

certificates, who are entitled to priority of payment over the allowance to the trustee and its solicitors. We consider the allowance as compensation to the receiver and his solicitors as part of the taxable costs in the case, and as such is preferred to the receiver's certificates, and entitled to prior payment.

3. We express no opinion as to whether the amounts allowed to the trustee and to its solicitors and to the receiver and his solicitors are excessive. We appreciate the fact that "no question can arise in a case giving greater embarrassment to a judge personally than the question of counsel fees," yet we fully concur with the supreme court of Alabama in the opinion expressed in *Strong v. Taylor*, supra, that "the courts, while observing principles of equity, and a fair consideration of the value and utility of the services rendered, should be cautious not to award excessive or improper allowances, whereby just criticism may be provoked." But the allowances in this case were settled by the decree of January 11, 1893, which was a final decree. From that decree no appeal has been taken. On the hearing of this case there was submitted by the appellees a motion to strike out certain assignments of error relating to the amount of said allowances. A motion to strike out an assignment of error because not well taken is not good practice. If permitted, it being a preliminary question, the court could be called on to hear the case by piecemeal; for in every contested appeal the ultimate question is whether the assignment of error is well taken. The motion to strike out is denied. The decrees appealed from are reversed, and the cause is remanded, with directions to the court below to enter a decree in accordance with the views expressed in this opinion.

LOWE v. PIONEER THRESHING CO. et al.
(Circuit Court, D. Minnesota. November 29, 1895.)

1. CORPORATIONS—MANAGEMENT—INTERFERENCE BY COURT.

A court will not interfere in the internal policy and management of a corporation, unless it is manifest that it is about to exceed its corporate powers, and do an act in fraud of the rights of stockholders.

2. SAME—PURCHASING STOCK—DISPOSITION OF ASSETS.

The stockholders of a corporation, by the vote of a majority, from which a minority dissented, authorized the directors to buy the stock of certain stockholders, and pay therefor in plant, machinery, etc., constituting nearly all the assets and property of the corporation. *Held* that, although, in the absence of statutory prohibition, the corporation might buy its own stock, at least with its profits, and with the consent of the stockholders, the proposed action would be in fraud of the rights of the dissenting stockholders, and should be enjoined.

This was an action by Henry B. Lowe against the Pioneer Threshing Company and W. E. Blodget and others, its directors, for an injunction and receiver.

Merrick & Merrick, for complainant.

Geo. N. Baxter, for defendants.

NELSON, District Judge. Upon full examination of the bill, the accompanying affidavits, and those presented in rebuttal, I am

satisfied that there is no sufficient reason for the appointment of a receiver. The corporation of which complainant is a stockholder was overcapitalized at the outset of its organization, and it appears to have at this time nearly as large an amount of assets in value as it had when the removal was effected from Minneapolis to Faribault. A court will not interfere in the internal policy and management and control of a corporation, unless it is manifest that it is about to exceed its corporate powers, and do an act which would be in fraud of the rights of stockholders. The records of the corporation show that on June 25, 1895, at a stockholders' meeting, the following resolution was proposed and adopted, three persons representing stock voting in the negative:

"Resolved, that we, the stockholders of the Pioneer Threshing Company, do hereby instruct the board of directors elect to take the following action, at any time after this meeting, during their term of office, if in their judgment they deem such action advisable: (1) To buy from the resident stockholders of Faribault, and those joining with them, the stock issued on account of removal of the business of the company from Minneapolis, and pay therefor in plant, machinery, etc., property or assets of the company."

It is a mooted question in this country as to whether a corporation may purchase shares of its own stock. Many states forbid it. In the absence of a charter prohibition or a statute forbidding it, there is no reason why the stock should not be purchased, at least with the profits derived from the business of the corporation, where all the stockholders assent thereto. The tendency of the decisions in the state of Minnesota is on this line. See *State v. Minnesota Thresher Manuf'g Co.*, 40 Minn. 227, 41 N. W. 1020. But in the case at bar the purchase of the stock was to be made by a transfer of nearly all the assets and property of the corporation to a few favored stockholders, and, evidently, there would be no equal exchange in value. This, it seems to me, would be in fraud of the rights of the minority stockholders, who protested against the resolution to make this purchase of stock. I shall therefore refuse the motion for the appointment of a receiver, but shall order an injunction, restraining the directors from carrying out the plan contemplated by the resolution of June 25, 1895.

A decree will be entered accordingly.

TUG RIVER COAL & SALT CO. v. BRIGEL et al.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1895.)

No. 249.

1. COSTS—PERSONAL LIABILITY OF TRUSTEES.

A bill by trustees to foreclose a mortgage failed to show jurisdiction in the circuit court, but no objection was made in that court, and there was a decree for complainants. On defendant's appeal, the decree was reversed, and the circuit court of appeals awarded defendant costs in the circuit court, and divided the costs of the appeal. *Held*, that the judgment as to costs should not be modified so as to show that complainants were liable as trustees only, and not personally.