

written deed. It is clear that Campbell took that beneficial interest in the trust deed solely as agent or representative of Wood, Brown & Co., and solely for their protection. This was the intent and purpose of all parties to the transaction. *Jones v. Indemnity Co.*, 101 U. S. 622.

The appellants press upon the court the application of the maxim, "*Ex turpi causa non oritur actio.*" But there does not appear a case for the application of this wholesome maxim. Who complains of the transaction? There are no creditors before the court. As far as can be seen, no person whosoever, except the appellants, makes any objection to the deed. The parties seeking to shelter themselves behind the maxim intended to prevent fraud are the guilty participants, who, by its use, seek to remain in enjoyment of what they now seek to show are illgotten fruits. See *Jones*, *Mortg.* § 629. Where, however, is the evil-doing in this case? All persons who dealt with Smith, Brown & Co. were informed by the recorded deed that this part of their property was incumbered by a lien. The trustee named in the deed was a well-known citizen of the town in which the deed was recorded. All persons who are interested were put on notice by the deed, and could have their inquiry answered by calling upon him. No man in business is obliged to expose all the details of his business. It is the universal practice for merchants to keep their own counsel, except as to those matters which the law requires to be disclosed. Courts have recognized the validity of mortgages kept from the record until the last moment of danger. *Haas v. Sternbach* (Ill. Sup.) 41 N. E. 51. We see no fraudulent conduct here which can prevent a party from going into a court of equity and asserting his rights.

The last question made by appellants is upon the statute of limitations. The statute does not prevent the enforcement of the deed of trust. It runs for 20 years against such an instrument. *Camden v. Alkire*, 24 W. Va. 674. Nor has the statute barred the debt. It is evidenced, as we have seen, in the contemporaneous memoranda made by each of the parties as parts of the contract then made, explaining and limiting the deed. It is, therefore, a contract by writing, signed by the party to be charged thereby, and it has 10 years to run. Section 6, c. 104, Code W. Va. The decree of the circuit court permitting a decree for any balance that may be found due the complainants after a sale of the property is in accordance with rule 92 in equity. The decree of the circuit court is affirmed.

TALBOT v. PRESS PUB. CO.

(Circuit Court, S. D. New York. May 11, 1897.)

BILL OF EXCEPTIONS—EXTENSION OF TIME—ORDER NUNC PRO TUNC.

The circuit court has power to extend the time for making, filing, and serving a bill of exceptions by an order entered nunc pro tunc as of a date before the expiration of the time allowed for the purpose, made after the expiration of the term at which the case was tried and judgment entered.

Charles L. Kingsley, for plaintiff.
L. G. Reed, for defendant.

LACOMBE, Circuit Judge. This is an application for an order nunc pro tunc as of November 25, 1896, extending plaintiff's time to make, file, and serve a bill of exceptions until May 12th. The case came to trial on October 21, 1896, and verdict was rendered in favor of defendant on October 26, 1896. The court, upon rendition of the verdict, gave plaintiff 30 days in which to make, file, and serve a bill of exceptions. Judgment was entered, and notice of entry and filing was duly served on November 12, 1896. The time to take out writ of error will expire May 12, 1897. The time to make, file, and serve bill of exceptions expired November 25, 1896, and plaintiff's attorneys have neglected to obtain any stipulation or to obtain any order of court extending such time. The counsel for defendant in error interposes no objection to this application in the way of asking terms or conditions, nor does he seek to take any advantage of plaintiff's default, but in behalf of his client submits to the court the question whether, in view of the fact that the term at which the case was tried has long since expired, there is any power in the court to give the relief asked for. There are two jury terms of the circuit court in this district, beginning on the third Monday of October and first Monday of April, respectively. The provisions of section 914, Rev. St. U. S., do not extend to the means of revising a decision once made by the circuit court. The practice upon writs of error is to be regulated by the federal statutes, and the rules and practice of the federal courts. The only regulation of statute as to bills of exceptions is that contained in section 953 of the Revised Statutes, which has no reference to the point here presented.

Reference is made to *Muller v. Ehlers*, 91 U. S. 249; *Bank v. Eldred*, 143 U. S. 293, 12 Sup. Ct. 450; *Morse v. Anderson*, 150 U. S. 156, 14 Sup. Ct. 43; and *Ward v. Cochran*, 150 U. S. 597, 14 Sup. Ct. 230; and it is urged that the court has no power, after a term has expired, to extend the time for making, etc., bill of exceptions, even within the period allowed by statute for suing out a writ of error. Inasmuch as the exceptions were all taken, noted by the judge, and reduced to writing at the trial, and the bill of exceptions is merely the convenient form in which they are reproduced for the court of review, such a hide-bound practice would often work great injustice. The decision in *Chateaugay Ore & Iron Co.*, 128 U. S. 544, 9 Sup. Ct. 150, has recognized a more liberal rule as applicable in this district, where, as the supreme court says, by Mr. Justice Blatchford, "the rules of the circuit court clearly contemplate proceedings to perfect a bill of exceptions within the time limited by those rules, without reference to the expiration of a term." Since those rules expressly contemplate an enlargement of the time by the judge in a proper case, there is no reason why enlargement should not be made in this case, although the trial and judgment term has expired. The time to make, file, and serve bill of exceptions is extended to and including May 12th.

FIRST NAT. BANK OF CHATTANOOGA, TENN., et al., v. RADFORD TRUST CO.

(Circuit Court of Appeals, Sixth Circuit. May 10, 1897.)

No. 456.

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP OF MORTGAGE TRUSTEE.

Where a trustee under a mortgage made to secure a series of bonds refuses to foreclose after default, any holder of such bonds may file a bill for the benefit of himself and all others, and pray foreclosure. To such a bill the trustee holding the legal title to the mortgaged property is a necessary party, and may be made a defendant when he refuses to file such bill himself.

2. SAME.

Where the bill shows no conflict between such a complainant and the trustee, and where the bill is such a one as the trustee should himself have filed, the trustee will, for purposes of jurisdiction, be ranged on the same side of the controversy as the complainant. But, where the object of the bill filed by a beneficiary is to procure a decree excluding all other bondholders from the equal benefits of the mortgage, the trustee is properly an opposite party to the subject-matter of that controversy, and should, for purposes of jurisdiction, be ranged with the other defendants to the suit.

3. CORPORATE MORTGAGES—REORGANIZATION—SUBSTITUTION OF BONDS—ELECTION.

Mortgage bondholders of an insolvent corporation agreed to accept in lieu of their bonds other mortgage bonds, to be issued by a reorganized company, but upon condition that all other holders of the old bonds should agree to a like exchange. Before all other bondholders had so agreed, they received the new bonds, at the same time retaining the old ones until the assent of all bondholders should be obtained. Such assent was not given, but they thereafter joined with other holders of the new bonds in declaring them matured for default of interest, and in requiring the trustee to institute foreclosure proceedings. *Held*, that this was an election to accept the new bonds and surrender the old, and that they were not thereafter entitled to the security of the old bonds.

4. CORPORATIONS—ASSIGNMENT FOR BENEFIT OF CREDITORS—ASSIGNEE'S SALE—LIABILITY OF PURCHASERS.

A corporation having made an assignment for benefit of creditors, certain of its bondholders bought in a part of its personal property at the assignee's sale. At this time a scheme of reorganization had been devised, by which a new company was to take all the property of the old one and issue securities to its creditors. The purchasers at the sale and the assignee, acting upon the assumption that all creditors would agree to the scheme, turned over the personal property purchased to the new company, the purchasers not paying any part of the purchase price. *Held*, that creditors who never assented to the reorganization were entitled to enforce payment of the purchase price for the purpose of discharging their claims.

5. SAME—ASSENT BY CREDITORS TO REORGANIZATION.

Creditors of a corporation which has made an assignment for benefit of creditors release their rights under the assignment when they consent to a plan of reorganization, and accept bonds of the reorganized company in payment of their claims.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

The Hughes Lumber Company, a corporation organized under the law of Tennessee, and doing a manufacturing business at Chattanooga, issued its interest-bearing bonds, to the extent of \$200,000, secured by a mortgage upon its real estate, machinery, etc., to R. M. Barton, Jr., as trustee. Ten of these bonds, each for \$1,000, were pledged by it to the Radford Trust Company, a corporation organized under the law of the state of Virginia, as collateral

security for an indebtedness of about an equal amount due to it by the Hughes Lumber Company. This indebtedness has not been discharged, and default has been made in the payment of interest on the bonds so held, in consequence of which the principal of the bonds has matured, under a provision of the mortgage. This Barton mortgage, as we shall designate it, was executed October 22, 1890. On the 26th of December, 1890, the same corporation made a deed of general assignment to the defendant M. H. Ward, whereby it conveyed its equity of redemption in the property conveyed to Barton, and all of its other assets of every kind, for the equal benefit of all its creditors. On the same day D. W. Hughes, president of the Hughes Lumber Company, and a large owner of its stock, also made a general deed of assignment to M. H. Ward, whereby he conveyed all of his individual assets for the equal benefit of all his creditors. Subsequently Mr. Hughes proposed a plan for the settlement of the debts of both the Hughes Lumber Company and himself, and a reorganization of the business of the corporation. This plan involved the organization of a new corporation, which should assume the debts of both himself and the old corporation, by giving to such creditors its own mortgage bonds in substitution for the bonds of the Hughes Lumber Company, and in discharge of the Barton mortgage and of the two assignments made to Ward; such bonds to be secured by a first mortgage upon the combined assets of the Hughes Lumber Company and of himself, which for this purpose should be conveyed to the new corporation. The combined indebtedness of the two debtors aggregated about \$250,000. Bonds to this amount, secured as mentioned, were to be exchanged for the bonds of the Hughes Lumber Company, to the extent outstanding, and the surplus applied in the paying off of debts not protected by such bonds, but which were entitled to the security provided by the assignments to Ward. This plan was submitted to a number of creditors, including appellants, who regarded it with favor, and joined in recommending its acceptance by all. Pending communication with creditors, Ward, assignee, brought to public sale the property conveyed to him under the general assignments of the Hughes Lumber Company. At that sale the real estate and the manufacturing plant of the Hughes Lumber Company were sold, subject to the Barton mortgage, for the sum of \$450. A large quantity of lumber and other material belonging to the same corporation, and not embraced in the Barton mortgage, were sold for \$11,880.57. The successful bidder for both properties was J. F. Loomis. The evidence establishes that the purchase was made by Loomis as the agent for appellants, and that their purpose in buying in the property was to promote the scheme of settlement and reorganization which had already been accepted by a large proportion of the creditors interested. It was believed that all would assent finally, and that it was desirable that the property should be kept together, so that when the assent of all was received the property could be conveyed to the new corporation, and the plan carried out. No part of the purchase money was ever paid to Ward, who subsequently, at the instance of Loomis and those for whom he acted, conveyed the property so sold to the Hughes Bros. Manufacturing Company, the new corporation organized under the plan of settlement above detailed. Mr. Loomis' account of the purchase of this property is as follows: "The purchases were made for T. G. Montague, president of the First National Bank, C. E. Stivers, cashier City Savings Bank, and the Loomis & Hart Manufacturing Company. I purchased them as trustee for the above-mentioned parties. I did not pay anything on these purchases. It was the understanding that Mr. Hughes was to make some arrangement with all of his creditors by which they were to take bonds issued on the plant and material, and on Mr. Hughes' individual property. When this arrangement was made, I was to deed back the property to Hughes Bros. If the arrangement was not made, I was then to handle the property for Mr. Montague, president, Mr. Stivers, cashier, and the Loomis & Hart Manufacturing Company. I understood Mr. Hughes had made such an arrangement with his company, and I deeded back the property, except what had been sold, to him, and the net proceeds of all sales that had been made by me." "Q. Did not T. G. Montague, president of the First National Bank, C. E. Stivers, cashier of the City Savings Bank, and the Loomis & Hart Manufacturing Company all consent to your transferring said property back to Hughes Bros. Manufacturing Company, or

Hughes Bros? And is it not also a fact that they knew you were not receiving anything for it, and were they not to take bonds of Hughes Bros. Manufacturing Company for their debts? A. I so understood that these parties all consented to my deeding the property back to Hughes Bros. The Loomis & Hart Manufacturing Company did agree to take bonds of the Hughes Bros. in settlement of their claim. Cannot answer as to other parties." Ward's deposition is not in this record, but, from exhibits and other evidence, it appears that he conveyed this property to D. W. Hughes, or to the Hughes Bros. Manufacturing Company, in promotion of the scheme of settlement, and without receiving the purchase price bid by Mr. Loomis, protecting himself by an indemnifying bond made by Hughes and some of his friends.

The original bill was filed by the Radford Trust Company, as a creditor of both the Hughes Lumber Company and D. W. Hughes, and entitled to the benefits of the Barton mortgage and of both the assignments made to Ward, for the purpose of foreclosing the Barton mortgage and of winding up the assignments to Ward for the benefit of all such creditors as had not waived the benefit of those instruments by accepting the liability of the new corporation in exchange for the obligations of the lumber company. That bill was filed against the Hughes Lumber Company, the Hughes Bros. Manufacturing Company, R. M. Barton, trustee under the mortgage of the Hughes Lumber Company, H. C. Beck, trustee under the mortgage of the Hughes Bros. Manufacturing Company, M. H. Ward, assignee under the two general assignments mentioned, and a number of others liable upon commercial paper transferred to the complainant by the Hughes Lumber Company either for value received, or as collateral for the debts of that corporation to the complainant. September 22, 1893, on application of complainant, a temporary receiver was appointed to take possession of the property embraced in these instruments. This appointment was subsequently made permanent. By an amended bill, filed October 5, 1893, other defendants were brought in; among them being the appellants, the First National Bank of Chattanooga, G. H. Jarnagin, assignee of the City Savings Bank, and the Hart & Loomis Manufacturing Company. After setting out the transactions we have stated, the bill, as amended, avers that, with the exception of complainant, every holder of bonds secured by the Barton mortgage had accepted bonds of the Hughes Bros. Manufacturing Company secured by a mortgage embracing the identical property conveyed to Barton, in addition to other property included in the assignments to Ward, and insists that thereby all such beneficiaries have estopped themselves from claiming any benefit under the Barton mortgage. It further insists that never having accepted bonds of the Hughes Bros. Manufacturing Company, nor assented to the conveyances made by Ward to that company, it is entitled to have the Barton mortgage foreclosed, and the assignments to Ward closed up, and the proceeds, as far as necessary, applied in payment of its debts against the Hughes Lumber Company and against D. W. Hughes. The complainant further insisted that all creditors who had assented to this reorganization scheme, and accepted the new security provided by the mortgage made by the new corporation, had waived the benefit of the general assignment made by the Hughes Lumber Company and D. W. Hughes, and that complainant was entitled to enforce said assignments for its benefit and that of other general creditors who had not agreed to this plan of reorganization. To this end, this amended bill asserted the right of complainant, in behalf of itself and all other creditors who had not accepted the bonds of the corporation, or assented to the acquisition of the property covered by the several conveyances in trust mentioned above, to follow and recover all such property, and compel its application exclusively to the payment of the demands of creditors who had not waived the benefit of the said several trusts, or, if such property could not be found or recovered from those into whose hands it had come, the right to hold Ward liable personally for the value of the property so lost to the trust was asserted, and proper relief prayed. Other facts necessary to an understanding of the case will appear in the opinion.

Upon a final hearing the circuit court decreed as follows: (1) That complainant was entitled to a decree foreclosing the Barton mortgage. (2) That complainant was the only holder of bonds secured under that mortgage who had not accepted the new security provided by the mortgage made by the

Hughes Bros. Manufacturing Company, and was therefore the only beneficiary entitled to look to that security. (3) That general creditors of the Loomis & Hart Company and of D. W. Hughes, who assented to the conveyance by Ward of the property assigned to him, and who had accepted the bonds of the Hughes Bros. Manufacturing Company, thereby waived the benefit of said assignments, and that only such creditors as had not elected to take such bonds as a substitute for their claims were entitled to share in the proceeds arising from the sale of the property so assigned to Ward. (4) That the persons bidding in the property of the Hughes Lumber Company at the sale made by Ward should be required to pay to the receiver the price they agreed to pay, which should be first applied in the payment of the claim of creditors secured by said assignments who had not assented to the reorganization scheme. From this decree the First National Bank of Chattanooga, the Hart & Loomis Manufacturing Company, and G. H. Jarnagin, assignee of the City Savings Bank, have perfected appeals and assigned errors.

Wheeler & McDermot, E. Y. Chapin, E. M. Dodson, and White & Martin, for appellants.

Garnett Andrews and Wm. L. Frierson, for appellee.

Before TAFT and LURTON, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

Before considering the merits, there is a preliminary question for consideration, involving the jurisdiction of the circuit court to pronounce any decree in this cause. The jurisdiction of the court seems never to have been brought to the notice of the court below until after an amended and supplemental bill had been filed by complainant, and the cause about ready for hearing. In considering this question of jurisdiction, we shall therefore consider the status of the cause as it appears upon both the original and amended bills. If the court had jurisdiction at the time a motion was first made to dismiss for want of jurisdiction, and had jurisdiction when it entered the decrees appealed from, it is of no moment, on this record, how long it had had jurisdiction, or at what prior stage of the cause it was acquired. In *Railroad v. Ketchum*, 101 U. S. 289-298, a like objection was made at a late stage of the cause, and the court said:

"For the purposes of this appeal, we need not inquire when the circuit court first got jurisdiction of this suit. It is sufficient if it had jurisdiction when the decree appealed from was rendered. As no objections were made by the parties in the progress of the cause to the right of the court to proceed, and the decree, when rendered, was consented to, it is enough for the purpose of this appeal if the record shows that, when the consent was acted on by the court, jurisdiction was complete. Consent cannot give the courts of the United States jurisdiction, but it may bind the parties, and waive previous errors, if, when the court acts, jurisdiction has been obtained."

The sole complainant in the original bill was the Radford Trust Company, a corporation of the state of Virginia. The defendants were all citizens of the state of Tennessee, or of states other than Virginia. One of these defendants was R. M. Barton, Jr., who was made a defendant as trustee under the mortgage securing the bonds issued by the Hughes Lumber Company, which was a corporation of the state of Tennessee. Barton, the trustee, was also a citizen of Tennessee. The appellants now insist very strenuously that Barton, as trustee, should, for purposes of jurisdiction, be classed on the same

side of the controversy as the complainant, and that, when the parties are thus arranged, we will have a cause where citizens of Tennessee are upon both sides of the case, and the jurisdiction of the circuit court must therefore fail. Where the jurisdiction of the United States court is dependent alone upon diversity of citizenship, the parties should be arranged with reference to the real controversy presented by the pleadings, and not according to the arbitrary arrangement of the pleader. This is well settled in the adjudications of this court. *Pittsburgh, C. & St. L. Ry. Co. v. Baltimore & O. R. Co.*, 22 U. S. App. 359-366, 10 C. C. A. 20, and 61 Fed. 705; *Shipp v. Williams*, 22 U. S. App. 380-385, 10 C. C. A. 247, and 62 Fed. 4; *Salt Co. v. Brigel*, 31 U. S. App. 666, 14 C. C. A. 577, and 67 Fed. 625. But what is the subject-matter of the real controversy presented by the original and amended bills of the complainant? In *Railroad v. Ketchum*, 101 U. S. 289, the court said, touching this classification of the parties with reference to the real controversy, that:

"For the purpose of jurisdiction, the court had power to ascertain the real matter in dispute, and arrange the parties on one side or the other of that dispute. If, in such arrangement, it appeared that those on one side were all citizens of different states from those on the other, jurisdiction might be entertained, and the cause proceeded with."

In the case last cited the bill was a foreclosure suit brought by Ketchum, a holder of bonds, against the mortgagor and the trustees under the mortgage. The complainant and the trustees thus made defendants were citizens of the state of New York. The mortgagor was a corporation of Missouri, and the suit was brought in one of the circuit courts of the United States for the Eastern district of Missouri. The jurisdiction was wholly dependent upon all the parties on one side of the controversy being citizens of different states from those on the other. As the parties were arranged by the pleader, this diversity did not exist, and there was no jurisdiction. It appeared, however, that the trustees were necessary parties, because the legal title to the mortgaged property was in them, and they were made defendants because, doubting their authority, they had declined to institute foreclosure proceedings. There were no averments in the bill indicating any antagonism between the trustees and the beneficiaries under the mortgages. "The complainants," said the court, "commenced the suit to get done just what the trustees, if they had been willing to proceed, might have done. Whatever he did was for the trustees, and in their behalf, and he really had no power to do more than they might have done if they had been so inclined." The court therefore held that there was no antagonism between the complainant and the trustees, who should therefore be arranged on the same side of the real dispute with the complainants, which gave jurisdiction and enabled the court to proceed with the cause. The averment of the amended bill touching the refusal of Barton to foreclose the mortgage made to him was in these words:

"R. M. Barton, Jr., the trustee, not only declined and neglected to advertise and sell the property covered by said trust deed, but complainant avers that he had definitely and positively determined and declined to join as a party bringing said suit; that he had in fact, for reasons personal to himself, and having no reference to this cause, or to giving this court jurisdiction thereof,

positively and definitely determined not to execute the trust, and to have nothing to do as trustee with the matters and trusts created by said deed; that he had reached this determination before he was aware that this suit would be brought, and before his connection therewith; that he did this, not for the purpose of giving this court jurisdiction, but that this conduct would have been the same under any and all circumstances, and, as before stated, for reasons personal to said trustee, and which were, in his judgment, imperative, and conclusive on him."

If the only object of complainant's bill had been to foreclose the Barton mortgage, such an averment as to the reasons moving Barton in his refusal to institute such a proceeding would be insufficient to show any real antagonism between the complainant and himself as trustee, and would bring the case within the facts of *Railroad v. Ketchum* and *Shipp v. Williams*, elsewhere cited, and require that the complainant and Barton should be treated as on the same side of the real controversy, which, in the case supposed, would have been the mere question of the foreclosure of the mortgage,—a controversy wholly with the mortgagor. But complainant's bill, as amended, was not a simple foreclosure bill. It was full of averments attacking the right of any beneficiaries thereunder, save itself, to share in the benefits of the common security; alleging that, with the consent of all other holders of bonds, the mortgaged property had been conveyed to another newly-organized corporation, and bonds of this new corporation, secured by a mortgage on same property, accepted in exchange for those secured by the conveyance to Barton. These averments involved a dispute as to the right of Barton to foreclose the mortgage for the benefit of any beneficiary other than complainant, and involved an insistence that if he did foreclose, or if foreclosure should result from judicial proceedings, the proceeds arising from the sale of the mortgaged property should be paid exclusively to complainant, to the extent necessary to satisfy its bonds. Thus, the controversy was not only as to the foreclosure of the mortgage, but as to the right of complainant to be paid to the exclusion of all others. Clearly, this was a dispute in which Barton, as trustee for all beneficiaries, must stand in antagonism to the exclusive claim set up by a single beneficiary, and should not be treated as upon the same side. The bill was not one which could have been properly prosecuted by him, and complainant cannot be said to be doing just what Barton might have done had he been willing to proceed, nor that what complainant did by filing such a bill was done for the trustee and in his behalf. Neither was the liability of the mortgagor to the complainant unquestioned, for it appears that its right to hold the bonds in its possession, or to proceed against the mortgaged property for their satisfaction, was also disputed. If this contention of the mortgagor should be sustained, the mortgage was satisfied, and the trustee had no power to foreclose. To a bill filed for the purpose of preventing all other holders of bonds from participating in the benefits of a common security, and for the purpose of establishing complainant's right to the bonds it held, and of procuring a decree appropriating that security to its exclusive benefit, the trustee was a necessary party defendant. Though the trustee thus made defendant may have been under no duty to actively participate in a controversy

between beneficiaries, yet his attitude was properly that of a defendant whose right to execute the trust for the equal benefit of all was denied, and made a subject of judicial controversy. Appellants have called attention to the fact that Barton is one of the counsel filing this bill, and this, they say, evidences his friendly attitude to complainant. Barton's attitude as counsel for complainant is clearly one of active antagonism to the rights claimed by all the other beneficiaries, and is one which he could not have assumed in his character as trustee. He was acting with proper judgment in refusing, as trustee, to champion the claims which he may well present, as counsel, after throwing off the responsibilities of trustee.

We come now to the merits of the cause. The principal question arises upon the error assigned to so much of the decree as excludes the First National Bank of Chattanooga and G. H. Jarnagin, assignee of the City Savings Bank of Chattanooga, from participating in the proceeds arising from a foreclosure of the mortgage to Barton. Both of the appellants who complain of this part of the decree were large creditors of the Hughes Lumber Company and of D. W. Hughes. The National Bank held, as collateral security for its debts, bonds of the Hughes Lumber Company aggregating \$75,000; and the City Savings Bank, for a like purpose, held bonds amounting to \$50,000. In the creation and management of these large debts, the National Bank was represented by its president, T. G. Montague, and the City Savings Bank by its cashier, C. E. Stivers. The Hughes Lumber Company was largely owned by its president, D. W. Hughes, who seems to have involved his personal credit in its business, and to have completely controlled the affairs of the corporation. After the execution of the Barton mortgage, and after the general assignments of both the corporation and D. W. Hughes to Ward, as assignee, Hughes made a struggle to extricate himself and his corporation, by the scheme of organizing a new corporation, which should take all the property of the old, and all of his individual estate, and assume all liabilities of himself, as well as of the Hughes Lumber Company. He believed, as did many of the creditors, that the combined property of the corporation and himself would furnish ample security for an issue of \$250,000 in bonds, and that these bonds would be accepted by the holders of the Barton bonds, and other creditors who had only the security afforded by the assignments to Ward in satisfaction of their debts. A meeting of creditors was accordingly held, and this scheme was indorsed. A circular letter was signed by Montague and by Stivers, representing these two banks, and by several other creditors, and was sent to such creditors as had not been present, soliciting their assent to the plan. The great mass of creditors did assent, and agreed to accept the new bonds in satisfaction of their claims, and to surrender the security afforded by the Barton mortgage, and by the assignments to Ward. But before all had assented the new corporation was organized, and Ward, through the active co-operation of these two banks and others, was induced to convey the assets vested in him to the new company. This conveyance was not joined in by Barton, and was therefore subject to the lien of his mortgage upon the real estate and machinery of the Hughes Lumber Company.

A mortgage was placed on the property thus obtained, and the bonds of the new corporation issued, to the extent of \$250,000. Those bonds were at once offered to the creditors of the old company and of D. W. Hughes in substitution for the securities they held, and were accepted by many unconditionally. When Hughes sought to obtain from these two banks the Barton bonds held by them, and to substitute for them the bonds of the new corporation, he was met by the demand that all other holders of such bonds must first agree to the plan of settlement, and that the Barton mortgage should be canceled. To meet this difficulty, it was agreed that the banks should take the new bonds conditionally; the condition being that the old bonds should be retained until all other holders of such bonds had agreed to accept the new security, and the Barton mortgage had been canceled.

It has been argued that these new bonds were accepted and received only as additional security to that afforded by the Barton mortgage and by the assignments to Ward, and were to be received in substitution for the old security only when all beneficiaries had accepted the plan of settlement, and when the Barton mortgage had been canceled, and that they are entitled to the benefit of both securities, the condition upon which they were to surrender one never having been performed. This contention is not supported by the facts and circumstances found in this record, nor can we believe that either Mr. Montague, who acted for the National Bank, or Mr. Stivers, who represented the Savings Bank, mean to have their evidence interpreted as supporting such a proposition. That these appellants should, under any circumstances, obtain an additional security to that afforded them by the Barton mortgage and the Ward deeds of trust, except upon condition that they should surrender the Barton bonds and the benefit of the Ward assignments, is utterly inconsistent with the whole scheme of settlement which had been presented by them. That they were unwilling to give up the Barton bonds until others had done so is quite reasonable. But it is equally clear that, until they did agree to surrender the Barton bonds, they could obtain no title to the bonds of the new corporation. A consideration of the whole evidence leads us to the conclusion that each of these banks accepted these new securities as a substitute for the old bonds, subject to the condition that all other holders of the old issue of bonds should agree to a like exchange of securities, and that the old or Barton bonds were retained until this condition had been complied with. These were the facts as reported by Special Master Ewing, and were the facts as found by the court below.

The document signed by D. W. Hughes under date of June 1, 1891, pledging, among other collaterals, 48 of the bonds of the Hughes Bros. Manufacturing Company to the City Savings Bank to secure the indebtedness which had been theretofore secured by the bonds of the Hughes Lumber Company and other collaterals, is not hostile to this conclusion. The indebtedness secured by the pledge of June 1, 1891, were the same debts theretofore secured by a pledge of the bonds of the Hughes Lumber Company, together with certain shares of stock in an electric lighting company, and by certain notes secured

by a deed of trust upon the individual property of D. W. Hughes. The instrument by which Hughes pledged the bonds of the new corporation also included the shares and notes before pledged, and makes no mention of the old bonds which had been held in pledge theretofore. A fair inference from this omission to pledge the old bonds would be that the new bonds were substituted for the old, the pledge in other respects being identical with the former security held by that bank. The fact that the old bonds were suffered to remain in the possession of the bank after this new pledge alone supports the conclusion that the new bonds were not accepted unconditionally. The condition upon which these banks were to accept the new bonds in exchange for the old has never been complied with. One holder of such bonds never did accept the new bonds, and that holder is the complainant. Unless, therefore, these banks which took the bonds conditionally have done something to change their situation, they may well stand upon their rights as holders of the Barton bonds, and participate with complainant in the proceeds of a foreclosure; for they have obtained no title to the new bonds, and no right to retain them. Clearly, appellants had the power to waive this condition, and might do so by any act which clearly indicated an election to hold and enforce the new bonds. They could not hold both classes of bonds, and could not enforce one mortgage without abandoning the other. While appellants were thus in possession of both sets of bonds, with the right to determine which they would rely upon, the complainant filed its original bill. That bill had for its principal object, as we have heretofore stated, the foreclosure of this Barton mortgage for the exclusive benefit of such holders of bonds as had not elected to accept the bonds of the new corporation in satisfaction thereof, and alleged, on information and belief, that all holders of such bonds, other than complainant, had elected to receive bonds of the new company in satisfaction of their claims. This bill was filed July 4, 1892. On the 1st day of September, 1893, the holders of the bonds issued by the Hughes Bros. Manufacturing Company joined, under a provision of the Beck mortgage, in a declaration maturing the principal of said bonds for nonpayment of interest, and requiring H. C. Beck, the trustee, to take steps at once to foreclose. This instrument was signed by both these appellants, and was duly delivered to the trustee. On the 20th of September, 1893, the First National Bank filed an original bill in a chancery court of the state against the Hughes Bros. Manufacturing Company and H. C. Beck, trustee, for the purpose of foreclosing the mortgage to Beck for the benefit of all holders of bonds secured thereunder. Upon the same day a bill was filed in the same court by Jarnagin, assignee for the City Savings Bank, to foreclose both the mortgages to Barton and Beck; claiming priority for the former, but praying to be allowed the benefits of the latter in case the court should determine that complainant was not entitled to claim under the Barton mortgage. As this last-mentioned bill sought only alternative relief under the Beck mortgage, we do not attach importance to it as evidence of an election to hold the bonds of the Hughes Bros. Manufacturing Company.

No clearer evidence of an intention to claim under the Beck mortgage and as a holder of the bonds of the Hughes Bros. Manufacturing Company could be imagined than was evidenced by joining in the declaration maturing the principal of those bonds, and requiring the trustee to institute foreclosure proceedings. It was an act to which no doubtful meaning could be attached, and was a distinct election to accept the new bonds and surrender the old. It was an assent and an acceptance utterly inconsistent with the subsequent retention of the old bonds, for the title of both banks to the new bonds was dependent upon the surrender of the old bonds, for which they were a substitute. For appellants it is said that this acceptance was made under mistake of fact, and that it was done under the belief that all other holders of old bonds had accepted the new. There is no evidence that they were misled, and no satisfactory evidence that they acted under any mistake of fact, or that they were ignorant of the refusal of the Radford Trust Company to accept the new bonds. It is true that neither of these banks had then been made parties to the bill of complainant, but that bill was pending in a court of record, and the Hughes Lumber Company and Barton, as trustee, were parties. That they were actually ignorant of the pendency of that bill is not affirmatively alleged or shown, and the circumstances were such that the slightest inquiry of the trustee would have resulted in full information. The legal effect of acceptance was known to them, and they are not to be now excused upon the mere suggestion that they acted in ignorance of the attitude of the complainant. The subsequent filing of a bill to foreclose the Beck mortgage by the national bank is only further evidence of acceptance, though the declaration of maturity, with notice to Beck, was in itself conclusive of that fact. Under the circumstances under which appellants held possession of these bonds, they were put to an election. They were obliged to affirm or disaffirm the plan of settlement. They knew all the facts touching that settlement, and it rested with them to determine whether they would accept the new bonds or hold on to the old. The notice to Beck was a conclusive exercise of the right of election, and a waiver of all right to look to the Barton mortgage, or to hold on to the Barton bonds. This election to hold and rely upon the bonds of the Hughes Bros. Manufacturing Company as a substitute for the bonds of the Hughes Lumber Company operated as a payment of the latter bonds, and a release of the security provided by the Barton mortgage. *Central Trust Co. v. Cincinnati, J. & M. Ry. Co.*, 58 Fed. 500. The case of *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. 4, is a case where, under circumstances of much greater hardship, a party was held to the consequences of an election. The principles upon which that case rests are those which govern this. *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 435-470, 6 Sup. Ct. 809, also presents a case of the acceptance of bonds secured under a junior mortgage in substitution for bonds issued under an earlier mortgage, where the court held that acceptance worked a cancellation of the earlier mortgage, and held the parties to their agreement. The decree, in this respect, must be affirmed.

The next question is as to so much of the decree as required appellants to pay to the receiver the sum of \$11,889.57, being the amount of the bid made by them, through J. F. Loomis, at the sale by Ward, assignee, of lumber and material included in the general assignment made by the Hughes Lumber Company. As before stated, this material was not covered by the Barton mortgage, and its proceeds were properly distributable among all the creditors of the assignors. The facts show that appellants, through Loomis, as their agent, became the absolute purchasers of this lumber, etc., at the price of \$11,889.57. Loomis says that their understanding with him was that, if the creditors all agreed to the plan of reorganization, the purchase should inure to the equal benefit of all, and the material in that event would be transferred to the new corporation. If that plan fell through, then he says he was to manage the transaction for the exclusive benefit of those he represented. It is evident that, if all interested under this deed of assignment had agreed to accept the proposed arrangement, there would have been no necessity for paying the price of this lumber to Ward or any one else. The acceptance of the obligations of the new corporation in substitution of the benefits provided by this assignment would have operated as a release and satisfaction of this deed of trust. In that event the payment of the price to Ward, and receiving it back again, would have been an idle ceremony. But neither Ward nor appellants waited the acceptance of this plan by all. Upon the supposition that all would assent to the plan, Ward, by direction of D. W. Hughes and appellants, turned this lumber and material over to the new corporation, or to Hughes for the new corporation, without requiring the payment of the purchase money, and without any other consideration than the supposed consent of all concerned. We have already stated the character of the relief sought by the amended bill of the Radford Trust Company by reason of this state of facts. After the appointment of C. E. Stivers as permanent receiver under the bill and amended bill of that corporation, the Rogersville National Bank, a large general creditor of both the Hughes Lumber Company and D. W. Hughes, and one of the defendants brought in by the amended bill of the Radford Trust Company, filed a petition and cross bill in the principal cause, in which, by permission of the court, the receiver joined, setting out the facts concerning this sale of lumber by Ward, and seeking relief on account thereof against Ward personally, and against J. F. Loomis and appellants by reason of their participation with Ward in a breach of trust. Upon all the pleadings and proof, the court below held Ward liable "to account to the nonassenting creditors of the Hughes Lumber Company for the price of the property sold by him for which the purchasers had not paid," but also held that appellants, as purchasers, should be first liable, and Ward only in the event the purchase price was not paid by them. The court further held that the fund thus realized should be distributed among the creditors secured by the assignment of the Hughes Lumber Company who had not accepted the bonds of the Hughes Bros. Manufacturing Company in payment of the claims against the original corporation. We see no error in this decree of which appellants