February 3d, that League did on February 5th, as he and Coryell and Hatch and Campbell all testify, say and repeat with persistence to Mr. Myers, until it was tacitly, at least, assented to by Mr. Myers, that he would not talk to Mr. Myers about the purchase and sale of these lands except on the understanding that the contract was at an end. It is not necessary to recapitulate the proof sufficiently shown in the statement of the case. In our opinion, the nature of the subject of this contract, the condition of the parties when it was made, the well-known purpose of each in making it, and all the subsequent conduct of each in reference to it, raised the necessary implication that time was an essential element in it; and we consider it is conclusively shown by the proof that all the parties are estopped from contending that either one did not agree that the contract was at an end on February 5, 1891. It follows that the appellant is not entitled to the relief he seeks by his bill. It, however, appears that J. C. League has $2,500 of the appellant's money, which should have been refunded to him at the determination of the contract. The right of the appellant to receive this money was acknowledged by League on the 27th of February, 1891. League has not made such a tender of this money as the appellant should be required to have accepted.

We conclude, therefore, that the circuit court should have decreed that League pay this money to appellant, with 6 per cent. per annum interest thereon from the 12th day of January, 1891, until paid, with all the costs of the suit, within 30 days from the date of the decree, otherwise execution therefor to issue against him, and that in all other respects the bill be dismissed. For the purpose of having the decree corrected as indicated, the decree is reversed, at the cost of the appellee J. C. League, and the case is remanded, with direction to the circuit court to enter the decree in accordance with our order.

Ordered, that the decree appealed from is reversed, and the case is remanded to the circuit court, with direction to enter a decree in favor of complainant against J. C. League for $2,500, with 6 per cent. per annum interest thereon from February 12, 1891, until paid, and all the costs of suit, with execution if payment is not so made in 30 days, and in all other respects dismissing the bill.

BILLING et al. v. GILMER.

(Circuit Court of Appeals, Fifth Circuit. June 5, 1894.)

No. 188.

RES JUDICATA—DECISION ON MERITS—AFFIRMANCE ON APPEAL.

Complainant brought suit in a state court in 1884 to redeem certain corporate stock, alleging a pledge thereof to defendant in 1871. The answer incorporated several demurrers, among them, that the demand was stale, and was barred by the statute of limitations, and alleged that defendant held the stock adversely after a transfer thereof to him in 1875. A material question in controversy was whether there was a continuing pledge of the stock at the time of such transfer and subse-

quently. On these pleadings, and testimony taken on the issues made by them, a final decree was made without a ruling on the demurrers, dismissing the bill, which was affirmed on appeal by the state supreme court. *Held*, that the decree was a bar to a similar suit thereafter brought in a federal court; and a contention that it was rendered on the demurrers, and was not a decision on the merits, could not be sustained, as the affirmance was necessarily on the merits, demurrers being waived on appeal, under the law of the state, where no ruling thereon was shown by the record.

Appeal from the Circuit Court of the United States for the Middle District of Alabama.

This was an application by James N. Gilmer, appellee, for a rehearing, after a decision reversing the decree appealed from (60 Fed. 332).

Thomas J. Semmes, H. C. Tompkins, and Alex. C. Troy, for appellants.

W. A. Gunter, E. H. Farrar, E. B. Kruttschnitt, and B. F. Jonas, and, on petition for rehearing, also J. D. Rouse and Wm. Grant, for appellee.

Before McCORMICK, Circuit Judge, and LOCKE and TOULMIN, District Judges.

TOULMIN, District Judge. Appellee, James N. Gilmer, in his amended bill filed in the state court avers in substance that the stock in question was transferred to Morris about the 30th of March, 1871, as security for the repayment of the purchase price thereof, which had been paid by Morris, and also as a basis of credit with Morris for money due him and to become due to him from time to time by Gilmer; that part of the purchase money had been paid to Morris, but that a balance was due on account of it; and also that he (Gilmer) was liable to Morris for other small sums of money, and that "said stock in the hands of Morris became and was a basis of a credit for money;" that he did not know what amount of money was due Morris, but that he was willing to pay, and admitted and offered to pay to him, whatever sum of money might be found due to him or to Josiah Morris & Co. for which the stock was held as security. The prayer was for a decree requiring Morris to transfer the stock to Gilmer, and to account for the dividends received since the transfer of the stock to him. Morris' answer to the amended bill denies that the complainant, Gilmer, was ever the owner of the stock, or that there was ever any agreement that it should become his property; that one F. M. Gilmer, the father of the complainant, subscribed for it, and had the certificate issued in the name of the complainant; that he (Morris) agreed with F. M. Gilmer to pay for the stock, and did pay for it, for the benefit of said F. M. Gilmer, who was at the time in an embarrassed pecuniary condition; that the certificate for the stock was not issued until November, 1871, and that immediately thereafter it was transferred to Morris, to be held by him for the repayment of the cost of the stock, and for the payment of a large indebtedness due him by said F. M. Gilmer; that this transaction was with said F. M. Gilmer, and the

complainant had nothing to do with it further than to make the transfer in accordance with the agreement between F. M. Gilmer and Morris. The answer avers that, if it were true that the complainant became or ever was the owner of the stock, as claimed, he, on the 30th day of March, 1875, caused and procured the certificate of stock, which had been issued in his name, to be surrendered to the company, and a new certificate to be issued in Morris' own name, and the stock transferred on the books of the company to his name. Morris denies that the issuance of the new certificate was done with the intent and for the purpose alleged in the bill, and he avers that the complainant had never set up any claim or right to the stock, or made any demand for its reconveyance to him, until the filing of the bill, which was on the 7th day of July, 1884. The answer, in effect, avers that Morris has had the title and possession of said stock, and has held the same adversely to complainant from March 30, 1875, and that in April, 1881, he sold it, as he had a right to do. There are incorporated in the answer several demurrers to the bill; among them, that the demand is stale, and that it is barred by the statute of limitations. On the issues thus made by the bill and answer testimony was taken by the respective parties. The cause was submitted for decree on the pleadings and testimony. The chancellor decreed that the complainant was not entitled to relief, and dismissed the bill without qualification. From this decree the complainant appealed to the supreme court of the state, and the decree of the chancellor was affirmed.

In our former opinion in this case (60 Fed. 332) the writer of the opinion inadvertently made a statement which did not clearly express what we meant to say. We there said that the particular cause of action or controversy in the former suit was ownership of certain stock, and a pledge of it in 1871, and a continuing pledge of it in 1875 and subsequent to that time. What we intended and should have said was that the particular cause of action in the former suit, as shown by the bill, was the ownership of certain stock, and a pledge of it in 1871, but a material question in controversy in that suit was whether there was a continuing pledge of it in 1875, and subsequent to that time. This question arose on the averments in the bill and in the answer, and was, in our opinion, a material one. In the bill it was alleged that "the said stock in the hands of said Morris became and was a basis of credit of money." It seems to us that this allegation was broad enough to cover daily transactions of recognition from the transfer in 1871 to the filing of the bill in 1884. In his answer, Morris denied that the stock was in his hands for any such purpose after the transfer in March, 1875. If Morris, on the 30th day of March, 1875, acquired the title and the possession of the stock, and held the same adversely to the complainant from that time until the filing of the bill, in July, 1884, then the complainant was not entitled to recover. The possession of the stock by Morris was permissive and subordinate in its inception, and, if it so continued, as alleged in the bill and claimed, the complainant was entitled to relief; but if that relation was dissolved by the act of the parties, or by the presumption founded on

the lapse of time, he was not entitled to relief. These issues were presented on the pleadings and testimony in the former suit. The statute of limitations runs only when the possession is adverse. Whether Morris' possession was adverse to the complainant was a question of fact. The transfer of the stock on the books, and the issuance of the certificate to him in March, 1875, was prima facie evidence of an absolute right and title in him. If liable to be rebutted or qualified by circumstances showing the purpose of the transfer, and a different holding by him, these circumstances must be shown. These were questions of fact arising on the pleadings and proof, and necessarily issues in the former suit. The same may be said as to the defense of staleness of the demand. Whether staleness of the demand is a defense must be determined by the varying facts of each particular case. Whether the complainant's demand was subject to this defense depended upon the facts and equities of the case. "Each case must necessarily depend upon its own circumstances, having regard not alone to the mere question of time, but also to the circumstances and relative situation of the parties, the nature of the property pledged, whether stationary or fluctuating in value, and other facts effecting the justness or equity of the right asserted." Gilmer v. Morris, 80 Ala. 78–83. How could the circumstances of the particular case be ascertained except from the proof? See Gilmer v. Morris, supra. In our former opinion we said that there was no demurrer to the bill in the state court for want of equity. What we meant to say was, there was no demurrer to the bill for want of equity, on the ground that there was no averment of recognition of a trust relation between the parties subsequent to March 30, 1875. This statement was induced by the argument of appellee's counsel, wherein it was contended that the supreme court of Alabama had decided the case before it on the demurrer to the bill that such recognition was not averred. We suggested that the counsel was mistaken. The supreme court made no such decision. We understood appellee's counsel in their argument before the court to concede that, if the state court did not decide the former suit on the demurrers to the bill, the plea of res adjudicata was well made, and appellants were entitled to a reversal in this case. The contention was that the decision of that court was on the demurrers, and that, therefore, said plea could not prevail, and the decree in this case should be affirmed. The demurrers do not appear by the record to have been ruled upon by the chancellor. He made no ruling or decision on them. The supreme court of Alabama affirmed the decree. That court has repeatedly decided that a demurrer will be presumed, on appeal, to have been waived, if the record does not show a ruling thereon. Corbitt v. Carroll, 50 Ala. 315; Daughdrill v. Helms, 53 Ala. 62; Harper v. Campbell (Ala.) 14 South. 650. In the last case cited there was a demurrer interposed to a bill, assigning, among other causes, the statute of frauds. The court said: "The chancellor made no ruling or decision on the demurrer, so far as appears from the record. In such case the presumption on appeal is that the demurrer was waived;" citing Corbitt v. Carroll and Daughdrill v.

Helms, supra. If the demurrers were presumed by the supreme court to have been waived, and that court affirmed the decree of the chancellor, it necessarily follows that it was affirmed on the merits of the case, and not on the decree sustaining the demurrers. The rulings of the chancellor and of the state supreme court were on the testimony, and, governed by that alone, they reached the conclusion that the complainant was not entitled to relief. See opinion of Stone, C. J., in Gilmer v. Morris, 80 Ala. 88. After careful consideration of this application and of the elaborate printed argument submitted in support of it, we are satisfied of the correctness of the conclusion reached by us and announced in our former opinion in this case. Rehearing refused.

THOMAS v. COFFIN et al.

(Circuit Court of Appeals, Fifth Circuit. June 12, 1894.)

No. 206.

USURY—EFFECT ON CONTRACT—NEW AGREEMENT NOT USURIOUS.

Parties to a loan, on charges of usury therein by the borrower, agreeing that the contracts on which it had been made should be purged from any usury, struck out every item claimed at the time to be usurious, and a final balance was determined, and a new contract entered into, providing for conveyance to the lenders of the securities for the loan, and a mutual general release was executed. *Held* that, under the law of New York, any usury in the contracts was purged by the mutual agreement of the parties; and if there was any mistake or omission the borrower should not be allowed, in equity, to set it up after permitting large additional expenditures by the lenders on the strength of the new contract, with no offer to refund any portion of the amount honestly due.

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

This was a suit by Coffin, Stanton, and Street, doing business under the name of Coffin & Stanton, against W. B. Thomas, to restrain him from interference with their ownership of certain stock and bonds. The circuit court rendered a decree for complainants. Defendant appealed.

W. B. Thomas, Gregory Smith, and H. T. Smith, for appellant.

Alex. C. King and Jack J. Spalding, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge. This suit was commenced in the court below by Coffin, Stanton, and Street, citizens of New York, and doing business under the name of Coffin & Stanton, alleging that they were the owners of 3,940 shares out of total capital stock of 4,000 shares of the capital stock of the Blue Ridge & Atlantic Railroad Company, a railroad situated in Georgia, and also owners of 300 first mortgage bonds of said road, and that one W. B. Thomas, a citizen of Georgia, who had been by them appointed manager of said road, had been endeavoring to perpetuate his control of

said road, and had repudiated the contract by which he had sold said shares and bonds to them, and was attempting to convey said shares and bonds to another party, and put a cloud upon the title of such shares and bonds, and praying that he be enjoined from interfering with their ownership thereof.

The history of the case is that the appellant, W. B. Thomas, being the owner of the above-stated shares of stock and bonds of the said railroad company, and the president of it, and desiring to borrow money for the purpose of paying off an existing lien and further improving the property, made application to appellees, Coffin & Stanton, of New York, in March, 1889, for a loan, to be secured by a deposit of the aforesaid shares of stock and bonds, and procured from them a loan of $30,000, purporting to be procured from the Loan & Investment Company a corporation of West Virginia, incorporated for the purpose of loaning money, and for which Coffin & Stanton were acting as brokers he giving a note therefor in the name of the said railroad company. For this loan he was to pay 6 per cent. interest, and Coffin & Stanton 5 per cent. commission for procuring it. The complainants subsequently advanced him $12,000 more and when the debt became due extended it for another year, they charging $15,000 commissions and he giving them in addition twenty-five $1,000 bonds of the railroad company, and a note for $75,000 to the Loan & Investment Company. Coffin, complainant, testifies that the commissions were charged and the bonds given at the urgent solicitation of the appellant, Thomas, who was desirous of giving appellees a portion of the profits that he was anticipating making from a sale of the property then in contemplation. The same stock and remaining 275 bonds were left as a security on the loan; and Thomas agreed if at any time more security was required he would furnish it. In December a demand was made for further security, and, after some discussion, he charged that the contracts were invalid, as tainted with usury, but stated, in effect, that he did not desire to take advantage of that defense, and was willing to do what was right. The result, as appears from a careful examination of all the testimony, was that after considerable negotiation it was agreed that the contracts should be purged from any usury, and a final one entered into. In accordance with this understanding, the amount of the indebtedness was reduced from something over $75,000 to about $63,000, purging out all that was at the time claimed to be usury and a final balance determined, the 25 bonds restored to the fund and an agreement in two parts, or two agreements, in writing, entered into the 17th of March, 1891, signed by Thomas and Coffin & Stanton. The first of these agreements, after reciting the negotiations which had been had between the parties stated that as it was the intention of the parties to provide by this agreement for the full compromise and adjustment of all manner of claims, disputes, and controversies growing out of these transactions, Thomas bargained, sold, and conveyed to Coffin & Stanton all the right, title, and interest that he held in the railroad company, and its property of any description, and in

the shares of stock and bonds relating thereto. He furthermore agreed to procure the resignations of the present board of directors, and the election of such persons as Coffin & Stanton might designate, and that Coffin & Stanton should pay Thomas $3,000 in equal monthly installments of $250 each, and that there should be good and sufficient deeds and instruments of conveyances executed by him, and releases from the Loan & Investment Company. It was further provided that Stanton should be elected president of the railroad company, and that Thomas should be appointed and designated as manager of the railroad for 12 months at a salary of $125 a month, to continue for the 12 months whether he should cease to act as manager or not; and that Thomas should have the power and authority to enter into contracts for sale of the shares of stock and the bonds of the road at any time within 12 months for any price not less than the amount of the indebtedness determined then to be due, together with interest and such expenditures as shall have been made upon the road in the meantime, he to have one-half of all that could be procured at such sale above such amount. He also had the power, as the attorney of Coffin & Stanton, to sell the road at public outcry at Atlanta, Ga., for any amount not less than the amount of the indebtedness due at any time within the year. If Coffin & Stanton could effect a sale during the year, they were to do so, but not to sell at a price less than approved by Thomas, and he was to have half of all that was received more than the debt and expenses. The next day—March 18th—they also entered into a further agreement, in which they mutually released and fully acquitted each other "of and from all and every manner of claim and demand of any kind whatsoever growing out of any transaction from the beginning of the world to the present time," saving inviolate the provisions of the contract of the previous day. The $3,000 was paid Thomas; also the $1,500 salary; but before the year had elapsed Thomas procured the commencement of a suit against the road in a court of the state of Georgia, and the appointment of a receiver to take possession of it, repudiated the agreement of March 17, 1891, and informed Coffin & Stanton that he had made an assignment for the benefit of his creditors, and included among the assets the Blue Ridge & Atlantic Railroad, but proposing to them that he would, for a further loan of $3,000, assign and convey to them in fee simple all his right, title, and interest to the railroad and the shares of stock and bonds. They refused his proposition for a further loan, and filed their bill for the purposes heretofore stated. Upon a hearing the court below found that the contract of March 17, 1891, was valid and binding, and free from any defect, and that Coffin & Stanton acquired thereunder the shares of stock and bonds; that they and Thomas executed mutual release from all manner of liability excepting of that agreement, and that Thomas had not presented a purchaser under that contract, nor tendered nor offered to pay them any sum of money for said stock and bonds; that Thomas had executed a deed of assignment to one A. H. Hodgson, and endeavored to convey thereby said stock and bonds, but that said deed of assignment

never took effect. And it was adjudged that the deed of assignment should be set aside, and decreed to be null and void, and that Thomas be enjoined from interfering with the possession or ownership of said stock and bonds or railroad, and that the contract of March 17, 1891, be decreed valid and binding, and that the receiver in charge, upon the payment of the costs and fees due, surrender the property to the president and directors of the railroad company. From this decree an appeal was taken, and six assignments of error stated, each one being based upon the allegation that the contract of March 17, 1891, was void by reason of usury. The only defense to the suit is the usury which is alleged to have entered into the final contract of settlement by which Thomas conveyed to Coffin & Stanton the stock and bonds of the railroad upon the consideration of the amounts then due, of the further payment of $3,000 in monthly installments, the salary of $1,500, and the right and privilege which he was given of finding a purchaser, or selling the road at public auction in Atlanta, within a year, and having one-half of the net proceeds after the payment of the road's indebtedness. To this defense the complainants urge first that Coffin & Stanton were private bankers, doing business in New York, and that the forfeiture of the loan did not attach to them, but, under chapter 409 of the Acts of 1882, the only penalty was the forfeiture of twice the amount of interest collected, upon suit brought within two years; second, that the first transaction was a loan made by one corporation to another corporation, and the commissions charged were allowable, and, if not, the railroad corporation could not avail itself of the plea of usury; and, thirdly, that any usury which might have existed in the business or accumulated loan of $75,000 or the conveyance of the 25 bonds was purged and eliminated by the mutual action of lender and borrower before or at the time of the final agreement, and it cannot now be urged.

The argument that the complainants were private bankers, and therefore exempt from the penalty of forfeiture of the debt, and only liable to a loss of twice the interest improperly collected, was not touched upon by the appellant, and was only contained in a brief of the appellees in reply to one of appellant. What reply may have been made to it, had an opportunity offered, we do not know; but the position taken therein seems applicable to this case, and conclusive thereof, if there had been no other defense to the charge of usury. The testimony shows that complainants were bankers, and the laws of New York appear to have extended to such individuals the immunity for taking more than the legal rate of interest, which at one time was only enjoyed by incorporated institutions, putting them upon an equality with the national banks in that respect. People v. Doty, 80 N. Y. 225; Perkins v. Smith, 116 N. Y. 441, 23 N. E. 21; Bank v. Dearing, 91 U. S. 29; Bank v. Johnson, 104 U. S. 271. But we do not consider it necessary to rely alone upon this position in order to determine the case. The language of the mutual release of the 18th of March, 1891, is sufficient to conclude any complaint or claim which either party had

against the other growing out of any previous transaction. The testimony shows that the charge of usury had been made and fully considered, and that the lender had declared himself ready to strike out any item of usury or usurious demand, and had stricken out all pointed out, or claimed to be such, by the party complaining. It is the recognized rule of law of New York that usurious contracts may be purged of usury by the mutual agreement of the parties, and, where such agreement has been made and accepted, the burden of proof is upon the party subsequently complaining, after mutual agreement and release and a lapse of time, to show fully and conclusively that there was usury intentionally remaining in the alleged indebtedness; and this we do not consider has been done. The first loan negotiated was in behalf of the railroad, its proceeds used to pay an existing lien, and the balance used for the benefit of the property, and the note signed by Thomas as president of the road. We do not find that it was a loan to Thomas, and not to the road, and therefore subject to the defense of usury. The contract and agreement of March 17, 1891, was a contract of conveyance for certain considerations, namely, the relinquishment of certain claims, the payment of $3,000, and a salary of $1,500, and a right to sell the property within a year, and receive one-half of the net profits. This certainly was not a usurious contract, and, if reliance can be placed upon the language and recitals of any written instruments, we can but consider that by the agreement witnessed by the certificate of release of May 18th any previous contract or agreement had been fully purged from any usury by a mutual understanding; and if, by any mistake or omission, such was not done, Thomas, in good conscience and equity, should not be permitted to set it up after permitting the expenditure of more than $20,000 additional upon the strength of such agreement, with no offer to refund any portion of the amount honestly due. The evidence shows that it was the intention and desire to eliminate any and all usury, and, if it was not done, it was an omission both on the part of complainant and the defendant in not pointing out the item now complained of.

We concur with the views and findings of the court below, and the decree appealed from is affirmed.

THOMAS v. CINCINNATI, N. O. & T. P. RY. CO.

(Circuit Court, S. D. Ohio, W. D. April 30, 1894.)

No. 4,598.

RECEIVERS—REDUCTION OF WAGES.

The court, in its discretion, will consider an application by railroad employés to rescind an order of the receiver reducing wages.

This was a motion for leave to file a petition in the suit of Samuel Thomas against the Cincinnati, New Orleans & Texas Pacific Railway Company.