of the land. The complainant therefore had no remedy in this case by means of application to the state land commissioner.

This is a bill to redeem, and a redemption of land through the intervention of a court is equitable in its nature, its effect being, ordinarily, to devest an outstanding legal title, upon the payment of what is due to the holder of such title. In Arkansas a donation deed is prima facie evidence of good title in the donee. Radcliffe v. Scruggs, 46 Ark. 96. And the plaintiff's suit to redeem is an affirmance of the tax title, and an election to defeat it by complying with the law governing such case, and the right of minors to redeem, may, in that state, be enforced in equity. Bender v. Bean, 52 Ark. 132, 12 S. W. 180, 241. The most serious question is whether the bill to redeem can be maintained without filing the affidavit of tender provided for by section 2595, Sand. & H. Dig., above referred to. The language of that section forbids the maintenance of an action to recover the lands, or for the possession thereof, without filing such affidavits of tender. The theory seems to be that such tender of itself effects the redemption, so that the redemptioner may thereupon maintain an action of ejectment, and he is not allowed to maintain that kind of action without such affidavit of tender. The section does not, by its terms, forbid the maintenance of a suit to redeem. And the supreme court of Arkansas holds that suits to redeem may be maintained, where that right remains because of the minority of the plaintiff, in cases where actions by the same plaintiffs for the recovery of the land have failed. Sims v. Cumby, 53 Ark. 418, 14 S. W. 623; Anthony v. Manlove, 53 Ark. 423, 14 S. W. 624. Even if such tender could be held requisite in ordinary cases, where the redemptioner claimed the entire land, and would become entitled to the whole upon paying the amount of all taxes, costs, interest, and the value of improvements, it would be impracticable, in a case like this, where the complainant claims only an undivided five-ninths of the land, and has the right to redeem only that five-ninths, and there is no existing right of redemption in the owners of the other four-ninths interest. He ought not to be compelled to pay the whole amount of such taxes, interest, and costs, and the entire value of all the improvements, as a condition to the exercise of his right to redeem his undivided partial interest in the land. Neither could he take from the defendant, by such redemption, his right to the four-ninths, in respect to which there is no outstanding right of redemption, and to which the complainant has no claim of title. And if it be a fact, as alleged, that the original tax sale was void because of including taxes not levied in accordance with the provisions of the constitution, that may effect the liability of the complainant to pay amounts which are in the nature of penalties. Douglass v. Flynn, 43 Ark. 398. Section 2595 of said Digest is not applicable to a case of this kind. It must be settled upon principles of equity, making practicable the existing right of redemption, and adapted to the unusual circumstances of the case. The decree appealed from is reversed, with costs, and the cause remanded for further proceedings.

HOGG v. HOAG et al.

(Circuit Court, S. D. New York. March 8, 1897.)

TRUSTS—DISPUTE AS TO CONTINUANCE—APPOINTMENT OF RECEIVER.

When there is a dispute among the parties to a suit as to the continued existence of a trust, the court will not appoint a new trustee, on a preliminary motion, though all parties concede the need for some one to protect the trust property, but will reserve that question for the final hearing; but it will appoint a receiver to hold and protect personalty pending the suit, and, where there is real property out of the jurisdiction, and all persons interested are parties, will direct the heirs of a deceased trustee to convey to such receiver, leaving it to the court in the jurisdiction where the land lies to determine whether the receiver thereby acquires sufficient title to manage and protect the property.

Charles W. Gauld, Arthur C. Rounds, Charles Bulkley Hubbell, and William L. Snyder, for plaintiff.

William Pinkney Whyts, for defendants.

LACOMBE, Circuit Judge. The decision of this motion lies within a much narrower compass than the argument. The situation is this: A trust was created by written agreement of individuals. By virtue of such trust, one Coe, now deceased, held certain property, real and personal. The personal property is in this district; the real estate is in Oregon. The legal title to such real estate at Coe's death was in him. All parties interested in such trust, or in its continuance, or in its funds, are parties to this suit. Complainant asked the court to appoint a trustee to continue the administration of the trust. Defendants resisted the application, contended that the trust terminated on the death of Coe, and that the property should be distributed to those entitled to it. This court refused to pass upon the question whether or not the trust had terminated, upon preliminary application, reserving it for final hearing. The personal property in this district, however, was in the possession of the executors of Coe, who wished to be relieved from its custody. An order was therefore made appointing a receiver of such property, to hold the same until termination of the suit. It now appears that the real estate in Oregon needs some one to conserve it pending this litigation; that portions of it have been, or are about to be, sold for taxes; and that portions of it could be rented if some one had authority so to do. The Oregon courts seem powerless to act, for the reason that nearly all the parties reside elsewhere, and no suit has been brought there. The receiver's appointment here gives him no title to the Oregon lands. Inasmuch as no statute of Oregon to the contrary is shown, it may be assumed that the legal title to the real estate there passed to Coe's children, to be held by them until a new trustee might be appointed, or the property turned over to the beneficiaries. The children of Coe do not wish to be burdened with this property, and there is no reason why they should be. No new trustee should be appointed until it is determined at final hearing whether or not there is any trust to administer, but in the meanwhile there should be some one authorized to look after the prop-

erty. It is suggested that a conveyance by the children of Coe to the receiver will give him sufficient authority, which would be recognized in Oregon. If it be the law in Oregon that the heirs at law of a deceased trustee succeed to the legal title of real estate held by him, and that, upon their declination to act, the court, all parties being present, may, by proper decrees, effect a conveyance of the trust estate to a new trustee, it would seem that the court would have abundant authority to place such estate in the hands of a temporary trustee, to wit, its receiver, until it determined whether a permanent new trustee should or should not be appointed. If, on the contrary, as complainant contends, it be the law of Oregon that the legal title to such real estate as a decedent may die seised of does not pass to his heirs when impressed with a trust, or that upon their declining to act as trustees it ceases to be in such heirs, and is thenceforth in nubibus, undoubtedly such conveyance from the heirs of Coe to the receiver will give him nothing. But it is not thought that this difficulty will be found to exist. Certainly this court should do what it can towards preserving the trust funds, and whether its orders and the conveyances under them will give the receiver sufficient authority in Oregon to hold and manage the real estate must eventually be decided by the courts in the state where the land is situated. The heirs of Coe therefore are directed to convey to the receiver, as prayed in the petition.

Complainant concedes the desirability of having some one appointed to look after the Oregon real estate, and, since he has not moved in that state, he evidently assumes that this court has such power of appointment. The fundamental difficulty with his practice, however, is that he expects this court to decide the main question in dispute upon affidavits on preliminary hearing, to hold that there is an existing trust, and to appoint a trustee, whereas it is the uniform practice in this district not to decide such questions on motion, but to reserve them for final hearing on pleadings and proofs, the court meanwhile merely preserving the status quo by injunction, receiver, or otherwise. Motion granted in the main action.

NIBLACK v. COSLER.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1897.)

1. BANKS AND BANKING—SPECIAL DEPOSIT — NEGLIGENT ALTERATION OF CERTIFICATE.

A bank, on receiving certain notes as a special deposit, issued a certificate for the amount thereof, made out on a printed form, from which the words "in current funds" were erased, and "in certain notes" substituted. The certificate was marked "Special deposit." Having been transferred, this certificate was sent by the holder to the bank for payment. The notes had not then been collected, and the teller was directed by the cashier to return the certificate; but, as the signature was torn, he was instructed to prepare and transmit a duplicate certificate. In doing so, he carelessly omitted to change the printed form by erasing "in current funds," and substituting "in certain notes." *Held*, that there was no ground for a claim that the second certificate was given in payment for the first; that it was

only a substitute for it; and that the receiver of the bank was only required to surrender to the holder the notes constituting the special deposit, for which the original was issued. 74 Fed. 1000, affirmed.

2 SAME—KNOWLEDGE OF CASHIER IMPUTABLE TO BANK.

Knowledge by a member of a firm of the true consideration of a certificate of deposit, which the firm discounted at a bank in payment of individual notes of one of its members, and which had been negligently altered in making out a duplicate certificate, *held* to be imputable to the bank, where the other member of the firm was its president, and, as such, acted as the sole representative of the bank in accepting the certificate. 74 Fed. 1000, affirmed.

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

This is a bill in equity filed by W. C. Niblack, receiver of the Columbia National Bank, against S. S. Cosler, as assignee, under a general assignment of the Valley Bank. The Valley Bank is a partnership doing business at Spring Valley, Ohio, under the partnership name of the Valley Bank. The object of the bill is to compel an allowance by its assignee of two certificates of deposit issued by the Valley Bank. The first of these certificates is known in the record as "Exhibit A," and is in the following words and figures:

"No. 112. The Valley Bank, Spring Valley, Ohio. $4,175.

"Dec. 17, 1892.

"Dwiggins, Starbuck & Co. have deposited in this bank forty-one hundred and seventy-five —— no/100 dollars, payable to the order of themselves —— in current funds on the return of this certificate properly indorsed, with interest at 4 per cent. per annum if left 6 months. No interest after 12 months unless renewed.

"$4,175.00. S. S. Cosler, Teller."

The said certificate is indorsed as follows:

"Face	$4,175 00
Int. at 4 per cent., Dec. 17—92, to May 11—93, 145 days	67 26
Total, 5—11—93	$4,242 26
Oct. 28—93, balance	$1,225 43
Suspense	620 28
	$1,855 71
Balance due	$2,386 55

"Dwiggins, Starbuck & Co."

The second certificate is known as "Exhibit B," and is in words and figures as follows:

"No. 106. The Valley Bank, Spring Valley, Ohio. $5,150.

"Feby. 1, 1893.

"United States Loan & Trust Co. has deposited in this bank fifty-one hundred and fifty and —— no/100 dollars, payable to the order of self —— in current funds on the return of this certificate properly indorsed, 6 months after date, with interest at — per cent. per annum, if left — months. No interest after 12 months unless renewed.

"$5,150.00. S. S. Cosler, Teller."

Indorsed:

"Without recourse. United States Loan & Trust Co., Harry M. Green, Secy."

The certificate which we shall designate as "Exhibit A" is not the original one issued by the Valley Bank, but is a duplicate, issued April 19, 1893, as a substitute for an original certificate issued December 17, 1892. The original

was issued at the request of a firm doing a banking business at Chicago, under the firm name of Dwiggins, Starbuck & Co. The consideration upon which it was issued was certain notes deposited in the Valley Bank, in which Dwiggins, Starbuck & Co. owned a one-half interest. The words "payable in current funds," found in the certificate as it now appears, were crossed out of the form used in filling out the original, and the words "payable in certain notes" substituted. The original also contained the words "special deposit." This original certificate was indorsed by Dwiggins, Starbuck & Co. to the Columbia National Bank, and the proceeds passed to their credit. Subsequently that bank charged it to the account of the Valley Bank, and sent it in for payment April 19, 1893. Payment was refused, as the notes in which it was payable had not been collected, and Mr. Cosler, the bank teller, was instructed by Mr. Puckett, the cashier, to return it. In opening the letter in which this certificate was inclosed, the teller accidentally detached the signature from the certificate, and was directed to issue a similar certificate, and send it to the Columbia Bank in place of the one defaced. In the execution of this simple direction, Mr. Cosler omitted to make the substituted certificate payable "in certain notes," as was the original, and omitted to mark it as a "special deposit." The certificate, in form as heretofore set out, was returned to the Columbia National Bank. These instructions were given the teller by Mr. Puckett, the cashier, over the telephone, and the latter never knew of this change in its terms until after the demand for payment in current funds was made by the receiver subsequently appointed to wind up the Chicago bank.

The history of Exhibit B is much the same. On February 2, 1893, Dwiggins, Starbuck & Co. sent to the Valley Bank $5,000 par value of bonds issued by a corporation doing business in Chicago as the United States Loan & Trust Company. These bonds were called "income bonds," and were supposed to be based upon shares in country banks owned by the trust company. These bonds were remitted with the request that a certificate of deposit be issued for them. By direction of the cashier, the teller issued a certificate for $5,150, being the par value of these bonds, with accrued interest. That certificate was made "payable in certain bonds," and was plainly marked as a "special deposit." The certificate was made payable to the order of Dwiggins, Starbuck & Co., and was remitted to that firm through the mail. On the 4th of February, 1893, it was returned to the Valley Bank by letter requesting that it would send "a similar one, but to the order of the United States Loan & Trust Company," and that it should be dated February 1st, instead of February 2d. Mr. Puckett, the cashier, was consulted by the teller, and instructed over the telephone to comply with this request, and issue another certificate similar to the one returned except in the particulars mentioned. The teller repeated the blunder he had made in renewing Exhibit A, and omitted to strike out the words "payable in current funds," and to insert in place the words "payable in certain bonds"; and for the second time he neglected to write on the certificate the words "special deposit." Instead of sending a similar certificate as requested, he sent the one set out in the earlier part of this statement of facts. This substituted certificate was indorsed without recourse by the United States Loan & Trust Company, and was discounted by the Columbia National Bank on February 8, 1893, which now claims as an innocent purchaser for value, without notice of the real consideration or of the circumstances we have detailed as to the issuance of the substituted certificate. The notes upon which Exhibit A was issued are uncollectible, and probably worthless. The so-called "income bonds" have never been sold by the Valley Bank, and are probably of no real value. The defendant below averred its readiness and willingness to take up these certificates in the notes and bonds in which, according to its contract, they were payable, and denied that the Columbia National Bank was entitled to the status and rights of an innocent purchaser for value. The Columbia National Bank failed in May, 1893. At that time it held for collection, on account of the Valley Bank, checks on other banks aggregating $620.28, which were subsequently collected by its receiver. There was to the credit of the Valley Bank $1,225.43, as shown by its books. Both these sums were credited on Exhibit A by the receiver, who seeks to recover only the balance after such credits. The defendant, by cross bill, prays that the complainant, as receiver, be required to pay to him the sum of $620.28, as

a collection made after the Columbia Bank had been closed, and to allow the dividend due upon its claim for $1,225.43, as a depositor. The circuit court held that the complainant was not an innocent purchaser for value of either of said certificates, and that it was not entitled to an order for the payment thereof, and granted the relief sought by the cross bill.

Harvey Scribner, for appellant.
Charles Darlington and Edward Colston, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

After making the foregoing statement of facts, the opinion of the court was delivered by LURTON, Circuit Judge.

Neither of the original certificates was payable in money, and neither was evidence of a deposit of money. One on its face was "payable in certain notes," and the other in "certain bonds," and both bore evidence of being issued for a "special deposit." Neither embodied a contract negotiable in character, and one taking them as originally issued could not claim the protection accorded one who takes negotiable paper before maturity for value, and without notice of defenses. When the first certificate was indorsed to the Columbia National Bank, it received it as a special contract, redeemable or payable in "certain notes," and not payable in money. No question of innocent purchaser could arise upon such paper, and it is wholly immaterial whether the bank had any knowledge outside the terms of the paper itself. It acquired no greater rights against the Valley Bank than existed in favor of the payee named in the certificate. The contention of appellant that the certificate which it now holds was issued in payment of the original certificate is without support in the facts. It was issued as a mere substitute for the original, which had been accidentally spoliated. The only consideration for the certificate now held was the one originally issued. That was redeemable in "certain notes." There was no new agreement between the parties, and no consideration for an agreement to pay in current funds. The change in the contract was made without the knowledge, consent, or intention of the Valley Bank, and was wholly due to the gross carelessness of the clerk who prepared and issued it. Under these facts, the complainant cannot be regarded as a purchaser without notice. It is therefore subject to any defense which could have been made against the original. This certificate was redeemable in the notes deposited by Dwiggins, Starbuck & Co. Those notes are held subject to the order of complainant, having never been collected or otherwise disposed of. The decree of the circuit court as to the certificate dated December 17, 1892, must be affirmed.

The rights of the complainant upon the certificate dated February 1, 1893, depend upon a different state of facts. That certificate, in its present shape and form, was discounted by the Columbia National Bank February 8, 1893. The officer who acted for the bank in discounting it was Zimri Dwiggins, its president. Dwiggins was one of the owners of the Valley Bank, and was a member of the firm of Dwiggins, Starbuck & Co., who procured the issuance of