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Branch Vs. Jesup

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SooperKanoon Citation : sooperkanoon.com/84628

Court : US Supreme Court

Decided On : Jan-15-1883

Appeal No. : 106 U.S. 468

Appellant : Branch

Respondent : Jesup

Judgement :

Branch v. Jesup - 106 U.S. 468 (1883)
U.S. Supreme Court Branch v. Jesup, 106 U.S. 468 (1883)

Branch v. Jesup

Decided January 15, 1883

106 U.S. 468

APPEAL FROM THE CIRCUIT COURT OF THE UNITED

STATES FOR THE SOUTHERN DISTRICT OF GEORGIA

SYLLABUS

1. The South Georgia and Florida Railroad Company having power, by its charter, to construct a railroad from Albany to Thomasville, Georgia, and from Thomasville to the Florida line, and to purchase and sell all kinds of property of every nature and quality, and to incorporate its stock with that of any other company, contracted with the Albany and Gulf Railroad Company to construct its road from Thomasville to Albany, and to sell and deliver it to the latter company in sections as completed, together with the franchise of using the same, and to incorporate its stock created for building said road with that of the Albany and Gulf Railroad Company. The latter had the same general power, except that of incorporating its stock with the stock of other companies, and had the right under its charter to construct a railroad from Thomasville to Georgia. *Held* that the contract was not *ultra vires,* and that the latter company could lawfully make the purchase, and pay for the same by issuing its own stock therefor; which was delivered to and accepted by the contractors in lieu of the stock of the other company, which latter stock they had subscribed for and agreed to take in payment for the work of construction.

2. A railroad company having the right of constructing a particular line of railroad, with general power to purchase all kinds of property of whatever nature or kind, may purchase from another company a road constructed upon that line, if the latter company had power to sell and dispose of the same.

3. As a general rule, a corporation cannot transfer its franchises, nor a railroad company its road, without legislative authority.

4. Prior to the purchase, the Albany and Gulf Railroad Company had executed a trust deed by way of mortgage upon all its railroad and property acquired or to be acquired. *Held* that inasmuch as the road purchased was within the chartered limits of the company, and might have been constructed if it had not been purchased, the mortgage extended to and covered it as effectually as if the company had constructed it.

5. The contractors who built the road and accepted in payment therefor the stock, and the assignees and purchasers of the stock, after the transaction between the two companies had been carried into effect and the road possessed and operated

by the Atlantic and Gulf Railroad Company for several years, are estopped from claiming the right to be regarded as stockholders of the South Georgia and Florida Railroad Company, or as preferred creditors as against the road. Having voluntarily accepted the position of stockholders of the purchasing company, they cannot question the validity of the transaction adversely to it, or to the mortgage given by it, covering the road in question.

6. The stock thus issued and accepted was preferred stock, on which interest was payable. *Held* that the holders thereof and their assigns, having accepted it and received interest on it for several years, are estopped from questioning the power of the company to issue it.

7. The South Georgia and Florida Railroad Company having received the stipulated consideration and incorporated its stock with that of the Albany

Page 106 U. S. 469

and Gulf Railroad Company, by accepting the stock of that company, and being in fact amalgamated therewith so far as the road in question is concerned, has no ground to complain that the terms of the contract have not been fulfilled by that company. It has lost nothing, and the liability which it incurred is protected by first liens on the road, the priority of which is conceded by all parties.

The facts are stated in the opinion of the Court.

MR. JUSTICE BRADLEY delivered the opinion of the Court.

This case arises upon a bill filed by Morris K. Jesup, as surviving trustee, for the foreclosure of a deed of trust in the nature of a mortgage, bearing date of December 20, 1867, given by the Atlantic and Gulf Railroad Company of Georgia to said Jesup and one Gardner (since deceased) to secure the payment of certain bonds of the company to the amount of $2,000,000, payable in 1897, with interest. The bill was filed Feb. 15, 1877, and on the 19th of the same month receivers were appointed to take charge of the mortgaged property, being the railroad of the company, with its rolling stock and machinery. A supplemental bill was filed on the

20th of April, 1877. The only defendant named in either bill was the Atlantic and Gulf Railroad Company. The premises sought to be foreclosed and sold were *first,* the main line of the company's road, extending from Savannah southwesterly and westerly to Bainbridge, in Georgia, a distance of about two hundred and thirty-seven miles; *secondly,* a branch road, extending from Dupont to the Florida line, about thirty-two miles, connecting, *thirdly,* with a short road in Florida, extending to Live Oak, in that state, which the company held and operated under a lease; *fourthly,* a branch road about fifty-eight miles in length, extending from Thomasville, on the main line, northerly to Albany, Georgia; *fifthly,* two other small branches at Savannah, one connecting the main line with wharves on the Savannah River, and the other connecting it with the Savannah and Charleston Railroad.

Page 106 U. S. 470

The Thomasville branch was purchased from the South Georgia and Florida Railroad Company in 1868 (shortly after the giving of the mortgage in suit) for the purpose of extending the line to Albany; which branch was subject to certain bonds and mortgages issued by the latter company, having a lien paramount to the mortgage in suit. The other branches were, in like manner, severally subject to certain prior mortgages, given for purchase money or construction, and having a paramount lien. The bill conceded the priority of the several liens.

The defendant answered, specifying the liens on its property prior to that of the mortgage, and insisting that it would be inequitable to foreclose and sell at that time, although consenting to the appointment of receivers.

On the 22d of April, 1878, Branch, Sons & Co. and others (who are appellants here), petitioned for and obtained leave to intervene *pro interesse suo,* claiming to be preferred creditors of that Atlantic and Gulf Railroad Company, as to the proceeds and earnings of the South Georgia and Florida Railroad; that is, the branch from Thomasville to Albany. By amendment to the petition the South Georgia and Florida Railroad Company was also made a party, and a prayer was added to have declared void the sale of the said branch road and for its restoration

to the South Georgia and Florida Railroad Company. By their petition of intervention, the appellants insisted that the lien of the mortgage sought to be foreclosed does not cover the branch aforesaid; that the petitioners and others are holders of certificates of special guaranteed seven percent stock of the Atlantic and Gulf Railroad Company to the amount of some $300,000, of which the petitioners own $56,100; that these certificates were issued by the Atlantic and Gulf Railroad Company under a contract with the South Georgia and Florida Railroad Company, dated January, 1869, for the construction of its road from Thomasville to Albany, a copy of which contract and certain modifications of it, and a copy of one of the certificates, were annexed to the petition. The petitioners further contended that the earnings of that branch road, if kept by themselves, would be sufficient not only to pay the

Page 106 U. S. 471

interest on the preferred bonds of the South Georgia and Florida Railroad Company, but to pay the interest on said certificates; that the guaranteed scrip was given for the purchase of the South Georgia and Florida Railroad, and was distributed among the contractors who built it in payment for their labor; that it is in effect the promissory notes of the Atlantic and Gulf Railroad Company, and that the holders could proceed by attachment if the property of that company were not in the hands of receivers, and after making further averments as to the solvency of the South Georgia and Florida Railroad Company, if it stood alone, unconnected with the Atlantic and Gulf Railroad Company, the petitioners prayed for themselves, and the other holders of certificates, to be examined *pro interesse suo* touching their alleged paramount claim upon the proceeds of the South Georgia and Florida Railroad after payment of interest on its bonds, and for an order directing such examination before the master, and for other directions.

In the amended petition, the petitioners averred that the original holders of the certificates of preferred stock before mentioned were subscribers to the capital stock of the South Georgia and Florida Railroad Company, and paid their subscriptions by work done on the road, for which they received the said certificates of preferred stock in the Atlantic and Gulf Railroad Company, and that

the present holders are *bona fide* purchasers of said scrip, except in some instances where the original holders have not parted with their scrip, and they alleged that when the contracts between the two companies were executed it was supposed that they had power to enter into the same, but that they are now advised that the contracts were *ultra vires* and void, and they prayed a rescission and the cancellation thereof; but if the court should decree that the contract only amounted to a lease of the road (which they conceded would not be *ultra vires*), then they prayed that it may be rescinded for noncompliance with its terms and the inability of the Atlantic and Gulf Railroad Company to comply therewith. But if the court should think there was a valid contract of sale, then they repeated their prayer to be decreed to have a first lien on the proceeds of the road after the mortgages

executed thereon by the South Georgia and Florida Railroad Company, and for a separate sale of that road subject to said mortgages.

The first contract referred to in the petition bore date June 19, 1868, and provided that the South Georgia and Florida Railroad Company should complete its road from Thomasville to Albany and turn it over in sections, as completed, to the Atlantic and Gulf Railroad Company, and that, when completed to Albany, the stock of the South Georgia and Florida Railroad Company should be incorporated with the stock of the Atlantic and Gulf Railroad Company, and that interest at the rate of seven percent per annum on the actual cost of the road should be paid as well before such incorporation of stock as on said stock after its incorporation, and that, when the stock should be thus incorporated, all the rights, privileges, and franchises of the South Georgia and Florida Railroad Company, so far as related to the road from Thomasville to Albany, should vest in the Atlantic and Gulf Railroad Company, and said road should be a branch of the Atlantic and Gulf Road. This contract was modified by another contract made January 15, 1869, which recited that the legislature of the state had passed an act authorizing the state to endorse the bonds of the South Georgia and Florida Railroad Company to the amount of $8,000 per mile, and that the Atlantic and Gulf Railroad Company

consented to the issue of said bonds, and a first mortgage to secure them, and guaranteed their payment, and it was stipulated that the amount of said bonds should be deducted from the amount of preferred stock to be issued to the South Georgia and Florida Railroad Company for the construction of the road. Another agreement, made September 1, 1869, authorized the further issue of bonds by the South Georgia and Florida Railroad Company to the amount of $200,000, to be secured by a second mortgage on the road, and guaranteed by the Atlantic and Gulf Railroad Company.

The road appears to have been completed to Albany prior to October, 1870. On the 10th of that month, the following resolution was passed by the board of directors of the South Georgia and Florida Railroad Company:

Page 106 U. S. 473

"Whereas, the South Georgia and Florida Railroad Company entered into an agreement with the Atlantic and Gulf Railroad Company, on the nineteenth day of June, 1868, by which a transfer of the said South Georgia and Florida Railroad was to be made (that is, all of said road between Thomasville and Albany) upon certain conditions therein stipulated, all of which will more fully appear by reference to said agreements, and whereas, the South Georgia and Florida Railroad has been completed to East Albany and the same has been turned over to the Atlantic and Gulf Railroad Company, and which is now being operated by said Atlantic and Gulf Railroad Company, and whereas, the president of the Atlantic and Gulf Railroad Company has signified his willingness to receive said road finished to East Albany, and whereas, the South Georgia and Florida Railroad Company have made up the entire cost of said road and made affidavit certificate under oath as prescribed by said agreement. *It is therefore resolved* that the president of this road proceed to Savannah, submit his estimates and certificates, and demand and receive the guaranteed stock agreed to be given to the South Georgia and Florida Railroad stockholders under said agreements in terms of the several agreements made by the South Georgia and Florida Railroad Company with said Atlantic and Gulf Railroad Company. *Resolved further* that

the president be, and he is hereby, authorized to make, execute, and deliver all papers necessary to carry out and fulfill said agreements for a transfer of so much of said South Georgia and Florida Railroad as lies or is located between Thomasville and Albany, specially reserving the other franchise or rights of building and equipping a railroad from Thomasville to the Florida line under the charter of the South Georgia and Florida Railroad Company."

This resolution was duly carried into effect shortly after its adoption, as appears by a final contract executed in due form between the companies, bearing date January 8, 1876, which recited the several prior contracts, and the said resolutions, and the fact of their acceptance and of the performance and fulfillment of the same, and by which the South Georgia and Florida Railroad Company made a formal conveyance to the Atlantic and Gulf Railroad Company, its successors and assigns, forever, of so much of the South Georgia and Florida Railroad as lies or is located between Thomasville and Albany, with all the appurtenances thereof, including the franchises of the South

Page 106 U. S. 474

Georgia and Florida Railroad Company to construct and use the same. The certificates of stock issued by the Atlantic and Gulf Railroad Company in pursuance of said contract were regular scrip certificates for preferred stock in that company in the following form:

"Atlantic and Gulf Railroad, Georgia. Special guaranteed seven percent stock issued under a contract with the South Georgia and Florida Railroad Company bearing date January 2, 1869, for the construction of the South Georgia and Florida Railroad. This is to certify that Branch and Sons, or bearer, is entitled to sixty-six shares, on which the par value of 100 dollars has been paid, of the special stock of the Atlantic and Gulf Railroad Company, on which interest from date is perpetually guaranteed at the rate of seven percent per annum, payable semiannually, &c.; Witness &c.; Sealed &c.;, first day of November, 1872. [Signed] John Scriven, president. Attest: D. McDonald, Secretary."

No evidence was taken in the case, and the hearing was had on bill and answer. It was conceded, or at least not controverted, that the intervenors were holders of the stock certificates as claimed in their petition, and that said certificates originated in the manner and in fulfillment of the contracts therein set forth. The court below denied the prayer of the intervenors and dismissed the petition, and went on to make a final decree in the cause, ordering a foreclosure and sale of the railroad of the Albany and Gulf Railroad Company, with all its branches, including the branch from Thomasville to Albany, subject, however, to all prior mortgage liens, including the first and second mortgages on the Thomasville branch. From this decree the intervenors have appealed.

The questions raised by the appellants, as stated in their brief, are as follows:

1st. Was the sale of a part of the South Georgia and Florida Railroad and its franchises to the Atlanta and Gulf Railroad void as against public policy and *ultra vires?*

2d. If not, did the contract amount to anything more than a lease?

3d. If it was a sale, are not the South Georgia and Florida

Page 106 U. S. 475

Railroad Company and other intervenors vendors with the purchase money unpaid, and hence entitled to assert their right of attachment upon the property sold, in preference to the claims of the mortgage creditors of the vendee, the Albany and Georgia Railroad Company?

4th. If the intervenors are not entitled to attach as vendors, are they not creditors of the Albany and Gulf Railroad Company, and entitled to be paid out of property of the debtor which is not covered by the mortgage, and in this case does the mortgage cover the South Georgia and Florida Railroad?

If only stockholders, can they not object to the sale of the South Georgia and Florida Railroad under the present proceedings?

The court below was of opinion that the sale and purchase of the road was not void, nor *ultra vires* of the two contracting companies, without examining the question of the right of the appellants to contest the validity of the transaction. We will proceed to give some examination into that question.

The appellants are stockholders of the Atlantic and Gulf Railroad Company. Their stock is preferred stock, it is true, entitling them to interest on its face before any dividends can be made to the common stockholders. But this is not inconsistent with its being stock. It is a very common thing in this country to issue stock of this kind. The interest accruing thereon is in the nature of preferred dividend, and is sometimes so called. Though after it has accrued it may become a debt, so also does a dividend become a debt after it has been declared and has become payable. It has no priority over other debts if indeed it has an equality with them. And this position, as stockholders of the Atlantic and Gulf Railroad Company, was voluntarily assumed by the appellants. This is true, both of those who purchased their stock at second hand, and of those who originally received the stock. They probably deemed it to their interest to accept payment for their work in this form. But again, not only are they stockholders in the Atlantic and Gulf Railroad Company, but the acceptance of the stock was an acknowledgment of the validity of the contract between the two companies. The issue of the stock was in part performance of that contract, and this appears

Page 106 U. S. 476

upon the face of the certificates. After thus acquiescing in the purchase by the Atlantic and Gulf Railroad Company of the branch railroad in question, and of the amalgamation of stock incident to said purchase, and after the possession and use of said road and its franchises by the said company as a part of its road system for a period of several years, the appellants are estopped from questioning the validity of said transaction, and cannot now repudiate their character of stockholders of the Atlantic and Gulf Railroad Company, and assume that of stockholders of the South Georgia and Florida Railroad Company. To sustain such a course on their part would have the effect of ripping up and unraveling a thousand transactions which have taken place on the basis of the purchase and

amalgamation referred to. Whatever right the state may have to inquire into the validity of such purchase and amalgamation, certainly the appellants have no right in law or in equity to question it. In law, they are stockholders of the purchasing company, in which character they neither can nor do ask any relief; in equity, they are participators in the face of all the world in a transaction which is conceded to have been fair and supposed to be lawful at the time, and upon the faith of which numberless transactions in business, and in the stock and bonds of the purchasing company, have undoubtedly been entered into. To give to the appellants relief in any form in which it is asked, would be attended with injury and injustice to others who have innocently confided in the acts of the appellants and their associates.

We might safely stop here and affirm the decree below on this consideration alone. But as our view of the other questions which have been raised leads to the same result, it may be proper to state the reasons therefor.

The first relates to the power of the two companies to enter into the arrangement for the sale and purchase of the Thomasville branch. The power of the South Georgia and Florida Railroad Company to sell the road depends upon its charter, which took its origin in an act of the legislature approved January 22, 1852, creating the Georgia and Florida Railroad Company, with power to construct a railroad from Oglethorpe, or some other point on the Southwestern Railroad, to Albany; also

Page 106 U. S. 477

with power to construct a railroad from Albany to Thomasville, and from thence to the Florida line in the direction of Tallahassee; also a plank or macadamized road in connection with the railroad, and for the purpose of constructing said road or roads, procuring right of way, and managing all its affairs, the said company was invested with the same powers and privileges granted to the Savannah and Albany Railroad Company, not inconsistent therewith, and it was enacted that the said Georgia and Florida Railroad Company might at any time incorporate their stock with the stock of any other company on such terms as might be mutually agreed upon. The company was further authorized, from time to time, to determine

the amount of stock necessary to carry out its purposes and the construction of said road or roads. The powers given in this charter by adoption and reference to the charter of the Savannah and Albany Railroad Company consisted, as expressed in the charter of the latter company, of all the rights, privileges, and immunities which by the laws of Georgia were held or enjoyed by any incorporated railroad company or companies in the state, and by a reference to prior existing charters we find that, so far as relates to the question in hand, these powers were,

"To have, purchase, possess, enjoy, and retain lands, rents, hereditaments, tenements, goods, chattels, and effects, of whatsoever kind, nature, or quality the same may be, and the same to sell, grant, demise, alien, or dispose of."

All the powers thus given to the Georgia and Florida Railroad Company in 1852 were conferred upon the South Georgia and Florida Railroad Company by an act passed December 22, 1857. By this act, the South Georgia and Florida Railroad Company was created, and the line of road which the Georgia and Florida Company was authorized to construct from Albany to Thomasville, and thence to the Florida line, was separated from the rest and granted to the South Georgia and Florida Railroad Company, which company was invested with the usual powers to purchase, hold, and convey property, real and personal, and with specific power to construct a railroad from Albany "to Thomasville and from Thomasville to any point on the Florida line," and to connect with any other road at such points as they should deem best, and it was enacted:

"that the provisions of the act incorporating the Georgia and Florida Railroad Company, so far as applicable, shall be applied to said South Georgia and Florida Railroad Company."

By reference and adoption, therefore, the latter company became invested with all the authority and power, in regard to the line between Albany and Thomasville, and between Thomasville and the Florida line, which had been conferred upon the George and Florida Railroad Company. It seems to us clear that these powers

were sufficient to enable the company to sell its road and franchises to any company competent to purchase them. As a general rule, it is true, a railroad company, with only the ordinary power to construct and operate its road, cannot dispose of it to another company. Legislative aid is necessary to that end. But this company had, by its charter, express power to incorporate its stock with the stock of any other company. This power has an enlarging effect upon the ordinary power to sell and dispose of property belonging to the company. Generally, the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company, and does not extend to the sale of the railroad itself, or of the franchises connected therewith. Outlying lands, not needed for railroad uses, may be sold. Machinery and other personal property may be sold. But the road and franchises are generally inalienable, and they are so not only because they are acquired by legislative grant, or in the exercise of special authority given, for the specific purposes of the incorporating act, but because they are essential to the fulfillment of those purposes, and it would be a dereliction of the duty owed by the corporation to the state and to the public to part with them. But where, as in this case, power is given to incorporate the capital stock with the stock of any other company, a very large addition is made to the ordinary powers granted to a company. In this country, the creation and exercise of such a power is well understood. It contemplates not only the possible transfer of the railroad and its franchises to another company, but even the extinguishment of the corporation itself, and its absorption into a different organization. The greater power of alienating or extinguishing all its franchises, including its own being and existence,

contains the lesser power of alienating its road and the franchises incident thereto and necessary to its operation. Its power of alienation and sale extends to a class of subjects to which it does not ordinarily apply. In view of the large power thus conferred upon the South Georgia and Florida Railroad Company, we cannot doubt that it had full power to enter into the arrangement made with the Atlantic and Gulf Railroad Company for the transfer of that portion of its line extending from Albany to Thomasville, including the franchise of constructing and using the

same, and an incorporation of all its stock issued for the construction of said road with the stock of the latter company.

It is true that the South Georgia and Florida Railroad Company did not part with its entire franchise. Power was given to it by its charter to construct a road from Thomasville to the Florida line (being a distance of about 15 miles due south), and to connect with any other road at such points as it might deem best. But this extension is mentioned as a distinct enterprise, has never been entered upon, and would have no value without a connection with some railroad in Florida, for which, so far as appears, no authority has thus far been accorded by that state. The authority to make it is nominal only, if it has not entirely expired by lapse of time, and could be of little use to the Atlantic and Gulf Railroad Company, which had a connection of its own with the Florida system of railroads at Live Oak. The retention of this nominal franchise by the South Georgia and Florida Railroad Company, which has never issued any capital stock under it, or with a view to its use, seems to be in reality a mere shadow without any substance. All the capital stock which the company ever provided for was that which went to the building of the road from Thomasville to Albany, and that at its very inception, was incorporated with the stock of the Albany and Gulf Railroad Company, the stock of the latter company being issued and accepted in the place of it. So that, in truth, the terms of the charter have been literally carried out. At all events, we think that the arrangement made with the latter company was within the powers given to the South Georgia and Florida Railroad Company, and this arrangement was fully assented

Page 106 U. S. 480

to and acquiesced in by every subscriber to its stock, as before mentioned.

In this connection, it is proper to notice a fact which has been referred to by the counsel of the appellants in support of his views, but which seems to us corroborative of the view which we have taken of the powers of the South Georgia and Florida Railroad Company. The original route authorized to be taken by its parent company, the Georgia and Florida Railroad Company, extended, as we

have seen, from Oglethorpe, or some other point on the Southwestern Railroad, to Albany, with authority also to construct a railroad from Albany to Thomasville, and from thence to the Florida line. Afterwards, as we have also seen, in December, 1857, the South Georgia and Florida Railroad Company was created, and that portion of the route extending from Albany southward to Thomasville and the Florida line was transferred to the latter company, with all the general powers of the parent company, amount which was the power to incorporate its stock with that of any other company. The northern part of the original route, extending from Albany northward to Americus, a point of connection with the Southwestern Railroad, still remained under the original charter, and this part (between thirty and forty miles in length) was afterwards transferred to the Southwestern Railroad Company with an incorporation of stock, similar to what was done by the South Georgia and Florida Railroad Company with the southern part of the line. But it seems that the Southwestern Railroad Company had not sufficient unissued stock to pay for the road thus acquired. Whereupon an act was passed by the legislature "to amend the charter of the Southwestern Railroad Company, and to authorize an increase of the capital stock of said company," etc., by which, after reciting the power given to the Georgia and Florida Railroad Company to incorporate its stock with the stock of any other company, further recited that the latter company had agreed with the Southwestern Railroad Company to incorporate its stock with the stock of that company, and had delivered its railroad running from Americus to Albany to the Southwestern Railroad Company, and had received stock of the said company to the amount of near $500,000, and that

Page 106 U. S. 481

it thereby became necessary to increase the capital stock of said Southwestern Railroad Company. It was therefore enacted that the latter company to authorized to issue stock in addition to the amount mentioned in its charter for any sum not exceeding $500,000, and that the road from Americus to Albany should be considered part and parcel of the road of the Southwestern Railroad Company, and be liable to pay to the state the same tax that the rest of the Southwestern Railroad Company was liable to pay. This arrangement, which the legislature thus

enabled the Southwestern Railroad Company to carry out (and in doing so recognized its validity), was precisely similar to that which had been made between the South Georgia and Florida Railroad Company and the Atlantic and Gulf Railroad Company in regard to the road from Albany to Thomasville. The only difference between the two cases was that the Southwestern Railroad Company had to get power to issue additional stock -- a power which the Atlantic and Gulf Railroad Company did not need, as it already had authority to issue the amount of stock required for carrying out its arrangement with the South Georgia and Florida Railroad Company; at least it is so stated, and is not denied, nor is the contrary alleged in any of the pleadings.

The point taken in relation to the issue of stock by the Atlantic and Gulf Railroad Company in payment of the road purchased by it is not that the company had no power to issue that amount of stock, but that it had no power to issue preferred stock. But it hardly lies in the mouth of those who received this stock, and who for several years accepted the interest guaranteed to be paid thereon, to make this objection, especially as no other parties, neither the state nor the holders of the common stock, have ever objected to the issue of this preferred stock. Without entering, therefore, into a discussion of the abstract question whether a railroad company may not issue a preferred stock, when done in good faith, instead of issuing bonds to the same amount, it is sufficient to say that the appellants are not in a position to raise the question.

But supposing it to be shown that the South Georgia and Florida Railroad Company had the power to sell, had the Atlantic and Gulf Railroad Company the power to buy the road

Page 106 U. S. 482

in question? The latter company was formed by the amalgamation of two distinct companies, and became invested with all the powers contained in the charters of both. These companies were first, the Savannah, Albany and Gulf Railroad Company, chartered in 1847, under the name of the Savannah and Albany Railroad Company, and secondly the Atlantic and Gulf Railroad Company,

chartered in 1856. The first of these companies was authorized to construct a railroad communication between Savannah and Albany, by such route as the company might select, with such branch road toward the north and toward the south from said road to such point or points as they might deem requisite; with power also at any time, to extent said road to any point or points on or across the Chattahoochee River. Besides the ordinary corporate powers given to this company, it was invested, as already mentioned, "with all the rights, privileges, and immunities which, by the laws of Georgia, are held and enjoyed by any incorporated railroad company or companies." The Georgia Railroad and Banking Company had been chartered in 1835. Other railroad companies in Georgia then in existence had power

"to have, purchase, receive, possess, enjoy, and retain lands, rents, tenements, hereditaments, goods, chattels, and effects of whatsoever kind, nature, or quality, and the same to sell, grant, demise, alien, or dispose of."

See charters of Georgia Railroad and Central Railroad Company, Gaines, being in a general westerly consolidated as aforesaid, to-wit, the Atlantic and Gulf Railroad Company, had power to construct a railroad from a point in Wayne county, southwest of Savannah, to the western boundary of the state south of Fort Gaines, being in a general western direction across the southern part of the state; but it was provided that the Savannah, Albany and Gulf Railroad Company, as well as the Brunswick and Florida Railroad Company, might join their tracks with that of the Atlantic and Gulf Railroad Company. The latter company was invested with all the privileges, immunities, and exemptions granted to the Central, and to the Georgia Railroad Companies, or either of them.

The two companies, Savannah, Albany and Gulf, and Atlantic and Gulf, were consolidated under the name of the latter

company by virtue of an act passed in April, 1863, by which it was provided that

"the several immunities, franchises, and privileges granted to said companies by their original charters, and the amendments thereof, and the liabilities therein imposed, shall continue in force."

From these charters and laws it appears that the consolidated company had power to construct a railroad from Savannah to the southwestern border of the state, and among other things to construct a railroad communication between Savannah and Albany, and to make branch roads toward the north and toward the south, and even before the consolidation, the Savannah and Albany Company was authorized to join its tract to that of the Albany and Gulf Company, so that the line of roads, as finally located, constructed, and acquired, including the branch from Thomasville to Albany, cannot be said to have departed in any respect from the strict course pointed out and designated by the charters of the consolidated companies. The main line commences at Savannah, under the charter of the Savannah and Albany Company, and runs southwesterly to Wayne County, and thence, under both charters (for both companies were authorized to use the same track) westwardly to Thomasville and Bainbridge, in the southwestern part of the state, with a branch running from Dupont toward the south into Florida, and a branch from Thomasville toward the north to Albany, forming a railroad connection between Savannah and Albany. In making the railroad connection between Savannah and Albany, the original charter of the Savannah and Albany Railroad Company could not be construed to require that this connection should be made by a rigidly straight line. The directors were invested with reasonable discretion as to the route to be taken, and since the subsequent legislation expressly authorized the Savannah and Albany Company to join its track with that of the Albany and Gulf Railroad Company, it is clear that the line of the latter company was not regarded as an improper departure for that of the former. Indeed, by an act passed in 1857, the Albany and Gulf Railroad Company were required to get the release of the Savannah and Albany Company of its right of way over the line of its contemplated road, before it could have

the state subsidy proposed to be given to it; which plainly shows that the line of the Albany and Gulf road (which properly lay through Thomasville) was regarded as within the fair limits of the route granted to the Savannah and Albany Company. This being so, the branch road from Thomasville to Albany was fairly within the power and authority given to the Savannah and Albany Company by its original charter, to establish a railroad connection between Savannah and Albany.

Then, since the consolidated company had authority to construct a railroad from Thomasville to Albany, and to establish the railroad connection between Savannah and Albany in that way, and had the general power to purchase and receive property of every conceivable kind, nature, or quality (limited, of course, by the general objects of its charter), what was to hinder its purchasing from the South Georgia and Florida Railroad Company its line of road between Thomasville and Albany, and paying for it by the issue of its own stock -- an arrangement which, as we have seen, the South Georgia and Florida Railroad Company, on its part, had a perfect right to make? It seems to us that this question is not hard to answer; but that it is clear that the one company had the right to purchase this road as fully as the other company had the right to sell it, and that the right of both was fully given by the charters and laws which gave them their respective powers.

We do not mean in the slightest degree to disaffirm the general rule that a corporation cannot dispose of its franchises to another corporation without legislative authority; but we think that the authority clearly existed in this case, being fairly derived from the legislation which affected the two companies, without any forced or strained construction of its terms.

The second question raised by the appellants, namely, whether the contract amounted to anything more than a lease, has been sufficiently answered by what has already been said. The transaction between the companies had in view a transfer of the entire interest of the South Georgia and Florida Railroad Company.

The third question raised is whether the South Georgia and Florida Railroad Company and the other intervenors are not vendors whose purchase money is unpaid, and who are thence

entitled to assert a right of attachment upon the property in preference to the claims of the mortgage creditors of the Atlantic and Gulf Railroad Company, the vendee? The original intervenors are certainly not entitled to assume any such position. As already shown, their status is fixed by their own choice as stockholders of the Atlantic and Gulf Railroad Company. They are such, and nothing more, except as to the interest due on their stock, as to which they are nothing more than general creditors. As to the South Georgia and Florida Railroad Company, it has no claim at all. It received all that it stipulated for. The priority of its bonds and mortgages is fully conceded, and its stock, so far as the railroad in question is concerned, was incorporated with that of the Atlantic and Gulf Railroad Company, with which it became amalgamated and identified. Its separate existence *pro tanto* became merged in the latter company. How far it can ever be galvanized into now life for the purpose of the extension of the road from Thomasville to the Florida line it is not necessary to inquire. That question has nothing to do with the one now in hand.

The only remaining question is whether the deed of trust or mortgage given by the Atlantic and Gulf Railroad Company to the complainant and his co-trustee covers the railroad in question. In terms, it covers and pledges the entire railroad of the Atlantic and Gulf Railroad Company in Georgia, constructed, or to be constructed, from Savannah to Bainbridge, or to and from any other points in the State of Georgia, with its appurtenances, with all rights of way acquired, or thereafter to be acquired or obtained, and all rolling stock and machinery acquired or to be thereafter acquired, and all franchises, rights, and privileges connected with or relating to said railroad, or the construction, maintenance, or use thereof. Under the settled rule in regard to the operation of railroad mortgages on after-acquired property, where the terms of the instrument extent to such property, there can be no question that the mortgage in this case did extend to and cover any portion of road belonging to the company and authorized by its charter, which was constructed after the mortgage was given. The only question here is whether the railroad from Thomasville to Albany is fairly within this category. We have already

seen that the

Page 106 U. S. 486

company had the power to construct this line; that it was within its chartered limits. There can be no doubt, therefore, that if the road had been constructed by the company without any reference to the South Georgia and Florida Railroad Company, it would have fallen directly within the operation of the rule in question. Instead of constructing it directly, the Atlantic and Gulf Railroad Company procured its construction through, and by arrangement with and purchase from, the South Georgia and Florida Company. Can this make any difference? When constructed, the road became part of the system of roads of the Atlantic and Gulf Railroad company, as much so as if it had constructed it independently. A road purchased as and for a part of its chartered line is no less a part of its proper road than one built for that purpose. Provision was made, it is true, in the contract between the companies, for a prior lien in favor of the mortgages separately placed upon the road thus acquired. That lien is conceded to be valid and binding. But, subject thereto, the mortgage given to the complainant properly extends to and covers this road as part of the entire line of the company. It is embraced in the terms of the mortgage, and is in law subject to its operation. It is part of the lawfully acquired property of the Atlantic and Gulf Railroad Company -- acquired under its chartered rights and powers. It is the property of no other company. It is subject to the debts of no other company, except those which attached to it by virtue of the superior mortgage liens before mentioned. The appellants, as stockholders of the company, equally with the company itself, are bound by the mortgage. Their claims are inferior and subject to it. Their position as general creditors, in regard to any interest due them, is equally inferior. They have no equity that can prevail against it.

The appellants have suggested several subsidiary points which, regard being had to the views we have already expressed, cannot affect the result. One point is that the charter of the South Georgia and Florida Railroad Company expired in 1872, before the execution of the final deed to the Atlantic and Gulf Railroad Company. We do not understand that the charter expired at that time, but only that the time

limited for the construction of the road expired. If the charter expired, how did the company

Page 106 U. S. 487

become a party to this suit? But even if the charter did expire, the road was finished and in the possession of the Atlantic and Gulf Railroad Company in 1870, and the entire transaction was then completed. The conveyance executed in 1876 was merely carrying out in form what was already completed and carried out in substance. But how can this objection avail the appellants in any view of the case? What right have they to object to the conveyance? Its only purpose was to carry out what they and all the parties concerned consented to and acquiesced in long before. And in their position, as stockholders of the Atlantic and Gulf Railroad Company, it does not lie in their mouths to object that the South Georgia and Florida Railroad Company unlawfully exercised corporate powers when it completed the performance of its obligation to the Atlantic and Gulf Railroad Company.

But it is unnecessary to pursue the subject further. We see nothing in the points raised on the appeal to invalidate the decree of the circuit court.

Decree affirmed.

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