tion; further, that, under the rule prevailing in the courts of Texas, the execution of the deed of trust did not vest the legal title in him, but merely conferred a power of sale, for which reason he had no interest in the subject-matter, and was not a necessary party to the foreclosure suit. In respect to the citizenship of Ward, it was argued that there was no controversy whatever between him and the defendant; that he merely set up in his answer the amount of his claim, as he was required to do by the bill; that the claim was in no way controverted; and, Ward being president of the defendant company, it was asserted as a matter of fact that he joined with the company in fighting plaintiff's claim, which was the only controversy in which he was involved. In regard to the second point, it was contended that the agreement contained no implications that the original evidences of indebtedness held by complainant must be surrendered on receiving the new notes and stock for which the agreement provided, and that, on the evidence produced, no such agreement was shown.

Chas. S. Todd and M. L. Crawford, for appellant.
R. R. Taylor and F. H. Prendergast, for appellee Rodgers.
G. J. R. Armistead, for appellee Ward.
Elijah Robinson, for appellee National Bank of Commerce.
L. S. Schluter, for appellee Atlanta Bank.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. In our opinion, none of the assignments of error urged by the appellant are well taken, and therefore the decree appealed from is affirmed.

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COUPER et al. v. GABOURY et al.

(Circuit Court of Appeals, Fifth Circuit. May 21, 1895.)

No. 362.

MECHANICS' LIENS—RAILROAD CONTRACTORS—FLORIDA STATUTES.

The Florida statute of June 3, 1887, which gives a superior lien to any persons "who shall perform any labor upon or for the benefit of any railroad," etc., is to be construed as extending its benefits to a railroad contractor who has furnished work and labor for construction, as well as to those actually performing labor.

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

This was a suit by Gaboury, Armstrong & Co., contractors (J. King joining as assignee of the account), against the Arcadia, Gulf Coast & Lakeland Railroad Company and the De Sota County Bank, as mortgagee of the railroad company, to enforce a lien alleged to arise under a construction contract. Numerous parties intervened, setting up claims against the railroad company, and the cause was referred to a special master. The master, among other things, found in favor of the lien set up by complainants, and an exception to this finding was overruled by the court, and a decree entered accordingly. From this decree appeals were taken by W. P. Couper & Co., interveners, and by Ziba King, receiver of the De Sota County Bank. In overruling the exceptions, LOCKE, District Judge, delivered the following opinion:

The only question in this case that seems to demand a very careful investigation is whether or not section 2 of chapter 3747 of the Laws of Florida (the act of June 3, 1887), which gave a lien to any person performing any labor upon or for the benefit of any railroad, gave a lien to a contractor who performed such labor by others. At the time the contract in this case was made this act was in force. Subsequently, by a special act, legislative commissioners were appointed to prepare and cause to be printed the laws of Florida then in force, and they prepared and caused to be printed and published what is known as the "Revised Statutes of the State of Florida," which were finally approved June 8, 1891. In this revision the commissioners, in section 1727 of such revision, provided that any person performing by himself or others any labor upon any railroad should have a lien upon the property of said road. It is under this provision that petitioner Couper claims a lien, his contention being that, as the law stood before revision, no contractor had a lien, but under the revision such right was given. There was no legislation upon this subject in order to effect the change of right given under the statute, and, if such change was made, it must be held to be in violation of the intention of the legislature. The presumption is, therefore, that there was no change in the force and effect of the former statute, but the revision only more clearly and plainly expressed the intention in enacting the law of 1887. This revision and construction was approved by the legislature, very many members of which had been members of the legislature which had passed the original statute. This construction is supported by the language of the eighth section of the act of 1887, which provides that contractors or subcontractors shall furnish a list of all persons employed to the person having the work done, under the penalty of having such contractors' or subcontractors' lien barred. It is an elementary principle in the construction of statutes that the entire statute shall be considered together, and not one particular section of it; and, examining the second section of this law in the light of the language of the eighth section, it is impossible to conclude that it was the intention of the legislature to confine the benefits of such act to the wageworkers, excluding contractors, although the courts of numerous other states have given such construction to somewhat similar statutes. In the act of 1885 it is plainly seen that contractors or subcontractors were not considered as having a lien, but the eighth section of the act of 1887, which in all other respects takes the place of section 2 of the act of 1885, shows that that change was intentional, and treated contractors as entitled. Not only this, but the supreme court of Florida, in Trustees of Wylly Academy v. Sanford, 17 Fla. 163, has plainly and clearly recognized the right of a lien in contractors. The exception to the master's report in this respect must therefore be overruled.

J. B. Wall, for appellants.

James B. Guthrie, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. The question raised on this appeal is whether the act of June 3, 1887 (chapter 3747 of the Laws of Florida), gives to a contractor a lien upon a railroad upon which he has under contract furnished work and labor. We concur with the ruling and opinion of the court below in favor of such lien, and the decree appealed from is therefore affirmed.

## FARMERS' LOAN & TRUST CO. v. ROCKAWAY VALLEY R. CO. et al.

(Circuit Court, D. New Jersey. July 11, 1895.)

1. EQUITY PRACTICE—OPENING DECREE—LACHES.
After a decree of sale had been duly entered in a railroad foreclosure suit, and the property advertised for sale, a bondholder applied to have the decree opened, and for leave to file an answer to the bill, and interpose certain defenses. The petitioner averred that he had first heard of the foreclosure suit after the advertisements of sale were posted; but he was directly contradicted upon this point by one witness, and impliedly by another, and it appeared, without contradiction, that the foreclosure had long been a matter of general discussion in the neighborhood where the petitioner lived. *Held*, that the petitioner had not sustained the burden of proving that he was not guilty of laches excluding him from the relief sought.

2. RAILROAD BONDS—VALIDITY—COST OF CONSTRUCTION.
Railroad bonds issued to pay for the construction of the road are not rendered invalid by proof that the road could have been, or was, constructed for less than the amount of such bonds, if the contract for its construction was fairly made and carried out, and called for the amount of bonds actually issued, and no fraud is charged in the inception or execution of such contract.

3. RAILROAD FORECLOSURE—DEFENSES—CONTRACTS OF BONDHOLDERS.
Certain bondholders of a railroad company, which was operating its road at a loss, and owed a considerable floating debt, made an agreement with a proposed lessee of the road not to seek to enforce payment of the interest on their bonds for 10 years. This agreement was unknown to the railroad company and to the trustee of the mortgage securing the bonds. It was violated by all parties to it, almost immediately, and apparently repudiated. Some of the parties to it sold their bonds without notice to the purchasers of the existence of the agreement. *Held*, that such agreement could not be interposed by a bondholder, to prevent the foreclosure of the mortgage for default in payment of interest, in a suit by the trustee of the mortgage.

This was a suit by the Farmers' Loan & Trust Company against the Rockaway Valley Railroad Company and others for the foreclosure of a mortgage. W. T. Melick petitioned to have the decree of sale opened, and for leave to file an answer. Denied.

Charles E. Hill, for petitioner.
Robert L. Lawrence, for complainant.
Flavel McGee, for First Nat. Bank of Jersey City, bondholder.

GREEN, District Judge. The Rockaway Valley Railroad Company, a corporation organized under the laws of the state of New Jersey, in the year 1890 made executed and delivered to the Farmers' Loan & Trust Company, of the state of New York, its indenture of mortgage, covering all its property and franchises, to secure certain coupon bonds given by it, in all amounting to $200,000; the trust company being, as well, the mortgagee, and the trustee for the owners and holders of the said bonds. Among other things, it was provided in and by the said mortgage that if default should be made in the payment by the mortgagor of any installment of interest as the same might become due upon said bonds, and if such default should continue for a period of 90 days, the whole principal sum of the said bonds should immediately become due and payable,

and if, after demand, the principal and accrued interest should not be paid, the trust company, as trustee, was authorized, upon the request of the holders of a majority, in value, of the bonds, to foreclose the mortgage, and cause the mortgaged premises and franchises to be sold in satisfaction of the bonded debt. It appears from the bill of complaint in this case that such default in the payment of interest has occurred; that it has continued for a long time; that the holders of more than $140,000 of said bonds have requested the trustees to take the necessary steps to protect them by foreclosure of the mortgage; and that to that end the trustee commenced an action in this court, which has progressed in an orderly and customary manner, and has resulted in a decree of foreclosure, with the usual directions for the sale of the mortgaged premises. The property covered by the mortgage has been advertised to be sold at public sale by the special master appointed for that purpose, according to law, and the sale is to take place within a fortnight. At this juncture the petitioner, William T. Melick, who is the owner of one of the said bonds, of the value of $500, but who claims in this proceeding to represent other bondholders owning bonds to the amount of $22,900, presented to the court a petition asking that the decree of foreclosure and sale heretofore made may be opened, set aside, and vacated, and that he and his associates may be permitted to enter their appearance to the action, and file an answer to the bill of complaint of the complainant, and in that way interpose two defenses: First, that there has been no such default in the payment of interest by the mortgagor as was contemplated by the deed of mortgage; and, secondly, that some of the bonds presumably represented in this proceeding by the complainant were issued without consideration, and are void as outstanding obligations.

To permit a cause which has seemingly moved in such an orderly and customary way to be interrupted at so late a stage, and at so critical a point in its progress towards a final decree, can only be justified on the ground that otherwise there would be a practical denial of justice to the petitioner, caused by the deprivation of his right to have his day in court. And it is well settled that he who seeks to obtain such interference by a court of equity must thoroughly clear himself of any suspicion of laches in making his application. The petitioner strives to do this, in the present case, by declaring that his first knowledge of this foreclosure suit was acquired after the posting of the advertisements of the sale of the mortgaged premises to be made, as stated, by the special master, and that he took his present action immediately thereafter. If this statement were uncontradicted, it would go a very great way in relieving him from charges of delay. But it is flatly contradicted,—directly by one witness who long ago conversed with him about the foreclosure,—impliedly by another; and it is in evidence, without objection, that in the neighborhood where the petitioner lives the pending proceedings for foreclosure were a common topic of conversation, and had been so for months. In view of these contradictory statements, it is not possible to say that the effect of

the petitioner to excuse his apparent lack of diligence has been successful. The burden of disproving laches was upon him. The testimony is, at least, evenly balanced, and its failure to preponderate in favor of him who must assume the burden of proof is fatal.

This conclusion would probably justify a denial of the prayer of the petition. But there are other reasons for such denial, as strong, if not stronger, than the one given. As stated, the petitioner asks for the interference of the court in his behalf at this time that he may interpose alleged defenses in bar of the foreclosure sought. These defenses are two: First, that there had been no default in payment of interest due upon the bonds; and, second, that some of the bonds represented by the complainant were without consideration, and should be canceled. As to this last allegation, it is enough to say that it is wholly unsupported by any evidence now before the court. In fact, the allegation itself is extremely vague and indefinite, and seems to be based solely upon an assumption that the railroad of the mortgagor could have been, or perhaps was, built and constructed for less than the amount of the bonds which were issued to pay therefor. If such allegation were well proved, it would not invalidate the bond issue. The only matter for investigation would be whether the contract for building and constructing the railroad was fairly made, fairly carried out, and called for the amount of bonds in payment therefor which were in fact issued. Whether the contract was a beneficial one to the company or otherwise, or whether it agreed to pay too much to the contractors for the work done, cannot now be considered. There is no charge made of fraud in the inception or execution of the contract under which the bonds in question were issued. In the absence of such allegation, as the matter now stands before the court, the issue of bonds under it must be held valid. If, however, the petitioner should be advised hereafter that any part of the bond issue is fraudulent, he will have the right to raise such question before the master, to whom all bonds must be submitted before they can participate in the distribution of the funds realized from the sale of the mortgaged premises. It is not necessary to interrupt the progress of this suit at this time to secure him that right.

The other defense which the petitioner desires to interpose rests upon peculiar grounds. It is not denied that the semiannual interest which has grown due upon the bonds in question has been in default for many months,—for years, in fact. But the petitioner seeks to avoid these many defaults by the force and effect of a certain agreement made, executed, and entered into in the year 1890 by those who were holders of these bonds at that date, whereby it was expressly agreed by them that they would waive the collection of the interest upon their bonds for a period of 10 years. This agreement has been submitted to the court. It appears from it that the Rockaway Valley Railroad Company was anything but a financial success. In the transaction of its business it was losing money every day. In 1890 one J. N. Pidcock, himself a large bondholder and stockholder, offered to lease the road, and, by close, economical operation, to relieve it of its financial troubles. Such

a lease was accordingly made. And that it might be rendered less burdensome, if possible, to the lessee, the holders of these bonds, at that time, agreed with him that they would not seek to enforce the payment of interest upon their bonds as it fell due, for 10 year; while, on his part, the lessee agreed to pay certain floating indebtedness of the company, and keep and perform certain covenants. This agreement was between the bondholders and the lessee only. The railroad company, the mortgagor, and the Farmers' Loan & Trust Company, the mortgagee and trustee, were not parties thereto, and had no knowledge of it. The agreement was not made a matter of record. No public notice of it was ever given. Practically, it was a secret agreement, binding only upon those who executed it. Some of the bondholders who were parties to it afterwards parted with their bonds, but gave to those to whom they transferred their holdings no notice of the existence of this agreement. The agreement was violated by all the parties almost immediately. The lessee failed to pay the floating indebtedness; failed to keep and perform his covenants, while the bondholders utterly disregarded their obligation. Thus it appears that upon application made by the present petitioner, who was one of the bondholders who had executed the agreement in question, the railroad company was, by the court of chancery of the state of New Jersey, decreed to be insolvent, and a receiver therefor was duly appointed, who, ousting the lessee, took possession of its property and assets. This action of this petitioner was in direct violation of the agreement in question, which, in terms, bound the bondholders to refrain from making such application. The truth seems to be that the agreement was voluntarily repudiated by all the parties to it. Under such circumstances, a court could hardly permit it to be resuscitated and used seemingly for the purposes of delay. But, if it be admitted that the agreement has yet some virtue remaining, it does not appear that it can have any force by way of defense to the present action. It was undoubtedly made for the benefit of the proposed lessee and of the railroad company. Both are parties to these proceedings. Neither ask that the agreement should be enforced. Both treat it as void in all respects. Clearly, it cannot be binding upon the present holders of the bonds, who are holders for value, without notice. How can it possibly be enforced in equity against those who had no part in its execution, who were ignorant of its very existence, who are innocent holders of the bonds, and became such by the concealment of the agreement in question by those who originally executed it? The application of the petitioner is addressed to the discretion of the court. A very clear case should be made, to secure favorable consideration. No such case has been presented, and therefore the prayer of the petition is refused, and the petition is dismissed.

## DUPONT et al. v. CITY of PITTSBURGH et al.

(Circuit Court, W. D. Pennsylvania. July 6, 1895.)

No. 6.

1. MUNICIPAL CORPORATIONS—LIMIT OF INDEBTEDNESS—PENNSYLVANIA CONSTITUTION.
   *Held*, following the decision of the supreme court of Pennsylvania, that the language of article 9, § 8, of the constitution of that state, limiting the debt of cities to 7 per cent. of the assessed valuation of taxable property therein, means the valuation fixed by the city authorities for city taxation, not that made by county officers for county purposes.
2. SAME—SPECIAL ELECTIONS—PENNSYLVANIA ACTS OF JUNE 9, 1891, AND JUNE 10, 1893.
   *Held*, also following the decision of the supreme court of Pennsylvania, that the act of the legislature of that state of June 9, 1891, regulating the manner of increasing the indebtedness of municipalities, is not repealed by the act of June 10, 1893, known as the "Baker Ballot Law."
3. EQUITY PLEADING—IMPEACHING SPECIAL ELECTION.
   Allegations, in a bill seeking to impeach the result of a special election to authorize a municipal indebtedness, that, in many districts tickets in opposition were not furnished, or, if furnished, were secreted or destroyed, and discrimination made between different loans proposed, by not furnishing tickets against loans to which there was opposition, are too indefinite to be a foundation for any relief, though ordinances relating to the election required the mayor to furnish ballots.
4. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—PENNSYLVANIA STATUTE.
   It is within the lawful power of a city, under the Pennsylvania statute of May 16, 1891, relating to the opening and improvement of streets, to provide funds to meet an estimated liability for the costs, expenses, and damages of opening a street; and it is not to be presumed that more of the fund raised will be used in making such improvements than will be lawfully applicable thereto.

Wm. B. Rodgers and J. M. Shields, for plaintiffs.

Watson & McCleave and W. C. Moreland, for defendants.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. The main object of this bill is to restrain the city of Pittsburgh and its mayor and controller from executing and issuing any bonds of the city under—First, certain ordinances, enacted on January 14, 1895, providing for the submission to the electors of the city of questions of increasing the indebtedness of the city for designated purposes; second, an election in pursuance of those ordinances, held on February 19, 1895; and, third, an ordinance enacted on April 23, 1895, authorizing an issue of bonds to the amount in all of $4,750,000, agreeably to the vote of the electors. The bill contests the legality of the proposed increase of the debt of the city upon the grounds—First, that the election relative to that increase was not held in conformity with, but in violation of, the laws of the state of Pennsylvania; and, second, that such increase will contravene the constitutional provision limiting the indebtedness of cities. With respect to the election of February 19, 1895, the complainants maintain that it should have been held under and in accordance with the provisions of the act of June 10, 1893, popularly known as the "Baker Ballot Law"; and that, as confessedly it