## MASURY v. ARKANSAS NAT. BANK et al.

(Circuit Court, E. D. Arkansas, W. D. June 2, 1898.)

1. CORPORATIONS—TRANSFER OF STOCK—LAWS GOVERNING TRANSACTION.
   A transfer of stock in a corporation is governed by the laws of the domicile of the corporation, rather than of the place where the transfer occurs.

2. SAME—RECORDING TRANSFER WITH COUNTY CLERK.
   Sand. & H. Dig. Ark. § 1338, provides that no transfer of corporate stock shall be valid, against creditors of the transferror, until recorded with the county clerk in the county where the corporation has its office. *Held*, that a pledge in New York of stock in an Arkansas corporation, not recorded in Arkansas, was void as to an attaching creditor of the transferror in the latter state.

This is a bill in equity by Grace Masury against the Arkansas National Bank and others to cancel a sheriff's sale of shares in a corporation, and to declare and foreclose a lien on the stock. The cause was heard on demurrer to the bill.

This cause is before the court on a demurrer to the bill and amended bills. The material facts necessary to a determination of the demurrer are: Hogaboom was the owner and holder of shares of stock of the Park Hotel Company, a corporation existing under the laws of the state of Arkansas, and having its domicile in the county of Garland. That, of the shares thus owned by him, he held 400 shares evidenced by certificate No. 36. That the face value of each share was $25. That in January, 1891, he borrowed the sum of $10,000 from the complainant, and executed his note therefor; and, as security for this loan, he assigned and delivered to complainant certificate No. 36. That the loan was made and the shares assigned in the city of New York, and that but a small part of the loan has been paid off. That complainant was not advised as to the laws of this state, which require transfers of corporate stocks to be recorded in the office of the county clerk of the county in which the corporation has its domicile. That in 1896 the defendant bank instituted a suit by attachment against the said Hogaboom for a large indebtedness due it from him, and that these 400 shares of stock evidenced by certificate No. 36, assigned and delivered to complainant as security as aforesaid, were, with other stock standing in the name of said Hogaboom on the books of the corporation, seized by the sheriff under and by virtue of said writ of attachment issued and directed to him out of the circuit court of Garland county, in which court said suit was pending, as the property of said Hogaboom. That before making said levy the secretary of the Park Hotel Company, at the request of said sheriff, gave him a certificate that these 400 shares evidenced by said certificate No. 36 appeared, with other stock, which it is unnecessary to mention here, on the books of the corporation in the name of said Hogaboom; and thereupon said shares were seized by the sheriff, under said writ, as the property of Hogaboom, the defendant in said writs, in the manner prescribed by the laws of the state, and a proper return made of the facts to the court. In due time said bank recovered a judgment against said Hogaboom, the attachment sued out at the beginning of the suit was sustained, and the sheriff ordered to sell the same. That in conformity with that order of the court the sheriff sold said 400 shares of stock, and the bank, the attaching creditor, became the purchaser thereof; the complainant giving notice at the sale, and before the purchase of the bank, that she held the same as a pledge for the indebtedness due her from Hogaboom. The sale was duly reported to the court by the sheriff, and confirmed. That before the sale complainant applied to the secretary of the corporation for a transfer thereof, and a certificate of such transfer, in order that she might have it recorded; but he refused to make such transfer, or issue her a certificate, for the reason, as stated by him, that this stock had before then been attached by the sheriff as the property of Hogaboom, under the writ of attachment

aforesaid. That complainant did not know that the laws of Arkansas required a transfer of corporation stock to be recorded, but thought an assignment and delivery thereof sufficient to pass title. The prayer of the bill is that the sheriff's sale be canceled; that the corporation be compelled to execute to her a proper certificate of transfer, in order that the same may be filed by her for record; and that she have a foreclosure of her lien.

Rose, Hemmingway & Rose and John M. Moore, for complainant.
George G. Latta and Jacob Trieber, for defendants.

WILLIAMS, District Judge. The only questions involved are whether, under the statutes of Arkansas, a seizure of shares of the capital stock of a corporation existing under the laws of that state, by virtue of a writ of attachment, or under execution, takes precedence over a prior transfer or pledge, not transferred on the books of the corporation, nor filed for record in the office of the county clerk of the county in which the corporation transacts its business, and whether the laws of this state govern such a transfer, if made in another state. As to the last proposition, learned counsel for complainant claim that Black v. Zacharie, 3 How. 483, is conclusive that the laws of New York, where the transfer was made, and not the laws of Arkansas, of which state the company was a corporation, control. The question involved in that suit was not that of a transfer of shares, but an assignment of the equity of redemption in stock previously assigned and delivered as a pledge. The court say:

"We admit that the validity of this assignment to pass the right to Black in the stock attached depends upon the laws of Louisiana [the domicile of the corporation], and not upon that of South Carolina [where the assignment was made]. From the nature of the stock of a corporation, which is created by and under the authority of a state, it is necessarily, like every other attribute of the corporation, to be governed by the local law of that state, and not by the local law of any foreign state."

Judge Lowell, speaking of the same subject, says:

"Whatever the general principles of international law in relation to assignments of personal claims may be, the validity of a transfer of stock is governed by the law of the place where the corporation is created." Lowell, Stocks, § 50; Hammond v. Hastings, 134 U. S. 401, 10 Sup. Ct. 727; Green v. Van Buskirk, 7 Wall. 140.

I am therefore of the opinion that, unless the transfer of this stock is valid under the laws of Arkansas, the state which created the corporation, the laws of the state where the transfer was actually made cannot control. The statutes of this state regulating private corporations, and specially the transfer of stocks, are peculiar, and different from those of any state except Connecticut, from which state this statute was evidently taken. In that state it has always been held—and it is the settled rule of that state—that a transfer of corporation stock is void, against attaching creditors, unless made in strict conformity with the charter and by-laws of the corporation. Manufacturing Co. v. Smith, 2 Conn. 579; Northrop v. Turnpike Co., 3 Conn. 544; Turnpike Co. v. Bunnel, 6 Conn. 552; Dutton v. Bank, 13 Conn. 493; Shipman v. Insurance Co., 29 Conn. 253; Colt v. Ives, 31 Conn. 35; Platt v. Axle Co., 41 Conn. 255; First Nat. Bank of Hartford v. Hartford Life & Annuity Ins. Co., 45 Conn. 22.

Learned counsel for both sides have cited a large number of au-

thorities as to the construction of charters which merely provide that "no transfer of stock shall be valid, until transferred on the books of the corporation." The same provision is found in our statutes, and is section 1342, Sand. & H. Dig.; but counsel for defendants do not rely on this provision of the law, but base their demurrer on section 1338. As to the effect to be given to section 1342, the authorities are very conflicting; some holding that this provision is for the benefit of the corporation solely. In view of the legislature of this state having enacted section 1338 in addition to section 1342, it is only important to notice the fact that the courts holding that the latter section is only for the benefit of the corporation, in order that they may know who are its stockholders, entitled to vote at corporate elections and receive dividends, base their opinions principally on the fact that a creditor of a stockholder not a shareholder of the corporation has no access to the stock books, and no means to find out who are stockholders. No doubt, to meet these objections, and to leave no room for doubt, the legislature enacted the statutes now in force. Section 1338, Sand. & H. Dig., provides:

"Whenever any stockholder shall transfer his stock in any such corporation, a certificate of such transfer shall forthwith be deposited with the county clerk aforesaid, who shall note the time of said deposit and record it at full length in a book to be by him kept for that purpose; and no transfer of stock shall be valid against any creditor of such stockholder until such certificate shall have been so deposited."

The language used is so clear and unambiguous that there is really nothing to construe. It shows, as clearly as language could express it, that this provision is intended for the benefit of the creditors of the stockholders. The requirement that the transfers shall be recorded in the county clerk's office meets the objection that the creditor,—unless a stockholder,—having no access to the stock books of the corporation, cannot know who are the stockholders; for, that being a public office, every citizen can at all times ascertain from the public records whether his debtor is a stockholder or not.

There is no doubt that the tendency of modern legislation is to make this class of instruments as near negotiable as possible; but the legislature of this state has seen proper to restrict their negotiability, and, under the laws of this state, the stock may have been canceled, although the certificate thereof is still outstanding. Section 1342 gives the corporation a lien on the stock for all debts due it from the stockholder, and this lien is superior to the rights of any purchaser or pledgee, even without notice. Oliphint v. Bank, 60 Ark. 198, 29 S. W. 460; Bank of Commerce v. Bank of Newport, 27 U. S. App. 486, 11 C. C. A. 484, and 63 Fed. 98. By the provisions of section 1353, the stock of one indebted to the corporation may be sold for such debts; and section 1354 makes it the duty of the corporation to issue to the purchaser a new certificate of stock, and cancel upon its books the certificates of the indebted stockholder; and that without a surrender of the certificates. And the same procedure is prescribed when the stock is sold under attachment or execution. Section 3059, Sand. & H. Dig. The corporation laws of this state clearly intend that there shall be a public record of the ownership

of corporation stock from the time of the organization of the corporation, and this must be kept in the county where the corporation transacts its business. Section 1334 provides that before a corporation shall commence business a duplicate of the articles of incorporation, together with a certificate under oath, must be filed for record in the county clerk's office, showing the names of each stockholder, the number of shares held by each, and the amount paid on the stock. Section 1344 provides for a like record if the stock is increased. Section 1337 provides for a record, to be filed annually, showing, among other things, the names of each stockholder, and the number of shares held by each. Section 1357 provides that, if the place of business is removed from one county to another, a certified copy of all records showing the state of its affairs must be procured from the county clerk of the county from which it is removed, and recorded in the county to which it is removed. It thus appears that the intention of the legislature was to provide for the same system of registration for this kind of property as is provided for real estate.

The fact that section 1338 was enacted in addition to section 1342 is almost conclusive that the legislature intended to protect creditors against unrecorded transfers. While I have not been able to find any statute exactly like section 1338 which has ever been construed by a supreme court, there are several which, although not as plain as this, yet have invariably been construed by the highest courts of those states in favor of the attaching creditor. In Alabama the statute provides that, unless the transfer is registered within 15 days, it shall be void as to bona fide creditors. A transfer of stock without such registration within the time prescribed by statute was held void as against an attaching creditor. Bank v. Pinckard, 87 Ala. 577, 6 South. 364; Abels v. Insurance Co., 92 Ala. 382, 9 South. 423. In Colorado the statute declares transfers void, for all purposes, unless registered within 60 days. In passing upon this statute the supreme court of that state say:

"There is not much room for construction of this language. The assignment of stock vests in the assignee an inchoate title, which for sixty days has the effect of a complete title; but, unless within that time it is perfected by the entry of the transfer upon the books of the company, it expires, and the transfer becomes invalid. The title of the assignor has not been devested, and the stock is subject to attachment at the suit of his creditors." Conway v. John, 14 Colo. 30, 23 Pac. 170; Bank v. Hastings, 7 Colo. App. 129, 42 Pac. 691.

The Wisconsin statute is as follows:

"But such transfer shall not be valid except between the parties thereto, until the same shall have been so entered on the books of the corporation." Rev. St. § 1751.

In a well-considered case it was held by the supreme court of that state that an execution levied on stock before the transfer is entered on the books of the corporation is entitled to priority over the transferee. In re Application of Murphy, 51 Wis. 519, 8 N. W. 419. In New Mexico the statute is like that of Wisconsin, and the same conclusion was reached by its court. Bank v. Folsom, 7 N. M. (Gild.) 611, 38 Pac. 253. In Maine and Iowa similar statutes prevail, and like

constructions were made by the courts of those states. Bank v. Cutler, 49 Me. 315; Ft. Madison Lumber Co. v. Batavian Bank, 71 Iowa, 270, 32 N. W. 336.

In Massachusetts the statute is:

"No sale, assignment or transfer of stock in a corporation shall * * * affect the right of an attaching creditor until it is recorded upon the books of the corporation." Pub. St. c. 105, § 24.

In a proceeding in equity, like this, the rights of an attaching creditor were held to be superior to those of a vendee of an unrecorded sale. Newell v. Williston, 138 Mass. 240; Bank v. Williston, Id. 244.

Learned counsel for complainant rely on the decisions of the supreme court of the United States in Bank v. Lanier, 11 Wall. 369, and Bullard v. Bank, 18 Wall. 589, as sustaining their view of this case. Neither of these cases can have any application to the case at bar. In the Lanier Case, which was an action against the bank for a refusal to make a transfer of its stock to a purchaser who was the holder by assignment of the certificate of stock, the liability of the bank was sustained by reason of its conduct, which created an estoppel. The court say:

"It is clear that the bank, in allowing its stock to be transferred to other parties while the certificates were outstanding in the hands of a bona fide holder, was guilty of a breach of corporate duty; and, as its conduct operated to the injury of Lanier and Handy, an action will lie in their behalf to obtain satisfaction for the injury."

The duties of the bank, the court say, were regulated by the act of congress which created the corporation, and its own by-laws, which provided that the stock of the bank shall be transferable only on the books of the bank, subject to the provisions and restrictions of the act of congress. Having made a transfer without surrender of the certificate, which certificate showed on its face that it was transferable only on its surrender, the bank was guilty of a wrong. In the Bullard Case the court held that the transfer of national bank shares was regulated solely by the acts of congress,—they existing under those acts,—and, as those acts gave no authority to a bank to limit the right of transfer by a by-law, such a by-law is void.

In this state, registration laws have always been strictly construed. As early as 1848 the supreme court held that the statute regulating the registration of mortgages (now section 5091, Sand. & H. Dig.) must be strictly construed, and a mortgage not recorded, or, if recorded, defectively acknowledged, so as not to entitle it to record, is void, against an attaching creditor, although he had actual notice thereof. Main v. Alexander, 9 Ark. 112. This case has been recognized as the settled law of the state ever since. Learned counsel for complainant, with apparent sincerity, contended in their argument that this case has been overruled by Byers v. Engles, 16 Ark. 543, and Tennant v. Watson, 58 Ark. 252, 24 S. W. 495. But they overlook the fact that those cases construe different statutes; one construing section 5091, and the other section 728, Sand. & H. Dig. The latter statute makes an exception of parties purchasing with actual notice. This is fully shown in the decision of the supreme court in the late

case of Ghio v. Byrne, 59 Ark., on page 292, 27 S. W. 243. Doswell v. Adler, 28 Ark. 85, overlooks entirely the distinction between these two statutes, and also Main v. Alexander, and the numerous cases following that decision. Since the decision of Doswell v. Adler, which was decided in 1873, the supreme court of this state has delivered written opinions in 11 cases on that question, and in none of them is that case recognized as an authority, while Main v. Alexander is followed. The most recent decision was published as late as October, 1895. Milling Co. v. Mikles, 61 Ark. 123, 32 S. W. 493. When the corporation act was enacted by the legislature, both of these sections were on the statute book, and had been construed many times. The fact that the legislature, with full knowledge of the construction given to those statutes by the supreme court, saw proper to follow section 5091, and not except purchasers with actual notice from the provisions of the act, as was done in section 728, is proof conclusive that it did not intend to limit the rights of these creditors to such as purchase without notice. It may be a great hardship on complainant to be thus deprived of her security, when, as alleged in the bill, she was not aware of the statutes of this state, but even courts of equity are powerless to afford relief against the harsh provisions of a statute. As to the policy of these statutes, courts cannot control that. The framers of the constitution in their wisdom have vested that power in another department of the government. Courts must enforce the laws as enacted by the legislature, unless they are in conflict with some provision of the constitution, and that is not contended for. It follows from these views that the demurrer to the bill must be sustained, and the bill dismissed.

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## In re LINFORTH et al.

(District Court, N. D. California. May 14, 1898.)

No. 2,071.

1. MORTGAGES—FORECLOSURE—DEFICIENCY—CONSTRUCTIVE SERVICE.
   Where, in a foreclosure suit, constructive service only is had upon the defendant, while a deficiency decree may not be entered, the deficiency after sale constitutes a valid and subsisting indebtedness, which may be recovered by appropriate action.

2. BANKRUPTCY—SECURED CREDITOR—DETERMINATION OF VALUE OF MORTGAGED PROPERTY.
   Rev. St. § 5075, prescribing the manner in which the value of mortgaged property must be determined in order that the mortgagee may be admitted as a creditor against the bankrupt estate of the mortgagor, applies only to cases where bankruptcy proceedings are pending. Hence, where a foreclosure suit has been begun, and prosecuted to judgment, after an order discharging bankruptcy proceedings against the mortgagor, and returning him his property, the mortgagee is entitled to prove his claim for the deficiency against the estate upon the subsequent setting aside of the order of discharge.

3. ELECTION TO RELY UPON SECURITY.
   Where a mortgage creditor of a bankrupt obtains, from the federal court in which the bankruptcy proceeding is pending, permission to foreclose his mortgage in a state court, upon condition of waiving any personal claim for deficiency, but for good reason, and without laches, fails to

prosecute his suit to judgment, such creditor or his assignee is not bound as by an election to rely solely upon the mortgaged property, so as to preclude him from being subsequently admitted as a creditor against the estate of the bankrupt on account of the same debt.

4. SAME—DISCHARGE SET ASIDE—INTERVENING RIGHTS.

A partnership and the individual partners having been adjudged bankrupt, one of the partners, by agreement of all parties in interest, including firm creditors, was discharged, and his individual property returned to him; the agreement providing that his individual creditors should have the same right to proceed for the collection of their debts as if no bankruptcy proceedings had ever been had. Under this agreement, a secured creditor foreclosed his mortgage; but, the service being by publication, no decree for the deficiency could be entered. Subsequently the discharge was set aside by the court, and the debtor's individual property again made subject to the claims of firm creditors. *Held*, that the deficiency claim of the individual creditor was entitled to be paid out of such property in preference to the claims of firm creditors.

Pierson & Mitchell, for assignee.
T. M. Osmont, for E. W. Chapman.

DE HAVEN, District Judge. This is a proceeding commenced by the assignee in bankruptcy, under section 5081 of the Revised Statutes of the United States, for the purpose of determining the validity of a claim filed in this court by E. W. Chapman against the individual estate of John Bensley, bankrupt. The material facts out of which the present controversy arises are these:

On November 24, 1875, John Bensley executed to the Nevada Bank of San Francisco his promissory note for the sum of $80,000, payable, with interest, one year from its date, and as security therefor on the same day executed to that bank a mortgage upon a large amount of real estate. On the 15th day of February, 1877, this note was still unpaid; and the firm of Linforth, Kellogg & Co., and the individual members thereof (Bensley being one of the co-partners in the firm), were duly adjudicated bankrupts, upon a petition filed in this court on that day by the firm and its individual members. On the 17th day of February, 1877, one James Coffin, to whom the above referred to note and mortgage of Bensley had been assigned by the Nevada Bank, for its convenience, and for collection only, instituted an action in one of the courts of this state for the purpose of foreclosing such mortgage. On March 26, 1877, James Patrick and A. L. Tubbs were duly appointed assignees in bankruptcy of said bankrupts; and on the following day all of the property of the firm of Linforth, Kellogg & Co., and also all the property of its individual members, was duly conveyed to said assignees in bankruptcy. Thereafter, on the 28th day of September, 1877, James Coffin filed in this court a petition in which he asked for an order allowing him to make the assignees of said bankrupts parties to the foreclosure suit commenced by him on February 17, 1877, and that he be permitted to proceed therein. The court thereupon made an order granting the prayer of his petition. The order, however, provided that in any judgment for foreclosure of said mortgage he should waive any personal judgment against Bensley. The said action never proceeded to judgment, and was dismissed on March 20, 1878. Prior to the dismissal of that action, Bensley and his individual creditors, including the Nevada

Bank of San Francisco, and the creditors of the firm of Linforth, Kellogg & Co., entered into a contract by which it was agreed between all the parties thereto that this court should grant to Bensley a decree of final discharge in the bankruptcy proceedings then pending, and direct the assignees in bankruptcy to reconvey to him his individual property, "free from, and discharged of, said proceedings in bankruptcy." This agreement contained the following provision:

"Said individual creditors of said John Bensley may and shall have the right to enforce payment of their claims against said John Bensley as fully and completely and effectually, to all intents and purposes, as though these presents had never been made, and as though said John Bensley had never been adjudged a bankrupt; and said John Bensley hereby agrees to pay and discharge to said individual creditors all their just claims, in the same manner and to the same extent as if said bankrupt proceedings had never been instituted, and as if these presents were never entered into, and that such claims shall have preference to payment out of the individual assets of said John Bensley."

This agreement further provided that the decree of final discharge of Bensley in the bankruptcy proceedings should contain the express provision that the obligation of that agreement, and the matters therein agreed on the part of Bensley to be performed, should be exempt from the operation of such decree of discharge. The contract also provided that it was to be subject to the approval of this court, and without such approval should be of no effect whatever. This contract was ratified by this court on February 12, 1878; and in pursuance thereof Bensley was on March 20, 1878, finally discharged from the bankruptcy proceeding, and from all his debts and liabilities; and on the same day the assignees in said bankruptcy proceeding reconveyed to him all his individual property. In December, 1880, James Coffin reassigned to the Nevada Bank the note and mortgage executed to that bank by Bensley on November 24, 1875; and on January 19, 1881, the bank commenced an action for the foreclosure of the mortgage in one of the superior courts of the state of California. John Bensley, James C. Patrick, and A. L. Tubbs were made defendants. Patrick and Tubbs, as before stated, were the assignees in bankruptcy of the firm of Linforth, Kellogg & Co., but were not sued in their official capacity; and no order was made by this court authorizing the Nevada Bank to prosecute that action. At the date of its commencement, and at all times thereafter, Bensley was absent from the state of California; and summons in the action was served upon him by publication only. On June 5, 1882, judgment was entered in that action in favor of the Nevada Bank against Bensley for the sum of $93,753.94 and costs; and the mortgaged premises were duly sold under an order of sale for the sum of $57,152.92, which was applied in part satisfaction of said judgment, leaving unpaid a deficiency of $37,727.51, which deficiency was on August 10, 1882, docketed in said court as a judgment against Bensley. Thereafter Bensley specially appeared in the action, and upon his motion the judgment for the deficiency was vacated by the court, upon the ground that the court was without jurisdiction to render a personal judgment against him for such deficiency, because the summons in the action was not personally served upon him. The Nevada Bank

thereafter assigned its alleged claim against Bensley for the deficiency arising upon the sale of the mortgaged premises under the decree of foreclosure, and E. W. Chapman now owns the same. On February 25, 1890, John Lloyd, the present assignee in bankruptcy of Linforth, Kellogg & Co., commenced in this court an action in equity to set aside certain conveyances of real property alleged to have been made by Bensley for the purpose of defrauding his creditors, and also to vacate the former order or judgment of this court, discharging him from the bankruptcy proceedings hereinbefore referred to, and also to annul the order of this court of February 12, 1878, ratifying the agreement between Bensley and his creditors, and to compel a reconveyance of all property conveyed to Bensley by the assignees in bankruptcy pursuant to such order. On December 7, 1893, a decree was entered in that action in accordance with the prayer of the bill of complaint therein; and real estate, of great value, belonging to the individual estate of Bensley, was also thereby recovered, and vested in the assignee in bankruptcy for the benefit of his creditors.

1. The state court in the foreclosure suit instituted by the Nevada Bank against John Bensley et al. on January 19, 1881, by the constructive service of summons on Bensley, acquired jurisdiction to enter a valid decree of foreclosure; and while it did not by this manner of service obtain jurisdiction to docket a personal judgment against Bensley for the deficiency left unpaid after the sale of the mortgaged premises, still the deficiency ascertained by the sale under the decree of foreclosure constituted an indebtedness due from Bensley to the plaintiff in that action, which such plaintiff thereupon became entitled to recover by appropriate action (Blumberg v. Birch, 99 Cal. 416, 34 Pac. 102), unless the right to proceed against Bensley for such deficiency had been waived.

2. It is claimed, however, by the assignee in bankruptcy, that the holder of this claim cannot be admitted as a creditor against the bankrupt estate of Bensley, because the value of the mortgaged property was not ascertained in the manner provided by section 5075 of the Revised Statutes of the United States. That section provides as follows:

"When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such a manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. * * * If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt."

This section is only intended to prescribe the practice to be pursued by a secured creditor when there is pending a proceeding in bankruptcy against his debtor. Unless there is such a proceeding pending, the section can have no operation. This being so, it must follow that the section is not applicable to the facts now before the court. When, on January 19, 1881, the Nevada Bank commenced the action to foreclose its mortgage, and until after the final decree *in* that action, there was no bankruptcy proceeding pending against

Bensley, as he had on March 20, 1878, been given by this court a certificate of final discharge in the bankruptcy proceeding; and this discharge continued in force until it was subsequently set aside by the decree of December 7, 1893.

3. It is claimed, however, that the petition filed by Coffin, as the representative of the Nevada Bank, asking for permission to proceed in the action for foreclosure instituted by him while the bankruptcy proceeding against Bensley was pending, followed as it was by the order of the court granting such permission upon the express condition that no judgment for deficiency should be obtained against Bensley, was in effect a conclusive election upon the part of the Nevada Bank to look alone to the mortgaged property for payment of its debt; and the bankruptcy proceeding against Bensley having been revived by the decree of December 7, 1893, Chapman, who has succeeded to the interest of that bank, is bound by that election, and thereby estopped from asserting his claim against the individual estate of Bensley, now in process of administration in the bankruptcy proceeding thus revived. It is, of course, a familiar rule that a party cannot, in the course of litigation, occupy inconsistent positions; and, where one has elected between several inconsistent courses, he is confined to that which he first adopts. In accordance with this rule, it is generally held that where a party, with full knowledge of all the facts, takes legal steps to enforce a contract, it is a conclusive election not to rescind such contract on account of fraud or other matters then known to him. Conrow v. Little, 115 N. Y. 387, 22 N. E. 346. So, also, an action ex contractu upon an implied contract of sale precludes a subsequent action by the same party for conversion of the same property, based upon the same transaction upon which the former suit was founded. Terry v. Munger, 121 N. Y. 161, 24 N. E. 272. And so, when a trustee wrongfully pays to another money which belongs to his beneficiary, the latter may sue the trustee as his debtor, or he may ratify the payment, and sue the person who received the money, but he cannot do both; and his election, once effectually made, is conclusive upon him. Fowler v. Bank, 113 N. Y. 450, 21 N. E. 172. In cases like those just mentioned, it is generally held that the bringing of an action, with full knowledge of all the facts, is a conclusive election to pursue the particular remedy or form of action selected, although such action be subsequently dismissed, and not prosecuted to judgment. In my opinion, this doctrine of election, which is really founded upon the principle of estoppel, is not applicable to a proceeding by which a secured creditor obtains from a United States district court, in which a bankruptcy proceeding is pending, permission to foreclose in a state court a mortgage upon a portion of the estate of the bankrupt. If the action thus authorized is not prosecuted to judgment in the state court, the creditor does not occupy an inconsistent position when he afterwards comes into the court having jurisdiction of the bankruptcy proceeding, and asks to be admitted as a creditor against the estate of the bankrupt, on account of the debt secured by his mortgage. Whether he elects to pursue the one course or the other, he affirms the same facts as the basis of his claim against the bankrupt. In such a case

it is clear that the rule that no person should be permitted to occupy inconsistent positions in the same litigation cannot be properly applied. See Crossman v. Rubber Co., 127 N. Y. 34, 27 N. E. 400. It is possible that a case might arise where a mortgagee would not be allowed to thus change the method of procedure first adopted by him, —as, for instance, where there has been great laches upon his part in finally declining to proceed in the state court, and the mortgaged property has in the meantime greatly depreciated in value; but no such case as that is presented here.

4. But, in addition to what has already been said, it appears that, before the dismissal of the action referred to, all parties in interest—all the creditors of the firm of Linforth, Kellogg & Co., as well as the individual creditors of Bensley—agreed that Bensley should be discharged from all further proceedings in bankruptcy, and that the individual creditors of Bensley should "have the right to enforce payment of their claims against said Bensley as fully and completely and effectually, to all intents and purposes, as though these presents had never been made, and as though said John Bensley had never been adjudged a bankrupt; * * * that such claims shall have preference to payment out of the individual assets of said John Bensley." It was after this agreement that the action of foreclosure first instituted was dismissed, and the decree of foreclosure in the subsequent action brought by the Nevada Bank against John Bensley et al. obtained. When the mortgaged property was sold under that decree of foreclosure, there still remained a balance due to the Nevada Bank of $37,727.51; and, by the terms of the agreement above referred to, the Nevada Bank was, on the day such deficiency was ascertained, entitled to take all lawful methods to recover such sum from Bensley; and such claim was entitled to preference of payment over the firm creditors of Linforth, Kellogg & Co., out of the individual assets of said Bensley. The subsequent decree of the court on December 7, 1893, setting aside its former order ratifying and approving this contract, and vacating its final discharge of Bensley in the bankruptcy proceedings commenced February 15, 1877, cannot be permitted to have relation back, so as to destroy the intervening right acquired by the Nevada Bank, under the agreement above referred to, to enforce payment of its claim out of the individual assets of Bensley, in preference to the firm creditors of Linforth, Kellogg & Co., and to which right Chapman succeeded by assignment on May 20, 1890, before the commencement of the action in which such decree was entered. The contest in this proceeding is really between the creditors of the firm of Linforth, Kellogg & Co., represented by the assignee, and Chapman, who is the only individual creditor of John Bensley. In my opinion, the firm creditors are estopped by their agreement from disputing the claim now made by Chapman, as the successor in interest of the Nevada Bank, to be paid out of the individual estate of Bensley. The effect of the decree of December 7, 1893, was to again bring all of the individual assets of said John Bensley under the jurisdiction of this court for administration in the bankruptcy proceedings; but it did not affect the then existing right of Chapman, under the agreement made between Bensley and his cred-

itors, to enforce payment of his claim against Bensley out of such assets, and in preference to the firm creditors of Linforth, Kellogg & Co. Ordered that prayer of the petition of the assignee be denied.

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## LOW et al. v. BLACKFORD et al.

(Circuit Court of Appeals, Fourth Circuit. May 3, 1898.)

No. 246.

1. MORTGAGES—PROVISIONS BINDING UPON BONDHOLDERS.
   A mortgage and the bonds and coupons secured thereby are to be construed as one contract, and provisions in the mortgage as to the method of distribution of the proceeds in case of foreclosure sale, although not found in the bonds, will bind the bondholders where there is nothing in the bonds inconsistent therewith.
2. SAME—FORECLOSURE SALE—DISCRETION OF COURT.
   Where a mortgage is foreclosed in equity, the court is not bound to decree a sale in strict accordance with the terms prescribed in the mortgage for the execution of the power of sale therein contained, but should exercise a sound discretion, having due regard to the interest of all parties.
3. SAME—METHOD OF SALE—APPORTIONMENT OF PROCEEDS.
   Where a single mortgage, given by a railway company to secure three series of bonds, each of which constituted a first lien upon one of the three divisions of the road, and a second lien upon the other two, was foreclosed in equity, *held*, that the three divisions should not be sold separately, nor should the property be offered both in separate divisions and as an entirety, and the most advantageous bid accepted; but the entire property should be sold as an entirety, and the proceeds apportioned among the bondholders of the three classes according to the relative value of the three divisions as found from the evidence. 82 Fed. 344, affirmed.
   Purnell, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

Charles Steele, for appellants.

Cowen, Cross & Bond, for appellees Wm. H. Blackford and others.

Turner, McClure & Rolston, for appellee Farmers' Loan & Trust Co.

R. O. Burton and Watson & Buxton, for appellee John W. Fries.

George Rountree, for appellee W. A. Lash.

Before GOFF, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

GOFF, Circuit Judge. The Farmers' Loan & Trust Company, trustee, instituted this suit in the circuit court of the United States for the Eastern district of North Carolina in March, 1894, for the purpose of foreclosing the first mortgage, dated June 1, 1886, executed by the Cape Fear & Yadkin Valley Railroad Company. The Mercantile Trust Company of Baltimore, the trustee in the second mortgage, known as the "consolidated mortgage," dated October 1, 1889, was made a party defendant, and subsequently, when it resigned its trust, William A. Lash was substituted as trustee under the mortgage and as defendant in the suit. A cross bill was filed by said Lash