

acquisition of the line of railroad of the First Division of the St. Paul & Pacific Railroad Company, etc., by purchase at the foreclosure sale to be made in said pending foreclosure suit, and payment therefor in bonds; that the suit should proceed under the advice and instruction of said parties, Smith and others; that the negotiation for the sale of the bonds was consummated with Kennedy, who approved the proposal and recommended its acceptance, and that the suit was prosecuted, conducted and concluded under the advice and instruction of Smith, Stephen, Kittson and Hill, through Kennedy as agent, and with a view to obtain a transfer of said road to them under the forms of judicial proceedings in fraud of the rights of bond holders who had not contracted to sell their bonds to said parties; that Kennedy, as agent, paid and controlled the counsel in the foreclosure suit; and, further, in substance, that the result of the suit and the decree, by consent, was in the interest of the parties who had so negotiated with Kennedy, they having become *domini litis* in respect to the foreclosure proceedings. It is also charged that the trustees, through Kennedy, fraudulently connived and combined with the syndicate to allow the property and railroad to be purchased at the foreclosure by the St. Paul, Minneapolis & Manitoba Railroad Company at a nominal price, compared with its true value.

“PROPOSAL MADE AT NEW YORK MEETING OF JANUARY 3, 1878,
BY CANADA PARTY.

“[TRANSLATION.]

“The proposal embraces all certificates which have been issued by the committee, and must be accepted by at least the same proportion of certificates which acceded to the former proposal. It is offered to pay for first section bonds (\$1,200,000) net 75 per cent. in gold; consolidated bonds (\$2,800,000) net 28 per cent. in gold; second section bonds (\$3,000,000) net 30 per cent. in gold; 1869 bonds (\$6,000,000) net 35 per cent. in gold; St. Vincent & Brainerd bonds (\$15,000,000) net 13 $\frac{3}{4}$ per cent. in gold, of the nominal amount of the bonds,

including the past-due coupons, which pass with the bonds for this price.

“Upon acceptance of this proposal these bonds shall be deposited in the Mercantile Safe Deposit Company of New York, in the name of trustees, for which the committee proposes the Messrs. J. S. Kennedy and John S. Barnes, chiefs of the firm of J. S. Kennedy & Co. These bonds shall be delivered to the purchasers by the trustees, as agents of the committee, against the payment of the purchase price in the manner hereinafter named.

“The aforesaid purchase price must be paid within six months after the date, which, by virtue of the last foreclosure decree of each court has been declared as the day of sale of the bonds, as described in the trust deeds by which the above-named issues of bonds have been respectively secured. The aforesaid purchase price for said bonds shall bear interest from the twenty-second of December, 1877, at 7 per cent. per annum, payable half yearly in gold, in the city of New York. The principal of the above-named purchase price shall be paid—*First*, either in gold; *second*, or in first mortgage gold bonds of the newly to be created company, bearing 7 per cent. interest, payable half yearly in gold at par; but the purchasers shall also add to every bond of \$1,000 the amount of \$250, in first preferred stock of the new company; *third*, or, at the option of the certificate holders, or any of them separately, the same first mortgage gold bonds as described under No. 2, calculated at 90 per cent., but in that case without addition of the preferred stock.

“It is further expressly agreed that on the reorganized road no further first mortgage shall be issued than the above-named, so that the rate of \$12,000 per mile on the completed road shall not be increased.

“As soon as ‘*bonds*’ shall be offered in payment the form and contents of the trust deeds must be subjected to the approval of the agents of the committee. The trust deeds must comprise all property of any and every kind belonging to the new company at the time that the mortgage is created, in-

cluding the land grant, and these bonds shall be received at par in payment for the lands of the company.

"The total amount of the above-named *preferred stock* shall be limited to 25 per cent. of the whole issue of bonds of the first mortgage, and the dividend on this preferred stock not to exceed 6 per cent. per annum in currency shall be paid, but only after the receipts of the new company, after payment of all necessary expenses and the interest on the bonds, shall have been provided for.

"The option of payment named under No. 1 and No. 2 is left, primarily, to the purchasers, but should they choose to pay in money the seller shall have the right to demand bonds, as described—sub. 2 and 3—either at par with preferred stock or at 90 per cent. without preferred stock.

"The purchasers further bind themselves:

"a. As soon as they have received the notice that their offer is accepted, and the bonds have been delivered to the above-named trust company, to restitute the costs caused by them to the committee, as well as the amount of the committee costs resting on the assenting certificates.

"b. To complete the extension to St. Vincent as speedily as possible; if possible within this year, and agree to furnish sufficient security for the execution hereof, which will be acceptable to the agents of the committee, Messrs. J. S. Kennedy & Co.

"c. To restitute the cost of the construction of the Breckenridge-Barnes line *in cash*, at the same time with the payment for the bonds, and in the meanwhile to pay interest at 7 per cent. per annum, half yearly.

"d. The now pending foreclosure suits, and other suits, shall be continued by the committee and its agents, under advice and instruction of the purchasers, free of all costs for the holders of the assenting certificates."

It is unnecessary to recapitulate all the allegations in the bill which are conceded to be true by the demurrer, nor is it necessary to determine whether all the relief prayed for can be granted. The charges are sufficient to require an answer, for they tend to show that Kennedy combined with Smith,

Stephen, Kittson and Hill to aid them in acquiring the property mortgaged at a sacrifice of the interests of bondholders not parties to the contract, to secure the road, etc., and that the former permitted the control of the litigation to pass to Smith and his associates, consenting that they might assume the functions of trustees; the co-trustees of Kennedy in the trust deed having accorded to him the right to determine and control the action of the trustees in all matters appertaining to the trust property and the execution of the trust.

While there is no doubt that creditors may combine to purchase the property of their debtor, and such action is proper and will be sustained, yet if a trustee, holding the property for the benefit of all the creditors, combine with a part to aid them in purchasing it to the exclusion of the other creditors, and the trustee also has in his possession, as agent, the evidences of debt belonging to the creditors with whom he has combined, and the property, by the act of the trustee, passes into the possession of those creditors at a price much less than its value, it can hardly be claimed that a purchase thus consummated is not inequitable. Such is one of the charges in the bill, and it requires an answer so that the court may determine upon the proofs, at the final hearing, whether it is true or not.

The demurrer is overruled, with leave to answer at the July rule day.

**KROPHOLLER v. THE ST. PAUL, MINNEAPOLIS & MANITOBA
RAILWAY Co. and others.**

(*Circuit Court, D. Minnesota. May, 1880.*)

MORTGAGE—CREDITORS MAY COMBINE TO PURCHASE PROPERTY.—The creditors of a mortgagor may fairly combine to purchase the property of the debtor at mortgage sale, and other creditors are not, by such combination, deprived of the right to bid at such sale.

BILL TO VACATE DECREE AND SALE—WANT OF EQUITY.—Bill in equity in this case not showing the complainant clearly entitled to all the relief claimed, and as he may, on proper petition and showing, be admitted as a party to the original suit, the bill in which he seeks to attack the decree and sale is dismissed.