que trust to the disadvantage of the others. If the trust indenture provided that the trustee should not sell the securities unless a sale should be advantageous to the common interests of the *cestuis que trust*, it would be unobjectionable, because it would only prescribe a condition which would be implied, and which a court of equity would impose in the exercise of its jurisdiction over trusts, if applied to by any of the parties in interest. But the indenture contains arbitrary restrictions upon the powers of the trustee, which he cannot disregard, and which materially impair the rights of the subscribers. It substitutes the discretion of 25 per cent. in interest of the *cestuis que trust* in place of the discretion of the trustee, and requires him, at the intervention of a majority of the subscribers, to extend the time of payment, and postpone a sale of the securities. The plaintiff did not consent to the creation of such a trust. The conditions may have been designed to promote the best interests of all the subscribers; they may have been wise and expedient, but they were not such as were authorized by the plaintiff's contract. A court of equity might reform the terms of the trust indenture if a suit were brought for that purpose, but, so long as they stand, would have to adhere to them, if called upon to intervene upon the application of the *cestuis que trust*.

It remains to consider whether the plaintiff can recover back his money in an action for money had and received, or whether his remedy is merely one for damages for a breach of contract. The subscription agreement was a separate and independent contract between the defendant and each subscriber. The defendant could maintain a suit against each subscriber upon his failure to pay the amount of the subscription; and it must follow that each subscriber has a corresponding right of action against the defendant for any breach of the contract on its part towards him. Similar contracts have been frequently adjudged to confer a several liability and a several right of action on the part of each subscriber. Thomp. Liab. Stockh. § 114; *Whittlesey* v. *Frantz*, 74 N. Y. 456. It is a familiar rule that when one party to an executory contract puts it out of his power to perform it, the other may regard it as terminated, and has an immediate right of action to recover whatever damages he has sustained. *Ford* v. *Tiley*, 6 Barn. & C. 325; *Bowdell* v. *Parsons*, 10 East, 359; *Heard* v. *Bowers*, 23 Pick. 455–460; *Shaw* v. *Republic Life Ins. Co.* 69 N. Y. 293; *U. S.* v. *Behan*, 110 U. S. 339; S. C. 4 Sup. Ct. Rep. 81; *Lovell* v. *St. Louis Mut. Life Ins. Co.* 111 U. S. 264; S. C. 4 Sup. Ct. Rep. 390. The plaintiff was under no obligation to tender his receipts. They were merely vouchers. They were to be exchanged for formal certificates, but when the defendant had put it beyond its power to deliver the proper certificates, the plaintiff was not bound to tender them. No demand of the certificates was necessary after defendant had incapacitated itself from giving them. Where money is advanced upon an executory contract, which the contracting party fails to perform,

it is in the election of the other party either to sue upon the agreement and recover damages for a breach, or to treat the contract as rescinded, and recover back his money as paid upon a consideration which has failed. *Hill* v. *Rewee*, 11 Metc. 271; *Brown* v. *Harris*, 2 Gray, 359; *Wheeler* v. *Board*, 12 Johns. 363; *Lyon* v. *Annable*, 4 Conn. 350; *Appleton* v. *Chase*, 19 Me. 74; *Shepherd* v. *Hampton*, 3 Wheat. 200; *Smethhurst* v. *Woolston*, 5 Watts & S. 106. If there had been a part performance of the contract by which the plaintiff received some benefit, and the defendant could not be restored to the previous situation, the plaintiff's only remedy would have been for a breach of the agreement, and his damages would be measured by his loss. *Hunt* v. *Silk*, 5 East, 449; *Foss* v. *Richardson*, 15 Gray, 306; *Nash* v. *Lull*, 102 Mass. 60. He has received nothing, however, under the contract, and the law implies a promise on the part of the defendant to pay back what it has received.

Judgment is ordered for plaintiff on the demurrer.

NEWTON and another *v.* HAGERMAN.

(Circuit Court, D. Nevada. November 26, 1884.)

STATE INSOLVENT LAWS—EFFECT OF DISCHARGE.

A discharge under a state insolvent law is no bar to an action by a citizen of another state who did not appear or take part in the insolvency proceedings.

The opinion states the facts.

Rothchild & Baum and *R. M. Clarke*, for plaintiffs.

Ellis & Judge, for defendant.

SABIN, J. In April, 1883, plaintiffs, then and now citizens of the state of California, residing at the city of San Francisco, brought this action in the Seventh district court for the county of Washoe, state of Nevada, against defendant, then and now a resident of said county, to recover $1,188.04 on account of goods by them sold and delivered to defendant at said city of San Francisco on or about October 8, 1881. By an amended complaint, duly filed, plaintiffs reduced their demand on the same cause of action to the sum of $1,060.76, and prayed judgment accordingly. Defendant demurred to the amended complaint, and pending that demurrer the case was removed to this court. In this court the demurrer was overruled, and defendant given time to plead. Thereupon defendant filed his answer in this court, setting up his discharge in insolvency under the state statute, duly issued and granted July 28, 1883, by the said district court of Washoe county, and that the same was so granted while this action was pending in said court, and that plaintiffs' demand was included in said discharge.