resolution. The proceedings of the board in dealing with the resolutions appear to be, under the circumstances, relevant and material, but I cannot see how the intention of the board can be considered relevant. The court will consider what the board did, but not what it or its members intended or threatened to do in the future.

Without referring to the other exceptions, it will be sufficient to say that the report of the master is confirmed, for the reasons therein stated. The effect will be, in disposing of the various exceptions, as follows: The court will overrule exceptions numbered 1, and 11 to 13, inclusive, and sustain exceptions numbered 2 to 10, inclusive. That is on the exceptions taken by the complainant. The defendants have filed six exceptions to the report of the master. In respect to those, the court overrules exceptions numbered 3, 4, 5, and 6, and sustains exceptions numbered 1 and 2. As this does not indicate clearly the disposition made of the answer, because of the fact that there are some exceptions to portions of this answer that involve other exceptions,—there being also exceptions that were not pressed, and exceptions that were admitted and not resisted,—I find it necessary to make a general order with respect to the answer. The effect of the disposition of the report of the master will be as follows: That the exceptions to the answer numbered 3 to 11, inclusive, 13, 16, 21, 23 to 27, both inclusive, and 29 to 50, inclusive, will be sustained, and that exceptions numbered 1, 2, 12, 14 (except as sustained in exception 13), 15, 17, 18, 19, 20, 22, and 28, will be overruled. There was an exception filed after the report of the master (that is, exception 51), and that will be sustained. The direction of the court will be that an order be prepared in accordance with this memorandum, confirming the report of the master.

CENTRAL TRUST CO. OF NEW YORK v. LOUISVILLE TRUST CO. et al.

(Circuit Court, D. Kentucky. March 21, 1898.)

1. EQUITY—JURISDICTION.
   A bill in equity against mortgagees for compensation of a trustee in foreclosing the mortgage, and for costs and attorneys' fees, under a contract of indemnity, may be maintainable as to the costs and attorneys' fees even if the mortgagees are not liable for the trustee's compensation.

2. DEMURRER—QUESTIONS CONSIDERED.
   On demurrer to a bill by a trustee under a mortgage for attorneys' fees and costs, which were allowed in the foreclosure suit, the question whether or not the adjudication as to the attorneys' fees was an allowance only against the mortgaged property, or whether it was a personal liability against the trustee, will not be considered where that case is not a part of the bill.

3. CONTRACT OF INDEMNITY—EQUITY JURISDICTION.
   A majority of the bondholders directed the trustee, under the mortgage securing the bonds, to declare them matured, and foreclose the mortgage, and, in accordance with a provision in the mortgage, agreed "to indemnify and hold harmless the said trustee from any loss or damage on account of costs, counsel fees, or other expenses of such litigation under this request." *Held*, that a court of equity has jurisdiction to enforce the contract of indemnity by requiring the bondholders to pay costs and attorneys' fees for which the trustee became liable, though it had not yet paid the same.

Humphrey & Davie, for complainant.
Bullett & Shields, for Louisville Banking Co.
Theo. Harris, Thos. W. Bullett, and St. John Boyle, for defendant Louisville Trust Co.

BARR, District Judge. It appears from the bill in this case that the complainant is a trustee in a mortgage executed by the Richmond, Nicholasville, Irvine & Beattyville Railroad Company of its property, to secure the sum of about $2,300,000 of coupon bonds; that there was a provision in the mortgage that, upon default of payment in the interest for six months, a majority of the bondholders could elect to have the trustee precipitate the maturity of the bonds, and take possession of the mortgaged property, and have a foreclosure and sale through the court. The mortgage provided that the trustee should not be required to do this until the trustee had been indemnified by the bondholders, making such a request, against costs, counsel fees, and other expenses of the litigation; and, under this provision, the defendants in this case (except Richards & Baskin), who were bondholders under the mortgage holding more than a majority of said bonds, requested the complainant to mature the coupon bonds, and institute foreclosure proceedings, and in the request the holders of said bonds agreed "to indemnify and hold harmless the said trustee from any loss or damage on account of costs, counsel fees, or other expenses of such litigation under this request." The complainant matured the bonds, and instituted in this court a foreclosure procedure, which resulted, after much litigation, in a foreclosure of the mortgage and a decree of sale, which decree of sale was appealed from, and in part reversed. After the case returned from the court of appeals, a final decree was entered. It is alleged in the bill that the liens which were adjudged superior to the mortgage are so greatly in excess of the whole value of said property that the sale of said property will not bring enough to satisfy the claims prior to said bonds, and nothing will be realized to your orator out of said property. While it is not alleged, it is a fact, however, that the mortgaged property has been sold since filing of bill, and nothing will be realized to the bondholders represented by the complainant. It is alleged in the bill that the court allowed the complainant $1,000 as a reasonable compensation for its services as trustee, and that the complainant was compelled to pay expenses amounting to the sum of $581.71, and became bound to pay counsel fees of counsel employed by it in a reasonable sum for their services. It is also alleged that the fees of the defendants Richards & Baskin, surviving partners of Richards, Weisinger & Baskin, which were allowed by the court, were, first, $15,000 for their services rendered in the trial court, and, subsequently, $2,500 for services rendered in the circuit court of appeals; and that the defendants, signers of said paper and agreement, have failed and refused, and still fail and refuse, to pay the expenses of your orator, and the allowance made to your orator for compensation and the counsel fees to Richards, Weisinger & Baskin, or any part thereof. The prayer of the bill is "that the amount due, owing, and unpaid for the compensation, expenses, and counsel fees may be charged and determined, and

that the payment of so much thereof as shall be due by the said defendants, or any of them, may be decreed by this court, and that your orator may be indemnified and saved harmless from any loss, expenses, and counsel fees aforesaid; that the signers of the agreements aforesaid may be compelled to pay off and discharge the expenses, compensation, and counsel fees aforesaid, so that your orator may be relieved from any obligation thereon or liability therefor."

The demurrer raises the question of whether or not there is any cause of action stated, and, further, whether, if there is, it is cognizable in equity. Before considering the main question, we may state that the compensation to the complainant is not covered by the terms of the indemnity sued on, and it may be that the defendants are not liable in this action even to the proportion which their bonds bear to the entire number, for said compensation. But this fact does not prevent the bill being maintainable for the attorney's fee which has not been paid and the costs which have accrued, for which the complainant is liable, if the suit is properly filed in equity; nor should we on this demurrer consider whether or not the adjudication as to the amount of the attorneys' fees which have been allowed in the foreclosure suit to the attorneys who brought said suit is an allowance only as against the mortgaged property then in the custody and control of the court, or whether it is a general allowance against the complainant, making it personally liable therefor. That case is not made a part of the bill and we must therefore take the bill as true in that regard. Taking the allegations for true, the amount has been ascertained by the adjudication in the very case which complainants were requested to bring.

The question presented by the demurrer is one almost entirely without direct authority. Mr. Story (Story, Eq. Jur. § 850) states the law thus:

"Courts of equity will decree the specific performance of a general covenant to indemnify, although it sounds in damages only, upon the same principle that they will entertain a bill quia timet; and this not only at the instance of the original covenantee, but of his executors and administrators. Thus, where a party has assigned several shares of the excise to A, and the latter covenanted to save the assignor harmless in respect to that assignment, and to stand in his place, touching the payments to the king and other matters, and afterwards the king sued the assignor for money which the assignee ought to have paid, the court decreed that the agreement should be specifically performed, and referred it to a master, and directed that, toties quoties any breach should happen, he should report the same especially to the court, so that the court might, if there should be occasion, direct a trial at law in a quantum damnificatus. The court further decreed that the assignee should clear the assignor from all these suits and incumbrances within a reasonable time. The case was compared to that of a counter bond, where, although the surety is not molested or troubled for the debt, yet, after the money becomes payable, the court will decree the principal to pay it."

To sustain this proposition, the cases of Champion v. Brown, 6 Johns. Ch. 405, and Ranelaugh v. Hayes, 1 Vern. 189, are referred to. The case of Champion v. Brown, decided by Chancellor Kent, is a very elaborate case, and seems to me to sustain the text of Justice Story. This case, and the case of Ranelaugh v. Hayes, 1 Vern. 189, have been reviewed by the supreme court of Michigan in Bank v. Hastings, 1 Doug. 235. The learned judge in the Michigan case

explains the case of Champion v. Brown as merely deciding that the covenant there made the defendants stand in the place of the intestate of complainant, and that they assumed the payment to Champion & Storrs which the estate of the intestate stood charged with. Therefore the court claims that it is not an authority for the specific performance of a covenant merely for indemnity, but that the obligation of the covenant was directly to pay; and so with the case of Ranelaugh v. Hayes, 1 Vern. 189. I do not understand that Chancellor Kent decided that the covenant made the parties Champion & Storrs directly liable to the original party for the debt which Paddock had agreed to pay. It is true, the chancellor used the following language in that case:

"In the case before me, the defendants, by their covenant of indemnity, and purchase of the contract between C. & S. and P., undertook to relieve the estate of P. from the burden of that contract. This is the true intent and meaning of the agreement; and it is as just that they should be decreed to clear the representatives of P. from the charge which they assumed for them as it is that a principal debtor should exonerate his surety before he is sued, and not leave 'a cloud always hanging over him.'"

The statement of the case, we think, makes this clear. It appears that Henry C. and Lemuel Storrs agreed to sell and convey to John Paddock 952 acres of land for the sum of $8,000, $500 to be paid in cash, and the residue to be paid in six annual installments. John Paddock died, intestate, November 16, 1816; and his administrators and heirs, being unable to perform the contract, for want of personal assets, on the 1st of June, 1818, entered into an agreement with the defendants, John Brown and Jacob Brown, by which the defendants covenanted and agreed that "they would take up and cancel" the contract made between Champion & Storrs and Paddock, etc., by the 1st day of August then next, or in case Champion, the survivor of Storrs, should refuse to give up and cancel the said contract, then the defendants covenanted to indemnify and save harmless the administrators of Paddock, etc., from all damages, costs, charges, and expenses which they might sustain or be put to on account of the claims, covenants, and agreements in said agreement contained, etc. Lemuel Storrs died intestate, and, in the distribution and settlement of the estate, all his interest in the contract became vested in the plaintiff, William L. Storrs. Soon after the agreement between the defendants and the administrators of P., the former entered and took possession of the land, and have since continued in possession, exercising ownership, receiving rents, cutting timber, etc. But they have made no payments, nor taken up the contract between Paddock and Champion & Storrs, but the representatives of P. still remain liable to be sued upon it. The bill prayed for a discovery, and that the defendants may be decreed specifically to perform the contract between Champion & Storrs and Paddock according to the true intent of the agreement between the defendants and Paddock, and for their indemnity, the heirs offering to ratify and confirm the conveyance of the land to the defendants in fee, etc., and for general relief. So, the original contract had not been taken up, and the purchasers Brown had not become directly liable to the original vendors, and they could not have sued directly upon said obligation.

The opinions of the supreme court referred to by counsel are not, we think, in point. The case of Wicker v. Hoppock, 6 Wall. 94, was a suit at law, and the question was as to the measure of damages for the nonperformance of an agreement to bid in certain property which was to be sold under a decree obtained by the party who subsequently sued, the agreement being that the party there sued would bid in the property for the amount of the judgment, with interest and costs. The court below allowed the amount of the judgment, with interest and costs, as the measure of damages, and in the supreme court Justice Swayne says:

"If the contract in the case before us were one of indemnity, the argument of the counsel for the plaintiff in error would be conclusive. In that class of cases the obligee cannot recover until he has been actually damnified, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case a recovery may be had as soon as there is a breach of the contract, and the measure of the damages is the full amount agreed to be paid."

It is evident the learned justice was considering the question only from a legal standpoint.

The case of Mills v. Dow's Adm'r, 133 U. S. 424, 10 Sup. Ct. 413, was a case at law, and the obligation of the covenant was not only to save harmless, but directly to pay the contracting party's obligation.

The case of Johnson v. Risk, 137 U. S. 308, 11 Sup. Ct. 111, is equally without application. There the question was whether or not there was a federal question, and whether the Tennessee statute of limitation applied.

The case of Refeld v. Woodfolk, 22 How. 318 (not cited by counsel), is in principle more applicable to the question under consideration. The facts in that case are, briefly, these: A man named Notrebe sold to Woodfolk a plantation in Arkansas. At the time of the purchase, there was an incumbrance arising out of Notrebe's subscribing 300 shares of the Real-Estate Bank of Arkansas, and mortgaging the land for $30,000. Notrebe and wife obligated themselves to Woodfolk that, upon the payment of the purchase money, they would convey to him by good and sufficient deed, with general warranty of title duly executed according to law. Woodfolk, the purchaser, paid all of the purchase money. Notrebe died, and, in winding up the Real-Estate Bank of Arkansas, there was a danger of a heavy liability upon the original mortgage to the bank. Woodfolk filed his bill for indemnity against the mortgage, and the court below gave him a decree requiring that the heirs of Notrebe "remove the incumbrance whenever it can be done, and then to convey the land by a deed with warranty, and with the relinquishment of dower by the widow, and meanwhile that they should deposit with the clerk of the court bonds of the state of Arkansas, for the amount of Notrebe's note and the interest ($61,500) to be held and appropriated under the order of the court as an indemnity, or that the executors might, in part, or for the whole, convey to the clerk unincumbered real estate of the same value, for the same object, and under the same conditions." The