

give them the right of possession, as a security for their claim; and as they could not continue the use of the property without accounting to the lessor for the rental, if they did not wish to continue the use, as they declared, at the end of the ten-years term, it seems to me that they have a right to go into a court of equity, and tender possession to the lessor, and have their equitable lien thereon enforced, as a means of making their security available. In this respect the right, in principle, differs little from that of a vendee in possession of real property, the legal title to which is in the vendor, in which case, on default of payment by the vendee, the vendor has several remedies. He may sue on the contract, at law, to recover judgment for the purchase money, and levy the execution on the property and sell it; or he may bring ejectment for possession, in which case the vendee within proper time may go onto the equity side of the court, and tender the contract money and demand a deed; or the vendor may in the first instance, notwithstanding he holds the legal title, go into a court of equity and demand that the vendee come forward with the money, or be forever foreclosed. The vendor holds the legal title as mere security for the payment of the purchase money; and as said by the court in *Hansbrough v. Peck*, 5 Wall. 506:

"In case of persistent default, his better remedy, and, under some circumstances, his only remedy, is to institute proceedings in the proper court to foreclose the equity, where partial payments or valuable improvements have been made. The court will usually give him a day to raise the money,—longer or shorter, depending upon the particular circumstances of the case,—and to perform his part of the agreement."

So here the lessees are entitled to retain possession of this property, as security for their claim against it, until the lessor complies; and they ought not to be required by an action at law to surrender the advantage of this additional security, but ought to be permitted to call the lessor into a court of equity, where the rights of the parties can be determined according to the very justice of the case, and their equitable lien preserved by *lis pendens* against the lessor and all the world. See *Allen v. Taylor*, 96 N. C. 37, 1 S. E. 462. The demurrer to the bill is overruled.

ALESSANDRO IRR. DIST. v. SAVINGS & TRUST CO. OF CLEVELAND,
OHIO, et al.

(Circuit Court, S. D. California. June 29, 1898.)

LIEN ON INVALID CORPORATE BONDS—FORECLOSURE—CROSS BILL.

Where corporate bonds recite their issue under a certain valid statute, and in pursuance of its provisions, and nothing upon their face indicates their invalidity, a defendant to a bill, seeking their sale in part satisfaction of certain liens, may, by cross bill, show that they are in reality void, and thus prevent the court from decreeing a sale, whereby they may pass for value to innocent purchasers.

Wm. J. Hunsaker, for Savings & Trust Co. of Cleveland, Ohio, and others.

F. W. Gregg, Geo. J. Denis, and Charles Wellborn, for Alessandro Irr. Dist.

ROSS, Circuit Judge. This cross bill, to which a demurrer has been interposed, was filed by leave of the court, in the case of Savings & Trust Company of Cleveland, Ohio, against Bear Valley Irrigation Company and others, pending herein. It is conceded on behalf of the demurrants that the cross bill shows that the bonds thereby sought to be annulled are void, but it is contended that, as it shows upon its face that the bonds were sold or exchanged for purposes and pursuant to a pretended contract not authorized by law, they can be defended against in an action at law, and that, therefore, a court of equity will decline to give relief. It appears from the averments of the cross bill that the cross complainant is a corporation of the state of California, organized and existing under and by virtue of the act entitled "An act to provide for the organization and government of irrigation districts and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes," approved March 7, 1887 (St. Cal. 1887, p. 29). The validity of that statute was sustained by the supreme court of the United States in the case of *Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56. By that act, as amended by the acts of March 20, 1891 (St. Cal. 1891, pp. 142, 147), the cross complainant was, among other things, authorized to acquire, either by purchase or condemnation or other legal means, all lands, waters, water rights, and other property necessary for the construction, use, supply, maintenance, repair, and improvements of reservoirs, canals, and other waterworks, and, subject to certain prescribed conditions, was authorized to issue its bonds and to dispose of them in two ways: In case of the purchase of property necessary for the purposes of the district, to pay for the same in bonds at their par value; or to sell the bonds for not less than 90 per cent. of their face value, from time to time, and in such quantities as should be necessary and most advantageous, to raise money for the acquisition of the necessary property and water rights, and the construction, etc., of the necessary canals and waterworks.

While counsel for the demurrants, one of whom is the Savings & Trust Company of Cleveland, Ohio, concede that the cross bill alleges facts showing the invalidity of the bonds in question, it is not claimed that the bonds themselves show upon their face such invalidity. They recite upon their face that they were issued under and by virtue of the provisions of the state statute referred to, and in pursuance of its provisions. The cross bill shows that one of the purposes of the original bill is the sale of these bonds, therein alleged to be held, among other property, as security for the payment of certain receiver's certificates, alleged to be held and owned by the complainant Savings & Trust Company, and sought to be foreclosed, among other liens, by the original bill herein. As the bonds do not show upon their face that they are invalid, and the cross complainant is a party defendant to the bill which seeks their sale in part satisfaction of certain liens, it is, I think, entitled to show by cross bill the invalidity of the bonds, to the end that this court be not called upon to decree the sale of bonds fair upon their face, but in reality void, and which may thereby pass for value into the hands of many different

purchasers, and result in a multiplicity of suits to enforce their payment.

An order will therefore be entered overruling the demurrer, with leave to the defendants to answer within 20 days.

BOYLE v. FARMERS' LOAN & TRUST CO. (two cases).

HUNTINGTON v. SAME.

(Circuit Court of Appeals, Fifth Circuit. May 31, 1898.)

Nos. 661, 662, 663.

RAILROADS—SALE ON FORECLOSURE—RIGHTS OF PURCHASER.

The purchaser of railroad property at foreclosure sale is not entitled to the earnings of the road after confirmation, where he has persistently delayed compliance with his bid, and has not paid the purchase money.

Appeals from the Circuit Court of the United States for the Eastern District of Texas.

No. 661.

J. A. Baker and R. S. Lovett, for appellant.

L. W. Campbell, M. F. Mott, and J. P. Blair, for appellee.

No. 662.

J. P. Blair, J. A. Baker, and R. S. Lovett, for appellant.

L. W. Campbell and M. F. Mott, for appellee.

No. 663.

J. P. Blair, for appellant.

L. W. Campbell and M. F. Mott, for appellee.

Before PARDEE, Circuit Judge, and SWAYNE and PARLANGE, District Judges.

PER CURIAM. The record shows that the Pacific Improvement Company is the real party in interest represented in these several appeals, that company being the purchaser represented by Wilbur F. Boyle, and the owner of the 614 bonds, which said Boyle represents, and the owner of the Lackawanna claim set up as a lien prior to that of the first mortgage bonds; that the purchaser at the sale under the decree, and as a part of the consideration, and in addition to the sum bid, took the property upon the express condition that he would pay off and satisfy, among others, the Lackawanna claim; and that the reservation of the sum of \$187,000 out of the earnings of the road to await the decision of the supreme court of the Lackawanna claim is in the direct interest of the appellants. Neither in law nor in equity is the purchaser under the foreclosure sale entitled to the earnings of the property since the decree of confirmation, because, among other things, he has persistently delayed complying with his bid. There is no merit in any of the above-entitled appeals. The effect of the appeals has been to pass the day within which the purchaser was ordered by the circuit court to comply with his bid. We notice, in the terms of the decree of foreclosure under which the sale was made, the court reserved the right to resell the property upon the failure of the