we are reviewing, that the purchasers of the last issue of bonds cannot be subrogated to the rights and equities, if any, of the holders of the Shade bonds. Ætna Life Ins. Co. v. Town of Middleport, 124 U. S. 534, 8 Sup. Ct. 625.

Even if the county, since the issue and sale of plaintiff's bonds, by its voluntary payment of the Shade bonds with the money received from the last issue of bonds, has given rise to any enforceable equity in favor of the purchasers of that last issue, then, as there was no transfer by subrogation of the previous equities of the holders of the Shade bonds, the equities of the holders of such last issue must rest upon facts and transactions subsequent to the issue of plaintiff's bonds, which are therefore not affected by such equities. The judgment of the circuit court is affirmed.

HAINES v. FRANKLIN et al.

(Circuit Court, E. D. Pennsylvania. May 11, 1898.)

1. FALSE REPRESENTATION OF CORPORATION—STATEMENT OF CAPITAL PAID IN —CAUSE OF ACTION.
   The cause of action of one who suffers loss in consequence of the false representation, in the sworn statement of the incorporators of a Pennsylvania corporation, in their application for letters patent, that 10 per centum of the capital stock is paid in, arises out of the fraud, and an action ex contractu for such loss will not lie.
2. SAME — ASSIGNEE OF JUDGMENT — INDUCEMENT TO PURCHASE — RIGHTS ACQUIRED.
   The assignee of a judgment against a Pennsylvania corporation does not acquire the judgment creditors' right of action against the incorporators for false representations in the sworn application for letters patent; and he has no such cause of action unless his acquisition of the judgment was induced by his belief, and in reliance on such representations.

Henry Budd, for plaintiff.
H. M. North, Brown & Hensie, and B. C. Kready, for defendants.

DALLAS, Circuit Judge. In Patterson v. Franklin, 35 Atl. 205, the opinion of the supreme court of Pennsylvania begins with this statement:

"The defendants were the incorporators and holders of the stock of the Keystone Standard Watch Company. In their application for letters patent, they set forth, among other things, that the capital stock of the corporation was five hundred thousand dollars, divided into five thousand shares of the par value of one hundred dollars each; and 'that fifty thousand dollars, being ten per cent. of the capital stock, has been paid in cash to the treasurer of said corporation, whose name and residence are William Z. Sener, Lancaster, Pa.' The statement is the method prescribed by law for assuring the executive department of the state government that the requirements of the law have been complied with by the corporators, and that they are entitled to be made a corporation. After letters patent have been issued, the statement, with all its indorsements, must be recorded in the proper county, for the information of the public, in order that the fact of incorporation may be known, and the credit to which the corporation is entitled may be intelligently judged of by all persons who may have occasion to do business with it. This statement, made and sworn to in the usual manner, is now alleged to have been false in so far as it asserted the payment of fifty thousand dollars to the treasurer of the corporation, and it is asserted that not

one dollar in cash was so paid. It is certain that, after a short business career, the corporation, being unable to pay its debts, made an assignment for the benefit of creditors. The plaintiff in this action is the assignee. The defendants are the corporators by whom the alleged false certificate was signed. The right to recover is rested on the alleged fraud committed by means of the false representation contained in the certificate."

In that case it was held that "the corporation had no right of action against the defendants growing out of the false statement in the certificate, and the plaintiff, its assignee, has none." The decision has this extent, no more; but it having been suggested that, if the assignee could not recover in the right of his assignor, he might do so in the right of creditors, the court further said:

"But the creditors have no joint action against the defendants. If a right of action exists, it is several to those injured, and extends no further than the individual loss of the creditor who sues. The question of the defendants' liability to those who were led to trust the corporation because of the false certificate is not before us. What we say is that, if they had a right of action, it is not an asset, the proceeds of which are for general distribution. The action is misconceived, and there can be no recovery in this case, though the fraud was admitted on the record in the terms in which it is charged. The right to complain is in the individuals who suffer, and the right of action extends only to the individual loss of the particular person injured, if the right of action exists."

The present action is a several one. It is founded upon the same certificate, and is brought for recovery of the alleged individual loss of the plaintiff, who claims as a particular creditor of the corporation. Can it be maintained? As we have seen, Patterson v. Franklin did not decide that it could be, and the court carefully abstained from intimating any opinion upon the subject. The question is therefore an open one.

The statement of claim to which the defendants have demurred is framed ex contractu. It alleges that the representation made by the defendants, that 10 per centum of the capital stock had been paid in in cash, was "altogether false and untrue, and was a fraud upon the commonwealth of Pennsylvania, and upon all persons who might thereafter deal with the said Keystone Watch Company upon the faith of the charter or letters patent granted by the commonwealth, and further constituted a joint and several covenant with such persons that said money had been paid, or would be, into the treasury of said company, to answer the claims of the said persons who might so deal with the said corporation." Now, if the contractual liability thus averred exists, it must arise out of the Pennsylvania statute under which the certificate was filed. No independent and direct contract between the plaintiff and the defendants is asserted. Ordinarily, all contracts, whether express or implied, rest upon intent; and therefore, to establish a contract of the latter class, it is necessary that facts should be alleged and proved from which an intention to contract may be implied. No such facts are present in this case. A contract, or quasi contract, may, it is true, be founded upon statutory provisions, as where, by statute, the stockholders of a company are made individually liable to its creditors to an amount equal to the amount of stock held by them respectively. Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263. The liability thus created is directly to the several creditors, and is held to be contractual because the stockholders, by their acceptance

of the stock taken by them respectively, are assumed to have intended to enter into the obligation which the statute attached to such acceptance. But a right of private action under a statutory provision must always be dependent upon the scope and language of the particular enactment, and the statute here in question creates no contractual liability whatever. I do not mean to say that one who has suffered legal injury in consequence of the false representation alleged to be contained in this certificate may not sue for redress of that injury. On the contrary, I think the right to do so results from a correct perception of the purpose of the Pennsylvania legislature in providing for its recording; that purpose, as was said by the supreme court of that state, in Patterson v. Franklin, supra, being, to supply means "for the information of the public, in order that * * * the credit to which the corporation is entitled may be intelligently judged of by all persons who may have occasion to do business with it." The right thus resulting, however, is one which, under the old system of pleading, could have been enforced only through the appropriate action of tort, and the innovations which have been made upon that system have not gone to the extent of obliterating the broad distinction between actions ex delicto and actions ex contractu. In Patterson v. Franklin it was said, "The right to recover is rested on the alleged fraud;" and some of the language which follows this statement quite plainly indicates that the court had in mind a wrong committed, and not a contract broken, as the ground upon which an individual creditor might possibly recover. It referred to those "injured" by the "false certificate" as being the persons entitled to sue, and to "the fraud" as being the basis of their complaint, "if the right of action exists."

It is contended, however, that a plaintiff may waive a fraud and sue in contract; and this, of course, may be done in some cases. Where, from the same facts, the violation both of a duty and of a contract appears, the party aggrieved may elect upon which ground he will proceed; but I do not understand that a fraud, pure and simple, can, at the choice of either party, be converted into a contract, or that it is possible for a plaintiff, by any device of form, to charge a defendant with breaking a promise which neither in fact nor by implication of law he had ever made. The true inquiry is not as to the remedy, but as to the nature of the right. Here, the defendants did not say, "We warrant," which would be a contract, but they said, "The fact is;" and this, if untrue, was a false representation, and therefore the case, aside from any question of pleading, is essentially one of deceit. Mahurin v. Harding, 28 N. H. 128; Derry v. Peek (1889) 14 App. Cas. 337; Bragdon v. Perkins-Campbell Co., 87 Fed. 109. "Deceit consists in leading a man into damage by willfully or recklessly causing him to believe and act on a falsehood." When you have alleged that the statement was false, you must further allege that the plaintiff believed and acted upon it, and has sustained damage by so doing. McHose v. Earnshaw, 3 U. S. App. 545, 5 C. C. A. 210, and 55 Fed. 584. And the existence of these essential facts may not be left to inference or conjecture from vague and indefinite language, but must be alleged with convenient certainty; that is to say, so dis-

tinctly and explicitly as to preclude any reasonably possible misunderstanding of what is meant.

With these principles in mind, I turn to the statement of claim, and find that it nowhere alleges that the plaintiff believed and acted upon the representation in question, unless such an allegation may be supposed to be deducible from the statement that the plaintiff, in the year 1891 (more than four years after the representation was made), purchased a judgment against the Keystone Standard Watch Company, "in the full belief that everything necessary for the proper organization of the company had been complied with, and on the bona fides of all actions of the persons concerned in the organization of the same." It is impossible to regard this as amounting to a distinct and explicit allegation that the plaintiff believed and acted upon the particular statement that 10 per centum of the company's capital had been paid in, in cash, and that he sustained damage in consequence. Nothing could have been more easy than to say this plainly; and it is not unfair to presume that it was not said simply because it was known that it could not be proved.

In the plaintiff's brief it is said that he stands in the shoes of the original judgment creditor. As respects the defendant in the judgment, the corporation itself, this may be conceded; but I cannot agree that the plaintiff, as assignee of the judgment, became clothed with any rights which his assignor may have had against these defendants. Their obligation, if any, was, though collateral, an independent one. The plaintiff's alteration of his condition consisted solely in his acquisition of the judgment, and, if this was not induced by his belief in and reliance on the defendants' representation, his supposed cause of action against them is palpably defective and incomplete. This was exemplified by Lord Cairns, in Peek v. Gurney (1873) L. R. 6 H. L. 377. He put the case of a person having built a house, and desiring to sell it, and said:

"He comes to me, and wishes me to purchase it. He describes it as a highly advantageous purchase, and makes statements of fact to me with regard to the house which are untrue and are misrepresentations; but I decline to purchase, and our overtures come to an end. He subsequently sells it to some other person, upon what terms I know not. That other person completes the purchase, and that other person, desiring to raise money on mortgage, applies to me to lend him money. I lend him money upon a mortgage of the house. The facts stated to me originally turn out to be untrue, and are so material as that the house, not being as represented, becomes comparatively worthless. I then apply to the original vendor, remind him of what he told me, and complain to him that my money lent upon mortgage had been lost; and I commence an action against him for damages to recover my loss. I ask, could such an action be maintained? I know of no authority for it, and I am of opinion that an action of that kind would not lie."

In the instance thus suggested, the transaction of mortgage was much more nearly connected with the false representations than is the purchase of the judgment with the alleged false certificate in this case. In Peek v. Gurney the bill alleged misrepresentations of facts and concealment of facts on the part of the directors, in a prospectus they had issued, by which the complainant had been induced to purchase shares; and it was held, the case being treated as one of deceit, that, assuming the falsity of the representations, there was no liability to

one who had purchased shares of the corporation in the market, notwithstanding that the purchase had been induced by the representations complained of. That case seems to me to closely resemble the present one. It was fully considered by very able judges, both in the first instance and on appeal; and the reasoning upon which the complainant there was denied recovery is, I think, conclusive against the plaintiff here. Furthermore, there was in that case no denial that the plaintiff had bought in reliance on the prospectus, whereas in this one there is no sufficient allegation that the plaintiff either believed or relied upon the certificate which he says was false. Upon the whole case, I am persuaded that the averment of the demurrants that the plaintiff has not, by his said declaration, alleged a state of facts entitling him to recover from them, is well founded in law; and therefore judgment for the defendants will be entered.

LOUISVILLE TRUST CO. v. KENTUCKY NAT. BANK et al.

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

1. USURY PAID TO NATIONAL BANKS—RECOVERY—ASSIGNEE FOR CREDITORS.
   An assignee for the benefit of creditors under the Kentucky statutes, who, in order to get possession of collaterals, pays to a national bank a note of his assignor, which includes usurious interest, may maintain an action to recover it back, under Rev. St. § 5198. The assignee is the assignor's "legal representative" in the meaning of that section.
2. LIMITATION OF ACTIONS—USURY—RENEWAL NOTES.
   Usurious interest on a note is not paid, so as to set running the statute of limitations against an action to recover it back, by giving a renewal note which includes the interest. The statute only begins to run from the time the renewal note is paid.
3. USURY—AMOUNT OF RECOVERY.
   Under Rev. St. § 5198, which provides that one paying usurious interest to a national bank may recover back twice the amount of the interest thus paid, it seems that the recovery allowed is twice the amount of the entire interest, and not merely of the excess over the legal rate.

Helm & Bruce, for plaintiff.
Humphrey & Davie, for defendants.

BARR, District Judge. This is a suit brought by the Louisville Trust Company, as general assignee of Thomas & Son, to recover from the Kentucky National Bank usury which is alleged to have been paid that bank. It appears from the allegations of the petition that Thomas & Son, who were large whisky dealers in the city of Louisville, on April 18, 1894, made a general assignment to the plaintiff, the trust company, for the benefit of their creditors, assigning and transferring to it all of their property of every description, choses in action, etc., except such property as is exempt from execution by the laws of the state of Kentucky. The petition sets out various loans made by the Kentucky National Bank to Thomas & Son, for which they executed their notes, and, as they matured, renewed them; sometimes increasing the amount by additional borrowings, and at other times renewing for the same amount less the discount, and at

other times paying something and renewing the balance. The renewed obligations were unpaid at the time of the assignment, in April, 1894, and, as the bank held a large amount of collateral, alleged to be twice as much in value as the debt for which it was pledged, the trust company paid to the bank several debts, and received the collateral. These payments were made a few days after the deed of assignment, to prevent a sacrifice of the collateral, as the bank threatened to sell the same on the board of trade; and the plaintiff, as assignee, seeks to recover double the amount of interest on the several notes which were given by Thomas & Son, and paid by the plaintiff as assignee. The suit was filed December 13, 1895, and within two years of the time the trust company paid the several debts. The demurrer, which is to each paragraph of the petition, is, because—First, there is no cause of action in favor of the plaintiff, the Louisville Trust Company; and, second, because the petition seeks to recover double penalty for the alleged payment of usury, made more than two years before the bringing of the suit.

Counsel for the defendant has filed a most elaborate brief, in which he presents quite a number of questions, some of which are not raised by the demurrer. The national banking act (section 5197) provides that:

"Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the state * * * where the bank is located and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under the laws of the state the rate so limited shall be allowed for associations organized or existing in any such state under this title. When no rate is fixed by the laws of the state, * * * the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days from which the note, bill or other evidence of debt, has to run:"

And by section 5198 it is provided that:

"The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid the person by whom it has been paid, or his legal representative, may recover, back, in any action in the nature of an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred."

The petition, as originally brought, included in paragraphs 2 and 3 a claim for usury for debts which had been paid in full before the deed of assignment was made to the plaintiff; but that has been stricken out on motion of the plaintiff, and all of the remaining paragraphs set up claims for usury on debts which were finally paid by the plaintiff as the general assignee of Thomas & Son. It is claimed that the plaintiff has no right of action, because it was not the original borrower, and is not the legal representative of Thomas & Son, within the meaning of the statute. Authorities are cited to sustain the general proposition that assignees under the state law cannot sue and recover usury which has been paid by their assignors, as in such cases they are not the legal representatives of the bor-

rowers who have paid the usury. The contention is that the legal representative must mean an executor or administrator of a deceased party who would be entitled to recover the usury. This contention makes it necessary for us to examine somewhat into the legal right and duty of a general assignee under the laws of the state of Kentucky. The Kentucky law requires that voluntary assignments of a debtor in trust for his creditors shall be for the benefit of all his creditors in proportion to their debts and claims, and prohibits any preference given by a person insolvent or in contemplation of insolvency, under penalty that such preferential transfer and assignment shall transfer and assign all of the debtor's property for the benefit of his creditors, to be equally distributed, except that certain named fiduciary claims are given preference. A general assignee is given the right, and it is made his duty, to institute proceedings to set aside a preferential or fraudulent transfer, conveyance, or gift, of the assignor's property, or that of a fraudulent purchase of property in the name of another person. Therefore an assignee under a general assignment is in the nature of a general liquidator of the estate of the debtor, and as such, we think, the plaintiff had a right, and it was its duty, if the estate of Thomas & Son required it, to pay these debts to the defendant the Kentucky National Bank, and thus get control of the collateral held by the bank, and save it from being sacrificed. The relations, by the Kentucky law, of a general assignee to an insolvent debtor, are very like those of an administrator to his decedent, in that it is the duty of both to collect, care for, and distribute, the estate of the insolvent in the one case and the personal estate of the decedent in the other. In the one case, if there is any of the estate left after the payment of the debts and the expenses of of the administration, it goes to the insolvent, and in the other case to the heirs and distributees of the decedent. By the provisions of the Kentucky statute, "personal representative" means executor or administrator or other person appointed to take charge of the estate of a deceased person, and "real representative" means the heir or devisee of real property of a deceased person. These definitions are in the Kentucky Code. The federal statute does not use the words "personal representative," but "legal representative." It seems to us, considering the rights and duties incumbent upon plaintiff as general assignee of Thomas & Son, it was, in making these several payments, the legal representatives of the assignors, who were the original borrowers.

It seems to be conceded by learned counsel that the plaintiff is entitled to recover because of the greater rate of interest paid by it upon the paper taken up by it; but, if we are correct in concluding that the plaintiff, in paying these debts, was the legal representative of Thomas & Son, then if these final payments are to be considered in law as the payment of the usury which had been taken in the previous renewals, the plaintiff is entitled to recover, because he is the person who paid the greater rate of interest than that permitted by the federal statute. This view, of course, does not assume that the deed of assignment transferred to the plaintiff the right to recover this double interest, which right had already

accrued to Thomas & Son; but merely that the deed of assignment gave to the plaintiff the right, and made it its duty, to pay these bank debts, under the circumstances; and in thus paying the debts the right to recover the double interest accrued and became perfect. The plaintiff is, therefore, not to be considered as merely a creditor or the representative of creditors of Thomas & Son, who is seeking to recover interest which had accrued to them, but the person who has paid the greater interest. But if we assume that the payments of the plaintiff, as assignee of Thomas & Son, of these debts, were the payments of Thomas & Son, and that thereby the right to recover accrued, still we think that the general assignee in Kentucky is a "legal representative" within the meaning of the federal statute, and entitled to recover. A brief review of several of the cases, we think, will sustain this view. It is impossible, in a brief opinion, to review all the cases referred to by learned counsel on this subject, but I will consider several that he refers to as decisive of this question. Thus the two cases decided by Judges Emmons and Swing, of Barnett v. Bank (decided in 1876), and reported in Fed. Cas. Nos. 1,026 and 1,034. The facts in these cases are not fully given, but the case No. 1,026 was taken to the supreme court, and was reported in 98 U. S. 555. It appears from that report that the usury which was sought to be recovered below was usury which had been paid by the insolvent debtors, Barnett & Whitesides, long before the assignment; and it is notable that, while the supreme court affirmed the case, they put it upon an entirely different ground from that of the trial judges, viz. that the usury could not be pleaded as a set-off to a suit, but that the recovery must be by a separate and distinct action, that being the only remedy given by the statute; and did not touch upon the question at all of whether or not the assignee could sue and recover. It appears from the statement of the case in the supreme court that the defendant assignee of Barnett & Whitesides set up that a bill which was sued upon contained illegal interest,—not only the bill itself, but the renewals thereof,—and claimed to have that usury applied to the payment of the bill sued on; and that plea was not demurred to, and was allowed by the trial court, and no error complained of therefor in the supreme court, showing that the assignee of the general assignment was allowed to so far represent the assignor. These cases, we think, are not in point in the present case, except that they show that the assignees could defend, under the statute against usury, when sued for the debt of the assignor. In the case of Osborn v. Bank, 175 Pa. St. 494, 34 Atl. 858, it was held that an assignee in the state of Pennsylvania was not entitled to sue for usury, and this was because of the local law, which defines "legal representative" as meaning executor or administrator, and it was held that under that law such an assignee was not a legal representative within the meaning of the federal statute. The court said (175 Pa. St. 498, 34 Atl. 859):

"It is true, if the subject-matter or the context shows that the words are used in a different sense, whether in statute or a contract, the courts will give them the meaning intended. Thus they may mean next of kin (Ralston v.

Waln, 44 Pa. St. 279), or, if land be the subject, they may be construed to refer to heirs, devisees, or alienees (Duncan v. Walker, 2 Dall. 205; Ware v. Fisher, 2 Yeates, 578; Cochran v. Cochran, 127 Pa. St. 486, 17 Atl. 981)."

The court said in another part of the opinion:

"This decision is not necessarily in conflict with Bank v. Overholt, 96 Pa. St. 327, as it was there held that the right of action passed to an assignee in bankruptcy. This officer, like the receiver, as already said, derives his power from the statute and the decrees appointing him, and stands on a different footing from a voluntary assignee for the benefit of creditors."

We have against this view the case of Tiffany v. Bank, 18 Wall. 409, in which Tiffany, trustee, was allowed to sue, or at least in which no objection was made, and the court disposed of the case thus brought upon its merits, thus assuming that he could legally bring it. In the case of Wright v. Bank, reported in Fed. Cas. No. 18,078, Judge Gresham sustained the right of an assignee in bankruptcy to sue for usury paid by the assignor. In the case of In re Prescott, 5 Biss. 523, Fed. Cas. No. 11,389, an assignee in bankruptcy was allowed to defend, and have the usury under this statute in a claim presented against the bankrupt stricken out. In the case of Bank v. Alves, 91 Ky. 146, 15 S. W. 132, the Kentucky court of appeals decided that an assignee under a deed of trust for the benefit of creditors was a "legal representative" within the meaning of the federal statute. In Re Hoole, 3 Fed. 496, Judge Choate allowed an assignee in bankruptcy to get the benefit of money paid by the bankrupt, and thus discharge a claim set up against the estate. Danforth v. Bank, 1 C. C. A. 62, 48 Fed. 271, decides that usury charged by a national bank destroys the interest bearing power of the note or bill. The reasoning of the court in Timberlake v. Bank, 43 Fed. 235, would rather tend to the conclusion that Thomas & Son could not sue for the usury paid by plaintiff, instead of proving plaintiff could not as claimed by counsel. But, whatever may be the rights of an assignee, either in bankruptcy, or a general assignee to recover usury under this statute, which had been paid (before the assignment or before the bankruptcy), and had been a concluded transaction, we think that there can be no serious doubt that plaintiff was the legal representative of Thomas & Son, and as such made the various payments of the debts under the circumstances detailed; and that fact, whether you consider the plaintiff as paying the usury, or whether you consider it merely as the legal representative of Thomas & Son, it seems to me gives it the right of action.

The next inquiry is whether or not several of the sums which are sought to be recovered are within two years from the time when the usurious transactions occurred. The case of Brown v. Bank (decided by the supreme court, Feb. 21, 1898) 18 Sup. Ct. 390, though not distinctly on this question, we think throws much light upon it. That case, as we understand, was a case which arose under the provisions of the law, where it was sought to have the entire interest on a note forfeited, because a greater rate of interest than allowed by law had been agreed to be paid thereon. The court of appeals of Kentucky held that only the interest on the last note

should be forfeited, and not the interest which had accrued upon notes for which the existing note had been a renewal. This was based upon the court's construction of the language of the act, which is, "Taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon." The case was returned to the trial court, and, although this construction of the statute had been subsequently reversed by the same court, still the trial court concluded that they were bound in that case by the court of appeals' decision, and the case went a second time to the court of appeals, and was there affirmed, and from there went to the supreme court of the United States. The opinion, delivered by Justice Harlan, is a brief one. The court says:

"If a bank which violates that section [5198] sues upon the note, bill, or other evidence of debt held by it, the debtor may insist that the entire interest, legal and usurious, included in his written obligation, and agreed to be paid, but which has not been actually paid, shall be either credited on the note or eliminated from it, and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit. We say 'entire interest' because such are the words of the statute, based on the act of June 30, 1864, * * * whereas the prior statute of February 25, 1863, * * * declared that the knowingly taking, reserving, or charging a greater rate of interest than was allowed should be held and adjudged a forfeiture of the debtor's demand on which usurious interest was taken, reserved, or charged. The forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the usurious interest. No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied upon, and the matters thus brought to the attention of the court, lose the entire interest which the note carries, or which has been agreed to be paid. By no other construction of the statute can effect be given to the clause forfeiting the entire interest which the note or other evidence of debt carries, or which are agreed to be paid, but which has not been actually paid. It is said that within the meaning of the statute interest is 'paid' when included in a renewal note, and when suit is brought upon the last note calling for interest from its date only the interest accruing on the apparent principal of that note is subject to forfeiture. We think that the statute cannot be so construed. If, within the meaning of the statute, interest is paid simply by including it in a renewal note, it would follow that, as soon as usurious interest is included in a renewal note, the borrower or obligor could sue the lender or obligee, and 'recover back * * * twice the amount of the interest thus paid,' when he had not in fact paid the debt, nor any part of the interest, as such. This cannot be a sound interpretation of the statute. The words 'in case the greater rate of interest has been paid,' in section 5198, refer to interest actually paid, as distinguished from interest included in the note, and only 'agreed to be paid.' If, for instance, one executes his note to a national bank for a named sum as evidence of a loan to him of that amount, to be paid in one year at ten per cent. interest, such a rate of interest being illegal, and if renewal notes were executed each year for five successive years without any money being in fact paid by the borrower, each renewal note including past interest, legal or usurious, the sum included in the last note in excess of the sum originally loaned would be interest which that note carried which was agreed to be paid, and not, as to any part of it, interest paid." And again: "If the note, when sued on, includes usurious interest agreed to be paid, the holder may in due time elect to remit such interest, and it cannot then be said that usurious interest was paid to him. McBroom v. Investment Co., 153 U. S. 318, 328, 14 Sup. Ct. 852; Stevens v. Lincoln, 7 Metc. (Mass.) 525; Saunders v. Lambert, 7 Gray, 484, 486; Stedman v. Bland, 26 N. C. 296, 299."

The court also refers to the case of Sydner v. Bank, 94 Ky. 231, 21 S. W. 1050, and quotes from it approvingly the quotation used by the Kentucky court from the case of Bank v. Hoagland, 7 Fed. 159, in which it was held that a forfeiture was not waived by giving subsequent notes, though in respect to them the agreed rate of interest was a legal rate. The case of McBroom v. Investment Co., 153 U. S. 318, 14 Sup. Ct. 852, is, we think, quite in point, and, taken with the reasoning of the court in the case of Brown v. Bank, is decisive of this question.

The remaining question which is argued by counsel is whether or not the recovery shall be double the amount of the interest paid or only double the amount of the usury paid. This question is not raised by the demurrer, and could not be raised, unless it would leave the amount less than the jurisdictional sum. Still, it has been argued by counsel very elaborately, and we should, perhaps, indicate our view upon it. We think the case of Brown v. Bank, read with the case of McBroom, is also decisive of this question, because it would be a most extraordinary construction of this statute to allow a forfeiture of all of the interest, not only of the remaining note, but all of the interest which accrued on previous renewals, when usury had not been paid, but only allow double the usury (double the amount of the excess of interest) to be recovered when the usury and the debt had actually been paid. It is quite evident from the entire section that the penalty is to be greater when the creditor has actually required the usury, and received it, than when it was merely agreed to be paid in the obligation, though not paid. The language of the section, fairly construed, we think makes it clear that the recovery should be double the amount of the interest, and not only the excess of the interest paid. We do not think it necessary to review the authorities upon this subject, but will refer to the following: Hill v. Bank, 15 Fed. 432; Bank v. Davis, 8 Biss. 100, Fed. Cas. No. 10,038; Bank v. Moore, 2 Bond, 175, Fed. Cas. No. 10,041; Crocker v. Bank, 4 Dill. 358, Fed. Cas. No. 3,397. The demurrer, therefore, should be overruled, and it is so ordered.

SOUTHERN RY. CO. v. MYERS. SAME v. WHYTE. SAME v. REED.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1898.)

No. 631.

1. RAILWAY—PASSENGERS—INJURY—BURDEN OF PROOF.
   Where passengers on a railway train are injured without fault of their own, the presumption is, under the statutes of Georgia, that the railway company is liable, and the burden is upon it to rebut such presumption.
2. SAME—DAMAGES—ANTICIPATED PROFITS.
   Where the members of a theatrical troupe take passage by a railway train to a place at which they expect to play, the mere fact that the agent of the railway company knows of such intention will not raise the presumption that he has in contemplation, as an element of the damage to result from a possible failure to arrive in time, the amount of profits which they expect