Statement of the case.

The record presents no question of law as to the construction of these patents. The only issues were of fact. It would be a tedious as well as an unprofitable task to attempt to vindicate the correctness of our decision of this case by quoting the testimony and examining the volume of plates annexed to it. The decision could never be a precedent in any other case. It is enough to say that we see no reason to doubt the correctness of the decision of the Circuit Court on the issues made, or the pleadings.

DECREE AFFIRMED.

DRURY *v.* CROSS.

1. A sale, far below value, of a railroad, with its franchises, rolling stock, &c., under a decree of foreclosure, set aside as fraudulent against creditors; the sale having been made under a scheme between the directors of the road and the purchasers, by which the directors escaped liability on indorsements which they had made for the railroad company. And the purchasers held to be trustees to the creditors complainant, for the full value of the property purchased, less a sum which the purchasers had actually paid for a large lien claim, presented as for its apparent amount, but which they had bought at a large discount. Interest on the balance, from the day of purchase to the day of final decree in the suit, to be added.
2. But because the full value of the property sold was not shown with sufficient certainty, the case was sent back for ascertainment of it by a master.

APPEAL from the Circuit Court for Wisconsin.

The case was this: Bailey & Co., of Liverpool, England, held notes against the Milwaukee and Superior Railroad Company, indorsed by four of its directors, for about $21,000 (the price of iron furnished to lay the road), and as collateral security for payment, $42,000 in mortgage bonds of the road. Two hundred and eighty thousand dollars in similar bonds, but which had never been *issued*, were sealed up and deposited with M. K. Jesup & Co., *not to be issued* until the debt to Bailey & Co. was paid, and twenty-seven miles of the road were built. The company was managed by a board of seven directors; of whom four made a quorum.

Statement of the case.

The company having made about five miles of the road, became thoroughly insolvent, and abandoned their enterprise. Bailey & Co. being unpaid, and not being willing to trust to and proceed on their mortgage, brought actions against the four directors on their indorsement. These, desirous to throw the debt on the company, where it belonged, procured, at their own expense and risk, a suit to be commenced to foreclose the mortgage, so that they could make their debt out of the collaterals in their hands. In this suit certain bonds issued to the city of Milwaukee, and the $42,000 of bonds held by Bailey & Co., were spoken of; but no mention was made of the $280,000 of bonds deposited with Jesup & Co., and no relief asked in relation to them. On the 19th of March, 1859, the bill was taken as confessed, decree rendered, and the case referred to the master to compute and report the amount that was due.

Prior to the decree, in consequence of negotiations between the directors and Cross, Luddington & Scott (Cross & Co.), an arrangement was made by which these persons were to purchase the claim of Bailey, and protect the directors from their indorsement. The directors, on their part, were to aid Cross & Co. to acquire the entire property of the road.

In furtherance of this plan, the $280,000 of bonds in the hands of Jesup & Co. were delivered, by resolution of the board of directors, to Bailey & Co., as additional security for their claim. Bailey & Co. did not ask for further security, and refused, at first, to receive these bonds, and, in fact, did not receive them until they had sold their claim, with their collaterals, to Cross & Co. This was after the decree in the foreclosure suit. Cross & Co. having thus got possession of $322,000 in bonds, transferred by Bailey & Co., as collaterals, in order, as they said, to become the absolute owners of them, sold them, with consent of the railroad corporation, at the Exchange in Milwaukee, on five days' notice; bought them for a small sum of money; produced them before the master, who allowed them as a lien on the road, and the final decree in the foreclosure suit was rendered upon the said $322,000 bonds, and no others.

Argument for the appellants.

The sum paid by Cross & Co. to Bailey & Co., for all the judgments obtained, was $13,380.20.

Under the decree of foreclosure, the entire railroad, its franchises, rolling stock (two locomotives and tenders, with ten platform cars) and fixtures, were sold, in August, 1859, to Cross & Co., for $20,100. The iron tracks, which were now torn up, some evidence showed had been sold for $22,500. The locomotives (little used) had cost $18,000; the cars about $5000. The company, it was said, had paid between $15,000 and $20,000 for their right of way. There were also railroad chairs, spikes, ties, some fences, &c.; the value not being exactly shown.

In this state of things, Drury & Page, having obtained judgment for $21,634 against the railroad company for locomotives sold to it, filed a bill in chancery in the court below against the company, Cross and his co-purchasers, alleging that the sale was fraudulent, and seeking to reach the franchises and property of the company sold to Cross & Co. under the decree of foreclosure. The court below dismissed the bill as to Cross and his co-purchasers; and from this decree of dismissal the present appeal came.

Mr. M. H. Carpenter, for the appellants, contended, that it was plain that the directors had agreed to sacrifice, and did sacrifice, the entire property of the company, which it was their duty as trustees to protect, to secure the personal advantage of discharge from their indorsements. That the case was the same in principle as *James* v. *Railroad Company*,* in which the court, setting aside a sale, animadverted with severity on the conduct of the parties concerned, and said that the notice of sale "was calculated to destroy all competition among the bidders, and, indeed, to exclude from the purchase every one except those engaged in the perpetration of the fraud." Upon this assumption the counsel argued that Cross and his co-purchasers should be charged with the full value of the property they received, and con-

* 6 Wallace, 752.

verted to their own use, fixed by him on the evidence (not very exact), at $66,100.00
Less what they paid, ... 13,380.20

$52,719.80

Mr. Palmer, *contra*, argued that the complainants had not acquired any lien upon the property of the railroad company, or upon the bonds deposited with Jesup & Co., and that by making the transfer to Bailey & Co. of the $280,000 bonds which had been deposited with Jesup & Co., the directors had only given a preference to a meritorious creditor; a preference which it had been repeatedly determined by this court was lawful.*

Mr. Justice DAVIS delivered the opinion of the court.

The transaction which this case discloses cannot be sustained by a court of equity. The conduct of the directors of this railroad corporation was very discreditable, and without authority of law. It was their duty to administer the important matters committed to their charge, for the mutual benefit of all parties interested, and in securing an advantage to themselves, not common to the other creditors, they were guilty of a plain breach of trust. To be relieved from their indorsement, they were willing to sacrifice the whole property of the road. Bound to execute the responsible duties intrusted to their management, with absolute fidelity to both creditors and stockholders, they, nevertheless, acted with reckless disregard of the rights of creditors as meritorious as those whose paper they had indorsed. If Bailey & Co. had sold iron to build the road, so had the Boston association sold locomotives to run it. It is not easy to see why the corporation should exhaust its effects to pay one, and leave the other unpaid. But, it is said, the directors, being unable to pay both, had the right to choose between them. We do not deny that a debtor has a legal right to prefer one creditor over another, when the transaction is *bonâ fide;* but

* See Tompkins *v.* Wheeler, 16 Peters, 106.

this is, in no just sense, a case of preference between creditors. If the law permits the debtor, in failing circumstances, to make choice of the persons he will pay, it denies him the right, in doing it, to contrive that the unpreferred creditor shall never be paid. In other words, the law condemns any plan in the disposition of property which necessarily accomplishes a fraudulent result.

That the plan adopted by the directors of this railroad to dispose of its property to Cross & Co. was a fraudulent contrivance, and necessarily, if executed, accomplished a fraudulent result, is too plain for controversy. At the time this scheme was initiated, there were only five miles of track laid, the company hopelessly insolvent, and the enterprise abandoned. In this condition of things, the directors were sued on their indorsement, and, as was natural, manifested an anxiety to have the property of the company pay the debt for which they were liable. But Bailey & Co. preferred not to enforce their mortgage lien, and only consented to allow it to be done, on being indemnified against the risk and expense of the suit. The directors, in furnishing them this indemnity, in order to procure the enforcement of the mortgage lien to the extent of $42,000, which in their hands was a just debt against the company, were guilty of no wrong. But the departure from right conduct, on their part, commenced at this point. Notwithstanding they had the control of the foreclosure suit, they were not content to let it proceed to decree and sale without they were, *in advance*, relieved of personal responsibility. Bailey & Co. would not release them, and they endeavored to find some person who would purchase the Bailey claim, with its collaterals, and discharge them from liability on their notes. This would have been well enough, if the scheme had embraced only the $42,000 bonds held as collaterals, which the company justly owed, and the foreclosure suit was brought to enforce. But the scheme went much further; for these directors, who controlled the corporation, in their selfish desire to save themselves at the expense of their own reputation and the rights of creditors, were willing to use the

means at their command to swell the indebtedness of the road beyond its true amount, in order to aid more effectually Cross and his associates to acquire all the property of the company.

If Cross & Co. had been satisfied with the transfer of the $42,000 bonds, which constituted the true indebtedness against the road, in the hands of Bailey & Co., the transaction on their part would have been free from censure; but the certain attainment of the object they had in view required more bonds. It was very clear that bidders might appear, if the road was to be sold for no more than the face of these bonds, while they would be deterred from attending a sale where the sum to be made was over $300,000. To bring the decree, therefore, up to a point at which competition would be silenced, it became necessary to use the bonds in the hands of Jesup & Co. Two hundred and eighty thousand dollars in the bonds of an insolvent corporation—constituting no indebtedness against it—are thrust, unasked, into the hands of creditors, for the ostensible purpose of furnishing them additional security, when, *at the time*, they were negotiating a sale of the debt to be secured for $7000 less than its face. But the transfer to Bailey & Co. was a mere pretence. To preserve a semblance of fairness in the business, the bonds had to come through Bailey & Co., but the real purpose was not to help them, but to aid Cross and his associates to absorb the whole road—and this these directors were willing to do—when the debt they were struggling to escape could be paid for $13,380.20, and the very iron in the road-bed, for which the debt was incurred, was worth over $20,000.

It is claimed that the sale at the Milwaukee Exchange, assented to by the corporation, conferred rights on the purchasers of the bonds which cannot be successfully attacked; but this claim is based on the idea that the sale was for an honest purpose, when, in fact, it was only part of a previously concerted plan to accomplish a fraudulent purpose. The ceremony of this sale was a cheap way of showing honesty and fairness, for it was very evident that an adver-

tisement to sell a large amount of the bonds (having no market value) of an insolvent and abandoned railroad corporation would never attract the attention of capitalists.

The scheme to acquire the property of this corporation was, in its inception, fraudulent, and every step in the progress of its execution was necessarily stamped with the same character. There is nothing in this record to mitigate the conduct of the defendants, who purchased the Milwaukee and Superior Railroad. They knew the road was abandoned, the company insolvent, the complainants unpaid for property then in the possession of the corporation, and yet they combine with timid and unfaithful trustees to get not only *this*, but all the property of the corporation, and adopted a plan to carry out their project, which resulted in raising the decree to an extent that would necessarily prevent all fair competition. The fruits of such an adventure cannot be enjoyed by the parties concerned in it.

There are other features in this case which provoke comments, but we forbear to make them.

Cross, Luddington, and Scott purchased the entire railroad, locomotives, cars, and franchises of the company, for about $20,000. Subsequent to the sale, they stripped the road-bed of iron, ties, spikes, and chairs, which, with the locomotives, cars, and fencing, they sold to various parties, and realized from the sales a large sum of money; but how much, the evidence is so singularly loose that we are unable to tell. On account of the want of certainty on this point, the case will have to be sent back, and referred to a master to take proofs, who will also ascertain and report the value (if there be any) of the franchises of the company which Cross & Co. still retain.

Cross, Luddington, and Scott must be held liable as trustees to the complainants for the full value of the property they purchased on the sale of the road, after deducting the amount due at the day of sale on the Bailey judgments against the directors, which amount they will be allowed to retain.

They must also be charged with interest on the balance found due the complainants, from the day of the sale to the day of the final decree in this suit.

THE DECREE of the Circuit Court is REVERSED, and the cause remanded, with directions to proceed in CONFORMITY WITH THIS OPINION.

EDMONSON *v.* BLOOMSHIRE.

1. If it is apparent from the record that this court has not acquired jurisdiction of a case for want of proper appeal or writ of error, it will be dismissed, although neither party ask it.
2. An appeal or writ of error which does not bring to this court a transcript of the record before the expiration of the term to which it is returnable, is no longer a valid appeal or writ.
3. Although a prayer for an appeal, and its allowance by the court below, constitute a valid appeal though no bond be given (the bond being to be given with effect at any time while the appeal is in force), yet if no transcript is filed in this court at the term next succeeding the allowance of the appeal, it has lost its vitality as an appeal.
4. Such vitality cannot be restored by an order of the Circuit Court made afterwards, accepting a bond made to perfect that appeal. Nor does a recital in the citation, issued after such order, that the appeal was taken as of that date, revive the defunct appeal or constitute a new one.

APPEAL from the Circuit Court for the Southern District of Ohio; the case being thus:

The Judiciary Act provides that final decrees in a circuit court may be re-examined, reversed, or affirmed here "upon a writ of error whereto shall be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party."

It further enacts that "writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be a *feme covert*, &c., then within five years as aforesaid, exclusive of the time of such disability."