

rule as to disqualification by reason of professional relations should be most scrupulously and carefully limited and defined before it is announced by a court of equity. But in this case we are spared all such discussion. It is not a question of professional relations, but of the obligations of a trustee of an express trust. Under the declaration, Campbell held, *inter alia*, the Smith-Chase contract for others as well as himself. In point of time it was prior to all the others, but by its terms was to be postponed to such subsequent ones as represented proper disbursements of De Chambrun, and were so phrased as to be valid obligations against the fund. At least one claim, apparently for counsel fees, was rejected by the referee because the phraseology of the contract on which it was based permitted recovery only when the title of the heirs was established to the property,—an event which he held never happened, since the original controversy was compromised. Whether or not the terms of all the other contracts permitted recovery, and whether they covered proper disbursements, were issues upon which the legal owners of those other contracts and the legal owner of the Smith-Chase were irreconcilably hostile. To sanction the contention that the holder of the Smith-Chase contract, when that holder is a trustee, active or passive, could acquire or hold any part or lot in hostile claims, or even prosecute them to his own personal profit, would be subversive of the fundamental principles of equity. The same remarks apply to the claims represented by Schermerhorn, in which concededly Campbell acquired a half interest, and would apply to the Le Bourgeois claim, if in fact he realized anything out of it, which the record before us leaves in some doubt.

The judgments in the Chester and Tauziade suits are no bar to the second claim in this suit, which was not, and could not be, litigated therein; nor was De Chambrun under any obligation to object in those suits to Campbell's prosecution of the hostile claims on the ground that he was the trustee of other claims. Whatever pecuniary benefit the trustee thereby obtained would be for the benefit of his trust, and the *cestui que trust* might fairly lie by, allow the trustee to secure all he could, and rely upon the subsequent accounting for the protection of his own interest. The decree of the circuit court is reversed, with costs, and the cause remitted to that court, with instructions to decree in favor of the complainant for an accounting as to any profits made by defendant's testator in excess of his fees and disbursements (\$25,213) out of the claims of Stoutenburgh-Chester, Griswold, Chatfield, Smith, and Schermerhorn.

On motion to amend the mandate the claim of Stanislaus Le Bourgeois was included among those for whom the accounting for profits was ordered.

WATTS et al. v. BRITISH & AM. MORTG. CO. OF LONDON, Limited.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1894.)

No. 158.

1. MORTGAGE—RESCISSION—AFFIRMANCE BY CONDUCT.

A mortgage company filed a bill to rescind a mortgage, and secure a return of the money loaned, on the ground of fraud. Afterwards, it advertised the premises for sale under the deed of trust. It did not, how-

ever, attempt to make the sale, but pressed its suit for rescission with due speed. *Held*, that the act of advertising should not be considered an affirmance of the mortgage.

2. SAME—CONSPIRACY TO DEFRAUD—LIABILITY OF CONFEDERATES.

A number of persons, each doing his part, acted together in procuring a loan from a mortgage company upon the security of land which was greatly overvalued. *Held*, that the mortgagor was entitled to a rescission of the mortgage, and a decree against all the parties for return of the money loaned, regardless of what disposition had been made of it, or which of the defendants had executed the papers.

Appeal from the Circuit Court of the United States for the Northern District of Mississippi.

This was a bill in equity filed by the British & American Mortgage Company of London, Limited, against Ben M. Pettis, W. C. Pettis, Charles L. Watts, and A. C. Johnson, to rescind a mortgage and procure a decree for the return of the money loaned. There was a decree for complainant in the court below, and the defendants appeal.

H. A. Barr, J. W. T. Falkner, and Chas. B. Howry, for appellants.
W. V. Sullivan, for appellees.

Before PARDEE and McCORMICK, Circuit Judges.

McCORMICK, Circuit Judge. On 27th December, 1889, C. L. Watts, one of the appellants, applied to an agent of the appellee for a farm loan on 820 acres of land in La Fayette county, Miss. This application was made on one of the regular forms used by appellee. The answers to the numerous questions in this form were all written in by W. C. Pettis, one of the appellants. On the 16th January, 1890, the land was conveyed to C. L. Watts by Ben M. Pettis, described as containing 826 acres, more or less. This deed recited, "In consideration of eighteen thousand two hundred and sixty dollars, I here convey and warrant C. L. Watts the following described lands," etc., "to wit." A. C. Johnson, one of the appellants, inspected the land, and reported it to be of the value of \$13,740, without the improvements, and to have on it a residence house, six tenant houses, and a gin house, with machinery, all of the aggregate value of \$2,250. Shattuck & Hoffman were the agents, at New Orleans, of the appellee. They seem to have corresponded with W. A. Roane, Esq., of Oxford, Miss., and to have received from him abstracts of title to land in La Fayette county on which they made loans. Mr. Shattuck testifies that A. C. Johnson never was in the company's (appellee's) employ, and W. A. Roane never was the company's attorney; that the company have no employes or attorneys or brokers in the country. Unless the inspection and report of A. C. Johnson was made for the company, it had none made by any one before it made the loan of \$4,500 on this land. On January 25, 1890, C. L. Watts drew on Shattuck & Hoffman in favor of Benjamin M. Pettis, for the full amount of the loan. This draft was accepted 30th January, 1890, payable at the Louisiana National Bank. It is indorsed: "Benj. M. Pettis. W. C. Pettis. For collection, for acct. of Bank of Oxford, Oxford, Miss. Ben Price, Cashier."

Benj. M. Pettis and W. C. Pettis are brothers. At the time of ob-

taining this loan they lived in the same house on a plantation a few miles from a farm on which C. L. Watts resided. The loan was completed January 30, 1890. In March, 1890, one H. C. Williamson examined the land and improvements, and reported to appellee's agents at New Orleans that the land and improvements had been grossly overvalued in Watts' application and in Johnson's report, and that the real consideration for B. M. Pettis' conveyance to Watts was \$3,500 of the money loaned by the appellee to Watts on the land. After efforts to obtain a rescission of the contract and the return of the money had failed, the appellee exhibited its bill, setting up the facts, and praying for relief on the ground of the fraud charged to have been perpetrated on it by the appellants. The utter want of care indulged by appellee in accepting the security mentioned should not escape notice, and, if it should result in a partial loss of the money loaned, retributive justice would hardly be more than satisfied.

After filing its bill the appellee advertised the mortgaged premises for sale under the deed of trust. The appellants insist that this was an affirmance after full knowledge of the facts. They support this contention by a reference to *Grymes v. Sanders*, 93 U. S. 55; *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. 29. It is sound doctrine that a party who desires to rescind a contract on the ground of subsequently discovered fraud must announce his purpose as soon as such discovery is fully made, and must adhere to it. He will not be permitted to vacillate, and play fast and loose. In this case the appellee did announce its purpose, endeavored to obtain a rescission and the return of the money without resort to a court of equity, and, failing in that, duly exhibited its bill, and has sped the cause. The sale was not attempted to be made. No other indication of a vacillating purpose is shown. Grant that this act is not adequately explained. Is it, under the circumstances, to be taken as a conclusive abandonment of appellee's bill, and an affirmance of the contract which by the bill the appellee seeks to have canceled? In our view the adjudged cases and sound reason do not go to that extent.

Appellants contend that no injury is shown to have resulted to the appellee by the alleged fraud; that the security was and is adequate and ample. To our view the proof does not sustain this contention. The most that can be claimed for the evidence on the subject of value is that the land is worth from eight to ten dollars an acre. No market value is shown. It appears that few sales of land in that neighborhood have been made since the loan was effected. The appellee, in making loans on farms, was not willing to take such security at more than one-third of its estimated value. It is matter of such common knowledge as not to require evidence that there is generally a great difference between landowners' estimates of the value of farm lands in their neighborhood, and the price the lands would bring at public sale. The preponderance of the evidence indicates that had the land been put up at public sale at the time Watts' application for the loan was made, or at any time since then, it would not have brought in cash as much money as

Watts borrowed on it. It is not extravagant to doubt if the appellee could, at any time since it made the loan, have realized one-third of the principal and interest, and the reasonable cost of a foreclosure, by a public sale, without reserve, of the mortgaged premises.

It is insisted that the conspiracy charged is not proved; that it is abundantly disproved. The complainant, in its bill, did not waive an answer under oath. The respondents, answering separately, each denies that he was a party to a conspiracy, as charged, and denies that any such conspiracy existed. It is, perhaps, a matter of definition. These are said to be good people. We do not deem it necessary to review the evidence. Our point of view may be so different from that of the appellants that any summary of the proof we could make would appear to them to be harsh. We therefore only say the evidence satisfies us that the appellee should have the relief it seeks. It appears to us that all of the appellants, each doing his own part, acted together in procuring this loan; that the part each acted contributed materially to effect the common purpose. It is immaterial what disposition was made of the money, or who of them executed the writings sought to be canceled. Equity is not so restrained that it cannot do full justice in such a case as this.

The decree appealed from is affirmed.

FRINK et al. v. McCOMB.

(Circuit Court, D. Delaware. March 5, 1894.)

1. ATTORNEY AND CLIENT—COMPENSATION—AMOUNT.

Counsel were retained to bring suit upon an important and doubtful claim, which had already been asserted in another jurisdiction without success. It was agreed that the client should furnish \$2,000 for necessary costs and disbursements, and that counsel should look only to the amount recovered for compensation for their services, of which recovery they were to be permitted to retain "a liberal amount." The litigation, which was long and arduous, was in the end successful. All the counsel retained testified that one-third of the amount recovered was no more than a moderate compensation, and their testimony was not contradicted. *Held*, that they were entitled to a lien on the amount recovered to the extent of one-third thereof.

2. SAME—AGREEMENT—ABROGATION.

Pending the litigation, counsel wrote to their client that, inasmuch as a final settlement was likely to be long deferred, they thought it "no more than reasonable to ask for a payment on account of services;" but no payment was made, and the request was not insisted upon. *Held*, that no inference could arise from this that the agreement asserted by counsel had not been made.

3. SAME—LIEN—EFFECT OF ASSIGNMENT.

An assignment made by a client, pending litigation, of the amount to be recovered, cannot prejudice the lien of his attorney thereon for services; nor is it essential to the preservation of his rights that he should notify the assignee of his claim, especially when such assignee assents to the services rendered, and knows that the client is financially unable to pay the fees.

Wilson & Wallis, George Gray, and William C. Spruance, for complainants.