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,

that in that case the surety for the debtor entered into his obligation of suretyship after his principal had parted with all interest in the property, and that the debtor had conveyed the property free of incumbrance, and received its consideration. The court expressly disclaimed any purpose to determine "the proper limits of the right of a surety whose obligation is coeval with the debt itself, or who comes in afterwards by the act or with the consent of the creditor, or who may be supposed to have some peculiar equity against him," but held that a surety upon an obligation incidental to the prosecution of a legal remedy against the person of the debtor "is prima facie to be considered as trusting to his principal only, for whom he alone is surety, and, upon payment, is entitled to subrogation only as to remedies against the person and property of the principal, and that, as to a prior surety or prior interest in the property which may be under pledge, he must occupy the place of the debtor." But here the incurring of the obligation of suretyship was contemplated, and the conditions agreed to, prior to the confirmation of the sale, and they were recognized by the decree of confirmation, which determined, as between the purchaser of the property and the American Surety Company, that the purchase money should be the primary fund for the payment of the claims, notwithstanding the subsequent execution of supersedeas bonds. The obligation of suretyship was contracted upon these conditions, with the knowledge and by the consent of all parties then interested in the property. The trustees of the subsequent mortgage upon the road, and the bondholders themselves, acquired their rights under and pursuant to the decree of confirmation, and must be held to stand consenting thereto, and to be bound thereby. They must be held to have agreed, in advance of their mortgage, that the surety should have the right of subrogation upon any supersedeas bonds thereafter made, upon which appeals should be taken from any decree upon the claims, and they agreed to and consented to the right by the surety of recourse to this fund. They took their rights subject to the payment of the purchase money, and upon the express stipulation and under decree of the court that the surety should be reimbursed out of it. That purchase money has not been paid. They cannot now be rightfully held to object to its payment.

The intervening petition asks a court of equity that the railway property may be relieved from the payment of the purchase price, for which its title was acquired. It asks a court of equity to refuse to enforce the payment of a lien which the court had reserved for the payment of the debts which it had incurred. It asks a court of equity to repudiate its own obligations made in the management of the road, for the benefit of the bondholders. It asks a court of equity to repudiate its own decrees which sought to secure satisfaction of these claims. It asks a court of equity to repudiate the sanction which it had given to this surety company to enter into an obligation of suretyship upon the faith of a decree of the court, which was made a condition of the confirmation of the sale; and this notwithstanding the fact that the trustees

and the bondholders take their title subject to all the conditions and reservations of the decrees of sale and of confirmation. It asks a court of equity to repudiate its own solemn decrees, that the present bondholders may escape payment of the purchase money of the very property to which they now claim to be entitled. To grant the prayer of the petition would be to work a grievous wrong. We are unable to bend our judgment to its consummation. The decree will be affirmed.

PLATT v. THREADGILL.

(Circuit Court, W. D. Virginia. April 17, 1897.)

1. JUDGMENT—EQUITABLE RELIEF—MISCONDUCT OF JURY.
   Equity has jurisdiction of a suit to enjoin the enforcement of a judgment based on a verdict which is vitiated by the misconduct of the jury, where the complainant had lost all ground of relief at law at the time of discovering the facts. Nor does it affect the jurisdiction that the judgment is pending on error, and under a supersedeas, in the supreme court.
2. SAME—IMPROPER INFLUENCE.
   In an action against a common carrier to recover for loss of a shipment of cigars, where the quality and value of the cigars are in issue, the fact that plaintiff conducted three jurors to his agent's place of business, and gave them a box of cigars, is sufficient ground for enjoining the enforcement of the judgment by suit in equity.

Beverly T. Crump, for plaintiff.
Kirkpatrick & Blackford, for defendant.

SIMONTON, Circuit Judge. F. M. Threadgill obtained a verdict against Thomas C. Platt, representing the United States Express Company, on the law side of this court, at Lynchburg, 27th April, 1895, in the sum of $54,371. Judgment was entered and exceptions were taken, but the appeal was not perfected in time for the circuit court of appeals. A levy having been made under execution on this judgment, it was stayed; the defendant entering into bond, with sureties, conditioned in the alternative, for the payment of the said judgment on or before the 15th April, 1896, or the obtaining of a writ of error or supersedeas thereon on or before that date. This bill is now filed to enjoin said judgment, and to enjoin proceedings upon the said bond. Afterwards, and by leave, an amended bill was filed, setting up yet other grounds for enjoining the judgment. The facts which are recognized and admitted on both sides are that pending the trial of the action at law, during the afternoon of the day preceding the day on which the case was submitted to the jury, some of the jurymen were present at and heard a conversation between one Bowden, the agent of the plaintiff, and a deputy marshal, in which the latter suggested that the former should treat to cigars. They heard his response that he was perfectly willing to do so, if a visit was paid to his place of business, and they thought that they were included in the invitation. After the court had adjourned for the day, three of the jury started to seek the place of business of Bowden, accompanied by a fourth juror, who was

going in the same direction, but not to the same place. On their way they either overtook or met the plaintiff, and, telling him their purpose, asked where Bowden's place of business was. Plaintiff replied that his place of business was in the same building as that of Bowden, and that he would show them where it was. He went along with them. On the way he endeavored to show them into a church building in which he was interested, and, failing to enter, he continued with them to Bowden's place of business. The fourth juror, who was with them, did not go to Bowden's. The others, with plaintiff, did go, however. When they reached the store, plaintiff told the brother of Bowden the purpose of the jurors, and instructed him to get a sample box of cigars,—25 in the box. He received the box; gave two of the jurors 9 cigars each, and the box with 7 cigars to the other juror. They waited about five minutes in the store, and then went out. On their way they met the fourth juror, and he was offered a cigar, which offer he declined. The cause of action in the pending suit was a lot of cigars, and an important question in assessing the damages recoverable was the character, quality, and value of the cigars. The bill charges that this communication with the jury had in this way tended to influence their verdict, was grossly improper, and that the verdict rendered so soon after it occurred should be set aside.

The trial by jury was instituted to secure an impartial tribunal of the issues of fact in a case. The jurors are kept as far as possible from all extraneous influences. And although the rigidity of the common-law practice has been relaxed, and now jurors are not kept secluded from possibility of such influences, still every precaution is taken to prevent them from reaching the jury. And, in so far as the absolute seclusion of the jury under the common law has been relaxed, just so far should the moral restriction substituted in its stead be enlarged and enforced. The jury are instructed to try every case according to the evidence. They are sworn to do so. The evidence before them is always delivered under oath or affirmation. Every fact submitted to them is brought out by examination and cross-examination. Every question by which such fact is elicited must be put in the presence of counsel, is subjected to the scrutiny of counsel and to discussion by them of its competency or relevancy, and, if any dispute arises, it is decided by the court. This examination is controlled by rules of evidence, a violation of which, even with the sanction of the court, will be ground for a new trial. Testimony is taken only before a full jury, and the rule is inflexible that nothing goes to them except in the presence of all. Private communications, possibly prejudicial, between jurors and third persons or witnesses or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least until their harmlessness is made to appear. Mattox v. U. S., 146 U. S. 150, 13 Sup. Ct. 50. "The rule is that the slightest tampering with the jury during the trial or prior to it, by a party, or the agent or attorney of a party, in whose favor the verdict has been rendered, is, on ground of public policy, good cause for setting aside the verdict, without reference to the merits of the case, and without considering whether the attempt to poison the sources of justice was or was not successful. On this point Hawkins says: 'The law so abhors all corruption of this