their present allowance; and I may add this further suggestion: It is said that the court, as a condition of the appointment of a receiver, may, in his discretion, require the payment of certain claims; but that discretion is not an arbitrary one. It may not require the payment of any claims that it desires, but only such claims as it is equitable should be paid,—claims that, in equity, are paramount to those of the mortgagees,—and if it is equitable that these claims should be paid prior to the mortgage debt, then what difference can there be in the mere time of making an order therefor? In all cases the payment of such claims rests on the fact that it is equitable that they should be paid, and oftentimes this equity can only be determined upon a full investigation into their nature,—an investigation which cannot be had at the time the receiver is appointed.

What claims are entitled to such equitable preference? The master has reported in favor of all claims accruing since the default in payment of the interest on the mortgage debt,—a period of over two years. This seems to proceed upon the assumption that the mortgagees, by failing to take action, have made the mortgagor company their agent to incur debts; have impliedly consented that all such debts should take preference of their secured claims. I do not think that this principle is sound. There is no implied agency to that extent, and I do not think that the rulings of the supreme court are based upon any such doctrine. The idea which underlies them I take to be this: that the management of a large business, like that of a railroad company, cannot be conducted on a cash basis. Temporary credit, in the nature of things, is indispensable. Its employes cannot be paid every month. It cannot settle with other roads its traffic balances at the close of every day. Time to adjust and settle these various matters is indispensable. Because, in the nature of things, this is so, such temporary credits must be taken as assented to by the mortgagees, because both the mortgagees and the public are interested in keeping up the road, and having it preserved as a going concern, and whatever is necessary to accomplish this result must be taken as assented to by the mortgagees. In this view, such temporary credits accruing prior to the appointment of the receiver must be recognized by the mortgagees and such claims preferred. Now, for what time prior to the appointment of a receiver may these credits be sustained? There is no arbitrary time prescribed, and it should be only such reasonable time as, in the nature of things and in the ordinary course of business, would be sufficient to have such claims settled and paid. Six months is the longest time I have noticed as yet given. Ordinarily I think that is ample. Perhaps, in some large concerns, with extensive lines of road and a complicated business, a longer time might be necessary. Certainly, so far as the present road is concerned, six months is ample. If any person permits a claim to continue longer than that he certainly has no right to be considered other than as a general creditor, with no preference over a secured

debt. So I think the exceptions must be sustained as to all claims accruing prior to six months before the appointment of a receiver.

One other matter requires notice. Out of what shall these claims be paid? Primarily, of course, out of the earnings of the road, and ordinarily out of such earnings alone. It is true, as appears from the quotation just made from the supreme court, that cases may arise in which such claims will be made a lien upon the *corpus* of the property, and payable out of the proceeds of receiver's certificates. But this can be done only in exceptional cases, and where there is special equity therefor. Apparently, this matter has not been considered by the master; and if any order is desired further than the payment of all these claims out of the earnings of the road, the matter will be referred back to the master for inquiry as to whether there exists any special equity justifying the payment of these claims, or any one of them, out of the proceeds of the receiver's certificates. The general rule, as I have stated, is that such claim should be paid out of the earnings. That is fair; because, if no receiver were appointed, and the claimants attempted by legal process to enforce the collection of their claims, they could obtain no priority over the mortgages, but must still be subject to such mortgages. So the appointment of a receiver ought not to give them a priority which they had not before. It is true, a special equity, as stated by the supreme court, may exist, making such claims a prior lien upon the *corpus* of the property; but, as I have said, such equity ought to be affirmatively shown. I believe this covers all the points that were argued before me. The order, therefore, will be that the exceptions will be maintained to all claims accruing more than six months prior to the appointment of a receiver. The exceptions to the other allowances will be overruled, and an order entered that they be paid out of the earnings of the road; and if in any particular claim it is thought by the claimant that there is a special equity which justifies its payment out of the proceeds of the receiver's certificates, such claims will be referred back to the master for examination in that respect.

Fosdick v. *Schall*[1] is the leading case upon the relative rights of secured and unsecured creditors of railroads which have been placed in the hands of receivers. After an exhaustive argument by some of the best legal minds of the country, the supreme court of the United States arrived in that case at unanimous conclusions. Those conclusions were announced by Mr. Chief Justice WAITE, whose opinion contains a statement of most of the great leading principles governing this delicate, difficult, and most important subject, and though much of what he said may be characterized as *dicta*, yet the opinion delivered is entitled to be considered a deliberate and careful expression of what the court considered to be the law of this whole subject, and the principles then enunciated have since been applied by that and other tribunals, and have been everywhere approved.

[1] 99 U. S. 235, (1878.)

EXTENT TO WHICH MORTGAGE COVERS INCOME AND FUNDS DERIVED THEREFROM. One of the most important of the rules laid down in *Fosdick* v. *Schall*[1] is that even where a mortgage on a railroad gives a lien on the income of the road in express terms, the income out of which the mortgagee is entitled to be paid, while out of possession, "is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipments, and useful improvements. Every railroad mortgagee," said the court, "in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income." It follows from this that persons to whom debts are due at the time a mortgaged road goes into the hands of a receiver for "necessary operating and managing expenses, proper equipments, and useful improvements, are entitled to a priority over mortgage creditors as to any fund derived from income which may be received by the receiver from the company.[2]

RULE AS TO CORPUS OF THE MORTGAGED PROPERTY. As a general rule, the rights of first mortgage creditors are superior to those of creditors of any other class, so far as the *corpus* of the mortgaged property is concerned. No lien equal to theirs can be given by the mortgagor to material-men, or others to whom debts may become due, for current expenses, even by an express mortgage.[3] But the lien of mortgage creditors only extends to the interest of the mortgagor; and, where the mortgage is made to cover after-acquired property, a lien for the purchase-money retained upon supplies sold, the mortgagor, after the execution of the mortgage, will take precedence of the mortgage lien, if the supplies furnished are not affixed to the realty.[4] If so affixed, the mortgage lien attaches, and takes precedence.[5] There are only two exceptions, so far as *ante*-receivership debts are concerned, to the general rule as to the superiority of the mortgage lien: The first is that, where current earnings have been used by the officers of a company for the benefit of mortgage creditors in paying bonded interest, purchasing additional equipments, or making permanent improvements on the fixed property, the mortgage security is chargeable, in equity, with the restoration of the fund thus improperly diverted.[6] The second exception is that, where it is necessary to pay employes back wages in order to retain their services, or to pay a debt for *ante*-receivership operating expenses in order to maintain business relations with the claimant, and the retention of such employes, or the maintenance of such relations, as the case may be, is indispensable to the welfare of the road, and such debts cannot be paid out of income, the receiver may be authorized to raise the necessary funds by issuing certificates of indebtedness, which shall take precedence of first-mortgage bonds.[7]

APPLICATION OF THE INCOME OF THE RECEIVERSHIP TO THE PAYMENT OF ANTECEDENT DEBTS. In *Fosdick* v. *Schall*[8] the proposition was laid down that "when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the

[1] 99 U. S. 252. See, also, Gilman v. Illinois & M. Tel. Co. 91 U. S. 603, (1875;) American Bridge Co. v. Heidelbach, 94 U. S. 798, (1876;) Galveston Railroad v. Cowdrey, 11 Wall. 459, (1870.)

[2] American Bridge Co. v. Heidelbach, 94 U. S. 798, (1876;) Gilman v. Illinois & M. Tel. Co. 91 U. S. 603, (1875.)

[3] Galveston Railroad v. Cowdrey, 78 U. S. 459, (1870;) Meyer v. Johnston, 53 Ala. 237, (1875.)

[4] Galveston Railroad v. Cowdrey, 78 U. S. 459, (1870;) Myer v. Car Co. 102 U. S. 1, (1880;) U. S. v. Railroad Co. 12 Wall. 362, (1870.)

[5] Dunham v. Railway Co. 68 U. S. 254, (1863.) Contra, Collins v. Central Bank, 1 Ga. 435, (1846.)

[6] Fosdick v. Schall, 99 U. S. 253, 254; Burnham v. Bowen, 111 U. S. 783, S. C. 4 Sup. Ct. Rep. 675, (1884.)

[7] Miltenberger v. Logansport Ry. Co. 106 U. S. 286, (1882;) S. C. 1 Sup. Ct. Rep. 140.

[8] 99 U. S. 251 et seq.