VETTERLEIN *et al. v.* BARKER.

(Circuit Court, S. D. New York. March 21, 1891.)

1. VACATING DECREE—EVIDENCE—RES ADJUDICATA.
A bill of review to annul a decree cannot be maintained on the ground that a decree in a collateral suit between the parties, which was introduced as *res adjudicata* upon some of the issues in the cause, has, since the decree, been set aside by the court which rendered it, where it appears that the collateral decree was void for want of jurisdiction of the court, and was vacated for that reason. The vacating of the decree did not detract from its original inoperativeness as *res adjudicata*, and therefore is not new matter arising since the decree now sought to be annulled, within the rules that apply to bills of review.
2. SAME—NEGLECT OF TRUSTEE.
A bill to annul a decree for fraud cannot be maintained upon the theory that the defendants, who were trustees, were derelict in their duty to their *cestuis que trustent* in not availing themselves of defenses which they might have presented, where it does not appear that the complainant in the suit was cognizant of any misconduct on the part of the trustees, and where they were the proper parties to represent the beneficiaries and litigate the cause for them. Under such circumstances the adverse party cannot be deprived of the benefit of the adjudication which he has obtained.

In Equity.
Roger M. Sherman, for plaintiffs.
John Proctor Clarke, for defendant.

WALLACE, J. This is a bill to reverse and set aside a decree of this court, (16 Fed. Rep. 759,) in affirmance of a decree of the district court (Id. 218) adjudging that certain insurance policies, the property of the bankrupt firm composed of Theodore H. Vetterlein and Bernhard E. Vetterlein, and assigned to trustees for the benefit of the wife and children of Theodore H. Vetterlein, were so assigned in fraud of the rights of the assignee in bankruptcy of the Vetterleins. The present complainants are the wife and children of Theodore H. Vetterlein, the beneficiaries named in the assignment of the policies. The defendants are the assignors in bankruptcy, who are the successors of the complainant in the former suit, and the defendants in that suit. The bill proceeds upon three grounds: (1) That a decree in a collateral suit between the parties to the original suit, which was put in evidence as *res adjudicata* upon the issue of fraud, has since been annulled by the court which rendered it as void for want of jurisdiction; (2) that the use of the collateral decree as evidence in the original suit was in fraud of an agreement made between the parties to that suit; and (3) that the defendants in the original suit, who were trustees for the present complainants, violated their duty to their *cestuis que trustent* by omitting to avail themselves of defenses which existed, and setting up defenses in hostility to their trust,—of all which the complainant in the original suit was aware at the time. The bill has been discussed by counsel as though it were a bill of review. So far as it proceeds upon the theory that the vacating of the collateral decree is new matter, which has arisen since the original decree, it would state facts appropriate for such a bill, if it did not appear that the collateral decree was void for want of jurisdiction of

the court,—a fact which is not new matter, which presumably was known when the decree was offered in evidence, and which, if it had been urged at the time, would have destroyed the effect of the decree as evidence. So far as the bill proceeds upon the theory that the former defendants, trustees of the present complainants, were derelict in their duty in the conduct of the suit, to the knowledge of the former complainant, it is essentially one to impeach a decree for fraud, and not a bill of review. As the bill has not been demurred to the cause will be disposed of on the proofs as though the averments, if established by the proofs, would entitle the complainant to relief in any aspect of the facts.

The bill cannot be maintained on the first two grounds, because the proofs do not show that the reception of the collateral decree in evidence had any material influence upon the result. The record of the proofs in the original suit has not been introduced, consequently it cannot be ascertained upon what evidence the court decreed. It would seem, however, from the opinion of the judge that there was evidence, irrespective of the collateral decree, to establish all the material facts in controversy upon which the decree proceeded, and that the collateral decree was not regarded at all in reaching the decision.

The bill cannot be maintained upon the third ground, because, irrespective of other considerations, it does not appear that the complainant in the original suit was cognizant of any misconduct of the trustees in the defense of the suit. He made the trustees adverse parties, because they were the proper persons to represent the beneficiaries. He is entitled to the benefit of the adjudication he has obtained by his diligence, and cannot be deprived of it because those who were duly authorized to represent the beneficiaries were negligent or faithless. If the trustees were derelict, the *cestuis que trustent* must look to them for their remedy. It appears, however, that the trustees insisted that the beneficiaries were necessary parties to the suit, and that they should be brought in. This contention was overruled, and the supreme court held that it was properly overruled. *Vetterlein* v. *Barnes*, 124 U. S. 169, 8 Sup. Ct. Rep. 441. The circumstance that the trustees endeavored to have the beneficiaries brought in as parties is quite cogent to show that they intended to protect the rights of the beneficiaries. From all that now appears, there is little room to doubt that the trustees defended the suit to the best of their ability.

The bill is dismissed, with costs.

VAN VLEET *et al.* v. SLEDGE *et al.*

SLEDGE *et al.* v. VAN VLEET.

(*Circuit Court, W. D. Tennessee.* August 9, 1890.)

1. NEGOTIABLE INSTRUMENTS—INDORSEMENT—EVIDENCE.
The testimony of a witness as to statements of the indorsers of a note in regard to the agreement under which the indorsement was made is inadmissible as hearsay.

2. SAME—REFORMATION OF CONTRACT—EVIDENCE.
Parol evidence is inadmissible to vary or explain an unconditional indorsement of notes, but is competent for the purpose of reforming the contract of indorsement.

3. SAME—ENTRY ON BOOKS OF ACCOUNT.
An entry on the books of the indorsers, charging the notes to the indorsees, and reciting, "All said notes transferred to them in part payment of their account, and indorsed by us, waiving protest," is not ambiguous, and the person who made the entry cannot construe it, or testify as to what was meant by the word "payment."

4. SAME—REFORMATION OF CONTRACTS.
A written contract will not be reformed unless a material mistake is shown by proofs that are full, clear, and decisive, free from doubt and uncertainty, and such as to entirely satisfy the conscience of the court.

5. SAME—LACHES.
Notes were indorsed and transferred in payment of an indebtedness, and at the same time an entry was made by the indorsers' book-keeper in their books to the effect that the indorsement was unconditional. Afterwards the indorsers went into voluntary liquidation, with complainants' testator as liquidating partner, and he had charge of the books until his death, four years after which, and nine years after the indorsement, complainants sought to reform the contract of indorsement by making it conditional. *Held*, that they were estopped on the ground of laches.

6. SAME—REFORMATION OF THE BOOK-ENTRY.
The entry in the indorsers' books, claimed by complainants to have been a written memorandum of a verbal agreement in regard to the indorsement, could not be reformed to show that the indorsement was conditional, where it was, without mistake, made to appear on the notes as unconditional; since the effect would be to put in writing a verbal understanding, to vary the written contract.

7. SAME—PAROL EVIDENCE TO VARY WRITTEN CONTRACT—RULE OF FEDERAL COURTS.
The federal court is not bound by the decisions of the state court of the state over which it has jurisdiction, allowing a parol agreement to limit the effect of a written contract, but will follow the contrary rule, as established in the federal courts.

8. INTEREST—RECOVERY OF USURIOUS INTEREST PAID.
Usurious interest alleged to have been received from a firm by one of the partners cannot be recovered from his representative by the representatives of the other partners, where it is neither alleged nor shown that the latter did not receive like interest.

9. SAME—LACHES.
A demand for such interest will be repelled on the ground of laches, where it is made 10 years after the affairs of the partnership have been amicably settled, and the accounts of the several partners, as between themselves, satisfactorily adjusted

10. INTEREST—STATEMENT OF ACCOUNT—CONVENTIONAL INTEREST.
Where a statement of account is furnished by the debtor, charging himself with interest at the conventional rate, he thereby contracts to pay that rate, and cannot, after paying the amount, recover the interest on the ground that it was greater than the legal rate.

11. SAME—USURY.
The statute of Mississippi, making the legal rate of interest 6 per cent., and providing that "contracts may be made in writing" for the payment of 10 per cent., only prevents the recovery of more than 6 per cent, unless the contract is in writing, and does not give the right to recover back more than 6 per cent. voluntarily paid under a verbal agreement.

12. PRACTICE IN FEDERAL COURTS—LACHES.
The federal courts sitting in equity will decline relief where complainant has been guilty of laches, though his claim may not be barred by the statute of limitations of the state.