the receivers' bonds were perfected by approval. Maynard v. Bond, 67 Mo. 315. To hold that because there was property included in the scope of the bill, and affected by the receivership, which was not embraced in the mortgage, as to which creditors could obtain liens by judgments after the appointment of the receivers, would be to open the door to all judgments entered before the actual sale. We think the better rule is that the appellants having had no judgments at the date of the appointment of the receivers, but being simple contract creditors, they were represented in the suit by the defendant corporation, and their judgments were obtained pendente lite. Stout v. Lye, 103 U. S. 66. After obtaining their judgments they might, by leave, have come into the suit, and contended for such modification of the orders and decrees as they could show themselves entitled to, but they did not. They accepted what the court had done to protect the property of the corporation and administer its assets, and came in on the footing of creditors on whose behalf the bill was filed. They excepted to nothing, except that their claims were not allowed as liens by reason of their judgments. That is the one point we consider to be before us, and on that point we are of the opinion that the judgment was entered after the property was in custodia legis, and too late to obtain a lien. The decree appealed from is affirmed.

COWEN et al. v. ADAMS et al.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1897.)

No. 367.

EQUITY PLEADING—DECISION—CONSISTENCY WITH PLEADING.

In a suit by the assignees of a legacy to cancel a receipt of payment thereof given by the legatee to the executors, the bill alleged the making of the will, the death of the testator, the assignment of the legacy to complainants, and the giving of the receipt to the administrators by the legatee, without any payment in fact of the legacy either to him or the assignees The bill further alleged that the receipt was given in pursuance of a combination between the legatee and the executors to defraud complainants. The executors denied any fraudulent combination, and the court found, on the evidence, that there was in fact no such combination, but held that the receipt was invalid, because obtained by the executors without payment of the legacy. *Held*, that there was no substantial inconsistency between this decision and the allegations of the bill.

On Petition for Rehearing. For report of prior decision, see 24 C. C. A. 198, 78 Fed. 536.

Before LURTON, Circuit Judge, SEVERENS, District Judge, and HAMMOND, J.

SEVERENS, District Judge. The defendants, Thomas M. Adams and E. C. Means, as administrators with the will annexed, have filed a petition for a rehearing of this case, upon the following grounds:

"First. Because the settlement of October 16, 1890, is decreed to be set aside upon grounds not alleged in the bill, and which were therefore not discussed by counsel for the petitioners at the argument.

"Second. Because, upon the question whether the notes of William Means are forgiven by the fifth clause of the will, there is a clear distinction, overlooked by the court, between the note of November 22, 1888, for $45,000, and the other notes covered by the settlement.

"Third. The petitioners believe, and are so advised by their counsel, that a consideration of arguments which, for the reason aforesaid, were not presented at the hearing, will lead this honorable court to a decision in their favor."

In the statement of the grounds and arguments appended to the petition, and in support thereof, counsel, in addition to the suggestion of reasons relevant to the particular ground first stated, on which a rehearing is asked, go into a discussion of other matters involved in the merits of the case, which have already been considered by the court, and passed upon in the opinion hitherto filed. We do not deem it necessary to reconsider those matters, including the supposed distinction between the note of November 22, 1888, for $45,000, and the other notes covered by the settlement, and shall therefore attend only to the special matter alleged in the petition, which is substantially this: whether the conclusion which we reached ought to stand, in view of the allegations contained in the pleadings. The ground of complaint is that the settlement of October 16, 1890, between the administrators and William Means, is alleged in the bill to have been made upon a fraudulent combination with William Means for the purpose of defeating the rights of the plaintiffs, and not that it was a fraud upon him, as the court appears to have found it to be, and upon which latter view it is said the conclusion of the court rests; and thereupon it is contended that the decision is inconsistent with the allegations of the bill. We do not think this suggestion of inconsistency rests upon any solid ground. The material facts upon which the complainants' case was founded, and upon the proof of which their right to relief was made out, were these: The making of the will, the death of the testator, the assignment of William Means' legacy to the complainants, and the giving of the receipt to the administrators by William Means without payment of the legacy, either to him or his assignees. These facts the bill avers. All the rest was defensive, and the burden of allegation and proof that the legacy had been paid or validly released was upon the defendants. This burden was assumed and the defensive allegations pleaded in the answer of the administrators. It is true, as stated, that the complainants alleged in their bill that the defendants entered into a fraudulent combination with William Means by which they attempted to secure his receipt for his legacy, in fraud of complainants, and that, in pursuance of said combination, William Means executed the receipt; but the defendants denied these allegations in their answer, and averred: "That the said receipt was not executed or delivered, in whole or in part, by reason or in pursuance of the pretended fraudulent agreement or combination in the bill set up, and that no such combination was ever made; and they deny each and every allegation in the bill in respect thereof." And throughout they have strenuously maintained this averment. In the briefs filed and at the argument, counsel maintained that there was no such combination. This they probably felt bound to do in order to resist the effect of the alleged assignment of his legacy by William Means to his family, and the decree of the Greene county court of common pleas. This court did not find that there was any fraudulent combination between the administrators and William Means in making the settlement of October 16, 1890, to defeat the rights of the beneficiaries under the complainants' trust, and to that extent practically sustained the defendants' contention, but upon other grounds held that the complainants were entitled to recover the amount of the legacy. The grounds upon which the court proceeded were strenuously contested, and in the printed and oral arguments were fully and elaborately discussed. What the defendants now contend for is that the complainants, by an allegation in the bill which they deny the truth of, and which allegation is unproved, ought to be precluded from recovery upon other substantive and sufficient allegations of fact which the court has found to be established. We think it clear that this proposition cannot be maintained, and that, as no other new matter is submitted, the petition should be denied.

DICKERMAN v. NORTHERN TRUST CO. et al.

(Circuit Court of Appeals, Seventh Circuit. May 24, 1897.)

No. 344.

1. CORPORATIONS—PURCHASE OF PROPERTY BY ISSUES OF STOCK—OVERVALUATION.
   When a corporation is organized to purchase several manufacturing plants from persons holding options upon them, the fact that the amounts in the stock of such corporation, at its par value, which are issued to the holders of such options, in payment therefor, are larger than the prices fixed on the plants in such options, is not evidence of overvaluation of the plants in the sale and in the issue of stock. 75 Fed. 936, affirmed.
2. MORTGAGE SECURING BONDS—FORECLOSURE.
   In a suit for the foreclosure of a mortgage securing an issue of bonds, it is not necessary that the bonds should be produced before the court or a master before the entry of a decree of sale. 75 Fed. 936, affirmed.
3. EQUITY PRACTICE—INTERVENTIONS—ANSWERS AND CROSS-BILLS.
   When persons who are not necessary or proper parties to a bill are given leave by the court, for the protection of an apparent right, to intervene and file an answer and cross bill, if the cross bill filed under such permission violates the rules applicable to such bills, and appears to be an abuse of the leave granted to file it, the court will withdraw its permission, and dismiss the bill, without putting the complainant to a demurrer.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This is a suit brought by the Northern Trust Company, a corporation organized under the laws of Illinois, and doing business at Chicago, and Ovid B. Jameson, a citizen of the state of Indiana, as trustees, against the Columbia Straw-Paper Company, a corporation organized under the laws of New Jersey, to foreclose a trust deed covering various paper-mill properties given by the Columbia Straw-Paper Company to the appellees, to secure the payment of 1,000 first mortgage gold-bearing bonds of the company for the sum of $1,000 each, payable to the bearer or registered owner thereof in gold coin, and bearing interest at 6 per cent. per annum from the 1st day of December, 1892, payable half yearly; the interest on the bonds being secured by coupons in the usual manner attached to the bonds. At the commencement of the suit the Columbia Straw-Paper Company was the only defendant. During the progress of the cause Harry W. Dickerman and other persons, minority holders of stock in the Columbia Straw-Paper Company, upon petition to the court, were allowed to come in and answer and to file a cross bill. Answers were filed setting up collusion and fraud on the part of the Columbia Straw-Paper Company and the controlling stockholders, and especially in overvaluing the various mill plants and properties upon which options were taken and which were transferred to that company in exchange for its capital stock; such Columbia Straw-Paper Company having been organized for the purpose of taking such conveyances, and thus consolidating the plants upon which options had been taken for that purpose. There were, it seems, some 70 of these paper-mill properties, situated in Illinois and other states. With the purpose of reducing expenses, and more economically carrying on the business, the idea was conceived by some of the owners of consolidating the various plants under one organization. To that end options were taken running for six months, and a new company, to be called the Columbia Straw-Paper Company, was organized with a capital stock of $4,000,000, with preferred stock of $1,000,000, to receive conveyances of the various plants from the person or persons taking the options, in exchange for the stock of the new company. The business, as it had been carried on by the separate mills, each with a full set of officers and managers, had not been profitable, and the purpose of the scheme was to reduce expenses by a consolidation of the various interests, and by the organization of a single management. More capital was also needed to carry on the business, and this was to be provided by the issuance by the new company of $1,000,000 of gold-bearing bonds to be secured by a first mortgage upon the consolidated properties of the new company. The plan is fully set forth in the option contracts given by the mill owners. One hundred thousand dollars of the bonded indebtedness was to be retired annually. The mill owners were to be paid according to their options, partly in cash and partly in the common and preferred stock of the company. The money to pay for the mills, and provide the working capital to organize the new company and carry into effect all the details of the plan, including negotiations with mill owners and paying preliminary expenses, was to be furnished by the party taking the options. This party was to procure and convey to the company a good title to the property named in the options, and give the new company a working capital of $200,000, and the company in return was to transfer to the party so taking the options all the stock and bonds of the company. This arrangement was perfected and carried out by written contract between the company and Emanuel Stein, contained in the record. Some or all of the options in the first instance were given to Philo D. Beard and Thomas T. Ramsdell, both of Buffalo, who transferred them to Stein. Stein, according to the contract, transferred all of the options to the company in exchange for its stock; but the stock called for by the options, and which was to go to the various companies who had given the options, was delivered by the company to the mill owners upon the order of Stein. All the other stock was delivered by the company to Stein, who converted the bonds, and from the proceeds made the cash payments for the mills and $200,000 to the company. Some of the stock was used in paying for the mills as agreed, some was used in payment for assistance to promoters of the enterprise in obtaining options, and some to pay commissions on sale to third parties of bonds, to lawyers for services, and to pay traveling and incidental expenses. In disposing of the bonds it was found necessary to give the purchaser of each $1,000 a bonus of $200 in addition of the preferred stock, and $400 in the common stock, of the company. All the bonds were sold in this way to any one who would buy them. The sum of $200,000 of the proceeds was handed over by Stein to the company, and the balance used in paying for the plants. Of the $1,000,000 preferred stock, $629,000 went to the mill owners and $200,000 to the purchasers of bonds. Of the common stock, $1,258,000 went to the mill owners, and $400,000 to purchasers of bonds. Some of the remainder went to Stein for services, and some was retransferred to the company under a modification agreement between him and the company. In this way the company acquired title to 39 mill plants out of 70 then in existence in the district covering the new enterprise. As before stated, the appellants are minority stockholders in the Columbia Straw-Paper Company, having in the aggregate 785 of the 10,000 shares of the preferred stock of the company and 1,070 of the 30,000 shares of the common stock. The answer of appellants to the original bill for foreclosure admits that 1,000 bonds of the company were sold and paid for at par, $1,000 for each bond, by the parties who purchased from Stein. This is also shown by the evidence. These are the bonds in suit, and to secure which the company gave its deed of trust for the various mill properties conveyed to it, which it was the purpose of the suit to foreclose. After the new enterprise was launched, the panic and hard times came on, business was interrupted and broken up, and the company unable to meet its obligations. Default was made in the payment of the principal and interest of the bonds. Indeed, no portion, either of principal or interest, has ever been paid. The proofs are quite voluminous, but perhaps the above statement will be sufficient for the purposes of this opinion. As stated, the Columbia Straw-Paper Company was the only defendant in the original bill to foreclose. Its answer virtually admitted the facts set out in the bill, and confessed its inability to pay. Subsequently Dickerman and the other stockholders who are here as appellants came in by petition and obtained leave to defend. The theory of their answer was that there was a fraudulent overvaluation of the property transferred to the company; that all the bondholders had acquired stock of the company without payment therefor, or that they were assignees of the bonds with notice of these facts; that they were still indebted to the company for the stock; and that the court should ascertain the amount of such indebtedness, and set off the same against the bonds. Substantially the same matters were set up by cross bill. The case was referred to Henry W. Bishop, master in chancery, to take the proofs and report to the court, which he did. By this report the master found all the issues in favor of the complainant and against the defendants; that the bonds had been made and delivered as alleged; that they were valid obligations against the company; that default had been made by the nonpayment of principal and interest; that the defendant company was insolvent and unable to pay its debts; that on or about January 22, 1895, an execution was duly sued out against the property of the company upon a judgment against the defendant by one James Flanagan, before George W. Underwood, justice of the peace, which still remained undischarged; and that by reason of the premises, and as provided in the deed of trust, the complainants had declared the principal and interest secured by the said 1,000 bonds, of the aggregate face value of $1,000,000, to be immediately due and payable, and that they had been requested in writing by the owners of more than one-third of the bonds to enforce the provisions of the deed of trust and the security created thereby. The report further finds that the contention of the defendants, who are now the appellants, that the procurement of the Flanagan judgment was the result of collusion with the company, is not supported by the testimony. All the other issues were found in favor of the complainants. This report was filed on April 15, 1896, and two days after the opinion of the court was rendered, and a decree signed overruling the exceptions to and affirming the master's report, and ordering a foreclosure and sale in accordance with the prayer of the bill.

Otto Gresham and John S. Cooper, for appellant.

Charles A. Dupee, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge (after stating the facts as above). Upon a careful perusal of the record and testimony, we find no error in the conclusions of law or fact, and think that the decree of the circuit court should be affirmed. The defendants seem to have failed wholly in making good the allegations contained in the answer. The principal questions discussed, and on which the case turned in the court below, seemed to be: Whether there was any fraud or collusion practiced in the organization of the company and the issuing of the stock; whether stock was issued without consideration, and has not been paid for; whether there had been a fraudulent overvaluation of the property and different mill plants conveyed to the defendant company under the options taken by Stein, and, if so, whether those defendants, who are the appellants here, being simply stockholders in, and not creditors of, the company, were in a position to urge such matters in defense to defeat the foreclosure of the mortgage or deed of trust given by the company to the trustees to secure the $1,000,000 of bonds, on sale of which the money was raised to put the new enterprise upon its feet. The main question is whether there is any liability on the part of the stockholders in defendant company which can be enforced in this proceeding or set up as a reason for defeating the foreclosure. We are of opinion that these contentions made by the defendants were properly overruled. The prime difficulty was in the lack of evidence to support the allegations of the answer. There was no evidence of any fraudulent overvaluation or of issuing stock without consideration. The consolidation of the plants and the organization of a new company was an experiment entered into for the supposed benefit of the various owners.

Assuming that the stock of the new company was of par value, and that the plants were worth only the prices fixed upon them in the several options, of course there would appear to be an overvaluation in the sale. But this is an assumption that would scarcely be warranted. Probably there was not much market value for the stock, especially the common and unpreferred stock. It was supposed that the new enterprise would make the plants more valuable, so that the value of any plant before the transfer would not be evidence of its value after the consolidation should be completed. Every one interested proceeded with his eyes open, and it was entirely competent to make such a contract as they might agree upon. There was no compulsion practiced and no evidence of fraud. The mill owners could set such valuation upon their plants as they chose, or as they could agree upon with those taking the options. The holders of options and the new company, in the absence of fraud, could do the same thing and make such bargain for the transfer as they saw fit. These owners wanted money. They wanted more capital. They wanted to lessen the expenses of conducting the business. The scheme by which this money was to be raised was to issue bonds upon a first mortgage security, and induce capitalists to buy them. The money was parted with on the faith of these bonds, which were negotiable, though even this is disputed by the counsel for appellants. The answer, however, to this contention is that an inspection of the bonds themselves shows them to be negotiable. But whether they were or not does not affect the right of complainants to a foreclosure. The company issued these bonds with full knowledge of what it was doing, and upon full consideration of the benefits to be derived to it and to the stockholders by such a proceeding. They were paid for at the face value. The company has had the money. Is there any good reason why it should not pay? Are minority stockholders, who knew all about the proceeding, in any position to exclaim against the payment or against the proceeding to foreclose? It is a mere question whether the discontent of a few stockholders can defeat the foreclosure of a mortgage legally and properly given by the company, by the consent and understanding of all concerned, to induce capitalists to advance the money to set the enterprise of consolidation upon its feet and enable it to do business. Possibly Stein received more for the part he performed in obtaining options and promoting the new scheme than he was entitled to. Whether he received more than an adequate compensation for his labor and expenses would be a matter of opinion. However that may be, it is difficult to see how the rights of the bondholders to foreclose the trust deed can be affected by such a consideration. He received what the parties had agreed he should receive. There was no fraud and no collusion, as is alleged in the answer. All parties representing the different interests went into the enterprise with their eyes open. They all wanted the $1,000,000 to set up the new concern, and there seems no very good reason why the company should not pay, or why the foreclosure should not obtain. There was no concealment or misrepresentation. The terms of the options, the value of the different properties, the conditions of payment, and all other material facts were open and accessible to the company and to each stockholder. As was said by the circuit judge in his opinion: "The Columbia Straw-Paper Company parted with its capital stock for what was agreed to be the value of that stock. The property which Stein contracted to give, and which he did give, or cause to be given, to the Columbia Straw-Paper Company, was what that company agreed to accept for its stock. In that transaction the Columbia Straw-Paper Company was in no way wronged. It can have no action to recover on the theory that the stock has not been paid for, nor can any discontented stockholder assert such right for the Columbia Straw-Paper Company as against any other stockholder." 75 Fed. 936. The suit is not prosecuted on behalf of creditors, and there is therefore no question here of the liability of stockholders. Not only was there no evidence introduced to impeach the valuation of the properties transferred to the company, but evidence was introduced by the appellees showing the fairness and justice of the valuation, and the finding of the master and the court upon these questions is fully sustained by the evidence. Even if there had been an overvaluation, that would not affect the result. No doubt, in an action by a creditor against a stockholder, a gross and obvious overvaluation of property conveyed to a corporation in consideration of an issue of stock would be strong evidence of fraud, as was held in Coit v. Amalgamating Co., 119 U. S. 343, 7 Sup. Ct. 231. But this is not an action by a creditor against a stockholder, nor is there an evidence of a gross and obvious overvaluation or any overvaluation at all.

Another contention made and decided in the court below was that the bonds should have been produced before the master. It was alleged in the original bill that "all of the 1,000 bonds, of $1,000 each, with the coupons attached, were duly issued, negotiated, and sold, and are now outstanding and valid obligations of the defendant Columbia Straw-Paper Company, and the same, with the coupons annexed thereto, have come into the possession of, and are now held by, a large number of persons who have become the owners thereof"; and this was admitted by the defendant company in their answer. The testimony for complainants shows that the bonds described in the mortgage were certified and issued by the defendant company; that the company had not paid any of them; that the interest coupons due January 1, 1895, have not been paid. The master found that all the issue of said 1,000 bonds was negotiated and sold, and is now outstanding, and is a valid obligation of the defendant company, and that they were due and unpaid. The court also so found and ordered a sale unless payment was made within a specified time. The trustees were not the owners of the bonds, or any part of them, but they were mortgagees in possession, and had power, under the trust deed, to enforce the lien by foreclosure and sale. In these cases, where bonds issued by railroads or other large corporations on a large scale, and held in trust by trustees, but really owned by persons in many parts of the civilized world, it has not been the practice, nor would it be practicable, to require the bonds to be produced before the court or master before a decree nisi is entered. The practice has uniformly been to enter a decree of sale without the production of the bonds. Of course they cannot be paid or share in the proceeds of sale until brought into court for payment and cancellation. In many cases years elapse after a decree is entered before all the bonds are brought in, the money lying in the registry of the court awaiting their presentation for payment, and in some cases all the bonds are never produced or paid. If the rule required all the bonds to be produced before the court or master before a decree for sale could be made, it would in many cases be a practical denial of justice. No such practice has ever obtained to our knowledge. The sale is made for the benefit of all properly concerned. The decree is not final as to the persons or debts entitled to share in the proceeds. When the time for distribution arrives, any creditor may challenge the title of the claimant of any bond presented. The course of proceeding in such cases is properly indicated in Toler v. Railway Co., 67 Fed. 168; Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 150, 11 Sup. Ct. 512.

Another contention of the appellants is that there is no evidence of a demand for the payment of interest. But no demand was necessary. It is apparent that the interest was due, and had not been paid, and, under the conditions prescribed in the trust deed, the trustees declared the principal and interest owing to be immediately due. The condition broken was that, if a distress, attachment, garnishment, or execution be respectively levied or sued out against the chattels or property of such company, and such company shall not forthwith remove or discharge or pay the same, the trustees shall have power to declare the principal and interest due. Upon this breach of condition the trustees had declared the principal and interest owing upon the bonds to be immediately payable. No other demand was necessary. The complainants' testimony also shows that the interest coupons falling due June 1, 1894, December 1, 1894, and June 1, 1895, had not been paid, and the answer of the defendant company admitted that they had not been paid. It is also said there is no evidence that one-third of the bondholders requested in writing the trustees to declare the principal and interest due and payable, but there seems to be no lack of evidence in the record to support the finding in this respect.

It is also contended by appellants that the taking of the Flanagan judgment, and the issuing of execution thereon, was not sufficient ground on which to declare the principal and interest of the bonds due, because the judgment was obtained by collusion, and was not a sufficient ground under the provisions of the trust deed. We can see but little force in this objection. The defendant had defaulted in the payment of its interest due on the bonds. Flanagan was one of the bondholders residing in New York. He sent six coupons owned by him for collection, which, not being paid, were put into judgment by one Leffingwell acting for him. Execution was issued upon the judgment, which not being paid, the trustees declared the bonds due and payable. The company was insolvent and unable to pay, and made no resistance to the obtaining of the judgment and issuing of execution. But there is no evidence of collusion in the record. Nothing was done either by Flanagan or the company which they had not a right to do. The failure to discharge the judgment and execution was clearly a breach of the conditions of the trust deed which authorized the trustees to declare the entire debt due, and proceed to foreclosure. If the company could have kept up its interest, all this would have been avoided. But being insolvent, and wholly unable to pay its accruing interest, these objections seem somewhat of a technical character, in the light of these facts.

There are some other minor objections made to the decree which are contained in the brief of counsel, but which were not urged upon the oral argument. We have carefully considered them all, and think they should be overruled. There is but one more contention that we care to notice specifically, and that is this: That it was an error, for which the decree should be reversed, for the court to strike the appellants' cross bill from the files. But the answer to this objection is that the appellants were not made defendants, and only came in and were allowed to intervene by permission and order of the court. The cross bill was not an original proceeding on their part. Stockholders are not necessary parties in a bill against the corporation to foreclose a trust deed. They are only allowed to come in under leave of the court, where fraud on the part of the bondholders, trustees, or other parties has occurred which would affect the right of the trustees to foreclose. Thomas v. Railroad Co., 109 U. S. 526, 3 Sup. Ct. 315. Appellants were not creditors, and constituted but a very small part of the stockholders. The court, upon petition, permitted them to become defendants, and put in an answer and cross bill, upon the supposition that their answer might show a state of facts which would defeat or qualify the right of foreclosure. The substance of the answer was, as before stated, that the bondholders had acquired their stock without paying for it, and were indebted