

claimed, been misapplied, and what right and justice required should be done touching the property in the hands of its officers. It was intended to enable the court, the plaintiff in the original action, and the claimant to reach the final and proper result by a process at once speedy, informal, and inexpensive." It does not seem to me, however, that it is material, except as to the appropriate means of bringing the parties before the court, whether this application be considered a cause petition, or a dependent suit, although I think it more regular and logical to treat the application as being made in the original action. This conclusion results, in part, from the fact that the court exercises control over the receiver, not through orders spread generally upon its minutes, but only by means of orders entered in the particular case in which the receiver is appointed. In whichever light, however, the application be viewed, the substantial requirement must exist, that the parties adversely interested to the petitioner shall be duly notified, and an opportunity to be heard thus afforded them. Foster states the requirement thus broadly:

"All petitions which are for matters not granted as of course must be served upon all parties interested in the matter prayed for in them. Service is made substantially in the same way, and at the same time before the hearing, as that of notices of motions." 1 Fost. Fed. Prac. § 202.

If, upon a hearing, after due notice to the parties interested, it shall be made to appear that the receiver of this court has taken possession of property which at the time was in the custody of another court of concurrent jurisdiction, I shall be prompt to recognize the rule of comity, and to act in accordance with its requirements. Whether the matters alleged in the petition are true, or, if true, whether they bring the case under the rule just adverted to, or, more specifically, whether an attachment of real estate gives to the officer attaching constructive possession thereof, or is merely the imposition of a lien thereon, are questions upon which no opinion is, at this time, expressed. All that I now decide is that the parties to the original suit are entitled to notice of this application before its hearing.

MORAN et al. v. HAGERMAN et al.

(Circuit Court, D. Nevada. August 13, 1895.)

No. 399.

FEDERAL COURTS—FOLLOWING STATE PRACTICE—INTEREST ON JUDGMENTS.

Since in Nevada, under Gen. St. § 4903, providing that when no different rate of interest is specified, interest shall be allowed on a judgment at a certain rate, it is held that, when the judgment is silent as to interest, no execution calling for payment of interest is authorized, and Rev. St. U. S. § 966, provides that interest shall be allowed on judgments rendered in federal courts only when allowed on judgments by the laws of the state in which the court was held, an execution issued on a judgment rendered in a federal court held in Nevada, which includes interest on the judgment, should be quashed.

This was a motion by Charles Moran and others, complainants in an action against J. C. Hagerman, administrator, and others, wherein

an affirmative judgment was given for defendants, to quash executions issued on that judgment. Motion granted.

Robert M. Clarke, for complainants.

W. E. F. Deal, for respondents.

HAWLEY, District Judge (orally). On the 6th day of September, 1892, a judgment was rendered in this court in favor of respondents A. A. Watkins, John Wright, administrator of the estate of James Webster, deceased, and J. C. Hagerman, administrator of the estate of Jerry Schooling, deceased, against complainants for separate sums of money, amounting in the aggregate to the principal sum of \$33,419.57, and interest thereon, amounting to \$18,239.87, making a total of principal and interest of \$51,659.44. The judgment does not, in terms, call for interest after the date of its rendition. It is silent upon that question. On the 3d day of November, 1892, the complainants took an appeal from said judgment to the supreme court of the United States, and gave a supersedeas bond for a stay of execution thereon. This appeal was dismissed by the supreme court for want of jurisdiction on the 22d day of January, 1894. *Moran v. Hagerman*, 151 U. S. 329, 14 Sup. Ct. 354. On the 3d day of November, 1892, complainants also took an appeal from said judgment to the United States circuit court of appeals for the Ninth circuit, and after a hearing of said case upon its merits, the court, on the 23d day of October, 1894, affirmed the judgment, with costs. *Id.*, 12 C. C. A. 239, 64 Fed. 499. On March 23, 1895, complainants paid the full amount of the principal and interest of the judgment, as expressed upon its face, and respondents gave a receipt therefor, which is indorsed upon the judgment, and reads as follows:

"Received of Charles Moran et al., complainants in the above-entitled cause, by the hand of E. Gest, the sum of fifty-one thousand seven hundred and forty-two dollars and seventy-nine cents (\$51,742.79), which is in full payment of the amount of said judgment, principal, and costs, but does not include interest on said judgment from the rendition thereof, to wit, September 6, 1892,—the question whether said judgment or any portion thereof bears interest being contested and reserved for decision by the court.

"W. E. F. Deal, Attorney for Defts., Judgment Creditors.

"Dated March 23, 1895."

On May 24, 1895, at the request of respondents, and evidently for the purpose of having the matter brought before the court, in pursuance of an agreement of the respective counsel, the clerk issued and delivered to the marshal three separate executions for interest due upon the principal sums named in the judgment from the date of the judgment up to the time of payment, making in all the total sum of \$5,952.02. Complainants now move to quash these executions upon the ground that they do not follow the judgment, and that such interest is not recoverable thereon.

Section 966 of the Revised Statutes of the United States provides that:

"Interest shall be allowed on all judgments in civil causes, recovered in a circuit or district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the state in which

such court is held, interest may be levied under process of execution on judgments recovered in the courts of such state; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such state."

What is the law of Nevada upon this subject? Section 4 of the territorial act in relation to interest provides:

"When there is no express contract, in writing, fixing a different rate of interest, interest shall be allowed at the rate of ten per cent. per annum, for all moneys after they become due on any bond, bill or promissory note, or other instrument of writing, on any judgment recovered before any court in this territory, for money lent, for money due on the settlement of accounts, from the day on which the balance is ascertained, and from money received to the use of another." Gen. St. Nev. § 4903.

Under this statute, if it was before the court for construction, it might be said that "on any judgment recovered before any court" in Nevada, the clerk might as a matter of course issue execution for the amount of the principal sum with legal interest thereon, irrespective of the question whether the rate of interest was expressed in the judgment or not. There are many authorities that tend to support this view. *Burke v. Carruthers*, 31 Cal. 470; *Himmelman v. Oliver*, 34 Cal. 247; *Dougherty v. Miller*, 38 Cal. 548; *Clark v. Dunnam*, 46 Cal. 204; *In re Olvera's Estate*, 70 Cal. 184, 11 Pac. 624; *Stewart v. Spaulding*, 72 Cal. 265, 13 Pac. 661; *In re Kennedy's Estate*, 94 Cal. 22, 29 Pac. 412. It will be seen by a perusal of these authorities that the supreme court of the state of California, from which state the statute in question was bodily taken, has uniformly, consistently, and persistently held that judgments entered under any of the provisions of the statute carry the legal rate of interest thereon, whether it is so expressed upon the face of the judgment or not, and that this result necessarily follows as a consequence under the statute making the judgment bear interest. The same construction upon similar statutes has been announced by the courts of other states. *Crook v. Tull* (Mo. Sup.) 20 S. W. 8; *Nevada Co. v. Hicks*, 50 Ark. 416, 8 S. W. 180; *Wither's Appeal*, 16 Pa. St. 151; *Cox v. Marlatt*, 36 N. J. Law, 389. In *Amis v. Smith*, 16 Pet. 311, the court said:

"We can see no good reason why interest upon a judgment, which is secured by positive law, is not as much a part of the judgment as if expressed in it. The legislature say: 'All judgments shall bear interest at the rate of eight per cent.' Can the judgment be satisfied without paying the interest? It is the practice in Mississippi and several other states to include no interest in the judgment, except what is then due, but to leave it to the collecting officer to calculate the amount of interest, according to law, when he settles with the defendant."

Why should interest on a judgment in a case like the present be allowed? In *Nevada Co. v. Hicks*, supra, the court said:

"The interest allowed in a judgment, where interest is not stipulated in the contract sued on, is not by virtue of the contract between the parties to the suit, but it is by operation of law, and in the nature of a penalty provided by the law for delay in payment of the principal sum after it becomes due."

In *Morley v. Railway Co.*, 146 U. S. 168, 13 Sup. Ct. 54, the court said:

"But if the contract itself does not provide for interest, then, of course, interest does not accrue during the running of the contract, and whether, after maturity and a failure to pay, interest shall accrue depends wholly on the law of the state, as declared by its statutes. If the state declares that, in case of the breach of a contract, interest shall accrue, such interest is in the nature of damages, and as between the parties to the contract such interest will continue to run until payment, or until the owner of the cause of action elects to merge it into judgment. After the cause of action, whether a tort or a broken contract, not itself prescribing interest till payment, shall have been merged into a judgment, whether interest shall accrue upon the judgment is a matter, not of contract between the parties, but of legislative discretion, which is free, so far as the constitution of the United States is concerned, to provide for interest as a penalty or liquidated damages for the nonpayment of the judgment, or not to do so. When such provision is made by statute, the owner of the judgment is, of course, entitled to the interest so prescribed until payment is received, or until the state shall, in the exercise of its discretion, declare that such interest shall be changed or cease to accrue."

If the disposition of the motion to quash the executions in the present case depended solely upon an original independent exposition of the terms and meaning of section 4903 of the General Statutes of Nevada, it will be observed that many valid and substantial reasons might be given in favor of respondents' contention in this case. But the question does not rest upon any independent construction which this court might give of the statute. The question involved in this case is not of such general interest as would justify this court in departing from the general rule of law which requires the United States courts to follow the decisions of the state courts upon the construction of the statutes of the state, upon the exceptional and broad ground that the decision of the state court is radically erroneous. The line of duty for this court to follow is clearly and directly pointed out in section 966, Rev. St. U. S., before quoted.

In order to ascertain the law of Nevada the decisions of the state court must be examined. They constitute the law upon the subject under consideration, and, whether right or wrong, they are of binding force and effect upon this court. *Morley v. Railway Co.*, 146 U. S. 166, 167, 13 Sup. Ct. 54, and authorities there cited. The evident object and purpose of section 966 was to bring about and maintain absolute harmony and uniformity between the United States courts and the state courts upon this subject. Rule 30 of the circuit court of appeals for this circuit imposes upon this court substantially the same duty as is specified in section 966, Rev. St. U. S. It reads as follows:

"(1) In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state or territory where such judgment was rendered." 11 C. C. A. cxii, 47 Fed. xiii.

What is the law of Nevada, as declared by the decisions of the supreme court? In *Hastings v. Johnson*, 1 Nev. 613, the court declared that, when the judgment of the court is silent in regard to the collection of interest, no execution calling for payment of interest is authorized by the statute. If this was the only decision in

relation to this matter, it might be argued that it would be the duty of this court to determine whether that decision was not rendered upon a section of the statute other than the one in question here, which, in allowing parties upon certain contracts to agree in writing for the payment of any rate of interest, provides that judgments rendered on such contracts shall conform thereto "and shall bear the interest agreed upon by the parties, and which shall be specified in the judgment" (Gen. St. Nev. § 4904), as the contract in that case might be said to be one that came under this section, and the decision might have rested solely upon the ground that interest could not be collected upon the judgment because no interest was "specified in the judgment." The decision, however, was to the effect that under the law of Nevada, which included both sections, no interest could be collected when the judgment was silent as regards the collection of interest. Moreover, the law of Nevada does not rest upon that decision alone. The identical question here presented was brought before the court in *Solen v. Railroad Co.*, 14 Nev. 405, and the court said:

"The decision in *Hastings v. Johnson*, 1 Nev. 617, is directly in point * * * upon the real question presented by this appeal. It was therein decided that, where the judgment of the court is silent as regards the collection of interest, it does not authorize the issuance of an execution calling for payment of interest on the judgment, that the execution must follow the judgment, and if the judgment does not call for interest, the execution cannot."

See, also, *Solen v. Railroad Co.*, 15 Nev. 313.

The principle announced in these decisions is the law of the state of Nevada to-day, and, as before stated, must be followed by this court. In obedience thereto it follows that the motion to quash must be, and it is hereby, granted; the costs of this motion to be taxed against respondents.

LOUISVILLE, N. A. & C. R. CO. v. OHIO VALLEY IMPROVEMENT & CONTRACT CO. et al.

(Circuit Court, D. Kentucky. September 11, 1894.)

1. RAILWAY COMPANIES—GUARANTY OF BONDS OF OTHER COMPANIES—INDIANA STATUTE.

The statutes of Indiana (Rev. St. 1888, §§ 3951a-3951c; Rev. St. 1894, §§ 5216-5218) provide that the board of directors of a railway company may, upon the petition of the holders of a majority of the stock of the company, direct the execution of a guaranty of the bonds of another company. The directors of the L. Ry. Co., an Indiana corporation, without any action by the stockholders, directed the execution of a guaranty of the bonds of the B. Ry. Co. The guaranty, as indorsed on the bonds, contained no representation that the stockholders had petitioned for its execution. The stockholders promptly disavowed the action of the directors. *Held*, that the guaranty was invalid, both as between the L. Ry. Co. and another corporation, at whose instance the guaranty was made, and as between the L. Ry. Co. and subsequent holders of the guaranteed bonds, for value and without notice. *Zabriskie v. Railroad Co.*, 23 How. 381, distinguished.

2. CONTRACTS—GUARANTY—PARTIES.

A guaranty indorsed on a railroad bond, and running to the holder of such bond, passes with the bond, by delivery, and is not affected by a statute

making obligations which pass by assignment subject to the same defenses in the hands of the assignee as in those of the assignor.

Bill by the Louisville, New Albany & Chicago Railroad Company against the Ohio Valley Improvement & Contract Company and others for an injunction, and to cancel a guaranty on certain bonds.

Henry Crawford and Helen & Bruce, for complainant.

Humphrey & Davie, St. John Boyle, Noble & Sherley, and Barnett, Miller & Barnett, for defendants.

BARR, District Judge. The decision of Justice Brewer and Judge Jackson, after full consideration, that this court has jurisdiction of this cause, and the granting of an injunction, should, we think, settle for this court some of the questions argued by counsel.¹ That decision determined the complainant is an Indiana corporation, and not a Kentucky one; hence, whatever authority the complainant had or has to guaranty the mortgage bonds issued by the Richmond, Nicholasville, Irvine & Beattysville Railroad Company is derived from the corporate powers granted by that state. It is also determined that upon the then showing the complainant was entitled to an injunction to prevent the disposition by the Ohio Valley Improvement & Contract Company and others of the bonds of the Beattysville Railway Company with the guaranty of the complainant upon them. The subsequent orders entered by this court canceling the complainant's guaranty on the bonds held by the Ohio Valley Contract Company were judgments against the validity of those guaranties, but, as those orders were made without discussion other than given the cause when the injunction was granted, it is proper this court should consider the general question of authority to make those guaranties, as well as the right of bona fide holders of the bonds, for value, without notice of any defect in, or want of authority to execute, the guaranty. The consideration for the guaranty on the coupon bonds of the Beattysville Railway Company was to be the delivery of three-fourths of the capital stock of that railway company to complainant by the Ohio Valley Contract Company. These bonds had been issued by the Beattysville Railway Company, and were to be delivered to the contract company as the Beattysville Railway was constructed. The guaranty which was indorsed on \$1,185,000 of bonds is as follows:

"For value received, the Louisville, New Albany & Chicago Railway Company hereby guaranties to the holder of the within bond the payment by the obligor therein of the principal and interest thereof, in accordance with the terms thereof. In witness whereof the said railway company has caused its corporate name to be signed hereto by its president and its seal to be attached by its secretary."

The authority to guaranty the payment of mortgage coupon bonds of another railway company does not arise, nor can it be implied, from the general business of the complainant, either in construct-

¹ The judges named filed no opinion, nor were their oral opinions reduced to writing.

ing or operating its railroad, but is an authority which must be given to it, as a railroad corporation, by the state, expressly, or be clearly implied from other corporate powers granted to such a corporation. The provisions of the Indiana statute upon the subject of guaranty bonds of another company are as follows:

"3951a. Guaranty of Bonds of Another Company. (1) The board of directors of any railway company organized under and pursuant to the laws of the state of Indiana, whose line of railway extends across the state in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining state, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so indorsing or guaranteeing such bonds.

"3951b. Petition of Stockholders. (2) The petition of the stockholders specified in the preceding section of this act shall state the facts relied on to show the benefits accruing to the company indorsing or guaranteeing the bonds above mentioned.

"3951c. Limitation of the Power. (3) No railway company shall, under the provisions of this act, indorse or guarantee the bonds of any such railway company or companies, as is above mentioned, to an amount exceeding one half of the par value of the stock of the railway company so indorsing or guaranteeing as authorized under this act." Rev. St. 1888 (Rev. St. 1894, §§ 5216-5218).

It is quite clear from this record that no effort was made by the board of directors of the complainant, or any one else, to conform to the provisions of this statute in regard to a petition of the holders of the majority of the stock in complainant's company, and that the order of the board, directing the president and secretary to guaranty these bonds, was without the approval or petition of a majority, or any, of the stockholders. The provisions of the Indiana statute seem to have been ignored, and the guaranty made presumably under the supposed authority of an act of the state of Kentucky approved April 7, 1882. But, as complainant is not a Kentucky corporation, this guaranty cannot be sustained or aided by that statute. It will be observed that the board of directors are authorized by the Indiana statute quoted to guaranty the bonds of another company only upon the petition of the holders of a majority of the stock of their company. The stockholders, and not the board of directors, are to take the initiative, and a majority thereof determine whether there shall be a guaranty of the bonds of another company. The board of directors may decide whether a majority has petitioned them so as to authorize a guaranty, and may determine the manner of the indorsement of guaranty, and the proper mode of executing the power given them by the petition of the holders of a majority of stock, but the authority does not exist except by and through the stockholders. The provision of this statute which requires the facts which are relied on to show the benefit accruing to the company indorsing or guarantying the bonds to be stated in the stockholders' petition clearly shows the authority to guaranty the bonds of another company was not intended to be given the board of directors. There is no question here as to the effect of a subsequent approval or ratification of the guaranty of

these bonds by the board of directors by the stockholders, as their action was promptly repudiated by them the first meeting after the guaranty was made, and presumably as soon as it was practical to have had a stockholders' meeting.

It is insisted that there are other provisions of the statute of Indiana which grant to railway corporations organized in that state, under its laws, corporate powers, that authorize guaranties such as made here. These powers are such as to consolidate with other railroad companies, and to buy and lease, by way of extension of their railway lines, other railroads, etc.; but the authority to guaranty the bonds of another railroad company is given in express terms in section 3951a, and the mode prescribed, and we think this precludes any implied authority arising to guaranty bonds, in cases covered by that section, by the exercise of other corporate powers given in other parts of the statute. Those parts of the statute might be pertinent to show corporate authority to buy the stock of the Beattysville Railway Company, but, as the consideration thereof was the guaranty of the payment of said company's coupon bonds, this guaranty could not be given by the action of the board of directors alone, without the petition of the stockholders, as directed by section 3951a. In *Thomas v. Railroad Co.*, 101 U. S. 71, the supreme court, by Justice Miller, says:

"We take the general doctrine to be, in this country,—though there may be exceptional cases, and some authorities to the contrary,—that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes,—that what is fairly implied is as much granted as what is expressed,—it remains that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others."

And in the case of *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 48, 11 Sup. Ct. 478, Justice Gray, after reviewing the cases in the supreme court, says:

"The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by laws."

This court and the circuit court of appeals of this (Sixth) circuit have recently considered the question of the corporate right of the Kentucky Union Land Company to guaranty the payment of the coupon bonds of the Kentucky Union Railway Company, and have sustained the land company's authority to make the guaranty; but this was upon a construction of the powers given in the charter of that company,—especially the power to engage in the business of transportation, and to consolidate with any railroad company chartered or to be chartered. See *Tod v. Land Co.*, 57 Fed. 48; *Marbury v. Land Co.* (Oct. Term, 1893) 10 C. C. A. 393, 62 Fed. 335.

The doctrine, as announced by the supreme court, through Justices Miller and Gray, as to the extent and the limitations of corporate powers, when applied to this case, is, we think, conclusive, if our construction of the Indiana statute is correct, against the right of the board of directors of complainant's company to enter into the contract of October, 1889, and subsequently to guaranty the bonds of the Beattysville Railway Company. As between the complainant and the Ohio Valley Contract Company, the guaranty on the Beattysville Railway Company is invalid. See, also, *Pearce v. Railroad Co.*, 21 How. 441; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 307, 6 Sup. Ct. 1094; *Colman v. Railway Co.*, 10 Beav. 1; *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775; *Davis v. Railroad Co.*, 131 Mass. 258; *Marble Co. v. Harvey*, 92 Tenn. 115, 20 S. W. 427.

Many of the defendants are bona fide purchasers and holders of these bonds, having bought them on the market for full value, with the guaranty upon them, and without knowledge or notice of the want of authority by complainant's board of directors to have the guaranty made; and they insist the guaranty is not invalid, as against them, and should not be canceled. The first inquiry upon this branch of the case is the relation which these bondholders have to the guaranty. The guaranty is, in terms, "to the holder of the within bond"; and although the Ohio Valley Contract Company was at the time of the indorsement the holder of some of these bonds, and the guaranty was made under a contract with that company, which was to deliver three-fourths of the capital stock of the Beattysville Railway Company as the consideration thereof, it was evidently the intention of the parties that the guaranty was to be to whoever might be the holder of the bond. The guaranty was intended to pass with the bond, and such is the legal effect of the indorsement. But it is insisted that although the legal title to this guaranty passed with the ownership of the bond upon which it is indorsed, yet, by the provisions of the Kentucky statute, the guaranty is subject to the same defenses as exist against the Ohio Valley Contract Company. The provisions of the Kentucky statute are as follows:

"All bonds, bills or notes for money or property shall be assignable so as to vest the right of action in the assignee, but except in case of bills of exchange, not to impair the right to any defense, discount or set-off that the defendant has or might have used against the original obligee, or intermediate assignor before notice of the assignment." Section 474.

The Code of Practice (section 19) provides:

"In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any discount, set off or defense now allowed * * *. This section does not apply to bills of exchange, nor promissory notes placed upon the footing of bills of exchange, nor to common orders or checks."

These are the only provisions touching the question under consideration. These provisions apply only when an assignment is necessary to pass the title to the thing in action. That is, where the bill, bond, or note had an obligee other than the party suing,

and from whom he gets his right of action, and in whose name the suit would be brought, except for the provisions of the law. But here the guaranty is not to the Ohio Valley Contract Company, or to the order of that company. The obligation of the guaranty is, in terms, to the holder of each bond, and it is to that holder the principal and interest of the bond is guarantied to be paid if the obligor defaults. These bonds were intended by the parties to be placed upon the market and sold, and they passed to a purchaser by delivery, and not by virtue of the statute of assignments enacted by Kentucky. This is by the general commercial law. *City of Lexington v. Butler*, 14 Wall. 282. The title to the obligation of guaranty passed with the bond, without assignment, under the statute, because the guaranty was to whoever might be the holder thereof, and the holder was by a bona fide delivery. There is no need, therefore, of an assignment, under the provisions of the Kentucky statutes. Thus, as no assignment was necessary, and there being no assignment, the statute authorizing assignment, with reservations as to defenses, etc., as against an original obligee, has no application. An assignment of the thing in action is necessary only when there can be an original obligee other than the party suing. This guaranty, if valid, does not place the complainant in the position of a second maker on the Beattysville railway bonds, nor does it place the company in the position of an indorser of a bill of exchange, but the position is somewhat analogous. An indorser of a bill of exchange agrees to pay if the parties previously bound thereon do not, and he is given legal notice of the defaults, and here the complainant guaranties the obligor will pay principal and interest of the bond according to its terms. It is quite unnecessary to review the conflicting authorities upon this subject. We conclude that as the bonds pass by delivery, and the obligation of the guaranty passes with the bonds, the provisions of the Kentucky statute of assignments as to defenses, etc., do not apply. We concur in what was said by Justice Matthews in *Davis v. Wells*, 104 U. S. 169:

"It has always been held in this court that, notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument, in furtherance of its spirit, and liberally, to promote the use and convenience of commercial intercourse."

Although this guaranty passed with the bond upon which it was indorsed, and inured to the benefit of the holder thereof, the question remains whether the guaranty is valid and enforceable in the hands of a bona fide holder for value, without notice of the want of authority in the board of directors and its president to make the guaranty. There are no recitals in this guaranty, other than that it is given for value received, and there can be no estoppel or presumption against the complainant corporation, in favor of innocent holders, other than that which may arise from the guaranty itself, and the fact these bonds were put upon the market, with the guaranty upon them, with the consent of the board of directors of complainant. The guaranty of such bonds was not within the scope of the business of operating a railway, nor could the corporate power to thus guaranty the bonds of another railway company

constructing a railway in another state be inferred from the usage of railway companies. The nature of the contract should have been notice to all purchasers to inquire into the corporate powers of the guarantying railway company, as it was unusual, and outside of the ordinary business of a railway company, either in operating or constructing railroads. Purchasers on the bond market were bound to know that the president and board of directors of complainant were not the corporation, but its agents, and that the corporate power to guaranty such bonds did not ordinarily exist in the directory. There were no recitals, either in the resolution of the board of directors, or in the guaranty itself, to mislead the purchaser, or stay inquiry. The commercial character of the bond and guaranty thereon did not relieve a purchaser from the risk of the want of corporate authority to execute the guaranty. In speaking of notes and bonds issued or accepted by an agent acting under a general or special power, the supreme court says:

"In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which the commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued."

See *Floyd Acceptances*, 7 Wall. 676, and approved in *Marsh v. Fulton County*, 10 Wall. 683.

It is insisted that as the board of directors of complainant's company had the corporate authority to guaranty these bonds, under certain circumstances, these innocent purchasers had a right to presume the necessary conditions existed to confer the authority upon them. The language of *Justice Swayne in Merchants' Bank v. State Bank*, 10 Wall. 604, is quoted as a general proposition applicable to all contracts with corporations. Justice Swayne said:

"Where a party deals with a corporation in good faith, the transaction is not ultra vires, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in part exists. If the contract can be valid under any circumstances, an innocent party, in such a case, has a right to presume their existence, and the corporation is estopped to deny them."

This language is applicable as in that case, where the company had the corporate authority to make the contract, and the agent who made it was within the general scope of his duties, though not especially authorized to make the contract in controversy; but it cannot be true, broadly stated, else stockholders in corporations would be without the protection of the limitations and conditions placed upon their corporation by the charter, and the state itself would be without the power to prescribe conditions to the exercise of corporate powers, or prescribe the mode or agencies by which corporate powers should be exercised. Here the condition upon which the board of directors had the authority to make the guaranty of the mortgage bonds of another railway company was the request of a majority of the stock of complainant's company, and this was to be in the shape

of a written petition, and the reasons therefor were to be given. This condition precedent to the corporate authority of the board of directors was not performed, or attempted to be performed. It may be the board of directors might have had the right to determine whether, if a petition of stockholders had been presented, it was as required by the statute, as to the number of stockholders and the character of the petition. But there was no action of stockholders at all, and there was no recital in the resolution of the board, or in the guaranty, that there was. We do not, therefore, see that the position of these bondholders, who are bona fide purchasers without notice, is other or different from that of the Ohio Valley Company.

It is earnestly contended that in the instance where the Cleveland, Columbus & Cincinnati Railroad Company guaranteed the payment of the bonds of the Columbus, Piqua & Indiana Railroad Company, the supreme court has decided the other way, in *Zabriskie v. Railroad Co.*, 23 How. 381. There the contest was between a stockholder of the Cleveland, Columbus & Cincinnati Railroad Company and the bona fide holders of the guaranteed bonds; the stockholders seeking to enjoin the payment of the interest on the bonds guaranteed by the guarantor, the Cleveland, Columbus & Cincinnati Railroad Company. There was an effort to sustain the stockholders' suit by allegation of misconduct of one or more of the directors of the Columbus, Piqua & Indiana Railroad Company; but the real objection to the guaranty was an alleged want of authority, as the stockholders did not assent thereto by a two-thirds vote before the contract of guaranty was entered into, as was required by the statute under which the Cleveland, Columbus & Cincinnati Railroad Company was organized. It appeared in that case, the contract under which the guaranty was to be made was entered into in March, 1854, and that in the summer (July) of 1854, at a called meeting of the stockholders of the Cleveland, Columbus & Cincinnati Railroad Company, the indorsement of guaranty was expressly approved by the stockholders, without a recorded dissent. The suing stockholder was present by proxy, who verbally dissented, but declined to vote, although his vote would have controlled the meeting. After this stockholders' meeting, these bonds were sold in the market "under an uncontradicted representation of their validity through the votes" at the stockholders' meeting, and the bonds were freely purchased upon the representation of the action of the stockholders. There was no action of the stockholders of the Cleveland, Columbus & Cincinnati Railroad Company repudiating the action of the company in making the guaranty, nor did the suing stockholder take any action to modify or repudiate the action of his company until the fall of 1856, and after the Columbus, Piqua & Indiana Railroad Company had become insolvent. He, in his suit, denied any efficacy to the vote of the stockholders in July, 1854, because the notice was insufficient as to time of notice, and the failure to state its purpose; and he contended that not more than half of the stock was represented, and two-thirds of those present did not vote. The court refused to sustain this stockholder's injunction, under the circumstances, and Justice Campbell, in the course of his opinion, said:

"The observations of Lord St. Leonards, in the house of lords (*Bargate v. Shortridge*, 5 H. L. Cas. 297), in reference to the effect of the conduct of a board of directors, as determining the liability of a corporation, are applicable to this corporation under the facts of this case. 'It does appear to me,' he says, 'that if, by a course of action, the directors of a company neglect precautions which they ought to attend to, and thereby lead third persons to deal together as upon real transactions, and to embark money or credit in a concern of this sort, these directors cannot, after five or six years have elapsed, turn around, and themselves raise the objection that they have not taken these precautions, and that the shareholders ought to have inquired and ascertained the matter. * * * The way, therefore, in which I propose to put it to your lordships, in point of law, is this: The question is not whether that irregularity can be considered as unimportant, or as being different in equity from what it is in law, but the question simply is whether, by that continued course of dealing, the directors have not bound themselves to such an extent that they cannot be heard, in a court of justice, to set up, with a view to defeat the rights of the parties with whom they have been dealing, that particular clause enjoining them to do an act which they themselves have neglected to do.' This principle does not impugn the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of their organization. This doctrine has been constantly affirmed in this court, and has been ingrafted upon the common law of Ohio. *Pearce v. Railroad Co.*, 21 How. 441; *Straus v. Insurance Co.*, 5 Ohio St. 59. But the principle includes those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard."

In that case the stockholders' meeting had been held, and proper resolution, by unanimous vote,—so far as the record showed,—passed, and the bonds had been sold upon the representation of that vote, taken when the suing stockholder was present by proxy. Certainly, the buyers of these bonds should not have been bound by facts which were not in the record, and which contradicted the record upon which the bonds were sold. The fact that the suing stockholder was present by proxy, and refused to put on record his dissent, which would have been decisive, would, of itself, have been sufficient to prevent his obtaining the relief he sought. But construing the language of the court in its broadest acceptation, and applying it to the case at bar, it is only to the effect that had there been a petition by stockholders presented to the board of directors of complainant's company, directing this guaranty, and that board had acted as directed, reciting a majority had petitioned, the question of its compliance with the statute, as to the reasons given or number of stockholders petitioning, would not be thereafter open to inquiry, as against bona fide purchasers.

The case of *Toppan v. Railroad Co.*, reported in 1 Flip. 75, Fed. Cas. No. 14,099, is also much relied on by defendants' counsel. That case arose on the same guaranty of the bonds of the Columbus, Piqua & Indiana Railroad Company mentioned in the case of *Zabriskie v. Railroad Co.*, supra. The action was at law, by a bondholder of the guaranteed bonds, for the interest thereon, against the Cleveland, Columbus & Cincinnati Railroad Company. The opinion of Judge Willson, of the Northern district of Ohio, was upon a demurrer to the declaration. One of the objections urged was that the guaranty was not negotiable, and the holder of the bond could not sue and recover thereon. Another was that, the defend-

ant having no power in its charter to make the guaranty, the legal authority and the facts and circumstances contemplated by the general act of 1852, by which such power could be exercised, should be fully set out in the declaration. The learned court decided that the guaranty was negotiable, and passed with the bond upon which it was indorsed. He also decided that the allegation in the declaration that "said guaranty was duly signed by the defendant, by its then president, who was authorized to execute the same, and was afterwards, to wit," etc., "duly ratified and confirmed by the stockholders of said company," was sufficient. The latter ruling raised the question of the materiality, under the law of 1852, of the time when two-thirds of the stockholders assented to the guaranty. The statute of 1852 gave to the railroad companies authority to aid, etc., other railroads, when certain facts and circumstances existed, and had the proviso "that no such aid shall be furnished, nor any purchase, lease or arrangement perfected until a meeting of the stockholders of each of said companies shall have been called by the directors thereof at such time and place, and in such manner as they shall designate, and the holders of at least two-thirds of the stock of such companies represented at such meeting in person or by proxy, and voting thereat, shall have assented." Laws 1852, p. 281, § 24. The court, in discussing the point, used language which, when disconnected from the case, is quite broad, but held the allegation of the declaration was sufficient, and that the time of the assent of two-thirds of the stockholders was not material. It appeared in that case that the action of the directory in making the guaranty had been ratified by the stockholders. The extent of this decision is that the assent of two-thirds of the stockholders to the aid, as given, might be given after the aid as well as before. That law provided for the arrangements and agreements to be made by the directors of the respective railroad companies, and for them to call the stockholders together at such time, place, and manner as they should determine, and then the action or proposed action of the directors should be assented to, and was to be before the aid was furnished, or the purchase, lease, or arrangement was perfected. In that instance all arrangements and agreements and the initiative was to be taken by the directors, and in fact, as is stated in the Zabriskie Case by Justice Campbell, the bonds with the guaranty upon them were not put upon the market until after the stockholders assented to the guaranty. It is not intended to state the stockholders assented to the guaranty before the guaranty was indorsed upon the bonds, but before they were put upon the market. In the case at bar the initiative was to be taken by the stockholders, and they were to determine whether there should be a guaranty, and direct the directors by a petition in writing, giving the facts upon which they based their determination. This extraordinary corporate power was to be exercised by the stockholders themselves, and not by their agents, the board of directors, and in a way and manner that all who dealt with the corporation could know, if they desired. These two cases, both in principle and facts, fall far short of the present case.

This view makes it unnecessary to consider and determine whether all of the defendants are bona fide holders of these bonds, without notice of the facts which make the guaranty invalid. The complainant is entitled to have its injunction sustained, and the guaranty on defendants' bonds canceled, and a decree will go accordingly.

FIRST NAT. BANK OF MONTPELIER v. SIOUX CITY TERMINAL RAILROAD & WAREHOUSE CO. (TRUST CO. OF NORTH AMERICA, Intervener).

(Circuit Court, N. D. Iowa, W. D. August 27, 1895.)

1. CORPORATIONS—LIMIT OF MORTGAGE INDEBTEDNESS.

The Iowa statute provides that corporations organized thereunder must, by their articles of incorporation, fix a maximum of indebtedness, which shall not exceed two-thirds of their capital stock; this provision not to apply, however, where corporate bonds are issued and secured "by an actual transfer of real estate securities," which shall be a first lien on unincumbered real estate, worth at least twice the amount loaned thereon. McClain's Code, § 1611. *Held*, that the execution and delivery by the corporation of a mortgage on its own real estate to secure bonds was a transfer of real-estate securities, within the meaning of the statute.

2. SAME—PRIOR INCUMBRANCES.

A terminal and warehouse company executed a lease of its property for a term of 100 years, and shortly afterwards mortgaged the same to secure an issue of bonds. The lease and mortgage mutually referred to each other, and the lease contained a provision, with an express covenant by the lessee, for the payment to the trustee under the mortgage of so much of the rental as was necessary to pay interest on the bonds and the costs of the trusteeship. *Held*, that the two instruments were to be construed in *pari materia*, and that, consequently, the lease was not a prior incumbrance to the mortgage, within the meaning of a statute requiring corporate bonds to be secured by mortgage upon unincumbered real estate. McClain's Code, § 1611.

3. SAME—VALUE OF MORTGAGED PROPERTY—EVIDENCE.

Upon a question as to whether property mortgaged by a corporation was worth twice the amount of the bonds secured by the mortgage, as required by statute, *held*, that where it appeared that the bonds were sold in open market for from 90 to 95 cents on the dollar, in cash, it could not be held that the security, at the time it was given, did not meet the statutory requirement.

4. SAME—VALIDITY OF MORTGAGE—RATIFICATION.

The fact that a trust deed to secure bonds was not in strict accordance, in some particulars, with the resolution authorizing it, is not sufficient ground for holding it invalid, where, subsequent to its execution, the board of directors recognized its existence and validity by directing the issuance of the amount of bonds which the deed was given to secure.

5. SAME—PERPETUITIES.

Where a corporation executed a lease for 100 years, and shortly afterwards a mortgage of the same property, and the two instruments mutually referred to each other, so as to be in *pari materia*, *held*, that there was no ground for a contention that the estate created by the mortgage could not take effect until the expiration of the lease, and that, consequently, the mortgage was void, as creating a perpetuity.

This was a bill by the First National Bank of Montpelier against the Sioux City Terminal Railroad & Warehouse Company, wherein the Trust Company of North America, as intervener, filed a bill to