not, in fact, owners." But one who is induced by a continuing fraud to subscribe for or to purchase and to retain stock is not estopped, as against creditors, on principles of fair dealing, from repudiating the contract and liability when he discovers the facts, because he has never knowingly or negligently deceived them to their injury. So are the American authorities that have treated of such fraudulent contracts (Bank v. Newbegin, 40 U. S. App. 1, 20 C. C. A. 339, and 74 Fed. 135; Improvement Co. v. Merrill, 2 U. S. App. 434, 2 C. C. A. 629, 52 Fed. 77, 80; Upton v. Tribilcock, 91 U. S. 54; Winters v. Armstrong, 37 Fed. 516, 517; Duffield v. Iron Works [Mich.] 31 N. W. 310, 316), and they clearly mark and strongly emphasize the distinction between the cases relied upon in the opinion of the majority and that now before us. In all the cases cited by the majority either a valid contract of subscription or purchase existed, or the stockholders were estopped from rescinding a voidable contract because they had acted as such after they knew, or might have known, the facts upon which they relied to avoid it. In the case at bar the contract was induced by fraud, and it was concealed by fraud. In this case no estoppel against the plaintiff in error can be sustained, because he did not know and could not learn the facts, and no duty to speak or act rested upon him until he acquired that knowledge, or means of knowledge. It may be that upon a trial of this case evidence could be adduced which would estop him from repudiating the purchase of this stock; but upon the admitted allegations of his answer here there are several reasons why I think he is not barred as against this receiver and the creditors he represents from obtaining the relief he seeks.

An estoppel arises only when one knowingly or negligently represents to another, who is ignorant, and relies and acts upon the representation, to his injury, that a fact or condition exists which has no existence. An essential element of such an estoppel is a willful intent to deceive, or such gross negligence of the rights of others as is tantamount thereto. There must be some moral turpitude, or some breach of duty. Henshaw v. Bissell, 18 Wall. 255, 271; Bank v. Farwell, 58 Fed. 633, 636, 639, 7 C. C. A. 391, 394, 396, and 19 U. S. App. 256, 262, 265; Insurance Co. v. McMaster, 30 C. C. A. 532, 87 Fed. 63, 66. Mr. Justice Field, speaking of this estoppel, in Henshaw v. Bissell, says:

"For its application there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud. An estoppel in pais is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury. Conduct or declarations founded upon ignorance of one's rights have no such ingredient, and seldom work any such result."

As long as the plaintiff in error did not know, and could not learn by the use of reasonable diligence, the facts constituting the fraud upon him until after the bank had incurred its debts to all its creditors, he was not guilty of any breach of duty to them, or of any negligence of their rights, or of any intent to deceive them, and they cannot sustain the plea of an estoppel against him.

Another requisite ingredient of an estoppel by conduct or declarations is that the party claiming its benefit has acted upon it in such a way that he will be injured if the natural inference from it is denied. The deceit of the victim of the representations and consequent damage from their denial are indispensable to the existence of the estoppel. Insurance Co. v. McMaster, 30 C. C. A. 532, 87 Fed. 63, 66; Bonsack Mach. Co. v. S. F. Hess & Co., 68 Fed. 119, 135, 15 C. C. A. 303, 318, and 25 U. S. App. 315, 341. There is nothing in this record to show that any creditor of this bank loaned his money to it or deposited his funds with it in reliance upon the fact that the plaintiff in error appeared to own 50 shares of stock in it, and I am aware of no presumption of law or of fact which makes it our duty to reach this conclusion in the absence of pleading and proof. Moreover, an estoppel does not operate in favor of everybody. No one can set it up, or derive any benefit from it, who has not been misled by the misrepresentation or conduct to his injury. Ketchum v. Duncan, 96 U. S. 659, 666; The Howard Carroll, 14 U. S. App. 506, 6 C. C. A. 320, and 57 Fed. 243; In re Harris, 57 Fed. 243, 246, 6 C. C. A. 320. If it were conceded that a creditor of the bank, who was induced to become such by his reliance upon the fact that the plaintiff in error appeared to have 50 shares of stock, could estop him from escaping from a liability thereon, that estoppel could not inure to the benefit of any creditor who was not induced to become such, in reliance upon that fact. If there were some creditors who were and some who were not induced to become such in reliance upon this fact, the receiver could not derive any benefit from it in this suit, because he can enforce only the common rights and claims of all the creditors, and he cannot plead or urge the personal claims of individual creditors which are not common to all. He cannot enforce an estoppel which may belong to one-third or one-tenth of the creditors, and distribute the proceeds he derives from it among them all. The right of a creditor to enforce such an estoppel is a personal right, which no one but the creditor misled by the representation can urge; and the receiver cannot avail himself of it, unless all the creditors have been induced to loan their money to this bank by the apparent ownership of its stock by the plaintiff in error. There is neither plea nor evidence of such a state of facts in this case. Indeed, the pleadings show that when this stock was subscribed the bank owed more than the value of all its assets. A state of things once shown to exist is presumed to continue; and where, as in this case, it appears that a bank owed more than the value of all its property in 1890 and again in 1894, the presumption that it had paid all of its old creditors, and become indebted to new ones, during this four years, would be contrary to the common experience and observation of business men, violent, and unreasonable. The strong probability is that most of the creditors of this bank loaned their money to it prior to 1890, and they surely cannot plead an estoppel. Whether they did or not, I am strongly of the opinion that the plaintiff in error is entitled to pleading and proof that some or all of these creditors loaned their money in reliance upon his ownership of the stock before an estoppel against him is found. "A creditor who has been defrauded by misrepresentation of the real capital of the com-

pany has his remedy in an action of tort against all who participated in the fraud. But the wrong done to him cannot entitle the entire body of creditors, who have not suffered from the alleged fraud, to recover of the entire body of stockholders, who have taken no part in it." Scovill v. Thayer, 105 U. S. 143, 151.

Finally, even if the fact were established that a creditor loaned his money since 1890 in reliance on the ownership of the stock of the plaintiff in error, I am unable to perceive any right or equity in his claim superior to that of the plaintiff in error. In that case they were both deceived by the same fraud. They were both kept in ignorance of the actual facts by the same falsifications and devices, and I see no reason why one of the victims of such a wrong should be allowed to prey upon the other. The bank induced the plaintiff in error to play the part of a stockholder, and thereby to lose all the money he deposited with it, and to run the risk of liability to lose as much more by the same scheme of false representations of its solvency, of its flourishing condition, and of its increase of stock, which doubtless induced the creditor to take the bank's promise of repayment for the money he deposited with it. In such a case, why should not the right of the purchaser of stock who suffers the greater wrong be equal to that of the creditor who suffers less? Neither of them was aware of the fraud. Neither of them did or could discover it until both were injured. Neither of them knowingly or negligently deceived the other, and, in my opinion, neither of them is entitled to estop the other from undoing the fraud from which they suffer. Bank v. Newbegin, 74 Fed. 135, 140, 20 C. C. A. 339, 344; Improvement Co. v. Merrill, 2 U. S. App. 434, 439, 440, 2 C. C. A. 629, 632, and 52 Fed. 77, 80; Upton v. Tribilcock, 91 U. S. 45, 54; Winters v. Armstrong, 37 Fed. 512, 516, 517; Duffield v. Iron Works (Mich.) 31 N. W. 310, 316.

The other question in this case is, does the subscriber for shares in the proposed increase of the capital stock of a national bank, under an understanding with the bank that his money on deposit there shall be used to pay his subscription only when the entire increased capital is paid in, become a stockholder of the bank, and liable as such, when all the increased capital is subscribed for, but only two-thirds of it is paid in, and the bank appropriates his money to its own use, sends him a certificate of stock, and falsely represents that the entire increased capital has been paid in? I cannot persuade myself that this question should be answered in the affirmative. The answer pleads that the plaintiff in error agreed to purchase his stock on the express condition that he should not take it, and his $5,400 on deposit with the bank should not be used to pay for it until the entire $150,000 of proposed increase of capital was paid in. The condition was never fulfilled, the increased capital was never paid in, and upon familiar principles the subscriber never became a stockholder. The fact that the bank falsely represented to him that the condition had been complied with, and so falsified its books that its falsehood appeared to be the truth, and the subscriber believed it, cannot change the fact, or its legal effect. It was the fact of payment, and not the bank's false statement regarding it, that conditioned the contract of subscription; and, as that condition was never fulfilled, and as the subscriber never

learned, and never could learn until after the failure of the bank, that it was not complied with, so that he did not waive it, he never became a stockholder by the express terms of his contract of purchase.

Moreover, I am unable to concur in the view that the proper construction of the provision of section 5142 of the Revised Statutes that "no increase of capital shall be valid until the whole amount of such increase is paid in," is that every increase of capital is valid any part of which is paid in, and I am unable to see how the judgment in this case can be sustained without adopting exactly that interpretation of this clause of the statute.

In Delano v. Butler, 118 U. S. 634, 649, 7 Sup. Ct. 39, 44, and in McFarlin v. Bank, 16 C. C. A. 46, 50, 68 Fed. 868, 872, it was held that:

"Three things must concur to constitute a valid increase of the capital stock of a national banking association: First, that the association, in the mode pointed out in its articles, and not in excess of the maximum prescribed by them, shall assent to an increased amount; second, that the whole amount of the proposed increase shall be paid in as part of the capital of such association; and, third, that the comptroller of the currency, by his certificate, specifying the amount of such increase of capital stock, shall approve thereof, and certify to the fact of its payment."

I do not understand that the supreme court has modified or departed from this holding in the later cases of Aspinwall v. Butler, 133 U. S. 595, 10 Sup. Ct. 417; Bank v. Eaton, 141 U. S. 227, 11 Sup. Ct. 984; and Thayer v. Butler, 141 U. S. 234, 11 Sup. Ct. 987. In each of those cases the amount of increase originally proposed was $500,000, but only $461,300 was actually subscribed and paid in. When this had been done, the bank modified its proposal, limited the amount of its increase to $461,300, notified the comptroller that this amount had been subscribed and paid in, and he issued his certificate for and approved the increase, not of $500,000, but of $461,300. In this state of facts the court held the increase valid. The key to these decisions is found, however, in the holding of that court in Delano v. Butler that the three conditions of the act of congress had been exactly fulfilled. It said:

"In the present case the association did, in fact, finally assent to an increase of the capital stock, limited to $461,300. That amount was paid in as capital, and the comptroller of the currency, by his certificate, approved of the increase, and certified to its payment; so that there seems little room to question the validity of the proceedings resulting in such increase. All the requisitions of the statute were complied with. The circumstance that the original proposal was for an increase of $500,000, subsequently reduced to the amount actually paid in, does not seem to affect the question, for the amount of the increase within the maximum was always subject to the discretionary power of the association itself, exerted in accordance with its articles of association, and to the approval and confirmation of the comptroller of the currency." 118 U. S. 649, 7 Sup. Ct. 44.

I agree that, if the Bank of Sedalia, after it had proposed the increase of $150,000, had obtained subscriptions and payment in full for $100,000 of increased stock, and had then limited its increase to that amount, reported that fact, and that the $100,000 had been paid in, and had obtained from the comptroller his certificate and approval of an increase, not of $150,000, but of $100,000, the new stock would

have been valid. But could that bank issue valid increased stock for $150,000 when only $100,000 was actually paid in, in the teeth of the plain declaration of the statute that no increase shall be valid until the whole amount of such increase is paid in? Could it issue valid new stock for $150,000 when only $1,000 or $100 was actually paid in? That is the real question in this case. The pleadings concede that the bank proposed an increase of $150,000, that this amount was subscribed for, that the comptroller was induced by the false representations of the bank to certify and approve an increase of that amount, and that only two-thirds of that amount was actually paid in. The evils against which that clause of the statute was directed were that, if the new stock was issued without payment of the entire amount of the increase, the stock would be watered; the bank would be doing business on an apparent capital, which it did not in fact possess; and the stockholders who paid for their stock would be wrongfully placed on an equality with those who held stock that was only partly paid for, or was not paid for at all. In the cases arising out of the failure of the Pacific National Bank these evils did not result, because the $461,300 actually paid in was the limit of the increase finally fixed by the bank, and certified and approved by the comptroller. But in the case at bar they have resulted. The increase proposed by the bank and the increase certified was $150,000, while only $100,000 was paid in. The stock was watered. The apparent capital was $50,000 more than the real capital. Every stockholder who paid for his stock was put on an equality with those who had not paid at all, or who had paid in part only. The pretended increase of the capital of this bank falls clearly and literally within the plain provision of the act of congress, "no increase of capital shall be valid until the whole amount of such increase is paid in"; and in Aspinwall v. Butler, 133 U. S. 608, 10 Sup. Ct. 421, the supreme court decided it in that case when it said, "This clause would have been violated by an issue of $500,000 of new stock when only $461,300 was paid in, but not by an issue of the exact amount that was paid in." That is this case. New stock to the amount of $150,000 was issued, while only $100,000 was paid in; and because this pretended increase of capital has produced the very evils which the statute was enacted to prevent, because it violates the plain terms of the act of congress, and because the supreme court so held in Aspinwall v. Butler, I have been forced to the conclusion that the new stock issued by this bank was invalid, and that the plaintiff in error is not liable upon it as a stockholder. I concede, as was held in Aspinwall v. Butler and in Thayer v. Butler, 141 U. S. 234, 11 Sup. Ct. 987, that a subscription to a proposed increase of stock contains no implied condition that the entire increase proposed shall be subscribed and paid for, because it is discretionary with the bank and the comptroller to reduce or change that amount at any time before it is certified and approved by the latter. But, in my opinion, every such subscription is made upon the express condition, clearly set forth in the statute, that it shall not be valid if the amount of the increase of capital finally reported to the comptroller and certified and approved by him exceeds the amount actually paid in for the new stock. Compliance with this condition is not discretionary with the bank or

with the comptroller; and as, in the case at bar, it was never fulfilled, and that fact was fraudulently and successfully concealed from the plaintiff in error until the bank failed, so that he never waived the condition, he cannot, in my opinion, be justly held liable for any of the debts of this bank. I think the judgment below should be reversed.

ALLINGTON & CURTIS MFG. CO. et al. v. GLOBE CO.

SAME v. LEE.

(Circuit Court, S. D. Ohio, W. D. November 9, 1898.)

1. PATENTS—VALIDITY—PRIOR DECISIONS OF OTHER COURTS.
A decision of one circuit court as to the validity of a patent upon substantially the same evidence will be followed in another circuit court.

2. SAME—PATENTABILITY—SUCCESS OF DEVISE.
While the success of a patented device is not conclusive as to its patentability or novelty, it is quite persuasive where the question is a doubtful one.

3. SAME—PRIOR PATENT FOR IMPROVEMENTS.
The granting of a patent for improvements on a machine pending a prior application for a patent on the machine itself does not invalidate the latter when issued, the earlier patents reciting the pendency of the application for the principal invention.

4. SAME—DUST COLLECTORS.
The Morse patents, Nos. 403,362, 403,363, and 403,770, and the Holt patent, No. 409,465, all covering improvements on dust collectors, are valid.

These were suits in equity by the Allington & Curtis Manufacturing Company and the Knickerbocker Company against the Globe Company and Thomas Lee, respectively, for the infringement of certain patents.

Offield, Towle & Linthicum and Albert H. Walker, for complainants.

Parkinson & Parkinson, for defendants.

TAFT, Circuit Judge. These are bills to restrain the alleged infringement of four patents, No. 403,362, No. 403,363, No. 403,770, issued to Orville H. Morse, and No. 409,465, issued to Noah W. Holt, all for an improvement in dust collectors. Claim 2 of letters patent No. 403,363 is as follows:

"A dust collector, consisting of a tapering separating chamber, having an imperforate peripheral wall, in which the whirling body of air forms a vortex, and in which the air moves from the periphery towards the axis of the vortex as it becomes freed from the solid matter; said chamber having at its large end a tangential inlet for the dust-laden air, and a discharge aperture for the purified air opening into the atmosphere, and provided with a tubular guard projecting into the separating chamber, and at its small end a discharge opening for the separated dust, substantially as set forth."

The validity of this claim has been considered by Judge Grosscup of the Northern district of Illinois in the contested case of Knickerbocker Co. v. Rogers, reported in 61 Fed. 297. That learned judge describes the operation of the collector as follows:

"The current of dust-laden air, being blown through the tangential opening into the collector, is projected round the interior of the large end of the