swers, the respondents moved the court to dismiss the bill upon the same grounds. This motion was heard before the circuit judge, and by him denied in a brief opinion, as follows:

"This is a motion to dismiss the bill for want of jurisdiction, on the ground that some of the complainants and respondents are citizens of the same state, and some of the parties on both sides are aliens. The bill is filed, however, to set aside a decree, in the same court, of foreclosure of a mortgage and sale, and confirmation of the sale, of the Sutro tunnel, on the ground of various frauds alleged, by means of which the proceedings are said to have been accomplished. I think that this is but an appendage of, or a suit supplementary and ancillary to, the prior suit. It is but a renewal and continuation of the prior litigation. It is within the cases of Dewey v. Gas Coal Co., 123 U. S. 329, 8 Sup. Ct. 148; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27; Pacific R. Co. v. Missouri Pac. Ry. Co., 111 U. S. 505, 4 Sup. Ct. 583; Johnson v. Christian, 125 U. S. 643, 8 Sup. Ct. 989, 1135; Railroad Co. v. Soutter, 2 Wall. 440, 510; and Jones v. Andrews, 10 Wall. 327. Indeed, the suit could not well be effectually prosecuted in any other court. The court has jurisdiction under these authorities. Let the motion to dismiss be denied."

I therefore decline to review this question.

2. The first question presented by respondents relates to the failure of the trustees of the Sutro Tunnel Company to levy an assessment upon its shares of stock. It is charged in complainants' bill that the trustees wholly disregarded their duty to raise, by lawful assessment upon the shares of the company, the sum required to complete the payment for the McCalmont mortgage, and, in violation of their duty, consented to the guaranty of its bonds by the syndicate, and authorized Theodore Sutro, at his instigation and request, to stipulate with the Union Trust Company for the entry of the decree of foreclosure, and for the sale of all the property of the Sutro Tunnel Company. After setting out at length the provisions in the syndicate agreement that if the necessary amount of money was raised by the subscriptions of the stockholders, or if the Sutro Tunnel Company should pay to the Union Trust Company, "within ninety days after the actual entry of the decree, the amount paid to the former complainants for the mortgage in suit, less the amount which should have been paid over by the receiver up to the expiration of said 90 days, * * * that then the said judgment and decree should be discharged and satisfied of record," etc., the bill further avers "that the said board of trustees allowed the said ninety days to elapse without levying any assessment upon the stock of said Sutro Tunnel Company to repay the amount advanced by said syndicate for the purchase of said mortgage, and allowed the said property of said Sutro Tunnel Company to be sold under said decree, and allowed the time for redemption under said decree to expire, and allowed the sale of said property to be confirmed, without redeeming the said mortgage, pursuant to said stipulation or otherwise, or lawfully providing any means for said redemption, as it might and ought to have done by assessment upon the stock of said company."

It is difficult to see why the charge of neglect of duty in this respect should be made against the trustees in office in 1888, in-

stead of the previous boards. Was it not as much the duty of the trustees in office in 1886 or in 1887, as it was of the board in 1888, to levy an assessment? The truth is that, independent of the legal questions involved, it was the honest opinion and judgment of the different boards of trustees, as well as of many, if not all, of the stockholders, that any attempt to raise the amount of money required to pay the McCalmont mortgage would have been prejudicial. All the facts tend to show that it would have been absolutely useless to attempt to raise the money in that way. The trustees of the Sutro Tunnel Company were not in a position on August 10, 1888, to apply the money subscribed and paid by the stockholders prior to that time, and to have levied an assessment for the balance of the amount necessary to purchase the McCalmont mortgage, as complainants claim they should have done. The trustees had no power, authority, or control of the money which was paid by the subscribing stockholders upon a specific plan for a specific purpose. This money could only be used as provided by the terms of their subscription. But, if such a course could have been pursued, it would have been grossly unjust to the subscribing stockholders. The assessment, if then levied, would necessarily have been against all the shares equally, whether held by subscribing or nonsubscribing stockholders, and the subscribing stockholders would have had a just cause of complaint, upon the ground that such an assessment, under all the circumstances, would have been unfair and inequitable. The McCalmont mortgage contained a provision that "the debt contracted by these presents on behalf of the company, and all further advances on the security thereof, are subject to the express stipulation (which is hereby made) that the stockholders shall not be held liable, in respect thereof, in their individual capacity." With the exception of about 30,000 shares, each certificate of stock of the Sutro Tunnel Company bore upon its face the word "Unassessable." The by-laws of the corporation were amended in 1880, and it was therein provided that the shares "were unassessable." No stockholder had at any time demanded the levying of an assessment for the purpose of enabling the corporation to pay the McCalmont mortgage; but the question as to the propriety and legality of levying an assessment for that purpose had at different times been suggested to the attorneys for the corporation, who had expressed the opinion that, to say the least, the levying of an assessment was of doubtful validity. It is not deemed necessary to judicially determine whether an assessment, if levied, could have been legally enforced. It may, for the purposes of this opinion, be conceded that it could. Cook, Stocks & S. § 242; Railroad Co. v. Spreckles, 65 Cal. 193.[1] But, under all the facts and circumstances of this case, the failure of the trustees, in 1888, to levy an assessment, does not tend to establish any fraud, conspiracy, or willful neglect of duty upon their part, which would authorize a court of equity to set aside the proceedings

[1] 3 Pac. 661, 802.

and decree in the foreclosure suit. The most that could possibly be said against the trustees would be that they erred in not attempting to raise the money by an assessment. But trustees are not liable for mistakes of judgment. Morawetz, in his work on Private Corporations (section 553), says:

"The directors of a corporation are intrusted with wide discretionary powers. They are bound to exercise these powers with the utmost good faith in the interest of the corporation, and to give the latter the benefit of their best judgment; but they are not liable for innocent mistakes. Directors merely undertake to make honest use of such judgment as they possess. They do not insure the correctness of their judgment, and they cannot be charged with the consequences of an honest error of judgment or accidental mistake in the exercise of their discretionary powers."

In Leslie v. Lorillard, 110 N. Y. 532, 18 N. E. 363, the court said:

"In actions by stockholders which assail the acts of their directors or trustees, courts will not interfere unless the powers have been illegally or unconscientiously executed, or unless it be made to appear that the acts were fraudulent or collusive, and destructive of the rights of the stockholders. Mere errors of judgment are not sufficient as grounds for equity interference, for the powers of those entrusted with corporate management are largely discretionary."

See, also, Association v. Childs, 82 Wis. 476, 52 N. W. 600; Watts' Appeal, 78 Pa. St. 370, 391; Green's Brice, Ultra Vires, 407. Especially is this true in all cases where the trustees act under advice of counsel. Spering's Appeal, 71 Pa. St. 11, 21.

3. In reference to the acts and conduct of complainants, and their participation and acquiescence in the various transactions, it must be remembered that the doctrine of ultra vires has two separate and distinct phases,—one, when the public or creditors are concerned, which has no application to this case; the other, where the question is between the stockholders and the corporation, or between it and its stockholders and third parties dealing with it and through it with them. It is this branch with which we have to deal. In Kent v. Mining Co., 78 N. Y. 185, the court said:

"When it is a question of the right of a stockholder to restrain the corporate body within its express or incidental powers, the stockholder may in many cases be denied, on the ground of his express assent, or his intelligent, though tacit, consent, to the corporate action. If there be a departure from statutory direction, which is to be considered merely a breach of trust to be restrained by a stockholder, it is pertinent to consider what has been his conduct in regard thereto. A corporation may do acts which affect the public to its harm, inasmuch as they are per se illegal or are malum prohibitum. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interest of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders dealing in good faith with the corporation will be protected in a reliance upon those acts."

It therefore becomes important to inquire, not only as to the character of the relief sought, but also to ascertain complainants' relations to the various transactions set out in the statement of facts. It would perhaps be difficult to explain what the result would be if the relief asked for by complainants should be granted. It might, and probably would, lead to confusion worse confounded, and liti-

gation more extended and disastrous. It is certain, however, that the relief they ask for is absolutely destructive of nearly everything that has been done by Sutro and the syndicate, and all of their various transactions are claimed to be in fraud of complainants' rights, and the court is asked to set them aside, regardless of consequences. This is to be done apparently for the benefit of all parties holding nonsubscribing shares of stock in the Sutro Tunnel Company; but it is claimed by respondents to be simply for the benefit of complainants, who, according to the averments in the bill, own 15,250 shares. Sutro, the members of the executive and reorganization committees, and the firm of Seligman & Seligman, attorneys, would, according to the contention of complainants, be compelled to return to the Sutro Tunnel Company the money and stock which they received as fees for their services. The syndicate would also have to account for the money paid by the Sutro Tunnel Company to the McCalmonts on the mortgage before it was transferred to the Union Trust Company, although it never received any part or portion of said money. For obvious reasons, the court declines to make any suggestion or conjecture as to what would become of the interests in the property held by the outsiders or the subscribing stockholders in the syndicate, or to speculate as to whether the nonsubscribing stockholders, who are not parties to this suit, could be compelled to participate in the future proceedings if the decree is set aside. It is enough to say, for the purpose of illustrating the question under consideration, that there is no direct offer upon the part of complainants to pay any money that might be found due, upon an accounting, from the nonsubscribing shares of stock which they hold. Equity appeals to the discretion of the court for justice. It has frequently been said that nothing can call forth the activity of a court of equity but "conscience, good faith, and reasonable diligence." Have complainants brought either of these ingredients into this case? Stockholders who seek protection against the acts of a corporation which are not directly prohibited by law, although in excess of its powers, must be diligent in order that the court may undo the wrong to them without doing equal or greater wrong to other persons. The jurisdiction of the court is purely equitable, and it must necessarily be governed by equitable principles. Parties who come into court asking equity must do, or offer to do, equity. As was said by Lord Justice Turner in Great Western Ry. Co. v. Oxford, W. & W. Ry. Co. 3 De Gex, M. & G. 359:

"If parties cannot come into equity without submitting to do equity, a fortiori they cannot come for the summary interference of the court when their conduct before coming has been such as to prevent equity being done."

Are complainants in a position to complain of the acts and conduct of the board of trustees of the Sutro Tunnel Company, of Theodore Sutro, of the syndicate, of the executive and reorganization committees, or of the sale and disposition made of the property of the Sutro Tunnel Company? In giving the general history of the various transactions in which Mr. Sutro is the central figure, the

part taken by the complainants does not, perhaps, prominently appear. But a history of this case would be incomplete without a brief reference to their acts and active participation in the premises. In fact, the legal aspects of the case (to be hereafter considered) cannot be fairly determined without a clear and full understanding as to their conduct, as well as that of the respondents. If they favored, encouraged, and aided the various plans proposed by Sutro, and assisted in carrying them out, or, with full knowledge of all the facts, ratified and acquiesced therein, then the question arises whether they are not precluded from attempting to destroy the results which they, in common with other stockholders, assisted in creating. If it be true, as claimed by respondents, that the complaining stockholders are bringing this suit in their own individual interests, and that they participated in all the acts complained of, with knowledge of the facts, then they would be barred of any remedy. Cook, Stocks & S. § 730. If they actively participated in any fraud or conspiracy, if any is shown, with the respondents, then, whatever the rights of innocent stockholders may be, the complainants would not be entitled to any relief. The truth is that the persons who were actually defrauded by the transactions, if any fraud, actual or constructive, took place, would be the few stockholders who took no part in the proceedings, or had no knowledge thereof. As to the stockholders who took part in the fraudulent transactions, if there were any, they are particeps criminis, and are not entitled to any relief. As was said in U. S. v. Union Pac. R. Co., 98 U. S. 569:

"It is against all the principles of jurisprudence, whether at law or in equity, to permit them to litigate this fraud among themselves. If the innocent stockholders are not parties here * * * they would get no relief by the suit."

But it is important, in determining the questions involved in this case, to know in what manner the complainants considered the conduct of respondents, as well as themselves, when the transactions complained of were in process of being carried out. It is essential to know who it is that makes the charges of fraud, conspiracy, and violations of trust and confidence, and to ascertain whether they knew of all the transactions complained of, and openly participated therein, or remained quiet, and made no objection until after they found out that the results attained were not such as they anticipated they would be.

Do they come into a court of equity with clean hands? Is it true that they have been on both sides of this controversy, waiting and watching to finally espouse the cause of the one with which, in their opinion, the greatest profit lies? Can it be said of them, as charged by the respondents' counsel, that, like their prototype in the old play written by Marlowe:

"And thus far roundly goes the business. Thus, loving neither, I will live with both, making a profit of my policy; and he from whom my most advantage comes shall be my friend."

Would they not repel any charge of fraud on their part? Would they not vigorously complain if any of the acts of fraud which they

allege against respondents should be charged against them? Who are they, what have they done, and what are their rights in the premises? Equity rule 94 provides:

"Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

Complainant Wheelan was not a stockholder during the time of the transactions complained of. He first bought 250 shares of the Sutro Tunnel stock, November 10, 1888, and subsequently, during the same month, bought 500 shares more. He is not, therefore, in a position, under the rule, to be a complainant in this case.

In Hollins v. Railroad Co., 9 N. Y. Supp. 909, the court held that, where a plan for the reorganization of a railroad company is not prohibited by law, one who purchases stock, after the plan is adopted, from a stockholder who voted for such plan, cannot insist that it is ultra vires, and that he is not "in such a position as to ask a court of equity to enjoin the officers of the corporation or the corporation defendant, from doing what his predecessors, as owners of the stock, expressly authorized and directed the officers of the company to do." Complainants Symmes and Aron were stockholders at the time of the transactions of which they complain; and it is alleged in the bill:

"That this suit is not a collusive one, to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance; * * * that the managing trustees of said Sutro Tunnel Company are defendants herein, and are parties to the fraudulent combination and conspiracy hereinafter complained of by your orators; and that any demand upon them to institute this or any action in the name of said Sutro Tunnel Company, to accomplish the objects herein sought to be secured, would be wholly fruitless and unavailing. And your orators aver, upon and according to their information and belief, that the majority of the shareholders of said Sutro Tunnel Company have become shareholders in the Comstock Tunnel Company, a corporation defendant, and that they expect to receive bonds of said Comstock Tunnel Company in lieu of the bonds of the Sutro Tunnel Company to which they have subscribed; and that it is impossible to secure a vote of a majority of the shareholders of said Sutro Tunnel Company to remove said trustees, or to appoint new trustees of said Sutro Tunnel Company, or any trustees who would institute any action to obtain the relief prayed for by your orators; that the said majority of said shareholders, having subscribed to bonds of the Sutro Tunnel Company, have been led by the defendants who have engaged in said fraudulent combination and conspiracy, and as the result thereof, to believe that the said Sutro Tunnel Company has lost all title to its property and franchises under the foreclosure sale hereinafter described, and that the same was transferred to and purchased by the Union Trust Company in trust for the exclusive benefit of the members of the syndicate hereinafter described, and of the shareholders who were subscribers to the bonds of said Sutro Tunnel Company, to the exclusion of all other shareholders of said Sutro Tunnel Company; and

that the said majority of said shareholders will not coöperate with said Sutro Tunnel Company to secure its interests in any manner, unless this court shall first grant the relief sought by your orators in this suit."

These averments, having been sworn to, will be deemed sufficient to comply with the rule as to complainants Symmes and Aron.

Mr. Symmes first appears upon the books as a stockholder in the Sutro Tunnel Company on December 31, 1887, as the owner of 4,000 shares, which were purchased by him from the office of the company in New York. On November 10, 1888, he procured 50 shares more, and on July 23, 1890, 100 shares more were issued to him in San Francisco. On the hearing before the examiner he produced certificates for 3,600 shares of stock issued in the names of other parties, and testified that he held these shares of stock before this suit was commenced, and acquired most of the stock in the spring and summer of 1887, and had a small portion of the stock a year or two before. On the 30th of December, 1887, he subscribed for $1,000 bonds, face value, on the A form, on 1,000 shares of stock, pursuant to the plan of the committee of November 15, 1887; and on November 27, 1888, subscribed on 3,650 shares of stock, at the rate of 55 cents per share, on the plan of April 27, 1888. In May, 1888, he had an interview with Mr. Sutro in New York, when he was fully informed of everything that had been done up to that time, and was then advised that it would be necessary to organize a syndicate, and perhaps pay it a large commission for subscribing the amount necessary to purchase the McCalmont mortgage. On August 6, 1888, the chairman of the reorganization committee addressed a letter to Mr. Symmes, in which, among other things, he detailed the plans of reorganization, informed him all about the syndicate and of its purchase of the mortgage, and offered to extend the time for further subscriptions at 50 cents until the 25th of the month. On September 3, 1889, three months before this suit was commenced, he received and accepted $12.98, interest on his bonds at 4 per cent. per annum from date of his payments to January 1, 1888. He admits in his testimony that when he subscribed for the bonds he remembered reading the closing paragraph of the circular, that "a compliance with the terms of this circular will be regarded as your assent to the reorganization plan, with foreclosure if necessary," and further admits that he had knowledge of the transactions in relation to the efforts made to raise the necessary money; but he testified that Sutro did not tell him, and that he did not know, that Sutro was to receive $100,000 as a fee, or that the executive and reorganization committees and attorneys Seligman & Seligman were to receive any fees, and that his first knowledge of Sutro's fee was obtained from the answer in this suit.

As to complainant Joseph Aron, the facts fully sustain the assertion of respondents' counsel that, "from the beginning of the transaction here disputed to the end of it, Mr. Aron was advised

of every step, every proposed change or modification of plan, and every hope and every fear of any of the parties connected with it." Aron was one of the incorporators of the Sutro Tunnel Company, was the president thereof from 1872 to 1874, and had over 10,000 shares of stock standing in his name on the books of the company. Mr. Lowengard, who was a member of the executive and of the reorganization committees, was Mr. Aron's confidential agent and broker, and acted throughout all the transactions in that capacity. He was one of the stockholders who first employed Mr. Sutro, and asked his aid, assistance, and advice. He is also made a respondent in this suit, and is charged by complainants with being one of the conspirators in the commission of the alleged frauds. There is not a scintilla of evidence in the voluminous record, nor is it claimed by complainants' counsel, that Lowengard ever exceeded his authority as Aron's agent, or that he at any time withheld from Aron any material fact or circumstance in relation to any of the transactions, whereby Mr. Aron was misled or deceived as to the true and actual condition of the affairs as they transpired. On the contrary, the record affirmatively shows that Mr. Lowengard informed Mr. Aron of every move that was taken in the efforts of Sutro and others to defend the foreclosure suit; to raise the money to pay off or purchase the McCalmont mortgage; the formation of the various plans adopted by the committees, and approved by the trustees of the Sutro Tunnel Company; the organization of the syndicate; the signing of the syndicate agreement, and the contents thereof; the purchase of the mortgage, and assignment thereof to the Union Trust Company,—and that Mr. Aron, with full knowledge of all the facts, consented to, ratified, and approved of all these transactions and negotiations, and of Mr. Lowengard's action and conduct in connection therewith.

Mr. Lowengard testified: That he interested himself in the affairs of the Sutro Tunnel Company, as the representative of Mr. Aron, in December, 1886. That he then cabled to Mr. Aron, in Paris, that Messrs. Baltzer, Stursberg, and others had organized a movement to put the interests of the Sutro Tunnel stockholders into the hands of Mr. Theodore Sutro, and received an answer: "We approve. Sign in your own name. Aron." That thereupon the firm of Palmer & Lowengard signed in their own names for 30,000 shares for Mr. Aron, and afterwards subscribed for 1,000 shares more. Mr. Aron did not want to sign in his own name because he had, or imagined he had, some special grievance against the McCalmonts and others, and wished to push that matter, whatever it was, whether the foreclosure suit was settled or not. On May 27, 1887, Mr. Aron wrote to Lowengard, with reference to the subscriptions, as follows:

"You can sign in your individual name if, as Stursberg says, no liabilities. You know me well enough that I would not dare to ask it of you if there was any liability to it. But as my agent I do not wish to sign it. By doing this all would be lost to me, as far as I am concerned, and I do not intend it to be so. I will be able to place lots of bonds, I am satisfied.

On November 30, 1887, in answer to a letter of Mr. Lowengard informing him that he would have to pay $15,500 on his 31,000 shares, Mr. Aron wrote:

"First of all, let me assure you that I appreciate very much all the trouble, pains, &c., you have taken in my behalf. * * * You are in a committee representing 31,000 shares. You would like to see your proposition carried out; that is, anyway, as far as yourself are concerned, be one of the signers of the taking of the bonds. Well, I have been trying to do the very thing without doing it myself, as, for reasons explained, I wish to leave myself out of all direct subscriptions. You represent the 31,000 shares you have on hand. (You do not represent J. A.) This letter will reach you on or about the 10th of December. I shall cause, before this, to get the party whom I told you some time ago to cable you, 1st, 10%, then the balance; making, in all, $15,500. This you will, of course, subscribe in the name of the party that will be mentioned to you, or you may even subscribe it, if you prefer, 'Ott Lowengard, agent.' In this way you, as member of the committee, will have subscribed, and I suppose this will be satisfactory to you. Again thanking you for your trouble, believe me to be at your disposal if I can be of any use to you in Paris."

On May 10, 1888, Mr. Aron wrote to Lowengard:

"What you have done about the 31,000 shares * * * has been approved."

In a letter written to Mr. Lowengard on the 30th of July, 1888, Mr. Aron referred to the large reduction made by the McCalmonts for the benefit of the syndicate and subscribing stockholders, complains of the acts of Sutro, and declares that:

"The bonds will not be issued by the Sutro Tunnel Company because that company will be wiped out. The new company is not yet formed which can issue them. * * * Of course, neither I or anybody else can find any fault for a committee to buy a mortgage and foreclose it. But to do so with the aid and advice of the company's own counsel, own president, whose only authority is derived from the company, for the purpose of freezing out, &c., &c., seems to me preposterous and wicked. * * * Of course, $100,000 fee to Theodore Sutro could not be paid by the S. T. Co.; only the profit of a scheme could do it."

The record shows that, when this letter was written, Mr. Aron had subscribed on 31,000 shares for $31,000 face-value bonds, and paid $15,500, upon the plan which he denominates a "preposterous and wicked scheme." This letter, which, like the Parthian arrow, pierces as he who casts it flees, clearly shows, by a careful reading between the lines, that in Mr. Aron's opinion it was only preposterous and wicked because some one by the name of Sutro was connected with it. Nobody, not even Mr. Aron, could find any fault "for a committee to buy a mortgage and foreclose it." That would be an honest, straightforward, business transaction, provided Mr. Sutro did not get any fee. The entire letter was evidently written by Mr. Aron for the purpose of casting discredit upon the conduct of Sutro, and at the same time to indorse everything that was done by his own agent, in order that he, as principal, might profit by the transaction. When complainants Symmes and Aron subscribed for their stock, with full knowledge of all the facts, they did not think they were guilty of any fraud, or that they were encouraging any conspiracy to defraud any stockholder of the Sutro Tunnel Company of his property or rights. They con-

sidered that all the proceedings that were taken in the premises were fair, legitimate, business transactions. They favored the plans, encouraged them, and aided them by their subscriptions and their money, when they knew or believed that a new company would have to be organized to issue the bonds, and that the Sutro Tunnel Company would be wiped out of existence. Why Mr. Symmes retained a portion of his stock in the Sutro Tunnel Company, upon which he did not subscribe, does not appear. But the reason why Mr. Aron did not subscribe on all his stock has already been referred to, and is made perfectly clear. He wanted to save some for the purpose of enabling him to have, as he supposed he would thus have, a legal standing against the McCalmonts, Kidder, Peabody & Co., and Adolph Sutro in relation to their prior connection and conduct in the affairs of the Sutro Tunnel Company, for the assertion of some rights of which he thought, and evidently still thinks, he had been unfairly or fraudulently deprived. But, whatever their motive, purpose, or object may have been in retaining a portion of their stock in the Sutro Tunnel Company without subscribing thereon to the scheme of which they now complain, it seems perfectly clear to me that, having subscribed upon a large proportion of their shares of stock, and having, with full knowledge of all the facts, ratified, acquiesced, and approved of the plans adopted by the executive and reorganization committees, and of everything that was done by the syndicate, except the payment of a fee to Sutro, and waited for a period of 18 months after the signing of the syndicate agreement before taking any action to protect their nonsubscribing shares of stock, they are not in a position to maintain this suit. Although it is averred in the bill that this suit is brought for all other stockholders who did not subscribe, it is a significant fact that not a single other nonsubscribing stockholder has, so far as the record shows, complained of any deprivation of his rights, or offered to come forward and pay his proportion of the expenses of this litigation, or claimed any privilege to share in its results.

In Berry v. Broach, 4 South. 117, the supreme court of Mississippi held that it was within the power of a majority of the stockholders to make the sale of the property of an incorporated company doing an unsuccessful and unprofitable business, and that, even if such sale was voidable by the nonparticipating stockholders, a stockholder who participated in the sale could not avoid the contract, which had been ratified by the acquiescence of the other stockholders.

In Matthews v. Murchison, 15 Fed. 691, the court held that a bondholder of a former organization had no standing in a court of equity to dissolve a new organization of a railroad company for which her agent had voted bonds, and to enforce a different plan, where it appears that she had known of what her agent was doing and did not dissent; but had accepted her share of the bonds of the new organization, and so acted as to induce others to believe she had acquiesced in the new organization. There the old company had made default in the payment of its debts, and its property was sold, and bought in by the first mortgage bondholders. The

old corporation was dissolved, and a new one formed, to which the property and franchises of the old corporation were conveyed. There, as here among the stockholders, there had been consultation among the bondholders respecting the sale and purchase of the property, and the plan of reorganization to be followed when the purchase was made; and it was in respect to these plans that the complainant filed her bill. It appeared that the complainant received her proportion of bonds in the new organization without objection; yet, according to the averments in her bill, she knew the company was illegally organized, and had no power to issue either bonds or stock. French had acted as her agent, and, although she claimed that French had exceeded his authority, it was shown that she knew of his acts and had ratified the same. Upon this state of facts the court said:

"To come into a court of equity, and ask it to set aside the organization of the new company, under these circumstances, and to take its property out of its hands, and put into those of a receiver, is little else than monstrous. Every act of complainant and her husband after the vote of French led the public and the committee of purchase and organization to suppose they acquiesced. The law and good conscience required that if they disapproved French's conduct, and denied his power to act as he had done, then to say so at once, and not mislead everybody by dealing in the worthless securities which they secretly meant to repudiate. Whether this is an estoppel or a ratification is of little consequence. Not to regard it as one or the other would work the greatest injustice to the other bondholders. We think this decides the matter, and is fatal to complainant's claim for a receiver, now, or at any other time, under her bill of complaint."

In Kent v. Mining Co., supra, the court said:

"Where third parties have dealt with the company, relying in good faith upon the existence of corporate authority to do an act, then it is not needed that there be an express assent thereto on the part of stockholders to work an equitable estoppel upon them. Their conduct may have been such, though negative in character, as to be taken for an acquiescence in the act; and, when harm would come to such third parties if the act were held invalid, the stockholders are estopped from questioning it. We suppose acquiescence or tacit assent to mean the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress, after knowledge of the committal of it, whereby innocent third parties have been led to put themselves in a position from which they cannot be taken without loss. It is the doctrine of equitable estoppel, which applies to members of corporate or associated bodies, as well as to persons acting in a natural capacity."

In Rabe v. Dunlap, 25 Atl. 962, the court of chancery of New Jersey said:

"Where an act is done openly, and especially on notice, and without evil intent, though clearly in excess of the power of the corporation, a nonassenting stockholder will not be allowed to pause to speculate upon the chances,—to wait until he can see whether such act is likely to result in profit or loss,—but, to be entitled to the summary interference of the court, he must ask for it promptly, and before the act of which he complains has become the foundation of rights or equities which must be destroyed or greatly impaired if the act be nullified or undone. Or, stated with greater brevity and in its simple essence, the rule is this: If he wants protection against the consequences of an ultra vires act, he must ask for it with sufficient promptness to enable the court to do justice to him without doing injustice to others. * * * This principle must control the decision of the present application. No argument is required to show its pertinency. When the leading facts of the case are recalled, it applies itself. Whether the com-

plainants remained inactive to speculate upon the chances, intending to abide by the consolidation if it resulted in benefit, and, if not, to try to undo it, it is manifest that they acted precisely as they would have done if such had been their intention."

See, also, Kitchen v. Railroad Co., 69 Mo. 225, 261; Thornton v. Railway Co., 81 N. Y. 462; Ashhurst's Appeal, 60 Pa. St. 290; Watts' Appeal, 78 Pa. St. 370, 394; McGeorge v. Improvement Co., 57 Fed. 262, 268; Streight v. Junk, 8 C. C. A. 137, 59 Fed. 323; Oil Co. v. Marbury, 91 U. S. 587; Hotel Co. v. Wade, 97 U. S. 13; Indianapolis Rolling Mill v. St. Louis, etc., R. Co., 120 U. S. 256, 7 Sup. Ct. 542; Cook, Stocks & S. §§ 161, 729, 732; Mor. Priv. Corp. §§ 262, 264, 624, 631.

These views virtually dispose of this case; but in view of its magnitude, and of the many charges of fraud that have been made, it is deemed proper to review the case upon its merits.

4. The only debatable question is whether the facts show any constructive fraud upon the part of Mr. Sutro or his associates, or any violation of trust or confidence of such a character as requires a court of equity to interfere, and declare the transactions, however innocent they may have been intended, to be fraudulent in law. Constructive fraud is such as the law infers from the relationship of the parties and the circumstances and conditions by which they are surrounded, regardless of any actual dishonesty of purpose or evil design. There are certain well-defined principles, which have become axiomatic in the jurisprudence of this country, with reference to the acts, conduct, and duties of the directors, trustees, and officers of a corporation in their relations with the corporation and with its stockholders. The officers of a corporation are trustees for the creditors and stockholders; and if an officer thereof, by means of his power as such, secures to himself any advantage over other stockholders or creditors, equity, with its strong arm, steps in, and treats the transaction as void or voidable, and will charge him as a trustee for the benefit of the innocent and injured parties. The officers, being in a place of trust, are, of course, obliged to execute their duties with fidelity, not for their own benefit, but for the common benefit of all the stockholders of the corporation. The directors and trustees of a corporation hold a fiduciary relation to the stockholders. They are intrusted with the management and control of the property of the corporation for the benefit and advantage of all the stockholders, and are therefore necessarily concluded from doing any act, or transacting any business, in which their own private interests or individual business will come in conflict with the duty they owe to each and every stockholder of the corporation. The same person cannot act for himself for gain, and at the same time, with reference to the same thing, act as the agent of others whose interests are conflicting. "No man can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other."

Equity does not, as a general rule, permit persons occupying fiduciary relations to be placed in such a position that the influence of personal motives is liable to be so strong a temptation as to

overcome their duty, or have a tendency to lead them to a betrayal of their trust. Directors or trustees are not allowed, by the rules of equity, to transact any business in relation to the corporate property with themselves, or to acquire any interest therein for their individual advantage, to the detriment of the stockholders of the corporation. It is not, however, so much the profit to themselves, as it is the detriment to others, that furnishes the ground for setting the transaction aside. The officers of a corporation are always required to exercise the utmost good faith in all their dealings with their cestui que trust, and should be ready at all times to explain all that they have ever done in connection with their management of the trust property. The books are full of cases sustaining these general principles; and in all such cases the rules should be rigidly enforced, so as to deprive them of all the benefits and advantages which they obtained, by setting aside the transactions, and disarming them of all legal sanction or protection for their acts.

But the question here to be decided is whether the facts presented by the record are of such a character as to bring this case within the application of these principles. The facts speak for themselves. They must be taken in their entirety, and weighed and considered with reference to all the conditions and surroundings of the Sutro Tunnel Company. Suit had been commenced to foreclose a mortgage against its property for about $1,500,000. There was no real defense to the suit. It owed the money, and its property was subject to the lien of the mortgage. A receiver had been appointed. An attorney had been employed. Testimony had been taken by the owners of the mortgage. Interest and costs were rapidly accumulating. The time for final hearing was near at hand. The stock of the company had depreciated in the market. The company had no ready money, and no means of raising sufficient to meet the demands of the suit. The question of levying an assessment was not even mooted. The trustees then in office were friendly to McCalmont Bros. & Co. They evidently and honestly believed that any attempt to levy an assessment would be useless, or that it would doubtless lead to litigation; and staggering, as the company then was, under heavy burdens, further litigation meant disaster to the company, if not the utter destruction of its property. This was the condition when Mr. Sutro first appeared to take hold of the company's matters, and make an effort to save the life of a tottering corporation which was overwhelmed in debt far beyond the market value of its property. These conditions must be kept constantly in mind in determining whether his acts were fair and open, or secret and fraudulent, in the various transactions that thereafter took place. There was a general belief among some of the stockholders living in New York City that the trustees were not inclined to defend the foreclosure suit or in any manner to protect the corporation, and were also of opinion that the property of the company, although heavily incumbered with a mortgage lien, was of great value, and that some

united effort ought to be made to try and save it from foreclosure and sale. It is wholly immaterial whether their belief was well or ill founded. It was with that object in view—a laudable one, to say the least—that Mr. Sutro was consulted by them, which fact afterwards led to his employment as counsel for the company.

The mere fact that an officer deals with the corporation in business transactions does not, of itself, make the transactions fraudulent in law. If any officer of the corporation, after the foreclosure suit was commenced, had had the money, and was disposed to do so, he could have made a loan to the corporation in order to extricate it from its existing difficulties, if the transaction was open and free from actual fraud, without placing himself under the ban of prohibited acts. In Oil Co. v. Marbury, 91 U. S. 589, the court said:

"While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given."

See, also, Hotel Co. v. Wade, 97 U. S. 13; Warfield v. Canning Co. (Iowa) 34 N. W. 467; Gorder v. Canning Co. (Neb.) 54 N. W. 833; Duncomb v. Railroad Co., 84 N. Y. 191, 88 N. Y. 1; Railroad Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802; Cook, Stocks & S. § 661.

The rule in relation to constructive fraud is founded in an anxious desire of the law to apply the principle of preventive justice, so as to shut out the inducements to perpetrate a wrong. It was adopted to secure justice, not to work injustice; and for this reason limitations and qualifications have been made upon its operation and effect which are well calculated to guard it against evil results as inequitable as those it was designed to prevent. Morawetz, in his work on Private Corporations (volume 1, § 521), speaking of the qualification of the rule, says:

"But the rule referred to is not an arbitrary one. It is founded on reason, and should not be applied without regard to the circumstances of the case. A merely nominal or a naked legal interest in the subject-matter of a transaction would not disqualify an agent from representing his principal in the transaction, if there is no temptation to the agent to obtain an advantage at the expense of the principal."

Any officer acting in good faith, for the benefit of the corporation, certainly had the right to use his official power and influence in endeavoring to induce other persons to give such aid as would relieve, or tend to relieve, the corporation from its financial embarrassments, or to secure a settlement or compromise of the pending litigation; and it was within the legitimate and lawful power of the board of trustees to employ any person—even one of their own members, if deemed advisable so to do—to act as agent or attorney of the corporation, and request him to devote his time, energy, and

ability, and to use all necessary and honorable means, to the accomplishment of such a purpose, and to agree in advance to pay him a reasonable compensation for his services. Bagaley v. Iron Co., 146 Pa. St. 478, 23 Atl. 837; Brown v. Silver Mines, 17 Colo. 421, 30 Pac. 66; Mor. Priv. Corp. § 508; Pew v. Bank, 130 Mass. 391, 395; Construction Co. v. Fitzgerald, 137 U. S. 99, 111, 11 Sup. Ct. 36.

Mr. Sutro, as before stated, had been employed by a number of stockholders to look after their interests. He ascertained that it would be difficult, if not impossible, to accomplish anything in their behalf without having the aid of the trustees, and being clothed with the authority of the corporation to act. He so notified the stockholders, and they, with him, immediately commenced active efforts to elect a new and more favorable board of trustees. There was no fraud; no conspiracy. It was their open and avowed purpose to save the company's property if it could possibly be done. A majority of the stockholders deemed it advisable to make a change in the management. Surely, they had the unquestioned right to do this. The rule is well settled that a majority of the trustees have the power to control all questions relating to the affairs of the corporation as long as their acts are not ultra vires. As is said in Cook on Stockholders (section 684):

"The corporate directors, so long as they act within their powers, may use their own discretion as to what ought to be done. Such, also, is the rule with the majority of the stockholders in meeting assembled. An act intra vires and without fraud is an act of internal management, and a minority of the stockholders are powerless to prevent, control, change, or question that act."

See, also, Road Co. v. Jewell, 8 B. Mon. 144.

Mr. Sutro was regularly elected as counsel of the corporation, and his salary agreed upon, at the annual election held March 28, 1887. He thereafter continued his efforts in behalf of the stockholders and the corporation. He formulated the subscription and bond plans of November 15, 1887, and of April 27, 1888. The trustees were at all times advised with reference to these plans, and to his efforts to induce stockholders to subscribe thereto, and of his efforts to secure a reduction of the mortgage debt; and with full knowledge of all the facts they indorsed, approved, and ratified all his acts in relation thereto. The principal contention of complainants is that he withheld the facts in regard to the syndicate agreement until the last moment, and that Mr. Wilson, of counsel for the Sutro Tunnel Company, was not fully advised in regard thereto when he joined with Mr. Sutro and Mr. Tauszky in writing the letter to the trustees, recommending the proposed settlement, which led to the action of the board consenting to a decree upon the terms proposed. Mr. Wilson had for more than a quarter of a century maintained his position in the front ranks of the legal profession in the city of San Francisco. He was a man of well-known probity of character and of unquestioned legal ability. His advice was naturally calculated to have great weight, if not controlling influence, in the final decision and action of the trustees. Complainants' counsel, in commenting upon the facts, said:

"We do not want to be understood to say that Mr. Sutro could control Mr. S. M. Wilson in a matter of this kind; but that he did not submit to Mr. Wilson this syndicate agreement is painfully evident."

Is it possible that knowledge of this syndicate agreement, and of its terms, was withheld from Mr. Wilson? The knowledge of the trustees, of Mr. Ames, the secretary, the acts of Lilienthal, the employment by him of Mr. Jarboe, the reasons given for his employment, the character of Mr. Wilson, the positive testimony of Mr. Sutro, and all the facts and circumstances in connection with the action of the trustees, are such as to convince the court that Mr. Wilson was fully advised in regard to the terms and conditions of the syndicate agreement when he signed the letter. The trustees knew what they were doing when they consented to the entering of the decree. They knew what the terms of the syndicate agreement were. They knew it was the only hope—the only chance—to get a further extension of time for 90 days. If the money could be raised in that time from the stockholders, the Sutro Tunnel Company could retain its life. If it could not be raised, its existence would come to an end. A new company would have to be formed. Reorganization was certain to take place. The stockholders who did not subscribe would lose all their interest in the property. All these things were painfully evident to the board of trustees when they acted in the premises. Complainants Symmes and Aron also knew what the result would be. With full knowledge of all the facts, they acquiesced and permitted the result to be accomplished without objection, and without taking any steps to prevent it.

No portion of the money paid by the syndicate for the purchase of the mortgage belonged to the Sutro Tunnel Company. When the mortgage was transferred and assigned to the Union Trust Company, it belonged absolutely to the subscribing stockholders and the outsiders who constituted the syndicate, subject only to the right of the nonsubscribing stockholders to come forward within 90 days and save their stock if so inclined. It is argued by complainants that in everything that was done by Mr. Sutro he was working to secure his contingent fee. This may be conceded. It would be strange, indeed, if he did not expect to get a good fee for his services. But it is claimed that the fee agreed upon and promised by a majority of the trustees, and allowed by the syndicate, was excessive, exorbitant, and outrageous. Could not the corporation have well afforded to pay him the sum of $100,000 if he had succeeded in carrying out his object of getting sufficient funds from the subscribing stockholders to the plans which he had formulated? The amount of the fee was large. The work to be done was stupendous. Who would have undertaken it without the hope or promise of a suitable reward? The work was difficult, and required extraordinary efforts. It demanded all his time, energy, and ability, as well as "his fertility of resources," so often referred to by counsel. Mr. Sutro received no more advantage or benefit from the syndicate agreement than had been promised him by the trustees if his other plans could have been carried out. The syndicate simply agreed to pay him the same amount of money that had been

originally promised by the trustees. The subscribing stockholders evidently deemed that this was just, right, fair, and proper in the premises. Mr. Lowengard, on the 31st of August, 1888, in answering a letter received from Mr. Aron, complaining of Sutro, and especially of the large fee which he was to receive under the terms of the syndicate agreement, expressed views which are directly applicable to this question, as follows:

"My Dear Mr. Aron: Your letter of July 30th has duly come to hand, and, according to your wishes, I have shown it to all the members of the reorganization committee. All of them feel, like me, that your antagonism against everybody of the name of Sutro must make you look at the doings of Mr. Theodore S. in a strongly prejudiced way. Whilst it is not necessary for me to enter into all the details, I only wish to submit to you the question, what would have become of the Sutro T. Co. if Theodore S. had not, a year and a half ago, begun to fight McCalmonts in the interests of the stockholders? The answer is very simple. The property would have been foreclosed long ago, in the interest of McCalmonts only, without even the attempt of a defense on the part of the company, whose lawyer Mr. Theodore Sutro was not at that time, and without any of the stockholders having had a chance of preserving their rights in the old or a new company; for you must admit that if a full decree had been entered then, with compound interest, and in view of additional 18 per cent., court and interest expenses, there would not have been the slightest probability that anything like the necessary amount could have been raised from the widely-scattered stockholders. Mr. Sutro was the man who took up the whole matter; and if, owing to the stubbornness and unwillingness of many stockholders, he may not succeed in saving the old company in its present form, he will have certainly managed to preserve the property for those shareholders who were willing to bring some sacrifices towards that end (if it can be called a sacrifice at all, when you give people a probably very good interest-bearing security for their money advances.) That Mr. Sutro wanted to make money for himself out of the matter, can you blame him for that? Was he under any obligations to anybody to defend the suit? I agree with you that the amount is very large indeed; but he has devoted his entire time to this matter for more than a year and a half, and, moreover, a majority of the members of the old board had promised him the amount at the beginning of his attempt to do something towards saving the shareholders. He has always maintained, and still clings to the hope, that the old company ought to be kept alive if possible. If he, nevertheless, now consents to a decree, it is simply because he—and every lawyer whose opinion I have heard in the matter—knows very well that there is no valid defense; so that I understand even the court has advised some such plan as is being carried out. Still more time for the delinquent stockholders (90 days), and a reduction in the decree to the simple interest basis, is a valuable consideration, and Mr. Sutro has strenuously fought for that against the interest of the syndicate. I and all the members of the committee fail to see how bona fide shareholders can claim to receive ampler time or facilities to protect their property. Originally, nobody thought it would be necessary to call in the assistance of a syndicate, who naturally want to make a big profit, but it was expected that the shareholders themselves would protect their property. Had they done so, that would, of course, have saved a large amount of money to the new or old company. But it is of no use to blame Mr. Sutro for the course of events."

Whatever criticism may be indulged in as to Mr. Sutro's actions and conduct, it cannot be fairly said that he obtained any undue or improper advantage by virtue of his position as counsel, trustee, or president of the Sutro Tunnel Company, to the detriment of any of the rights of the subscribing stockholders. He constantly advised with the trustees; notified them of every step he was tak-

ing; informed them of what he had done, what he desired to do, and hoped to be able to accomplish; and consulted with other officers of the company, some of the leading stockholders, and various members of the executive and reorganization committees, and with other attorneys for the company as to what was best to do. He earnestly protested when his plans were interfered with, and frankly stated that such interruptions and interference would result, if continued, in the loss of the property of the corporation, and that a syndicate would have to be organized with outsiders, to whom a bonus would have to be paid, and subscribing stockholders; that he wished to avert this if possible, and asked for the confidence, support, and assistance of the trustees, and finally, when all his efforts in that direction failed, he submitted and recommended the syndicate agreement for approval, with the results before stated. Without specifically noticing other points discussed by counsel, or further comment upon the evidence, it is deemed sufficient to say that, after a careful and thorough examination of all the testimony contained in the voluminous record, the mind of the court has been irresistibly led to the conclusion that no actual fraud or conspiracy has been established against any of the respondents; that the acts of Sutro, of the executive and reorganization committees, and the board of trustees of the Sutro Tunnel Company were openly done, with full knowledge, and with as much notice as could reasonably be given to all parties interested; that no advantage was taken by any of the respondents who held fiduciary relations with the corporation, to the detriment or injury of the complainants; that there was no betrayal of trust or violation of confidence; that the facts are not of such a character as to raise any question of a constructive or resulting trust, or to bring the case within the application of the rule as to constructive fraud, and are insufficient to justify this court in granting the relief prayed for.

These conclusions are, in my opinion, fully sustained by the authorities. Morawetz, in his work on Private Corporations (section 812), says:

"The term 'reorganization' is commonly applied to the formation of a new corporation by the creditors and shareholders of a corporation which is in financial difficulties, for the purpose of purchasing the company's works and other property, after the foreclosure of a mortgage or judicial sale. The result of a transaction of this kind is to form a new corporation to carry on the business of the old company upon a new basis, free from its debts and obligations, except to the extent that they have been expressly assumed."

Cook, in his work on Stocks and Stockholders (section 654), in treating of the same subject, and of the purchase of the corporate property by a majority of the stockholders, says:

"Accordingly, it is found to be expedient, during or previous to a railway foreclosure suit, for the parties interested in the property, whether they be the stockholders or bondholders, or mere outsiders, to formulate and propose to the bondholders and stockholders a plan of reorganization whereby, after a foreclosure sale, the purchaser of the property will allow the said bondholders, and often, also, the stockholders, to come into a new company, which shall own the property so purchased. It has been found necessary,

in most cases, to reorganize on some such plan, in order to quiet the defense to the foreclosure, or to raise the funds required in the reorganization, or to obtain a charter from the state for the reorganized enterprise, or to preserve intact the system of railways, branches, leases, and connections, which give value to the property foreclosed. This method of effecting a reorganization is legal and valid, since it involves an ordinary foreclosure of a mortgage, and an agreement of interested parties to purchase at the foreclosure sale. The foreclosure cuts off all rights of the old corporation and stockholders to the property foreclosed, and also the rights of the bondholders whose mortgage is foreclosed. The only rights which any of these parties have after the foreclosure are such rights as the plan or contract of reorganization gives them. By this plan, generally, the old stockholders are allowed to come into the new corporation upon the payment of a fixed sum for each share of stock held by them. The bondholders are generally allowed to exchange the old bonds for new ones in the new corporation, on different terms of interest and times of payment. Plans of reorganization such as this are favored by the courts. There must, however, have been no fraud or collusion exerted, whereby the property at the sale brings less than its real value. The courts uphold purchases by the reorganization company for the reason that thereby a better price is obtained for the property than could probably be obtained otherwise. Thus it has been held that a purchase of corporate property by a majority of the stockholders at a foreclosure sale, if made in good faith and without oppression or undue advantage being taken of the minority, is legal and valid. It is not constructive fraud."

In Shaw v. Railroad Co., 100 U. S. 612, the court said:

"The power of the courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances. It is always better to do what was done here whenever it can be; that is to say, reorganize the enterprise on the basis of existing mortgages as stock, or something which is equivalent, and by a new mortgage, with a lien superior to the old, raise the money which is required, without asking the courts to engage in the business of railroad building. The result, so far as incumbering the mortgage security is concerned, is the same substantially in both cases, while the reorganization places the whole enterprise in the hands of those immediately interested in its successful prosecution. The bare fact that some of the trustees were holders of bonds secured by their trust is not sufficient, of itself, to make them incompetent to consent to such a decree as was rendered. From the whole case it is apparent that from the beginning their conduct was governed by the wishes of a very large majority of bondholders. If there was anywhere the slightest evidence of fraud or unfaithfulness, their conduct would be carefully scrutinized. The acts of trustees, when personally interested, should always be open and fair. Slight circumstances will sometimes be considered sufficient proof of wrong to justify setting aside what has been done; but when everything is honestly done, and the courts are satisfied that the rights of others have not been prejudiced to the advantage of the trustee, the simple fact of interest is not sufficient to justify the withholding of a confirmation of his acts."

In Hayden v. Directory Co., 42 Fed. 875, the stockholders of a corporation which was financially embarrassed resolved to wind up its business, and authorized the trustees to sell the property to pay debts. At a sale duly advertised, of which the stockholders had notice, the property was struck off to the secretary, who bought it in the interest of a combination of stockholders, formed in good faith, for their own protection. The property was sold for all it was worth, and the purchase by the secretary was approved by all of the stockholders except the complainant. The court held, it not being shown that the action of the majority was

oppressive or in bad faith, that the sale should not be set aside, and the injunction asked for was refused. In the course of the opinion, Wallace, J., said:

"The real question in the case is whether the majority stockholders were acting in good faith towards the complainant as a minority stockholder in authorizing the sale of the property, and its purchase by the new corporation. The right of the majority stockholders of a corporation established for manufacturing or trading purposes to wind up its affairs and dispose of its assets, even against the objections of the minority stockholders, whenever it appears that the business can be no longer advantageously carried on, is well recognized."

In Hotel Co. v. Wade, 97 U. S. 22, the court said:

"Differences of opinion existed among the stockholders as to the best way of raising the money, and prior discussions had not tended to quiet the dissensions; but the stockholders at the meeting referred to decided to adopt the proposition which was carried into effect. Beyond doubt, some of the conditions of the proposition were somewhat peculiar; but the proofs show that it was openly submitted to the stockholders, and that they adopted it by a majority of their votes; that the bonds were subsequently issued, and that they were voluntarily secured by the mortgage or trust deed set forth in the record. * * * Examined in the light of the circumstances attending the transaction, as the case should be, the court is of the opinion that the evidence fails to support the proposition that the bonds and mortgage are invalid because the directors became the holders of the bonds and advanced the money. Transactions of the kind have often occurred; and it has never been held that the arrangement was invalid, where it appeared that the stockholders were properly consulted, and sanctioned what was done, either by their votes or silence."

In Harts v. Brown, 77 Ill. 226, the court held that where a company is insolvent, and has no means to discharge its debts, and the directors give all the stockholders an opportunity of making advances to relieve the company of its embarrassment, which they refuse to embrace, the directors will have the right to purchase the indebtedness, and acquire title to the corporate property, by enforcing its sale under a deed of trust given to secure such indebtedness, and the other stockholders will have no right to complain. Among other things, the court said:

"The stockholders had been called together, and they were urged to make advances in proportion to the stock they severally held, and thus relieve the company and preserve its existence; but this they refused to do, and, as it could not be preserved and must come to an end by a sale under the power in the trust deed, no reason is perceived why appellants might not become the purchasers at the sale. They were under no moral or legal obligation to advance their own means, pay the debt, and preserve the property for the use of the other shareholders, who had declined to join in making pro rata advances to relieve it from debt. Appellants seem to have acted fairly, as they purchased at a sum sufficient to pay all the debts of the company. They chose to do so rather than make an effort to obtain all the property for the debts secured by the trust deed and the certificate of purchase. On the contrary, they gave many thousand dollars more, that honest creditors might be fairly paid, and the company wrong no one. This does not have the appearance of fraud. Appellants had faith that the enterprise could be carried out with success, and that they could thus save the means they had advanced; but appellees, by the course they adopted, manifested an entire want of confidence in its ultimate success. They were even offered the opportunity to come in for a considerable period afterwards, and share in the new enterprise, by advancing a ratable portion of the means, but they all declined;

but, when success was achieved, they then saw the advantages they had lost, and then sought to set aside the sale, and have the property restored to the old company, and thus reap the benefits arising from the enterprise and means advanced by others. To do so, they should show fraud or a want of power to make the sale or the purchase by appellants, neither of which has been done."

See, also, Leavenworth Co. Com'rs v. Chicago, R. I. & P. R. Co., 134 U. S. 688, 707, 10 Sup. Ct. 708; Osborne's Adm'x v. Monks (Ky.) 21 S. W. 101; Kitchen v. Railroad Co., 69 Mo. 224; Oil Co. v. Marbury, supra; Appeal of Shaaber (Pa. Sup.) 17 Atl. 209; Spering's Appeal, 71 Pa. St. 20; Bristol v. Scranton, 57 Fed. 70; Barr v. Plate-Glass Co., 6 C. C. A. 260, 57 Fed. 86, 97.

Complainants' bill should be dismissed, and judgment entered in favor of respondents for their costs. It is so ordered.

MARION PHOSPHATE CO. v. CUMMER et al.

(Circuit Court of Appeals, Fifth Circuit. December 5, 1893.)

No. 177.

1. APPEAL—REQUISITES OF BILL OF EXCEPTIONS.
   A record containing the evidence in a case tried by the court without a jury, the findings, and requests and refusals to find, with occasional entries stating that plaintiff excepts, but not in form stating the ruling, the exception, or the grounds of either, although certified as a bill of exceptions, is not sufficient to permit a review of rulings on admission or rejection of evidence or findings or refusals to find.
2. PLEADING—VERIFICATION.
   Verification of a plea, in an action against partners and a corporation, by one shown by the record to be, individually and as a member of the partnership and agent of the corporation, the principal and active defendant, is a sufficient compliance with the requirements of Rev. St. Fla. § 1062, and a rule of court that pleas shall be sworn to either by the defendant or his agent or attorney.
3. SAME—LEAVE TO FILE SPECIAL PLEAS.
   An order overruling a motion to strike special pleas may be taken as leave granted to file them, if leave is necessary.
4. CIRCUIT COURT OF APPEALS—APPELLATE JURISDICTION.
   Objections to pleas that an exhibit was made part thereof by reference, and that no sufficient bill of particulars was attached, are not reviewable by the circuit court of appeals.
5. PLEADING—SET-OFF—DEMURRER.
   Under Rev. St. Fla. § 1040, which provides that no pleadings shall be deemed insufficient for any defect which heretofore could only be objected to by special demurrer, an objection that pleas of set-off of unliquidated demands arising out of contract, which sections 1069, 1075, and 1058 permit to be general, as in common counts in assumpsit, are not sufficiently specific, cannot be taken by demurrer; the remedy is by motion for more detailed bills of particulars.
6. TRIAL BY THE COURT—FINDINGS OF FACT.
   Upon issues presenting the questions whether plaintiff and defendants were in default on a contract between them, each claiming a large recovery from the other, findings that defendants had substantially complied with the terms of their contract; that, so far as there had not been full compliance, it was the fault of plaintiff; and that a specific amount is due from plaintiff to defendants under the terms of the contract,—are sufficient to sustain a judgment for defendants for such amount.