Case No. 4,934.

FOREMAN v. BIGELOW ET AL.

[4 Cliff. 508; 7 Cent Law J. 430; 18 N. B. R. 457; 7 Reporter, 137; 26 Pittsb. Beg. J. 128.][1]

Circuit Court, D. Massachusetts. May Term, 1878.

CONTRACTS—FRAUD—RIGHTS OF THE PARTIES CORPORATIONS—PURCHASE OF PROPERTY WITH STOCK—OVERVALUATION—BONA FIDE PURCHASER OF STOCK—LIABILITY OF THOSE CONNECTED WITH THE CORPORATION.

1. Fraud does not render a contract void, only at the option of the party defrauded, whether the fraud was committed by one of the contracting parties upon the other, or by both upon persons not parties to the transaction. Where fraud was committed by one of the parties upon the other, the contract remains operative, and in force, until it is disapproved by the injured party.

[Cited in McCan v. Conery, 12 Fed. 318.]

[Cited in New Haven Horse Nail Co. v. Lindon Springs Co., 142 Mass. 356, 7 N. E. 773.]

2. A mining corporation bought certain mineral lands, and paid for the same in shares of the stock, which were issued to the directors as paid up stock. The lands were greatly overvalued, and were not worth the amount at which they were valued. The corporation went into bankruptcy, and suits were brought by the assignee to recover the difference between the real value of the lands and the par of the stock. *Held,* the complainant could not, without disaffirming the contract of purchase, set up the theory that the property taken in payment of the shares was less than their estimated value, nor seek redress against a bona fide purchaser of the stock in the open market.

[Cited in Steacy v. Little Rock & Ft S. R. Co., Case No. 13,329.]

[Cited in Coffin v. Ransdell, 110 Ind. 423, 11 N. E. 20.]

3. So far as an innocent purchaser of the stock in open market is concerned, the shares were paid up stock, as shown by the hooks of the corporation.

[Distinguished in Flinn v. Bagley, 7 Fed. 789.]

[Cited in Erskine v. Lowenstein. 82 Mo. 303.]

4. Notice of any fraud upon the respondents was not alleged. But the mere fact that a person has become a shareholder, pursuant to a scheme in which he was a party, and which is ultra vires, will not relieve him from liability as a contributory, if the shares he has taken, can be considered as legally existing.

[Cited in Re South Mountain Consol. Min. Co., 14 Fed. 349.]

[Cited in Skrainka v. Allen, 76 Mo. 392.]

5. Power to issue stock was possessed by the company, and therefore the rule that the holder takes nothing where the power is entirely wanting does not apply.

6. Every person connected with a company which issues certificates of stock for paid-up stock, when the money or value has not been paid, is guilty of a personal wrong towards the company, and may be made answerable for it in the same way, and to the same extent, as if the money had been taken out of the coffers of the company to pay up shares.

[Cited in Doty v. Johnson, 6 Fed. 482.]

The complainant [William C. Foreman] was the assignee in bankruptcy of the Central Coal Mining Company, and the respondents [Henry Bigelow and others] were the owners of certain shares in the capital stock of that company. Attempt was made by the bill of complaint to compel the respondents holding such shares to pay certain sums alleged to be due for the non-payment in full of the amount of the capital of the company represented by such shares. From the bill of complaint it also appeared that the corporation was organized with a capital of $400,000, divided into shares of $100.00 each, and that certain persons named, five in number, none of whom were made respondents in the case, became the corporators and directors of the company; and that the whole amount of the original stock was issued to those five persons, of which $353,790 in amount was issued in consideration of the conveyance to the corporation, by the directors, of certain coal lands, fraudulently valued at that sum, as between themselves, though in fact the lands were worth only twenty or thirty per cent of that amount, and that the remaining $46,210 of the stock was issued to the directors without consideration. Corporate authority was subsequently given to the directors to issue the bonds of the company, secured by mortgage in the sum of $100,000, and to increase the capital stock in that amount. New stock for $100,000 was accordingly issued, and given, under a vote of the company, such persons as purchased said bonds at ninety per cent, without other consideration, that the directors, pursuant to that vote, did increase the capital stock of the company $100,000, and did; issue certificates of shares for the same, and gave them away without consideration. Shares of the capital stock of the company

in due form were held by the respondents in the amounts specified in the bill of complaint. Debts to a large amount were contracted by the corporation, and on the 4th of May, 1874, the corporation was adjudged bankrupt. Nor was it questioned that the complainant was the lawful assignee of the bankrupt's, estate, having duly succeeded the person who was first appointed to that place. As such assignee, he, on the 26th of April, 1877, petitioned the proper bankrupt court for a call and assessment upon the capital stock of the company to pay the debts of the corporation. Hearing was had, and the court decreed that 8200,000 of the original stock remained unpaid, and that nothing had been paid on the increased capital stock; that the amount required to be raised was $281,120. Pursuant to that finding the court ordered a call and assessment on the whole capital stock, original and increased, of one hundred per cent, less any sum or sums that might have been paid thereon. Due and proper notice was given of that adjudication at the time it was made. The bill of complaint prayed for an account of the stock of each of the three issues held by each respondent—how, and in what manner, and to what extent the same had been paid for,—and that the respondents might be decreed to pay the par value of the same severally held by the respondents, less any amounts they might have paid for the same. Respondents demurred, and set up two grounds of defence: 1. The statute of limitations; 2. That they were not liable to the assessment set up in the bill of complaint.

Dryden & Dryden and McComas & Mc-Keighan, for complainants.

The liability of the stockholders to pay the assignees, who represent the creditors, such portion of the unpaid stock as may be necessary to liquidate the bankrupt's indebtedness cannot be seriously questioned after the numerous decisions by the supreme court of the United States. The capital stock of a corporation is a trust fund for the payment of its debts, publicly pledged to all who deal with it Ogilvie v. Insurance Co., 22 How. [63 U. S.] 387. It is a trust fund to be-managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Upton v. Tribilcock, 91 U. S. 47. The capital stock is a substitute for the personal liability which subsists in private partnerships. Sanger v. Upton, Id. 57. No subscription or express promise to pay is necessary; the taking and holding the stock raises an implied promise to pay. Webster v. Upton, Id. 65, and cases before cited. A corporation cannot give away its stock and issue paid-up certificates. Such action is ultra vires, at least as to those who deal with the corporation. Green's Brice, Ultra Vires, 153; Sawyer v. Hoag, 17 Wall. [84 U. S.] 610; Tuckerman v. Brown. 33 N. Y. 297; Ogilvie v. Insurance Co., 22 How. [63 U. S.] 380; Osgood v. Laytin, 3 Keys [42 N. Y.] 521. The purchaser of shares from original holder stands in his shoes. He succeeds to all his rights and all his obligations. Upton v. Hansbrough [Case No. 16,801]; Seymour v. Sturgiss, 20 N. Y. 134; Sagory v. Dubois, 3 Sandf. Ch. 460; Hartford & N. H. R. Co. v. Boorman, 12 Conn. 530; Armstrong v. Wheeler, 9 Cow. 88. Stock certificates are

assignable, but not commercial paper. The assignee may have paid full value for it, and relied upon the representations of the assignor and the officers of the company that the shares were fully paid for, yet, if the shares were not paid for, the assignee is liable to creditors. Myers v. Seeley [Case No. 9,994]; also, cases cited in 91 U. S. This must be so as to creditors. The assignor of stock may estop himself by his representations; the company may, perhaps, estop itself by its representations on the certificate, or otherwise, but, the capital stock being a trust fund for the benefit of creditors, which is known to all the world, this trust cannot be destroyed by the representations of the company. Even certificates to stockholders made payable to bearer are not negotiable or commercial paper, and purchasers of the same are held to all the responsibilities of original holders, although, in fact, innocent of the trust resting on original owner. Railroad Co. v. Howard, 7 Wall. [74 U. S.] 415; Shaw v. Spencer, 100 Mass. 382; Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599. The payment of stock in any thing but money will not be regarded as a payment of any thing, except to the extent of the true value of the property. Osgood v. King, 42 Iowa, 483; Burnham v. North Western Ins. Co., 36 Iowa, 632; Nathan v. Whit-lock, 3 Edw. Ch. 215. An executory contract to pay in any thing but money will not be enforced as against creditors, and trustees of a corporation cannot be both vendors and vendees. Henry v. Vermillion & A. R. Co., 17 Ohio, 187; Goodin v. Cincinnati & W. Canal Co., 18 Ohio St. 169.

Does the plea of the two years statute of limitations of the bankrupt act constitute a good defence to their action? Two questions must be passed on:—1st. Does the statute apply at all to recover debts or enforce a mere money liability on a contract? 2d. Did the specific right of action to recover the assessments here sued on accrue to the assignees at the date of the deed of assignment, or when the assessments were made and payment refused?

Reference is here made to section 2 of the bankrupt act [of 1867 (14 Stat. 518)], as it stood before the adoption of the Revised Statutes. The first part of this section is jurisdictional, giving—First, a superintending and supervisory control to the circuit courts over district courts, and from the action of which no appeal or writ of error lies to the supreme court; and, secondly, concurrent

plenary jurisdiction, in a distinct and accurately described class of cases, to the circuit courts. It will be conceded that the latter part of the section operates as a limitation only in the cases to which concurrent jurisdiction is given. As to what cases the circuit courts had jurisdiction of by this section, there have been several decisions by circuit courts, which all concur in denying jurisdiction to actions necessary to recover debts or money due on contracts, and confining the jurisdiction to actions wherein the defendant's claim, whether assignee or claimant, was adverse as to some interest in dispute. The language employed clearly indicates that the action must relate to something the existence of which is not the subject of the controversy, but which is adversely claimed. This is not so in an action to recover money on a debt. The defendants here do not claim the debt alleged, or any interest in it, adversely to the assignee. The controversy is not, In whom is the right of property in the debt? but, Is there a debt? If it is decided that there is no right of property, the defendants will not succeed as having an adverse and superior right to the debt, or any interest therein. The language of the act is: "Which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by 'such person against such assignee." The "such person" referred to is the same person before described as an adverse claimant,—in one case plaintiff, in the other defendant. This could not be true as to creditor and debtor. The defendants here could not, in the nature of things, have any action to recover any portion of the assessment from the assignees. The bankrupt act, in section 1, had conferred on the district courts jurisdiction for "the collection of all the assets of the bankrupt" The studied use of different language, not pertinent to the mere collection of debts, in two sections, one immediately following the other, shows that congress meant to distinguish between different subjects of controversy, having reference more particularly, in section 2, to disputes arising under section 35 of the act of 1867. The following decisions construe section 2 as it stood in the act of 1867, before the Revision: Bachman v. Packard {Case No. 709}; Sedgwick v. Casey {Id. 12,610}; Davis v. Anderson {Id. 3,623}; Smith v. Crawford {Id. 13,030}; Stevens v. Hauser, 39 N. Y. 302; Union Canal Co. v. Woodside, 11 Pa. St. 176.

The act of June 22, 1874 {18 Stat. 17S}, amended section 2 by inserting in the place of the word "same," in line 12, the word "any," and after the words "claiming an adverse interest," the words "or owing any debt to such bankrupt" If the circuit court had jurisdiction to recover debts before the amendment, the amendment performs no office. It will be claimed, however, that since the amendment the limitation clause of section 2 has been enlarged by the increased jurisdiction given to circuit courts-by two things: First, by the intimate connection between the different parts of the section, and by the phrase in the limitation clause "touching the property and rights of property aforesaid." Even if section 2, at the date of the amendment, was in force as section 2, it would be more plausible than sound to say that the phrase quoted would refer to debts which were only brought

into the jurisdictional clause by the amendment. If the decisions cited are correct, then the limitation clause did not apply to debts. The amendment does not profess to amend the limitation clause. It is left untouched-Statutes, like contracts, are to be construed with reference to the objects sought to be attained, and the state of things existing at the time of their adoption. Congress, with the same ease and in the same amendment, could have inserted in the limitation clause, after the phrase "touching any property or rights of property," the words "or any debt owed to the bankrupt." It did not see fit to do it, but left the limitation clause to refer to what it did before.

But the defendants are not entitled to the apparent advantage given them by considering section 2 still in force. The amendment of June 22, 1874, never did take effect as an amendment to section 2 as it stood before the adoption of the Revised Statutes. The Revision went into effect on the same day of the amendment, June 22, 1874. Rev. St 1091, 1092. All acts of congress passed prior to Dec. 3, 1873, any portion of which was embraced in any section of the Revision, were repealed by express language. See same pages. The bankrupt act of 1867 was, of course, passed prior to Dec. 1, 1873, and the Revision embraced section 2. Without, therefore, the aid of another section of the Revised Statutes, the amendment of June 22 would fall to the ground. And the same result follows, whether the amendment is considered as going into effect before, at the same instant, or after the repeal. By the Revision the different parts of section 2 were sent into independent and unconnected sections, uncorrupted by each other. The jurisdiction clause reappeared in section 4979, the limitation in section 5057. This (section 5057) is the only statute of limitations in force in the bankrupt act, and from it is stricken the word "aforesaid," and the language of the section made more emphatic,—that it bars only suits "between the assignee and a person claiming an adverse interest." It-cannot be claimed that section 5057 has been amended, nor would section 4979 be affected by the amendment of June 22, 1874, were it not for section 5601, p. 1092, of the Revised Statutes, which reads as follows: "Sec. 5001. The enactment of said Revision is not to affect or repeal any act of congress passed since the first day of December, one thousand eight hundred and seventy-three, and all acts-passed since that date are to have full effect,

as if passed after the enactment of this Revision, and, so far as such acts vary from, or conflict in, said Revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith." By the terms of this section it is plain that the act of June 22, 1874, can only apply to, and amend, section 4979. Said section, so amended, and as it appears in recent editions of Bump, is as follows: "Sec. 4979. The several circuit courts shall have, within each district, concurrent jurisdiction with the district court of any district, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not, of all suits, at law or in equity, brought by an assignee in bankruptcy against any person claiming an adverse interest, or owing any debt to such bankrupt, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to or vested in such assignee." It would seem that every pretence is taken away, by the Revision, for contending that the amendment enlarging the jurisdiction also enlarges the limitation section. On the contrary, the views we have insisted on are strengthened by the consideration that section 4979, as it now stands, divides the suits over which circuit courts have jurisdiction into two classes, one class being where the claims of the assignee and claimant are adverse as to the subject-matter of the controversy, and the other class being actions to recover debts owed to the bankrupt. Section 5037 applies, by using the same language, only to the first class of actions. There may be reasons here for legislation, and there may not, but there is no ground for judicial intervention.

The eighth section of the bankrupt act of 1841 [5 Stat. 440] was as follows: "Sec. S. The circuit court shall have concurrent jurisdiction with the district courts of all suits, in law or equity, which may and shall be brought by an assignee in bankruptcy against any person claiming an adverse interest or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee; and no suit, at law or in equity, shall, in any case, be maintainable by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of suit shall first have accrued." This is, in effect, the same as section 2 of 1867. In the cases of Clark v. Clark, 17 How. [58 U. S.] 315; Stevens v. Hauser, 39 N. Y. 302; Union Canal Co. v. Woodside, 11 Pa. St 176; Carr v. Lord, 29 lie. 54; and In re Conant [Case No. 3,086],—it was decided that section 8 of the act of 1841, both as to jurisdiction and limitation, applied only to actions where the interest in the subject-matter was adverse. Against cases cited, construing section 8, will be produced only two cases: Mitchell v. Great Works Milling Co. [Case No. 9,662]; Pritchard v. Chandler [Id. 11,436]; Walker v. Towner [Id. 17,089]. The last case merely follows the first. We can afford to offset against these cases the cases cited, and the powerful criticisms of Judge Blatchford and Judge Deady, in Smith v. Crawford [Id.

13,030], and Bachman v. Packard, already cited. We will be referred to the opinion of Judge Miller, in Bailey v. Glover, 21 Wall. [88 U. S.] 343, in which the strong language of the judge is supposed to favor the construction of the defendants. That decision, however, must be taken in connection with the case itself, which was a suit brought to set aside a conveyance to a fraudulent grantee. Manifestly the defendant was an adverse claimant, although his counsel, being in extreme peril, contended he was not. In that case the assignee was allowed to maintain his action, although begun more than two years from his appointment, the court holding that the statute did not run until the fraud was discovered by the assignee. In Clark v. Clark, 17 How. [58 U. S.] 315, in which the statute of limitations was pleaded, the supreme court said: "The interest adversely claimed, and which the statute protects, is an interest in a claimant other than the bankrupt."

The second question for the court to decide is when the right to recover the specific amount of money sued for accrued to the assignees. We claim that when the deed of assignment was made to the assignees, their right of action against the stockholders depended upon a contingency; viz., whether the other assets of the company would be sufficient to pay its debts; and the amount which they would have a right to sue depended upon what the difference between the assets and liabilities should turn out to be. The assignees, representing the creditors only in these suits, have no other legal or equitable right than that of recovering such assessment as the bankrupt court may determine necessary to discharge the company's indebtedness. Adler v. Milwaukee Patent Brick Manufg Co., 13 Wis. 63; Myers v. Seeley [Case No. 9,994]; [Kennedy v. Gibson] 8 Wall. [75 U. S.] 505. The liability of the stockholders depends upon the necessity for funds, in addition to the other assets, to pay the bankrupt's debts; and this necessity must first be determined by the court which makes the call, or authorizes the assignees to do it The assignees represent the creditors; the unpaid stock is a trust fund for the benefit of the creditors, to the amount necessary to satisfy their claims. This trust may not be, and is not in this case equal to the whole amount of the unpaid stock. When the debts are paid, the trust resting upon the unpaid stock and the stockholders who owe it is discharged, so far as the creditors

or the assignees are concerned. This was held by Judge Treat in Myers v. Seeley [supra], and also in Chandler v. Keith, 42 Iowa, 09, and Payson v. Stoever [Case No. 10,863]. In both the first two cases the assignee and receiver brought suit with an assessment, and their bills were dismissed, and they remanded to proceedings for an assessment In both cases the reasons for the necessity of an assessment are ably given, and no court has held otherwise. It cannot be held that the statute runs against a mere delay to obtain a cause of action, however negligent the assignee may have been. In this case, however, the assignees were constantly engaged for two years in trying to realize something out of the lands and leases of the company, and in fighting and defeating nearly $100,000 of fraudulent claims presented for allowance, mostly founded upon contracts made during the last days of the corporation by the officers and agents of the company. The justice or injustice of these claims had to be determined, and the lands and leases disposed of, before the assignee could represent, or the court determine, how much of the trust fund was necessary to call in. A cause of action does not accrue until the existence of such a state of things as will enable a person having the proper relations to the property or persons concerned to bring the action. Whitcher v. Hall, 5 Barn. & C. 269; Mayor, etc., Bristol v. Visger, 8 Dowl. & R. 346. It will be claimed that the right of action of the assignees is like a note payable on demand, on which suit may be brought at once, the suit being held a sufficient demand. There is no analogy. Such is not the stockholder's liability. There is more analogy in the case of a note payable at a certain time after demand, in which case a demand is necessary before suit Little v. Blunt, 9 Pick. 488; Wenman v. Mohawk Ins. Co., 13 Wend. 267. The bankrupt statute of limitations could not run until this assessment was made, and the stockholders had failed to pay as required. Even as against a corporation, the statute of limitations does not begin to run until a call or assessment is made. Gibson v. Columbia & N. R. T. & B. Co., 18 Ohio St. 396; Bigelow v. Libby, 117 Mass. 359; and 42 Iowa, already cited. See Howland v. Edmonds, 24 N. T. 307.

We also claim that the plea of the statute of limitations is not good because these suits are brought to enforce a trust The statute does not run against an express trust until after the trustee has been called upon to execute his trust, and he has refused or disavowed the trust The trustee does not hold adversely to the cestui que trust until this refusal or disavowal. Ball. Lim. 369; Prevost v. Gratz, 6 Wheat [19 U. S.] 481. In 3 Swanst 585, Lord Nottingham defines an express trust as a "trust raised or created by the acts of the parties, which are declared either by word or writing, and these declarations are established either by direct and manifest proof or violent and necessary presumption." Tested by this rule there is no difficulty in reaching the conclusion that the defendants, as members of the corporation, are trustees of an express trust, and they did not hold adversely until after the call was made and they refused to pay. In Payne v. Bullard, 23 Miss. (1

Cushm.) 88, it is held directly that the stockholders could not interpose the plea of the statute of limitations, as the unpaid stock was a trust fund.

W. G. Russell, George Putnam, Moorfield Storey, and Sidney Bartlett, for respondents.

Brief of W. G. Russell and George Putnam:

The bill alleges that the stock of the Central Coal Company was not in fact full paid, although issued as such, and that the defendants are holders of such stock. It does not allege that the defendants, or any of them, were parties to any of the fraudulent issues, or had any notice that the shares were not full paid. It may be therefore assumed that the defendants purchased the shares as full paid in good faith. The defendants being purchasers of stock, issued as full paid, and without notice that it is not, in fact, full paid, cannot be assessed for the unpaid portion of their shares, even in bankruptcy and for the benefit of creditors. Waterhouse v. Jamieson, L. R. 2 H. L. Sc. 29; Guest v. Worcester, &c, R. Co., L. R. 4 C. P. 9; Spargo's Case, 8 Ch. App. 410; Nicholls' Case, 26 Wkly. Rep. 334. The remedy for unpaid calls in such case is against the original subscriber, who was a party to the fraudulent issue. Society for Illustration of Practical Knowledge v. Abbott, 2 Beav. 559; Wallworth v. Holt, 4 Mylne & C. 619; Spargo's Case, 8 Ch. App. 410; Nathan v. Whitlock, 9 Paige, 152; Nicholl's Case, 26 Wkly. Rep. 334; Ex parte Currie, 7 Law T. (N. S.) 486; Leifchild's Case, 13 Law T. (N. S.) 267; Ashworth v. Bristol R. Co., 15 Law T. (N. S.) 561. And see Phelan v. Hazard [Case No. 11,068]. In Webster v. Upton, 91 U. S. 65, where a purchaser of stock was held liable to pay up the unpaid installments, the stock showed upon its face that it was only partially paid. And the same is true of all the cases in which a purchaser of stock has been held to pay subsequent calls. Bend v. Susquehanna B. & B. Co., 6 Har. & J. 128; Hall v. U. S. Ins. Co., 5 Gill, 484; Hartford & N. H. R. Co. v. Boorman, 12 Conn. 530; Upton v. Hansbrough [Case No. 16,801]. No case can be found in which a purchaser of stock which did not show upon its face that it was not full paid has been held liable for calls or assessments made after his purchase. And the cases in which it has been held that creditors can enforce rights which the corporation itself would be estopped to, enforce on account of fraud of its agents,

were suits against original subscribers for installments upon stock which, upon its face, was not full paid. Oakes v. Turquand, L. It. 2 H. L. 325; Upton v. Tribilcock, 91 U. S. 45; Upton v. Englehart [Case No. 16,800]. Now, if a purchaser of stock is bound to find out whether the stock was honestly paid or not, he must clearly go beyond the books and ascertain the real value of the property transferred. And inasmuch as many properties, especially mining properties and patent rights, have been sold and bought in perfect good faith at prices which turned out to be grossly in excess of their true value, he must, if the value seems excessive, go further and ascertain whether it was honestly valued or not at the time of its transfer to the corporation. And it would also follow, contrary to the well-settled rule, that the original perpetrators of the fraud cannot be held to make good their fraudulently issued stock; for the ground of the equity of the bill is that the vendor has ceased to be, and the vendee has become, a stockholder, and that the liability to pay assessments is transferred with the stock. Webster v. Upton, 91 U. S. 65, and cases cited; Ang. & A. Corp. § 534.

The cases in which it has been held that the purchaser of stock is liable to calls, notwithstanding the fraud of the corporation or of the vendor, are all cases in which the stock appeared on its face not to be full paid, and the fraud consisted, not in issuing it as full paid, but in making false representations as to its value or its liability to assessment. Oakes v. Turquand, L. It. 2 H. L. 325; Webster v. Upton, 91 U. S. 65; Upton v. Englehart [supra]. The stockholder has been held liable by reason of laches in not discovering the fraud or in not repudiating the stock when the fraud was discovered. Upton v. Tribilcock, 91 U. S. 45; Upton v. Englehart [supra]; Farrar v. Walker [Case No. 4,679]. The bankruptcy proceedings do not preclude defendants from taking the defences here set up. Lamb v. Lamb [Case No. 8,018]; Upton v. Hansbrough [supra]; In re Republic Ins. Co. [Case No. 11,704]; Miehener v. Payson [Id. 9,524]; Sanger v. Upton, 91 U. S. 56. The defences of individual contributories are left to be dealt with in the suits brought by the assignee. In re Republic Ins. Co. [supra]; Lamb v. Lamb [supra].

The statute of limitations in the act relating to bankruptcy (Rev. St § 5057) is a bar to the maintenance of the present bill. That act applies to all judicial contests between the assignee and any person whose interest is adverse to his. Bailey v. Glover, 21 Wall. [88 U. S.] 342; Walker v. Towner [Case No. 17,089]. It appears that the present suit was brought more than two years after the appointment of the assignee, but less than two years after the order of the bankruptcy court directing the assessment of the capital stock. If, then, the cause of action accrued to the assignee at the time of his appointment, the bar of the statute applies. If it did not accrue till the assessment was made by order of the court, then it is not barred. We contend that it accrued to the assignee at once upon his appointment. Ogilvie v. Knox Ins. Co., 22 How. [63 U. S.] 380; Ward v. Griswoldville Manuf'g Co., 16 Conn. 599; Adler v. Milwaukee Pat Brick Manuf'g Co., 13 Wis. 61;

Mann v. Pentz, 2 Sandf. Ch. 257; Hall v. U. S. Ins. Co., 5 Gill, 484; Henry v. Vermillion & A. R. Co., 17 Ohio, 187. The right of the creditors rests on the right of the corporation, as against the subscribers to its capital stock and those who have succeeded to their liabilities, to compel the payment of so much of the capital as has not already been paid in. Ogilvie v. Knox Ins. Co., 22 How. [63 U. S.] 380; Ward v. Griswoldville Manuf'g Co., 16 Conn. 599; Adler v. Milwaukee Pat. Brick Manuf'g Co., 13 Wis. 61; Waterhouse v. Jamieson, L. R. 2 H. L. Sc. 29. The suit may be brought by the corporation itself, or by the stockholders who have paid in full, against delinquent subscribers, for the purpose of paying the corporate debts. Society for Illustration of Practical Knowledge v. Abbott, 2 Beav. 539; Wallworth v. Holt, 4 Mylne & C. 619; Nathan v. Whitlock, 9 Paige, 152. And upon the bankruptcy of the corporation, the suit, which up to that time might have been brought by any creditor or by the corporation itself, may be brought by the assignee who represents both the corporation and the creditors, and succeeds to all their rights against the debtors to the corporation. See Baker v. Atlas Bank, 9 Mete. [Mass.] 182; Com. v. Cochituate Bank, 3 Allen, 42.

The discussion in this brief has proceeded upon grounds open to any bona fide purchaser of shares of either of the three issues, and upon the assumption that the theory of the plaintiff's bill is maintainable, viz., that the original transaction between the directors and the corporation, by which their land was taken in payment for the first issue, may be treated as a partial payment for that stock, leaving the balance due thereon to be recovered by the corporation or the assignee. We do not, however, concede this proposition. The original issue of stock, so far as any contract rights ever existed or are to be enforced between the parties, was full-paid stock. The fraud might furnish ground for avoiding and rescinding the contract by the corporation, or for the recovery of damages by the corporation or its assignee against the parties concerned in it; but even as against them it can furnish no ground for assuming or enforcing a contract which they never made, namely, a contract to pay for stock which, by the very terms of their real contract, was to be taken as full paid. Still less can it furnish ground for assuming and enforcing such an implied contract against bona fide purchasers of the stock so issued, who have taken it as full paid, and without knowledge of the fraud. It is evident that

the remedy for such fraud, whatever it may be and against whomsoever it may he, might have been pursued by the corporation at any time after the perpetration of the fraud, and by the assignee at any time after his appointment. In addition to the cases there cited, we refer to Ex parte Currie, 7 Law T. (N. S.) 486; Carling's Case, 1 Ch. Div. 115; Maynard's Case, L. R. 9 Ch. 60; De Ruvigne's Case, 5 Ch. Div. 306, 323.

Brief of Moorfield Storey:

A transferee of shares is not liable for unpaid subscriptions on his shares unless he has agreed with the corporation to pay them. If he has not promised he is not liable. A transferee's promise may be implied as well as that of an original subscriber. The latter may procure a release from his liability, if some one else, with the consent of the corporation, will assume his obligation. If a man buys snares from another, knowing that the seller is liable to the corporation for a portion of their price, procures a transfer of the shares to himself on the books of the corporation, and receives from the corporation a new certificate which on its face expresses the liability, it is not difficult to find in this transaction the intention of the buyer to assume the seller's liability, and the consent of the corporation to the substitution. The buyer knows that the seller is bound to pay the corporation the balance still due on the shares; he knows that, by the sale of his stock, the seller parts with all interest in the corporation and all right to share in its profits; and as no sensible man would part with the chance of profit, and retain the liability for loss which he assumed only for the sake of profit, and as a transfer cannot extinguish the corporation's claim to the balance due, it is clearly the intention of all the parties that by novation the buyer shall assume the seller's liability to the corporation. The cases support this view. Where there is no agreement by the transferee to pay, he is held not liable. President, etc., of the D. & S. Canal Nav. Co. v. Sansom, 1 Bin. 70; Palmer v. Ridge Mining Co., 34 Pa. St. 288; Franks Oil Co. v. McCleary, 63 Pa. St. 317; Pittsburg & B. C. C. & I. Co. v. Otterson, ubi sup. [4 Wkly. Notes Cas. 545]; Franklin Glass Co. v. Alexander, 2 N. H. 380; Seymour v. Sturgess, 26 N. Y. 134; Jay Bridge v. Woodman, 31 Me. 573; Upton v. Burnhani [Case No. 16,798]. Where there is an agreement by the transferee to pay, either express or clearly to be inferred from his acts, he is liable. Hartford & N. H. R. Co. v. Boorman, 12 Conn. 530; Ward v. Griswoldville Manuf'g Co., 16 Conn. 593; Mann v. Cooke, 20 Conn. 178. These cases are all cases where the intent of the buyer to assume the seller's liability was clear. In Bend v. Susquehanna Bridge & B. Co., 6 Har. & J. 128, the defendant acquired his stock by a transfer which recited that thirty per cent, had been paid, and that it was assigned ";subject to the payment of the remaining seventy per cent agreeably to the charter." In Hall v. U. S. Ins. Co., 5 Gill, 484, the original subscriber expressly promised to pay 820 on every share for which he subscribed. He afterwards assigned to the defendant, who subsequently paid various instalments on the stock. The court says, "The transfer of the stock having been duly made to him, and he having assented thereto,

as is unequivocally demonstrated by his payment of instalments subsequently called in by the president and directors of the company, he was, in respect to said stock, substituted to all the rights and liabilities which would have attached to the assignor had he continued the owner thereof." In Merrimac Mining Co. v. Bagley, 14 Mich. 501, where a transferee was held liable, there was a clear novation. Campbell, J., who dissented from the decision in the case of Carson v. Arctic Mining Co. [5 Mich. 288], in this case gives the opinion of the court. In dissenting he assumed that the court put the liability of an original subscriber on the relation of stockholder, independent of a promise to pay, whereas, in fact, the court made it rest on a promise. Merrimac Mining Co. v. Levy, 54 Pa. St. 227, was a suit by the same Michigan corporation in Pennsylvania, and the court follows the Michigan decision, saying it considers itself bound by it in construing Michigan statutes. But the clearest recognition of the principle above stated is found in the decision of the supreme court in Webster v. Upton, 91 U. S. 65. This was an action for calls against a transferee of stock, and the court distinctly made the defendant's liability rest on a promise to pay, proved by the circumstances attending the acquisition of his shares. It is clear, from the authorities, that the liability of a stockholder for unpaid capital in every case rests upon a promise to pay, which if not express may be implied from "proof of circumstances that show the party intended to assume an obligation." As sustaining this proposition, see, also, Williams' Case, 1 Ch. Div. 576; Shackleford's Case, L. R. 1 Ch. 567; Mallorie's Case, L. R. 2 Ch. 181.

No contract of subscription preceded the organization. The bill expressly alleges that "up to this date none of the capital stock of said company had been subscribed for, issued, or sold." It is not claimed that any subscription agreement was signed afterward. No provision in the charter or any other statute prescribed the manner in which the capital should be paid, or imposed any liability to pay it upon the holders of shares. The contract of the original stockholders in this corporation was not express, nor can its terms be found in the language of any statute. It must, therefore, be implied, and the only fact from which any contract by the riginal stockholders can be implied is the fact that-they took stock from the corporation. From this fact the law implies simply

a promise to pay for it, not at some future time or in instalments, but at once and in full. The taking of the stock creates a debt from the taker for its full value, which is due as soon as the stock is taken. When, therefore, this corporation issued its stock, the law imposed upon the original holders an obligation to pay for it, from which they could be relieved in only two ways, viz., payment, or obtaining some one to assume the liability whom the corporation would accept as its debtor. In the latter case a new person contracts with the corporation to pay the old debt, and the new contract is accepted as a substitute for the old. If the respondents in this case are liable, it is because their shares have not been paid for, and they have assumed the obligation of the original takers, and have relieved them from their liability by agreeing to pay their debt. It is perfectly clear that they never made this agreement.

No express promise is alleged. No circumstances are alleged which: show that they intended to assume any obligation to the company. On the contrary, the stock was Issued by the corporation and taken by them as fully paid. Seymour v. Sturgess, 26 N. Y. 134. So far as the shares are concerned which were issued in payment for land, it Is clear that there is no liability for this assessment. Neither the corporation nor the original takers of the stock contemplated any further payment on account of it. By the terms of the contract the land was taken as full payment for the shares, and by that payment all liability to the corporation for their price was extinguished, as long as that contract is not avoided. Where the contract is express no different contract can be implied; and neither by the original holders of this stock nor their transferees was there ever any promise to pay any tiling for these shares except the land. The transaction is precisely the same in effect as if the corporation had received cash in payment for the shares, and the directors had taken the money and paid themselves the price agreed on for their land. Great Luxembourg By. Co. v. Magnay, 25 Beav. 586; Governor, etc., in York Buildings v. Mackenzie, 8 Brown, Pari. Cas. 42; 2 White & T. Lead. Cas. Eq. (last Eng. Ed.) 253, note to Robinson v. Pett; Twin Lick Oil Co. v. Marbury, 91 U. S. 587; Grymes v. Sanders, 93 U. S. 55.

It is well settled by authority that in cases of this sort such a transaction, until avoided, is an effectual payment for the stock. Pell's Case, 5 Ch. App. 11; Drummond's Case, 4 Ch. App. 772; Maynard's Case, 9 Ch. App. 60; Ferrao's Case, Id. 355; Adamson's Case, L. R. 18 Eq. 670; Schroder's Case, L. R. 11 Eq. 131; Coates' Case, L. R. 17 Eq. 169; Jones' Case, 0 Ch. App. 48; Spargo's Case, L. R. 8 Ch. 407; Calling's Case, 1 Ch. Div. 115. Morton's Case, L. R. 16 Eq. 104, illustrates our proposition both in making the liability to pay depend on contract, and in recognizing the novation in the case of a transferee. In Minor v. Mechanics' Bank, 1 Pet. [26 U. S.] 46, was a case where a defendant, sued by a corporation, set up that the whole capital stock had not been paid in, but that by a fraudulent arrangement between certain subscribers and the commissioners it had been made to appear that it was all paid in. See opinion of the court In the case of Phelan v.

Hazard [Case No. 11,068], Judge Dillon sustains the claim of the respondents on both grounds. This was a bill brought by a creditor to enforce the liability of a stockholder for the unpaid balance on his stock. The case arose in Missouri, under the statutes of that state, and therefore the liability of the defendant, so far as it depended on statute, was precisely the same as that of the respondents here. In that case, as in this, the shares had been issued in payment for a mining property which the corporation had purchased, and there also the defendant was not the original holder of the stock.

The liability of the transferee arises from a novation, and how can there be a novation when there is no contract to renew? The respondents are not the original takers of the other two sets of shares, those representing the balance of the original capital and those representing the increased capital, which were issued without consideration, but purchased them as full-paid shares from the original takers or their assignees, they cannot be held liable to pay the assessment in this suit They never promised to pay a debt, of whose existence even they were ignorant. And the corporation must look to the original takers for the amount which they should have paid. The corporation, having issued full-paid certificates and so assisted to defraud the respondents, cannot now be allowed to say that the shares were not paid for, nor can its assignee. This view is sustained in Nicholl's Case, decided by the court of appeal, chancery division, and reported in 26 Wkly. Rep. 334. In this case a company issued certificates of shares as fully paid up, when in fact no payment had been made, and they were taken without notice by Nicholls in payment for land which he sold a third party. The court unanimously held that Nicholls could not be held liable as a contributory for unpaid shares.

It may perhaps be argued that the respondents cannot now contest their liability because the proceedings in the district court of Missouri are conclusive against them, and it therefore becomes necessary to consider precisely what effect must be attributed to these proceedings. In Hall v. U. S. Ins. Co., 5 Gill, 484, the corporation was put into the hands of receivers upon a bill in equity filed by a creditor, and afterwards, upon a petition filed in this suit, a decree was made, ordering stockholders to pay to the receivers all amounts unpaid on their stock, and directing the receivers to collect them by suit from all

who did not pay after sixty days notice. In suit brought by the receivers, the proceedings and decree in the equity suit were put in evidence under objection; and in discussing the exception taken to their admission, the supreme court of Maryland say: "The proceedings of Baltimore county court when sitting in equity, which were objected to as evidence, were not offered as an adjudication of any of the rights of the parties in any suit between them, and upon that ground as admissible evidence in the present controversy, out were offered without reference to the parties thereto, for the purpose of showing by what authority the present action was prosecuted. In that aspect of their being offered, they are obnoxious to neither of the reasons urged for their rejection. The court's order for the institution and prosecution of this suit was definite and final." Upton v. Hansbrough, ubi supra, is the first case arising under the bankrupt law. In that case the unpaid balance was to be paid "on the call of the directors, when ordered by a vote of a majority of the stockholders themselves." In that case proceedings were taken in the bankrupt court, similar to those which were taken in this case. The proceeding in the bankrupt court takes the place of an assessment by the corporation, and its effect is the same, and the act of the court is held an exercise of the power to 'collect the assets of the bankrupt. But the claim of the respondents is supported by express adjudication. In re Republic Ins. Co. [supra]; Lamb v. Lamb [supra]. The claim is further supported by the recent decisions of the supreme court, which give to the proceedings in the bankrupt court the same effect and no more. The cases of Upton v. Tribilcock, Sanger v. Upton, and Webster v. Upton were all actions brought to collect from stockholders an assessment imposed by the "bankrupt court. In every case proceedings in that court, like those detailed in the bill, preceded the suit In Webster v. Upton, 91 U. S. 63, the effect of the decree making the assessment was not considered by the court, but in this case, as in all the others, there is not the least suggestion that the decree in the bankrupt court was conclusive. Each case proceeded on the theory that the stockholder could contest his liability in the suit brought to collect the assessment imposed by it The same conclusion is sustained by Turnbull v. Payson, 95 U. S. 418; Chubb v. Upton, 95 U. S. 665.

But even if the respondents were ever liable, the provisions of the United States bankrupt act (section 5057 of the Revised Statutes) are a bar to this action. Under that section an assignee can maintain no suit, either at law or in equity, unless it is brought within two years from the time the cause of action accrued in his favor. That this provision applies to every suit by an assignee is settled. Bailey v. Glover, 21 Wall. [8S U. S.] 342; Walker v. Towner [supra]. The cause of action accrued when the assignment was made.

A reference to the circumstances under which the stock was issued makes this clear. In the first place, all the stock, both the original and the increased capital, was issued as fully paid up. Neither the corporation which issued it nor the parties who received it contemplated any further payment for it or intended to make any contract which would

bind them to pay for it The parties understood that the shares issued in payment for the land were paid for in full by the land. The persons who took the corporation's bonds at ninety cents on a dollar, and at the same time, as a further consideration for their money, received shares, did not intend, by receiving them, to make any contract to pay for them. Such a contract would have made the receipt of the shares not an inducement to buy the bonds, but a reason for not buying them. The directors who took the balance of the original capital without paying for it did not intend to pay for these shares,—they meant to take them discharged of the liability to pay. In each case, if we look only at the intention of the parties, no contract to pay for the shares was made. The contract under which the original recipients of the stock were liable to pay for it is a contract implied by the law against the intent of the parties. It is implied from the receipt of the shares and the knowledge of the recipients that they had not been paid for. The only promise that can be implied from the taking of stock under such circumstances is the promise to pay for it at once. The price of the share is due as soon as the holder takes them. The liability to pay for them accrues then. Horsey's Case, L. R. 2 Eq. 167; Terry v. Anderson, 95 U. S. 628, 635, 636. This case, therefore, differs from those which have been cited, where the bankrupt court has made an assessment In those cases it was a term of the subscriber's contract that there should be an assessment before he was called upon to pay any thing. His promise was a conditional promise; until that assessment was made, there was no debt from him to the corporation. In such cases it may be said that the right of action does not accrue until the assessment is made. In the case at bar there is no ground for Interpolating into the subscriber's contract any new term, making the payment dependent on an assessment to be made. No call or assessment was contemplated by the subscribers when they took the shares. The promise which the law raises against their intention is an absolute promise to pay, implied from the receipt of unpaid stock. The debt for the price was due the moment the shares were taken. So far as the shares are concerned, for which the takers paid nothing, the corporation might have sued at any moment thereafter. No assessment was necessary to give it a right of action. The assignee acquired

the corporation's right, and might have sued for the full value of the shares as soon as he received the assignment. No action of the bankrupt court was necessary to give him that right, and there was no ground for its interposition. Terry v. Anderson, ubi supra.

Brief of Sidney Bartlett:

First. What would be the remedy of the corporation itself against the parties to whom the shares were thus fraudulently issued? Carling's Case, 1 Oh. Div. 115, 124; De Ruvigne's Case, 5 Ch. Div. 306, 323; Ex parte Currie. 7 Law T. (N. S.) 486; 9 Ch. App. 6.

Second. If, then, it be true that the only remedy open to the corporation is as above supposed, the question arises, have creditors, or an assignee representing creditors, different and distinct rights from those of the corporation? Spargo's Case, 8 Ch. App. 407. The contract under discussion is, except for the fraud, in its consideration, perfectly valid. The general doctrine as to the rights of assignees to redress wrongs suffered by a corporation is stated with precision by Lord Westbury in a recent ease in the house of lords. Waterhouse v. Jamieson, L. R. 2 H. L. Sc. 29.

Having thus stated one of the defences to the claim of plaintiff to charge defendants who held shares issued in payment for mining property, we proceed to submit to the court the other defences applicable alike to that claim and to all the claims made by plaintiffs bill.

The first of these defences is, that each and all of the shares on which plaintiff's claim rests, are, as shown by the bill, held under certificates by bona fide purchasers not privy to the transactions attending their original issue, and not alleged by the bill to be affected with notice of the same, but who took the same on faith of the certificates issued by the company, and, as such bona fide holders, we submit they are not chargeable by the assignee with the vice attending the original issue or its consequences, but relief must be sought by him against the original parties to the wrong.

1. All the issues, as disclosed by the bill, were, and were intended to be, issues of full-paid shares, and it is a necessary inference that the certificates issued conformed to this expressed purpose, and contained no indication that they were not shares of that character, since otherwise a subsequent sale and transfer would be difficult, if not impossible, and the purpose of the parties be defeated.

2. That none of the present defendants were parties to the transaction under which the first issue of shares was made is distinctly stated in the bill, which gives the names of those parties. Simpson v. Fogo, 1 Johns. & H. 23; Ayck. Ch. Pr. 113; Foss v. Harbottle, 2 Hare, 461, 502. 503; Parker v. Nickson, 7 Law T. (N. S.) 461.

3. Assuming, then, that upon the pleadings and the legal results thereof defendants are to be deemed innocent holders of certificates of shares issued by the company subsequent to the issue of original shares (and upon their surrender), and that said original issue was fraudulent or without adequate consideration, the question is, whether, as against credi-

tors or an assignee, defendants hold those shares, charged with the duty to pay the par value thereof or any sum whatever, or whether the assignee must resort to the parties to whom, under the fraudulent contract, they were originally issued. Bank v. Lanier, 11 Wall. [78 U. S.] 377; Leitch v. Wells, 48 N. Y. 585; Matthews v. Bank [Case No. 9,286]; Nicholls' Case, 26 Wkly. Rep. 334. It is to be noted that shares in a corporation are not mere choses in action which a transferee takes subject to all rights between the original parties. They are property in which the legal title vests by transfer (1 Lindl. Partn. 683, 684); and further, that plain certificates of shares, unless qualified on their face, contain nothing to put the purchaser on inquiry (Waterhouse v. Jamieson, L. R. 2 H. L. Sc. 29). The bill seeks to charge stockholders of a bankrupt corporation severally upon two separate and distinct statements of alleged fact, namely: As holders of shares originally issued in February, 1867, at the time of the organization of the company, to the parties who organized that company. Also, as holders of shares under a subsequent increase and issue made in April, 1870, and sold, together with the bonds of the company, to parties purchasers thereof. Of one or the other class of the above-described shares the bill charges that each of the defendants held, at the date of the decree of bankruptcy, and now holds a designated number, but it does not aver of which issue either of the defendants held shares. True, it avers that the bankrupt court has declared that an assessment on both classes of shares is required to pay the debts of the company, but as to the ownership of the shares its averment merely is that "the certificates of the shares of said stock were, at the date of the adjudication, held and owned by the following persons: namely, H. J. Bigelow, 380 shares," &c., &c., but of which issue the several parties were thus holders is not disclosed. In default of any averment that each defendant holds shares of both issues, if one or more of the defendants hold shares of the first issue only, and if, as to that issue, there is apparent on the face of the bill a defence as matter of law, is defendant shut off from demurring, and compelled to set up the fact by plea, namely, his ownership of that issue only, when by law it is the duty of the plaintiff in his bill to have averred how the fact was? The rule that, on demurrer, a "court is-bound adopt the construction which is least favorable to the plaintiff," and "every ambiguous statement must be taken in the

sense most adverse to the pleader," above referred to, need not be repeated. The true test is, if demurrer be overruled and no further proceedings had, and if one class of shares is, on the face of the bill, in law not liable, then what decree, and against whom, can the court proceed to enter? We submit, then, that it is to be inferred that some of the defendants do or may hold stock only of one of the issues; and as the question who they are is left by the bill uncertain, the objection may be taken by each defendant on general demurrer to the whole bill.

We come, then, to another ground of demurrer, namely, the limitation of suits to be brought by the assignee to two years from the time when the cause of action accrued to him. The statute applies to all judicial contests between the assignee and any persons whose interest is adverse to his, including actions for unpaid assessments of stock. Bailey v. Glover, 21 Wall. [88 U. S.] 342; Walker v. Towner [supra]; Payson v. Coffin [Case No. 10,859], referred to in same. In this case the question is, did the cause of action accrue immediately upon the appointment of the assignee, or did it only accrue at the date of the order for assessment, the 4th May, 1877 (if the same is valid), for which order the application was made on the 26th April, 1877, nearly three years after the appointment of the assignse? The answer to this inquiry will necessarily involve the determination of all or of a part at least of the following questions: (a.) Is an assessment of any character by the bankruptcy Court in any case a necessary preliminary to suit by the assignee, and, if in any ease it be, still, may he not by bill in equity proceed to cause such assessment, and also obtain in the same suit decree charging the stockholders? So that his right of action is immediate on his appointment, (b.) If such assessment by the bankruptcy court is in any case necessary, is its necessity confined to cases where, by the terms of the subscription to shares or by the charter or by-laws, subscribers to stock are by contract liable to future calls only in the mode and at periods to be thereafter fixed by the directors or corporation, and where such calls have not already been made prior to bankruptcy? (c.) Can such assessment ever be a prerequisite to "bringing suit by the assignee when not only no right exists by contract regulating the mode and time of future calls, but where shares are issued by the corporation by agreement (fraudulent in part or in whole) as being full-paid shares, so that no executory contract exists between the parties, but merely a right of action for the fraud after or without rescinding the contract? (d.) If in the case last named an assessment be a legal prerequisite to suit by the assignee, what is its purpose, and what its effect after it has been obtained, upon the rights of the parties in future suits by assignees against shareholders? (e.) Has there been in this case any such assessment (if such an assessment was a necessity), as has complied with the law or is valid for any purpose?

1. It will be conceded, we think, that it is the right and duty of the assignee to enforce all the claims of the corporation, whether against delinquent shareholders or others, to the end that, in case the property shall prove more than sufficient to pay the debts, all

its property and rights shall be restored to the corporation unimpaired. The assignment vests in the assignee all the corporate property and rights, and among them the right to collect unpaid subscriptions. The corporation, though not extinct, is thenceforth powerless to collector enforce those rights. However speedily the bankruptcy act may look to the winding-up of the estate, it is obvious that if it be not the duty of the assignee to enforce the payment of delinquent subscriptions until he has ascertained that they are requisite, after exhausting the other assets for payment of debts, insolvency, migration, or other causes may impair, if not destroy, all chances of their collection. If, then, a bankruptcy assignee represents both the Corporation and creditors, it is submitted that, without applying for any assessment, such assignee has the right and duty to collect all unpaid subscriptions of the capital, whether needed to pay debts or otherwise. Defendants admit that under the usual creditor's bill, to reach the equitable assets of an insolvent corporation, consisting of unpaid subscriptions to shares or capital distributed among stockholders, it has been held that the only equity of the creditors is to subject such unpaid subscriptions or divided capital to their claims, when the other assets of the company shall have been exhausted or shown to be insufficient. The ground upon which this doctrine rests would seem to be that, as between a corporation and its shareholders, the capital is to be held as a fund to be resorted to only when there is a deficiency of other corporate property, and that creditors have no other or higher equity, as to this fund, than the corporation,—a doctrine seemingly open to discussion, at all events inapplicable in bankruptcy, where the assignee is bound to collect ail assets for the benefit as well of the corporation as of its creditors. The only possible ground, therefore, for petitioning for an assessment in the bankruptcy court would seem to be that by contract between the shareholders and the company, at the outset, the former are not to be called on to pay assessments, except in the mode and at the times fixed by that contract. And such is the judgment of the supreme court (Terry v. Anderson, 95 U. S. 628, 635), which ease deals with the rights of creditors against stockholders whose subscriptions are not full paid, thus: "There the charter of the bank made a call by the directors, and sixty days notice of it to the stockholders, conditions precedent to the collection of unpaid stock subscriptions, and it was consequently held that the

statute did not commence to run against a liability until the requisite call had been made and notice given. Neither in this case, nor in Terry v. Tubman [92 U. S. 156], does any such provision of the charter appear. For all that is shown in the record the stockholders were liable at any time for the balance due from them." Further, it has been determined, that in ease of bankruptcy, or technical insolvency, where such contract exists (based as it is upon the assumed solvency of the corporation), it has no legal effect or force. Henry v. Vermillion & A. R. Co., 17 Ohio, 187.

2. But if it shall be held that, notwithstanding bankruptcy, such contract with shareholders, if made originally, still subsists,—that an assignee represents merely the creditors and not the corporation, and that, in conformity with that contract, he must in some court obtain an assessment,—the doctrine could have no application to this case, where there was no contract as to assessments, but a contract that no future assessments should be made. Whatsoever remedy the corporation had for the fraud was immediate and direct It is submitted that the assignee had the immediate right which belonged to the company, and that it cannot be requisite to go through any form prior to bringing suit.

3. If, then, there was in this case no legal necessity for an assignee to procure an assessment in the bankruptcy court, it is hardly necessary to discuss the general character and effect of such assessments, when required and when legally made, nor of the character of the one attempted in this case, since it is obvious that the statute of limitations began to run with the date of the appointment of the assignee.

4. But if all this be wrong and unsound, and if an assessment was in some form and in some character a prerequisite in this case, it may be well to advert, first, to the general purpose and effect of such assessments; and, next, especially to the character of the pretended assessment in this case. Upon the assumption that the assignee represents creditors alone and not both creditors and the corporation, so that, as such representative, his rights are limited to recover for unpaid stock only when there is a deficiency of assets to pay the debts and to the extent of that deficiency, and that there must in all cases be ascertained at some time and in some mode the quantum of debt and the amount of assets to determine the extent of the shareholders' liability; it is clear, as will be shown hereafter, that there are two modes of accomplishing this object: One, by a suit in equity in which the debts and assets can be marshalled, the extent of the liability be determined; and the question whether the parties proceeded against as shareholders, are or are not chargeable with this liability, can be determined in a single suit. This is the usual course in regard to insolvent corporations not in bankruptcy, where creditors or receivers seek to recover unpaid assessments of capital. Ogilvie v. Knox Ins. Co., 22 How. [63 U. S.] 380; Ward v. Griswoldville Manuf'g Co., 16 Conn. 599; Adler v. Milwaukee Pat Brick Manuf'g Co., 13 Wis. 61; Henry v. Vermillion & A. R. Co., 17 Ohio, 187; Nathan v. Whitlock, 9 Paige, 152; Mann v. Pentz, 3 Comst. N. Y. 415. The other course usually adopted in bankrupt-

cy, in cases of unpaid subscriptions to stock subject to future calls, is to apply by petition to the bankruptcy court for an assessment on unpaid subscriptions, in which proceeding the question of deficiency of assets, and the amount necessary to be raised and the sum for which the shares are liable, is determined as against all parties, leaving the assignee to enforce the assessment by suit at law or in equity against such parties as shall prove to be liable therefor. This course has probably been adopted instead of a suit in equity to avoid the necessity which would otherwise exist, in cases of the numerous suits necessary to charge the parties in different jurisdictions, of furnishing in each of those suits proof of such amount and deficiency and of the sums due upon the shares. In each of the following cases this last-named course has been adopted, and in most of them the question of the liability of the party sought to be charged is, In the suits brought to enforce such assessment, held to be open among the matters at issue; and it has been further distinctly held that only the quantum of the assessment, as distinguished from the question whether the defendant is chargeable therefor, is to be deemed settled by the bankruptcy court Turnbull v. Payson, 95 U. S. 418; In re Republic Ins. Co. [supra]; Lamb v. Lamb [supra]; Upton v. Hansbrough [supra]; Upton v. Englehart [supra]; Michener v. Payson [supra]; Upton v. Tribilcock, 91 U. S. 45; Sanger v. Upton, Id. 56; Chubb v. Upton, 95 U. S. 665.

5. Such being the purposes and effect of assessments in general, where such assessments are by law or original contract necessary as preliminary to a suit by the assignee, although, as we have seen, wholly inapplicable to this case, yet, if it would be so applicable, this attempted assessment is wholly nugatory and void. An order or decree which leaves the quantum of delinquent assessments unsettled, and thus, if it be valid, leaves, in any future proceedings in other tribunals—facts open to proof and controversy, which are essential to the establishing of that quantum, and thus fails to accomplish the object on which its jurisdiction rests, is a nullity. The order or decree of the bankruptcy court in this case finds and declares the amount of the assets, the amount of debts, the quantum of deficiency of assets to pay those debts. It, then, instead of ascertaining and determining the amount of unpaid assessments due upon the several shares or classes of shares (which, as has already been suggested, may differ

widely in the cases of the several defendants), proceeds to order an assessment of one hundred per cent, on each share, less whatever may, in future suits, he proved by the defendants respectively to have been paid on their shares. Is it valid? It would seem to be clear that such a decree, which ascertains part only of the elements necessary to determine the amount of unpaid 'assessments, and thus furnishes part only of the complete foundation on which to base future suits, to determine the liability and amount of liability of the parties sought to be charged, cannot be even received In evidence. It need not be added that, if no valid order or assessment by the bankruptcy court is shown, then, if such assessment be a prerequisite, the bill must be dismissed; if it be not a prerequisite, then the statute of limitations dates from the accruing of the original cause of action, viz., from the appointment of the assignee.

We next submit that even if an assessment was, in this case, one mode of ascertaining the deficiency of assets to which the assignee might lawfully resort (which, and the effect of which, in its bearing on this ease, this defendant denies), and if this pretended assessment were a real assessment, yet it cannot be in the power of an assignee to defeat the statute of limitations by postponing his application for such assessment, as in this case, until long after the statute has run to completion, and thus continue defendant's liability indefinitely at his pleasure. If the filing of such petition for assessment be deemed the commencement of a suit by the assignee, of which the present suit is a mere continuation, then it was not filed until nearly three years after his appointment, and it almost warrants the suggestion that its filing was an experiment with a view to avoid, it might be, the bar which had already matured.

Finally, upon this point arising from the statute of limitations, we submit that if an assessment by the bankruptcy court was one of the lawful methods of proceeding in this case, and it had been legally made, yet there was another clear and complete remedy equally open to the assignee, in which an assessment and a final decree could be had, and the right of which accrued to him from the date of his appointment And further, that he cannot lay by for years, neglect this remedy, and finally resort to an assessment as the means to avoid the statute. Defendants contend that the assignee had the legal right, at any period within the two years, without seeking an assessment from the bankruptcy court, to bring a suit in equity, in which, in conformity with the procedure of courts of chancery, all questions of the existence and amount of unpaid subscriptions on the shares or class of shares held by the defendants respectively, the question of deficiency of assets, the extent of that deficiency, the liability and amount of liability of each separate defendant, and the calls and assessment in conformity, could all be ordered, tried, and determined. Or, if it shall be held that such assessment can only be had in bankruptcy courts, then the bill in equity, and a proceeding for assessment in the bankruptcy court, may be brought contemporaneously, and the former proceeding, if need be, stand or be suspended until

the order fixing the quantum of assessment on shares held by each class shall have been passed, and then the question of defendant's liability be heard and determined under the bill.

First. As to the first of the above propositions, it is submitted that although no case has been found where the assignee has, without procuring such assessment, proceeded to accomplish the same purpose by a bill in equity, yet it is undeniable that the jurisdiction of a court of equity is fitted in all respects to work out and perfect every step preliminary, or otherwise necessary in case of bankruptcy, to charge the proper parties for the proper amounts of unpaid subscriptions. This is shown by the various cases in which creditors of insolvent corporations by bill, in behalf of themselves and other creditors, and also where receivers appointed in cases of insolvency, have successfully invoked the aid of a court of equity to attain the same ends which are sought in this case by the plaintiff. Ogilvie v. Knox Ins. Co., 22 How. {63 U. S.} 380; Ward v. Griswoldville Manuf'g Co., 16 Conn. 599; Adler v. Milwaukee Pat Brick Manufg Co., 13 Wis. 61; Henry v. Vermillion & A. R. Co., 17 Ohio, 187; Hall v. U. S. Ins. Co., 5 Gill, 484; Mann v. Pentz, 2 Sandf. Ch. 257. If the processes of a court of equity are thus found adequate to accomplish in behalf of a creditor all that is sought in this case, it is difficult to see why the same remedy does not exist in behalf of an assignee in bankruptcy, who, upon the theory above stated, is the representative of creditors. The bankruptcy act (Rev. St §§ 40, 79, 49, 72) confers on all district courts, including that in which the decree of bankruptcy is made, and on all circuit courts, full equity jurisdiction in all bankruptcy matters. Bump, Bankr. Pr. (9th Ed.) 341, in notis, 323, 324; Wilkins v. Davis. {Case No. 17,664}.

Second. As to the second of the above propositions, namely, that if it is by law requisite that the assessment be had in a bankruptcy court only, yet a bill to charge the defendants for their liability as ultimately ascertained, and a petition to the bankruptcy court to assess the amount attributable to the shares held by each defendant, may be instituted at the same time. For this we refer to the cases of Com. v. Cochituate Bank, 3 Allen, 42; Baker v. Atlas Bank, 9 Mete. {Mass.} 182. The first of these cases was a bill in equity, by receivers of an insolvent bank, to obtain an order conferring and carrying into effect an assessment made by them to enforce a statute liability in favor of bill-holders against parties who were stockholders when the bank stopped payment The defence was

the statute of limitations; to which it was replied that the right of action or process against the stockholders did not accrue until after assessment made by the receivers in conformity to the statute ascertaining the deficiency of assets. But it was held that the statute began to run when the bank stopped payment, and that suits against the bank, under which the assessment may be ordered to be made, and suits against the stockholders by the bill-holders, might be commenced and go on pari passu. This case reaffirms the same doctrine that is contained in the last cited case (Baker v. Atlas Bank), which was a creditor's bill to enforce against shareholders the statute liability for mismanagement of directors. A synopsis of the case will be found in the opinion of the court in the Cochituate Bank Case, above cited. The argument in that case, in answer to the statute of limitations, was that the statute did not begin to run until the" plaintiffs' right to sue arose from the refusal of the receiver to commence an action for their benefit, to which the court replied, "If this argument would hold good, the plaintiffs might delay the application to the directors or receivers any length of time, and the statute would be inoperative and nugatory;" and in answer to the suggestion that the statute could only begin to run after it was first ascertained what would be paid by the assets of the bank, the court declare that suits against the bank and against the stockholders may be brought at the same time.

CLIFFORD, Circuit Justice. Fraud does not render a contract void, but voidable only at the option of the party defrauded, both at law and in equity, whether the fraud was committed by one of the contracting parties upon the other, or by both upon persons not parties to the transaction, the rule being that where the fraud was committed by one of the parties upon the other, the contract remains operative and in force until it is disaffirmed by the injured party. Chit. Cont. (10th Ed.) 626; Add. Cont (7th Ed.) 228; Clough v. London & N. W. Railway, L. R. 7 Exch. 34; Jones v. Carter, 15 Mees. & TV. 722; Upton v. Englehart [supra].

Due consideration will be given to both defences, but it will be more convenient to examine the one addressed to the merits before considering the question whether the claim is barred by the statute of limitations.

Considered broadly, the bill of complaint seeks to enforce from the respondents the payment of the entire capital stock of the company, or such portion of the same as may be necessary to pay the debts of the corporation less the amount any particular holder of the stock may have paid towards his shares. Three classes of shares were issued, as plainly appeal's from the allegations of the bill of complaint: 1. Shares to the amount of $350,790, fraudulently issued to the directors in payment for the mining lands which they, at a greatly overvalued estimation, conveyed to the corporation. 2. Unpaid shares to the amount of $46,210, issued to the directors without any consideration. 3. Shares to the amount of $100,000, issued by the corporation to such persons as took an equal amount of the mortgage bonds of the corporation at ninety per cent

Viewed in the light of these suggestions, it is plain that it is sufficient for the respondents to show that the complainant cannot sustain any claim against them as holders of the first issue of the original stock, as the bill of complaint does not charge that the respondents are holders of any particular issue of the stock, or either of the other issues. Such being the state of the pleading, it is open to the several respondents to assume that his stock, as charged, is wholly of the first class of the stock which was issued to the directors in payment for the mining lands, the rule being that pleadings which are uncertain or ambiguous must be taken in the sense most adverse to the pleader. Story, Eq. Pl. (7th Ed.) § 257; Foss v. Harbotue, 2 Hare, 503; Simpson v. Fogo, 1 Johns. & H. 23; Ayck. Ch. Pr. 113; Parker v. Nickson, 7 Law T. (N. S.) 461.

Certificates of shares of that kind were issued to the amount of $350,790; and, nothing being alleged to the contrary, the several respondents in this controversy may properly assume that they are charged with holding of shares in the capital stock, the certificates of which were of that issue which were entered upon the books of the company as shares paid up in full. Issued, as these shares were, to the directors in payment for the mining lands, they were, as between the grantors of the land and the directors issuing the shares, fully paid up, as the shares paid for the land, and the land conveyed paid for the shares; and all this appears upon the books of the company. Transferees of the shares took the certificates with nothing on their face to show any unfairness, and with nothing appearing on the books of the company to put them upon inquiry. Suppose that is so, still the complainant contends that such payment was made in mineral lands at a fraudulent valuation, not binding on the corporation. Admit that and still the fact remains that the land was actually received by the company in full payment for the stock, and that the shares were issued and delivered as fully paid up shares. Taken as a whole, the averments of the bill of complaint show that the transaction in purchasing the mineral land, and in issuing the first class of stock in payment for the same, was a gross fraud upon the company which cannot be sustained; but it does not follow that the present suit against the respondents is the proper remedy to redress the injury, for the reason that the contract was duly executed by the execution of the deed of conveyance to the corporation, and by issue of fully paid up shares to the corporation for the

whole amount of the agreed consideration of the mineral land.

Nothing can be plainer in legal decision than that the title to the mineral land passed to the corporation, and that the title to the paid-up stock passed to the directors. Being formally executed the contract must stand until it shall be rescinded, or the assignee, if he prefers that course, may retain what the company received for the stock, and seek redress in damages against those who defrauded the corporation. And the redress is at his command, but he certainly cannot be allowed to disaffirm the contract only in part, and affirm it as to the residue, as he must do in order to maintain the present suit against the respondents.

Beyond all question the present respondents are bona fide purchasers and holders of shares in the capital stock of the company, which the books of the company show were fully paid for by the directors, and which, by the terms of the contract between the directors and the grantors of the mineral land, were fully paid in the manner stipulated by the contract. Under such circumstances it cannot be that the complainant, without disaffirming the contract, can be allowed to set up the theory that the property taken in payment of the shares was less than their estimated value, and to seek redress for the difference against bona fide purchasers of the same in the open market. Gross fraud may have been perpetrated between the parties to the sale and purchase of the mineral land; but it is nevertheless true, so far as the shares of the capital stock are involved, that the shares, as between the corporation and innocent purchasers of the stock in open market without notice, knowledge, or means of knowledge of the fraud, were paid up, as shown by the books of the corporation. Notice of the fraud as respects the respondents is not alleged, nor is there an intimation in the bill of complaint that any facts or circumstances were known to the respondents, to put them upon inquiry in respect to any such imputation.

Innocent purchasers of the stock in the open market are not liable in such a case; but the remedy of the corporation is against the guilty perpetrators of the fraud in their individual capacity. Support to the opposite theory is attempted to be derived from the adjudication of the bankrupt court; but the decree of the bankrupt court was only an adjudication that, for the purpose of paying off the indebtedness of the company, a call and assessment be made on the stock of one hundred per cent, less any sum or sums that may have been paid thereon. Properly considered, as a whole, the decree of the bankrupt court does not absolutely fix and determine the amount to be assessed. Instead of that, it merely calls for one hundred per cent, less all payments; nor does the decree in any respect contradict the theory that the class of stock first issued was fully paid up before it was put upon the market; and, if so, the court is of the opinion that the proper remedy of the complainant is against the perpetrators of the alleged fraud, which he might have enforced the moment he was appointed assignee of the bankrupt's estate. Holders of shares issued improperly stand on a different footing from the holders of shares which

the company had no power to issue, as the purchaser in the latter case acquires nothing, and cannot, in general, be held as a contributory. 2 Lindl. Partn. (3d Ed.) 1381; Bank of Hindustan v. Alison, L. It. 6 C. P. 54, 222. But the mere fact that a person has become a shareholder pursuant to a scheme which is ultra vires will not relieve him from liability as a contributory, if the shares he has taken can be considered as legally existing, and he was himself a party to the scheme, or had knowledge of the fraud. Even where the shares were fraudulently issued, it is necessary to give strict attention to the precise facts in order to ascertain what are the rights of the parties in the case. The respondents were not subscribers to the stock, but the purchasers of the shares in the open market as paid-up shares. It was held in Carling's Case that, where the contract was to take paid-up shares, the court could not convert the contract into one for unpaid shares, for reasons which are obviously sound and correct Carling's Case, 1 Ch. Div. 124.

Where there is a contract, even if fraud be imputed, the party seeking redress must disaffirm the contract, or proceed for damages against the perpetrators of the fraud. Such a party must throw over the agreement altogether, or he must take it as a whole. He cannot adopt as to one part, and reject it as to the rest De Buvigne's Case, 5 Ch. Div. 323. Certain shares of capital stock were allotted as fully paid up shares, and the court held that, as the shares had been allotted to a stranger as paid-up shares, they could not be considered otherwise, and that neither he nor his alienees could be liable to contribute in respect of the shares. Ex parte Currie, 7 Law T. (N. S.) 486.

Argument, to show that the transaction of issuing the stock in payment for the mineral land would have been valid if unmixed with fraud, is scarcely necessary, as the proposition is one which finds support in the daily transactions of life. Spargo's Case, 8 Ch. App. 413. Shareholders are not required to suspect fraud or to institute inquiries where all seems fair and conformable to the requirement of law and fair dealing. Waterhouse v. Jamieson, L. R. 2 H. L. Sc. 29. Where certificates of shares were issued as fully paid up, when in fact no payment had been made, it was held in the chancery court of appeal, reversing the vice chancellor, that by the issue of the certificates the company were estopped from alleging that the stock was not paid up, and that an innocent holder of the shares could not be placed on the

list of contributories in respect to such shares as unpaid shares. Nicholl's Case, 26 Wkly. Rep. 334.

Three of the judges gave opinions: The master of the rolls said: "Where you have a receipt given you by the company, a final receipt as a certificate of payment, what more is a bona fide purchaser to ask for, and what occasion has he to make inquiry? He has the representation of the company by the certificate that the shares are fully paid up. It appears to me the company, having made that representation by the certificate to be used by the vendor as evidence of title, is estopped from saying afterwards that the company has not received the money. * * * It appears to me impossible that the company should be allowed to say the shares were not paid up in due course." James, L. J.: ";Every person connected with the company who issues a certificate for paid-up shares in money, when the money or value has not been paid, is guilty of a personal wrong towards the company, and may be made answerable for it in exactly the same way and to the same extent as if the money had been taken out of the coffers of the company to pay up the shares, or as if by some fraud of the directors and officers receipts had been given for the payment when payment had not been made. If any person is a party to such a breach he can be made answerable for it, but that cannot affect the position of one who says, You made a representation to me, and you are bound by every principle of law and equity to make good the representation upon the faith of which I was induced to act.;'" Thesiger, L. J., held that any such shareholder may show either that the shares have been paid up in fact, or that the company whom the liquidator represents have, by their words or conduct, estopped themselves from disputing that the shares have been so in fact paid up.

Certificates of shares in due form were issued as paid-up shares, and there is much reason to hold that the corporation, as to innocent holders of the same, is estopped to set up the defence that they are void. They admit that the shares were paid up to the extent of fifty per cent, and the opinion of the bankrupt court contains a finding of the same import, which strengthens the position that the corporation is estopped to set up the defence that the certificates are void. Riche v. Ashbury Ry. C. & I. Co., L. R. 9 Exch. 264.

Power to issue shares was possessed by the company, and hence the rule, that the holder takes nothing where the power is entirely wanting, does not apply. Ferguson v. Landram, 436;[2] Stace's Case, 4 Ch. App. 688. Cases arise, however, where the suit was against the perpetrators of the fraud, or against holders of the stock, with notice that it was fraudulently issued, or with knowledge of such facts and circumstances as legally put them upon inquiry, in which the rule is different. Equity, in such a case, regards the property of the corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it in whosesoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser; and the rule is

well settled that stockholders are not entitled to any share of the capital stock, or to any dividend of the profits, until all the debts of the corporation are paid. Railroad v. Howard, 7 Wall. (74 U. S.) 409.

Assignees in bankruptcy in such a case represent creditors as well as the bankrupt and may disaffirm the contract, or retain what passed to the bankrupt and proceed for damages against the perpetrators of the fraud, or against subsequent transferees of the stock with notice that it was fraudulently issued, or with knowledge of such facts and circumstances as legally put him upon inquiry. Decided cases which assert that rule are quite numerous and decisive. Two or three cases of the kind deserve consideration, of which the following is, perhaps, the most important.

Money was owed to the corporation for a subscription to the capital stock, and the debtor and the officers of the company entered into an agreement to extinguish the stock debt, and to convert it into a debt for the loan of money. Bankruptcy of the corporation ensued, and the assignee claimed that the stock debt was due. Justice Miller gave the opinion, and, in replying to the argument that the assignee can assert no greater right than the bankrupt, said: "The assignee is the representative of creditors, as well as of the bankrupt He is appointed by the creditors. The statute is full of authority to-him to sue for and recover property, rights, and credits where the bankrupt could not have sustained the action, and to set aside-as void transactions by which the bankrupt would be bound. * * * Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation is a trust fund for the benefit of the general creditors of the corporation." Sawyer v. Hoag, 17 Wall. [84 U. S.] 619. To the same effect also is the case of Upton v. Tribilcock, where the opinion was given by Justice Hunt. He decided that the original holder of stock in a corporation is liable for unpaid instalments of stock without an express promise to pay the amount and that a contract between such a subscriber and the corporation or its agents, limiting the liability therefor, is void, both as to the creditors of the company and its assignee in bankruptcy; that representations by the agent of a corporation, as to the non-assessability of its stock beyond a certain percentage of its value, constitute no defence to the action against the holder of the stock to enforce payment of the entire amount subscribed, where the-holder has failed to use due diligence to ascertain the truth or falsity of such representations. Upton v. Tribilcock, 91 U. S. 43. Due care and diligence was not exercised by the

purchaser in that case, although the proof was full to the point that he was legally put upon inquiry. Thomas v. Bartow, 48 N. Y. 193. Half a century before these cases were decided, Judge Story held that the capital stock of a corporation was a trust fund for the payment of the debts of the corporation, and that it might be followed into the hand of the stockholders or of any persons haying notice of the trust attached to it Wood v. Dummer {Case No. 17,944}.

Trusts are enforced not only against those persons who are rightfully possessed of the trust property as trustees, but also against all persons who come into possession of the property bound by the trust and with notice of the same, and whoever comes so into possession is considered as bound, with respect to that special property, to the execution of the trust Taylor v. Plumer, 3 Maule & S. 574; Adair v. Shaw, 1 Schouler & L. 262. Reported cases almost without number lay down the same rule, but those referred to will be sufficient to illustrate the principle. Nothing is alleged in the bill of complaint tending to show that the respondents were participants in the fraud, or that they had notice of the transaction, or knowledge of any facts or circumstance tending to put them upon inquiry; and if there were any such matters alleged in the bill of complaint it could not benefit the complainant, as it is settled law that in such a case the cause of action arose in favor of the complainant when the estate of the bankrupt corporation vested in him as the assignee in bankruptcy.

Where the charter of a bank contained a provision binding the individual property of its stockholders for the ultimate redemption of its bills, in proportion to the number of shares held by the stockholders respectively, the supreme court held that the liability of the stockholder arose when the bank refused or ceased to redeem, and became notoriously insolvent Terry v. Tubman, 92 U. S. 156. Just the same question, with others, was presented to the supreme court in a subsequent case in which the court held—the chief justice giving the opinion—that the liability of the stockholders upon their unpaid subscriptions is that of debtors to the bank, and that all such balances passed to the assignee under the assignment, which, by the bankrupt act, is of all the property, estate, credits, and assets of the bankrupt, whether a corporation or an individual; and, for all that is shown in the record, the stockholders were liable to suit at any time for the recovery of the balance due from them as such stockholders. Kennedy v. Gibson, 8 Wall. {75 U. S.} 505; Com. v. President, etc., of Cochituate Bank, 3 Allen, 42; Baker v. President, etc., of Atlas Bank, 9 Metc. {Mass.} 182; Terry v. Anderson, 95 U. S. 632. Apply that rule to the case before the court and it follows that, even if the bill of complaint had charged that the respondents had notice of the fraud, or were put upon inquiry in that regard, it would not have benefited the complainant, as in that event his claim would have been barred by the two years limitation of the bankrupt act Bailey v. Glover, 21 Wall. {88 U. S.} 342.

Purchasers of stock, where it appears upon its face that it was only partially paid up, may be held liable to pay up the unpaid instalment; but the authorities to that effect have no application in this case. Webster v. Upton, 91 U. S. 65; Upton v. Hansbrough {Case No. 16,801}. Adjudged cases, in which it has been held that creditors or assignees in bankruptcy may enforce such payments when the corporation would be estopped to do so, are suits against original subscribers or transferees implicated in some way in the fraudulent transaction. Upton v. Tribilcock, 91 U. S. 45. Failure to use due diligence when put upon inquiry was the ground of the decision in that case. Oakes v. Turquand, L. R. 2 H. L. 325. Whatever remedy for the fraud the assignee had, it is evident he might have pursued at any time after he acquired title to the bankrupt's estate. Ex parte Currie, 7 Law T. (N. S.) 486; Carling's Case, 1 Ch. Div. 124; 9 Ch. Div. 60; De Ruvigne's Case, 5 Ch. Div. 323.

Demurrer sustained. Bill of complaint dismissed.

[1] {Reported by William Henry Clifford, Esq., and here reprinted by permission. 7 Reporter, 137, and 26 Pittsb. Leg. J. 128, contain only partial reports.}

[2] {5 Bush, 230.}