

plaintiffs' duty, before purchasing the bonds, to examine the records, and ascertain whether the mayor and council had ever authorized their issuance, and, failing to do so, they will be charged with notice of the facts which they could have ascertained by such an examination. Neither *Board v. De Kay*, 148 U. S. 591, 13 Sup. Ct. 706, nor *City of Alma v. Guaranty Sav. Bank*, 60 Fed. 203, have any application to this case, as the only question involved there was whether a resolution of the mayor or council submitting the question of issuing bonds at an election was sufficient. In my opinion, the act of the mayor in issuing these bonds was wholly without authority, and they are therefore void. As this disposes of the case, it is unnecessary to pass on the other issues raised by the defense. There must be judgment for the defendant.

COTTON v. DACEY et al.

(Circuit Court, D. Kansas, Second Division. May 16, 1894.)

1. PRINCIPAL AND AGENT—FRAUD—MORTGAGE SUBROGATION.

One who intrusts money to an agent to be invested in land, and whose agent fraudulently used the money to pay off a mortgage on certain land belonging to a corporation organized by the agent, may, on discovering the fraud, be subrogated to the rights of the mortgagee.

2. LIS PENDENS—ATTACHMENT.

One who attaches land after a bill to establish an equitable interest in the land has been filed, but before service of process in such suit has been made on him, and who does not obtain judgment in his action until such service has been made, does not acquire, by his action, any rights in the land superior to the equities set up in the bill.

3. SAME—AMENDMENT.

The fact that, after a sale of the land under the attachment judgment, a demurrer to the bill is sustained, with leave to amend, does not subordinate the equities set up in the bill to the lien of such judgment, where the bill is subsequently amended, since the amendment relates back to the institution of the suit.

In Equity.

Suit by Henry E. Cotton against W. G. Dacey and others.

Edwin White Moore, for complainant.

Bentley & Hatfield and Ira E. Lloyd, for defendants.

WILLIAMS, District Judge. It appears from the pleadings and testimony in this case that one of the defendants, Phipps, went from the state of Kansas east, for the purpose of procuring money to be invested in real estate in the vicinity of Ellsworth and Wichita, Kan., representing that said lands were exceedingly valuable, could be platted into town lots and blocks, and would return a large profit upon the investment to be made; that he, or the parties with whom he was connected, had options on said lands; that he obtained from the plaintiff and one Babcock the sum of \$7,750, to be invested in such lands, representing to them that other citizens of adjacent cities were about to make similar investments, and that, with the money thus furnished, the plaintiff and Babcock and two

other persons mentioned by him were each to have a fourth interest in the lands, and that parties in Kansas were to have the other fourth interest. Phipps returned to Kansas with the money, and instead of investing it in lands, as contemplated by the agreement with the plaintiff and Babcock, he entered into an arrangement with the Daceys, who are defendants herein, and inaugurated a joint-stock company or corporation known as the Ellsworth Midland Investment Company, the capital stock of which was \$200,000, Phipps receiving 300 shares, representing \$30,000. No land whatever was purchased by Phipps with the money thus intrusted to him by the plaintiff and Babcock, but the Daceys had, prior to that time, purchased 272½ acres of land, paying therefor in cash \$5,250, and executing a mortgage upon it for the sum of \$8,000. This, by the arrangement between Phipps and the Daceys, constituted the capital stock of the Ellsworth Midland Investment Company, of which Phipps had, as shown, 300 shares, and the Daceys and their coadjutors the remaining 170 shares. The money of the plaintiff was used to pay off the mortgages upon a portion of the lands to which the Daceys have title, unless the same has been merged into the Ellsworth Midland Investment Company. The plaintiff repudiates the transaction between Phipps and the Daceys, and charges that it was a conspiracy from the beginning between Phipps and the Daceys to swindle him out of his money, and he asks that he be subrogated to the rights of the mortgagees in the lands upon which the mortgage existed which his money paid off, and asks that the lands be now decreed to be sold, to reimburse him for the money out of which he has been wrongfully deprived.

I think a statement of the case is sufficient to show, without further evidence, that there was collusion between Phipps and the Daceys in the entire transaction, and that a fraud has been perpetrated by them upon the plaintiff in this action, and that, as between the plaintiff and the Daceys and Phipps, they are entitled to the relief asked for. I am aware that there are authorities without number that, where a volunteer pays off a mortgage, he cannot be subrogated to the rights of the mortgagees, but where a fraud has been practiced upon him, and his money fraudulently used by connivance with his agent, or the one intrusted by him with his money, and the mortgagor, then a court of equity certainly should grant him the relief asked for, to be subrogated to the rights of the original mortgagee. Phipps had not a right to do anything with the money intrusted to him but to invest it in lands. That was the contract; that was the understanding; and no hint was conveyed to the plaintiff that his money thus obtained from him was to be thrust into the maw of a Kansas corporation organized as this was, he to receive such an insignificant share of the stock as to render him entirely helpless, and without any voice in the management of the corporation or company. When we consider the original cost of the lands,—\$13,000,—and that the plaintiff furnished, in order to pay off the mortgages upon it, the sum of \$7,750, it would seem that anything like a fair consideration of his rights would have induced the parties forming the Ellsworth Midland In-

vestment Company to have given him shares of the stock commensurate with the money that was invested. But, though he furnished more than half of the money, he received less than one-sixth of the stock, and that, too, under a distinct contract that his money was to be invested in lands. In view of the fraud thus apparently perpetrated upon the plaintiff, so far as the rights of the Daceys and Phipps are concerned, he should be and is clearly entitled to be subrogated to the rights of the original mortgagee.

But it is contended that one Evans, who is made a defendant herein, has rights superior to the rights of the plaintiff, because he has obtained, in the district court of the county where the land was situated, a judgment against the Daceys, the original owners of the land, and by virtue of said judgment and attachment proceedings his rights are superior to the rights of the plaintiff herein. His claim is based upon a fee or commission to be paid him for the purchase of the lands in controversy, and his original claim was in the sum of \$1,472.15 for commissions, amounting to \$5 per acre for the purchase of the land. The court may say in passing that such commissions are at least quite liberal, and seem to be acquiesced in by the Daceys, whether they were contracted for or not. The suit of Evans was instituted in said court after the filing of the original petition in this suit in the circuit court of the United States for the district of Kansas, second division. But it is claimed that, because no subpoena was issued until after the proceedings by attachment were instituted under the Evans suit, and because he was diligent and pursued his suit to judgment, and a sale was had of the property, his rights are superior to the rights of the plaintiff in this action; and the court is referred to numerous authorities in the state of Kansas which counsel insist shall regulate the course of procedure in this court. While due deference is paid to the decisions of the state courts of the state in which the courts of the United States are held in common-law proceedings, yet the courts of the United States refuse to be governed in equity proceedings by any statute law or the decision of any state court thereunder. This admits of no question, and the inquiry here is, was the institution of this suit in the circuit court of the United States sufficient notice to Evans, as provided for by the rules of said courts, or to all parties claiming any interest in the lands in this action? It is true, as contended by counsel for Evans, that a suit is not so pending as to operate as constructive notice until the process has been served or publication made. *Games v. Stiles*, 14 Pet. 326. And the writ in this case was not served until after Evans had instituted attachment proceedings against the land, although the bill had been filed February 5, 1892, and service had on the defendants other than Evans on July 5, 1892, and on C. J. & J. M. Evans on October 6, 1892, which was prior to final judgment in the district court of the state in favor of Evans. So the suit in this court was constructive notice to all the parties who now set up any equities in the lands sought to be subjected to the claim of plaintiff in this case, prior to the rendition of the judgment under which they purchased; and they cannot be held as innocent purchasers, for, up to

the time of the service of process in this case, they had done nothing by which they were within the definition of an innocent purchaser, which is that he is one who, at the time of his purchase, advances some new consideration, surrenders some security, or does some other act which leaves him in a worse position should his purchase be set aside. Perry, Trusts, par. 239. The attachment proceedings instituted by Evans did not affect the rights of plaintiff, or render his rights any greater as against the plaintiff. It must be borne in mind that the rights of the plaintiff grew out of the fact that, by the fraud and conspiracy between Phipps and Dacey, by which the money of plaintiff was used to redeem the lands in controversy from the mortgages, a trust is established in favor of the plaintiff in the lands which a court of equity will favor and enforce. This was the condition when Evans' attachment proceedings were instituted, and they did not terminate the trust, nor deprive him of the benefits or protection accruing to him thereunder. The equities of the plaintiff are such as to appeal strongly to the conscience of a chancellor, and I am clearly of the opinion that he is entitled to the relief prayed for as against Evans and those claiming to be innocent purchasers of the lands in controversy. But much stress is laid on the fact that, after the sale of the lands under Evans' judgment, a demurrer was sustained to the bill filed by the plaintiff herein, with leave to amend, and that for that reason the claim of Evans is paramount and superior. If the bill in this case was sufficiently amended, after demurrer and leave to amend was given, to afford the plaintiff the relief he asks for, the amendment relates back to the institution of the suit, and neither Evans nor those holding under him can take anything by this objection or this contention. I have deemed it unnecessary to enter into any discussion as to the validity of the attachment proceedings instituted by Evans, because, with my views of the case, the plaintiff is entitled to the relief asked for, regardless of the invalidity of such proceedings. Let decree be entered as prayed for in the original and amended complaint.

STEELE et al. v. CRIDER et al.

(Circuit Court, D. Kansas, Second Division. May 16, 1894.)

APPEAL—ACTION ON BOND.

An appeal bond which is given in a cause in which no appeal lies, and which does not operate to stay execution, creates no liability.

Action by Dudley M. Steele and J. W. Walker against James H. Crider, John A. Cragen, Edgar Henderson, William S. Grosvenor, and C. A. Magill upon an appeal bond.

Rossington, Smith & Dallas, for plaintiffs.
J. D. Houston, for defendants.

WILLIAMS, District Judge. It is shown by the petition and answer in this case that the defendant James H. Crider, as prin-

cipal, and the other defendants as sureties, executed for the benefit of the plaintiffs, in one of the courts of the Indian Territory, held at Muskogee, an interpleaders' bond, conditioned according to law; that, upon the trial of his interplea in said court, a judgment was rendered against him, and he—desiring, as is stated in the petition, to appeal to the supreme court of the United States from said judgment—executed in said court an appeal bond, with the defendants herein as sureties upon said bond. The bond, omitting the captions, is as follows:

"That we, James H. Crider, as principal, and John A. Cragen, Edgar Henderson, Wm. S. Grosvenor, and C. A. Magill, as sureties, are held and firmly bound unto Steele & Walker, a partnership composed of Dudley M. Steele and J. W. Walker, plaintiffs herein, in the full and just sum of four thousand dollars, to be paid to the said firm of Steele & Walker, their heirs or assigns, or their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this 20th day of May, in the year of our Lord 1890. Whereas, lately, at a term of the United States court for the Indian Territory, held at Muskogee, in the Indian Territory, in a suit depending in said court between Steele & Walker, partners as aforesaid, and Mackey & Company, a firm composed of T. E. Mackey and one Thomas Jones, wherein James J. Crider was an interpleader for attached property, a judgment was rendered against the said J. H. Crider, interpleader for attached property, and in favor of said Steele & Walker, and the said J. H. Crider having obtained leave to appeal, and filed a copy thereof in the clerk's office of the said court, to reverse the said judgment in the aforesaid suit, and a citation directed to the said Steele & Walker, citing and admonishing them to be and appear at the supreme court of the United States to be holden at Washington on the second Monday of October next: Now, the condition of the above obligation is such that if the said J. H. Crider, interpleader in said cause, shall prosecute such appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and effect." [Signed] ———.

No supersedeas was issued or allowed after the execution of said bond, and the said Crider failed to prosecute his appeal. The plaintiffs thereupon filed a transcript of the said judgment in the supreme court of the United States, and thereupon had said appeal dismissed.

The question for consideration is whether said bond has any force or effect whatever, or whether it can afford any ground for an action in this or any other court. Section 691, Rev. St. U. S., is as follows:

"All final judgments of any circuit court, or of any district court acting as a circuit court, in civil actions brought there by original process or removed there from courts of the several states, and all final judgments of any circuit court in civil actions removed there from any district court by appeal or writ of error, where the matter in dispute exclusive of costs exceeds the sum or value of two thousand dollars, may be re-examined and reversed or affirmed in the supreme court upon a writ of error."

Section 692 of said Revised Statutes reads as follows:

"An appeal shall be allowed to the supreme court from all final decrees of any circuit court or of any district court acting as a circuit court in cases of equity and admiralty and maritime jurisdiction, where the matter in dispute exclusive of costs exceeds the sum or value of two thousand dollars, and the supreme court is required to receive, hear and determine such appeals."

Section 42 of the Supplement to the Revised Statutes (page 738) reads as follows:

"Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the supreme court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, except as otherwise provided in this act."

So it seems that there was no such thing as an appeal provided for by law from the judgment of the court in the Indian Territory in the case in which this bond was executed, and the inquiry then is whether this bond so executed has any force and effect whatever. In *Saltmarsh v. Tuthill*, 12 How. 387, where a bond on appeal was taken in a common-law case, instead of writ of error, the supreme court said:

"The appeal did not remove the case, and the writ of error was sued out too late to stay execution. It is immaterial whether it was a mistake of the party, or of the court."

In *Bank v. Mixer*, 124 U. S. 721, 8 Sup. Ct. 718, the court said:

"No attachment can issue from the circuit court of the United States in an action against a national bank before final judgment in the cause, and if such an attachment is made on mesne process, and it is then dissolved by means of a bond conditioned to plaintiff to pay the judgment which he may recover, given in accordance with the provisions of the law of the state in which the action is brought, the bond is void, and the sureties are under no liability to plaintiff."

No further citation of authorities is deemed necessary to show that this bond had no force and effect, except, possibly, as a bond to secure the costs; and if this bond had been filed within 60 days from the rendition of the judgment, and had actually operated in law as a supersedeas bond, then, under the rules of the supreme court, it would have been a bond to secure the costs. See *Hotel Co. v. Kountze*, 107 U. S. 378-388, 2 Sup. Ct. 911. But it appears that this bond was not filed within 60 days from the rendition of the judgment, for it seems that the appeal was allowed May 17, 1890, and the bond was not filed until August 31, 1890; and, inasmuch as there was no supersedeas allowed in this case, the plaintiffs in the case in the territorial court could have sued out an execution, and had their remedy against the maker and sureties of the interpleaders' bond, at any time. I am therefore of the opinion that, upon the pleadings in this case, the defendants are entitled to judgment, the finding of facts and law being as stated herein. Let judgment be entered accordingly.

WALTON et al. v. UNITED STATES.

(Circuit Court, W. D. Pennsylvania. April 17, 1894.)

No. 20.

1. INTEREST ON JUDGMENTS AGAINST UNITED STATES—ACTIONS OF TORT.

The provision made by section 10 of the act of March 3, 1887, for interest on judgments against the United States, does not apply to an