

and he may deem worthy of confidence." Greenl. Ev. § 6; Jones v. U. S., 137 U. S. 202-216, 11 Sup. Ct. 80; U. S. v. Jackson, 104 U. S. 41; Fancher v. De Montegre, 1 Head, 40; Moody v. State, 6 Cold. 299. The presumption that justices present and acting when the court met continued present, and participated in the assessment of this tax, can only be rebutted by some other part of the record. McCullough v. Moore, supra. This has not been done. It was not essential for the journal of the court to show that those present constituted the requisite number to lay a tax, if the number of those recited as present is judicially known to the court to be more than the requisite number. The decree in favor of the county must be affirmed.

CRIMP v. McCORMICK CONST. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. March 5, 1896.)

No. 251.

1. CONTRACTS—INTERPRETATION.

The reasonable intention of the parties to a contract is to be sought in the words of such contract, not assumed; and it is not the duty of a court to bend the meaning of some of the words of a contract into harmony with a supposed reasonable intention of the parties.

2. SAME—18 C. C. A. 70, 71 FED. 356, REAFFIRMED.

The terms of the contract involved in Crimp v. Construction Co., 18 C. C. A. 70, 71 Fed. 356, reconsidered, and the decision therein affirmed.

This was a suit by Eugenia Crimp, as executrix of the will of W. G. Crimp, against the McCormick Construction Company and others, to determine the rights of the parties in the assets of the corporation. The decree made by the circuit court was affirmed on appeal. 18 C. C. A. 70, 71 Fed. 356. Complainant petitioned for a rehearing.

John N. Jewett and R. W. Baylies, for appellant Eugenia Crimp.
Wm. J. English, for appellant Ingersoll-Sergeant Drill Co.

W. E. Church, Tenney, McConnell & Coffeen, Collins, Goodrich, Darrow & Vincent, A. Burton Stratton, and McGlasson & Beitler, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. This petition in large part covers ground already considered, and to that extent requires no response. In so far as it goes beyond the original briefs and the argument at the hearing, it is characterized by inaccuracy of statement, and by an uncalled-for exhibition of temper. After quoting from our opinion the proposition that Crimp's purchase of stock was conditional, or upon an agreement to resell at the same price, the petition says:

"Now, let us see in what sort of a hole this conclusion puts the court. We take the court at its word. It is no use to say that there is not a sentence, a line, a word, or a syllable of this contract that points to a conditional sale of the stock, or of a sale with an agreement to repurchase at the same price

or any other price. No matter for this. The court wipes out the old contract and constructs a new one. The proposition is that McCormick sold his stock (126 shares) to Crimp for \$25,200, paid to the construction company upon the condition that Crimp should sell it back to McCormick at the same price, McCormick (not the construction company, that received the money) agreeing to repurchase at that price, provided the other parts of the agreement were duly performed; that is, McCormick agreed to repurchase, if he and the construction company, who were together the first party to the contract, did as they agreed to do, and if they did not perform the contract on their part, and, by their failure to perform, destroyed the value of the stock, then McCormick would not be bound to repurchase. McCormick and the construction company did in everything fail to perform, and utterly abandoned the execution of the drainage contract, and therefore no obligation to repurchase the worthless stock or to refund the money to Mr. Crimp rests upon anybody. * * * There are some things which the members of the profession can bear patiently, treat respectfully, and discuss with good temper, even though they may consider them errors. Other things in the same line seem so unnatural, so lacking in perceptions of justice and reason, that they stir up all the bitterness of feeling which can find lodgment in the human breast. Prudence would then dictate a suspension of comment. We yield to the dictates of prudence. If the court adheres to the conclusion announced in the last quotation from the opinion, this petition must be denied. If it does not so adhere (and we fail to see how it can), the petition must be granted, for the conclusion is the result of wrong methods and wrong reasoning, and the whole case must be reconsidered by different methods and upon different theories."

This is Nestor playing the part of Thersites, though hampered somewhat, it seems, by a prudent regard for the scepter of Ulysses.

But from the manner we turn to the matter of the petition. "A sale with an agreement to repurchase is usually termed a conditional sale." 1 Hil. Mortg. 96. And that this agreement was of that character is demonstrated by the first, fourth, eleventh, and twelfth articles of the contract. The proviso that is supposed to have made the proposition worthy only of ridicule, if it relates at all to the undertaking of McCormick to repurchase, applies especially to the agreement of Crimp to resell. Only upon the condition of that proviso did he agree to reassign the stock purchased, together with that pledged, and it is not difficult to perceive his motive for having the contract so framed. His belief, manifestly, was that the company would realize large profits, and, if he had lived to give the business his personal attention, it is possible that his expectation would not have been disappointed; and in that event it was his purpose, upon failure of the other parties to fulfill to the letter their promises and covenants, to have it in his power, if he should deem it to be to his interest, to refuse to reassign, and, by forfeiting the 99 shares which had been pledged, to become the owner of the entire capital stock, and thereby the effectual owner of the entire property of the company. On the other hand, he could hardly have failed to understand, that, if McCormick and the construction company, by their failure to perform the contract, should destroy the value of the stock, or that, if for any reason the contemplated enterprise should prove disastrous, the company and McCormick would thereby be made insolvent, and their promise, or the promise of either of them, to repurchase or to redeem the stock, would be worthless. The sup-

posed incongruity between the agreement for a resale and repurchase and the condition upon which its performance was made dependent is therefore more imaginary than real.

The court's view of the twelfth article of the contract is criticised. "In this part of the opinion," it is said, "the court forgets that it was one of the early stipulations of the contract that the profits to be made by the performance of the drainage contract should be divided equally between the parties. * * * If not otherwise provided (and there is no other provision in the contract), the cost of all improvements and additions to the plant or assets of the company must necessarily be taken from that fund which would otherwise go to increase the profits of the enterprise. All such improvements and additions would therefore be invested profits, and, as Crimp's interest in and connection with the construction company was to cease with the completion of the drainage contract, his share in the profits thus invested would be lost to him, unless an interest in those improvements and additions was preserved to him." This only emphasizes the significance given by the court to the twelfth article, which, unlike the fourth, is not limited to improvements and additions to the assets of the company derived from the proceeds of the drainage contract, but embraces all increment, betterment, and additions, from whatever source, accruing or made after the date of the contract. The business of the company was not limited to the performance of the drainage contract, and, if other profitable business had been done, there is no possible construction of the contract in suit by which Crimp could reasonably have been denied the joint interest so unequivocally stipulated for in the last article of it.

The case was understood to be submitted to us as one which depended in the main on the construction of the contract, unaided by extrinsic evidence, and so we decided it, overlooking nothing, though not specifically mentioning everything, within the four corners of the writing; but now it is suggested that "both competent and necessary to be considered along with the papers signed by the parties are the facts and circumstances attending their execution, and the situation of the parties themselves." If, however, the case is of a character to require or permit of such presentation, and if there is evidence in the record competent to be considered, outside of the contract, that evidence was not referred to at the hearing and has not now been called to our attention. But it is said, also, that "the opinion does not utilize the definite facts appearing upon the face of the contract for the purpose of arriving at the probable and reasonable intention of the parties. We wish again, as briefly as possible, to call attention to those facts." And here follow eight propositions, some of which accord with express terms of the contract, some are mere inferences, more or less probable, some are wholly unwarranted, and intermingled with them are subordinate suggestions and assumptions of which the contract contains no hint. For instances of the definite facts, it is stated that the construction company

was seriously embarrassed for the want of ready money; that in this situation McCormick applied to Crimp, a stranger, so far as the record shows, for assistance to enable the company to go on with the drainage contract, "and nothing more"; that the contract relates solely to the work to be done under the drainage contract; that the mere fact of Crimp's \$25,200 having been advanced to the construction company imported an obligation on the part of the company to refund it; that the stock belonged to McCormick, and, however intimate his relations with the company, the two are distinct, "and cannot be, and must not be, confounded"; that the drainage contract was the property of the construction company and not of McCormick; and that, by the fourth and eleventh articles, the \$25,200 advanced are to be "repaid" or "returned." The contract, however, does not show that the company was not able readily to obtain from other sources needed money, nor that McCormick applied to Crimp, nor, even by suggestion, that they were strangers, but, to the contrary, expressly recites that Crimp was "desirous of becoming interested in the construction company" upon the terms and conditions mentioned. That the contract does not relate solely to the work to be done under the drainage contract is shown by the last article, as already explained, and though it is provided, in terms, in the eleventh article, that, upon the performance of the things there mentioned, "this contract shall be ended," it is evident that, for the purposes of the twelfth article, it would continue in force. And, if presumptions are to be indulged, it is probable that the money paid by McCormick for stock went to the company because McCormick had not paid therefor, or was otherwise indebted to the company, and that thereby the shares became, as recited in the contract, "full-paid and nonassessable," and the requirement of the seventh article, that the money be applied in the particular way specified, was made reasonable, when it otherwise would not have been. It is not true, in law, that the mere fact of Crimp's money having been advanced to the construction company, under the circumstances, imported an obligation on the part of the company to refund it. But, as bearing upon the question of construction, the more important fact, evident upon the face of the contract, as it seems to us, is that all the parties, and certainly Crimp, entered into the agreement anticipating large profits from the performance of the contract with the drainage district; and, if that had been the outcome, it may be assumed that Crimp would have insisted upon the construction which the court placed upon the contract, because it would have been more beneficial to him than any other. On the theory of a loan, he could have claimed rightfully only the return of his money with lawful interest, and perhaps reasonable compensation for his services. All besides would have been usurious. If the transaction was in fact a loan, the contract was, on Crimp's part, most unconscionably exacting; and there is no rule of construction or interpretation which requires the court, in order to fasten such a character upon a writing, to

ignore any of its provisions, or to force upon them strained and unnatural definitions. As a shareholder in a speculative enterprise, it was legitimate that Mr. Crimp should make large profits, and take security for their realization. As a lender of money he was entitled only to lawful interest, for the payment of which and the repayment of the principal sum he was entitled to exact such security as he was willing to accept, but, as a good citizen, nothing more.

It is insisted in behalf of the appellant that, somehow or other, a construction shall be invented or forced which will relieve from the disaster of a condition of affairs which was not apprehended, and against which no stipulation or security was provided, or, indeed, could well have been provided, in so far as it was the result of the alleged fraudulent conduct of McCormick, made possible, and perhaps suggested, by Crimp's physical inability to interfere. It is said, further, that the contract "needs and must have construction, and not simply interpretation, in order that it may, if possible, be brought into line with the reasonable and probable intention of the parties to it. If this cannot be done, then it would be the duty of the court to pronounce the contract void for uncertainty, or fraudulent for its gross injustice, and to determine the rights of the parties, independently of the jargon of words to which their signatures were appended." And yet it is by virtue, and upon the assumed validity, of the contract, that the appellant sought relief and has whatever standing she has in court. Without it she has no pretense of a lien upon the drainage contract, or the fund realized from its sale, and she has asserted no right not dependent upon it. Besides, there is no issue in the case, nor proof, upon which the court could have considered whether the contract was for any reason invalid or fraudulent; and, if it be true, as asserted, that McCormick misappropriated or converted to his own use the money advanced by Crimp, and even if that was his intention from the beginning, it does not affect the question of the right interpretation or construction of the contract.

Finally, it is said:

"The trouble with the opinion of the court is that it is all the time sticking to the literal and technical meaning of the words employed in some of the articles of the contract. It does not try to bend that [meaning] into harmony with a reasonable intention of the parties. The effort is all the time to interpret and not to construe, to find inconsistencies and not to harmonize them, and in doing this it gives the widest and most sweeping effect to words and clauses which seem to open wide the door for successful rascality, and visits the consequences of the iniquities of the construction company and McCormick upon the victim of those iniquities in every possible way. The 126 shares of stock would be as much involved and as completely liberated from the claims of Crimp and his representative, by the forfeiture of the 99 shares under article 10, as would the drainage contract. The theory of the opinion makes Crimp agree that if the construction company and McCormick fail to perform their part of the contract, and thereby ruin the entire enterprise, he will accept 99 shares of the stock, made worthless by their defaults, in full satisfaction of his money advances and expected profits. As already said, nothing short of inexorable necessity should compel such a conclusion, and the hesitancy and want of positiveness of the opinion, if nothing else, indicate that

no such necessity exists. As the 99 shares were transferred as a security for profits mainly, it would be easy, other parts of the contract considered, to limit the effect of their forfeiture to the loss of the profits, and no rule of construction would be violated by so doing. If the court will force upon the appellant the ownership of these 99 shares by virtue of the provisions of article 10, and against her will, for the villainous conduct of McCormick and his company (which ought not to be done), we insist that the consequences should extend no further than the most rigid and limited construction of their rights absolutely requires."

To all this the opinion itself, and what we have already said here, would be sufficient answer. The theory of the opinion, neither by construction nor interpretation, can be made to bear the implication suggested. On the contrary, the opinion says that, "if that remedy"—that is, the forfeiture of the 99 shares—"were asserted, the absolute ownership of the 225 shares of stock would become vested in the appellant as the representative of the second party." Upon the construction given by the court to the contract, that is clearly so, because, on that theory, Crimp was already the owner of the 126 shares, and by reason of the default of the other parties was released from the obligation to resell. And while "the right of the company to retake possession of the drainage contract, which could not be included in the forfeiture, would immediately revive," the beneficial ownership of that contract would follow the ownership of the stock, subject, of course, as on that theory it ought to be, to the payment of the debts of the company. The suggestion, in the first lines of this last quotation, that the court ought "to bend" the meaning of the words employed in some of the articles of the contract "into harmony with a reasonable intention of the parties" is a begging of the question. The "reasonable intention" is to be sought, not assumed; and the intention contended for cannot be found in "the literal and technical meaning of the words employed" in any of the articles of the contract. It might, perhaps, by construction, be deduced from some of the articles, but not from the entire contract, without ignoring or forcing from their true significance the plain and unequivocal words and expressions of other articles. The court's construction puts upon no word, phrase, sentence, or article a strained or unfamiliar sense. Upon that construction, every provision of the contract was upon its face favorable to the appellant's testator, and if, in the outcome, there has been misfortune or injustice, it is attributable to causes outside of the contract, against which no safeguard was devised, or, perhaps, thought to be necessary.

The petition is overruled.

WOODBURY et al. v. ALLEGHENY & K. R. CO. et al.

(Circuit Court, W. D. Pennsylvania. August 26, 1895.)

No. 33.

I. STATE AND FEDERAL COURTS—JURISDICTION—PENDENCY OF FORMER SUIT.

The A. Ry. Co., a corporation of the states of New York and Pennsylvania, most of whose property lay in the latter state, made a mortgage to the C. Trust Co. to secure an issue of bonds. Pursuant to a provision of

the mortgage, a majority of the bondholders requested the trustee to foreclose the mortgage, and it accordingly commenced suit in a court of the state of New York. The railway company thereupon commenced a suit in the same court, in which it obtained an injunction restraining the trustee from proceeding with the foreclosure. The bondholders then requested the trustee to bring suit for the foreclosure of the mortgage in Pennsylvania, and, upon its refusal to do so, themselves filed a bill in a federal court in Pennsylvania for the foreclosure of the mortgage. *Held*, that the mere pendency of the suit in the New York court in which the trustee had been enjoined from proceeding did not oust the jurisdiction of the federal court to proceed to decree foreclosure of the mortgage on the property in both states.

2. DEEDS—ALTERATION—RATIFICATION BY GRANTOR.

The mortgage was made jointly by the railway company and one B., its president, who pledged certain lands owned by him as additional security for the bonds of the railway company. After the directors of the railway company had authorized the execution of the mortgage in such form as should be approved by counsel, to secure the bonds, the mortgage was drawn, executed, and acknowledged by the railway company and B., and submitted to complainants, brokers, who were to purchase a part of the bonds. They objected to the provisions relating to the pledge of B.'s property, requiring that certain reserved interests should be included in the mortgage. After negotiation and correspondence between complainants, B. and his counsel, who was also counsel of the railway company, and W., the secretary of the railway company, a new clause was drawn up by B. and his counsel, including the interests in question, approved by complainants, and then inserted by W., under B.'s direction, in the mortgage, to which W. then obtained the acceptance of the trustee. B. then had the completed mortgage recorded, and, as president of the railway company, executed the bonds reciting the mortgage. Part of the bonds were then delivered to the complainants, who paid cash for them, which was used in paying the indebtedness of the railway company. *Held*, that the bonds were not void or voidable, either by B. or the railway company, on the ground of unauthorized alteration, the change in the mortgage having been fully ratified both by B., whose interest was alone affected, and by the officers of the railway company, who had authority to execute the mortgage in any form approved by counsel.

3. RAILROAD BONDS—BONA FIDE HOLDER—PENNSYLVANIA CONSTITUTION.

The mortgage was given in pursuance of a series of contracts between B. and B., the principal stockholders of certain railway companies which were consolidated to form the A. Ry. Co., a firm of brokers, who were to assist in extending the railroad and negotiating the securities of the company, for which they were to receive a part of such securities as commission, and to turn over the proceeds of others to B. and B., and a construction company, which was to build the extensions of the road. Under such contracts, the stock of one of the constituent companies, a New York corporation, was largely increased, and the bonds were to be used in part in retiring the securities of the constituent companies. A large proportion of the bonds issued under the mortgage were sold to the complainants, who paid for them in cash, which was applied to the payment of the debts of the constituent companies, and who had no knowledge of the contracts leading up to the making of the mortgage and the issue of the bonds. *Held* that, without regard to such previous contracts, the bonds bought and paid for by the complainants were not within the prohibition of the constitution of Pennsylvania that no corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; the validity of the bonds could not be questioned, and the complainants were entitled to a foreclosure of the mortgage.

4. MORTGAGES—PENNSYLVANIA STAY LAWS.

The stay clause in the Pennsylvania statute of 1705 (1 Smith's Laws, p. 60) applies only to scire facias sur mortgage, and not to a bill in equity to foreclose.

C. Walter Artz, for complainants.
Jack & Roberts and A. Moot, for defendants.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. This bill in equity was filed August 23, 1892, by Woodbury & Moulton, a firm whose members are citizens and residents of the state of Maine, against the Allegheny & Kinzua Railroad Company, a consolidated corporation of the states of Pennsylvania and New York, Spencer S. Bullis and Sarah E., his wife, the Central Trust Company, a corporation of the state of New York, and others, to foreclose a joint mortgage given by the said railroad and Bullis to the said trust company. The mortgage is dated February 1, 1890, is recorded March 10, 1890, in McKean county, Pa., and in Cattaraugus county, N. Y., and is to secure payment of \$500,000 of the bonds of said railroad. Of the bonds, \$200,000 are in the trustee's hands, unissued. Of the \$300,000 issued, \$15,000 were paid under a sinking-fund provision, leaving \$285,000 outstanding. Default was made of the semiannual interest due February 1, 1892, and on the principal of \$15,000 of bonds then payable under the sinking-fund clause. Pending such default, the trustee (upon the written request of more than 50 per cent. of the bondholders to so declare and to foreclose), in pursuance of the provisions of the mortgage, declared the entire outstanding issue of bonds due. In pursuance of the above request of the bondholders the Central Trust Company, the trustee, in April, 1892, began an action to foreclose in the supreme court of the state of New York, Cattaraugus county. Thereupon the railroad company filed a bill in said court against the trustee and others, in which, on July 26, 1892, that court, by an order which is still in force, enjoined the trustee from proceeding in said action. On August 17, 1892, the present complainants, the owners of \$50,000 of said outstanding bonds, and who had joined in the previous noted request to the trustee, requested the trustee, among other things, to bring an action to foreclose in Pennsylvania, where most of the mortgaged property was situate. This the trustee declined to do, on account of the pending order above recited; whereupon the complainants filed the present bill to foreclose on behalf of themselves and other bondholders. To it the trustee has made no defense or objection. On October 5, 1892, the railroad company and Bullis filed separate demurrers, alleging the bill contained no averment that "a written request of the holders of a majority in amount at par value of the outstanding and unpaid bonds issued under the mortgage sought to be foreclosed by said bill, accompanied by proper bonds of indemnification, was made to the trustee under said mortgage, requesting the commencement of this suit by it." They also filed special pleas to the effect that the trustee had, before the bringing of this suit, brought a bill to foreclose the same mortgage in the supreme court of New York, Cattaraugus county, which suit was pending

and undetermined. These pleas and demurrers were, on February 6, 1893, overruled. The same questions being raised on final hearing, we have re-examined them, and find no reason to change the views then held. Article 6 of the mortgage provides that the trustee "shall, upon the written request of the holders of a majority in amount at par value of the outstanding and unpaid bonds which may have been issued hereunder, and upon being properly indemnified, and whenever entitled to do so by the terms hereof, institute proceedings to foreclose this mortgage, whenever the holders of a majority in value of said outstanding and unpaid bonds may direct; and, in absence of any such direction, then as the trustee may deem expedient." This the bill (paragraph 11) expressly alleges was done, viz.: "Said trust company was duly requested in writing by the holders of more than 50 per centum of the said bonds outstanding to exercise its option, and to declare that the principal of all the bonds secured by said mortgage or deed of trust should become immediately due and payable, anything contained in the said bonds to the contrary notwithstanding, and to foreclose said mortgage or deed of trust;" and we find such demand was made before the New York suit was begun. The bill also avers, and the proofs show, an additional notice and request by the complainants to the trustee before this bill was filed. By this precedent request the trustee was called upon to execute the trusts imposed by the mortgage upon it for the bondholders. *Ashhurst v. Iron Co.*, 35 Pa. St. 30; *Bradley v. Railroad Co.*, 36 Pa. St. 152; *Com. v. Susquehanna & D. R. R. Co.*, 122 Pa. St. 306, 15 Atl. 448. Indemnification was a right personal to the trustee, which it could, and presumably did, waive, for it has not raised any such question, or, indeed, any objection to the present bill. The property and line of the respondent railroad being situate in two states, and the road a consolidated one under the laws of both, the courts of each state had jurisdiction to foreclose and sell the entire line. *Muller v. Dows*, 94 U. S. 444; *McElrath v. Railroad Co.*, 55 Pa. St. 208. See, also, *Massie v. Watts*, 6 Cranch, 148, and *Burnley v. Stevenson*, 24 Ohio St. 474. That the mere filing of a bill to foreclose in the New York state court did not oust the jurisdiction of the circuit court for the Western district of Pennsylvania is clear. *Stanton v. Embrey*, 93 U. S. 548; *Gordon v. Gilfoil*, 99 U. S. 168. While the New York court enjoined the trustee from bringing all suits upon the matters involved in the suit before it, and the trustee prudently obeyed the order, yet the mere pendency of that suit, or the subsequent restraining order upon the trustee, did not, in the absence of a final decree by that court, oust the jurisdiction of the United States circuit court of the Western district of Pennsylvania, or prevent it from entertaining a suit and determining all questions properly brought before it, although the same questions might be involved in the suit pending and undetermined in the first-named court. The right and duty to foreclose having been settled by the proper number of bondholders, and the hands of the

trustee having been tied in an attempt to foreclose, are the cestuis que trustent thereby deprived of their right to prosecute their foreclosure in the circuit court of the United States in another state, and one where the bulk of the property mortgaged lies? Assuredly not, and the wisdom of the rule is apparent from this case. The railroad company, having obtained the restraining order in July, 1892, in the court first appealed to, has not taken a single step towards obtaining a final decree in that case, and yet, in the absence of such a decree, or of any attempt to secure one, now suggests that the federal court, in which a vast amount of proofs have been taken, and a huge record presented for final decree, is powerless to afford complainants relief because of the mere pendency of the other bill. We are of opinion the circuit court originally had jurisdiction of the subject-matter of their present bill; that its jurisdiction was not ousted by the filing of a bill in the New York state court; and that under the facts peculiar to this case the complainants had the right to file this bill, and, having filed it, and all parties in interest having appeared and taken part in the case, including the railroad company, Mr. Bullis, and the trustee, our jurisdiction to foreclose the mortgage upon all the property included therein, as well that within the state of New York as that within the state of Pennsylvania, seems to us to be clear. *Muller v. Dows*, 94 U. S. 444; *Massie v. Watts*, 6 Cranch, 148; *Bradley v. Railroad Co.*, 36 Pa. St. 141; *Burnley v. Stevenson*, 24 Ohio St. 474; *McElrath v. Railroad Co.*, 55 Pa. St. 208.

The validity of the mortgage, however, is assailed on the ground of an unauthorized alteration. The bonds were given by the railroad company alone. The mortgage was a joint one, in which the company mortgaged its property and franchises; and Spencer S. Bullis, who was its president, one of its large stockholders, and the owner of large bodies of timber land along its line in Pennsylvania and New York, mortgaged these lands as additional security for the company's bonds. At a meeting of the directors of the railroad held February 1, 1890, a resolution was passed, which, after reciting that Bullis was to join in the mortgage, provided that "the officers of this company are hereby authorized and directed to make, execute, and deliver said mortgage or deed of trust in such form as they may be advised by counsel, and to make, execute, and deliver under the terms thereof the bonds of said company to the number and in the amount hereinafter specified, substantially in the following form; that is to say" (then follows a copy of the bond). It would seem from the recitals in the resolution that both bonds and mortgage had been previously drawn, and it would appear the board adopted the specific form of bond, but made the form of mortgage subject to advice of counsel. While this term is general, yet, under the proofs, Frank Sullivan Smith, Esq., who was counsel for Bullis, the company, and for Newcombe & Co., the negotiating brokers, was evidently the person contemplated. The mortgage, as originally prepared, was duly signed for the company by Mr. Bullis, its president, attested

by Lewis F. Wilson, its secretary, and its execution acknowledged and proved by them, February 27, 1890. On the same day it was executed by Bullis as an individual, his wife joining, and duly acknowledged by them. As thus executed, the mortgage provided for the reservation in Bullis of the timber, wood, lumber, and bark; also for the petroleum, gas, coal, and other minerals of the lands mortgaged. It was submitted to complainants, a firm of brokers at Portland, Me., who had been in communication for some time with the parties with a view of purchasing \$125,000 of the bonds. They objected to it by telegram to Mr. Smith, and claimed there should be a forfeiture of Bullis' reserved rights to the timber in case of default. This message was forwarded to Bullis, with a note calling attention to the fact that complainants asked "that a provision be inserted in the mortgage that, in case of a default in the payment of the interest on the bonds, upon a foreclosure of the mortgage the timber land can be sold free of the reservation to you." To this Bullis replied by letter, in which he said: "I could not, perhaps, make a change in that mortgage that would meet the point they make, inasmuch as in some cases I do not own the reservations. Whatever the mortgage covers, I, of course, expect will be subject to sale upon any default, the same as any other part of the property." On March 4th, Mr. York, a member of complainants' firm, met Mr. Bullis in New York. He says he told the latter that the absence of the default clause was an insurmountable objection. After a conference a clause meeting York's objection was drawn by Wilson, Smith's clerk, and the secretary of the railroad, but he would not take the responsibility of inserting it in the mortgage without the consent of Smith. The latter was at Olean, N. Y., and it was arranged Bullis should take the proposed clause to him there, and submit it to him. He did so, and Smith prepared another form of it, which was afterwards inserted, and in which not only was the reserved timber which Bullis owned made subject to sale on default, but his contracts for timber also. He then sent a copy of this in a letter to Woodbury & Moulton, in which he said, "In this I have conceded everything that you ask." The testimony is that York did not know the mortgage had already been acknowledged, and Mr. Bullis further added in his letter: "Will you please examine it, and, if satisfactory, wire him [Smith] to New York, and the mortgage will then be executed in this form." He also sent a copy in a letter to Wilson, telling him he had sent a copy to Portland, and saying, "It will, of course, be satisfactory, as it is all they ask." The following day he wrote Wilson, as secretary of the road, signing himself as president, and saying, "Let me know if we must execute it here again, or whether the pages are so arranged that no further execution will be necessary." Woodbury & Moulton having reported the clause satisfactory, Wilson, in pursuance of an arrangement made with Bullis, had the new clause printed, and inserted in the mortgage. He then had the trust company accept the trust, which it had not before done, and forwarded the com-

pleted mortgage to Bullis for record. This Bullis did, then came to New York, and, as president of the railroad, executed the bonds, which recited they were "secured by a first mortgage or deed of trust bearing even date herewith, duly executed by said railroad company to the Central Trust Company of New York." Thereafter \$125,000 of them were delivered to complainants, for which they paid par in cash. Of the sum received from them by the trust company \$110,000 was applied, as provided in the sixth provision of the mortgage, to the payment of prior bonded indebtedness of the Bradford & Corydon Railroad, a Pennsylvania corporation, one of the constituent companies of the respondent railroad, and whose debts it had assumed. The balance was applied to other indebtedness of the constituent companies.

In view of these facts we fail to see how either Bullis or the railroad can, on the ground of an unauthorized alteration, successfully attack this mortgage. The subject-matter of the reservation concerned Bullis alone. He was a surety for the debt of the company, and the extent of the pledge he gave the mortgagee was a question solely between him and it. The inserted clause neither diminished, increased, nor affected the debt in bonds which the railroad incurred. There can be no doubt that, so far as Bullis personally was concerned, the clause was fully understood by him, was inserted with his consent, and was ratified by his placing it of record. Under these facts he is not in position to take advantage of the absence of a reacknowledgment, and this especially in view of the fact that in his letter to complainants he promised, if the clause were satisfactory, "the mortgage will then be executed in this form." Nor, if it be granted the clause affected the railroad, can it defeat the mortgage on this ground. As finally put on record, the instrument was one which the executive officers could, under the resolution, have made and executed. If they had the right to execute in that form, manifestly they had a right to waive a re-execution of it when changed to that form. The change was approved by Smith, its counsel, ratified, and accepted by its president and secretary, the only officers required to execute it, and was by them placed of record. Subsequently the bonds were executed, negotiated, and their full value applied by the trustee, the agent of the railroad, to the payment of uncontested debts. Under any view, the mortgage cannot be declared void or voidable on the ground of alteration.

But its validity is attacked for the reason that it is alleged to be part of a scheme to issue bonds and stocks in contravention to that provision of the constitution of Pennsylvania which provides: "No corporation shall issue stocks or bonds, except for money, labor done or money or property actually received; and all fictitious increase of stock or indebtedness shall be void." This question renders necessary a summary of the somewhat complicated proceedings and agreements out of which these bonds arose. The Allegheny & Kinzua Railroad Company, the respondent mortgagor, is a consolidated corporation of New York and Pennsylvania, and was formed by merger

of the Allegheny & Kinzua Railroad Company of New York, the Allegheny & Kinzua Railroad Company of Pennsylvania, and the Bradford & Corydon Railroad Company of Pennsylvania. On October 8, 1889, Messrs. Bullis and Barse, of Olean, N. Y., who were the principal stockholders of the two constituent Pennsylvania companies, entered into an agreement with the broker firm of I. B. Newcombe & Co., of New York City, with a view to their consolidation and extension. The contract recites the two companies have a mileage of 16 miles, which it is proposed to extend to 30; that Bullis and Barse are the owners of or control 30,000 acres of valuable timber lands tributary to the roads, the product of which they desire to carry over the completed roads, and that they have applied for financial aid to Newcombe & Co. On their part, Bullis and Barse agreed to cause the roads and the 30,000 acres of land to be owned or controlled by a corporation of Pennsylvania with a capital of \$250,000, and to cause a mortgage to be given to secure \$250,000 bonds to be issued by said to be formed company. Newcombe & Co. agreed to negotiate \$210,000 of the bonds at par, and turn over the proceeds to Bullis and Barse. One hundred and twenty-five thousand of these they were not required to negotiate, except as the contemplated 14 miles of the road were completed in 5-mile sections under the directions of John Byrne, a civil engineer, connected with their house. On completion of such 5-mile sections Bullis and Barse were to receive the proceeds of five-fourteenths of the \$135,000. Seventy-five thousand were to be negotiated presently; and concurrently with their sale Newcombe & Co. were to receive the remaining \$40,000 of the issue for their commissions, labor, and services, of which bonds Byrne, the engineer, was to have \$15,000 for services performed or to be performed. It was agreed that 1,000 acres of timber land per mile or completed road—in all 16,000 acres for 16 miles—were to be under the lien of the mortgage originally; and that for every 5-mile section of the road subsequently completed for which Newcombe & Co. were required to sell bonds, 5,000 additional acres should be placed under the lien of said mortgage. Of the \$250,000 stock Bullis and Barse were to give Newcombe & Co. \$100,000, of which Byrne was to have \$15,000; and they were to guaranty for two years a 6 per cent. dividend on \$40,000. This agreement was subsequently modified by one of December 9th following, which recites that Bullis and Barse were owners of this stock of the Allegheny & Kinzua Railroad Company of New York, a line of which 10 miles were completed out of a contemplated 16; that it was desired to consolidate it with the two Pennsylvania corporations, and form a new consolidated one. By it Bullis and Barse agreed to procure such merger into a corporation with \$500,000 capital, and to issue \$500,000 bonds, secured by a first mortgage upon the property of the merged roads, "including 30,000 acres of timber land for the first 46 miles of railroad constructed and completed, and 16,000 acres for the additional 24 miles to be constructed and completed as aforesaid." Newcombe & Co. agreed on their part to negotiate \$260,000 of the bonds at par, and turn over the proceeds to Bullis and Barse. One hundred and thirty-five thousand of them they were not

required to negotiate, except as the contemplated 16 miles of the road were completed in 5-mile sections, as in the original contract; and on completion of such sections Bullis and Barse were to receive the proceeds of five-sixteenths of the bonds. Of the remaining bonds \$125,000 were to be negotiated at once (provided 26,000 acres of timber land was placed under the mortgage), and concurrently with their negotiation Newcombe & Co. were to receive the commissions before mentioned, viz. \$40,000 in bonds and \$100,000 in stock. The remaining \$200,000 in bonds and the like amount of stock were reserved to provide for the building of the 24 miles of additional road. It was agreed Bullis and Barse might contract with the Interior Construction & Improvement Company of New Jersey to perform their covenants under these contracts. On the same day the construction company mentioned, of which John Byrne was president and principal stockholder, entered into an agreement with the Allegheny & Kinzua Railroad Company of New York to construct its road to the Pennsylvania state line, to acquire the two Pennsylvania companies by merger or consolidation, and construct and complete the consolidated road under directions of the railroad company's engineer up to 46 miles, and, if required, to construct the remaining 24 miles, so that the consolidated company should have 70 miles of completed road at a cost not to exceed \$7,000 per mile. It further agreed to pay all liens, etc., of the constituent roads, and furnish certain rolling stock. The railroad agreed to increase its capital stock from \$80,000 to \$390,000, to issue \$500,000 bonds secured by mortgage on its property, and that it would pay all of said bonds and stocks to the construction company for its work as above, performed or to be performed, as soon as they could be legally issued. It was further provided the consolidated company to be formed should have a capital stock of \$500,000 (made up of the stock of the New York company, \$390,000, and the Pennsylvania companies, \$110,000), and that it should issue \$500,000 in bonds, secured by mortgage on its property, and certain lands in addition, for the purpose of retiring the New York company's bonds, specified above, which bonds, as well as the stock of said company, the construction company had a right to exchange for corresponding bonds and stocks of the consolidated company. On the same day the construction company entered into an agreement with Bullis and Barse in which the foregoing contract was recited and made part thereof. By it the construction company agreed to make the following disposition of the stock and bonds of the consolidated company received by it under the preceding contract: To Newcombe & Co., \$260,000 bonds, to be sold under agreements of October 8, 1889, and December 9, 1889. To Newcombe & Co., \$40,000 bonds, commissions under said agreements. To Central Trust Company, \$200,000 bonds, to provide for construction of 24 additional miles of road. To Bullis and Barse, \$265,000 stock. To Newcombe & Co., \$100,000 stock, for commissions under first agreements. To construction company, \$135,000 stock, for its compensation. Bullis and Barse, on their part, agreed to apply the proceeds of bonds sold by Newcombe & Co. to payment of liens upon property covered by mortgage, to carry out the consolida-

tion, to provide for construction of the additional road to be built under the preceding agreement, to cause the proper amount of timber land to be placed under the mortgage, and save the construction company harmless. The same day the Allegheny & Kinzua Railroad of New York executed the mortgage to secure the \$500,000 bonds provided for in the preceding agreement. In pursuance of the agreements the stockholders of the latter corporation voted to increase its capital stock to \$390,000, and applied to the board of railroad commissioners of New York state to sanction their action. On February 24, 1890, that board approved the proposed increase, and an examination of its order shows the contract of the railroad with the construction company, the proposed issue of bonds, the payment of bonds and stocks to the construction company, and the terms of merger with the Pennsylvania companies were all fully set forth and understood by that body. Thereafter the constituent roads were merged and consolidated, the subsisting debts and contracts thereof assumed by the consolidated company, and the mortgage in suit given. Of the \$300,000 of bonds issued thereunder, \$125,000, as we have seen, went to Woodbury & Moulton, the complainants; \$40,000 to Newcombe & Co. for commissions, of which sum Byrne was to get \$15,000; and \$135,000 are alleged to have been sold, and their proceeds spent in construction. Of the fact that this latter sum was properly expended in behalf of the railroad there is a dispute. Of the Woodbury & Moulton bonds \$15,000 were retired under the sinking-fund clause of the mortgage.

Whatever contention may be made in reference to the preceding agreements, and to the increase of stocks and issues of bonds in pursuance thereof, it is certain that of the validity of the bonds bought and paid for by the complainants there can be no question. Mr. York, one of the firm, testifies he knew nothing of the previous contracts. It is true, Mr. Woodbury, the other member, was named as a director of the consolidated company, but there is no evidence that he took part in or knew of any of the contracts or proceedings leading to said issues. That complainants received at the time of the purchase of the bonds, as a bonus or inducement to do so, a portion of stock of the consolidated company from Newcombe & Co., the negotiating brokers, does not affect them in any way. They paid full value for their bonds to the trustee, and the money was applied to the payment of the debts of the constituent companies, the validity and legality of which debts are in no wise questioned. These bonds are, therefore, not within the constitutional prohibition that "no corporation shall issue stocks or bonds except for money, labor done, or money or property actually received." Having issued them for a lawful purpose, having negotiated them for full value, and having used their proceeds for the payment of its legal obligations, they were not such bonds as the constitution inhibited, and the consolidated company must pay them. The bonds of complainants being valid, and being secured by the mortgage in suit, why should it not be foreclosed? That disputes may exist between

the railroad company, the construction company, and Messrs. Bullis & Barse as to the extent, expense, and details of construction; that questions exist as to the proper application of the proceeds of some of the other bonds; or that their holders are not purchasers for value; or that there is stock outstanding whose legality is questioned,—are questions which do not affect the right of the complainants, who are bona fide holders for value, to have their security enforced by foreclosure.

The view we take of this case renders it needless to discuss the many other questions suggested. It is, however, alleged that, even if a right to foreclose exists, the bill is prematurely filed, by reason of the year and a day stay clause of the Pennsylvania state statute of 1705 (1 Smith's Laws, p. 60). We cannot accede to this view. That act applies to a scire facias sur mortgage, and has no application to a bill in equity to foreclose such as the present.

It is also contended the lien of the mortgage was not to cover Mr. Bullis' timber land until 46 miles of road were constructed. Assuming, for present purposes, the 46 miles were not built, the position contended for cannot be yielded. While there is some ambiguity in the description of the lien of the mortgage as given in the bonds, viz.: "This bond * * * is * * * secured by * * * mortgage * * * upon the property and franchises of said railroad company, including thirty thousand acres of timber land, upon the construction and completion of the first forty-six miles of the railroad of said railroad company,"—yet all uncertainty disappears when we turn to the mortgage itself. It contains words of present conveyance, describes lands by metes and bounds, in its seventh clause provides for the further conveyance of the 16,000 acres mentioned in the bond, "in addition to the thirty thousand acres of timber land conveyed to said trustee by this mortgage." If further reason were needed in support of this view it would be found in the third clause of the agreement of Bullis & Barse with Newcombe & Co., of December 9, 1889, that the latter were not required to negotiate the \$125,000 lot of bonds until the contemplated mortgage "shall constitute a security upon twenty-six thousand acres of land" and in article 10 of the mortgage, where careful provision was made to enable the trustee to release portions of the timber land from its lien,—a provision subsequently acted upon by Mr. Bullis, and money actually paid for such release. We see no reason to depart from the express words of present conveyance of the land in the mortgage, and the presumption of law is that all previous verbal negotiations and understandings were merged in the final writing. On the whole, we are of opinion a right to foreclose has been shown.

RHINO v. EMERY et al.

(Circuit Court of Appeals, Sixth Circuit. December 11, 1895.)

No. 345.

1. PLEADING—HEIRSHIP.

An averment that the blood of both the ancestors on the paternal side, in the second generation from one from whom the pleader claims to inherit, as next of kin on the mother's side, is extinct, is a sufficient averment that there is no one of the blood of such ancestors to inherit.

2. EQUITY PLEADING—FRAUD.

An averment that one B. was from infancy and during all his life of unsound mind, and incapable of transacting business, and that B.'s mother and her legal adviser fraudulently procured from B. a deed of property, for a grossly inadequate consideration, which was never paid to him nor to any one for his use, is a sufficient averment of fraud in procuring such conveyance.

3. SAME.

Complainant's bill alleged that one E. had obtained by fraud a conveyance from her son of certain land devised to him by his father, E.'s husband; that subsequently she had instituted proceedings in a probate court, as executrix of her husband, to procure the sale of the same land to pay the testator's debts, and had obtained an order to that effect, directing the surplus to be paid to herself, under which she had received a large sum of money, such proceedings in the probate court being alleged to be fraudulent. Complainant, claiming to be B.'s heir, sought to set all these acts aside, and hold the representatives of E. as trustees for him. *Held*, on demurrer to the bill, that it was not necessary that the proceedings in the probate court should be set aside before B. would be entitled to such relief.

4. LIMITATIONS—ACTION TO CONTEST VALIDITY OF WILL.

A limitation of time for bringing a suit to contest the validity of a will does not apply to a suit to establish a trust in property which is alleged to have been diverted from its true owners by fraud, and to have passed into the hands of others under sundry conveyances, including a will.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

David Stewart Hounshell, for appellant.
Herbert Jenney, for appellees.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge. This is an appeal from a decree dismissing an amended bill on demurrer. 65 Fed. 826. The bill in general charges the defendants, or some of them, with having obtained title to and possession of the proceeds of a large amount of real property belonging to one James Berry, 2d, by fraud; avers that James Berry, 2d, died May 13, 1891; that the complainant is entitled to a moiety of his estate; and that he is therefore entitled to hold the defendants as trustees for his share of the property described in the bill.

The first ground upon which the action of the court is sought to be upheld is one not taken by the court below. It is that the complainant does not show by the averments of his bill that he is the heir and next of kin of James Berry, 2d, according to the laws of Ohio. The property in controversy was real estate be-