

was held in Minnesota that a tax judicially assessed is not void because the land was exempt (County of Chisago v. St. Paul & D. R. Co., 27 Minn. 109, 6 N. W. 454); and the same ruling was made in England in respect to an assessment of a poor rate to the occupier of land, exempt because it belonged to a literary society (Birmingham v. Shaw, 10 Adol. & E. [N. S.] 868, 880, 59 E. C. L. 867, 879). The record of the state board of tax commissioners cannot be contradicted, varied, or explained by evidence aliunde, touching any matter whose decision is committed to it, any more than can the record of a court of general jurisdiction. Railway Co. v. Backus, supra. And it is clear, beyond dispute, that among the things expressly committed to it is the determination of what property is properly subject to assessment by it. This is the first question which it must determine in the exercise of its jurisdiction. Some tribunal must be intrusted with this power, and the legislature has confided it to a board composed of the most eminent personages in the state. The power is an important and delicate one, which cannot be administered with unerring certainty in every case, but its determinations are as likely to be unmixd with error and partiality as any other tribunal to which these questions could be committed. In the absence of fraud, the citizen who is aggrieved by its erroneous judgments must submit, without remedy. It follows that the answer is insufficient.

---

HOOK et al. v. BOSWORTH et al.

(Circuit Court of Appeals, Seventh Circuit. November 27, 1894.)

No. 170.

1. RAILROAD FORECLOSURE—APPOINTMENT OF RECEIVER—OF RAILROAD NOT A PARTY.

A suit was brought by the trustee of a mortgage, made by the C. Ry. Co., for the foreclosure of such mortgage, and in such suit receivers were appointed, not only of the property of the C. Ry. Co., but of that of several other railway companies, not mentioned in the mortgage or made parties to the bill, but which were operated with the defendant company in one system, upon some plan not disclosed by the record; and certain petitions, cross petitions, and bills of parties whose relation was not shown by the record, were consolidated with the foreclosure suit; and the receivers so appointed were afterwards ordered to turn over the property of the J. Ry. Co., one of such other companies, to that company. *Held*, that the court was without jurisdiction to appoint receivers of the property of such companies, other than the defendant; that the order making such appointment, if not absolutely void, was revoked as to the J. Ry. Co. by the direction to the receivers to return its property to that company; and that the court could not direct persons who had received moneys belonging to such company to turn them over to the receivers.

2. SAME—RECEIVER'S RIGHT TO EARNINGS.

Where a railroad mortgage contains a provision that until default the mortgagor shall remain in possession of the railway, etc., exercise its franchises, and collect and use its revenues, a receiver appointed in a suit for foreclosure of the mortgage, the filing of the bill constituting the first demand for possession of the road, is not entitled to moneys earned by the railroad company prior to the filing of the bill, though not paid until after the appointment of the receiver.

**On Appeal from the Circuit Court of the United States for the Southern District of Illinois.**

Petition in the nature of a bill in equity by C. H. Bosworth and E. Ellery Anderson, receivers of the Chicago, Peoria & St. Louis Railway Company, against William S. Hook and Marcus Hook, to require defendants to pay petitioners certain money collected for transportation of mail. Petitioners obtained a decree. Defendants appeal. Reversed.

Isaac L. Morrison and Thomas Worthington, for appellants.

Bluford Wilson (Philip Barton Warren, of counsel), for appellees.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

**JENKINS, Circuit Judge.** The Chicago, Peoria & St. Louis Railway Company owned a railway in the state of Illinois extending from the city of Pekin to Jacksonville, with a branch line from Havana to Springfield. The Jacksonville, Louisville & St. Louis Railroad Company owned a railway extending from Jacksonville to Centralia, a distance of about 112 miles. The Litchfield, Carrollton & Western Railroad Company and the Louisville & St. Louis Railway Company were respectively the owners of other lines of railway, the record not disclosing their location. It may be inferred, however, that they connected at one or more points with the other railways mentioned. Each railway company was an independent corporation, and it is to be inferred from the record, although not specifically so stated, that these several lines of railway were parts of one general system, and were operated together under some arrangement not disclosed by the record. On the 21st day of September, 1893, the Mercantile Trust Company of New York filed its bill in the court below against the Chicago, Peoria & St. Louis Railway Company to foreclose a mortgage or trust deed upon the railway from Pekin to Jacksonville and from Havana to Springfield. On the same day the court appointed the appellees receivers of the lines of railway mentioned. The order provided, among other things, that the receivers should forthwith be in possession of, operate, and maintain said railway and premises—

“Being the railroad of the Chicago, Peoria & St. Louis Railway Company, comprising also the Jacksonville, Louisville & St. Louis Railroad Company, the Litchfield, Carrollton & Western Railroad Company, and the Louisville & St. Louis Railway Company, and including a partially constructed line of railway northwestwardly from Havana, together with all the constituent railroad lines now operated by said Chicago, Peoria & St. Louis Railway Company, commonly known as the ‘Jacksonville Southeastern Line,’ more fully and particularly described as follows, to-wit: Extended, lying, and being a railroad from the city of Pekin, through the counties of Tazewell, Mason, Cass, to and through the city of Jacksonville, in the county of Morgan; and thence, through the said county of Morgan and the counties of Macoupin and Montgomery, to and through Litchfield; and thence, through the counties of Montgomery, Macoupin, Madison, and St. Clair, to East St. Louis, in the said last-named county; and from Litchfield southeasterly, through the counties of Montgomery, Bond, and Clinton, to Centralia, in the county of Marion; and thence through the county of Marion, to Drivers, in the county of Jefferson; and from Havana, in said county of Mason, to

Petersburg, in the county of Menard; and thence to Springfield, in the county of Sangamon; also, from Barnett westerly through Carlinville, in said county of Macoupin; thence through Carrollton, in the county of Greene, to Columbiana, on the Illinois river,—together with all interests in, and contract rights and privileges for, the use of the Peoria & Pekin Union Railway from the said city of Pekin to the city of Peoria, in the county of Peoria, and all terminal contract rights and privileges at East St. Louis, all in the state of Illinois, together with all equipment owned, leased or held in car trusts or otherwise, and the tolls, rents, incomes, franchises, issues, and profits of the said Chicago, Peoria & St. Louis Railway Company and its said constituent companies, and all their appurtenances, as well as their land and other premises as now held, used, and operated by the said company, as fully described in their existing mortgages, deeds of trust, leases, contracts, and other evidences of title and possession, reference thereto, for greater certainty, to be had, with all property rights, powers, privileges and franchises and equities now owned, possessed, held or controlled by the said the Chicago, Peoria & St. Louis Railway Company; it being the purpose and intention of this order to clothe the said receiver with all property rights, powers, privileges, and franchises now owned, possessed, held, or controlled by the said 'the Chicago, Peoria & St. Louis Railway Company, or any of the said constituent or affiliated lines now under a common management as the Jacksonville Southeastern Line.' "

The bill of complaint in that case contained no reference to the Jacksonville, Louisville & St. Louis Railroad Company, or to any other of the companies above mentioned. Neither of them was a party to the bill, nor is any statement made therein of the manner in which, or the company by whom, such lines of railway were operated. The prayer of the bill, in addition to the usual prayer for foreclosure, asked for a receiver of the property covered by the mortgage of the Chicago, Peoria & St. Louis Railway Company, which mortgage did not affect any of the lines referred to other than those of that company. On the same day the court below ordered that certain petitions, cross petitions, and bills in the cases against the Chicago, Peoria & St. Louis Railway Company, namely, R. J. Cavett, receiver (entitled and filed in the cause of the Mercantile Trust Company against the St. Louis & Chicago Railway Company et al.), John M. Coughlin et al. (entitled and filed in the intervening petition of R. J. Cavett, receiver), Woodward & Tiernan Printing Company, the St. Louis & Eastern Railway Company, and the Atchison, Topeka & Santa Fé Railroad Company, be consolidated with the foreclosure suit mentioned, and under the title of that suit, and that they thereafter proceed under said name as one suit, with all rights reserved. The record before us is silent with reference to the character of those petitions, cross petitions and cross bills, or of the suit against the St. Louis & Chicago Railway Company. The receivers so appointed took possession not only of the property of the Chicago, Peoria & St. Louis Railway Company, but also of the lines of railway of the other companies mentioned. On the 5th of December, 1893, the court directed the receivers to return to the Jacksonville, Louisville & St. Louis Railroad Company its railway and property. On the 9th of December, 1893, one Henry W. Putnam filed his bill against the Jacksonville, Louisville & St. Louis Railroad Company for the foreclosure of a certain mortgage or trust deed upon the line of railway of that company from Jacksonville to Centralia, and

prayed for the appointment of a receiver, and on that day Mr. S. P. Wheeler was appointed such receiver. Thereupon, on that day, an order was entered by the court in the case of the Mercantile Trust Company against the Chicago, Peoria & St. Louis Railway Company, reciting the appointment of a receiver of the Jacksonville, Louisville & St. Louis Railroad Company in the Putnam suit, and directing that the property of that company be turned over and delivered by the appellees to, and that the accounting with respect to its management theretofore ordered to be rendered by them to that company be made with its receiver. For the quarter ending October 1, 1893, there became due to the Chicago, Peoria & St. Louis Railway Company from the United States, for the transportation of the mails over its line of railway, the sum of \$4,632.63, of which amount \$453.20 was earned after September 21, 1893, and the remainder was earned prior to the filing of the bill of foreclosure and the appointment of the receivers. For the same quarter there became due to the Jacksonville, Louisville & St. Louis Railroad Company from the United States, for transportation of mails over its line of railway, the sum of \$2,653.56. On the 20th of January, 1894, the appellees, as receivers of the Chicago, Peoria & St. Louis Railway Company, filed their petition in the suit of the Mercantile Trust Company of New York against that company, that the appellants, William S. and Marcus Hook, who had received from the United States the several sums of money mentioned, be required to pay over the same to them. To this petition the Messrs. Hook made answer, setting forth that William S. Hook was, and had for many years been, president and general manager of the Chicago, Peoria & St. Louis Railway Company, and Marcus Hook its auditor and treasurer; that they had received from the United States the sum of \$4,632.63, the compensation for mail service over that road from July 1, 1893, to October 1, 1893; that William S. Hook, upon receiving the usual warrant, transferred the same to Marcus Hook, the treasurer of the company; that of said money the sum of \$453.20 was earned by the road between September 21 and September 30, 1893, and since the filing of the bill and the appointment of the receivers, and which amount Marcus Hook offered to pay to them; and that the balance of the money had been "applied in the payment of debts contracted on account of the operating of such line of railroad, and which in equity should be paid." The answer further admits the receipt from the government of \$2,653.56 for transportation of mails over the Jacksonville, Louisville & St. Louis Railroad, and that Mr. William S. Hook received the same as general manager of that railway company. The mortgages or trust deeds upon the two several railways each contained a provision that "Until default shall be made by the said party of the first part, its successors or assigns, in the payment of interest or principal of said bonds, or the due observance of the covenants and agreements hereinafter contained on the part and behalf of the said party of the first part, the said party of the first part, its successors or assigns, shall be suffered and permitted to remain in actual possession of said railway and premises, and to exercise the franchises and rights relating thereto, and to collect, receive,

and use revenues and profits thereof in any manner which shall not impair the lien created by these presents." The matter of the petition was heard by stipulation of the parties "upon the petition and answer thereto, with the right of either party to refer to, and make a part of the record, any of the files in said consolidated cause, and also the exhibit filed in the case of Henry W. Putnam against the Jacksonville, Louisville & St. Louis Railroad Company, and the interlocutory order entered in said cause appointing Samuel P. Wheeler receiver of the last-named railroad, and the bond and oath of office of said Wheeler." Upon the hearing of the petition the court rendered a decree that the appellants had wrongfully appropriated the several sums of money mentioned, and directed them forthwith to pay over to the petitioners, C. H. Bosworth and E. Ellery Anderson, the receivers of the Chicago, Peoria & St. Louis Railway Company, the sum of \$4,632.63, with interest from the date of the decree, being the amount received for mail service upon the Chicago, Peoria & St. Louis Railway, and also the sum of \$2,653.56, with like interest, being the sum received for transportation of mails over the Jacksonville, Louisville & St. Louis Railroad. The appellants bring here this decree for review.

1. We are unable to understand upon what principle the appellees, receivers of the Chicago, Peoria & St. Louis Railway Company, can maintain the right to recover of the appellants the moneys received by the latter for mail service over the lines of the Jacksonville, Louisville & St. Louis Railroad Company. The latter company was not a party to the suit in which the appellees were appointed receivers. There was neither attack therein made with respect to this railway, nor any claim asserted to its possession. The company was neither served with process in that suit, nor did it appear therein. The court therefore never acquired jurisdiction in that suit to appoint receivers of its property. The order would seem to have been passed upon the assumption that, because all the lines were practically component parts of one system, the public interest would be conserved by the continuance of such management under one head. It is not made clear to us that such necessity existed, nor are we informed why these separate and distinct lines of railway, although co-operating with each other in the conduct of business, could not be operated under separate management. Possibly it is to be preferred, if the interests were identical, that it should be under a single management. That is matter for those pecuniarily interested in the several railways. Such consideration, however, cannot avail to give the court jurisdiction over the property of one not a party to the suit, and with which it was in no legal sense concerned. The mortgage upon the Chicago, Peoria & St. Louis Railway in no way affected the property of the Jacksonville, Louisville & St. Louis Railroad Company, and the bill was wanting in any averment which would sanction the taking possession by the receivers of the property of the latter company. As before stated, we are not informed by the record of the nature of the intervening petitions consolidated with that foreclosure suit. It is intimated that they were by creditors of the Chicago, Peoria & St. Louis Railway Company for debts contracted by

it in the management of all the lines of railway mentioned. We are not informed by the record of the nature of the arrangement, if any, under which these lines were operated as one system. It may possibly be that, while one railway company operating the entire system would be responsible for all debts it incurred, creditors might also have a remedy over against a "constituent or affiliated" company, so called, for debts applicable to the management of a particular line. That would depend upon circumstances not here disclosed. Such right of action would not, however, warrant the taking possession of its property by receivers of another railway in a suit to which it was not a party. We should do violence to a fundamental principle of the law to uphold the right of receivers of one corporation to take possession of the property of another not a party to the suit in which such appointment is made. No one should be concluded without his day in court.

It is insisted that the direction to the receivers to take into their possession and control the railway of the Jacksonville, Louisville & St. Louis Railroad Company was voidable merely, not void. We cannot assent to this contention. If, however, such direction was merely voidable, the order in that regard was, before this petition, set aside and revoked. In a suit to which that company was a party, another has been appointed its receiver, and these appellees, in the suit in which the decree under review was rendered, and before this petition, directed to turn over the property of that company which came to their possession to such receiver. If, under the order of September 21, 1893, they acquired any right whatever over the property of that company, that right was extinguished by the order of December 5, 1893. Subject to the accounting ordered, their functions with respect to that company therefore ceased, if they ever had lawful right, and they thereafter had no more authority to collect debts due to that company than a stranger would have. If there exists any liability on the part of the appellants with respect to the transaction in question, that liability is to the receiver of the company, Mr. Wheeler, and not to the appellees. We perceive no ground upon which that portion of the decree can be sustained.

2. The amount received for mail service for the quarter ending October 1, 1893, was, with the exception of the sum of \$453.20, earned by the Chicago, Peoria & St. Louis Railway Company prior to the appointment of the receivers on September 21, 1893, but received by the appellant William S. Hook subsequently to such appointment. The bill filed that day was the first demand by the trustee for possession of the road. It has been repeatedly held, under clauses similar to that contained in this mortgage, that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken in his behalf by a receiver, or until, in proper form, he demands and is refused possession. *Railroad Co. v. Cowdery*, 11 Wall. 459; *Gilman v. Telegraph Co.*, 91 U. S. 603; *Bridge Co. v. Heidelberg*, 94 U. S. 798; *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420; *Macalester's Adm'r v. Maryland*, 114 U. S. 605, 5 Sup. Ct. 1065; *Grant v. Insurance Co.*, 121 U. S. 105, 7 Sup. Ct. 841; *Dow v. Railroad Co.*, 124 U. S. 652, 8 Sup. Ct. 673; *Sage v.*

Railroad Co., 125 U. S. 361, 8 Sup. Ct. 887. So that the complainant trustee, or the receivers as its representatives, have no right to the earnings prior to the filing of this bill. As to the amount earned since the bill was filed, there is no contention. The appellants concede the right of the appellees thereto. What right the receivers would have to the fund earned prior to the filing of the bill, if they represented judgment creditors, we do not find it necessary to determine. As we have before observed, the record discloses that certain intervening petitions, cross petitions, and bills (some of them filed in the cause of the Mercantile Trust Company against the St. Louis & Chicago Railway Company, of the nature of which suit we are not informed) were ordered to be consolidated with the principal cause for the foreclosure of the trust deed or mortgage. The record is wholly silent with respect to the nature of those petitions, cross petitions, and bills, and to the character which the petitioners, cross petitioners, and complainants therein assumed. We are only told that those proceedings, whatever they were, were consolidated with the principal suit. The stipulation under which the hearing was had reserved the right to either party to make part of the record upon such hearing any of the files in the consolidated cause, but from the certificate of evidence it appears that none of these intervening petitions or bills were presented in evidence or considered. We are therefore unable to say that the appellees represent creditors as well as the trustee. We cannot, therefore, adopt the suggestion of counsel that these intervening petitions, etc., represent "labor, supply, and traffic balance creditors." The fact does not appear from the record. We cannot assume it. It is, moreover, to be observed that by the stipulation the cause was heard "upon the petition and answer thereto," with right reserved to make part of the record certain exhibits mentioned. The petition here was in the nature of a bill in equity. The answer thereto asserted that the moneys in question received by the appellees for the earnings of the road prior to the receivership had been by the appellants "applied in the payment of debts contracted on account of the operating of such line of railroad, and which in equity should be paid." No issue was taken upon this answer, but the hearing proceeded upon the express agreement, as we construe it, that the facts stated in the petition and answer should be taken as true, the rule being that, in case of inconsistency between the bill or petition and the answer, the averments of the latter must be taken to be true. According to this record, therefore, the appellants have expended this money in the discharge of obligations incurred in the operation of the road which in equity should be paid. It would seem inequitable, under such circumstances, that they should be called upon to respond to the receivers for the amount so paid, unless possibly it might be claimed that they had no right, after the appointment of receivers, to receive or to so disburse the money as against representatives of creditors, appropriating it wholly to the payment of debts of their selection, when the debts discharged had only right to share ratably with other indebtedness of the corporation. We are, however, from this record, unable to

regard these receivers as representatives of others than the trustee of the mortgage, who is not entitled to the earnings prior to the receivership. The decree will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

SOUTHERN CALIFORNIA MOTOR-ROAD CO. v. UNION LOAN &  
TRUST CO. et al.

(Circuit Court of Appeals, Ninth Circuit. October 24, 1894.)

No. 129.

1. RAILROAD MORTGAGE—USUAL COVENANTS—ALLOWANCES TO COUNSEL.

A resolution of a board of directors of a railroad company, authorizing an issue of bonds, directed that such bonds should be secured by a mortgage "with the usual covenants and agreements." *Held*, that a covenant that the trustees should be entitled to just compensation, and to be reimbursed for all necessary expenses, "including expenses of all necessary attorneys, counsel, or agents in and about said trust," is properly inserted in the mortgage, and justifies the court in allowing counsel fees in a suit for foreclosure of the mortgage.

2. COUNSEL FEES—AMOUNT OF ALLOWANCE.

The amount of an allowance for counsel fees is, necessarily, to a great extent within the sound discretion of the trial court; and, finding nothing to indicate an abuse of discretion, this court declines to reduce an allowance of \$15,000 in this case.

3. RAILROAD MORTGAGE—CHATTEL MORTGAGE ACT.

Where a statute of a state (Civ. Code Cal. § 456) makes special provision for the mortgage by railroad companies of their property and franchises, a mortgage by such a company of its property and franchises, though including locomotives and rolling stock, is not subject to the provisions of another statute (Id. §§ 2955, 2959), relating generally to chattel mortgages, and requiring such mortgages to be accompanied by an affidavit of good faith.

Appeal from the Circuit Court of the United States for the Southern District of California.

This was a suit by the Union Loan & Trust Company against the Southern California Motor-Road Company and others to foreclose a mortgage. Decisions were rendered respecting the payment of certain moneys for grading and macadamizing (49 Fed. 267), and, on motion of defendant, for payment of its counsel fees (51 Fed. 106). On final hearing, a decree of foreclosure and sale was entered. 51 Fed. 840. The Southern California Motor-Road Company appeals.

R. E. Houghton, for Southern California Motor-Road Co.

Charles D. Houghton, for Mary A. Franklin.

Curtis, Oster & Curtis, for San Bernardino Nat. Bank.

Edwin H. Lamme, for Union Loan & Trust Co.

W. J. Curtis and Chapman & Hendrick, for First Nat. Bank of San Bernardino.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity brought by the Union Loan & Trust Company, as trustee, to foreclose a mortgage executed by the Southern California Motor-Road Company, to



secure the payment of certain of its bonds which were issued to enable it to construct its road. The principal question involved upon the appeal was whether the bonds were regularly issued, and the oral arguments were directed to that question; but, since the cause was argued and submitted, appellant has withdrawn from the consideration of this court "all opposition interposed \* \* \* to the invalidity or irregularity of the issue, or to the invalidity or irregularity of the transfer or sale of the bonds in suit." This withdrawal leaves only two questions for consideration, viz.: First. Did the court err in the matter of the allowance of counsel and receiver's fees? Second. Did the court err in ordering, by its decree, that the sum of \$12,000 should be retained out of the proceeds of the sale of the property of said motor-road company to satisfy the claim of the First National Bank of San Bernardino?

1. The contention of appellant is that no authority was ever given by the stockholders or board of directors to include in the mortgage the allowance of any counsel fees, and that no provision was made in the mortgage for the allowance of the same. This contention cannot be maintained. The resolution of the board authorizing the issuance of the bonds ordered that they should be secured by a first mortgage or deed of trust, "with the usual covenants and agreements to fully secure the payment of said bonds," etc.; and the mortgage contained a covenant that the trustee should be entitled to just compensation, and to be reimbursed for all necessary expenditures, "including expenses of all necessary attorneys, counsel, or agents in and about said trust, to be paid by the party of the first part." We are of opinion that this is such a "usual covenant" as was authorized by the board to be inserted in the mortgage, and that it justifies the action of the court in allowing counsel fees herein. The court allowed the sum of \$15,000 as counsel fees, and allowed the receiver for his services at the rate of \$6,000 per annum. These allowances are claimed by appellant to have been excessive and wholly unwarranted. The compensation to be allowed to counsel and receivers must in all cases be determined according to the circumstances of each particular case, and should correspond with the degree of care, responsibility, and ability that is required. Allowances of this character are necessarily, to a great extent, within the sound discretion of the trial court, "since it has far better means of knowing what is just and reasonable than an appellate court can have." *Stuart v. Boulware*, 133 U. S. 78, 82, 10 Sup. Ct. 242. We find nothing in the record which would justify us in saying that the court abused its discretion, and we decline to interfere with the action of the court in this respect.

2. The mortgage given by the motor-road company is prior in date to the attachments under and by virtue of which the First National Bank asserts its lien upon the rolling stock of said company. The statute of California provides that chattel mortgages may be made upon "locomotives, engines, and other stock of a railroad." Civ. Code, § 2955. And section 2957 provides that:

"A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good

faith and for value, unless, 1st, it is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors."

The mortgage not being accompanied by such an affidavit; the circuit court held that the attachment liens of the bank were superior to the mortgage. *Union Loan & Trust Co. v. Southern California Motor-Road Co.*, 51 Fed. 851. There is a great diversity of opinion upon this question in the different state courts where no express statute exists upon the subject. *Jones, Ry. Sec. § 150.* Several of the states, owing to the conflict in the decisions of the courts, have settled the matter by direct legislation. In all of the decisions which hold that the locomotives, engines, and other rolling stock of a railroad are subject to the provisions of the act relating to chattel mortgages it is conceded, if the question is referred to, that, if there is an independent statute of the state authorizing railroad companies to mortgage their corporate property and franchises to secure the payment of their bonds, the chattel-mortgage act would not be applicable, because it must be and is universally acknowledged that it is within the power of the legislature of a state to regulate the mode and prescribe the manner in which the real and personal property within the state may be conveyed or mortgaged. The Civil Code of California, in dealing with the subject of railroads and of corporate stock, provides that railroad corporations, for the purpose of constructing and completing their roads, may, among other things, "mortgage their corporate property and franchises." Civ. Code, § 456. There are no conditions attached to this power. It is absolute, and gives to the railroad the right to mortgage its personal, as well as real, property for the purpose mentioned, without incumbering it with any of the conditions attached to the chattel mortgage act. The act relating to chattel mortgages may be applicable in cases where a mortgage is given by a railroad company simply upon its "locomotives, engines, or other stock," wholly independent and separate from its franchises and other corporate property; but when the mortgage of a railroad company, as in the present case, covers personal property in connection with the real estate and corporate franchises, as it is authorized by statute to do, such a mortgage creates a valid and binding lien on its personal as well as its real property, and the provisions of the chattel-mortgage act have no application to such a mortgage.

The decree of the circuit court is hereby modified by striking out therefrom that portion which provides for a reservation of the sum of \$12,000 from the proceeds of the sale, to be applied to the payment of the claim of the First National Bank of San Bernardino, and in all other respects it is affirmed. The Union Loan & Trust Company is entitled to recover its costs herein against appellant. Appellant is entitled to recover from the First National Bank one-tenth of the costs of the record on appeal, and all other costs by it incurred in presenting the issues between it and the bank.

## RISLEY v. VILLAGE OF HOWELL.

(Circuit Court of Appeals, Sixth Circuit. October 15, 1894.)

No. 174.

**MUNICIPAL BONDS—VALIDITY—FRAUD IN EXERCISE OF POWER TO ISSUE.**

If, in municipal bonds, the recitals of facts, taken collectively, are such as naturally and reasonably would inspire the confidence and belief of purchasers in the existence of the conditions which would make their issue lawful, and that was the intended and expected consequence of incorporating those recitals in the bonds, a bona fide purchaser would not be chargeable with notice, and defeated in his right of recovery as such, by the fact that an ordinance, recited in the bonds by its date only, misappropriated the bonds to an unlawful use. *Hackett v. Ottawa*, 99 U. S. 86, followed.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

This was an action by Oliver H. K. Risley against the village of Howell on certain bonds and coupons. Judgment was given for the defendant. 57 Fed. 544. Plaintiff brings error.

This case was brought here upon a writ of error to the circuit court for the Eastern district of Michigan. The facts were found by the court, a jury having been waived. Upon the facts thus found the conclusions of law were resolved against the plaintiff, and, judgment in conformity therewith having also been rendered against him, he sued out this writ, alleging that upon the facts found the judgment should have been for him. The action was brought to recover the amount claimed to be due upon certain bonds and coupons issued by the defendant.

The legislature of the state of Michigan in 1885 passed an act (found in the Local Acts of that year at page 16) authorizing the common council of the village of Howell to borrow money on its faith and credit, and to issue its bonds therefor, to the amount of \$20,000, which should be expended in making public improvements in the village, upon a vote of a majority of the electors of the village in favor of such loan, at a meeting called as provided in the act. This power was substantially conferred by the first section. Section 2 provided for the manner of taking the vote. Section 3 provided that: "If such loan shall be authorized by a majority of such electors, said bonds may be issued in such sums not exceeding the amount hereinbefore limited, and payable at such times with such rates of interest, not exceeding six per centum per annum, as the said common council shall direct, and shall be signed by the president of said village and countersigned by the recorder of said village, and negotiated by or under the direction of said common council, and the money arising therefrom shall be appropriated in such manner as said common council shall determine for the purpose aforesaid, and the said common council shall have power, and it shall be their duty, to raise by tax upon the taxable property of said village, such sum or sums as shall be sufficient to pay the amount of said bonds and the interest thereon as fast as the same may become due." This act was approved February 25, 1885, and ordered by the legislature to take immediate effect. On the following 5th day of March the common council of the village passed a resolution to submit to the electors the question whether money should be raised to the amount of \$20,000, to be secured by the bonds of the village, for the purpose of making public improvements therein, and directing the manner of the submission. The election was held on the 23d day of March ensuing, in accordance with the provisions of the above resolution, and resulted in a vote of 437, in a total vote of 443, in favor of the proposition submitted. The vote was canvassed by the common council, and the result minuted in its records. No action was taken by the common council in reference to the subject until the 12th day of August, 1885, upon which day it adopted an