CINCINNATI, H. & D. R. CO. v. McKEEN.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1894.)

1. EXECUTED CONTRACT—ILLEGALITY—CANCELLATION.
Where the parties are in pari delicto, an executed contract will not, as a general rule, be set aside because of want of authority to make it.

2. SAME.
In May, 1887, complainant's board of directors authorized its vice president, I., to buy 20,000 shares of the stock of the T. & I. Railroad Co., and directed the sale of certain stock of the D. & M. Railroad Co., owned by complainant, to provide funds for the purchase, which stock was accordingly sold. June 1, 1887, I., "trustee," entered into an agreement with defendant, by which defendant agreed to sell to I. 11,160 shares of stock of the T. & I. Railroad Co. and 4,446 shares of stock of the T. & L. Railroad Co., to deliver 8,560 shares of T. & I. stock and all the T. & L. stock on June 4th, and the remainder of the T. & I. stock in 30 days, and acknowledged the receipt of $250,000 from I., who agreed on June 4th to pay $639,500, and execute his note for $669,150, with the stock purchased as collateral. On June 4th the stock was delivered by defendant, and the money paid and note and collateral delivered by I., and a receipt signed by both parties acknowledging the receipt of stock, money, and notes. Within the 30 days, defendant delivered the remainder of the stock. June 21st, a meeting of complainant's stockholders ratified the sale of the D. & M. stock, with knowledge of the purpose of the sale. I. having been displaced as an officer of complainant, the board of directors passed two resolutions referring to the T. & I. stock, and treating it as the property of complainant, and subsequently brought two suits, before the present one, seeking relief based upon complainant's ownership of that stock. Upon this bill, alleging that the funds paid to defendant by I. belonged to complainant, and seeking to set aside the contract of June 1st as ultra vires the complainant, to declare defendant a trustee for complainant of the $889,500 paid him by I., and to cancel the note given by I., *held*, that the contract had been fully executed; and both parties being equally chargeable with notice of its illegality, and no circumstances of oppression or fraud on defendant's part being established, it would not be set aside, nor would the note be canceled, the illegality of the contract being a complete defense at law, and the note being overdue at the commencement of this suit.

Appeal from the Circuit Court of the United States for the District of Indiana.

Suit by the Cincinnati, Hamilton & Dayton Railroad Company against William R. McKeen. Defendant obtained a decree. Complainant appeals.

This suit was brought to obtain a decree declaring the defendant, William R. McKeen, a trustee for the plaintiff, the Cincinnati, Hamilton & Dayton Railroad Company and its stockholders, in respect of certain moneys aggregating $889,500 received by him from one Henry S. Ives, and also cancelling, as against that corporation, an agreement in writing of June 1, 1887, signed by McKeen individually, and by Ives, "trustee," and a note of June 4, 1887, given to McKeen by Ives as "trustee," for $669,150, and payable six months after date.

The circuit court held by Judge Jenkins when district judge dismissed the bill for want of equity.

The case made by the pleadings and evidence is as follows:

Prior to May 30, 1887, Henry S. Ives, a vice president of the Cincinnati, Hamilton & Dayton Railroad Company, an Ohio corporation,

entered upon negotiations with the defendant, William R. McKeen, who at the time was the president and a stockholder of the Terre Haute & Indianapolis Railroad Company, an Indiana corporation, for the purchase of a majority of the shares of stock of the last-named company. McKeen did not at that time, as Ives knew, own a majority of such shares, although those held by him had been sufficient to give him practically the control of that company. He also owned 4,446 shares of stock in the Terre Haute & Logansport Railroad Company, an Indiana corporation then under lease to the Terre Haute & Indianapolis Railroad Company. During the negotiations between Ives and McKeen, the latter distinctly stated to the former that some modifications must be made in that lease before he would sell his stock in the Terre Haute & Indianapolis Railroad Company, unless Ives also purchased his stock in the Terre Haute & Logansport Railroad Company.

On the 30th day of May, 1887, the directors of the Cincinnati, Hamilton & Dayton Railroad Company, at a special meeting held in Cincinnati, adopted the following resolutions:

"Resolved, that Vice President Ives is authorized to purchase 20,000 shares (par value $50 each) of the total outstanding issue of the 39,762 shares of the Terre Haute and Indianapolis Railroad Company at a price not exceeding $100 per share, and that the same shall be submitted to the stockholders of this company for ratification at the annual meeting, June 21st proximo; and, to provide for the payment of the same, it is further

"Resolved, that it is expedient that the guarantied common stock of the Dayton and Michigan Railroad Company, now owned by and held in the treasury of this company, be sold for the benefit of this company, provided that not less than one million dollars par value thereof can be sold at the present time; and that, therefore, C. C. Waite, the vice president and general manager, and F. H. Short, the assistant secretary, of this company, be, and are hereby, authorized and directed to cause the same to be sold at thirty-five dollars per share, being seventy per cent. of the par value thereof, and that the proceeds of such sale or sales be deposited in the treasury of this company," etc.

Pursuant to these resolutions, 20,500 shares of the guarantied stock of the Dayton & Michigan Railroad Company, of the par value of $1,025,000, were sold May 31, 1887, and certificates therefor were duly delivered to the purchasers.

It may be here stated that at this time the Terre Haute & Indianapolis Railroad Company, whose road extended from Indianapolis to Terre Haute, operated, under lease, a railroad extending from Terre Haute to East St. Louis, known as the "Vandalia Line;" and the Cincinnati, Hamilton & Dayton Railroad Company, whose road extended from Cincinnati, by way of Hamilton, to Dayton, owned the entire capital stock of the Cincinnati, Hamilton & Indianapolis Railroad Company, whose road extended from Hamilton, Ohio, to Indianapolis, and was connected at Indianapolis with the Terre Haute & Indianapolis Railroad by way of the Belt and Union Railway tracks. The object, therefore, of the directors of the Cincinnati, Hamilton & Dayton Railroad Company in authorizing the purchase of 20,000 shares of the stock of the Terre Haute & Indianapolis Railroad Company, must have been to obtain the control of a continuous line of railroad from Cincinnati to St. Louis.

On the 1st day of June, 1887, Ives and McKeen, pursuant to previous arrangement, met in Terre Haute for the purpose of closing up the business, about which they had been negotiating for some weeks. Ives was attended on that occasion by Mr. Ramsey, who at the time held the position of general counsel of the Cincinnati, Hamilton & Dayton Railroad Company, by Mr. Waite, vice president and general manager of that company, and by Mr. Short, a director and the secretary and assistant treasurer of the same company. McKeen was attended by his counsel, Mr. Williams. At this meeting the written agreement which the bill prays may be canceled was signed by McKeen and by Ives, after having been examined by the respective counsel of the contracting parties. That agreement was as follows:

"This agreement, made and entered into this 1st day of June, A. D. 1887, by and between William R. McKeen, of the county of Vigo and state of Indiana, and Henry S. Ives, trustee,

"Witnesseth, that the said McKeen hereby agrees to sell, assign, and transfer unto said Ives 11,160 shares of the capital stock of the Terre Haute and Indianapolis Railroad Company and 4,446 shares of the capital stock of the Terre Haute and Logansport Railroad Company, both corporations of the state of Indiana, and to deliver the certificates for such stock to said Ives, as follows, to wit:

"Certificates for 8,560 shares of said Terre Haute and Indianapolis stock and for 4,446 shares of said Terre Haute and Logansport stock on June 4th, 1887, and the remainder of said Terre Haute and Indianapolis stock, to wit, 2,600 shares, on or before thirty days from this date.

"In consideration of the premises, the said Ives has this day paid to said McKeen $250,000, and hereby agrees to pay him, on June 4th, 1887, upon delivery of the certificates of stock aforesaid, the further sum of $639,500, and also at the time last aforesaid the said Ives will execute and deliver to said McKeen a good and sufficient note for $669,150, dated June 4th, 1887, due on or before January 1st, 1888, bearing 6 per cent. interest from date, and providing for the sale and purchase of the collaterals hereinafter mentioned, in the form and upon the terms usually adopted in cases of notes secured by collateral security. The said Ives further agrees that, as collateral security for the payment of the note above described, he will on said June 4th, 1887, assign and transfer unto said McKeen certificates for 8,560 shares of the capital stock of said Terre Haute and Indianapolis Railroad Company and 4,446 shares of the capital stock of the said Terre Haute and Logansport Railroad Company, and will also, from time to time, likewise transfer and assign to said McKeen, as such collateral, any or all of the certificates for the 2,600 shares of said Terre Haute and Indianapolis which said McKeen is to deliver to him within thirty days from this date, as hereinbefore provided.

"It is agreed that, if said McKeen does not deliver any or all of said certificates for 2,600 shares within thirty days from this date as aforesaid, then the said McKeen shall pay or refund to said Ives the sum of $200 for each and every share of said Terre Haute and Indianapolis stock which he may fail to deliver within said thirty days, as liquidated damages.

"Said Ives shall neither buy, directly or indirectly, nor offer to buy, any of said stock from any other party or parties until said thirty days shall have expired.

"William R. McKeen.
"Henry S. Ives, Trustee."

At the time this agreement was executed, McKeen, as Ives had been informed, did not own as much as 11,160 shares of the stock of the Terre Haute & Indianapolis Railroad Company, and it was contemplated that he would supply the deficiency by purchase from

others within the time limited by the contract; and the last clause was inserted in order to protect him against competition with Ives in the stock market.

In part execution of the agreement, Ives paid $250,000 to McKeen on the 1st day of June, 1887. The parties, attended by the same persons, with perhaps one exception, met again in Terre Haute on the 4th day of June, 1887, on which day Ives paid to McKeen the additional sum of $639,500, and executed and delivered to the latter the note for which the above agreement provided, and which the bill prayed may be canceled. That note reads:

"$669,150. Terre Haute, Ind., 4th June, 1887.

"Six months after date, or before, at my option, I promise to pay to the order of W. R. McKeen, at 25 Nassau street, New York, six hundred and sixty-nine thousand one hundred and fifty dollars, for value received, and without relief from valuation or appraisement laws, and with interest at six per cent. per annum after this date until paid; and I hereby pledge, as security to the payment of this note, eleven thousand one hundred and sixty shares Terre Haute and Indianapolis Railroad Company and 4,446 shares of Terre Haute and Logansport Railroad Company, with power hereby conferred upon the holder of this note to sell said stock, after default in the payment of this note, in such manner and at such times as he or they may deem proper, either at public or private sale, without notice. Said W. R. McKeen, or the then holder of this note, shall have the right to purchase said stock at such sale.

"Henry S. Ives, Trustee."

On the occasion of the execution of this note the contracting parties signed a paper in duplicate, of which the following is a copy:

"This is to certify that on this, the 4th day of June, 1887, pursuant to the contract of June 1st, 1887, by and between W. R. McKeen and Henry S. Ives, trustee, the said McKeen has assigned, transferred, and delivered to said Ives 8,560 shares of the capital stock of the Terre Haute and Indianapolis Railroad Company and 4,446 shares of the capital stock of the Terre Haute and Logansport Railroad Company, and has received from said Ives ($639,500) six hundred and thirty-nine thousand five hundred dollars, and also the above-named shares of stock as collateral security for the payment of the note for ($669,150) six hundred and sixty-nine thousand one hundred and fifty dollars provided for in said contract.

"Henry S. Ives, Trustee.
"Wm. R. McKeen."

Subsequently, June 13, 1887, McKeen transferred to Ives, trustee, one certificate calling for 2,594 other shares of the capital stock of the Terre Haute & Indianapolis Railroad Company; and 6 shares of stock in the same company were transferred to parties friendly to the Ives combination, in order that they might qualify as directors.

On the 4th day of June, 1887, after the execution and delivery of the note for $669,150, and in order that the Terre Haute & Indianapolis Railroad Company might pass under the control of Ives and his associates, the request was made that the directors, except McKeen, resign, and their places be supplied by others, to be named by the new owners of the stock. The old board was accordingly convened, when Mr. Ramsey, the legal adviser of Ives and his associates, prepared an additional by-law providing that the board of directors at any meeting might fill any vacancies occasioned in the board by death, resignation, or otherwise.