

CITY OF SUPERIOR v. NORTON et al.¹

(Circuit Court of Appeals, Seventh Circuit. October 16, 1893.)

No. 107.

MUNICIPAL CORPORATIONS—EXECUTION OF CONTRACTS—CITY COMPTROLLER.

In that chapter of a city charter which defined the powers and duties of the city comptroller it was provided that he should "countersign all contracts made with the city, if the necessary funds shall have been provided to pay the liability that may be incurred against the city under such contracts, and no such contract shall be valid until so countersigned;" while the chapter defining the powers and duties of the board of public works declared that "all contracts shall be signed by the mayor and clerk, unless otherwise provided by resolution or ordinance, provided, however, that no contract shall be executed on the part of the city until the city comptroller shall have executed the same and made an indorsement thereon showing that sufficient funds are in the city treasury, or that provision has been made to pay the liability that may accrue under such contract." *Held*, that a contract of the city, imposing pecuniary obligation payable out of the revenue of the current year, not countersigned by the comptroller, was invalid, although the contract was made by another department of the city government than the board of public works.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

Suit by Ann E. Norton and William F. Norton, Jr., against the city of Superior for specific performance. Complainants obtained a decree. Defendant appeals.

The appellees filed their bill in the court below to enforce the specific performance of a contract for the conveyance of certain real estate situated in the city of Superior. In 1890 the board of park commissioners of that city adopted a plan for a boulevard and park system for the city, extending from St. Louis bay on the west, easterly and northeasterly to the Bay of Superior, a distance of several miles. In the central portion of the system it was designed to have a large park. The lands of the appellees which form the subject of contention here were situated within the territory embraced by the system, and were desired to be acquired by the city authorities for the purposes of the proposed park. The city, under the authority of its charter, instituted proceedings for the condemnation of the lands by the exercise of the right of eminent domain. Pending these proceedings, the parties negotiated for the purchase of the lands by the city, which resulted in a contract dated December 16, 1890, between the board of park commissioners of the one part and the appellees of the other part, by which the premises were agreed to be sold to the city for the price of \$33,083.50, payable upon the delivery of a good and valid warranty deed at any time on or before six months from that date, with interest at 7 per cent. per annum, which sum the city of Superior, by the board of park commissioners, agreed to pay. This contract was ratified and approved by resolution of the common council of the city on the 6th day of January, 1891.

The defendant interposed three pleas to the bill, in substance as follows: First. That previous to the contract the common council had not provided the money or funds to discharge the liability created by it, and that there was no money in the treasury at the time of the execution of the contract, nor at the time when the deeds were to be delivered, available to pay the liability and indebtedness thereby incurred; and that the common council did not, by the resolution approving the contract or otherwise, provide for the collection of a direct annual tax sufficient to pay the principal and interest of the

¹ Rehearing pending.

indebtedness as it fell due, and whereby, as it was alleged, said contract was illegal and void, and in violation of section 3 of article 11 of the constitution of the state of Wisconsin. The second plea states the same facts alleged in the first plea, with the additional allegation that by reason of the failure of the common council to make provision for the payment of the indebtedness stated in the contract it was incompetent and illegal for the comptroller of the city to countersign the contract, or to countersign any order drawn on the treasury to liquidate the indebtedness therein stated; and that the contract was not countersigned by the comptroller, and was therefore illegal and void. The third plea sets forth the provisions of the ordinances of the city creating and defining the powers and duties of the park commissioners; that thereunder it was their duty to file with the city clerk of the city, on or before the 1st of November in each year, a detailed statement of the amount of money that would, in their judgment, be needed during the ensuing year for the acquisition of parks; that it became the duty of the city clerk thereupon to place such estimate before the common council for its guidance in making the annual levy for taxes; that the park commissioners did not make or file any such estimate, and that no estimate for the purpose of acquiring lands for the park was made or placed before the said common council, or was before it or considered by it previous to the alleged contract, or at any time thereafter; and that during the month of November, 1890, there were no moneys or funds of any kind in the park fund of the city, and no money or funds in the general fund of the city, but that, on the contrary, there was a deficit in the general fund, and that such park fund and such general fund were the only funds from which the city could have legally drawn for money to pay for park lands in accordance with the provisions of the city charter. These pleas were severally overruled by the court, and the defendant ordered to plead to the merits, and, failing therein, the bill was taken pro confesso, and a decree entered against the city that upon the tender and delivery to it of a conveyance for the land it should pay to the complainant the sum of \$38,203.43, the purchase money of the premises, with interest, and that the complainants have execution therefor.

A. C. Burnett and P. H. Perkins, for appellant.

A. L. Sanborn (William F. Vilas, of counsel), for appellees.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

JENKINS, Circuit Judge (after stating the facts). The contention of the appellees that the pleas interposed by the defendant below (appellant here) are not before us for review is not well founded. The pleas were set down for argument by the appellees. They thereby confessed the facts stated, and submitted to the court the question of their sufficiency in law. *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534. But the pleas are not out of the case, because they were overruled. The appellant did not waive its right to stand upon the pleas by submitting to a decree pro confesso. This appeal authorizes a review of the ruling below upon the question whether the facts stated in the pleas, or in any of them, are availing to defeat a recovery upon, or the enforcement of, the contract set forth in the bill.

We will first consider the second plea, which goes to the question of the validity of the contract because it was not countersigned by the city comptroller. The question is dependent wholly upon the provisions of the charter of the city. We must look to that charter for the authority of the city to contract, and the mode in which that authority is to be exercised. The charter is

the source of power. It was said by Chief Justice Marshall in *Head v. Insurance Co.*, 2 Cranch, 127, 169:

"The act of incorporation is to them an enabling act. It gives them all the power they possess. It enables them to contract; and when it prescribed to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." Approved, *Merrill v. Monticello*, 138 U. S. 673, 687, 11 Sup. Ct. 441.

In construing charters of municipal corporations it is the policy of the law to require of such corporations a strict observance of their power. "Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public." *Minturn v. Larue*, 23 How. 435, 436; *The Binghamton Bridge*, 3 Wall. 51, 75; *Stein v. Water-Supply Co.*, 141 U. S. 67, 79, 11 Sup. Ct. 892. And see, also, *Hamilton Gas Light & Coke Co. v. Hamilton City*, 146 U. S. 258, 268, 13 Sup. Ct. 90. And while powers expressly granted or necessarily implied are not to be defeated or impaired by any overstrict construction, yet a power cannot be upheld unless it be clearly comprehended within the language of the act, or derived therefrom by necessary implication; and the restriction imposed by the charter upon the exercise of the power granted must be upheld in the interest of the public. So that every one dealing with a municipal corporation is bound at his peril to know the extent of its powers, and the manner provided for their execution.

We proceed, therefore, to the inquiry whether by the terms of the enabling act it was requisite to the validity of the contract by the city of Superior that it should be countersigned by its comptroller. The charter of the city is to be found in chapter 152 of volume 2 of the Laws of Wisconsin for the year 1889, published March 25, 1889. In chapter 5 of the act defining the powers and duties of the city comptroller we find the following provision, in section 27 of that chapter:

"He shall countersign all contracts made with the city if the necessary funds shall have been provided to pay the liability that may be incurred against the city under such contract, and no such contract shall be valid until so countersigned."

In chapter 10 of the act defining the powers and duties of the board of public works (section 71) occurs the following provision:

"All contracts shall be signed by the mayor and clerk unless otherwise provided by resolution or ordinance. Provided, however, that no contract shall be executed on the part of the city until the city comptroller shall have executed the same and made an endorsement thereon showing that sufficient funds are in the city treasury, or that provision has been made to pay the liability that may accrue under such contract."

Standing alone, and construed without reference to other legislation, the language of the provisions would seem to be plain and unambiguous, and not open to doubt. By a familiar rule of construction, the latter provision, being embodied in the chapter entitled "The Board of Public Works," has reference only to those contracts of which the board of public works had cognizance and control. The former provision is found in the chapter defining

the duties of the officers of the city, is comprehensive in its terms, and upon the face of it manifestly includes all contracts made by the city which entail upon the corporation a pecuniary liability. This view—which to us seems clear by the very language of the provision—is fortified by the manifest design of the legislature, apparent in all the provisions of the act, to inhibit the corporation from entering into any contract imposing pecuniary liability upon the city, unless and until the common council has provided the necessary means for the liquidation of such liability. The legislature sought to impose upon this municipal corporation a restriction with reference to the incurring of liability payable out of the income of the current year, similar to that imposed by the constitution of the state by amendment to section 3, art. 11, adopted November 3, 1874, upon municipal corporations with respect to their bonded indebtedness, which was that before or at the time of the incurring of such indebtedness the corporation should provide for the collection of a direct annual tax sufficient to pay the interest as it matures, and a sinking fund to discharge the principal when it should fall due. The charter evinces a consistent, harmonious, single spirit and policy governing and regulating the action of this municipal corporation, as in fact exists as to all municipal corporations of the state created under the general charter of cities, that in respect of all contracts whereby pecuniary liability is incurred, provision for payment should be made at or before the time of the execution of the contract. The considerations which led to the adoption of this policy are apparent in the history of the state prior to the adoption of the constitutional amendment. Municipal corporations had issued bonds without respect to the value of the taxable property within the limits of the corporation, and without provision for payment of the interest or principal of the bonds at maturity. Indebtedness for municipal improvements within the limits had been incurred without regard to the sufficiency of the revenue of the current year to meet the indebtedness, and without respect to the extent of the burden cast upon the taxpayer. The practice had become a scandalous evil. In many instances bankruptcy had resulted; the public debt of many corporations was compromised, and in one or two instances, where the load of indebtedness seemed too great to be met, or there was inability to compromise, repudiation was resorted to, to avoid the payment of just obligations. It was to prevent in the future this unwholesome state of affairs that the policy was adopted by constitutional amendment as to bonded indebtedness, and by statute as to indebtedness payable out of the revenue of the current year, that provision should be made for payment at or before the time of the incurring of the liability. The people of the state and their representatives in the legislature sought thus to avoid reckless extravagance, and the repudiation of just obligations. We find, therefore, throughout this act, the manifest design that there should be prior provision for the payment of every obligation incurred, and restrictive measures to insure such provision. The comptroller is named as the censor of the common council and of the several departments of the city

government. He is required, in anticipation of the annual tax levy by the common council, to lay before them a detailed statement of the expenses during the past, and an estimate of the expenses for the ensuing, fiscal year, and the income of the city for that year from sources other than taxation, so that the common council may have the necessary information to provide adequately for the pecuniary necessities of the city during the coming year. He is also to report monthly the condition of the several funds of the city and of all outstanding contracts and claims which may be payable out of each fund. He shall examine and countersign all city orders issued for the payment of obligations of the city before the same shall be valid. He shall not countersign such orders before the money is in the treasury to pay the same. Section 27.

We find further illustration and confirmation of this view in the provisions of chapter 15, treating of eminent domain. The common council of the city is authorized by section 165 to establish a board of park commissioners, and to prescribe their powers; and by section 167 is granted full power to legislate with reference to public parks, provided, however, that no park should be established at the expense of the city unless the proposition was first submitted to the vote of the electors at an annual city election, and adopted by a majority vote in its favor. By chapter 6, § 34, subd. 29, the common council is empowered to acquire by gift, grant, devise, donation, purchase, or condemnation lands for public parks, and by section 103, c. 13, the common council is vested with authority to issue bonds for the acquiring of public parks, subject to the constitutional provision that the amount thereof, together with all other indebtedness of the city, less sinking funds on hand, shall not exceed 5 per cent. of the assessed valuation of the city at the previous assessment. The city may also, under chapter 15, institute proceedings in court for the condemnation of lands necessary to be taken for a public park, or for other public use. Section 133 provides that within three months after any judgment of condemnation the common council shall cause an assessment of damages and of benefits to be made chargeable upon the property supposed to be benefited thereby. Such assessment is to be confirmed by the common council, or that body may by resolution abandon the condemnation proceedings. In case of neglect for three months to order such assessment of benefits and damages, or to confirm such an assessment, and make provision for paying the excess of damages over benefits within one year after the entry of judgment of condemnation, the condemnation proceedings shall be deemed to have been abandoned. Section 128 of that chapter provides that if the city shall not, within one year after the entry of a judgment of condemnation, cause the benefits and damages by reason of such condemnation to be assessed, and shall not have in the proper fund available for that purpose sufficient to pay the excess of damages over benefits, the condemnation proceedings shall be deemed to have been abandoned. The comptroller is required at the expiration of the year to furnish, upon demand, to the mayor or other proper officer of the city, a certificate showing whether

there was at the end of such year in any fund of the city available for that purpose a sum sufficient to pay such excess of damages over benefits. If it shall appear that there is in any fund a sufficient sum available for that purpose, then the city may take possession of the land condemned, and an order may issue for payment to the persons entitled thereto.

The ordinance defining the powers and duties of the park commissioners (section 195, Principal Ordinances) otherwise designated as "City Ordinance No. 39, § 3," provides that on or before the 1st day of November in each year the board of park commissioners shall file with the city clerk a detailed statement of the amount of money which will in their judgment be needed during the ensuing year for the acquisition, care, and improvement of parks; and this estimate the city clerk shall place before the common council at the time the common council shall receive the estimates of city officers as required by section 110 of the city charter, so that the common council may be guided thereby in making the annual levy of taxes. Section 110, therein referred to, requires estimates by the board of public works and board of education of the amount of money necessary for the ensuing fiscal year in their respective departments; by the city comptroller the statement of the several amounts required by the police department, fire department, and general fund, and for purpose of paying interest for the ensuing year on the public debt and 5 per cent. of the principal thereof. Thus it will be seen that full provision is made by law for the ascertainment in advance of all payments necessary to be made by the city during the ensuing fiscal year, and for the levy of taxes for payment thereof, and the design is apparent that no monetary obligation shall be incurred not so provided for; and as a further restriction upon the incurring of indebtedness the charter provides that all contracts involving pecuniary liability made by the city shall be invalid unless countersigned by the city comptroller. We observe nothing on the face of this statute which restricts the language to contracts of any particular department of the city government, or, as is claimed, to contracts made by the board of public works. The fact that we find in the charter treating of the board of public works an express provision prohibiting the execution of such contracts by the mayor and clerk until the city comptroller shall have certified thereon that sufficient funds are in the treasury, or that provision has been made to pay the liability that may accrue, does not restrict the language of the general provision that all contracts of the city shall be void unless countersigned by the comptroller. It is contended that the term "such contracts," used in the section defining the duties of the city comptroller, refers to the contracts of the board of public works. We conceive this contention to be unfounded. The term manifestly refers to the contracts previously mentioned, namely, such contracts as entail pecuniary responsibility upon the city; and we think it would be a strained construction of the statute otherwise to limit it. The term "all contracts" is comprehensive, and is not to be limited unless used in a connection which clearly shows that such limitation

was intended. It is not so used here, but is found stated in a general provision touching the powers and duties of the city comptroller with respect to all financial affairs of the city. Lord Coke said (*Bonham's Case*, 8 Coke, 117): "The best expositor of an act of parliament in all cases is acts of parliament themselves." We should be doing violence to the language employed to restrict the provision to contracts entered into by the board of public works.

This conclusion is further fortified by reference to chapter 124 of the Laws of 1891, being "An act to revise, consolidate and amend chapter 152 of the Laws of 1889, entitled 'An act to incorporate the city of Superior.'" The legislature, in section 27 of that act, treating of the powers and duties of the comptroller, provides as follows: "He shall examine and countersign all general and improvement bonds." There would seem to have been some question whether the original charter required the comptroller to execute such bonds, the improvement bonds being supposed by some to impose no liability upon the city, but to be chargeable only upon the property of individual taxpayers,—a claim subsequently proven unfounded (*Fowler v. City of Superior*, 85 Wis. 411, 54 N. W. 800), or to refer to bonds of the city payable at the expiration of a term of years. To make the matter certain, this provision was made by way of amendment, thus emphasizing our conclusion that all contracts of every kind involving pecuniary liability upon the city of Superior were designed and intended to be countersigned by the comptroller; otherwise this anomaly would result: that countersigning is essential with respect to the bonded indebtedness and with respect to the obligations contracted through the board of public works, and not necessary with respect to contracts made by the board of park commissioners or by the common council. This would be in derogation of the general spirit and policy of the law and of the manifest design of the legislature to restrict the power to contract when no provision had been made for the payment of the liability incurred, and in enforcement of such restriction to require as a condition to the validity of such contract that it be countersigned by the comptroller. In an able and ingenious argument, the construction contended for is sought to be enforced by construing this provision of the charter in the light of chapter 326 of the Laws of Wisconsin for the year 1889, approved April 8 and published April 12, 1889, being "An act dividing cities into classes, and providing for their incorporation and government." It is claimed that this act, though passed subsequently, formed a model for the charter of the city of Superior; and it is properly insisted that under a familiar principle of construction weight should be given to the construction which the legislature passing the same has put thereon, either in other parts of the same act or in other acts relating to the same subject-matter. *Milwaukee Co. v. Ehlers*, 45 Wis. 281, 295. It becomes necessary, therefore, to inquire whether, in the light of that act, the provisions of the act in question should receive a different construction from that which is required by the language of the act, and should be limited to contracts made by the department of public works. This general

charter of cities (chapter 326) by its terms does not affect any city then incorporated, unless it be adopted in the manner therein provided, and does not apply to the city of Superior. It is, however, properly invoked by counsel for consideration as an act in *pari materia* for the purposes of interpretation. A careful comparison of the two acts leaves no room for question that the charter of the city of Superior, although prior in passage and publication, was in fact almost literally, and with Chinese fidelity, largely copied from that part of the general charter of cities referring to cities of the second class. It is part of the history of the state that this chapter 326 was prepared by a commission appointed by the legislature of 1887, and reported to and adopted by the legislature of 1889. The act divided the cities of the state, or those which should adopt the provisions of the act, into three classes: First, those containing a population of 40,000 or over; second, those containing a population of 10,000 and over and under 40,000; third, those containing a population of 2,000 and over and under 10,000. The act provides, as to cities of the first and second class, for a comptroller and a board of public works. In cities of the first class the comptroller is not a member of that board. In cities of the second class he is a member *ex officio*. The charter of the city of Superior embraces those provisions of the general charter touching cities of the second class. With respect to the duties of a comptroller in cities of the first class, the act (section 44) provides:

"He shall examine all estimates of public work to be done made by the board of public works and all contracts made by them, and shall countersign the same if they are legal and if the necessary funds shall have been provided for the proposed work, and no contract shall be valid unless so countersigned."

The act provides in respect to the duties of comptrollers of cities of the second class (section 45):

"He shall countersign all contracts made with the city if the necessary funds shall have been provided to pay the liabilities that may have been incurred against the city under such contract, and no such contract shall be valid unless so countersigned."

In the chapter treating of the board of public works (chapter 11, § 93) it is provided as follows:

"All contracts shall be signed by the mayor and clerk unless otherwise provided by resolution or ordinance. Provided, however, that no contract shall be executed on the part of the city until the city comptroller shall have countersigned the same and made an endorsement thereon showing that sufficient funds are in the city treasury, or that provision has been made to pay the liability that would accrue under such contract."

It will be observed that the two provisions last quoted are identical with the provisions in section 27 and section 71, respectively, of the charter of the city of Superior. It is insisted that, as the same reasons and necessity supposedly existed to require the comptroller of cities of whichever class to countersign all contracts made by a city, and as the provision in respect of cities of the first class requires the comptroller to countersign only those contracts made by the board of public works, that the provision

in respect to cities of the second class that "no such contract shall be valid unless so countersigned" refers necessarily to the same class of contracts mentioned in the provision with respect to cities of the first class, and that such construction should be applied under the circumstances to the provision of the charter of the city of Superior. We cannot give such construction to these provisions without a straining and contortion of the language of the two provisions that would be without warrant or justification. The language of the two provisions is quite different. In cities of the first class the comptroller shall examine all estimates of work to be done made by the board of public works, and all contracts made by them. This provision is wanting in respect of cities of the second class, because, it is insisted, in the latter class the comptroller is a member of the board of public works, while in the former he is not. In the former case the language is, "He shall countersign the same if they are legal." This language is wanting in the provision respecting cities of the second class. "And if the necessary funds shall have been provided for the proposed work, and no contract shall be valid unless so countersigned." This clearly limits the provision to the contracts of the board of public works. But in case of cities of the second class the comptroller is to countersign "all contracts made with the city if the necessary funds shall have been provided to pay the liabilities that may have been incurred against the city under such contracts, and no such contract shall be valid unless so countersigned." The language here is broader and more comprehensive than in the former provision. The term "no such contract" has reference to and comprehends contracts which shall entail a liability upon the city, whether made by the board of public works or otherwise. We do not understand why the legislature made this distinction in respect to the duties of the comptroller in cities of the first class and in cities of the second class; why it required in the one case that all contracts should be countersigned, and in the other that only contracts made by the board of public works should be countersigned. But it is not our duty, because we cannot perceive the reason, to say that the legislature had no reason. The power was lodged with the legislature to make the distinction, and it is not within our province to give to the language employed a restricted meaning in the case of cities of the second class because the legislature failed to give the same power and impose the same restriction upon its exercise in the case of cities of the first class. We have no more right to restrict the language in the one case than we have to enlarge the scope and meaning of the language employed in the other case. We can only say, "Ita scripta est," and give to the language employed its natural meaning.

We are constrained to the conclusion that the provisions of the charter require that all contracts involving the outlay of money made by the city must be countersigned by its comptroller, and that, therefore, failing such countersigning, the contract in question was void. It is clear to us that the provisions of the law are explicit, and are not to be set aside by construction. If the con-

demnation proceedings had proceeded to judgment, the appellees would have been in no better plight than they are now. There had been no provision made for payment of the amount that might have been awarded as the value of their land, and there was no compulsion of law so to provide. The proceedings, therefore, by the very terms of the charter, would have fallen to the ground. Contracting with a municipal corporation, they were bound to know the extent of the powers granted, and the mode in which they should be exercised. They retain their land, and have lost nothing, unless it be in failing to receive a price which the city authorities unlawfully contracted that the city should pay. The conclusion to which we have arrived renders it unnecessary to consider the questions presented by the other pleas. The judgment will be reversed, and the cause remanded, with instructions to sustain the second plea and to dismiss the bill.

WACHUSETT NAT. BANK v. SIOUX CITY STOVE WORKS (HUBBARD et al., Interveners).

(Circuit Court, N. D. Iowa, W. D. October 13, 1894.)

1. CHATTEL MORTGAGE—ENFORCEMENT AGAINST LEVYING CREDITORS—ESTOPPEL.

Where a bank buys notes of the payee on the faith of a statement by the latter that the maker has a large capital, and is doing a prosperous business, when in fact such payee holds unrecorded chattel mortgages securing such notes and others on all the property of the makers for an aggregate amount greater than the actual value of the property, of which the bank has no knowledge, the mortgagee and its assignee for the benefit of creditors are estopped to set up such mortgages to defeat an attachment by the bank, levied after the mortgages are recorded.

2. SAME.

The facts that the other creditors of the mortgage represented by the assignee are holders of other notes secured by the mortgages, that when they purchased the notes they had no knowledge of such mortgages, and that they had no knowledge of, and did not consent to, the fraudulent acts of the mortgagee, will not enable the assignee to avoid such estoppel as against the bank, which does not consent to assume the position of a beneficiary of the mortgages.

This was a bill by the Wachusett National Bank, filed in proceedings for the appointment of a receiver of the Sioux City Stove Works, in which E. H. Hubbard, assignee for benefit of creditors of the Union Loan & Trust Company, was appointed such receiver, to settle priority of liens, and attacking the validity of certain chattel mortgages executed by the stove works to the trust company.

Wm. Milchrist and Swan, Lawrence & Swan, for complainant.
Wright, Hubbard & Bevington, for interveners.

SHIRAS, District Judge. The questions in dispute in this proceeding grow out of the following state of facts: The Daniel E. Parish Stove Company, in the year 1892, and prior thereto, was a corporation created under the laws of the state of Iowa, and was engaged in an extensive manufacturing business at Sioux City.

For the purpose of procuring money to be used in its business from time to time, it entered into a contract with the Union Loan & Trust Company, of Sioux City, under date of May 17, 1892, whereby it was agreed that the stove-works company should execute and deliver to the trust company its three several promissory notes,—one for \$75,000, one for \$25,000, and one for \$100,000,—all payable on demand, the first-named note to be secured by the deposit of first mortgage bonds, the second note to be secured by a mortgage upon its real estate, fixtures, and machinery, and the third note by a chattel mortgage upon all the personal property of the corporation, including after-acquired property and manufactured goods. In the contract it is declared that “the purpose of giving said notes and securing the same as aforesaid is to enable the said party of the first part to procure a line of credit with the said party of the second part, and to borrow money on said notes and securities within the limits of said two hundred thousand dollars;” it being further agreed “that said notes, and the securities put up to secure them, shall stand and remain in the hands of the said party of the second part to secure any advances now made or that may be made hereafter, during the continuance of this agreement, by the party of the second part to the party of the first part, and the said notes and securities so put up shall stand and remain as security for any renewal of said advancement, or change in said advancements, the purpose of said securities being to secure any debt within the amount of said notes that may be due and owing the said party of the second part from the party of the first part at any time during the continuance of this agreement by reason of any advancement that may be made by the party of the second part to the party of the first part and not repaid.” Subsequent to the date of this agreement the corporate name of the stove-works company was changed to that of the Sioux City Stove Works. In pursuance of the arrangement between the parties, the stove-works company, on the 17th day of May 1892, executed its three promissory notes for the sums of \$25,000, \$75,000, and \$100,000, delivered to the trust company \$75,000 of its first mortgage bonds, and executed and delivered to the trust company two mortgages covering substantially all the personal property of the corporation. Subsequently, on the 10th day of January, 1893, the Sioux City Stove Works executed its promissory note, payable on demand, to the order of the Union Loan & Trust Company, for the sum of \$175,000, and to secure the same executed a chattel mortgage upon its personal property, it being therein declared that: “The intention of this instrument being that this note and this mortgage shall stand as full security for any advances made by said Union Loan & Trust Company to said Sioux City Stove Works upon said note and mortgage in addition to the said sums of money advanced by said Union Loan & Trust Company to this company under the previous note and mortgage made by this company to the said Union Loan & Trust Company.” It appears that the trust company did not, from its own funds, advance or loan any sum to the stove-works company, but from time to time the latter company executed

its promissory notes, generally for the sum of \$5,000 each, payable to the order of the Union Loan & Trust Company, which notes the latter company would indorse and sell to banks located in different sections of the country, and the money thus obtained would be paid to the stove-works company. On the 25th day of April, 1893, the Union Loan & Trust Company, being insolvent, executed to E. H. Hubbard an assignment of its property for the benefit of its creditors, under the provisions of the statute of Iowa upon that subject. Upon entering upon the trust thus created, the assignee found that the several chattel mortgages executed by the stove-works company as hereinbefore stated had not been filed for record, and thereupon, on the said 25th day of April, 1893, the assignee caused the same to be filed and recorded in the proper office in Woodbury county, and at once took possession of the property therein described. It also appears that in February, 1893, the Wachusett National Bank of Fitchburg, Mass., purchased, through the Union Loan & Trust Company, three notes for \$5,000 each, executed by the Sioux City Stove Works, and coming due August 7, 8, and 9, 1893, these notes being payable to the order of the trust company, and being indorsed by it. On the 1st day of May, 1893, the Wachusett Bank brought an action at law in this court, aided by a writ of attachment, upon these notes against the maker thereof, and the writ of attachment was duly levied upon a large amount of the personal property of the stove-works company, which was then in the hands of E. H. Hubbard, assignee of the Union Loan & Trust Company. On the 2d day of June, 1893, a petition on behalf of creditors was filed in this court, asking the appointment of a receiver to take possession of the property of the stove works, and on the day named E. H. Hubbard was appointed receiver, and the property of the stove works was placed in his hands for the benefit of all interested, including the property levied on under the attachment process in favor of the Wachusett Bank. For the purpose of settling the rights of the parties, the Wachusett National Bank filed a petition in the proceedings for the appointment of a receiver, setting forth the lien claimed by it under the attachment process, and asking the court to direct the payment of the sums due it, as evidenced by the judgment obtained in its action at law on the notes issued by the stove-works company. Thereupon E. H. Hubbard, as assignee of the Union Loan & Trust Company, intervened in said proceedings, and filed a petition setting up the giving the notes and chattel mortgages to his assignor by the stove works, and averring that the lien created thereby was superior in law and equity to the lien of the Wachusett Bank in favor of the parties who had purchased the notes of the stove works indorsed by the trust company; and several of the banks who are owners of these notes have likewise intervened for the protection of their rights under the chattel mortgages executed to the Union Loan & Trust company. The question at issue is whether the lien created by the levy of the attachment in favor of the Wachusett Bank is superior at law or in equity to that created by the execution of the chattel mortgages.

It is well settled that the lien of a chattel mortgage as against third parties without actual knowledge of its existence dates from the time when it is filed for record in the proper county. *Allen v. McCalla*, 25 Iowa, 464; *Bacon v. Thompson*, 60 Iowa, 284, 14 N. W. 312. As it is admitted that the chattel mortgages had been duly filed for record in the proper county on the 25th day of April, 1893, whereas the writ of attachment in favor of the bank was not sued out until May 1, 1893, it follows that at law the lien of the mortgages antedates and is superior to that of the attachment. Are the equities of the situation such that the lien of the mortgages should be postponed and be held inferior to that of the attaching creditor? On behalf of the Wachusett Bank it is claimed that the trust company intentionally withheld the mortgages from record, concealed the fact of their existence, and misrepresented the business and financial standing of the stove works in order to induce the bank to purchase the notes of the stove works; and therefore the bank is entitled to estop the trust company, and all parties claiming under or through it, from asserting the priority of the lien under the mortgages. The evidence in the case clearly shows that the trust company did intentionally withhold the mortgages from record, and when negotiating the sale of the notes of the stove works to the bank it represented that "the stove works have a capital of \$200,000. Their plant is a very extensive one, covering over seven acres of ground, and the company is doing a prosperous business,"—these statements being contained in a letter dated January 27, 1893, and upon the faith thereof the bank bought the notes. Under these circumstances, if the question was simply between the bank and the Union Loan & Trust Company, it would be most inequitable and unjust to permit the trust company to assert and maintain the superiority of the lien, created by the mortgages to it, as against the equity existing in favor of the bank, growing out of the fact that the bank had been induced to purchase the notes of the stove works on the faith of the representation made by the trust company that it was doing a prosperous business, when in truth the trust company then held unrecorded mortgages covering the entire property of the stove works, and for an aggregate amount greater than the actual value of the property. *Blennerhassett v. Sherman*, 105 U. S. 100; *Goll v. Miller* (Iowa) 54 N. W. 443.

It is, however, earnestly contended by the assignee that the facts in this case are such as to take the case out from the operation of the general rule recognized in the cases just cited, it being claimed that in fact the Wachusett Bank is one of the beneficiaries under the mortgages, and therefore cannot object to the enforcement of the lien thereof for the common benefit of all; and, further, that the real beneficiaries are the other creditors who now hold the notes of the stove works, and that these parties were ignorant of the acts of the trust company, did not consent thereto, and should not be estopped thereby. In the agreed statement of facts it is admitted that the bank had no knowledge of the existence of the mortgages executed to the trust company until after they were

recorded, unless such knowledge is inferable from a statement contained in the letter of the trust company forwarding the notes to the bank, in which, following a description of the notes, it is said "All being amply secured by good collateral." It is entirely clear that the bank must have regarded this as a statement in regard to collaterals held by the trust company to protect it, in that it indorsed the paper, for the bank had already agreed to take the notes upon the faith of the statements contained in the previous letter of January 27, 1893, in which it is not stated that the stove-works notes were secured in any manner, and the bank never made any inquiry about any security, collateral or otherwise, but simply took the paper on the strength of the names of the maker and indorser; and therefore it cannot be held that the bank was charged with any knowledge of the actual existence of the chattel mortgages, or that it must be deemed to be one of the beneficiaries of the mortgage security, unless it has consented to assume that position. The mortgages, in terms, are given to secure only indebtedness due the trust company, and while, in equity, creditors may obtain the benefit thereof, they cannot be compelled to recognize the mortgages as existing for their benefit. If the mortgages had been executed to the trust company as a trustee for the common benefit of the Wachusett Bank and the other holders of the notes of the stove works, then there would be very great force in the argument that no one of the common beneficiaries could repudiate the instrument and estop his cobeneficiaries from asserting the validity of the lien created thereby, on the ground that the mortgages had not been duly recorded; but that is not the actual situation. The only parties to the mortgages are the stove works and the trust company, and the security created thereby is expressly declared to be for the protection of the trust company. The creditors now represented by the assignee of the trust company can claim an interest in the security only on the principle of subrogation. The trust company, by indorsing the paper of the stove works, has become liable thereon to the creditors, and therefore has the right to apply the securities to the payment of the stove-works notes. In equity the creditors who have the legal right to look to the assets of both the maker and indorser for payment are entitled to be subrogated to the rights of the trust company in regard to the securities held by it. *Sheld. Subr. § 154.* This is, however, an equity based upon the right of the surety, and to be worked out through it. *Hall v. Railroad Co., 13 Wall. 367; Railway Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566; Phoenix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 312, 6 Sup. Ct. 750, 1176.* In *Sheldon on Subrogation (section 157)* it is said:

"It is generally considered that, while the creditor has the right to be substituted to the place of the surety in a case in which the creditor has given indemnity to the surety, yet the creditor's right must be measured by that of the surety. * * * If the surety holds the property only by a conveyance which is fraudulent as against the general creditors of the principal debtor, the creditors' right can be no better than that of the surety, and will not prevail against the principal's general creditors."

In the agreed statement of facts it is stipulated that the holders of the notes of the stove-works company bought the same without actual knowledge of the existence of the unrecorded mortgages. They did not rely thereon in buying the notes, and therefore the only hold they now have upon the security created thereby is by claiming through and under the trust company, and in so doing they occupy no better position than that of the trust company; and as, against that company, the Wachusett Bank could undoubtedly plead and maintain an estoppel on the grounds already stated, it follows that such estoppel is also good against the assignee of the trust company and the creditors who now seek to avail themselves of the benefit of the mortgage securities.

It further appears that certain portions of the buildings owned by the stove-works company were boarded off and called warehouses A, B, and C, and therein, from time to time, were stored the manufactured products, and warehouse receipts were issued and delivered to the Union Loan & Trust Company; but the real object of so doing is not made clear, and I can see nothing therein that affects the lien, rights, or equities of the Wachusett Bank. It follows, therefore, that the bank is entitled to hold the attached property as against the claim of the assignee of the Union Loan & Trust Company, and as against the claims of the creditors of the stove works based upon the chattel mortgages executed to the trust company, and is entitled to an order directing the receiver to pay the amount due the bank in preference to the assignee and other creditors.

GORRELL v. HOME LIFE INS. CO. OF NEW YORK.
(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

No. 158.

1. **NEGOTIABLE INSTRUMENTS—PLEA—ULTRA VIRES—CORPORATIONS.**
In an action upon a note payable to an insurance company, a plea that the taking of such a note was an ultra vires act is not good.
2. **SAME—PAROL EVIDENCE TO VARY NOTE.**
Oral evidence is not admissible to show that a note absolute in its terms is payable only out of a particular fund.
3. **SAME—EVIDENCE—LETTER.**
A note by which the maker agreed to pay a certain sum of money, and to allow certain commissions accruing to him to be retained by the payee on account of the note, was sent by the payee to the maker for signature in a letter in which the payee wrote that the note, "as you will see, we have made payable from your commissions." *Held*, that the letter merely called attention to the provisions of the note, and did not make it payable only out of the commissions.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Assumpsit by the Home Life Insurance Company of New York against William F. Gorrell. Plaintiff obtained judgment. Defendant brings error.

The circuit court directed a verdict and gave judgment against the plaintiff in error for \$6,088.57. Besides the common counts in assumpsit, the