

entitled to recover from the trustees, who refuse to act, what would be their lawful compensation if the trustees had acted. As to T. P. Branch,—who, with James A. Simmons, most wrongfully, if the allegations of the bill are true, sold out and betrayed the rights of which they came into control,—he holds \$100,000 in his proper person, to which he has no title whatever; and while the Central Railroad & Banking Company, and the parties who acted for it, may not be able to recover what they have wrongfully paid to him, he holds the sum he received as a trustee for the plaintiffs and other persons in interest who may be entitled to it, and who represent—in part, at least—the franchises and property of the Short-Line Company; and as the case now appears he should be compelled to make restitution of the sum which he has received for the benefit of the trust which he attempted to defeat, and for the legal beneficiaries of that trust. It would seem that the court has ample power to compel this; and the decision of the court is that the injunction prayed for against all the parties against whom it is prayed shall be granted, and that a receiver be appointed to take charge of the assets of the Savannah, Dublin & Short-Line Railway Company and of the United States Construction & Improvement Company, so far as they are within the control of either of the defendants, or otherwise in the jurisdiction of the court; and to recover, in such manner as may be deemed most effective, from T. P. Branch and the persons acting with him, the sum unlawfully paid to him by E. P. Alexander for the franchises, stocks, shares, and other property of the Savannah, Dublin & Western Railway Company, and that the case proceed regularly, as is usual in equity.

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HIDDEN v. KRETZSCHMAR *et ux.*

(Circuit Court, D. Minnesota. February 21, 1889.)

**MORTGAGES—ASSIGNMENT—PAROL WAIVER BY MORTGAGOR OF CONDITIONS.**

It is competent for the mortgagor to waive by parol the conditions specified in a written agreement, limiting the use of a mortgage, given to secure advances, and to consent to its assignment as collateral security for a loan.

In Equity. Bill to foreclose mortgage. On final hearing.  
*Kerr & Richardson* and *Pierce & Wilkinson*, for complainant.  
*Leo & George* and *John M. Boyle*, for defendants.

NELSON, J. This suit is brought to foreclose a mortgage executed by the defendant Carl Kretzschmar to T. S. Coffin, to secure the payment of his note for the sum of \$10,000. The note and mortgage were assigned as collateral security for the payment of a note of \$5,000, executed on the 14th day of June, 1884, at Boston, Mass., by the Red Lake Milling & Lumber Company, a corporation of the state of Minnesota, to the complainant, Hidden, a citizen of the state of Maine, and payable

April 24, 1885. At the time of the execution of the note and mortgage for \$10,000, an agreement in writing was entered into between the defendant Carl Kretzschmar and T. S. Coffin, the mortgagee, specifying the conditions upon which it was executed, and the considerations influencing the mortgagor. This instrument was on record in the same office in which the mortgage was recorded, and, I think, was notice to the complainant of the exact facts therein stated, and for what purpose the mortgage was given. Although T. S. Coffin, the mortgagee, held this mortgage to secure any advances made by him to the corporation, and for services rendered in the past, and to be rendered in the future, the evidence is satisfactory that the defendant Carl Kretzschmar consented that T. S. Coffin might use it, as he did, to secure a loan of \$5,000 to the corporation,—at that time being in need of money, and in a very embarrassing financial condition. It was entirely competent for the mortgagor to waive by parol the conditions mentioned in the agreement upon which the mortgage was executed, and assent to the use of the mortgage for the purpose of meeting the pressing need for money. The assignment of the mortgage as collateral security for the loan of \$5,000 from the complainant appears from the evidence to have been made with the knowledge and consent of the defendant Carl Kretzschmar. True, in his testimony there are indications of remonstrance to such a use of the mortgage, and some suspicious circumstances are apparent, but no fair inference from the whole evidence would warrant me in denying the relief asked. The evidence of the witnesses introduced by the complainant, who are unimpeached, entitle him to a decree for a foreclosure to satisfy the amount due. No argument has been made or filed by the counsel of defendants, and they appear to have abandoned the case. The interest of defendant Anna Kretzschmar in the property accrued since the mortgage lien and the note for \$5,000. Decree will be entered in favor of complainant. Amount due: Principal, \$5,000; interest (6 per cent per annum) from June 14, 1884, to February 21, 1889, \$1,507; insurance paid, \$225; protest, \$2.04; attorneys' fees, \$100.

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**ARMSTRONG v. CHEMICAL NAT. BANK.**

(*Circuit Court, S. D. New York.* February 11, 1889.)

**1. EQUITY—ACCOUNTING—PLEADING—PLEDGE.**

To a bill for an accounting for the surplus of securities pledged for advances thereafter to be made, averments in the answer of facts such as the prior state of the parties' accounts, are needless since these facts may be proved under any other averment.

**2. SAME.**

Averments referring to facts entitling defendant to affirmative relief are only proper for a cross-bill, and may be expunged from an answer.