants which it is not necessary for us to examine in detail. Our conclusion is that the decree, so far as it is in favor of the complainants, must be affirmed.

The complainants have also appealed from the decree because it fails to award them the tolls, income, and profits of the railroad during the time it was operated by the present defendants, and to make the defendants accountable therefor. The complainants claim that nearly all the rolling stock and property, including the junction railroad, claimed

by the defendants as their property, were really produced by the earnings of the railroad fraudulently appropriated to themselves by the defendants. This claim raises the question whether a mortgage of the tolls and income makes the mortgagor or his assignees accountable therefor before demand made by the mortgagee. In this case it does not appear that the complainants or their trustees made any demand for the tolls and income until they filed the present bill. The bill itself does not contain any allegation of such a demand. Now what is the language of the deeds of trust? They convey, it is true, with the other premises, the tolls, income, issues, and profits, whenever the company shall be in default of payment; but a subsequent clause provides that in case the company shall at any time for the space of three months be in default in respect to the payment of either interest or principal of said bonds when due and demanded, on request in writing of any of the holders of the bonds, the trustees shall take possession of the railroad and other property, and through the agency of the persons they may appoint, shall collect and receive the tolls, incomes, and profits of the railroad and mortgaged property for the purpose of the security before declared, and may sell the road upon giving due notice, &c. It seems to us that the latter clause defines and points out the manner in which the pledge of the tolls and income is to be practicably carried into effect. At all events until a regular demand were made for the payment of the tolls and income we do not think, under the language of the deed, that the defendants were bound to account therefor. If this be so, it matters not what bargains the defendants made between themselves as to the disposition of said tolls and income.

We are, therefore, of opinion that this part of the decree ought also to be affirmed. The result is that the entire decree of the Circuit Court is

AFFIRMED.