was substituted as trustee in the first mortgage for the Security Savings & Trust Company, and in that capacity brings his bill of complaint, in the nature of a cross bill herein, against the East Side Railway Company, to foreclose the said first mortgage.

The principal question that arises in the case involves the validity of this sale of bonds made in San Francisco,—the contention of the Steels and of the railway company being that the sale to Morris & Whitehead is a mere pretense, designed for the purpose of enabling the German Savings & Loan Society to foreclose for the face value of the bonds, instead of the amount due upon the notes, for which the bonds were pledged; and, furthermore, that the hypothecation of the unissued bonds, 156 to 300, inclusive, was unauthorized, the company being without authority to make such hypothecation; that the debt for which these bonds were hypothecated was that of the company, and not of the Steels, and, if such bonds were lawfully hypothecated, still their sale in the mode employed was unauthorized and void. The answer made to this is that the sale to Morris & Whitehead is bona fide; that the German Savings & Loan Society has no interest in the sale, but that it is immaterial as to this, for the reason that the latter might, as is claimed, have purchased the bonds at its own sale, under the power given it. As to the contention that bonds 156 to 300, inclusive, were unissued treasury bonds, and were not authorized to be sold in the mode employed, it is answered that there is no distinction as to the bonds and notes; that the two notes are evidences of one debt, and that the debt of the Steels; and that all the bonds pledged were their property; and, further, that it is immaterial whether the note for $80,000 is for the debt of the East Side Railway Company, or whether bonds 156 to 300, inclusive, were treasury bonds or not, because (1) the Steels are the owners of practically all the stock of the railway company, and are therefore, in equity, the owners of the company's bonds, and (2) that neither the German Savings & Loan Society nor Morris & Whitehead had notice that the $80,000 was for a company debt, or that the bonds referred to had not been issued. As to the issues of fact thus presented, the testimony of the officers of the German Savings & Loan Society, and of the managing member of the firm of Morris & Whitehead, is most positive that the former have no interest whatever in the purchase made by the latter. This testimony is uncontradicted, unless the circumstances of the case are against it. In July, 1897, the Steels applied to Morris & Whitehead to purchase bonds of the East Side Railway, and at the time furnished them a detailed statement of the company's affairs, its earnings and expenses, and business plans. The company was then in the hands of a receiver in the suit of the Northwest General Electric Company to foreclose a second mortgage held by it. James Steel testifies that he had a conversation with Mr. Morris, of Morris & Whitehead, about this time, in which he advised Mr. Morris that the electric company's mortgage was the key to the situation, and expressed the opinion that this claim could be purchased for much less than its face; that Mr. Morris said he thought he could work the matter through; that it was a good proposition; that thereafter, on the arrival of Mr. Morris' brother from the East, the witness and his brother took a private

car, and went over the road with the two Morrises and their attorney; that they seemed well pleased, and talked very favorably of being able to negotiate the matter proposed; that later he saw Mr. Morris a few times, and he still talked favorably, but there came a time when, hearing nothing further from Mr. Morris, the witness thought that "the whole thing had been dropped," until he heard one day that Morris & Whitehead had bought the electric company's mortgage. It transpired that Morris & Whitehead bought the mortgage referred to on March 31, 1898, and were thereupon substituted as parties in the pending foreclosure. The loan society transferred the Steel notes and bonds to Albert Meyer on April 26th. On the 27th Meyer addressed a letter to the Steels, the East Side Railway Company, and divers creditors of such company, demanding payment of the Steel notes, and on the same day published notice of the proposed sale of bonds to take place on May 11th. This notice of sale accompanied the demand of payment made as above stated. The bonds were bid in by Morris & Whitehead for $173,589. Meyer, to whom the bonds and notes had been transferred by the German Savings & Loan Society, transferred the bonds on that day to the purchaser, and reassigned the notes to the loan society. The latter on the following day, May 12th, assigned the notes to Morris & Whitehead in consideration of the payment of $4,970.10. This was the sum still due on the notes after deducting therefrom the price bid for the bonds. At the time of the sale Mr. Morris gave Meyer a check for $10,000 "to bind the bargain." Thereafter, on the same or the succeeding day, the balance of the purchase price of the bonds, $163,589, was paid by a check drawn by Wells, Fargo & Co. in favor of F. S. Morris, and indorsed to Meyer. Meyer paid the German Savings & Loan Society by his own check, drawn on the London & Paris American Bank. This check was collected a day or two after the sale. The money represented by the Wells, Fargo & Co.'s check to F. S. Morris, used in completing the payment to Meyer, was obtained upon a short loan from that company to Morris & Whitehead, for which the bonds were pledged as security, and this loan was paid "a day or two after the sale." The money with which to make the payment to Wells, Fargo & Co. by Morris & Whitehead was borrowed by Morris & Whitehead from the German Savings & Loan Society upon the security of the bonds, a couple of days after the sale, in pursuance of an arrangement made some days before the sale. The collection by the German Savings & Loan Society of the Meyer check, representing the purchase price of the bonds (with the exception of $10,000), the repayment of the loan from Wells, Fargo & Co. to Morris & Whitehead, which was represented by Wells, Fargo & Co.'s check indorsed to Meyer, and the loan to Morris & Whitehead by the German Savings & Loan Society, all took place "a day or two after" or "a couple of days after" the sale. In other words, Wells, Fargo & Co. were repaid their loan at about the same time that the money derived therefrom was paid to the German Savings & Loan Society, and the latter at the same time loaned Morris & Whitehead the money to pay Wells, Fargo & Co. for their loan to pay the German Savings & Loan Society. The real character of the transaction shows through all this circumlocution. The Ger-

man Savings & Loan Society was not seeking to realize upon its securities, but to effect a transfer of the title of the bonds held by it to Morris & Whitehead. The sale, if it can be so called, was not a cash sale, as advertised, except as to the $10,000, which, when the amount involved is considered, appears to be too small a sum to have operated as an inducement for what was done. The debt of the Steels, except as to $4,970, was simply transferred to Morris & Whitehead. I am satisfied that the solvency of these bankers was not an inducement for the transfer. The security for the debt was the bonds. The German Savings & Loan Society was merely playing into the hands of Morris & Whitehead, and, if the former has no pecuniary share in the title derived from the sale, yet its conduct has all the consequences of such an interest to the debtors whose property was sold. But whether the pledgor may buy at his own sale is not considered. It is enough to defeat the sale that it was contrived between the seller and buyer, in order to get the pledgor's title at a sacrifice of his interest, with that result. I am of the opinion that the purchasers of these bonds are only entitled to a decree for the amount of the debts for which the bonds were pledged, and interest and costs; and this conclusion is based upon the fact that the sale to Morris & Whitehead was prearranged between the parties, that it was contrived between them as a means of acquiring the property pledged, and that it is immaterial whether the German Savings & Loan Society have any interest in the sale or not. In reaching this conclusion, I assume, from the earning capacity of the railway as shown by what appears in the case, that the bonds have a value greatly in excess of the price bid for them at the sale. If this is so, it is unconscionable that the mortgagors, or, what is the same thing, the other creditors, shall lose this excess by the expedient of this sale, while some $5,000 of the original debt remains unsatisfied in the hands of the purchasers at the sale. If it shall turn out that the price bid is substantially all that the bonds are worth, then the considerations upon which this decree is based will fail. In that case the sale could not have prejudiced the mortgagors and other creditors, but in that case the purchasers at the sale will not be prejudiced by the decree. In any event they will have their debt and interest, whether that is sufficient to absorb the property or not; and it is all they are equitably entitled to have. This decree in favor of the complainants, as aforesaid, has priority over the several judgments pleaded in this suit. I am of the opinion that the substitution of A. L. Maxwell for the Security Savings & Trust Company, as trustee, was authorized, and that such trustee and his attorney are entitled to compensation for their services in this suit.

The other questions involved herein are reserved for further consideration.

METROPOLITAN TRUST CO. v. COLUMBUS, S. & H. RY. CO

(Circuit Court, S. D. Ohio, E. D. June 21, 1899.)

1. RAILROADE LASE—VIOLATION OF CONDITION—WAIVER BY ACQUIESCENCE.
A railroad company leased to another company the right to use a portion of its road as a part of the lessee's main track for 99 years, renewable forever; the lease providing that the lessee should not extend its road into certain coal territory, or receive coal for transportation from any connecting line, and that in case of violation of such conditions the lease should not terminate, or the payment of rental cease, but the right of the lessee to use the track demised should be suspended during the continuance of the violation. The successor in interest of the lessee acquired by purchase, as permitted by law, certain connecting lines extending into the prohibited territory, which it operated in connection with its original road for nine years, without objection on the part of the lessor. *Held* that, conceding the provision against extension to have been valid, it was waived by the lessor by such long acquiescence, and with it the right to object to the transportation by the lessee of coal received for shipment on its purchased lines, which was not prohibited by the lease, except incidentally, by the provision against extension.

2. SAME—VOID CONDITION SUBSEQUENT.
The provision of the lease against the receiving of coal for transportation by the lessee from connecting roads imposed upon the lessee a condition subsequent, which was void as against public policy, being one which the lessee could not perform without a violation of its legal duty as a common carrier; and the lessee took the grant freed from such condition, and from any right in the lessor to enforce the penalty for its violation.

3. SAME—INTERFERENCE WITH RECEIVER'S USE OF LEASED ROAD—INJUNCTION.
The right of a receiver of the court operating a railroad to the joint use, as a part of the main line of such road, of a portion of the track of another company which the insolvent company is given the right to use by a valid lease, will be protected by injunction.

Petition of Samuel M. Felton, receiver of the defendant railroad company, against the Toledo & Ohio Central Railway Company. On motion for preliminary injunction.

This is a railroad foreclosure suit. Samuel M. Felton, as receiver, is engaged in operating the railroad of the defendant, the Columbus, Sandusky & Hocking Railroad Company, under orders of this court. He now files an intervening petition against the Toledo & Ohio Central Railway Company. He avers that 24 miles of the main track of the Columbus, Sandusky & Hocking Railroad Company, extending from Alum Creek Junction, near Columbus, Ohio, to Hadley Junction, at Thurston, is held under a lease from the Toledo & Ohio Central Railway Company made to the Columbus & Eastern Railroad Company on or about August 24, 1895, with the Columbus & Eastern Railroad Company; that the latter company duly entered upon the demised premises, and used and enjoyed the same from 1885 until 1889, when all of its railroad and property, including the leasehold estate, was sold under foreclosure and conveyed to the Columbus, Shawnee & Hocking Railroad Company; that this company entered upon the demised premises, and continued to use and enjoy the same until its consolidation with the Columbus & Sandusky Short-Line Railway Company into the Columbus, Sandusky & Hocking Railway Company; that the latter company entered upon the demised premises and enjoyed the leasehold estate until the same were sold under foreclosure in 1895 to the Columbus, Sandusky & Hocking Railroad Company, the defendant in this foreclosure suit; that the petitioner has been in possession of the demised premises since his appointment as receiver; that the premises are a part of the main line of the defendant's railroad, and that without them the petitioner cannot operate the railroad, or discharge his duties as a common carrier; that the petitioner has paid the rentals and other charges provided in the lease, and that the Toledo & Ohio Central