tion. Not in justice or common honesty, nor upon any consideration of public policy, can a corporation, whether private or quasi public, like a trust company or a national bank, be allowed immunity for participation in a fraud, and, in such a case as this, it is immaterial whether the corporate participation was the result of action by a board of directors or by a president or other officer in actual and presumably authorized control.

It is urged on behalf of the appellees that, the contracts between the parties having been reduced to writing, all oral promises by Walsh and by the trust company are merged in the agreements, and are not to be considered. The general rule on the subject is familiar, and likewise the exception from the rule of purely collateral contracts, which may be left in parol; but the question here is not of the obligatory force of the alleged promises as such, but what do they show of the good or bad faith of the parties in the transaction in connection with which they were made and in their subsequent conduct? On that point whatever was said and done by Walsh, representing, as he did, the trust company, was clearly relevant and competent.

One form of appropriate relief, if the bill should be sustained by the proof, manifestly would be an extension of time beyond the date of the decree for the payment of each installment of the purchase price, with interest, according to the contract; and, if additional sums are found to be due, the payment thereof should also be required. The time allowed should be reasonable,—perhaps equal to but not greater than was originally agreed upon by the parties. Whether relief could be made effective in some other form, upon the theory of constructive trust, for instance, as defined in section 1053, Pom. Eq. Jur., quoted in Angle v. Railway Co., 151 U. S. 1, 27, 14 Sup. Ct. 240, has not been discussed by counsel, and need not now be considered. The decree below is reversed, with direction that the respective demurrers of Walsh and the Equitable Trust Company to the amended bill be overruled, and that further proceedings be had in accordance with this opinion.

HENSZEY et al. v. LANGDON-HENSZEY COAL MIN. CO.

(Circuit Court, E. D. North Carolina. March 26, 1897.)

1. RECEIVERS—PETITION FOR REMOVAL—MOTION FOR LEAVE TO INSPECT MINE.
A petition by a stockholder and bondholder of an insolvent company to inspect a mine either in person or by agent, with a view to having the receiver in charge thereof removed, is in the nature of a motion made for the production, by parties, of books or writings in their possession, or motion for inspection of writings or examination of parties before trial, and being made by a party in interest, and entitled to the knowledge sought, will be granted by a federal court.

2. SAME—EVIDENCE.
An inspection made pursuant to such a petition gives the party inspecting only the ordinary powers, and his report is subject to the same rules of evidence as the testimony of any other witness.

John W. Hinsdale, for petitioner S. P. Langdon.
MacRae & Day, Womack & Hayes, and Simmons & Ward, for receiver.

SIMONTON, Circuit Judge. A petition has been filed in the main cause by S. P. Langdon, a stockholder and bondholder of the defendant company. The purpose of the petition is to secure the removal of the receiver. One of the grounds for removal is mismanagement and waste on the part of the receiver. The receiver is in charge of the mines worked by the company, and in exclusive possession of them, under the order of this court. The motion now under consideration is that the petitioner, S. P. Langdon, be permitted to examine the mines by a person named Davis, in order that he should see if the grounds upon which he has based his petition are well founded. This motion the receiver resists. The discussion of the motion seems to proceed on the idea that, if the motion be granted, the person selected by Langdon will be clothed with a sort of official responsibility, and will make a report for the consideration of the court with more or less authority. This is by no means the case. If the motion be granted, Davis will be the agent of Mr. Langdon; no more and no less. He may or may not testify to all that he sees. If he does testify, his evidence will be taken as that of any other witness, subject to any proper exception, liable to any rebuttal, and exposed to any attack. Neither the court, nor any party to the cause,—least of all the receiver,—will be responsible for him in the smallest degree.

The motion appears to me to be analogous to the motion made for the production, by parties, of books or writings in their possession, which contain evidence pertinent to the issue (Rev. St. U. S. § 724), and to the motions under the Code practice for admission or inspection of writings or examination of the parties, before trial. The petitioner, a party in interest in the main cause, one of those whom the receiver represents, wishes to examine the mines in charge of the receiver. He cannot do so in person. He wishes to do so by agent in whom he confides. He is entitled to this knowledge. It is for himself only, certainly, in the first instance. It is ordered that the petitioner have access to the mines for the purpose indicated at such time as will not interfere with the working thereof, either in person or by any one agent whom he may select. The receiver may require that he himself or some other person selected by him shall accompany the agent selected by the petitioner; this visit to be limited to one occasion, the petitioner to be at liberty to employ as his agent Evan H. Davis.

CONTINENTAL TRUST CO. OF NEW YORK v. AMERICAN SURETY CO.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 316.

1. MORTGAGES—RESERVATION OF LIEN IN FORECLOSURE DECREE.
A foreclosure decree for the sale of a mortgaged railroad provided that, within 20 days after the confirmation of the sale, the purchaser should pay of the purchase money a sum sufficient with the cash payment to pay the costs and claims that should have been adjudged to be due as court and receiver's indebtedness, and to be prior in equity to the lien of the mortgage, excepting such final decrees as might have been superseded, and that upon such payment the purchaser should be let into possession, and that the deed to the purchaser should reserve to the court full power on his default to retake possession of the property, and forthwith resell the same; it being further provided that the residue of the purchase money not required to make the payments stated should be paid by the purchaser from time to time upon the amount finally adjudged by the court to be due upon court and receiver's indebtedness, the surplus, if any, left after payment of such indebtedness, to be distributed pro rata upon the coupons and bonds secured by the mortgage. *Held*, that the court in effect reserved a lien for the purchase money of as great dignity as a purchase-money mortgage executed by the purchaser would be, and all subsequent purchasers were bound thereby, and the holders of preferred claims subsequently adjudicated had the right to invoke the power of the court to enforce that lien.

2. SAME—BONA FIDE PURCHASER.
The purchaser at the foreclosure sale being the representative of the mortgage bondholders, his conveyance by quitclaim deeds to several different corporations, afterwards consolidated, did not constitute the consolidated corporation a bona fide purchaser without notice, even if that were material, the consideration paid being expressed to be the capital stock of the new company, the old bondholders thus becoming stockholders of the new corporation; and bondholders under a mortgage executed by the new corporation, being notified by the recitals of the mortgage, took their bonds subject to the purchase-money lien.

3. SAME—SURETY IN SUPERSEDEAS BOND—SUBROGATION.
The foreclosure decree provided that the purchaser should have the right to appeal from any final order decreeing the payment of claims adjudged to be entitled to priority as court and receiver's indebtedness, the decree excepting from present payment such final decrees upon claims as may have been superseded by proper appeal bond. A company to which the purchaser applied to sign such a supersedeas bond being unwilling to do so unless, by the decree of confirmation, the bond should be made a superior lien to all others upon the railroad property, it was provided in the decree of confirmation that the amount secured by any such supersedeas bond "shall be considered as part of the purchase money, to enforce payment of which the court may retake said property, or any part thereof." The decree to supersede which the bond was executed decreed the claims adjudged to be "a prior and paramount lien upon all the railroad property." *Held*, that the surety entered into the suretyship upon the express condition that the purchase money of the road should be the primary fund for the payment of such claims, notwithstanding the appeal; and, having taken an assignment of the claims which it was obligated as surety to pay, it is subrogated to the right of the claimant to payment out of the purchase money, as against mortgage bondholders who acquired their rights pursuant to the decree of confirmation.

Appeal from the Circuit Court of the United States for the District of Indiana.

The Toledo, Cincinnati & St. Louis Railroad Company, a consolidated corporation, owned and operated a line of railway extending from Toledo, in the

state of Ohio, through the states of Ohio, Indiana, and Illinois, to the city of East St. Louis, in the latter state. The Toledo or Eastern Division of this road extended from Toledo to the city of Kokomo, in the state of Indiana; the Western or St. Louis Division from Kokomo to East St. Louis. These divisions had been separately mortgaged prior to the consolidation. Upon default in the payment of these mortgages, foreclosure suits were commenced in the circuit court of the United States for the district of Indiana,—one for the foreclosure of the mortgage upon the Toledo Division, and two suits, which were subsequently consolidated, for the foreclosure of the mortgages upon the St. Louis Division. Prior to the decrees in these several foreclosure proceedings, a number of intervening petitions were filed by trustees under car trusts, and by holders of other claims of similar character, each claiming payment out of the mortgaged premises and property in priority to the bonds secured by the mortgages sought to be foreclosed. These petitions were contested, and, at the time of the entry of the decrees of sale in the foreclosure suits, many of them were still pending and undetermined. Receiver's certificates had been issued under order of the court in the action for foreclosure upon the mortgage upon the St. Louis Division, the validity of which was disputed, and this question also remained undetermined upon the entry of the decree. On November 12, 1885, decrees of foreclosure and sale were entered in the foreclosure suits. The decrees were similar in character, and found that the respective mortgages were paramount and first liens upon the property described in them, "subject only to such court and receiver's indebtedness as had theretofore been or might thereafter be decreed to be prior in equity to the lien of said mortgage"; and after the usual provisions for the sale of the mortgaged railroad at not less than the upset price fixed by such decree, a specified portion whereof was to be paid in cash, each decree provided that, within 20 days from and after the confirmation of the sale thereunder, the purchaser should pay, of the unpaid purchase money for which said mortgaged property was sold, a sum sufficient, with the cash payment to be made at the time of sale, to pay and discharge the court costs, the master's fees, solicitor's fees, counsel fees, and the claims and debts, including the taxes legally due upon the mortgaged property that should have been then and prior thereto found and determined and finally adjudged and decreed to be due and payable as court and receiver's indebtedness, and to be prior and superior in equity to the lien of the mortgage thereby foreclosed, excepting such final decrees upon claims and debts as might have been superseded by proper appeal and supersedeas bonds, and, upon such payment, the purchaser should be let into the possession, use, and enjoyment of the railway and property purchased, subject to the stipulations thereinafter set forth; that upon confirmation of the sale, and upon payment within 20 days thereafter of such part of the purchase money as might be required fully to comply with the provisions of the decree, the masters should deliver to the purchaser a deed of conveyance of the mortgaged railroad and property, which deed should contain an express stipulation reserving to the court, and the court reserved, full power and jurisdiction over the mortgaged property, with full authority and power, upon default of the purchaser in complying with the requirements of the decree respecting payment of the purchase money, to retake possession of the railway and property, and forthwith resell the same; that the deed should contain the further stipulation that the purchaser and his assigns should forthwith yield possession of the railway and property upon the order of the court entered upon default of the purchaser in the payment of purchase money required by the order of the court. Each of the decrees further provided that the residue of the purchase money not required to make the payments above stated should be paid by the purchaser from time to time upon the amounts found and determined and finally adjudged by the court to be due and payable upon court and receiver's indebtedness, and to be prior and superior to the lien of the mortgage thereby foreclosed, such payments to be made by the purchaser, upon 20 days' notice, upon the order of the court requiring such payment, until the entire purchase money should be exhausted, if it should require the entire purchase money to pay and discharge said court and receiver's indebtedness, and that, if any surplus be left after full payment of the court and receiver's indebtedness, the same should be distributed pro rata upon the coupons and bonds secured by the mortgage, until the same should

be fully paid; that, in making payment of any surplus of the purchase money left after full payment of the court and receiver's indebtedness, the purchaser should be allowed to make payment in the bonds and coupons to which the same may be applicable, which were to be receivable for such sum as the holder would be entitled under the distribution according to the priorities adjudged. It was also provided that the purchaser or purchasers at the foreclosure sale reserved the right to appeal from any order or final decree made by the court decreeing the payment of claims adjudged to be due and payable as court and receiver's indebtedness, and to be prior and superior in equity to the mortgage in suit, and that any or either of the parties might apply to the court for such other and further directions at the foot of the decree as might be necessary to carry it into effect, according to its true intent and meaning.

The special masters appointed to sell the railway properties incorporated in their notice of sale the special provisions of the decree referred to, and on December 30, 1885, sold both such railway properties at the upset prices stated in the decrees, to Sylvester H. Kneeland, who was a representative of the bondholders. The reports of sales were approved by the court on February 5, 1886, and on March 10, 1886, the court approved the form of the proposed masters' deeds, and directed their delivery by orders which provide that the deed is delivered upon the express understanding that the court shall have and retain full power and authority to retake possession of said property, or any part thereof, if the grantee shall fail to pay the full purchase money according to the decree of sale; and, in case any appeal is taken from any decree for the payment of money by said grantee, and supersedeas bond be given, the amount secured by said bond shall be considered as a part of the purchase money, to enforce the payment of which the court may retake said property, or any part thereof." On March 10, 1886, the master delivered deeds of the property to the purchaser, which conveyed the property "free, clear, and discharged of all right, authority, and interest, claim, lien, equity of redemption in or to the premises, real and personal property, right, and franchises so sold and hereby conveyed, and every and any part thereof, of each and every of the defendants to such suits respectively, and of all persons claiming and to claim under them or any of them," and which deeds also contained the following clause: "It is hereby stipulated that the court shall have, and hereby it is reserved, full power and jurisdiction, and, upon default of the said Sylvester H. Kneeland to comply with any order of the court respecting payment of the purchase money, to retake possession of said property, and forthwith sell the same or any part thereof, upon order of the court to that effect entered. And the said grantee further stipulates that he and his assigns will forthwith yield possession of said railroad and property upon such order of the court entered upon his default in the payment of the purchase money, or any part thereof, as required by said decree; and, further, that all money becoming due on appeals to the supreme court shall be deemed to be purchase money, notwithstanding said decrees may have been superseded pending such appeal."

On April 6, 1886, the purchaser conveyed to the Toledo, Charleston & St. Louis Railroad Company all that part of the St. Louis Division of the railways situated in the state of Illinois. On June 11, 1886, he conveyed to the Bluffton, Kokomo & Southwestern Railroad Company all that part of the railway situated in the state of Indiana; and on June 12, 1886, to the Toledo, Dupont & Western Railway Company all that part of the Toledo Division situated in the state of Ohio. These deeds were respectively quitclaim deeds, and are not expressed to be subject to any lien or reservation whatever, and contain no assumption on the part of the respective grantees of any liens, charges, or payments whatever. These three several corporations, grantees, on June 19, 1886, were consolidated into the Toledo, St. Louis & Kansas City Railroad Company. On June 19, 1886, the consolidated company, the Toledo, St. Louis & Kansas City Railroad Company, executed its deed of trust of the road so acquired to the American Loan & Trust Company and Joseph E. McDonald, to secure an issue of first mortgage bonds to the amount of $9,800,000, of which $9,000,000 in amount were issued, which was duly recorded. The trust deed recites as a reason for the bonding of the road that the company is about to broaden the gauge of its road to standard gauge, to furnish the same with motive power and rolling stock, "and is about to provide for the discharge of all underlying

liens," and to exchange with certain holders of securities in the companies theretofore owning the property, for securities to be issued by the present company, and that it is necessary to provide money for the matters aforesaid. The American Loan & Trust Company having become insolvent, and having been dissolved by process of law, the Farmers' Loan & Trust Company was substituted as trustee in place of such insolvent in the month of May, 1891, and subsequently, in November, 1893, removed by action of the bondholders, who on the same day appointed the Continental Trust Company, the present appellant, as trustee. The trustee Joseph E. McDonald died on June 19, 1891, and John M. Butler was afterwards, and on the 20th day of January, 1892, substituted, and he died after the rendering of the decree from which this appeal is taken.

On April 5, 1886, a decree was entered upon certain of the claims for car rentals and for car repairs and for cars destroyed, adjudging claims to the amount of $158,708.93 in favor of the claimants specified, which decree adjudged "that each of said several claimants for car rentals, cars destroyed, and repairs above named, do have and recover the amount so found due to them as above set forth, with interest thereon at the rate of six per cent. from the date hereof, which said sums, respectively, are hereby ordered, adjudged, and decreed to be prior and paramount liens upon all the railroad property and effects, of every nature and kind, pertaining to each of said divisions respectively, and prior to the rights and interests of the bondholders and purchasers thereof, and of all persons claiming by, through, or under them, or either of them, which said sums shall be paid out of the proceeds of the foreclosure sale of said divisions prior to any distribution of the proceeds thereof among the holders of the bonds secured by the mortgages thereon," and directed that the purchaser of the railway pay into the registry of the court, within 20 days, the sum of $158,708.89, for the use of the claimants, "such payment to be made in cash as a part of the purchase price due upon the sale of said division, in accordance with the decree of foreclosure entered in said causes." To this decree, Sylvester H. Kneeland, "as purchaser and trustee, representing the first mortgage bondholders on said entire line of railroad, covering both divisions from Toledo, Ohio, to East St. Louis, Ill.," excepted and prayed an appeal to the supreme court, which was granted, to operate as a supersedeas upon giving bond in the sum of $200,000, "which is now filed, with the American Surety Company of New York as surety, and the same is approved by the court; the court, however, reserving the right to resume possession of the property on the terms mentioned in the order confirming the sale and approving the deed." Similar decrees in favor of other claimants were entered from time to time, with similar provisions. Appeals were taken from these decrees by the purchaser, Kneeland, upon supersedeas bonds executed by the American Surety Company, the appellee, and the decrees were substantially affirmed. Kneeland v. Trust Co., 136 U. S. 89, 10 Sup. Ct. 950; Id., 138 U. S. 509, 11 Sup. Ct. 426; Kneeland v. Lawrence, 140 U. S. 209, 11 Sup. Ct. 786; Kneeland v. Bass Foundry, 140 U. S. 592, 11 Sup. Ct. 857; Kneeland v. Luce, 141 U. S. 437, 12 Sup. Ct. 39; Id., 141 U. S. 491, 12 Sup. Ct. 32. The first bond executed by the American Surety Company was forwarded by it on the 6th day of March, 1886, to the clerk of the court at Indianapolis, with a letter authorizing him to fill in the date of the decree from which an appeal was to be taken, and stating that the bond was to be delivered upon condition that the decree and deed of the property to Mr. Kneeland contained all of the stipulations embodied in the public notice of the master's sale, and upon the further condition that the decree of the court "shall contain the stipulation that the inclosed supersedeas bond is a prior and superior lien to all other liens upon said railroad property." On March 9, 1886, the company wired the clerk of the court that the "supersedeas bond given by this company is to be a lien upon the R. R. under which appeals are taken, and decrees should so provide." It was established by the evidence that the American Surety Company executed these surety bonds upon the assurance of the purchaser and his counsel that the company would be fully indemnified for the liability assumed, for the reason that the judgment or decree of the court which allowed the claims appealed from made the judgments a lien upon the property, and, if it should not be paid when directed, the court reserved the power to retake

the property, and resell it for the payment of the claims directed. On the affirmance by the supreme court of the several decrees referred to, and upon failure by Kneeland to comply with the terms of the decrees, the American Surety Company took from a number of the claimants assignments to it of their respective claims, amounting in the aggregate to $300,000, paying the claimants the amount of their claims respectively.

In the year 1893, the Toledo, St. Louis & Kansas City Railroad Company became insolvent. Two of its judgment creditors, Stout and Purdy, thereupon filed bills in the several federal courts of the districts in which the railroad was situated, for the appointment of a receiver, and one was appointed by the courts, May 18, 1893. The railroad company made default in the payment of its interest on June 1, 1893, and in the month of December, 1893, the Continental Trust Company and John M. Butler filed their bills in the several federal courts of the districts in which the railway was situated for the foreclosure of the first mortgage of the Toledo, St. Louis & Kansas City Railroad, and the same receiver was therein appointed who had been appointed in the suit of Stout and Purdy. In the original foreclosure suits on July 22, 1891, Sylvester H. Kneeland, the purchaser at the foreclosure sales, applied to the court for an order extending the time for the payment of various sums adjudged to be due for rental and repairs of cars and locomotives, and for cars destroyed as adjudged by the several orders of the court recited, and this motion was denied. The several intervening petitioners and claimants for car rentals, etc., thereupon moved the court for an order resuming possession of the railway property and the appointment of a receiver, and for a sale thereof in satisfaction of such decrees. Upon the hearing of this motion, the court decreed that unless the several decrees referred to should be paid in full on or before the 10th day of September, 1891, the court would resume possession of the railway property, and that an order of sale would be entered directing its immediate sale in satisfaction of such decrees. These orders were not complied with, and proceedings to enforce them would seem to have been suspended under some arrangement not disclosed. On August 7, 1893, by agreement between the parties and their solicitors, but without notice to the trustees, the Continental Trust Company and John M. Butler (except so far as Butler, one of the trustees, had notice from the fact that he acted as counsel for Kneeland and for Stout and Purdy), and with the assent of the judges of the court having jurisdiction of the matter, the American Surety Company filed its petition in the original foreclosure suits, reciting the facts and the allowance of the claims; that Kneeland was the largest owner and holder of the new mortgage bonds and stocks of the Toledo, St. Louis & Kansas City Railroad Company, and was a member of its board of directors, of its executive committee, and its fiscal agent and representative in the state of New York, and had agreed with the surety company to pay it the amount which it had paid for the several claims which had been assigned to it, for which it was holden upon its supersedeas bond, and which amounted on the 1st of July, 1893, to the sum of $323,909.99, as computed and determined between Mr. Kneeland and the American Surety Company. The petition recited the embarrassments of the new company, the appointment of the receiver, and the want of funds with which to pay the claims; that the available moneys in the hands of the receiver were needed in the current operation of the road, and for pressing labor and supply claims, and for betterments indispensable to its safe and profitable operation, and that the enforcement of the claims of the American Surety Company would greatly embarrass and possibly arrest the operation of the railroad, and hinder and delay the progress of its reorganization; that it had been requested to exercise further forbearance in the collection of its debt and delay in its enforcement for at least one year longer, and was willing so to do if the receiver would pay quarterly the interest accruing on the debt from and after July 1, 1893, with suitable provisions, to be agreed upon, for the payment of the debt after the expiration of the year. The petitioner asked the court for an order directing the receiver to pay such interest, and to direct a stay of the petitioner's debt, "but without prejudice to any of the paramount rights of your petitioner, and with leave to your petitioner to proceed to enforce the same at once upon any default in the payment of such interest, or in the event of any contest or denial of any of the rights of your petitioner

in respect of said claims on the part either of such receiver or of said Kneeland, or of any one holding by, through, or under them." A similar petition was also filed by the State Trust Company, the holder of some of the claims. On August 7, 1893, the court entered an order upon the petition, at the hearing of which appeared not only Mr. Kneeland, the purchaser, as trustee and agent of the bondholders of the respective divisions, but also Stout and Purdy, complainants in the creditors' suit, and Mr. Calloway, the receiver appointed in such suit, and the Toledo, St. Louis & Kansas City Railway Company, successor to Kneeland, as purchaser. The order recites that the American Surety Company had become the purchaser and assignee of certain of said claims, specifying them, and that the State Trust Company had become the purchaser of certain of the receiver's certificates, specifying the amount, and the order then recites: "And it further appearing to the court that the said claims, as liquidated by said decree, are prior and paramount liens upon all of the railroad property and effects, of every nature and kind, pertaining to each of said divisions, and prior and paramount to the title of said Kneeland, as purchaser of said railroad property, or of said Toledo, St. Louis & Kansas City Railroad Company, as successors to said Kneeland, and prior to the rights and interests of all persons claiming by, through, or under them, or either of them, and that the holders of said claims are entitled, under said decree, to have all of said railroad property reclaimed by this court, and resold for the payment and satisfaction of the same." It further recites the embarrassment of the road, and that the enforcement of the claims would interfere with the current administration of the property, and hinder and delay the reorganization of the railroad property. The court thereupon adjudged and decreed that the receiver of the Toledo, St. Louis & Kansas City Railroad Company, out of any moneys that may come to his hands as such receiver, from the operation of the road, should pay to the American Surety Company the interest due on the sum of $323,909.99, at the rate of 6 per centum from July 1, 1893, and to the State Trust Company like interest on the sum of $52,247.30. And the court, in consideration thereof, ordered that the collection of the principal of said sums should be stayed for the period of one year from July 1, 1893, "but with leave to the said petitioners, respectively, to proceed to enforce their said claims at once upon any default in the payment of such interest, or in the event of any contest or controversy of any of the rights of said petitioners in respect to their said claims on the part of such receiver, or of said Kneeland, or of any one holding by, through, or under them, or either of them." This decree was entered by consent.

At this time the Farmers' Loan & Trust Company and John M. Butler were acting as trustees under the mortgage of the Toledo, St. Louis & Kansas City Railway Company. On June 27, 1894, the Continental Trust Company and John M. Butler, the then trustees under the mortgage, filed their intervening petition, setting forth the various facts herein recited, alleging that the mortgaged property was not sold subject to any claim, but that, by the terms of the decree the claims were to the extent of the proceeds of the sale transferred to such proceeds, which were thereby made the primary fund for their payment; that the purchaser became personally liable for the amount bid; that the decrees awarding payment of the claims were decrees for their payment by the purchaser personally in satisfaction pro tanto of the purchase price of the property, and that such decrees established a personal liability upon the part of the purchaser in exoneration to that extent of the property; that the surety company, by the execution of the supersedeas bonds, became surety in respect to the personal liability of the purchaser, and became bound as surety, for the payment of the decrees, and, upon their affirmance, became bound to discharge the same; that it could not, in violation of its liability, acquire the decrees, and hold the same adversely to the railroad and property mortgaged to the petitioners. It then prayed that the American Surety Company account for and refund all sums received, by way of interest, on the claims, and for an injunction against the further prosecution of its claims against the mortgaged railroad and property. To this petition an answer was duly filed, in which it was alleged, among other things—First, that the supersedeas bond for $200,000, given on the appeal from the decree of April 5, 1886, was executed *under an agreement* between the American Surety Company, the court, and the

parties, and that that decree should be and remain a lien upon the railroad property; second, that the purchase in 1891 by the American Surety Company of the intervening decrees was made after it had been advised by the petitioner Butler that the matter of such purchase had been submitted to the judges of the circuit court having the matter in charge, and that they announced their satisfaction with the purchase of the claims by the surety company, and that there could be no doubt about the assignments being valid, and that they would convey to the surety company, as assignee, all the rights, liens, and securities possessed by the claimants, assignors, to the surety company; third, that the petitioner Butler, as trustee, had knowledge of the entry of the decree of August 7, 1893, before and at the time it was entered, and that the same was entered with his knowledge and approval as trustee. At the hearing, a decree was entered December 31, 1895, dismissing the petition of the trustees, for want of equity. Mr. Butler, one of the trustees, died during the pendency of the proceeding, and the Continental Trust Company, as surviving trustee, prosecutes this appeal.

E. C. Henderson, Alpheus H. Snow, and Samuel O. Pickens, for appellant.

Bluford Wilson and H. C. Willcox, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts). It is contended by the appellant that, by the decrees of foreclosure and sale, the mortgaged property was not sold subject to the claims which might be adjudged paramount to the lien of the mortgages, but was sold free and clear of all claims and liens whatever. We concur in this contention so far as it asserts that the intervening claimants had and retained no equitable lien upon the mortgaged property after its sale. It is clear that the railway properties were to be sold subject to no incumbrance existing prior to the sale; nor were they sold subject to liens thereafter to be ascertained and decreed upon intervening petitions. The contemplation of the decrees was that the property should be sold at the upset price stated, which was deemed to be, and was, sufficient to discharge all such intervening claims as should be established, and that the proceeds of the sale should be devoted to their payment before any payment upon the mortgage debt. It is undoubtedly true that the terms of the decree of sale and the decree of confirmation constitute the contract of purchase, and that, therefore, it was not within the power of the court to impose further terms, or to declare a lien upon the property not contemplated by those decrees. Railroad Co. v. McCammon, 18 U. S. App. 628, 10 C. C. A. 50, and 61 Fed. 772; Id., 18 U. S. App. 709, 10 C. C. A. 50, and 61 Fed. 772. It was also clearly contemplated that the railway would be purchased by the bondholders, secured by the mortgages foreclosed, as in fact it was, and at the upset price in the decree; and undoubtedly, if the entire purchase price had been paid in cash into the registry of the court, the purchasers would have taken the road discharged of every lien and incumbrance whatever. Such a course, however, was not in the interest of the bondholders. Numerous claims, of large amounts, growing out of the operation of the road while in the hands of the court, had been preferred. These arose upon receiver's certificates issued by authority of

the court, and for car rentals and the like. They were asserted to be entitled to payment in priority to the mortgage debt. These claims were disputed by the bondholders. The court therefore did not require the purchasing bondholders to make present payment into the registry of the court of a large sum of money to be held for the payment of claims which might or might not be established, but, by the decree, required the payment of so much of the purchase price as should be necessary to discharge the claims when and as they should be determined and adjusted. By the terms of the decree, the purchasing bondholders were to be let into possession subject to the conditions of the decree, which reserved full power and jurisdiction over the property, with the right, upon default by the purchaser respecting any order for the payment of the purchase money, to retake possession of the road, and to resell the same. This was tantamount to the reservation of a lien reserved by the court upon the property for the purchase money, and this reserved lien was of as great dignity and potency as a purchase-money mortgage executed by the purchaser; and all subsequent purchasers of the property were bound thereby as effectually as though a purchase-money mortgage had been given and duly recorded before any conveyance by the purchaser. Kneeland, the purchaser, was bound by the provisions of the decree directing the sale and the decree of confirmation of the sale. So, also, were his grantees; and so also were the trustees in the mortgage executed by the Toledo, St. Louis & Kansas City Railroad Company and the holders of the bonds thereunder. The trust deed itself recites that the bonds were issued in part for exchange for the interests of the bondholders under the old mortgage, and in part "to provide for the discharge of all underlying liens." There was no other lien upon this property, so far as the record discloses, except the lien for the purchase price reserved by the decree. So that the purchaser at the sale, his subsequent grantees, the trustees under the mortgage, and the bondholders, all held their interests in this property, subject to the lien imposed upon it by the decree of sale, and subject to the payment of such amount of the purchase price that the court should decree must be paid upon the claims which had been preferred before the decree, but which had not then been adjudicated. Without question, the claimants could rightfully invoke the power of the court to enforce that lien to render them satisfaction of their demands. They were debts which the court had incurred in the operation of this property. It was to secure payment of these debts that the court demanded, as it might rightfully do, that the bondholders who were seeking foreclosure of their mortgage should bid for the property a sum sufficient to their payment, and that the payment of that sum should be charged as a purchase-money lien upon the railway. It may be true that these claimants had no direct recourse upon the court or upon this railway; but it still remains true that here were debts which the court had incurred in protecting the property of the bondholders, and at the request of the bondholders. Under such circumstances, no court of equity would permit the property

to escape from its control until such debts were adjusted and paid. These claims were thereafter adjudged and adjusted, and the court could unquestionably enforce the lien reserved for their payment, in whosesoever hands the road might come. If, therefore, the American Trust Company is in a position to assert the rights of those whose claims it was obliged to pay, and whose debts it now claims to hold, we entertain no doubt of the right of the court, by all proper proceedings, to enforce the payment of the purchase money which has not been paid, so far as it may be necessary for the satisfaction of such claims. And, in this view, it would be immaterial that the railway had passed into the possession of a purchaser without notice of this reserved lien. Such a one was bound to take notice of the provisions of the decree of sale, and of confirmation of sale. But the parties here stand in no such plight. Kneeland was the representative of the bondholders under the mortgages foreclosed. His conveyance to the several railways which were consolidated under the title of the Toledo, St. Louis & Kansas City Railroad was by quitclaim deeds, the consideration paid being expressed to be the capital stock of the company grantee. In other words, the old bondholders became stockholders of the present corporation; and the bondholders under the new mortgage, if not identical with the old bondholders, were notified by the recital in the mortgage, and took their bonds subject to the payment of the purchase money of the road. There is here no bona fide purchaser without notice.

We pass to the consideration of the question whether the American Surety Company is in a position to assert the demands of the original intervening petitioners. The circumstances antecedent to and attending the execution of the first supersedeas bond are important to be considered, and may be briefly summarized. It was clearly within the contemplation of the decree of foreclosure of November 12, 1885, that the bondholders should be granted the right to make full contest of claims, and, if any of them should be sustained by the court below, they should be protected in the right of appeal to the ultimate tribunal, and, intending to purchase the property, they desired to be protected from the enforced payment of the claims, or of that part of the purchase money which ought to be applied to the payment of the claims, until final adjudication of their validity by the courts. In that view, and for the convenience of the bondholders, the decree provided there should be excepted from present payment such final decrees upon the claims as may have been superseded by proper appeal and supersedeas bond. It would appear that prior to March 10, 1886 (the date of the confirmation of sale), some of these claims had been adjudged, although the decision of the court thereon was not formally entered until April 5, 1886. Mr. Kneeland, representing the bondholders, during the first days of March applied to the American Surety Company to sign a supersedeas bond or bonds to enable the bondholders to stay proceedings upon the contemplated appeal, and thus to contest the claims without payment into court of the part of the purchase money of the property properly ap-