

of an injury that would have been fully compensated by the payment of less than one-fourth of that amount to the corporation? These questions seem to us to be susceptible of but one answer. We are convinced that damages so enormous could not have been reasonably expected to follow from, and could not have been the natural or probable consequence of, so relatively small an increase of the mortgage debt of so gigantic a corporation. This view is confirmed by the fact that the reduction of the mortgage debt of this corporation more than \$2,000,000 by an exchange of its first mortgage bonds and accrued interest for its stock at par in January, 1894, did not appreciate or change the market value of this stock by as much as 1 per cent. of its par value.

The errors in the rulings of the court below relative to the measure of the plaintiff's damages, which we have been considering, are fatal to this judgment, and necessitate a retrial of the case. There are many other assignments of error, and they present many interesting questions, but their consideration and decision would not change the conclusion at which we have arrived. The judgment below must be reversed, with costs, and the case must be remanded to the court below, with directions to grant a new trial; and it is so ordered.

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MILES v. ROBERTS et al.

(Circuit Court, S. D. New York. July 20, 1896.)

**1. CORPORATE BONDS—TRUSTEE'S WARRANTY.**

Plaintiff purchased certain railroad bonds, which were indorsed by the trustee with a certificate that they were secured by a deed of trust or mortgage to him. No such mortgage was ever recorded. The trustee, who was also president of the railroad company, subsequently executed another mortgage of the same property, and received a considerable portion of the avails thereof. The property was all taken by foreclosure of the latter mortgage. *Held*, that the trustee's certificate amounted to a warranty, and that plaintiff could recover, out of the avails of the security which had reached the trustee, as much as his share in the security, if it had existed according to the certificate, would have amounted to.

**2. SAME—LIMITATION OF ACTIONS.**

The statute of limitations does not begin to run against an action to enforce this liability until the bonds become due.

This was an action by Frederick Miles against Susan L. Roberts and others, executors of Marshall O. Roberts, to recover upon the testator's warranty of certain corporate bonds.

Treadwell Cleveland, for plaintiff.

Almon Goodwin, for defendants.

**WHEELER**, District Judge. According to the agreed statement, upon which this case has been heard, the plaintiff took from Marshall O. Roberts ten \$1,000 bonds of the Florida Railroad Company, dated November 10, 1868, and due March 1, 1887, each of which recited:

"This bond is one of a series amounting in the aggregate to one million and two hundred thousand dollars, and consisting of twelve hundred bonds, num-

bered from one to twelve hundred, inclusively, each of which is for one thousand dollars, and all of which are of like tenor and date, and the payment of which is secured by a deed of trust or mortgage, bearing date the tenth day of November, 1868, duly executed and delivered by the Florida Railroad Company to Marshall O. Roberts, trustee, and conveying the railroad of the said company, from Fernandina to Cedar Keys, in the state of Florida, of about one hundred and fifty-four miles in length, and the equipments, appurtenances, franchises, and things therein described.

"This bond shall not become obligatory until it shall have been authenticated by a certificate indorsed hereon and duly signed by the trustee."

And upon each of which was indorsed this:

"Trustee's Certificate.

"I hereby certify that the within bond is one of a series of first mortgage bonds, amounting to \$1,200,000, secured by the deed of trust or mortgage within mentioned, executed and delivered by the Florida Railroad Company to Marshall O. Roberts, trustee. M. O. Roberts, Trustee."

For them, relying upon this certificate, he paid \$7,500. No such mortgage was recorded. Another mortgage was made and executed by Roberts, then president of the company, covering the same property, of the avails of which over \$100,000 came to Roberts, and over \$30,000 of which remain with the defendants, his executors, and upon which the property was all taken by foreclosure. The plaintiff's share in the security, if it had existed according to the certificate, would have been worth \$7,200. This bill was brought, July 30, 1890, to reach so much of the avails of the security that came to Roberts as would have gone to the plaintiff upon the security which he supposed he had.

By common principles, whatever a warrantor, by deed of realty, or by sale implying title of personalty, acquires of the property, follows the warranty, and belongs to the warrantee. The security by mortgage of the railroad was assumed to belong to these bonds, and Roberts, by his certificate, in effect warranted that it did, to the purchasers. He could not, in equity at least, so assure the security to the purchasers of the bonds, and himself hold it away from them. His assurance was as trustee; but that does not seem to lessen its effect, which was that he held the security, as such trustee, for the purchasers. He could not afterwards justly be heard to say, against the purchasers, that he did not so have the security for them, especially when he did actually have it to a greater extent than that in question, although in another capacity. As to him, the plaintiff's right to the security would be paramount, to the extent of the assumption in the certificate. This was that he held the security for the satisfaction of the plaintiff's bonds, with those of the others, when due.

Lapse of time is very much relied upon against the enforcement of this liability now; and, if the action was at law for the misrepresentation, this reliance would, upon proper plea, seem to be well founded. But Roberts' assumption was that he held the security as trustee for the payment of the bond when due; and the plaintiff's right to the security in his hands, or those of his personal representatives, is co-extensive with that assumption. The plaintiff could wait, without losing time, until his bonds were due and

remaining unpaid, before calling for the security; and long with-  
in the statute of limitations, from that time, this suit was brought.  
If the security had existed as was represented, a foreclosure could  
well have been brought by the trustee when this suit was brought.  
This suit is brought as for the avails of the same thing received  
otherwise, and would seem to be brought in good time. Decree  
for plaintiff for \$7,200.

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KEIHL v. CITY OF SOUTH BEND.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1896.)

No. 293.

**1. JURISDICTION OF FEDERAL COURTS—FEDERAL RECEIVERS.**

Where the subject-matter of an action involves the acts and rights of a receiver appointed by a federal court, it constitutes a case arising under the laws of the United States, and is therefore within the jurisdiction of a federal court.

**2. CONSTITUTIONAL LAW—CITY ORDINANCES—CITY DEBTS.**

A city, by ordinance, conferred upon a water company a franchise for 30 years, and agreed to pay a rental of \$7.50 per month for each of 25 hydrants to be put in by the company, which rental was to be paid for so many of said hydrants "as were in good order during the preceding month." At the time the ordinance was passed, the city was indebted beyond its constitutional limit. *Held*, that the contract did not, in and of itself, create an indebtedness in contravention of the state constitution, but created a condition upon which a debt might arise; and the debt, having arisen when the city was taxed beyond the limit, was invalid.

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

This was an action brought by Chester H. Keihl, as receiver of the South Bend Water Company, against the city of South Bend, to recover money alleged to be due said company as rentals for the use of hydrants. The case is brought here by writ of error.

The defendant in error is a municipal corporation created and organized under the laws of the state of Washington, with the power, among other powers, of contracting for the supply of water to the city of South Bend and its inhabitants for protection against fire and for other purposes. The South Bend Water Company is a domestic corporation organized under the laws of the same state, and by the terms of its articles of incorporation was vested with the powers and privileges of constructing and operating a system of waterworks for the supplying of water to the city and its inhabitants for the extinguishment of fires and for domestic purposes. The city, on August 31, 1891, by an ordinance numbered 100, conferred on the water company a franchise for the term of 30 years, to build and operate waterworks for the purposes stated, on certain terms and conditions, and thereby agreed to pay to the company a rental of \$7.50 per month during the life of the franchise for each of 50 hydrants to be put in by the company, which rental was to be paid each month for the number of hydrants in good order during the preceding month, by the proceeds of a sufficient tax to be levied and collected annually on all property in the city; such proceeds to be kept in a separate fund called the "Water Fund." The franchise and agreement were accepted by the company September 30, 1891. Litigation between the company and city ensued in respect to the timely and sufficient construction of the works and compliance on the part of the company with the terms of the franchise. The litigation was compromised by a parol agreement to the effect that a new ordinance, limiting the number of hydrants to 25, and such others as the city should choose to order at the same rental and for the same term, should be passed as a substitute for ordinance numbered 100. Such ordinance, known as "Ordinance No. 118," was accordingly adopted on April 3, 1893, and the litiga-