when advised by counsel on March 29, 1898, that they should not exclude the complainant from the occupation of the property, they at once surrendered its possession to the complainant.

It follows, in the opinion of the court, that John R. Cook, W. E. Cook, John S. Cook, and H. B. Gillis have been guilty of contempt of court, and the judgment is that they pay a fine of $50 each and the costs of the proceedings; and, unless the fines and costs are paid within 10 days, that they be imprisoned until the fines and costs are paid, not to exceed 30 days. That George Marsh, George Norris, and Thomas McInerney are also guilty of contempt of court, and that they be fined $50 each and the costs of these proceedings; and, unless the fines and costs are paid within 10 days, that they be imprisoned until the fines and costs are paid, not to exceed 30 days. With respect to J. R. Tapscott, I find that he is the junior member of the law firm of Gillis & Tapscott, and that what he did in this case was in accordance with the views of Mr. Gillis, the senior member of the firm. My judgment is, however, that he is guilty of contempt of court, and that he pay the costs of the proceedings, under the conditions heretofore stated. That Henry Martin, Julius H. Stock, Robert Hopkins, Abner Giddings, William Ferguson, J. H. Layman, Norman Campbell, E. Campbell, J. Van Landingham, J. P. Plunkett, Peter Linn, Albert Panknin, Frank L. Martin, William Hanning, Andy Davis, E. A. Farr, Nels Monson, H. I. Small, and Louis Stoneburg are guilty of contempt of court; that they be fined the costs of these proceedings; and, if the costs are not paid within 10 days, that they be imprisoned until the costs are paid, not to exceed 30 days. That in the case of David S. Baxter the order to show cause be discharged.

FARMERS' LOAN & TRUST CO. et al. v. FIDELITY TRUST CO.[1]

(Circuit Court of Appeals, Ninth Circuit. February 14, 1898.)

No. 371.

1. BANKS AND BANKING—DRAFTS BY AGENT—CERTIFICATE OF DEPOSIT TO AGENT INDIVIDUALLY.
   The mere fact that an agent asks for a certificate of deposit in his own name for moneys of his principal is equivalent, nothing to the contrary appearing, to a declaration by the agent that the money is received by him in his individual capacity, for his individual use, and is enough to put the bank on inquiry as to why the agent wanted the certificate so issued, especially where the president of the bank knew the agent to be irregular and unreliable in his business methods.
2. SAME—PREVIOUS DRAFTS.
   The fact that previous drafts drawn by the agent, and credited to him as such agent on the books of the bank, or cashed when drawn, had been paid by the principal, did not warrant the bank in issuing a certificate in the individual name of the agent on a draft drawn by him as agent.

Hawley, District Judge, dissenting.

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

Crowley & Grosscup, for appellants.

R. G. Hudson and R. S. Holt, for appellee.

[1] Rehearing denied May 20, 1898.

Before ROSS and MORROW, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This is an appeal from a judgment for $4,641, with costs, rendered against the Northern Pacific Railroad Company and Andrew F. Burleigh, receiver thereof, upon an intervening petition of the Fidelity Trust Company filed in the suit brought by the Farmers' Loan & Trust Company against the Northern Pacific Railroad Company for the foreclosure of certain mortgages. The intervention was based upon a draft drawn April 5, 1895, by one Paul Schulze, as general land agent of the Northern Pacific Railroad Company, upon George S. Baxter, the treasurer of the company, at New York, for $4,200, and cashed by the petitioner in Tacoma, Wash., the day it bore date, upon its presentation at its bank in that city by Schulze. Before the draft was presented for payment in New York, Baxter had ceased to be treasurer of the company. His successor having refused to pay it, the petitioner sought by its intervention payment thereof out of the funds in the hands of the court, which payment was resisted by the receiver on the ground that Schulze had no authority to draw the draft, and that the money paid thereon by the petitioner was not devoted to the uses of the corporation or its receiver, but was wrongfully appropriated to the personal use of Schulze. That the money paid for the draft by the petitioner was appropriated by Schulze to his individual use, and that none of it was ever received by the Northern Pacific Railroad Company, or its receiver, is shown by the evidence, without conflict. The court below, however, gave the petitioner judgment, upon the ground that, by the course of business of the corporation and its receiver, Schulze, as the general land agent of the company, had been held out to the public, and to the petitioner in particular, as clothed with authority to draw such drafts as that in question, and that the railroad company and its receiver are estopped to deny the binding character of the draft in question by reason of three certain other prior drafts drawn by Schulze, as such general land agent, upon Baxter, as treasurer, for certain sums of money, each of which drafts was at the time cashed by the petitioner, and, upon its presentation to the drawee in New York, promptly paid by him. The first of those drafts was drawn September 20, 1894, for $4,925; the second was drawn March 15, 1895, for $3,500; and the third upon April 1, 1895, for $4,700. The first two were presented by the petitioner, and were paid by the drawee, prior to the drawing of the draft in controversy. The third had not been paid by the drawee at the time when the draft in question was presented to the petitioner's bank at Tacoma, and by it cashed, but was paid on the 8th day of April, 1895,—three days after the fourth draft was cashed by the petitioner. It appears from the deposition of Baxter that on May 9, 1892, he wrote to Schulze, saying:

"I understand all the outside land business of the company on the Pacific Coast is in your charge; and before authorizing any further draft for taxes, or any other purpose, I should have notice from you of any draft to be made."

It further appears from Baxter's deposition that when the draft of September 20, 1894, was presented to him in New York, he telegraphed

Schulze to know if it pertained to the company's business, and received the answer that it was personal business, and that when the draft of March 15, 1895, was drawn, Schulze notified him of it by telegraph, and that Baxter answered, saying, "If it is personal, make the money payable to me personally," and that Schulze complied with his direction, by sending him the money at New York to meet the draft when it was presented. When the draft of April 1st was presented, Baxter had ceased to be treasurer of the company, but he paid the same, as he had paid the preceding ones,—evidently from money sent to him by Schulze. Since all of these drafts were drawn by Schulze as general land agent of the company, it thus appears that Schulze's rascality was connived at and aided by Baxter, the treasurer of the company. The petitioner's bank was the depository of the funds of the Northern Pacific Railroad Company at Tacoma, both before and during its receivership. It carried upon its books several accounts with the railroad company, which were not changed after the receivership, except by noting at the head of the accounts the fact of the receivership, with the names of the receivers. Those accounts were a general account, in which was deposited all the receipts of the station agents in Tacoma and the surrounding territory; the land-department account, in which was deposited the receipts of the Northern Pacific land department at Tacoma; the account of the Puget Sound & Alaska Steamship Company, which was controlled by the railroad company; a pay check and voucher account; a certificate account with the freight agent at Tacoma; and an account with Paul Schulze as general land agent of the company. This latter account was entirely separate and distinct from the account of the land department, which was drawn against by the assistant treasurer of the company at St. Paul only. Schulze was empowered to manage and sell all of the lands of the company in Washington, Oregon, and Idaho, and to collect their proceeds. In pursuance of his powers, he drew drafts on the land commissioner and assistant treasurer of the road at St. Paul for moneys with which to pay taxes upon the lands, and for refunding purchase moneys where necessary. He was charged, too, it would seem, with some disreputable work for the road; for it appears from the record that he drew for and disbursed a political "corruption" fund, although it does not appear on whom he drew for the purpose, or how he disbursed the money. It appears, also, that in the year 1888 Schulze drew two drafts for $25,000 and $15,000, respectively, on the treasurer of the company at New York, which were paid; but these drafts were drawn through another bank than that of the petitioner, were never brought to the knowledge of the petitioner, so far as appears, and were drawn under special authority. The only drafts ever drawn by Schulze, as general land agent of the company, on its treasurer at New York, through the petitioner, or through any other medium with its knowledge, so far as the record shows, were the four drafts already mentioned, the fourth of which is the draft in controversy. The first (that of September 20, 1894, for $4,925) was deposited with the petitioner to the credit of Schulze as general land agent, and the amount of it subsequently checked out by him in the same capacity. The second and third drafts (those of March 15, 1895, for $3,500, and April

1, 1895, for $4,700) were cashed by the petitioner over its counter at the time they were respectively drawn. For the fourth draft, with $300 in cash, delivered by Schulze to the petitioner, petitioner issued in his individual name its certificate of deposit for $4,500, which was returned to petitioner the next day by the Bank of British Columbia, with Schulze's indorsement thereon, and paid by the petitioner. If this was all, it would be clear that neither the Northern Pacific Railroad Company nor its receiver is responsible by reason of the draft in question; for it cannot be doubted that ordinarily an agent who undertakes to pledge the security of his principal for his own benefit must show express authority therefor, and that whoever deals with such an obligation does so at his peril. West St. Louis Sav. Bank v. Shawnee Co. Bank, 95 U. S. 557; Chrystie v. Foster, 9 C. C. A. 606, 61 Fed. 551; Anderson v. Kissam, 35 Fed. 699; Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 631. The only thing we find in the record that has any tendency to take the present case out of this most salutary rule is evidence to the effect that the petitioner had frequently issued its certificates of deposits in the individual name of the freight agent of the railroad company at Tacoma for moneys of the company deposited by him with the petitioner, and had also on a number of previous occasions issued similar certificates of deposit in the individual name of Schulze for moneys of the company deposited by him with the petitioner. But it hardly needs argument to prove that the defendant had no right to do anything of the sort. There is nothing in the record tending to show any authority in the freight agent at Tacoma, or in the general land agent, to take, for moneys of the company deposited with the petitioner, its certificate of deposit in his individual name, and nothing to show the principal's knowledge of such conduct. The mere fact that such a certificate was asked for, for moneys of the company, was enough to put the petitioner upon inquiry as to why, for moneys of the principal, the agent wanted a certificate of deposit in his own name. For neither of the three previous drafts drawn by Schulze on the treasurer of the company at New York was a certificate of deposit issued by the petitioner. The amount of the first draft, as has been seen, was credited to Schulze, as land agent of the company; and the amounts of the second and third drafts, respectively, were paid to him, at the time they were drawn, over the counter of the bank,—presumably, for his principal, in whose behalf he had made the draft. But when he came to draw the draft in question, which was for $4,200, he added $300 in cash, and asked for and received a certificate of deposit for $4,500 in his individual name. Here was a feature, and a most important one, that did not appear in respect to either of the preceding drafts drawn by Schulze, as general land agent, on the treasurer of the company at New York. When an agent draws a draft in the name of his principal, and receives from a bank the money therefor, the presumption, in the absence of any showing to the contrary, is that he receives the money in the same capacity in which he draws the draft; that is to say, as agent. But when the agent, for such a draft, asks for and receives from the bank a certificate of deposit in his individual name, not only is such bank thereby put upon inquiry as to why, for money of the principal, the

agent wants such certificate in his individual name, but such conduct—nothing to the contrary appearing—is equivalent to a declaration by the agent that the money is received by him in his individual capacity, and for his individual use; for certainly the legal presumption that follows the deposit of money in the individual name of a man is that the money so deposited is the property of the depositor. In the present case that presumption was strengthened by the fact that Schulze added $300 in cash to the draft, and by the further fact that he then had, and for years had had, an account, as land agent of the railroad company, with the bank in question. The record further shows that the president of the petitioner well knew that Schulze was very irregular and unreliable in his business methods, for he himself so testifies; and the president of the petitioner further testifies that he had been, without his knowledge, made by Schulze a trustee in a written instrument concerning some of the railroad lands, by which Schulze sought to secure to himself a large profit out of a sale by him of those lands of his principal. Certainly, under such circumstances as these, it was the duty of the petitioner, before issuing to Schulze a certificate of deposit in his individual name for a draft drawn by him, in his capacity as general land agent of the company, upon its treasurer, to inquire into his authority; and certainly the court cannot assume that such inquiry would have disclosed the necessary authority in the drawer. Judgment reversed.

HAWLEY, District Judge (dissenting). I concur in the general proposition announced in the opinion of the court as to the ordinary powers and authority of an agent,—that, when he undertakes to pledge the security of his principal for his own use, he must affirmatively show express authority therefor. But the question here, as I understand it, does not involve the proposition whether Schulze, simply by virtue of his position, had authority from his principal to do the act in question. I am of opinion that the evidence justifies the findings of the circuit court, to the effect that the Fidelity Trust Company believed, and had the right to believe, that the draft in question, as well as the three other drafts which were paid by the treasurer of the railroad company, was drawn, in the regular course of business, for the use and benefit of the railroad company, and would, as the other drafts had been, be paid by the treasurer thereof, and that it relied upon this understanding and knowledge in cashing the draft, and issuing a certificate of deposit therefor in the name of Schulze; that it did not know, and had no reason to believe, that Schulze intended to convert the same to his own use; that the Northern Pacific Railroad Company, and the receivers thereof, by the appointment of Schulze as general land agent, and the authority conferred upon him thereby, and their dealings through him with the Fidelity Trust Company, and the payments of the drafts drawn by Schulze by the treasurer of the railroad company, induced it to believe that Schulze, as the general land agent, had the power, and was authorized, to draw the draft in question, and to take and receive the money therefor; and that, by holding him out by this general course of dealing, they gave him such apparent authority for that purpose as to justify it in entertaining and acting upon

the belief that he was authorized to perform such acts as their agent. In cases of this character, the question is not what authority was intended to be given to the agent by his principals, but what authority were third persons having dealings with him, justified, from the conduct and acts of the principals, in believing was given to him. The fact and scope of his agency is not, in such cases, to be confined to the actual authority given by the principals to the agent, but courts can look at the knowledge that the principals have or had, or by the exercise of ordinary care and prudence ought to have had, as to what the agent was doing. The general rule upon this subject is clearly stated in Mechem, Ag. § 84, as follows:

"Whenever a person has held out another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in such capacity, or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent, authorized to act in that capacity, whether it be in a single transaction, or in a series of transactions, his authority to such other to act for him in that capacity will be conclusively presumed, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith, and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent, authorized to do the act that he assumed to do, provided that such act is within the real or apparent scope of the presumed authority."

It is a well-settled rule of law that, where one of two innocent parties must suffer through the wrongful act of a third party, the one who has enabled such third party to accomplish the wrong must bear the penalty and suffer the loss. The Fidelity Trust Company in the present case appears to have acted in good faith, and was not guilty of any negligence or wrongdoing. It is true that the president of the bank testified that he knew that Schulze, as the general land agent of the railroad company, had been irregular and unreliable in some of his business methods; but the transaction concerning which this testimony was given occurred long prior to the procuring of the drafts drawn by Schulze, which were paid by Baxter as treasurer of the railroad company. The fact that the railroad company and its receivers continued to have faith in Schulze as a business man, and to repose trust and confidence in him, and that the treasurer of the corporation continued to pay drafts drawn by him without any real authority so to do, were of sufficient weight to overbalance the president's personal knowledge of Schulze's irregular and crooked methods prior to that time. When we take into consideration the character of the acts which the railroad company permitted Schulze, their general agent, to do, and that Schulze's unlawful and unauthorized acts were connived at and aided by Baxter, the treasurer of the company, it furnishes sufficient grounds, in my opinion, to have induced the bank to believe that Schulze had authority, not only to draw the draft, but to have it cashed, and the money paid to himself, or deposited to his order, for the benefit of his principals. The rule announced in the opinion of the court requires greater vigilance upon the part of the bank than it exacts from the principal himself, as to the agent's authority, and, in my view of the case, compels the party least at fault to bear the loss. As long as corporations or individuals hold out to the

general public, and to all parties with whom they have dealings, that their agent has authority to do acts beyond the general scope of an ordinary agent's power, and sanction and approve such acts, without interposing objections thereto when brought home to their knowledge, they cannot thereafter raise the objection that the acts performed by him were beyond the ordinary scope of his agency. The usage and custom of the principals in sanctioning and approving the illegal acts of Schulze, or the acts performed by him without any direct authority from them, was calculated to mislead and deceive the public with whom they dealt, and the knowledge of such parties that the agent was unreliable in his business methods cannot be urged as a reason why they should not be bound by such acts. By their own course of conduct they are estopped from raising such a defense. As before stated, it does not appear that the bank had any knowledge that Schulze intended to appropriate the money obtained upon the draft to his own use. The mere fact that he requested the bank to issue to him a certificate of deposit, and that he procured the same, was not of itself calculated to put the bank upon inquiry as to what use he intended to make of the money. If he had authority to draw the draft, he had the power to obtain the money for the benefit of his principals; and, unless the bank had knowledge to the contrary, it had the right, from the previous course of business, to presume and believe that he was acting for his principals in having the draft cashed, and that he intended using that money for his principals, and not for himself. "For the acts of his agent within his express authority, the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent within the scope of the authority which he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such case would be to enable him to commit a fraud upon innocent persons." 1 Am. & Eng. Enc. Law (2d Ed.) 990, and authorities there cited; 4 Thomp. Corp. §§ 4881, 4993, 5250.

HUBBELL v. HOUGHTON.

(Circuit Court, D. Massachusetts. April 26, 1898.)

No. 667.

STOCK OF INSOLVENT NATIONAL BANK—REAL AND OSTENSIBLE OWNER—LIABILITY FOR ASSESSMENT.

Defendant acquired stock of a national bank through his agents, in whose names the shares were registered on the books of the bank, and so appeared when the bank became insolvent. Defendant had all the time held the certificates, so indorsed that he might have had the shares registered in his own name. *Held*, that the receiver can recover from defendant an assessment on said stock for the benefit of creditors, though he might have proceeded against those in whose names the shares appeared on the bank's stock register.

Charles S. Hamlin and Robert M. Morse, for plaintiff.
Benjamin E. Bates and William F. Dana, for defendant.

PUTNAM, Circuit Judge. The shares of the capital stock of the national banking association involved in this litigation were never entered on the books of the association in a way which would indicate ownership of them by the defendant. Nevertheless, when they were acquired by the parties in whose names they appeared on its books at the time it became insolvent, they were acquired by them as the agents of the defendant; and, from the time they were acquired, the substantial proprietorship had always been in the defendant, and the defendant had always held the corresponding stock certificates, so indorsed that it was in his power to have the shares properly registered in his name at any time.

Under these circumstances, it is entirely clear, and it is not denied, that the receiver might have brought actions against the individuals in whose names the stock appeared on the books of the association, for the assessment claimed in this suit, and might have recovered judgments against them for the same; and that thereupon, so far as this case shows, those individuals would have had rights of action over against the defendant for the amounts which they might have been required to pay on the judgments, and could have recovered the same from him. In other words, it is clearly the law, and it is not denied, that the ultimate result, under the circumstances shown here, would have been payment by the defendant to somebody of the assessment in suit. If, therefore, there is anything which renders necessary in this instance, in order to accomplish the ultimate result, the multiplicity of suits which the law abhors, it must be something imperative in that behalf, either in the terms of the statutes relative to national banking associations or in the technical rules as to the proper parties to actions.

It is also settled that the individuals who permitted this stock to remain registered in their names on the books of the association were estopped from denying that they were liable for this assessment; but it does not follow that the converse of the proposition is true. On the other hand, it is not inconsistent with the principles of law that, under such circumstances, the receiver had an option to avail himself of this estoppel or to recover from the person who was in substantial proprietorship of the stock, and ultimately liable for the assessment, as he might find the one or the other having the better pecuniary responsibility, or within easier reach of legal process.

It is also well settled that a receiver is not, under all circumstances, limited to a remedy against stockholders of record in a national banking association; because, when such a stockholder has transferred his shares in anticipation of the insolvency of an association, a receiver may, under some circumstances, pursue him, notwithstanding the books of the association did not exhibit his name at the time the insolvency actually occurred. The latest authoritative decision of this character is Stuart v. Hayden, 169 U. S. 1, 18 Sup. Ct. 274. Nevertheless, this line of decisions does not reach the case at bar, because it depends on the proposition that the transfer of the stock was, under the circumstances, fraudulent, and, in law, a thing done fraudulently is held as though not done.

The defendant relies on various expressions in the statutes relating to national banking associations which, by their letter, treat, for certain purposes, as stockholders only those persons who appear such of record. We need not detail these, as substantially nothing can be found in them which indicates any purpose except that common in various states to legislation of this character.

Section 5139 of the Revised Statutes provides:

"The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association."

The by-laws of the association involved in this case provide:

"The stock of this bank shall be assignable and transferable only on the books of this bank, subject to the provisions and restrictions of the banking laws, and a transfer book shall be provided in which all assignments and transfers of stock shall be made."

The certificates put in evidence contain a like restriction, but in a modified form; that is to say, they contain the words, "Transferable only on the books of the bank in person or by attorney, subject to the by-laws, by indorsement hereon, and surrender of this certificate." They are, therefore, in the usual form, so far, at least, as to contemplate the passing of the certificates from hand to hand after proper indorsements, which delivery, according to the well-established usage, conveys, as between the seller and the purchaser, the entire interest. Johnston v. Laflin, 103 U. S. 800, 804; National Bank v. Watsontown Bank, 105 U. S. 217, 221. In Johnston v. Laflin, at page 804, Mr. Justice Field, speaking in behalf of the court, says that "the transferability of shares in the national banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies." Several other decisions of the supreme court are to the same effect, the latest expressions being in Leyson v. Davis, 170 U. S. 36, 40, 18 Sup. Ct. 500.

Therefore, as was well said in Sibley v. Bank, 133 Mass. 515, 520, the by-law and the stock certificates do not affect the construction of the statute. They run pari passu with it, and only indicate the details of the manner in which the transfer shall be made on the books of the association, without adding to, or taking anything from, the legal effect of such a transfer, or of the absence of it.

The defendant cites several expressions of various judges delivering opinions in behalf of the supreme court, to the effect that, under the statutes, no person can be regarded a shareholder, liable to contribution, unless stock appears of record in his name, with the exceptions to which we have referred, and, perhaps, with some other exceptions which are not pertinent here. It is conceded, however, that there is no actual decision in his behalf by that court. It must, also, be conceded by the plaintiff that there is no decision in his behalf; although there are two cases which we think outweigh the various expressions favorable to the defendant, as we will hereafter explain.

The circuit court of appeals for this circuit has so fully considered the nature of expressions found in the opinions of courts which are not necessary to the disposition of the case, in King v. Asylum, 12 C. C. A. 139, 64 Fed. 331, 340, that we do not deem it of value to add anything to what is there said as to the lack of the obligatory force of dicta, even of the supreme court. What is there said is reinforced by a late opinion, with reference to this very question of the liability of the holder of shares of the stock of national banking associations, in Stuart v. Hayden, 169 U. S. 1, 7, 18 Sup. Ct. 274, already cited, and in a later case, relating to a different topic, McCormick Harvesting Mach. Co. v. C. Aultman & Co., 169 U. S. 606, 611, 18 Sup. Ct. 443.

The decisions of the English courts and of the various state courts on which the defendant relies cannot control us, except so far as they commend themselves to our judgment, and are based on circumstances of like character with those at bar. It is true, as claimed by the defendant, that by a long line of decisions in England, with the exception of a limited class as to which the courts are authorized by statute to rectify a corporation's register, no person can be regarded as a shareholder, subject to calls, unless he appears as such of record; but the subject-matter of the winding up of corporations in England constitutes a special statutory system, harmonious in the whole, and the elements of one part of which necessarily work with, and are molded by, the remaining elements. Therefore we cannot safely transfer elements from it into the system established with reference to national banking associations, which is also peculiar and wholly statutory. It is enough to say that in England no person can become a shareholder, except under special circumstances, until he has been accepted by the corporation; while, under the general rules applicable in the United States, a purchaser of stock has an unrestricted right to be admitted as a corporator.

The state decisions cited by the defendant are inapt. In Manufacturing Co. v. Smith, 2 Conn. 579, suit was brought by the corporation itself for an assessment on the shareholders, without any notice in the opinion of the court that it was in the interest of the creditors. The same was the fact in Vale Mills v. Spalding, 62 N. H. 605. In Glenn v. Garth, 133 N. Y. 18, 30 N. E. 649, and 31 N. E. 344, the party sued was not even substantially the owner of the shares, but merely a broker, who had purchased on margins for customers; that is to say, he was holding the stock as collateral. The question at bar was not presented in that case.

In like manner, the text-books ordinarily accept the general principle, working out the same result as the state decisions to which we have been referred, without carefully distinguishing the relation growing out of a contract between the corporation and the shareholder, on the one side, from a statutory liability created for the benefit of creditors, on the other. The latter relation arises in suits of the character of that at bar under the statutes relating to national banks. Bank v. Hawkins, 24 C. C. A. 444, 79 Fed. 51. But, beyond this, there is the fact, to which we have already re-

ferred, that we must determine this suit under statutes constituting a special system. Therefore, we are at liberty, without being prejudiced by the authorities referred to, to apply to the case before us the general rules of law.

Coming to the two decisions of the supreme court which seem to us to bear more directly on the question at bar than any other authorities which have been brought to our attention, we refer, first, to Anderson v. Warehouse Co., 111 U. S. 479, 4 Sup. Ct. 525. There the chief justice says, at page 483, 111 U. S., and at page 527, 4 Sup. Ct.: "It is also undoubtedly true that the beneficial owner of stock registered in the name of an irresponsible person may, in some circumstances, be liable to creditors as the real shareholder."

The connection in which this is said shows that it has no reference to the case of a transfer of stock for a fraudulent purpose. It is also difficult to see the excuse for the line of reasoning of the court if the position of the defendant at bar is correct. The suit was brought by the receiver of a national bank against the Philadelphia Warehouse Company, which was never a registered owner of the stock; and if that was a sufficient answer, as claimed by the defendant here, the court ought not to have felt holden to go into an elaborate discussion of a wholly different principle in order to relieve that corporation. However, it must be said that the precise point which we have now before us was not decided in that case, and yet it carries great weight. We shall have occasion hereafter to refer to another expression in this case in connection with Pauly v. Trust Co., 165 U. S. 606, 17 Sup. Ct. 465. There, Mr. Justice Harlan, speaking on behalf of the court, at page 619, 165 U. S., and at page 470, 17 Sup. Ct., says: "The real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder, within the meaning of section 5151." This section is the provision of the Revised Statutes which imposes liability on the stockholders of such associations. It may be claimed, however, that this expression goes beyond the case. Further on, at page 623, 165 U. S., and at page 471, 17 Sup. Ct., he states that "congress did not say that those only should be regarded as shareholders, liable for the contracts, debts, and engagements of the banking association, whose names appear on the stock list distinctly as shareholders." This is literally true.

It is held in the case that a pledgee of shares of a national banking association who appears as such on the books of the association is not liable to the statutory assessment. At pages 622, 623, Id., the court meets the objection that, if the pledgee is not liable to the assessment, no one can be; and, in that connection Mr. Justice Harlan makes the statement to which we have referred, that "congress did not say that those only should be regarded as shareholders, liable for the contracts, debts, and engagements of the banking association, whose names appear on the stock list distinctly as shareholders." And also, in this connection, at page 624, 165 U. S., and at page 472, 17 Sup. Ct., he repeats what was said in Anderson v. Warehouse Co., 111 U. S. (already referred to), at page 484, and 4 Sup. Ct., at page 528, that, in cases of this character, the transferrers remain "the

owners of the stock, though registered in the name of others, and pledged as collateral security for their debt."

Now, in Anderson v. Warehouse Co., as in many other like cases, after the stock was transferred to the pledgee on the books of the bank, the name of the pledgor no longer remained of record. Yet it follows, as a necessary result, as said by Mr. Justice Harlan, that the pledgor continued liable to the assessment. Such seems to be his course of reasoning in Pauly v. Trust Co., at various points, and this appears to be so directly involved in the determination of that case as to render it of much more effect than an ordinary dictum. Looking, therefore, at the lines of reasoning and the results in Anderson v. Warehouse Co. and Pauly v. Trust Co., we think we are compelled, sitting on the circuit, to hold them as weighty authorities in favor of the plaintiff, notwithstanding the issue made here was not directly made there.

In looking at the merits of the question before us, we are urged by the defendant to determine that the relations between the registered owners of this stock and the defendant are those of trustees and cestui que trust, and that, in no event, can a cestui que trust be holden for an assessment under the statutes relating to national banks. Certainly, there is no express trust here, and we perceive no elements raising an implied trust. The registered owners of the shares had completed their duty with reference to it; they were under no obligation to see to the proper entries of the transfers on the books of the association; and the parties are, in every sense of the word, at "quits," with no existing obligations or confidential relations between them, so far as this stock is concerned. Moreover, if we were compelled to consider the proposition, we should probably hold that the statute, so far as it relates to the status of stock held in trust, concerns only express and active trusts, where there is a probability of some estate to respond to the liability, and also that it does not apply when the records of the corporation show an unincumbered title in the alleged trustee, as is the fact at bar.

We have already said that the directions in the statutes touching national banking associations, with reference to the method of transferring shares of stock and entering the transfers on the books of the corporations, are, in no substantial respect, unlike the provisions of law so common in the various states in regard to the same subject-matter. And we have also said that, under such provisions, the indorsement and delivery of the certificate are sufficient to complete a transfer of stock as between the parties to the transaction, even when it is of the nature of a sale. Nothing in these statutory provisions, so far as we can perceive, concerns the substantial rights of anybody, and all is only directory, except, of course, so far as needed to relieve the registered holder from an estoppel. So far back as Black v. Zacharie, 3 How. 483, 513, Mr. Justice Story said with reference to a similar system in the statutes of Illinois: "But this is manifestly a regulation designed for the security of the bank itself, and of third persons taking transfers of the stock without notice of any prior equitable transfer." To the same effect, but having distinct reference to national banking associations, it was said by Mr.

Justice Field, speaking in behalf of the court, in Johnston v. Laflin, 103 U. S. 800, 803, 804, already cited:

"The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings, and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and perhaps, also, to protect the purchaser against proceedings of the seller's creditors."

We are therefore of the opinion that the statutory provisions which require records of transfers of the shares of stock of national banking associations do not relate to matters of substance, and that they concern only convenience, and are in essence directory. While a noncompliance with them may, as we have already said, place the seller of shares at a disadvantage, yet there is nothing in them which prevents looking through the substance of the transactions when the rights of the creditors of national banking associations are involved. These observations apply to all the provisions contained in the statutes relative to national banking associations which contemplate that, for certain purposes, the holders of shares shall appear of record. Several of these have been specially relied upon by the defendant, but they are all governed by this general observation.

Having come to this conclusion with reference to instances where shares of stock have been actually sold, the case for the plaintiff seems stronger, under the circumstances at bar. Here there was no sale as between the holders of record and the defendant. They had been his agents, and, for all the purposes of this case, they were substantially the same as he; and, as against the rights of the creditors of the bank, the fact that the stock stood in their names on its books, and not in his, ought to be regarded as of the very least importance.

We limit our decision to the precise case presented to us; and we do not undertake to say what the result would be if the defendant had shown that there were equities between him and the record holders of these shares, which might justify him in rescinding the transfers of the certificates by suitable proceedings already commenced, or any other equities of equivalent effect.

Our finding is general, but we will consider any special findings which may be seasonably submitted to us by either party, the same having been first exhibited to the other. The court finds that there must be judgment for the plaintiff, with costs.

WALLACE v. BACON.

(Circuit Court, S. D. California. April 4, 1898.)

1. PLEADING—MATTERS OF PUBLIC RECORD—INFORMATION OR BELIEF—MOTION TO STRIKE OUT.

   An answer denying matters of public record, on the ground that defendant has not sufficient information or belief concerning them, will be stricken out as sham.

2. SUBSCRIPTION TO CORPORATE STOCK — INSOLVENCY OF CORPORATION — RESCISSION FOR FRAUD.

   A subscription to stock induced by fraud may be rescinded after, as well as before, the corporation ceases to be a going concern, where no considerable