

pany, fairly and honestly directed, to secure a substantial compliance with the law of Alabama." It follows that the transaction between the defendant railroad company and the Brownings by which the debenture bonds were acquired was entirely just and lawful, for the only semblance of a serious contention as to them rests on the complainants' mistaken view as to the subscriptions of stock and the issue of the first mortgage bonds.

It remains only to notice the contention of appellants that they and their fellow bondholders were induced to take the bonds held by them by false and fraudulent representations made by E. F. Browning, by which he, or Grovesteen & Pell, got said bonds listed on the New York Exchange, of which the defendants all had knowledge, or are chargeable with knowledge. The trial judge, after fully stating all the testimony on that subject, concludes that the evidence is not sufficient to show that the appellants, or any person similarly situated, bought said bonds held by them on any representations the Brownings had made either to procure the listing of the bonds or otherwise. In this finding of his we fully concur.

It is unnecessary to consider other features of the case, as what has already been concluded requires that the decree of the circuit court be, and it is, affirmed.

PARDEE, Circuit Judge, having sat in the circuit court rendering the decision appealed from, took no part in the hearing and decision of this appeal.

PUTNAM SAV. BANK v. BEAL.

(Circuit Court, D. Massachusetts. March 1, 1893.)

No. 2,994.

1. ASSIGNMENT—WHAT CONSTITUTES—BANKS—INSOLVENCY.

To constitute an equitable assignment of property, there must be an appropriation or separation, and the mere intent to appropriate is not sufficient.

2. SAME.

Plaintiff bought of a bank \$25,000 of five-year city of Duluth bonds, and paid the \$25,000. The bank, not having in its possession enough of the five-year bonds, proposed to set aside \$17,000 five-year bonds and \$8,000 one-year bonds, and to exchange the latter for five-year bonds as soon as received. A clerk was directed to make a package of such bonds, and mark it with plaintiff's name, and set it aside as his property, and the officers of the bank supposed this had been done. When defendant, as receiver, took possession of the bank, there were found two packages of bonds. The first package contained \$18,500 five-year bonds, with a slip of paper on which was written a memorandum, "Property of Putnam Ct. Sav. Bank; 6,500 more due them 5 year bonds." The second package contained bonds amounting to \$23,611.50, of which three, amounting to \$10,255.90, had one year to run; six, amounting to \$2,280.81, had five years to run; the remaining bonds running two, three, and four years. With this package was a slip of paper on which was written a memorandum of the date, amount of bonds, and the time when due, and also the words, "6,500 due Putnam." *Heid*, that these facts did not show an equitable assignment by the bank to the plaintiff of the remaining \$6,500 worth of bonds.

In Equity. Suit by the Putnam Savings Bank against Thomas P. Beal, receiver of the Maverick National Bank. On demurrer to petition. Sustained.

C. M. Reed, for complainant.

Hutchins & Wheeler and Frank D. Allen, U. S. Atty., for defendant.

COLT, Circuit Judge. The Maverick Bank agreed to sell to the plaintiff \$25,000 five-year city of Duluth bonds, for which the plaintiff remitted its check for \$25,000. Not being able at once to procure all the bonds, the bank proposed to set aside \$17,000 five-year bonds, and \$8,000 one-year bonds, and to exchange the one-year bonds for five-year bonds as soon as received. This proposition was accepted. Accordingly the clerk having charge of the bond department of the bank gave directions to another clerk, under him, to make a package of \$17,000 five-year bonds and \$8,000 one-year bonds, mark it with the plaintiff's name, and set it aside as the property of the plaintiff; and the officers of the bank and managing clerk supposed this had been done. When the defendant, as receiver, took possession of the Maverick Bank, November 2, 1891, there was found a package of \$18,500 five-year bonds, with a slip of paper on which was written:

Sept. 30, 1891.

Property of	Putnam Ct. Sav. Bank	25,000 Duluth 6s sold
Duluth 6 due Oct. 5, '96		
6,500 more due them 5 year bonds		
18,500.		

There were also found two other packages of these bonds. One of these packages contained bonds amounting to \$23,611.50, of which three, amounting to \$10,255.90, had one year to run; six, amounting to \$2,280.81, had five years to run; the remaining bonds running two, three, and four years. With this package was a slip of paper on which was written a memorandum of the date, amount of bonds, and the time when due, and also the words, "6,500 due Putnam." The other package contained ten \$1,000 bonds, having four years to run, and two \$500 bonds, having five years to run. Accompanying this package were two slips of paper, one marked with a memorandum of the amount and date of the bonds, while on the other was written the following: "Hold for the Travellers' Ins. Co. 25,000. 4 & 5 yr. bonds bot." The Travellers' Insurance Company never paid for, and makes no claim to, these bonds. The package of \$18,500 bonds has been delivered to the plaintiff by the receiver, and this suit is now brought to recover the remaining \$6,500 of the \$25,000 purchased. The case was heard on demurrer to the bill.

A receiver takes the property subject to all the equities which exist against the bank. *Winsor v. McLellan*, 2 Story, 492; *Dugan v. Nichols*, 125 Mass. 43; *Beach*, Rec. § 474. The question in the present case is whether the facts show an equitable assignment by the Maverick Bank, in favor of the plaintiff, of \$6,500 Duluth city bonds.

To constitute an equitable assignment of property, there must be an appropriation or separation, and the mere intent to appropriate is

not sufficient. *Christmas v. Russell*, 14 Wall. 69, 84; *Scudder v. Worcester*, 11 Cush. 573; *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Ex parte Hardcastle*, 44 Law T. (N. S.) 523; *Warriner v. Rogers*, L. R. 16 Eq. 340; *Miller v. Congdon*, 14 Gray, 114; *Aldridge v. Johnson*, 7 El. & Bl. 885; *Dickenson v. Phillips*, 1 Barb. 454; *Benj. Sales*, (4th Amer. Ed.) §§ 352-354. In this case the bank in fact appropriated \$18,500 of these bonds when it placed them in a separate package, and marked it as the property of the plaintiff. But the bank stopped there, and the reason is obvious, since it had no other five-year bonds which would make up the balance due. To be sure, it agreed to substitute one-year bonds to cover this deficiency, and directed that this should be done; but it is plain that this could not be done from the one-year bonds then on hand, which are set out in the bill, because the \$7,000 bond was too large, and all the smaller bonds, put together, would not equal the amount required. The indorsement, "6,500 due Putnam," on the package of miscellaneous bonds, was not a separation or appropriation of bonds to that amount in favor of the plaintiff. It was manifestly not so intended. There was no bond or combination of bonds inside the package which would make up that amount. This writing was a mere memorandum that such an amount of bonds was due the plaintiff. This interpretation of the words is the natural one, and is in accord with the condition of things as they existed at the time. It is made clear by the indorsement on the \$18,500 package, which says, "Property of Putnam Sav. Bank." The memorandum as to the \$6,500 of bonds was no more an appropriation than an entry to that effect on the books of the bank, or a slip of paper found in the paying teller's drawer, which should have upon it a writing that a certain sum of money was due a depositor. It showed no intent to pass title to any specific amount of bonds, but was merely a writing declaring what was due.

The plaintiff relies on the language of Lord Cranworth in *Hoare v. Dresser*, 7 H. L. Cas. 290, 317, and on *Rayner v. Harford*, 27 Law J. Ch. 708. The doctrine laid down in these cases seems to be that where there is an agreement to appropriate a part of a larger cargo, as, for example, an order to sell part of a cargo of wheat to arrive, equity will interfere, and give a lien to the person so entitled. In such a case there must be an agreement to appropriate the whole or a part of a specific thing, and it is not sufficient that the vendor may have property available for the specific performance of his contract. The difficulty in the present case is that, while the *Maverick Bank* agreed to do a certain thing, it was not, so far as appears, in a condition to execute its agreement, and never, in fact, did so. Nor can equitable relief be invoked on the ground of accident or mistake for the reason that this case does not come within that class of cases. Here there was no accident or mistake in the performance of what the parties intended, but an entire failure of performance.

Demurrer sustained.

MUTUAL BEN. LIFE INS. CO. v. ROBISON.

(Circuit Court, N. D. Iowa, E. D. March 21, 1893.)

1. LIFE INSURANCE—POLICY—FOREIGN COMPANIES—WHAT LAW GOVERNS—APPLICATION.

Where an application for insurance is made in one state, by a resident and citizen thereof, through agents located therein, to an insurance company of another state, the policy, though actually issued in such other state, to take effect by its terms upon payment of first premium, and the policy is delivered and premium paid in the state where the application is made, the law of that state governs the interpretation and force of the contract.

2. SAME.

An insurance company undertaking to do business in a state other than that of its home and policy issuing office is subject, with reference to such business, to the terms and conditions by the laws of such state imposed on such business.

3. SAME.

An insurance company doing business in a state other than that of its home office will not be permitted to withdraw the business done in such state from the obligatory force of the statutes of that state, by the insertion, in its forms of application or policy, of a clause expressly providing that the law of the state of its home office shall govern its contracts of insurance.

4. SAME—CANCELLATION OF POLICY—ESTOPPEL.

Where an insurance company has accepted the premiums, and the insured has relied on the indemnity contract provided in the policy, the insurance company is as much estopped to cancel the policy after the insured has become in such a physical condition that he cannot obtain desirable insurance upon his life in any reputable company as it would be estopped to avoid the policy after the insured's death.

In Equity. Suit by the Mutual Benefit Life Insurance Company against Charles W. Robison to cancel insurance policies. Bill dismissed.

Henderson, Hurd, Daniels & Kiesel, for plaintiff.

Utt Bros. & Michel, for defendant.

WOOLSON, District Judge. The plaintiff, a corporation organized under the laws of the state of New Jersey, and being a purely mutual insurance society or corporation, has brought this action, in equity, to cancel four policies of insurance, of \$5,000 each, which were by plaintiff issued to, and which are held by, defendant, who is a resident and citizen of the state of Iowa. The evidence shows that on March 17, 1890, the defendant signed a written application to the plaintiff company for \$20,000 life insurance upon his own life, and that, as requested by him, the plaintiff company duly issued to him, and on his own life, four policies of life insurance in the plaintiff company, each policy being dated March 24, 1890, and the same being numbered, respectively, Nos. 157,618, 157,619, 157,620, and 157,621, of said plaintiff company; that, at the date of said application, defendant was, and for over 30 years theretofore had been, a resident of the city of Dubuque, Iowa; that, at said date, one T. F. McAvoy was the general agent for the state of Iowa of the plaintiff company, and Charles J. Brayton was the agent at Dubuque of said