the items as stated on the face of the account. Had objection been made at the beginning, or at a later time, to the interest charged, the plaintiffs might have declined further business. In the absence of objection they had the right to assume that the rate was assented to. It is incredible that a business man should receive such accounts for 14 years, and never know the rate of interest invariably charged in each account, and believe all the time that the interest was at another specific rate, never charged in any of the accounts, and never mentioned between the parties; and that he should at the end of the business, by reason of implicit confidence in the honesty and integrity of the other parties, settle the accounts without scrutiny, giving promissory notes for the footed balance, and yet, when these notes become due and unpaid, for the first time bethink himself to look over the accounts, finding readily therein the rate of interest charged. The inference is obvious. The rate of interest charged—8 per cent.—was legal under the Arkansas statutes. While its collection could not be enforced by suit in the absence of a written agreement to pay that rate, the party charged could pay or settle it at that rate. The promise implied upon a stated account is a promise to pay the stated balance, in the absence of fraud or mistake, and not a promise to pay any of the specific items. Marye v. Strouse, 5 Fed. 483, 496. In the course of the business all these items of interest were actually paid by Price by the application of credits to such payment, with his consent. Without specific directions from him the plaintiffs could apply the credits, or the law would apply them, to the older items of debit. But each account rendered showed the application of the credits by the plaintiffs to the entire previous account, including the interest items, and by not objecting Price consented to such application. Price must be held to have been cognizant of such application of payments, as well as of the rate of interest charged, and of everything else which a reasonable examination of the accounts as rendered would have shown. To hold differently would overthrow the wholesome rules of law in respect to accounts stated, and offer advantages to the dishonest and careless for throwing aside accounts rendered without examining them.

The case may be different in respect to the charges for insurance, contained in these accounts. A factor or commission merchant ordinarily would have no right to charge his principal any sum for insurance, or like disbursements, in excess of the amount actually paid. In view of the confidential relation, which, in respect to disbursements, is that of principal and agent, the law will not permit any overcharge. No custom allowing such overcharge can be sustained unless known and assented to by the principal. Marye v. Strouse, supra. The accounts rendered by plaintiffs afforded Price no means of ascertaining whether the amounts therein charged for insurance were the amounts actually so paid by the plaintiffs therefor. These items constituted representations by plaintiffs that they had paid the sums charged for such insurance. Price was obliged to rely and act on these representations, and, if deceived, he would not be estopped by the stated accounts, nor by having given the notes, from showing such deceit, and the actual facts relative to the amounts

paid for such insurance. The case of Marye v. Strouse, 5 Fed. 483, 494, determines all the points in the present case. The action was to recover a balance upon a mining-stock account between the plaintiff's assignors, who were stockbrokers, and the defendant, for whom they had acted in stock dealings. Accounts had been rendered, and, being retained without objection, had become, and were by the court considered, accounts stated. The defendant was permitted to falsify them in respect to overcharges for telegrams charged in accordance with a custom established by mining stockbrokers, but which the court refused to sustain, and also in respect to a charge for stock owned by one of the brokers, with which they filled an order of defendant for the purchase of stock, without disclosing that it was the broker's own stock which they represented they had bought for defendant. Another portion of the account objected to was various charges for interest at the rate of 2 per cent. per month, which the defendant claimed was illegal, because no agreement in writing had ever been made by him to pay that rate. The statute of Nevada allowed parties to agree in writing for the payment of any rate of interest, and, in the absence of written agreement, fixed the rate of interest at 10 per cent. per annum. The court held that the effect of the law was to prevent the recovery by suit of more than 10 per cent. where there was no agreement in writing; that the rate of 2 per cent. per month was not illegal, nor opposed to good morals, nor to the policy of the state; that such rate of interest might be included in the balance agreed upon in stating an account, which alters the nature of the debt, and amounts to a new promise to pay the agreed balance stated. The opinion of the court proceeds as follows (page 489):

"Under the circumstances of this case it appears to me that the balances struck in the 'broker's pass book' must be regarded, upon settled principles of law, as accounts stated. The book is kept for the express purpose of showing the customer how his account stands. It has on the debit side charges against Strouse for stocks bought, commissions, telegrams, assessments, and interest. On the credit side appear the proceeds of stock sold, money paid in on account, and dividends collected. The course of business in the brokers' office was to balance all stock accounts at the end of each month. The balance was carried forward as the first item of the next month's account. Interest on all advances during the month, as well as on the balance brought forward from the preceding month, was charged at the rate of two per cent. per month at the expiration of each month, and went into the balance struck. The pass book is a copy of the broker's ledger. Whenever it was brought in by the defendant it was written up by copying into it the entries from the ledger, and then returned to him, he having at all other times possession of the book. The first balance was struck August 31, 1874, and the last July 31, 1875. Every account and every balance made contains a charge for interest at the rate of two per cent. per month. In charging the item for interest it is not stated to be at the rate of two per cent., but the amount shows that to have been the rate. No objection was ever made by the defendant to this or any other portion of this account until the bringing of this suit in November, 1877. It thus appears that he retained the last account more than a year without objection. This warrants fully the presumption that he acquiesced in the accounts, and it is unnecessary that he should have given an express assent. Wiggins v. Burkham, 10 Wall, 129. The defendant, however, says that acquiescence ought not to be presumed, because he did not, in fact, know what rate of interest was charged to him in his accounts. It is perhaps a sufficient answer to this to say that, having been in the receipt of these monthly accounts for a year, if he did not know he

should have known that he was bound to examine them enough to discover what a very slight examination would have disclosed, upon the principle that a party is chargeable with knowledge when the means of knowledge are within his reach. Ogden v. Astor, 4 Sandf. 332. It would, indeed, be wrong to permit the defendant to lie by without objection while his broker advanced large sums for him upon the understanding that the rate of interest was to be as charged. But there can be no reasonable doubt that Strouse did know and assent to the rate of interest as charged. * * * It is impossible to believe that any business man could receive so simple an account, and not know the rate of interest he was charged. * * * Under such circumstances the authorities are clear that an account stated cannot be opened because an item of interest which went into it could not have been recovered by suit, provided such item is not illegal. Backus v. Minor, 3 Cal. 231; Young v. Hill, 6 Hun, 613; Bainbridge v. Wilcocks, Baldw. 536, Fed. Cas. No. 755; Freeland v. Heron, 7 Cranch, 147."

The circuit court therefore erred in overruling the objections of plaintiffs to the testimony of each of the defendants that he had not examined the interest charged in plaintiffs' accounts, and did not know nor understand that such interest was charged at a higher rate than 6 per cent. It also erred in refusing to charge the plaintiffs' sixth request, above quoted, and in its charge to the jury to the effect that the highest rate of interest which plaintiffs could charge in said accounts was 6 per cent.; and that, if the testimony and circumstances showed that at the time of the execution of the notes the defendants did not know that the rate of interest charged in the accounts current was 8 per cent., the jury should deduct the overcharge from the amounts for which the notes were given.

The circuit court correctly instructed the jury that there was nothing in the case to sustain any claim for deduction because of compound interest. Whatever of compound interest was charged was plain and obvious on the face of the accounts, and was assented to by lack of any objection. An agreement to pay interest upon an amount of interest already due and unpaid is valid. Guernsey v. Rexford, 63 N. Y. 631; Stewart v. Petree, 55 N. Y. 621. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

SECOND WARD SAV. BANK OF MILWAUKEE v. CITY OF HURON

(Circuit Court, D. South Dakota. May 8, 1897.)

1. MUNICIPAL CORPORATIONS—BONA FIDE PURCHASERS.
   In the absence of evidence to the contrary, a stipulation that a party "purchased" certain negotiable bonds is sufficient to show that he is a bona fide holder of them for value.

2. SAME—ESTOPPEL BY RECITALS.
   As against a bona fide holder of its bonds, a municipal corporation is estopped, by recitals in such bonds of the purpose of their issue and that all the provisions of the act authorizing their issue were complied with, from asserting that they were not issued for such purpose or that the provisions of the act were not complied with.

3. SAME—REFUNDING BONDS.
   It is no defense to an action on municipal bonds, issued to fund floating indebtedness, that the proceeds were used to take up warrants issued for illegal purposes.

4. SAME.

A municipal corporation empowered by its charter to borrow money by issuing bonds, for any legitimate municipal purpose, is thereby authorized to issue bonds to fund its floating indebtedness.

5. SAME—EXCESSIVE INDEBTEDNESS—ESTOPPEL.

A municipal corporation, for the purpose of selling its bonds, furnished to an intending purchaser a certificate, purporting to show the assessed valuation of its property and the amount of its indebtedness, being less than the legal limit. The bonds were taken and paid for, and the municipality paid several coupons. *Held* that, as against a bona fide purchaser, it was estopped to set up that, at the time of the issue of the bonds, it was indebted to an amount exceeding the legal limit.

Howard & Mallory, for plaintiff.
A. W. Wilmarth, for defendant.

CARLAND, District Judge. The plaintiff brings this action to recover of the defendant the sum of $2,400, claimed to be due upon certain coupons, which are attached to certain bonds issued by the defendant on August 15, 1889. The bonds were 16 in number, for $500 each, and were in the following form:

"The United States of America, Territory of Dakota.

"$500.00.

"Bond of the City of Huron, Beadle County, Dakota Territory.

"The city of Huron, ten years after date, for value received, will pay to bearer the sum of five hundred dollars, at the American Exchange National Bank, New York, with interest thereon at the rate of six per cent. per annum, payable semiannually, according to the terms of the annexed coupons.

"Issued pursuant to an election held April 2, 1889, by authority granted by article 32 of section 7 of the charter of the city of Huron. Said charter approved by the legislative assembly of the territory of Dakota, March 8, 1883. Issued for the purpose of funding the floating indebtedness of the city of Huron.

"In testimony whereof the city of Huron, Beadle county, Dakota, has caused this bond to be signed by the mayor thereof, and countersigned by the city clerk of said city, and the seal of said city affixed this 15th day of August, 1889. H. J. Rice, Mayor of the City of Huron.

"B. M. Rowley, City Clerk."

By stipulation in writing a jury was waived, and the action was tried to the court on April 27, 1897. The plaintiff at the trial relied upon the presumption that the holder of negotiable paper is presumed to have received the paper for value, in due course of business, without notice of any defects therein, and also upon the following stipulation filed in the case:

"It is stipulated hereby that the firm of Farson, Leach & Co., of Chicago, Illinois, purchased the bonds described in the complaint herein outright from the defendant, and that the plaintiff purchased said bonds outright from the said firm, and that said firm in no manner whatever acted as agents for said plaintiff in said matter. Howard & Mallory, Plaintiff's Attorneys.

"Dated April 27th, 1897. A. W. Wilmarth, Defendant's Attorney."

I quote this stipulation for the reason that it is the only evidence in the case that the plaintiff is a bona fide holder for value of the bonds and coupons involved in this action, providing the defendant has proved that the bonds originated in illegality or fraud, and thus has overcome the presumption arising from the possession of the bonds and coupons. The word "purchased," in the connection in

which it is used in the stipulation, imports that the plaintiff paid value for the bonds, and therefore, for the purposes of this case, the plaintiff will be held to be a bona fide holder for value, in due course of business, without notice of any defect in the bonds.

It now remains to be considered whether there are any defects in these bonds, shown by the evidence, which would defeat recovery, on the coupons attached thereto, by an innocent holder. The bonds contain this recital:

"Issued pursuant to an election held April 2, 1889, by authority granted by article 32 of section 7 of the charter of the city of Huron. Said charter approved by the legislative assembly of the territory of Dakota, March 8, 1883. Issued for the purpose of funding the floating indebtedness of the city of Huron."

Article 32 of section 7 of the charter referred to is in the following words:

"Powers of City Council.

"To borrow money, and for that purpose to issue the bonds of the city in such denominations for such length of time, not to exceed twenty years, and bearing such rate of interest, not to exceed 7% per annum, as the city council may deem best. Said bonds to express upon their face under what authority and for what purpose they are issued, and may have interest coupons attached: provided that no bonds shall be issued by the city council unless at an election after twenty days' notice in a newspaper published in the city, stating the purpose for which said bonds are to be issued, and the amount thereof, the legal voters of said city, by a majority, shall determine in favor of issuing said bonds: provided, further, that no bonds issued by the city council, under this act, shall be sold for less than par value."

As against this plaintiff, the defendant is estopped by the recital in the bond from denying that all the provisions of said article 32 were complied with. Evansville v. Dennett, 161 U. S. 434, 16 Sup. Ct. 613; Town of Coloma v. Eaves, 92 U. S. 484; Commissioners v. Bolles, 94 U. S. 104; Mercer Co. v. Hacket, 1 Wall. 83; Commissioners v. Beal, 113 U. S. 227, 238, 239, 5 Sup. Ct. 433; Cairo v. Zane, 149 U. S. 122, 13 Sup. Ct. 803; National Life Ins. Co. v. Board of Ed., 10 C. C. A. 637, 62 Fed. 783. It is also estopped, as against this plaintiff, from denying that the bonds were in fact issued for the purpose stated on their face. National Life Ins. Co. v. Board of Ed., 10 C. C. A. 637, 62 Fed. 783, and cases cited on page 645, 10 C. C. A., and page 785, 62 Fed.; Simonton, Mun. Bonds, p. 167. And it is no defense to these bonds, as against the plaintiff, that the proceeds thereof were used to take up and pay warrants issued for an illegal purpose. In National Life Ins. Co. v. Board of Ed., supra, it was said:

"That a municipal corporation has given away or squandered the proceeds of negotiable securities which it placed upon the market cannot affect the rights of bona fide purchasers who had no knowledge of or part in the gift or waste."

These propositions of law dispose of several of the matters urged against the validity of these bonds. It is further contended that the defendant had no power to fund its floating indebtedness, and that, the bonds having recited on their face that they were issued for such a purpose, the coupons are invalid in the hands of the plaintiff. The power to fund the floating indebtedness of the plaintiff, by issuing negotiable security, must be found, if at all, in the provision quoted herein from defendant's charter. Does the power to

borrow money, and issue negotiable securities for that purpose, give to the defendant the power to issue bonds to fund a floating debt? In Portland Sav. Bank v. City of Evansville, 25 Fed. 389, the court held that the words, "to borrow money for the use of the city," conferred the power to issue renewal bonds. The provision quoted from defendant's charter confers the power to borrow money by issuing bonds for any legitimate municipal purpose. Is not the borrowing of money to fund an existing indebtedness a legitimate municipal purpose? There seems to be but one answer to the question, and that is, that the general power to borrow money by issuing negotiable security necessarily carries with it the power to issue bonds to fund a floating debt. Simonton, Mun. Bonds, § 126. Sections 1149, 1150, Comp. Laws S. D., do not limit or restrict the power of the defendant conferred by its charter, as section 1150 states "that this act shall not be construed to limit or restrict the powers already conferred by any special charter upon the council of any city or municipal corporation." At the time these bonds were issued the defendant was a municipal corporation of the territory of Dakota, and as such was subject to section 4 of an act of congress approved July 30, 1886, which is in the following language:

"No political or municipal corporation, county or other subdivision, in any of the territories of the United States, shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county, or subdivision, to be ascertained by the last assessment for territorial and county taxes, previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount, given by such corporation, shall be void."

The plaintiff, as a part of its case, introduced into evidence a certificate made by the clerk of defendant under its corporate seal, addressed to Farson, Leach & Co., and dated August 14, 1889, wherein the bonds involved in this action are offered for sale, and wherein it is stated to be true that the assessed valuation of the property in the city of Huron for the year 1889, liable to taxation, was $1,573,001, and that the total debt of defendant was: Water, $4,000; funding, $14,500. This certificate is addressed to the same firm which it is conceded purchased these bonds outright from the city of Huron, and from whom, it is conceded, the plaintiff purchased the same bonds outright. It was made for the purpose of selling these bonds. The evidence shows that the defendant received in cash, which went into its treasury and was used to pay off outstanding warrants, $8,140; that defendant has paid the first four coupons on each of these bonds; that at an election duly held, as recited in the bond, the constituent members of the defendant corporation decided to issue these bonds. Can the defendant now set up the fact that at the time the warrants were issued, which the proceeds of these bonds paid off, the defendant was indebted in an amount exceeding the limitation imposed by the law of congress? Has not the defendant, by its conduct and representations, estopped itself from now showing that the warrants which the proceeds of these bonds paid off were issued in excess of the statutory limit? Every

principle of right and justice would seem to require an answer in the affirmative.

The bonds in this case contain the recital that they were issued for the purpose of funding the floating indebtedness of the city of Huron. The bonds do not specify any particular floating indebtedness, and an innocent holder for value of these bonds would have no right to presume that the proceeds of the bonds were to be used in paying off illegal warrants, nor is it possible that the law is that the holders of these bonds were bound to know that the proceeds of the bonds were to be used in paying illegal warrants. The city council had the right to determine what indebtedness should be funded, and if, after getting the money arising from the sale of these bonds, it saw fit to apply it to the payment of warrants which were illegal, the plaintiff, as an innocent holder of these bonds, cannot have its rights depend merely upon the decision of the city council as to what debt it should pay off with the proceeds of the same. If this limitation contained in the act of congress shall be considered a constitutional limitation, still the courts hold that, even in that event, municipal corporations may be estopped by recitals. Chaffee Co. v. Potter, 142 U. S. 355, 12 Sup. Ct. 216; National Life Ins. Co. v. Board of Ed., supra.

The principle of law heretofore stated, to the effect that innocent holders of negotiable securities are in no wise responsible for the wise and economical use by the corporation of the fund it borrows, is also applicable, so long as there was nothing recited in the bonds showing the particular portion of the defendant's floating debt which was to be funded with the proceeds of plaintiff's bonds. In City of Cadillac v. Woonsocket Inst. for Savings, 7 C. C. A. 578, 58 Fed. 939, the circuit court of appeals for the Sixth circuit said:

"It seems to us that the representations made on the face of the bonds estops the city, as against a bona fide holder, from disputing the fact that these bonds were issued to take up old bonds falling due. Power was conferred by the act upon the common council to issue new bonds to take up bonds falling due. The question as to whether there are any such bonds is referred to the council. The old bonds, on the facts found by the circuit court, were at least 'colorable obligations.' The council determined to issue new bonds to take them up. It seems to us that, upon these circumstances, it did not devolve upon the purchaser of the new bond to look into the validity of the funded old bonds. * * * The defense it might have made against the old bonds it elected not to make. It should not now be permitted to make the same as against an innocent holder of the new bonds."

LEAHY v. LOBDELL, FARWELL & CO.

(Circuit Court of Appeals, Sixth Circuit. May 17, 1897.)

No. 305.

1. BANKERS AND BROKERS—PLEDGE.
When securities have been purchased from one who deals in them sometimes as owner, and sometimes as broker for others, though a credit is given for a greater part of the price, and the securities remain in the vendor's hands subject to a lien for the balance, the mere fact that the vendor has, in other transactions, acted as the vendee's broker in dealing in securities with others, does not convert the securities purchased into the subject of a pledge for the payment of balances due from the vendee on the general account for brokerage transactions.

2. RESCISSION OF SALES—PART PAYMENT—ENFORCEMENT OF LIEN.
When a vendor gives credit for a part of the price of the articles sold, and retains them subject to a lien for the remainder of the price, if he either sells such articles before the expiration of a fixed term of credit, or, when there is no fixed term of credit, if he sells them without giving the vendee due notice, with an opportunity to pay the price, the vendee may treat the sale as rescinded, and recover back what he has paid, with interest.

3. PLEDGE—COLORABLE SALE BY PLEDGEE.
A sale by a pledgee of the article held in pledge, which is merely colorable, and which is subsequently rescinded by the pledgee, who takes back such article into his possession, is wholly inoperative to divest the pledgor's title; and by reporting such a pretended sale to the pledgor, thereby leading him to believe that his rights in the pledge are gone, the pledgee disentitles himself to make a subsequent sale of the pledge without giving the pledgor notice of the facts and of his intention to make such sale.

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

Lobdell, Farwell & Co., of Chicago, who were plaintiffs in the court below, brought this suit against the defendant, Leahy, a resident of Muskegon, Mich., for the purpose of recovering a balance alleged to be due them on account of certain dealings in stocks and bonds. In 1893, and for several years previous thereto, Lobdell, Farwell & Co. were engaged in the business of buying and selling stocks and bonds as brokers for other parties, and also in buying and selling stocks and bonds on their own account. Among others who had bought and sold stocks and bonds through them as brokers was the defendant, Leahy, who is plaintiff in error here. This dealing was for the purposes of speculation on the part of Leahy. On the 26th day of January of the year above mentioned, after some preliminary conversation between the parties in reference to a sale by Lobdell, Farwell & Co. to Leahy of a certain amount of bonds of the Metropolitan West Side Elevated Railroad Company of Chicago, and some stock of that company, the right to which passed to the holder of the bonds, and certain stock of the West Side Construction Company, also of Chicago,—being a corporation organized for the purpose of building the road of the Metropolitan West Side Elevated Railroad Company,—Leahy signed and delivered to Lobdell, Farwell & Co. a certain instrument in writing of that date, addressed to them, of which the following is a copy:

"As per my talk with you this morning, please reserve for me $25,000 (par value) of the bonds of the Metropolitan West Side Elevated Railroad Company, at par, and charge my account. With these bonds you are to allow as a bonus 25 per cent. of my subscription, or 62½ shares of the stock of the Metropolitan West Side Elevated Railroad Company. Also, as talked this morning, you are to allow me to have 25 shares of the stock of the West Side Construction Company, on which 40 per cent. has been paid, the cost of which ($1,000) you will also charge to my account, with interest. The stock of the Metropolitan West Side Elevated Railroad Company, I understand, is not yet issued, and

when it is issued it will be issued to a trust company in New York, whose receipts will be issued therefor. This will be perfectly satisfactory to me, as stated."

This proposition was accepted, and Leahy paid down, as part of the purchase price, or as a margin to carry the stocks and bonds,—it is uncertain which,—the sum of $2,500.

From the bill of exceptions it appears that evidence was given by Leahy upon the trial in the court below tending to show that, at the time of his purchase of the stocks and bonds mentioned in the instrument above set forth, Lobdell, Farwell & Co. agreed to carry those stocks and bonds for him for a year at least, and, if his necessities required it, for another year longer, upon the terms of his paying to them interest at the current business rate. The plaintiff below denied the making of this agreement. The bonds and stocks thus purchased by Leahy belonged to Lobdell, Farwell & Co., and were not bought by them as brokers. In July following Lobdell, Farwell & Co. wrote Leahy that, on account of the high rates of interest prevailing, they would have to charge a commission of ½ per cent. per month on all open accounts in addition to regular charges for interest, and on the 26th of July Leahy replied as follows:

"When I purchased the bonds, you stated that you would carry them a year or two, if necessary, at the regular interest rates, which were six per cent. at that time, and, when you advanced to seven per cent. I supposed you were paying more, but when you come to double it, I must say it is too high. You certainly made a good profit on the bonds when you sold them, and I do not believe you should charge a commission at this time when so many are losing money, myself among the number."

At the date of this purchase, other accounts between the parties, growing out of the purchase and carrying of stocks and bonds for Leahy by Lobdell, Farwell & Co., were still open. This transaction of purchase and sale of the bonds and stock of the Metropolitan West Side Elevated Railroad Company, and of the shares of stock of the construction company, was entered upon their books by Lobdell, Farwell & Co. in their general brokerage account with Leahy, and subsequently they rendered successive statements of account, in which these bonds and stocks were intermingled and treated as being subject to the same conditions as other purchases of bonds and stock which they had made for Leahy; and evidence was given upon the trial from which the jury might have found that the defendant, Leahy, assented to this mode of treating the bonds and stock in controversy, and that the parties, subsequently to the contract of sale, had an understanding and an agreement that these bonds and stock should stand in the same situation, and subject to be treated in like manner, with bonds and stock which Lobdell, Farwell & Co. had, as brokers, bought and were carrying for Leahy.

In the early summer of 1893 the financial troubles of that year began, and the stocks and bonds of all kinds which Leahy then had in the hands of Lobdell, Farwell & Co., among them those purchased of them as above stated, quite rapidly depreciated. That depreciation went on to such an extent that, in the latter part of July, Lobdell, Farwell & Co. wrote to the plaintiff in error, calling his attention to the financial situation, and stating, in substance, that they desired additional margin on his account, and on the 2d day of August they addressed to him the following letter:

"We wrote you some days ago, asking for additional margin on your account, and telling you the condition of the market. The borrowing power of all stocks and bonds has declined very seriously, even while actual quotations have, perhaps, not changed a great deal. Alley stock has been offered here quietly at 65, with no public bids. Probably the stock would be sold around 60, if forced, although we do not know of any such bid at the moment. In figuring your securities at the close of the month, we have figured Alley stock at 60, Metropolitan 5's at 70, and Construction Company at 75, although these prices are nominal. Figuring them at these prices would leave a deficiency on your account of about $3,000. As a matter of fact, we are unable to borrow more than 40 on Alley stock, 50 on Metropolitan 5's, and 60 on Construction stock. As things are now, it looks as though we would be obliged to sell out all securities which we hold that are not properly margined, and write you this

letter to tell you the condition, and ask you, if you are not able to give us cash, to give us mortgages, or good notes, or some other securities, which will be enough to be good security for at least $5,000. We trust you will respond to this at once, and let us know what we shall do. If you are unable to give us this security, it looks now as though we will be obliged to sell the securities for what they will bring, although we should dislike to do so very much, if it can be avoided. When the market turns up again, we will probably be able to return you whatever security you may give us. Do not fail to reply to this at once upon receipt."

Other correspondence ensued immediately thereafter, and on August 14th Lobdell, Farwell & Co. sent the following letter to Leahy:

"Please wire us upon receipt of this letter, in case you are not able to make the raise talked of in former letter, and we will sell the securities which we are now carrying for your account. We have an opportunity to sell Metropolitan bonds at 65 with the stock, and the 25 Construction stock at 60. Alley 'L' sold to-day at 55, and we may be able to work this off at the same price, although it is not certain. If this deal is to go, we will have to make it at once. You will please wire us to-morrow, authorizing us to make the sale, in case you cannot put up the other security."

And again, on the 17th, the following:

"We have been unable to find a buyer for your Alley stock since the receipt of your telegram. We have to-day, however, a probable buyer for 100 shares at 50. We have, also, an opportunity to sell the $25,000 Metropolitan bonds with the stock bonus at 65, and the 25 Construction stock at 60. Please wire us as early as possible to-morrow if we shall make this sale, or whether you have succeeded in making your arrangements for additional collateral."

To this last letter Leahy, on the 18th of August, made the following reply:

"Your letter received, and would say in reply that I do not wish to sell Metropolitan bonds and stocks that go with them at present. I wired you a few days since to sell Alley 'L' stock at best price."

On the same day Lobdell, Farwell & Co. addressed to him the following letter:

"We have to-day closed out your account at the following prices, and inclose herein memorandum showing the balance due us. We closed out 100 shares of Alley 'L' stock at 50, 25,000 Metropolitan bonds with their stock rights at 65, and 25 Construction Company at 60. In making a lump sale of these securities, at this price, you have obtained more than they could be peddled out for. We trust you will be able to secure us the balance due us."

Leahy replied to this on the 19th of August, as follows:

"Yours of 18th inst., stating that you had closed out one hundred shares of Alley 'L' stock at 50, and twenty-five thousand Metropolitan bonds with their stock rights at 65, and twenty-five shares Construction Company stock at 60, and inclosing memorandum, received. I authorized you to sell the Alley 'L' stock, but you had no authority from me to sell the bonds with their stock rights and the Construction Company stock. In view of the arrangements you made with me at the time of selling me those bonds with their stock rights and the Construction Company's stock, and by which I was induced to buy them, I do not recognize on your part any right to sell, nor do I assent to your reported action in making sale of those bonds, the stock rights, and Construction stock, or any part of them, without authority from me. I therefore expect and demand that you forthwith place me in the same position I occupied with respect to the Metropolitan bonds, with their stock rights, and the Construction Company's stock, immediately before you reported sale thereof. I certainly cannot and do not admit the memorandum inclosed in your letter to be correct."

Not long after this, upon the closing out of their business with Leahy, they sent him a statement of account, showing the balance due upon all of their transactions to be $5,361.17, and upon Leahy's refusal to pay the balance thus claimed they brought this suit.

Upon the trial it was disclosed that the sale made by Lobdell, Farwell & Co. of Leahy's stocks and bonds, mentioned in their letter of the 18th of Au-

gust, was not a bona fide sale, but was a merely nominal one to Charles H. Deere, who at that time was a director of the Lobdell, Farwell & Co. corporation. Deere never paid anything for the property, and a few days afterwards the sale to Deere was canceled; Lobdell, Farwell & Co. agreeing to stand in Deere's place in regard to the property. The stocks and bonds in question were held by them until October 31, 1893, when a part of them were sold; the other part being held until December 30th of the same year, when they also were sold. The amount realized on these sales was $2,400 more than the amount reported by Lobdell, Farwell & Co. as having been realized on the sale made to Deere on the 18th of August. The rescission of the sale to Deere, and the resale of the same bonds and stocks by Lobdell, Farwell & Co. later on in the year, was never reported by them to Leahy, nor was he made aware of those facts until they were proven upon the trial. The declaration was on the common counts in assumpsit, to which the defendant pleaded the general issue and gave notice of set-off thereunder, which mode of pleading is allowed by the law and rules of practice in the courts of the state of Michigan. The questions raised at the trial related solely to the circumstances involved in the transaction of the sale and purchase of the Metropolitan Elevated Railroad bonds and stock and the Construction Company stock, and the subsequent dealings with and disposition of that stock by the plaintiff in the suit; there being no controversy with regard to other matters of account between the parties. Proof was given upon the trial of the transactions above detailed, and upon the view that, under the circumstances attending the purchase by the defendant of Lobdell, Farwell & Co. of the bonds and stocks above mentioned, and the subsequent conduct of the parties in reference to them, the bonds and stocks were held by them as pledgees for security, in common with other stocks and bonds held by them, for the payment of the balance of the purchase price of all bonds and stocks which Lobdell, Farwell & Co. were carrying for Leahy, the court held that Lobdell, Farwell & Co. were entitled, as such pledgees, to sell the bonds and stock in question upon Leahy's refusal to keep his account good. The court further held that the sale to Deere and the cancellation of that sale did not affect the rights of the parties or their relation to the bonds, and that the plaintiff in suit was chargeable for the amount finally realized for the bonds and stocks in October and December, as above stated. A direction was given to the jury to render a verdict, in accordance with these views of the court, for the sum of $3,179.78, that being the amount agreed upon between the parties upon the assumption that the ruling of the court was correct. The defendant, Leahy, excepted to this ruling, and contended that the only relation between Lobdell, Farwell & Co. and himself arising from the sale was that of vendor and purchaser, and that the proofs justified him in claiming that the plaintiff had agreed to carry the stocks and bonds for one or two years on his paying interest at the current rate, and that the resale by the vendor was in violation of his rights as a purchaser, authorizing a rescission of the sale by him, and a recovery of the amount of the $2,500 which he had paid, with the interest thereon, and insisted that he was entitled upon that state of facts to a verdict for the sum of $3,807.96; and it was agreed between the parties that, if the defendant's contention was well founded, the verdict ought to be for that sum, and the court, while directing a verdict for the plaintiff for the sum previously mentioned, $3,179.78, further asked the jury to find what amount would be due from the plaintiff to the defendant, if the plaintiff were not entitled to charge up anything, either principal or interest, on account of the Metropolitan bond transaction, and the defendant were entitled to a credit of $2,500 for the money paid by the defendant on the transaction, with interest to date. The sum due from the plaintiff on this contingency was agreed by the parties to be the sum of $3,807.96. The defendant excepted to the ruling and direction of the court to the jury, and also presented requests to charge the jury in accordance with his claim in reference to the nature of the transaction and the relation of the parties, as above stated, and asked, if that was not allowed, to have the questions of fact involved in their contention submitted to the jury. These requests were denied by the court, and the defendant excepted. The jury rendered a general verdict for the plaintiff for the sum of $3,179.78, as directed by the court, and further found, in response to the request for a special finding, that upon the facts stated in that request the

defendant would be entitled to a verdict against the plaintiff for the sum of $3,807.96. Judgment having been entered in accordance with the general verdict, the defendant brings the case here on writ of error, and sufficiently assigns the errors complained of to bring up the questions of law raised upon the trial.

Smith, Nims, Hoyt & Erwin and James E. Monroe, for plaintiff in error.

Smiley, Smith & Stevens and Thomas C. Clark, for defendant in error.

Before LURTON, Circuit Judge, HAMMOND, J., and SEVERENS, District Judge.

SEVERENS, District Judge, having made the foregoing statement of the facts, delivered the opinion of the court.

It seems clear that the result of the purchase of the Metropolitan Company bonds and stock and the Construction Company stock by Leahy on January 26, 1893, of Lobdell, Farwell & Co., though accompanied by a credit for a part of the price, with an agreement to carry the bonds and stock during the time for which such credit was given, was to pass the title to the bonds and stock to the purchaser, subject, however, to a lien of the vendor for the unpaid purchase price. This lien, however, would be suspended during the time for which the credit was given, and would not attach if the vendor should not still be in possession at the expiration of that time. This lien does not depend upon any express stipulation of the parties that it shall exist, but is implied by law upon principles of natural justice. McElwee v. Lumber Co., 37 U. S. App. 266, 16 C. C. A. 232, and 69 Fed. 302; Hodgson v. Loy, 7 Term R. 440; Bloxam v. Sanders, 4 Barn. & C. 948; McEwan v. Smith, 2 H. L. Cas. 328; Arnold v. Delano, 4 Cush. 39; Railroad Co. v. Vibbard, 114 Mass. 447–458; Welsh v. Bell, 32 Pa. St. 12; Owens v. Weedman, 82 Ill. 409; 1 Jones, Liens (2d Ed.) § 800; 2 Schouler, Pers. Prop. (2d Ed.) § 553; 2 Benj. Sales (Bennett's 6th Am. Ed.) p. 804. It appears to have been a fact undisputed at the trial that a credit was given on this purchase, though the terms and conditions of the credit were a subject upon which the parties differed.

The mere fact that Lobdell, Farwell & Co. had, in other transactions, acted as Leahy's brokers in purchasing bonds and stocks from others, did not convert the bonds and stocks of this purchase from Lobdell, Farwell & Co. into the subject of a pledge for the payment of balances due from Leahy on the general account for brokerage transactions; and, in the absence of some agreement between the parties, the relation of the parties with reference to bonds and stocks purchased on this occasion would be that of vendor and vendee, with the incidental rights growing out of that relation in a case where credit is given for the purchase money. If the agreement in respect to the giving of credit was for a period reaching beyond the time when Lobdell, Farwell & Co. finally disposed of the bonds and stocks in question, and Leahy kept up the interest as required by the agreement, and there was no further agreement changing the relations of the parties, it is manifest that Lobdell, Farwell & Co. had no right

to sell the bonds and stocks as they did; and such unauthorized sale would entitle Leahy to treat the sale to him as rescinded, and to recover back what he had paid on the purchase, with interest from the date of payment. Holland v. Rea, 48 Mich. 222–224, 12 N. W. 167; Pollen v. Le Roy, 30 N. Y. 549–557; Fancher v. Goodman, 29 Barb. 317; Rosenbaums v. Weeden, 18 Grat. 793; McClure v. Williams, 5 Sneed, 718; Redmond v. Smock, 28 Ind. 365; Benj. Sales (6th Am. Ed.) §§ 782–795.

But we see no reason to doubt that it was competent for the parties, by further agreement, to impress upon the bonds and stocks in question the character of a pledge, giving to Lobdell, Farwell & Co. a lien for the payment of any balance due them on their general account with Leahy. There is some evidence in the record tending to show that such an understanding was had between the parties. It was affirmed by the plaintiff and denied by the defendant. The determination of the fact is followed by important consequences. If no such an agreement was had, Leahy, as already stated, was in position to treat his contract of purchase as at an end, and to recover back the $2,500 which he had paid, with interest; and, if the facts were as just stated, the result would have been the same if no credit for a definite time had been given, but the price was subject to call, for the subsequent sale finally made by Lobdell, Farwell & Co. was not justified by any proper proceedings taken by them to that end. In such case they were bound to call for payment of the purchase price, and in case of his default notify the purchaser of their intention to sell the property for their indemnity. Benj. Sales, § 794, and pages 775 and 776, Bennett's note, where the American cases are numerously collected. This they did not do. They called on Leahy to furnish margins on general account, and notified him that if he did not comply they would sell the property upon the footing of a pledge for the whole balance due them. This was a demand and notice wholly unwarranted by such conditions, and furnished no basis whatever for the subsequent sale.

On the other hand, if the parties agreed that Lobdell, Farwell & Co. should hold the bonds and stocks as security for the balance of account upon their dealings with Leahy, as they held those which they had bought as brokers for him, this would constitute a pledge. If they should exercise the rights of a pledgee, they would necessarily waive any lien which might have inured to them as vendors in the sale to Leahy, which would be inconsistent with the pledge, and depend upon the latter's personal responsibility. But in such case there would be no rescission of the sale, and Lobdell, Farwell & Co. would hold the bonds and stocks as the property of Leahy, subject to the terms and conditions of the pledge. In that state of things, if they disposed of the property in an unauthorized way, they would be liable to the pledgor for its value in an action of trover, or the pledgor might waive the tort and recover the price for which the property was sold. The measure of damages would not be the contract price on the sale to Leahy, which would have become an indifferent matter in respect to such subsequent dealings.

Pursuing the subject further upon this latter alternative, there