

fendant asserts a right to create a lien, and has done all that is necessary to enable him, or his successor in office, to do so under color of the right asserted. This is sufficient ground for apprehending that the power (which unquestionably exists) to cloud the plaintiffs' title will be exercised; and the "naked and unsupported" promise of the defendant that he will refrain from exercising that power does not defeat the right of the plaintiffs to have its exercise prohibited. *Celluloid Manuf'g Co. v. Arlington Manuf'g Co.*, 34 Fed. Rep. 324. The first step towards the creation of a lien having been taken, the jurisdiction in equity then attached, and cannot now be divested by the averment of the defendant that he does not intend to proceed further in that direction; and if it be assumed that equity would interpose primarily only to prevent the perfection of the apprehended lien, yet, having acquired jurisdiction for that purpose, the court should not hesitate to strike at the root of the wrong by annulling the unlawful preliminary procedure by which the completed injury has been rendered possible. Therefore, and irrespective of the other grounds which have been urged with much force, I am of opinion that this suit is within the equitable jurisdiction of this court.

The complainants are entitled to relief in accordance with the stipulation filed, for which a decree may be prepared and, if requisite, be submitted for settlement.

FARMERS' & MERCHANTS' BANK OF CLAY CENTER v. FARWELL
et al.

(Circuit Court of Appeals, Eighth Circuit. November 13, 1893.)

No. 312.

1. ASSIGNMENT—RIGHT OF ASSIGNEE.

One who, being indebted to a bank, and also to a firm, had assigned to the latter his interest in certain fire insurance policies, prosecuted actions thereon in his own name, testifying that he was solely interested therein. Previously, he had refused to assign the policies to the bank, but informed its officers that when he collected the money he would deposit it, and the bank could pay itself; and the bank, having no knowledge of the assignment, and relying on these statements, granted him further credit, and made him other loans. Subsequently, after a settlement of certain of the actions, the attorney for the assignor, without his knowledge, or that of the assignees, deposited the proceeds in the bank. *Held* that, by the assignment, the entire beneficial interest in the policies vested in the assignees, and entitled them, as against the bank, to the proceeds of the settlement.

2. SAME—FAILURE TO GIVE NOTICE OF ASSIGNMENT—ESTOPPEL.

The assignees were not estopped to claim the money because of their failure to give notice of the assignment, nor for allowing the prosecution of the actions in the assignor's name, as they had no knowledge of the assignor's indebtedness to the bank, or that the latter intended to extend his credit.

Appeal from the Circuit Court of the United States for the District of Kansas.

In Equity. Suit by John V. Farwell, Charles B. Farwell, John K. Harmon, John T. Chumasero, and John V. Farwell, Jr., doing busi-

ness under the firm name of John V. Farwell & Co., against the Farmers' & Merchants' Bank of Clay Center, Kan., to recover proceeds of insurance policies, as assignees thereof. Decree for complainants. Respondent appeals. Affirmed.

Statement by SANBORN, Circuit Judge:

H. L. Frishman, a merchant in Clay Center, in the state of Kansas, sustained a loss by fire March 3, 1888. He held nine policies of insurance against this loss, issued by nine insurance companies. In the summer of 1888 he commenced actions against these companies upon these policies, and they remained pending until 1891. At the time of the fire he owed the appellant, the Farmers' & Merchants' Bank of Clay Center, Kan., \$3,000, but before November 23, 1888, he had reduced this indebtedness to \$2,200. At the time of the fire he owed the appellees, John V. Farwell & Co., \$4,000, and on November 23, 1888, he owed them \$11,000. On that day he made a written assignment of his interest in the insurance policies, and in the moneys to be derived from them, to the appellees, to secure his indebtedness to them. This assignment was not filed in any court, but was delivered to one of the attorneys of Farwell & Co. Subsequent to this assignment, Frishman testified, in the trial of the actions against the insurance companies, which were prosecuted in his name, that he was the owner of the policies, and that no one else was interested in them, and this fact was known to the officers of the bank. Frishman informed some of these officers after the assignment that he could pay his debt to the bank when he collected the money on these insurance policies, that this money would be deposited with their bank, and that they could then pay the bank out of it. In reliance upon these statements, they permitted Frishman to renew his notes to the bank repeatedly; allowed him on one occasion to take up an indorsed note with his own note, without indorsement, and loaned him some more money; so that he owed the bank \$3,500 on March 19, 1891, all of which was past due. The bank officers knew that Frishman was indebted to Farwell & Co., but did not know that he had assigned the policies to them. They had demanded an assignment of the policies to the bank, but he had refused to make it. Farwell & Co. did not know that Frishman was indebted to the bank, nor that he had testified that he alone was interested in the policies, nor that he had made the representations recited to the bank. The attorneys who prosecuted the actions against the insurance companies were employed by Frishman, and were not advised of the assignment to the appellees. One of these attorneys, on March 19, 1891, settled certain of these actions, and collected \$3,480.19, which, without the authority or knowledge of Frishman, he deposited to the credit of Frishman in this bank. On the same day the bank charged the indebtedness of Frishman to it against this credit. Frishman and Farwell & Co. immediately notified the bank that the money so deposited was the property of the latter, under the assignment, and Farwell & Co. brought this suit in the court below, and obtained a decree for its recovery. This decree is challenged by this appeal.

F. B. Dawes, (Dawes & Durrin, on the brief,) for appellant.

Charles Blood Smith, (W. H. Rossington and Clifford Histed, on the brief,) for appellees.

Before CALDWELL and SANBORN, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

A bank has a lien on the moneys or funds of a depositor to secure his overdue indebtedness to it, and may at once apply these funds to the payment of such a debt. The foundation of this lien is the mutual relation of the parties. The depositor owes the bank for money he may have borrowed, and his debt is due. The bank owes the depositor for moneys he has deposited, and that debt is due. If

the depositor brings an action for the amount of his deposit, the bank can, of course, set off the past-due debt he owes it, and the balance only can be recovered. The lien of the bank upon moneys deposited with it—the right of the bank to charge the overdue debt of its depositor against his deposit—is based upon this right of set-off, and is coextensive with it. It is essential to its existence that each of the parties should be a debtor to the other, and that each of the debts should be due. Not only this, but, as against third parties, the indebtedness of the bank that becomes subject to this right of lien must have arisen from the deposit of moneys or funds that belonged to the depositor himself. He cannot, by depositing moneys of others intrusted to his care, pay his own debt to the bank, or enable the bank to do so. In the absence of fraud or gross negligence on the part of third parties, the bank has no higher right or better title to their moneys intrusted to its depositor than the depositor has himself. It is met here by the rule that equity will follow moneys held in a fiduciary capacity as far as they can be identified, and restore them to the beneficial owner of them. If they are deposited in the bank by a trustee, agent, factor, or bailee, even if they are mingled with his own money, they do not become his property, and the bank stands in the shoes of its depositors. It must pay the money to the true owner. *Pennell v. Deffell*, 4 De Gex, M. & G. 372, 383; *Knatchbull v. Hallett*, (In re Hallett's Estate,) 13 Ch. Div. 696, 710, 719; *Central Nat. Bank of Baltimore v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 67, 68; *Bank v. King*, 57 Pa. St. 202, 209; *Van Alen v. Bank*, 52 N. Y. 1; *Manningford v. Toleman*, 1 Colly. 670; *Murray v. Pinkett*, 12 Clark & F. 764, 785; *Jordan v. Bank*, 74 N. Y. 467, 472; *Falkland v. Bank*, 84 N. Y. 145, 149, 150. In *Pennell v. Deffell*, supra, Lord Justice Knight Bruce said:

"When a trustee pays trust money into a bank, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust, as much and as effectually as the money so paid would have done, had it specifically been placed in a particular depository, and so remained."

In *Murray v. Pinkett*, supra, the trustee of certain bank shares, which stood in his own name on the books of the bank, borrowed £4,000 of the latter upon his agreement to pledge the shares as security for the loan. In summing up the case the lord chancellor said:

"Then here are two equities; that is to say, here is a trustee of the property, which he held for the benefit of the cestuis que trustent, endeavoring to create an equity upon that property to secure his own debt. Which of these two equities is to prevail? Undoubtedly, the former."

In *Bank v. King*, supra, a collector of rents deposited moneys of his principal in a bank in his own name. It was attached by a creditor of a depositor, and the principal immediately gave notice of his ownership. It was held that the attaching creditor stood in the shoes of the depositor, and could recover only what the depositor could.

The case before us is stronger than any we have cited, because these moneys were never deposited with the bank by the trustee, or with his consent. They were deposited by a mistake of his attorney, and without his knowledge or authority. The entire beneficial interest in the insurance policies, and in the moneys collected from them, as against Frishman, vested in Farwell & Co. by his assignment to them in 1888. They were intrusted to him to collect for their benefit. If, after he had collected their proceeds, he had deposited this money with the bank, with the intent to thus apply it to the payment of his own debt to the latter, he would have been guilty of a gross breach of trust, if not of a more serious offense. By mistake, and without his knowledge, these moneys of Farwell & Co. were deposited with this bank. It is the province of a court of equity to enforce trusts and to correct mistakes. The decree below corrected the mistake of the attorney who deposited this money, and enforced the trust under which it was collected. It directed that the money should be paid to the beneficial owners. To reverse it would be to enforce a mistake, and to compel the breach of a trust.

But it is said that Farwell & Co. are estopped to claim this money because they concealed the assignment, and permitted Frishman to appear as the owner of the policies, and he, by his testimony that he alone was interested in them, in the trial of the actions against the insurance companies, and by his representations to the bank, induced it to extend the time of payment of his debt, to surrender the security of an indorser, and to increase its loan. This position is untenable: First. It is the province of a court of equity to correct mistakes. Equity considers that as done which ought to have been done. The money in dispute must be treated as though the attorney of Frishman had never made the mistake of depositing it in the bank, but had paid it to Frishman, as it was his duty to do. Farwell & Co. would then have had the promise of Frishman to pay this money to them, supported by the legal title evidenced by their assignment and the possession in their trustee, while the bank would have had the bare promise of Frishman to violate his trust and pay the money to it. Where equities are equal the legal title prevails, and the bank could never have maintained any claim to this fund. Second. An essential element of such an equitable estoppel as will defeat a legal title is a willful intent to deceive, or such gross negligence of the rights of others as is tantamount thereto. There must be either some moral turpitude or some breach of duty. We find no evidence of anything of this kind in this record. There is some evidence that Farwell & Co. and Frishman agreed that they would not give notice of the assignment while the suits were pending because they thought they could be more successfully prosecuted by Frishman than by Farwell & Co. To prosecute them in the assignor's name was a right expressly given to them by the statutes of Kansas, which provide that in case of any such transfer of interest the action may be continued in the name of the original parties, or the court may allow the person to whom the transfer is made to be substituted in the action. 2 Gen. St. Kan. 1889, par. 4117. At common law a

chose in action not founded on a negotiable instrument is not assignable, so as to give the assignee a right to sue in his own name. The action must be brought in the name of the original owner. There was nothing in this agreement, or in the prosecution of these actions in Frishman's name, evidencing any intent on the part of Farwell & Co. to deceive the bank, or to give a delusive credit to Frishman. They did not know that he was indebted to the bank, or that the bank intended to give him credit.

The case of *Burnett v. Gustafson*, 54 Iowa, 86, 6 N. W. 132, is cited by counsel for appellant in support of his contention. In that case the owner of certain cattle in Iowa gave a chattel mortgage upon them, and it was duly recorded in the proper office. The mortgagee permitted him to remove the cattle from Iowa to Chicago, and to sell them there in his own name. He received the proceeds. He deposited them in a bank in Chicago to the credit of his own bank in Iowa. The bank in Iowa passed these proceeds to his individual credit, where they remained for several weeks, until one of his notes to the bank, for \$1,000, fell due. He then drew a check on the bank for the amount of his note, payable to the latter out of this deposit, and the bank paid it, and surrendered the note. Subsequently, the mortgagee of the cattle claimed to recover the amount of this check from the bank. It is evident that there is a clear distinction between this case and the one at bar. In the former the mortgage, by its terms, covered the cattle only, and gave no authority to the mortgagor to sell them, or to receive or dispose of the proceeds for the benefit of the mortgagee. In the latter the assignment expressly covers the policies, and the moneys to be collected on them, and Frishman was expressly authorized to receive the money, and pay it over to the assignees. In the former case the moneys were deposited by the mortgagor himself, and they were applied by his own act to the payment of his debt to the bank. In the latter they were deposited by mistake by another, and they were seized by the bank without the consent of Frishman. It might well be held in the Iowa case that the bank was authorized to presume that the mortgage lien had been discharged, or that, if it had not, the mortgagee would follow the cattle, and not their proceeds. But there is no warrant for any such holding on the facts of this case. Undoubtedly, if the insurance companies paid Frishman in reliance on his apparent title, Farwell & Co. would be estopped to demand a second payment to themselves. This is because they knew that the natural and probable consequence of their silence would be such a payment to Frishman, and hence it became their duty to give notice to the companies of their assignment, if they intended to demand payment to themselves. Again, if, while he held possession of the policies, and was prosecuting the actions upon them in his own name, Frishman had assigned his claim against the companies to the bank or to a third person for value, and without notice of the prior assignment, and the subsequent assignee had first given notice to the insurance companies of his assignment, Farwell & Co. would have been estopped to claim the proceeds of the policies

as against such an assignee. To this effect are *Dearle v. Hall*, 3 Russ. 1; *Spain v. Hamilton*, 1 Wall. 604; and *Judson v. Corcoran*, 17 How. 614. And they rest upon the rule that where one of two innocent parties, holding titles of equal apparent validity, must suffer through the fault of a third, that one must bear the loss who has put it in the power of the third to commit the fraud. In *Williams v. Thorp*, 2 Sim. 570, and in *Ex Parte Colvill*, 1 Mont. Bankr. Cas. 110, it was held that the assignee of an insurance policy, who had given no notice to the company of his assignment, could not recover a fund which had been collected by the assignee in bankruptcy of the original assignor under a subsequent assignment. But these cases are far from holding that, if the original assignor had collected the money on the insurance policies, the courts would compel him to violate his trust, and turn it over to his general creditors. If *Farwell & Co.* had been informed that the bank was about to give credit on the faith of *Frishman's* apparent title, and had then represented it to be good, or if the assignment they received had been subject to such registry statutes as commonly govern deeds and chattel mortgages, and they had kept it from the registry with the intent to give the assignor a delusive credit, an estoppel might have arisen, because in each of these cases they would have failed to perform a plain duty. To this effect are *Hilliard v. Cagle*, 46 Miss. 309; *Hafner v. Irwin*, 1 Ired. 490; *Hildeburn v. Brown*, 17 B. Mon. 779; and *Anderson v. Armstead*, 69 Ill. 452.

These cases to which we have referred in the discussion of this question of estoppel are cited by counsel for the appellant in support of their contention. In each of them there was some evidence of moral turpitude, or of such negligence of the rights of others as was tantamount to a breach of duty, but in the case at bar there is nothing of this character. *Farwell & Co.* trusted *Frishman*, as they had a right to do, to prosecute these suits and collect this money for them. They trusted him to do it in his own name, and the sequel has proved that their faith was well founded. He did not assign the policies to another, but he refused to do so. He did not appropriate the money he collected to his own use, or to the use of other creditors; but when the bank undertook to do so, by taking advantage of a mistake committed by another, he immediately notified its officers that the money belonged to *Farwell & Co.* *Farwell & Co.* never knew that *Frishman* owed the bank, or that it was extending credit to him on the faith of his ownership of these policies, while the officers of the bank did know of *Frishman's* indebtedness to *Farwell & Co.* To create an estoppel, there must be knowledge, actual or constructive, by the party making the representation or the concealment, that the other party intends, or is likely, to act upon it. *Andrews v. Lyons*, 11 Allen, 349. No statute has been called to our attention which authorized or required the registration of this assignment in order to give it validity against creditors of the assignor, and we know of no rule of law which required these assignees to give unknown creditors of their assignor notice of their assignment in order to

protect themselves against the claims of the latter; nor do we know of any method by which they could have effectually given such a notice. Mr. Justice Field, in delivering the opinion of the supreme court in *Henshaw v. Bissell*, 18 Wall. 255, 271, declared "that there must be some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to a constructive fraud," to warrant the application of the doctrine of equitable estoppel. As there was no knowledge on the part of Farwell & Co., and no reasonable ground to anticipate that the bank intended to act, or was acting, on the faith of Frishman's apparent title to the policies, there could have been no intent on their part to induce it to so act. It was no breach of duty on their part to fail to notify the bank of the assignment, because they did not know, and could not anticipate, that it would act upon Frishman's apparent title, and negligence that does not amount to a breach of duty does not constitute constructive fraud, and is not sufficient to raise an estoppel. *Henshaw v. Bissell*, supra; *Brant v. Iron Co.*, 93 U. S. 326, 336; *Copeland v. Copeland*, 28 Me. 525, 540; *Hill v. Epley*, 31 Pa. St. 331, 334; *Com. v. Moltz*, 10 Pa. St. 527, 531; *Zuchtmann v. Roberts*, 109 Mass. 53; *Boggs v. Mining Co.*, 14 Cal. 279, 368; *Davis v. Davis*, 26 Cal. 23. The decree below is affirmed, with costs.

FARMERS' LOAN & TRUST CO. v. OREGON & W. T. R. CO., (CONGDON,
Intervener.)

(Circuit Court, D. Oregon. November 3, 1893.)

No. 1,896.

1. SALE—RAILROAD BONDS—COUPONS.

A contract for the sale of railroad bonds held to include overdue coupons, where it appeared that the contract contemplated a purchase of the railroad free from all indebtedness, and that the purchase of the bonds was merely a means to that end.

2. SAME—BONA FIDE PURCHASER.

One who took an assignment of such coupons, with knowledge of the contract, held not to be a bona fide purchaser.

In Equity. Bill by the Farmers' Loan & Trust Company against the Oregon & Washington Territory Railroad Company to foreclose a mortgage. Chester A. Congdon intervenes. Petition denied.

C. E. S. Wood, for petitioner.

Lewis L. McArthur and Richard C. Dale, for C. B. Wright.

BELLINGER, District Judge. Chester A. Congdon files his petition of intervention in this suit, claiming to be the holder and owner, for value, of 5,866 coupons of the consolidated first mortgage bonds of the defendant company, of the par value of \$30 each. These coupons matured on July 1, 1890, and January 1, 1891. There was a decree of foreclosure heretofore made in this suit, of the mortgage in question, but such decree did not provide for the payment of any coupons maturing prior to January 1, 1891, or in any way refer

to such coupons. The petitioner prays that, as the owner of these coupons, he be allowed to participate in the proceeds of the sale had under the decree of foreclosure, and that the decree be modified accordingly. The answer to this petition denies that the petitioner is a bona fide holder of the coupons in question, and alleges that on the 27th day of February, 1891, G. W. Hunt was the owner of the bonds to which these coupons were attached, and then sold such bonds to C. B. Wright for a valuable consideration paid by Wright; that the petitioner knew of such sale, and, having such knowledge, accepted such coupons from Hunt without consideration, knowing that Hunt had wrongfully detached them from the bonds after the sale to Wright, and in fraud of the latter's rights; that Wright is the owner of the coupons mentioned in the petition. The ownership of these coupons is the question to be decided.

On the 27th day of February, 1891, G. W. Hunt was the president, manager, and in fact owner, of the Oregon & Washington Territory Railroad, and of all its bonds, except 1,142 of a first issue on what is known as the Pendleton Division, already sold, and then owned by C. B. Wright. On that day he entered into the following agreement with Wright:

"Philadelphia, Pa., Feb. 27, 1891.

"It is hereby agreed between C. B. Wright, of Philadelphia, Pa., and G. W. Hunt, of Walla Walla, Wash., as follows: The said Hunt agrees to deliver, and the said Wright to take, all of the issue of bonds of the Oregon & Washington Territory R. R. Co., (except 1,142 bonds of the first issue on the Pendleton Division, already sold,) at 90 per cent. of their par value, at \$20,000 per mile, or at a purchase price of \$18,000 per mile. There are said to be 111 miles of said road, but the exact mileage shall be determined by actual measurement, by two competent parties, one to be selected by each of the parties to this contract. If said road is not in a fair and reasonable good condition, according to the standard of western railroads, the said Hunt agrees to put it in such a condition, to the reasonable satisfaction of the president and chief engineer of the Northern Pacific, at his own expense. This provision applies only to roadbed, not to stations or other improvements. The said Hunt further agrees to deliver to said Wright, without additional compensation, 51 per cent. of the capital stock of said corporation.

"It is further agreed that said Hunt shall be paid for all the rolling stock of said corporation or of said Hunt, and used by said corporation, an additional sum, to be determined by T. F. Oakes, president of the N. P. R. R., and G. W. Hunt. Also, that the said Hunt shall be allowed to build and complete, ready for the rolling stock, about 42 miles of extension of said road, as follows:

"About 18 miles to the Snake river.
 " 12 " to the near Conalle.
 " 12 " to the near Milton.

--All in Washington and Oregon, whenever the same shall be built, and at such price as may be agreed on with the said T. F. Oakes.

"The terms of payment to be as follows, \$75,000 cash, which immediate payment shall be further secured by said Hunt pledging with said Wright, as collateral security, until the second payment is made, all the capital stock of said corporation remaining and belonging to said Hunt, over and above the 51 per cent. aforesaid.

"\$800,000 to be paid on Friday, April 17th, 1891.

"\$300,000 " " " " July 1st, 1891.

"\$400,000 " " " " September 1st, 1891.

--And the balance on December 1st, 1891. Deferred payments to draw interest at 6 per cent.

"It is further agreed that said road shall be delivered clear and free of floating (or unsecured) indebtedness, and that the said Hunt, as president of said corporation, shall lend his best efforts and his time to the reorganization of said corporation, as the said Wright or his successors shall direct.

"In the presence of

"C. E. S. Wood.

"C. B. Wright, Jr.

C. B. Wright. [Seal.]

G. W. Hunt. [Seal.]

C. B. Wright."

While this agreement does not, in exact terms, state that the sale includes all the coupons of all the bonds not already owned by Wright, such is its effect. The provisions that Hunt is to deliver, and Wright take, "all of the issue of bonds," except 1,142 already owned by Wright; that the road shall be delivered clear and free of floating or unsecured indebtedness; that the bonds are to be taken at 90 per cent. of their par value, at \$20,000 per mile, "or at a purchase price" of the road "of \$18,000 per mile," and the further provision for the purchase of all the rolling stock of the road and of Hunt, and of 42 additional miles of road to be built by Hunt, at prices to be determined by T. F. Oakes, president of the Northern Pacific Railroad Company,—show that this was intended to be a purchase of the road free from all indebtedness, and that the purchase of the bonds of the road was merely a means to that end.

The remaining question, then, is, did Congdon, the petitioner, purchase these coupons, as claimed by him, under circumstances that entitle him to the protection of a bona fide purchaser?

At the time the agreement between Hunt and Wright was made, the bonds in question were deposited as collateral security for Hunt's debts with the Park National Bank and J. Kennedy, Tod & Co., both of New York. Of the overdue coupons now in controversy, 2,388 were at the former bank, and 3,478 at the bank of J. Kennedy, Tod & Co. The collaterals held by the Park National Bank were, in greater part, to secure Ladd & Tilton. All of them were so held in the first instance, but subsequently, at different times, at Hunt's request, portions of them were agreed to be held to secure certain other creditors, whose debts were pressing. These bonds and coupons are still in the Park National Bank. The 3,478 coupons at the bank of J. Kennedy, Tod & Co. were delivered to C. E. S. Wood, upon his order, but on account, presumably, of Mr. Congdon, whose attorney Mr. Wood now is. These latter coupons were offered in evidence on this hearing in behalf of Mr. Congdon. The coupons in question were overdue at the time of the agreement between Hunt and Wright. It is claimed for Congdon that they had been detached from the bonds prior to that time, and that he purchased them in good faith, without notice of Wright's claim, and in pursuance of an agreement with Hunt theretofore had, prior to the latter's agreement with Wright. In his testimony, Hunt does not state when the coupons were cut off, further than that it was done by his order at different times, by the parties who held the bonds; that he had ordered them cut off whenever they were due. The witness King, loan clerk of the Park National Bank, testifies that he does not know how or when the coupons belonging to the bonds in that bank were

cut from the bonds; that it might have been done while he was away from the bank for a day, sick, and he would know nothing of it; and that he does not know who would have knowledge of it, unless it is Baldwin, assistant cashier of the bank. Baldwin testifies that he knows nothing on the subject, and does not know who would know, unless it is King. William S. Tod, of the banking firm of J. Kennedy, Tod & Co., testifies with particularity to the receipt of bonds at different times from Hunt, and to their delivery, giving dates and amounts, but knows nothing as to the cutting off of coupons. A letter is in evidence from Ladd & Tilton to the Park National Bank, dated April 28, 1891, in which the writer says that "early in 1891 Mr. Wilcox cut off some O. & W. T. consolidated coupons, and left them with you," and they request the bank to forward these coupons by registered mail. Mr. Wilcox was the agent of Ladd & Tilton. He was a witness for the petitioner, but was not examined as to the cutting off of these coupons. On the 21st of May, 1892, Mr. W. S. Ladd, of Ladd & Tilton, answering a letter from Wright, says, "I understood from Mr. Hunt that, when the bonds were delivered to you, it would be with the coupons cut off up to that date, and so the coupons were cut off." From this it seems that the coupons attached to bonds in the Park National Bank were not detached at the time of the sale of these bonds to Wright, February 27, 1891, but that thereafter Hunt represented to Ladd & Tilton that the bonds sold to Wright were to be delivered with the coupons cut off up to that date, and that thereupon the coupons were cut off. What is true of these coupons is, no doubt, also true of those in the custody of J. Kennedy, Tod & Co. The matter of the cutting off of these coupons is not decisive of the rights of the parties. It is important as tending to show good faith, or want of good faith, on the part of Hunt in the transaction; as tending to show that the coupons were not cut off as fast as they matured, in obedience to a direction from Hunt to that effect, as he tries to have it appear, but that they were cut off after the sale to Wright, and in order that the bonds sold might be delivered to Wright without the attached coupons.

Hunt testifies that he had been "carrying" these coupons, and that he means by this that he was paying the interest on the bonds out of his own pocket, and that Wright knew this. He further explains this statement by saying, "The bonds belonged to me, and I borrowed moneys, and put up the bonds as collateral security to the parties I owed." But this would not alter his relations to the coupons. It has no bearing upon the question of sale to Wright, which, so far as such "carrying" of the bonds is concerned, may as well have been of coupons as of bonds.

Hunt's assignment of coupons to Congdon is dated April 2, 1891, —more than a month later than the agreement between Hunt and Wright. The consideration stated is \$120,000. This \$120,000 was a pre-existing debt due Congdon from Hunt. Notwithstanding the claim made that Congdon took these coupons on this debt in

good faith, he presented an order from Hunt to Wright for this \$120,000, which he sought to have paid out of the moneys which Wright had agreed to pay Hunt for these bonds, and he claimed, and wrote to Wright at length to convince him, that this order operated as an assignment of so much of the moneys due from Wright under the latter's contract with Hunt. In other words, Congdon now claims ownership of these coupons as a purchaser of them in good faith on his debt, after having tried to avail himself of Wright's contract of purchase to get such debt paid out of the price agreed to be paid for these coupons, and the bonds to which they were attached. Wright refused to accept the order for the reason that he was compelled to pay the amount of his obligation to the creditors of Hunt who held the bonds of the company. The assignment of coupons to Congdon is dated April 2, 1891. On the 16th of the same month, Wright wrote to Congdon, saying that he had not had an opportunity, until that date, to look over the document handed him (Wright) by Congdon, in New York, "some days ago." The document referred to was a copy of Hunt's order to Wright to pay Hunt's debt to Congdon out of the payments due Hunt under the February contract. Wright explains his position in his letter,—that he must "corral" the bonds of the Oregon & Washington Territory, as these "govern the road," and he does not know, and cannot know, what amount will be due Hunt, until these bonds are corraled,—until he knows what amount "has to be advanced to cover the amount of bonds on the road." This letter to Congdon also says, "I understand you have seen a copy of the contract,"—the contract between Wright and Hunt. Congdon answered this letter on May 2d, stating that, at the time he took the order from Hunt, he had seen a copy of the contract referred to. He insisted in this letter that Hunt's order entitled him to receive \$120,000 from Wright out of the price Wright was to pay Hunt under their agreement. He did not, in this letter, make any reference to coupons, although the letter to which this was an answer had explained Wright's refusal to accept Hunt's order by stating that he (Wright) was under the necessity of "corralling" the indebtedness which "governed the road." If Congdon had, or supposed he had, these coupons, at that time, as security for the debt for which the order was given, he would have mentioned the fact. These coupons comprised a part of the debt for which the road was held, and would therefore be what Wright was trying to "corral." With these coupons, Congdon would be among the favored class of Hunt's creditors. When Wright said to Congdon, "I cannot pay your order, because I must pay those whose debts are liens upon the road," it is incredible that Congdon would, if he had at the time a contract for these coupons, write at length in reply, and endeavor to convince Wright that he should pay the order, and yet omit to inform him that he held these coupons, which made his debt a lien on the road. Congdon has not testified in the case, but his correspondence in evidence leaves nothing to be said upon the question of his good faith

in the matter of the claim made in his petition. The assignment of April 2, 1891, or any previous promise of Hunt made in consideration of Congdon's antecedent debt, does not give the latter the better right, as against Wright, who gave his acceptances for large sums of money, which he subsequently paid, without notice of the claim now made, in discharge of the debts for which the bonds and coupons in question were pledged.

I conclude that, by the agreement between Hunt and Wright, the latter became the owner of the coupons in controversy; that such was the intention of the parties, and is the effect of their agreement; that the detaching of these coupons was an afterthought on the part of Hunt and the petitioner; that the latter took his assignment subsequent to the agreement between Hunt and Wright, and probably subsequent to the refusal of the latter to accept Hunt's order, although it antedates such refusal; and that he took such assignment with notice of Wright's purchase. The prayer of the petitioner is denied.

REPUBLICAN MOUNTAIN SILVER MINES, Limited, et al. v. BROWN et al.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1893.)

No. 290.

1. FOREIGN CORPORATIONS—DISSOLUTION—EQUITABLE JURISDICTION.

The circuit court has no inherent power, as a court of equity, at the suit of domestic shareholders, to dissolve an English mining company, owning and operating a mine in the United States, and to wind up its business operations; nor has it any such power under the act of parliament known as the "Companies Act 1862."

2. SAME—INVALID RESOLUTION—RECEIVERS.

The fact that a resolution to wind up a foreign company was confirmed at a meeting of shareholders held on insufficient notice, is no ground for the appointment of a receiver by the circuit court. Adequate relief may be afforded, where the defendants submit themselves to the jurisdiction of the court, by a decree declaring the resolution invalid, and enjoining the defendants from carrying it into effect.

3. SAME—CONFLICT BETWEEN ACT AND ARTICLES OF ASSOCIATION.

Where the articles of association of an English company are in conflict with the act of parliament under which the company was organized, the act of parliament must prevail.

4. SAME.

A provision in articles of association of an English company that the company may amalgamate its business with, or transfer its business or property to, any similar undertaking or company, does not relate to the same kind of proceeding as that provided in section 51 of the "Companies Act 1862," for the voluntary winding up of a company, and consequently is not in conflict with that act, although they differ as to the time prescribed by each for the confirmatory meeting of shareholders required. 55 Fed. 7, reversed.

5. SAME—EQUITABLE JURISDICTION.

A circuit court, as a court of equity, should not interfere, at the suit of shareholders in the United States of an English mining company operating a mine in the United States, to restrain proceedings by English shareholders to wind up the company, merely on account of the motives