of his inability to comply with and carry out the same, and about the same time Bailey resigned as director, and afterwards, in the month of September, Blake resigned as director and president, and thereupon Charles M. Zeh was chosen president of the company, and that the company was greatly damaged, and its credit ruined, by the actions and doings of the alleged copartners, Kittel, Bailey, Blake, and Green, in their reckless conduct of the management of the defendant company's interest, and the total failure to construct the defendant's road, and in the pretended incumbrance placed upon the defendant company's land grant, for their own selfish uses and purposes.

The decree in the court below was in favor of the complainant, recognizing and foreclosing the mortgages sued on, finding the sum of $33,270.86 due, ordering the company to pay within a short day, and, in failure thereof, that the mortgaged property be sold, after public advertisement, by a special master of the court.

The railroad company, in bringing the case to this court, assigns the following errors: (1) The court erred in overruling the demurrer interposed to the bill of complaint herein by the said defendant; (2) the court erred in rendering a decree against the above-named defendant.

The demurrer interposed by the defendant railroad company states the inconsistent propositions that the legal title to the lands mortgaged is in the United States and also in the state of Florida. The counsel for the company contends in this court that the bill shows the legal title to the lands sought to be sold to be in the United States, and claims that what passed under the grant of 1850 was the legal title to swamp and overflowed lands, and what were and what were not swamp and overflowed lands was a question of fact, to be hereafter determined, when the question should be raised in the courts, upon proofs submitted; and he further contended that the certificate of the trustees guarded the United States upon this point, and that the company received its certificate upon the express condition mentioned, and that the company, as well as the mortgagee, are bound by it; and that, in order for the court to sell the lands under this decree, it must, by some form of proof, determine that the land is in fact swamp land, under the act of 1850. The appellee contends that the legal title to the land passed to the state by the act of congress of September 28, 1850, without any patent, citing *Wright* v. *Roseberry*, 121 U. S. 488–503, 7 Sup. Ct. Rep. 985; and further, as follows:

"By the act of the legislature of Florida, January 6, 1856, this legal title passed to the board of trustees, defendants, who have not appealed from the decree; and the trustees say in their answer they will convey to appellant the remainder of the lands as soon as they receive the patent. They could convey before. The legal title passed by the grant to every acre of land that is swamp and overflowed land, in point of fact. The appellant admits, by its mortgage, it is all swamp and overflowed land. The trustees admit, by their answer and exhibit thereto, it is swamp and overflowed lands, and are estopped from and do not seek to controvert it. If at any future time the government of the United States should contend that any single piece of the one hundred and nine thousand acres is not swamp and overflowed land, it will

be time enough to settle that controversy, whenever it arises. The defendant company, the appellant here, cannot and has not raised any such question in its answer. Apart from this, a mortgagor can never raise a question of title, and say it had no title, as against the mortgagee. The latter is entitled to have the property mortgaged sold to pay his debt, and the purchaser will get such title as the mortgagor holds."

In our opinion, if the company has not a legal title to the lands mortgaged, it had a full equitable title. The language of the mortgages, in the granting part, is full and complete, conveying any and all interest of the railroad company in the lands, and passed whatever title the railroad company had. It was sufficient to mortgage land held by a full equitable title, as well as that held by a legal title. *Railroad Co.* v. *Hamilton*, 134 U. S. 296–305, 10 Sup. Ct. Rep. 546; *Trust Co.* v. *Kneeland*, 138 U. S. 414–419, 11 Sup. Ct. Rep. 357.

Whether the decree appealed from was correctly rendered in favor of the complainant, Kittel, depends upon the undisputed facts hereinbefore recited, and upon several contested propositions of law and fact, which may be stated and answered as follows:

1. Was M. W. Hayward the assistant secretary of the company from March 24, 1889, to September 11, 1890, and as such authorized to attach the seal of the company to the mortgages granted to complainant, Kittel? It appears that he was employed about the office of President Blake; that he was appointed by President Blake assistant secretary and assistant treasurer about February 1st, 1889; that up to the time of his resignation he acted as secretary, though signing as assistant secretary, transacting the business of the company, with the knowledge of most if not all of the directors, and that in fact he transacted all the business of the secretary during the time mentioned. It is not necessary to determine whether he was an assistant secretary *de jure*, since it clearly appears that with the consent and knowledge of the president and board of directors, during the time mentioned, he was *de facto* secretary of the company.

2. Whether the board of directors authorized the president, Blake, to borrow money for the uses of the company, and to mortgage the land grant of the company to secure the repayment of sums borrowed. The minutes of the board, kept by Hayward, as secretary, show a resolution to that effect, passed at a meeting held on the 24th day of May, 1889. Other proceedings had that day, at the reported meetings of the board of directors, are undisputed, such as the appointment of Bailey as director and vice president; the authorization of the president to make a contract for the construction and equipment of the proposed line of the road to Augusta, Ga.; to authorize the president to appoint a general manager,—the minutes of all of which were recorded by Hayward, while the stockholders' meeting reported to have been held the same day is disputed. That it was not held, is not proved. The record book does not appear to have been produced in evidence. The extracts given from it are not in chronological order, or as in any wise attempting to give an insight into the manner in which the book was kept. Whether

the resolution authorizing the president to mortgage the lands granted by the state of Florida was passed, depends upon the credit given the testimony of Directors Robert Cumming, William Henry Gamble, Robert B. Symington, Charles M. Zeh, and William Clark, which testimony is negative,—not recollecting the meeting,—rather than positive,—recollecting that no such resolution was passed.

3. Was Kittel a director of the company? There is no doubt he was elected at an informal meeting, during his absence in Europe; that he was notified in writing of the appointment very soon after his return; and that, about two months thereafter, he resigned as director. He was not the owner of any stock in the company, and was therefore ineligible. He never in any wise acted as director, and his resignation was given under the advice of counsel, and in order to clear the matter of doubt, as to whether he was or was not a director.

4. Was Kittel acting in good faith in the loans he made to the company? The evidence shows that he acted under advice of experienced counsel, after a full examination of the records of the company as to the authority of the president to borrow on behalf of the company, and to give as security the mortgage on the land grant. There is no evidence whatever to show that he doubted the legality or honesty of the transaction; that he suspected the president's authority to borrow, or his authority to grant the mortgage; or that, to his knowledge, the money was in any wise intended to be used otherwise than directly for the needs and benefits of the company; or that he had any idea that the money he loaned was money loaned to and for the benefit of the construction company, otherwise than as the construction company would be aided by funds in the hands of the railroad company. The loan does not appear to have been in any wise secret, for even Mr. William Clark, the moneyed man of the concern, admits that he was informed by Blake of the loan, just after it was made. The only suspicion with regard to the *bona fides* of Kittel in the whole transaction arises from the fact that, as part of the consideration for loaning the company money at an extraordinarily low rate of interest, considering the enterprise and the security offered, Kittel was granted, in all, a three-twentieths interest in the construction contract. In our opinion, this circumstance is of small weight. The construction contract was authorized by the board of directors. They were charged with notice that Bailey, a director, was, at the making of the contract, interested in the same. President Blake's interest, even if unknown to the board of directors, would not render the contract absolutely void, if otherwise free from fraud or undue advantage. This contract had been made for four months; was apparently in process of execution, with the knowledge of all concerned; and Kittel's acceptance of an interest therein falls far short of showing that he was making himself a party to any contract or scheme to defraud or injure the railroad company. The construction contract, on its face, does not, as defendants Clark and the company claim, carry with it marks of extortion or fraud or bad faith, by reason of the compensation to be given for construction. In enterprises like the one then in hand, which seem to con-

sist of building and equipping a railroad on the proceeds of land grants, subsidies from favored towns, and the sale of securities on the railroad to be built, the second mortgage bonds are nearly always rated at a nominal value, the stock is nominal, and only the first mortgage bonds are valued at anything near par. Certainly, no experienced financier would value $16,000 per mile first mortgage bonds, $7,000 per mile of second mortgage land-grant bonds, and $20,000 per mile of nominal stock, on a line of railroad to be built from the city of Carrabelle to Augusta, Ga., as worth in cash anything more than from sixteen to eighteen thousand dollars per mile.

At the date of contract the company had succeeded in constructing 11½ miles. How this construction was paid for—whether by mortgage bonds or sales of stock—does not appear; but the record does show that Mr. William Clark has recovered a judgment against the company, presumably for sums advanced for constructing that part of the road built at the date of the contract, for the sum of $432,228.42, which is at the rate of over $37,500 per mile.

5. As to the laches of the company. The evidence shows that the money loaned by Kittel was paid over to the railroad company, and used by the officers of the company for company purposes; that the knowledge of the first loan, of $25,000, was communicated to the principal director, Clark, a few days after the loan was made; that in December, 1889, about three months after its date, the mortgage was recorded in the state of Florida, and knowledge of that recordation was brought home to the directors other than Blake and Bailey. Until the answer was filed in this case, March 9, 1891, there was no repudiation of the loan and mortgage, no denial communicated to Kittel, on the part of the board of directors, of the authority of the president to execute the notes and grant the mortgage. True it is that in November, 1890, after Blake's resignation as president, the directors, by resolution, rescinded the minutes of the meeting of May 24, 1889, so far as they showed a resolution authorizing the president to execute a mortgage of the Florida lands; but this action was not notified to Kittel, nor followed by any proceedings to nullify the mortgage or return the loan. In the mean time the company spent the money, and recognized the validity of the transaction by paying interest and renewing the notes, and Director Clark obtained, by default, his large judgment against the company.

On the whole case, it seems to us that as Kittel loaned his money and took the mortgages in good faith, as the company had the benefit of the same, as the directors and officers of the company, by permitting Blake, president, to manage and control the affairs of the company without oversight and scrutiny, and by neglect of their duties and responsibilities enabled Blake and Bailey to deceive Kittel, if he was deceived, and as the directors and officers, after discovering the loan by and mortgage to Kittel, failed to take prompt action of disaffirmance, and otherwise were guilty of laches, the transactions had between Kittel and the company should be treated as fully ratified on the part of the company.

In *Indianapolis Rolling Mill* v. *St. Louis, etc., Railroad*, 120 U. S. 256,

7 Sup. Ct. Rep. 542, it was held that where a board of directors, when notified of what had been done by their agents, did not disaffirm their action within six months, the disaffirmance came too late. This doctrine was affirmed in *Pennsylvania Ry. Co.* v. *Keokuk & H. Bridge Co.*, 131 U. S. 371–381, 9 Sup. Ct. Rep. 770, as follows:

"When the president of a corporation executes in its behalf, and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his acts."

And the same doctrine was again affirmed in *Construction Co.* v. *Fitzgerald*, 137 U. S. 109, 11 Sup. Ct. Rep. 36.

The decree appealed from should be affirmed; and it is so ordered.

CITY OF NEW ORLEANS *v.* PEAKE.

(Circuit Court of Appeals, Fifth Circuit. June 23, 1892.)

No. 46.

1. APPEALABLE DECREE—FINALITY—CONFIRMATION OF SALE.
A creditor of the drainage fund held in trust by the city of New Orleans caused a receiver of the fund to be appointed, to whom, by order of court, a regular notarial transfer of its assets was made. Thereafter the receiver sold the property, and the court confirmed the sale. *Held*, that the decree of confirmation was a final decree, from which an appeal would lie to the circuit court of appeals, since it finally disposed of the possession and ownership of the property.

2. APPEAL—PARTIES.
It appearing from the record that the city was the main defendant in the court below, and that it claimed to be a large creditor of the fund, and entitled to preference over other creditors, it had an interest entitling it to appeal from the decree, notwithstanding that its title to the property was divested by the notarial transfer.

3. JUDICIAL SALE—VALIDITY—VARIANCE BETWEEN ORDER AND ADVERTISEMENTS.
The order of sale directed the delivery to the purchasers of good and valid titles free from all liens, mortgages, or incumbrances. In the advertisements of the sale the words "and taxes" were added. *Held* that, in the absence of objection by the purchaser, this variance was immaterial, especially as it appears to be the duty of the receiver, under Rev. St. La. § 3147, to either sell property free of taxes, or see that the taxes are paid before passing title.

4. SAME—SALE IN BLOCKS—STREETS.
The fact that the property was advertised and sold in blocks intersected by public streets does not show that the court either ordered or approved a sale of the fee in the streets, when it appears that the sale was in the same lots or blocks existing when the city acquired title, and when the property was transferred to the receiver by the notarial act, and that a large plat, showing the position of the streets, was exhibited at the sale, thus charging the purchasers with notice of their location.

5. SAME—SUBDIVISION.
It was not unlawful to sell the property in such blocks, when it appears that to survey and subdivide it would be very expensive, and without substantial benefit.

Appeal from the United States Circuit Court for the Eastern District of Louisiana.

In Equity. Bill by James W. Peake, a judgment creditor of the drainage fund of New Orleans, in his own behalf, as well as in behalf of other parties similarly situated, against the city, as trustee of the