any authorities sustaining this suggestion, and is compelled to treat this certificate, indorsed in blank and stolen, as it would any other stolen property, aside from strictly negotiable securities. There has been at times a disposition to lay down broadly rules touching negligence in cases analogous to this. In *Bank* v. *Stowell*, 123 Mass. 196, these rules were largely discussed. The opinion pointed out that they apply only when there is some special duty or confidential relation between the parties, as between a depositor and the bank; and it was held that the maker of a note was not liable for the increased amount by which it was raised, notwithstanding the careless manner in which he had drawn it. The same principle was also discussed in *Baxendale* v. *Bennett*, *ubi supra;* where it was held that, although the defendant had completed a blank acceptance, and left it in the drawer of his writing table, which was unlocked, from which it was stolen, and afterwards filled up and purchased by an innocent party, yet he was not liable thereon. In *Abbott* v. *Rose*, 62 Me. 194, 204, the broader rule was stated with favor, but it was not material to the case, and is not harmonious with the principles of the later decisions,—*Breckenridge* v. *Lewis*, *ubi supra*, and other cases already cited. In all the cases in any way pertinent relied on by the counsel of Mrs. Lee there was a voluntary intrusting of actual possession by the holder. On the whole, the court is unable to find any principle of the common law which will protect her; and the case at bar, though in equity, involves only common-law rights. Let there be a decree that the blank transfer on the certificate of stock in question in this case, deposited in the registry of the court, be filled up in favor of defendant Robinson, and that the plaintiff corporation issue him a new certificate in exchange therefor, and that complainants recover one half of their costs from defendant Robinson and one half from defendant Lee.

---

FINANCE CO. OF PENNSYLVANIA *v.* CHARLESTON, C. & C. R. Co. *et al.*, (POCAHONTAS COAL CO. *et al.*, Interveners.)

(*Circuit Court, D. South Carolina.* November 4, 1892.)

RAILROAD COMPANIES—RECEIVERS—CLAIMS OF MATERIAL MEN—DIVERTED EARNINGS.

A diversion by a railroad company of $2,300 from the payment of claims for material used in keeping the road a going concern, to the permanent improvement of the road, or to the payment of interest on bonds, must be made good by the bondholders, and is so made good by the issue of receiver's certificates and the application of their proceeds to such claims, and the material men are entitled to no further preference from the proceeds of the sale. *Fosdick* v. *Schall*, 99 U. S. 235, followed.

In Equity. Bill by the Finance Company of Pennsylvania against the Charleston, Cincinnati & Chicago Railroad Company and others. D. H. Chamberlain appointed receiver. 45 Fed. Rep. 436. The Poca-

hontas Coal Company and others intervene by petition to assert claims for materials furnished. Reference to a master ordered. 48 Fed. Rep. 188. Heard on master's report.

*B. A. Hagood*, *Hugh Sinkler*, *A. M. Lee*, *Buist & Buist*, and *Inglesby & Miller*, for petitioners.

*S. Lord* and *A. T. Smythe*, for respondent.

SIMONTON, District Judge. These are claims by material men, proved and allowed in this court. The petitioners prayed an order for payment out of funds in the hands of the receiver; failing these, that provision be made for them out of the proceeds of the sale of the road, when such sale be ordered. The cases were heard and considered. The opinion of the court can be found in 48 Fed. Rep. 188. The court held that the petitioners had established their equity. A reference was ordered to ascertain whether the Charleston, Cincinnati & Chicago Railroad ever earned any income. Was any portion of it applied to the payment of interest or to any permanent improvement of the property, or in any way for the benefit of the bondholders? How much? The master has made his report, which shows that there was no payment of interest by the road, but that the sum of $2,300 was taken from cash in the hands of Receiver Lord, derived from earnings, and applied to the construction of the road at and near Marion, N. C. Mr. Lord, temporary receiver, turned over to Mr. Chamberlain, his successor, permanent receiver, $4,000, derived from earnings. Shortly after his appointment, Mr. Chamberlain filed a petition for leave to issue receiver's certificates to meet certain pressing claims. Mr. Lord had had leave to issue such certificates, but had not used the privilege. In his petition, Mr. Chamberlain sets out the claims to be paid, aggregating $48,854.81. He estimates that with $30,000 in certificates and his earnings he can get along comfortably, and he obtained leave to issue the $30,000 in certificates. The expenditure for the road to Marion is not in his list of claims to be paid. These were:

| | |
|---|---|
| For taxes, | $12,605 90 |
| Freight balances, | 19,136 33 |
| Cross-ties, | 7,567 47 |
| Pay rolls, | 9,593 33 |
| | $48,901 93 |

The larger part of these were due before any receiver was appointed. Neither under Mr. Lord nor under Mr. Chamberlain has the railroad company been able to earn its running expenses, and keep down the payment of taxes. It thus appears that when Mr. Lord used $2,300 in building the Marion connection he borrowed that sum from moneys urgently needed for pressing demands, and that these demands were met by the issue of receiver's certificates, displacing the lien of the bondholders to the extent of $30,000. The underlying principle of *Fosdick* v. *Schall*, 99 U. S. 235, and the cases following it is this: The earnings of the railroad must first be applied to meet the outlays necessary to

keep it a going concern. After this application only can the bondholders lay any claim to them. If earnings have been diverted from this primary purpose, and used for the advantage of the bondholders, either in payment of interest or in permanent improvements which tend to enhance the value of the property, the sums thus diverted must be restored. This restoration may be from the income. If this fail, then the diversion must be met out of the proceeds of sale. There was in this case a diversion of some $2,300. This the bondholders must restore. They have, in fact, restored it by consenting to the displacement of their lien by the issue of receiver's certificates to the amount of $30.-000. These must be paid out of the proceeds of sale. The money they furnish has been applied to claims of the same rank as those held by the petitioners, and this exonerates the bondholders from any further assessment. It thus appears that the petitioners have no equity which can displace the vested lien of the bondholders. The prayer for preference from the proceeds of sale is refused.

---

## FINANCE CO. OF PENNSYLVANIA *et al.* *v.* CHARLESTON, C. & C. R. CO. *et al.*, (MOON, Intervener.)

*(Circuit Court, D. South Carolina.* November 8, 1892.)

1. RAILROAD COMPANIES—RECEIVERS—LABOR AND SUPPLY CLAIMS—PRIORITIES.
   A lawyer, employed by a railroad company at a fixed salary in a state where the road is in course of construction, but not yet in operation, is not entitled, on the appointment of a receiver in foreclosure proceedings, to receive payment out of the proceeds of the sale, prior to the satisfaction of the mortgage bonds, even though earnings of the road have been improperly diverted from current expenses for the benefit of bondholders; for the equity to a return of diverted earnings applies only in favor of those who have helped to keep the road a going concern. *Fosdick* v. *Schall*, 99 U. S. 235, distinguished.
2. RECEIVERS—ORDER FOR PAYMENT OF EMPLOYES—SALARIED LAWYER.
   An order appointing a receiver authorized him to pay out of income, besides the current expenses and charges, all wages due to employes at the date of the order for services within 90 days theretofore. *Held*, that a lawyer employed at a fixed salary per month came within the terms of the order.
3. ATTORNEY'S LIEN.
   A lawyer who renders legal services to a railroad company at a fixed salary, and who advances money for the company's purposes, is entitled to a lien for the retention of papers for the whole amount of his claim.

In Equity. Bill by the Finance Company of Pennsylvania and others against the Charleston, Cincinnati & Chicago Railroad Company and others. A receiver was appointed. 45 Fed. Rep. 436. Heard on the intervening petition of John B. Moon. Decree for intervener.

*B. A. Hagood*, for petitioner.

*Samuel Lord* and *A. T. Smythe*, for respondents.

SIMONTON, District Judge. This case comes up on the report of the special master. The petitioner, a member of the bar of Virginia, of