

RUTTEN *v.* UNION PAC. RY. CO. AND
ANOTHER.

Circuit Court, S. D. New York. July 25, 1883.

RAILROAD BONDS—CONSOLIDATION OF
RAILROAD COMPANIES—BILL TO ENFORCE
LIEN.

The holder of the bonds of a railroad and telegraph company payable to bearer, with interest semi-annually, secured on the income from the sale of its land, and the operation of its road and line, which have passed by consolidation to another railroad company, is a creditor having a specific lien upon the income of the property which has gone from his debtor into the hands of the other company, and he may file a bill in equity to enforce such lien after default in payment of the principal of such bonds, and interest according to the terms thereof.

In Equity.

Simon Sterne, for orator.

Artemas H. Holmes, for defendant.

WHEELER, J. This case is not like *Walser v. Seligman*, 13 FED. REP. 415, and *Jones v. Green*, 1 Wall. 330, and that class of cases, which are mere creditors' bills, seeking a decree against the holder of the debtor's property solely because it is the debtor's property and the defendant has it; nor like *Whipple v. Union Pac. Ry. Co.* Sup. Ct. Kan., where a personal judgment was sought for personal injuries. 481 on the road of one of the constituent companies of the defendant before consolidation; nor like *Hayward v. Andrews*, 106 D. S. 672, [S. C. 1 Sup. Ct. REP. 544,] and *New York Guaranty & Indemnity Co. v. Memphis Water Co.* 2 Sup. Ct. REP. 279, (Sup. Ct. U. S., Oct. Term, 1882,) where the equitable assignee of a purely legal right of action was seeking relief in equity,—the principles of all of which have been invoked in support of this demurrer by the defendant the Union Pacific Railway Company. According to the

allegations of the bill the orator is the bearer of the bonds of the defendant the Denver Pacific Railway & Telegraph Company, payable to bearer, with interest semi-annually, secured on the income from the sale of its lands, and the operation of its road and line, which have passed by the consolidation to the other defendant. He is not an assignee merely of the bonds, but is, as bearer, an original payee, to whom the promise runs directly. *White v. Vermont & M. R. Co.* 21 How. 575.

The orator is not seeking to enforce any personal liability of the Union Pacific Railway Company, as founded upon its own undertaking or wrongful act; and does not claim that that defendant is liable for the undertakings or acts of the other. The grounds of relief upon which he stands rest entirely upon his relation to the property of the latter in the hands of the former. This relation is not that of a creditor at large merely, as mentioned by Judge WALLACE in *Walser v. Seligman, supra*; it is that a creditor having a specific lien upon the income of property which has gone from his debtor into the hands of the other defendant. Perhaps the debtor corporation is, by the consolidation agreement, so far left in existence that he could maintain an action at law against it, and have execution, and by it reach any specific property that was the property of the debtor at the time of consolidation, if there is any such; and as to the general property of the debtor, upon which he has no lien, he would be obliged to exhaust that remedy, as shown in the cases mentioned on that subject, before proceeding against others on account of such property; but he has a lien upon this income, which he has a right to pursue, independently of any proceeding at law, to reach other property, or any foreclosure of specifically mortgaged property. He has the clear right to avail himself of any one of all his securities by pursuing any one of the appropriate remedies for

that purpose. This income, in the hands of the Union Pacific Company, never was the property of the Denver Pacific, and could not be reached by judgment against that company, and the orator can have no judgment against the Union Pacific Company. This lien can be enforced only in equity, and this bill seems to be appropriate to enforce it. The interest coupons for several years are due, and this income is alleged to be sufficient to meet them. By the terms of the bonds, default of interest for 60 days after demand made the principal “subject to become due and payable;” which is understood to mean, subject to become 482 so at the option of the holder; and this bill shows no election of the orator to have these bonds become due.

As the case stands, the orator has this debt, equal to the amount of the coupons, secured upon this income large enough to meet it in the hands of the Union Pacific, which he can reach only in equity, and which this bill is appropriate to reach. Unless this is changed by the answer he seems entitled to the relief asked.

The demurrer is overruled; the defendants to answer over by the September rule-day.

¹ See 10 FED. REP. 596, and 13 FED. REP. 516.