

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 whosoever 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-

plicable to such claims. It appears also that the American Surety Company was unwilling to become bound unless, by the decree of confirmation, the supersedeas bond should be made a prior and superior lien to all other liens upon the railroad property. This appears from the letter of the company of March 6, 1886, addressed to the clerk of the court, and by its telegram to the clerk under date of March 9th. These conditions were evidently brought to the attention of the court, and assented to by the bondholders and purchasers, for we find in the decree of confirmation of March 10, 1886, this provision: That the deed of the master was approved with the express understanding that the court should retain full power and authority to retake possession of the property if the grantee should fail to pay the full purchase money according to the terms of the decree of sale, "and that 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 payment of which the court may retake said property, or any part thereof." In pursuance of that decree the deed contained the stipulation "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." The formal order entered on April 5, 1886, adjudging the claim, decreed it to be "a prior and paramount lien 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 sum shall be paid out of the proceeds of the foreclosure sale of said property prior to any distribution of the proceeds thereof among the holders of the bonds secured by the mortgages thereon." To this decree, Mr. Kneeland, as purchaser and trustee representing the first mortgage bondholders on the entire line of railroad covering both divisions, excepted and prayed an appeal, which was granted, the court "reserving the right to resume possession of the property on the terms mentioned in the order affirming the sale and approving the deed." It is thus apparent that the American Surety Company entered into its stipulations of 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, to which it should be entitled to resort for reimbursement in case the decrees appealed from should be affirmed, and it should be compelled to pay the claimants under their obligation of suretyship. It is also clear that this understanding was assented to by all the parties interested, and this before the time of the confirmation of the sale; and, to carry out and make effectual such understanding, the court, by its order confirming the sale, decreed to the like effect.

We lay no stress upon the language contained in the formal adjudication of April 5, 1886, or of any of the subsequent decrees adjudging the claims which declared them to be liens upon the

railroad property, since, if such decrees may be treated as independent decrees entered subsequently to the confirmation of sale, it was not competent for the court, after confirmation of sale and delivery of the deed, to create a new charge upon the property sold. These provisions were, however, manifestly designed to express what is more aptly expressed in the decree of confirmation, that each claim was a charge upon the proceeds of sale, and that such proceeds should constitute a primary fund for payment, and that the lien reserved for payment of the purchase money might be resorted to for the payment of the claim established either by the claimants or by the American Surety Company, obligated as surety to pay them. Such seems to have been the understanding of all parties down to the time of the filing of the intervening petition of the Continental Trust Company, which we are considering. On July 22, 1891, Mr. Kneeland, still representing the parties interested in the road, applied to the court for time to pay these claims, recognizing the right of the court to enforce payment of them notwithstanding the decree and execution of the supersedeas bond. This motion was denied, and the court directed possession of the road to be retaken unless the claims should be paid by the 10th day of September, 1891. Notwithstanding this order, the court and the American Surety Company seem to have stayed their hands, and on the 7th day of August, 1893, after the road had again passed into the hands of a receiver under the creditors' proceedings of Stout and Purdy, by agreement of all the parties, except possibly the trustees of the mortgage, and certainly with the active co-operation and consent of Mr. Butler, one of the trustees, in his capacity as attorney, the court granted a further extension of payment for the period of one year, and directed, as a condition, that the receiver should pay the interest accruing upon the claims from the 1st day of July, 1893. We are constrained, therefore, to hold that the American Surety Company entered into its obligations upon the condition, created before the decree of confirmation of sale, and expressed in that decree and in the master's deed, that the purchase money of the property should be the primary fund for the payment of the claims, notwithstanding the appeal and the supersedeas bonds, and that such fund might be resorted to by the surety company for reimbursement in case it should be compelled to meet its liability under the obligation of suretyship. It is a general doctrine in equity that a surety who has discharged the debt is entitled to stand in the shoes of the creditor as to all liens securing the debt. This doctrine of subrogation, it is true, is a purely equitable one, and is only enforced to accomplish the ends of substantial justice. It may be true that it should not be asserted against third persons whose rights may be subordinate to the liens of the creditor if they are prior in date to the obligation of the surety, and more specific in character than the equity of the surety.

We need not stop to consider the case of *Patterson v. Pope*, 5 Dana, 241, and the large number of cases to which we are referred, and which follow in its wake. It is to be observed, however,