

the constitution or statute under which the bonds purport to have been issued expressly or by implication provide that he must look beyond the face of the bonds for the purpose of ascertaining the existence of the facts justifying their issuance. The cases of *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, and *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654, as explained in the later case of *Chaffee Co. v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216, are not opposed to this conclusion; and the same also may be said of *Sutliff v. Commissioners*, 147 U. S. 230, 13 Sup. Ct. 318. The rule stated is founded, not only upon principles of equity, but is also consistent with public policy, which seeks to give stability and value to this class of negotiable instruments by inviting the confidence of bona fide purchasers for value. The law which determines what the judgment must be upon the facts appearing in this case is clear, and in conclusion what was said in *Barnards Tp. v. Morrison*, 133 U. S. 523, 10 Sup. Ct. 333, may well be repeated here:

"Whatever may be the hardship of this particular case, to sustain the defenses pressed would go far towards destroying the market value of municipal securities."

Judgment must be entered in favor of the plaintiff for the amount demanded, less the sum of the three coupons assigned to plaintiff by the Northern Counties Investment Trust Company, Limited.

GARNER v. SECOND NAT. BANK et al.

(Circuit Court, D. Rhode Island. February 21, 1898.)

No. 2,566.

RES JUDICATA—JUDGMENT ON THE MERITS—WHAT CONSTITUTES.

A judgment which determines the right of a party, though it may have been rendered on default or on a dismissal, is a judgment on the merits, and is conclusive as to such right and all matters which properly belonged to the subject, and which the parties, in the exercise of reasonable diligence, might have brought forward therein.

Heard on Demurrers to Pleas of Res Judicata.

Alex. Thain and D. R. Ballou, for plaintiff.

James Tillinghast and W. K. Allen, for defendants.

BROWN, District Judge. The plaintiff's contention on demurrer to the pleas, that the former judgment was not upon the merits of the case, is based apparently upon a misconception as to what constitutes a judgment on the merits. If the right upon which the plaintiff relies in her action at law has already been determined, together with the pecuniary compensation due her for violation of that right, then, according to the proper meaning of the terms, there has been a judgment on the merits. It is immaterial upon what evidence this judgment was found. A dismissal or a default may be the basis of a judgment on the merits. *Durant v. Essex Co.*, 7 Wall. 107; *Forsyth v. City of Hammond*, 166 U. S. 506, 17 Sup. Ct. 665; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 691, 692, 15 Sup. Ct. 733. The

defendants' pleas of *res judicata* apply to every point which properly belonged to the subject of the issue in the former litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. *Cromwell v. Sac Co.*, 94 U. S. 351. Notwithstanding the allegations in the declaration of an agreement between the defendants, I am of the opinion that the pleas set forth in proper form a prior adjudication of the matters upon which the plaintiff relies in the action at law. The demurrers, therefore, are overruled.

CONTINENTAL TRUST CO. v. TOLEDO, ST. L. & K. C. R. CO.

(Circuit Court, N. D. Ohio, W. D. October 24, 1898.)

RAILROADS—LIABILITY FOR FIRES—NEGLIGENCE—CONSTRUCTION OF STATUTE.

The Ohio act of April 26, 1894 (91 Ohio Laws, p. 187), on the subject of the liability of railroad companies or others operating railroads for loss or damage resulting from fires caused in the operation of such roads, does not eliminate negligence as an essential element of such liability.

This hearing was on exceptions to the report of a master on the intervening petition of the Dewey Stave Company and the Dayton Insurance Company against the receiver to recover for the loss of property by fire caused in the operation of defendant's road by the receiver.

Clayton W. Everett and Doyle & Lewis, for intervening petitioner.
Clarence Brown, for receiver.

TAFT, Circuit Judge. The Dewey Stave Company is a corporation of Ohio engaged in the manufacture of staves. Its plant is situate adjacent to the line of the railway of the Toledo, St. Louis & Kansas City Railroad Company. The principal action is an action in foreclosure. The road is being operated, under orders of the court, by a receiver. The mill and other property of the Dewey Stave Company were burned by fire caused by hot cinders from the stack of a locomotive of the receiver. The intervening petition is by the Dewey Stave Company and the insurance company, to which it has transferred part of its claim upon payment of a policy. Petitioners seek to obtain compensation from the receiver's earnings for the loss thus occasioned to them, which aggregates about \$16,000. The master heard evidence, and makes a finding of fact that the fire was caused by hot cinders from an engine falling upon the roof of a shed of the Dewey Stave Company during a very long drought, and at a time when a very high wind was blowing. The master finds that there was a spark arrester on the engine, which had been examined very shortly before the accident, and that the receiver was guilty of no negligence whatever in respect to the fire. He thereupon finds, as a conclusion of law from this finding of fact, that the receiver is not liable. Exceptions are filed to the report of the master in respect of his conclusion of law, and the motion is made for a decree for the amount of the loss found by him to have been suffered, notwithstanding the conclusion of law. The case turns upon the construction of an act of the legislature of Ohio passed April 26, 1894 (91 Ohio Laws, p. 187). The statute is as follows: