

It may well be that all the persons who have made themselves parties, or who have come in since the sale asking for payment of their bonds, are bound by the decree. And yet it may be said that a close inspection of the pleadings and proceedings had in the case shows that the original bill, giving it its fullest scope, is not one for foreclosure; that it shows no grounds looking to a foreclosure, except the allegation that the mortgagor is going to default; that in only one application of a bondholder to be allowed to join the complainant is there any allegation that there had been default in paying the interest; that only the original bill was notice to the defendant who made no appearance; that the decree *pro confesso* entered against the defendant goes only to the allegations of the original bill; and that there is no proof in the case by confession or otherwise, except affidavit offered on this hearing, that there had been any default or breach of contract that would warrant a decree of foreclosure. Nor is it necessary to determine whether or not all the bondholders, or else the trustees to represent them, must be made parties in order to obtain a valid foreclosure of a trust deed. The law of Georgia which controls the effect of the trust deed which is the foundation of this case, to the effect that "a mortgage is only security for a debt and passes no title," may well make it a vexed question in this state as to how far it may be necessary for trustees of a trust mortgage to be made parties in the foreclosure of the mortgage granted by the trust deed. It is clear that the bondholders who have not been made parties are not bound by the decree.

The equity rules that allow suits to be brought by some complainants for the benefit of all, expressly reserve the rights of absent parties. See Equity Rules 47 and 48. The absent bondholders are not *quasi* parties, as they would have been had the trustees been made parties to the suit. See *Campbell v. Railroad Co.* 1 Woods, 377, 378. It follows that, as the absent bondholders are not bound by the decree, they may inaugurate new proceedings, involving a foreclosure and a review of what has been done. The parties who have joined in this case, but who now insist that the trustees shall be joined, are also in a position to keep the case before the court. The purchaser at the sale made, who is also a bondholder and party, takes no full title to what the decree purports to sell. The remedy, then, given by the decree in this case is not full and complete, even as to the parties before the court, and the litigation is not ended.

The proposition is to open the case, (the proceedings still being *in fieri*.) to allow proper parties to be made, so as to grant full relief and

settle the rights of all parties interested. It also seems clear from the evidence that the apprehensions of some of the bondholders, and their proceedings at the sale, have thrown such a cloud upon the title to be given under the decree rendered as to justify the finding that the price offered at the sale is inadequate. The affidavits filed go to this extent. On this point nothing is left, then, for the court to do but refuse to confirm the sale and set the same aside. That being done, there are no good reasons against, and many good reasons in favor of, vacating the decree to allow new parties to be made, a proper case proved, and a new decree to be rendered, that will do full equity to all parties and end the litigation in the premises. No damage can result but by delay, and no great delay can result, as a new decree can be rendered at this term and the property at once offered for sale. In vacating the decree and allowing new parties to be made, the court can and will make such terms as will result in speeding the cause and procuring a speedy sale of the property.

CALHOUN and others v. ST. LOUIS & SOUTHEASTERN RY. CO.
(Consolidated) and others.

(Circuit Court, D. Indiana. March, 1880.)

RAILROAD MORTGAGE—FORECLOSURE—PREFERRED CLAIMS.

On a bill filed by the trustees to foreclose a consolidated mortgage, where there had been prior mortgages on different parts of the consolidated road, the net earnings of the road are to be applied primarily to the payment of the employes of the company, and of the amounts due for supplies and materials furnished; and if, instead of making these payments, the earnings are directed either to the payment of what is due to the mortgagees, or for improvements or betterments placed upon the road, that constitutes a valid claim against the *corpus*, the property in the hands of the court, which it is the duty of the court to see enforced.

In Equity.

Judd & Whitehouse, Bluford Wilson, and Asa & J. E. Iglehart, for complainants.

Scholes & Mather, for defendants.

DRUMMOND, C. J. This was a bill filed in the fall of 1874, by the trustees, to foreclose a consolidated mortgage. There had been prior mortgages on different parts of the consolidated line of road, and the parties interested in those prior mortgages (the bondholders) were made defendants in January, 1876. Pending the litigation, various

parties have filed claims for labor, supplies, and materials. The bondholders interested in the prior mortgages also filed, in 1879, independent bills to foreclose them. A receiver was appointed by the court, who took possession of the property on November 1, 1874, and since then the property has been in the hands of a receiver. The trustees of the consolidated mortgage were also trustees of the prior mortgages. These intervening petitions were for labor and supplies furnished during the year 1874. The claims were referred to a master, who took proof, and has filed a report allowing a large number of the claims; and to the confirmation of that report objections have been made by some of the mortgagees. During that year, and before the receiver took possession of the railway, the company issued certificates of indebtedness, instead of paying the money, and a large portion of the claims consist of these certificates given by the company. There was an order entered by the court, when the bill was filed for the foreclosure of the consolidated mortgage, directing the receiver, out of the net earnings of the road, to pay all certificates of indebtedness and other balances which might be due to the employes of the road, and what might be due for supplies and materials furnished since the first day of January, 1874. It is claimed that this order was entered by the consent of the parties then appearing in the case, and that the parties to the prior mortgages are not bound by this order; but it seems to me that being an order made at the time the court took jurisdiction of the case, the parties then in court were clearly bound by it, and that all parties who came into the litigation afterwards must be considered as coming subject to the policy which had been prescribed by the court in relation to the payment of the labor and supply claims, and if that be not so, then certainly subject to the order as modified by the court at the instance of the first mortgagees. Then it would follow, under the rule of the supreme court in the case of *Fosdick v. Schall*, 99 U. S. 235, the court having a discretion in relation to the appointment of a receiver, and the right to prescribe on what terms the appointment should be made, that the condition then imposed upon the property should adhere to it during the progress of the litigation, and therefore all claims coming within the terms of the order of the court should be paid in the manner there pointed out. But independent of this, as I understand the facts of the case, under the rule which the supreme court laid down in the case already referred to, these claims would be payable out of the net earnings of the road, in consequence either of those earnings having been diverted from the payment for labor performed,

and supplies and materials furnished, to the discharge of a portion of the indebtedness due on the mortgages, or by the appropriation of a part of those earnings to the betterment and permanent improvement of the railway, thus adding to the security of the mortgagees; and therefore, on that account, the amount being sufficient to meet the sum due on these various claims, they should be paid.

I shall, therefore, overrule all objections of that character which have been made to the report of the master, and hold that these claims should be paid, but I shall not allow interest on any of the claims, notwithstanding the certificates may have declared that interest was payable. Where claims have been transferred by the original parties to whom they were due, and the assignees have presented them, I will allow as valid claims only what has been paid for the claims thus transferred. The master was of the opinion that the fair inference from the testimony was that these claims arose out of work done for, or supplies and materials furnished to, the railway in Illinois and Indiana, and I cannot say that in this case this is necessarily erroneous. This was a contract made by the company after the lien of the mortgages had operated on the road, and was, of course, subject to the rights of the mortgagees, and, as has been frequently held in a case like this, there must be some sacrifice made by all parties—the employes and the material men on the one side, and the mortgagees on the other. Notwithstanding the ability of the arguments which have been made by the counsel for the mortgagees, they do not affect the view which I have always taken of these claims, nor are they able to withdraw this case from the principles which the supreme court has established, which are that the net earnings of the road are to be applied primarily to the payment of the employes of the company, and of the amounts due for supplies and materials furnished, and that if, instead of making these payments, the earnings are diverted either to the payment of what is due to the mortgagees, or for improvements or betterments placed upon the road, that constitutes a valid claim against the *corpus*, the property in the hands of the court, which it is the duty of the court to see enforced.

See *Tuerner v. I., B. & W. Ry. Co.* 8 Biss. 527.