

latter as security for the former, on which nothing appears to have been paid. The defendant then exhibited testimony to show that the price stated in the deeds is much too high. In answer the plaintiff offered testimony to prove that the estimates of the defendant's witnesses were too low, and that the value specified in the deeds was not too great. To this offer the plaintiff objected, and the court sustained the objection. This action of the court, and numerous exceptions to the charge, form the basis of the several assignments of error. As respects the exceptions to the charge it is sufficient to say that none of them are sustained. The plaintiff presented numerous points, relating to matters of fact, which could not be affirmed (without qualification at least). The one important question in the case was: Does the evidence prove the alleged fraud? This was for the jury, and was fairly submitted.

In rejecting the plaintiff's offer of testimony, we think the court was wrong. That the testimony proposed was relevant and important cannot be doubted. It went to the marrow of the question involved—the adequacy of price, paid for the property. The objection urged was that the offer came too late. It seems clear to us that it did not, however; that it came in its proper place and order. The plaintiff was fully justified in relying, at the outset, on the sum stated in the deeds to have been paid. This was a distinct admission of value, quite sufficient for the plaintiff's purpose, until attacked. The statement was the defendant's, as clearly as if he had executed the deeds, instead of accepting and holding under them. The plaintiff was not required to anticipate that he would attack the truth of the statement, but might properly wait until he did, and then answer him.

The judgment must be reversed.

WARRINGTON v. BALL.

(Circuit Court of Appeals, Third Circuit. December 2, 1898.)

No. 37, September Term, 1898.

1. CORPORATIONS — SUIT AGAINST STOCKHOLDER IN KANSAS CORPORATION—DEFENSES.

It having been held by the supreme court of Kansas that a suit by a judgment creditor of a corporation of that state against a stockholder to enforce the statutory liability of the defendant is founded upon the plaintiff's judgment against the corporation, and that the defendant may impeach such judgment for fraud or want of jurisdiction (*Ball v. Reese*, 50 Pac. 875, 58 Kan. 614), an allegation by a defendant that the judgment sued on was fraudulent and collusive states a defense to such an action in any state, the faith and credit to be given such judgment in other states being that to which it is entitled in Kansas.

2. SAME—IMPEACHING JUDGMENT SUED ON—FRAUD AS A DEFENSE.

Fraud being an available defense at law, a stockholder sued upon a judgment against the corporation, to which he was not a party, may allege fraud in the procuring of such judgment as a defense, and is not required to bring a suit in equity to set it aside. Such a defense is no more a collateral attack upon the judgment than a suit in equity would be.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action by William E. Ball against Anna M. Warrington, a citizen of Pennsylvania, to enforce an alleged liability of defendant as a stockholder in a Kansas corporation. The circuit court held the affidavit of defense insufficient, and rendered judgment for plaintiff, from which defendant brings error.

E. Spencer Miller, for plaintiff in error.

S. Morris Wain and A. E. Bannard, for defendant in error.

Before ACHESON, Circuit Judge, and BUTLER and BRADFORD, District Judges.

BUTLER, District Judge. The suit is founded on a judgment obtained in Kansas, against the Kansas Saving Bank, chartered under the laws of that state, and located there. The constitution of Kansas (article 12, § 2), provides that "dues from corporations shall be secured by individual liability of stockholders, to an additional amount equal to the stock owned by each stockholder," and a statute of the state (Gen. St. 1889, par. 1192) provides (when a creditor has obtained judgment against the corporation) as follows:

"If execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged, and upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Several defenses are set up, one of which is that the judgment sued upon is fraudulent; the allegation being, substantially, that it was obtained by collusion between the plaintiff and the representatives of the bank; that the bank was not indebted to the plaintiff, the certificate of deposit on which he sued having been issued for money furnished to the cashier personally; and that the object of the collusion was to avoid a defense, enable the plaintiff to obtain judgment by default, and pursue the defendant and other stockholders. The circuit court entered judgment for the plaintiff—holding the affidavit of defense to be insufficient.

It is not necessary to examine the several defenses averred. If one of them is sufficient the judgment must be reversed, and the case sent back for trial. If questions shall thereafter exist respecting others, they may be considered in the light of the facts, ascertained by the trial. We think the judgment was erroneously entered. If the averment of fraud was confined to the certificate of deposit, as the learned judge of the circuit court seems to have believed, a different question would be presented. The right to sue is, in terms, based on the judgment against the corporation; and these terms having received a literal interpretation by the supreme court of Kansas, in *Ball v. Reese*, 58 Kan. 614 [50 Pac. 875], we must follow it, and treat the judgment alone, as the foundation of the suit. The fraud averred, however, as we have seen, involves the

judgment itself. That it constitutes a valid defense we cannot doubt. Fraud, generally, vitiates whatever it touches—whether a contract, a deed, or a record. It is unnecessary to consider questions presented by such a defense when set up to suits on foreign judgments, against the defendant therein. The only question before us arises under the clause of the constitution of the United States which provides that “full faith and credit shall be given in each state to public acts, records, and judicial proceedings of every other state.” This judgment must be given the same credit here that it is entitled to in Kansas. What credit is it entitled to there? In the absence of decision by the supreme court of that state, the question might possibly present difficulties. We do not doubt however that we would hold it liable to invalidation by proof of the fraud here averred. Any other view would render the statutory remedy against stockholders too inequitable to justify its enforcement outside the state. Indeed the courts of many of the states have declined to enforce it under any circumstances. See *Cushing v. Perot*, 175 Pa. St. 66 [34 Atl. 447]; *Marshall v. Sherman*, 148 N. Y. 9 [42 N. E. 419]; *Fowler v. Lamson*, 146 Ill. 472 [34 N. E. 932]; *Tuttle v. Bank*, 161 Ill. 497 [44 N. E. 984]. To bind one by a judgment to which he is not a party, as provided for by the statute, is barely tolerable. To bind him by such a judgment obtained by fraudulent collusion (as here averred) would be intolerable. We are saved the necessity, however, of considering the subject by the decision in *Ball v. Reese*, supra. The credit to which such judgments are entitled in Kansas, was there directly involved; and while the court (contrary to its former declarations) held the judgment to be conclusive of all questions *except fraud* and want of jurisdiction, it as distinctly held that it may be impeached and avoided for these causes. The court is emphatic in so declaring; and places fraud and want of jurisdiction in the same category. This determination of the question is conclusive. There is no force in the contention that the impeachment cannot be made collaterally. The court in *Ball v. Reese* distinctly says it can, and cites the following language from 3 *Thomp. Corp.* p. 392, § 3:

“Although stockholders cannot appear and contest the merits of the action against the corporation, yet when a judgment is rendered against the corporation it establishes as conclusively as any judgment can establish the matter in litigation, the liability of the corporation to pay the debt. Like any judgment, it may be impeached for fraud or for want of jurisdiction by a party entitled to question it; but it cannot be assailed collaterally by a stockholder for any other cause when sought to be charged in respect of it.”

The defendant cannot indeed impeach the judgment in any other way than collaterally. She is not a party to it; and it is valid as between the plaintiff and the bank, so long as the latter acquiesces. She could not therefore be heard in an application to open it. A proceeding in equity to declare it void as to her, would be as clearly a collateral impeachment as that here proposed. The suggestion that she should go to Kansas to seek equitable aid, has no support in reason or authority. She might have such aid wherever the plaintiff is found. Having come here and sought the assistance of our courts to enforce the judgment, she might appeal to equity here against the consequences of the fraud, as effectually as she could in Kansas. She is not re-

quired however to seek the protection of equity anywhere. Fraud is an available defense at law, and she may therefore set it up in answer to the suit.

The judgment must be reversed.

CINCINNATI, N. O. & T. P. RY. CO. V. N. K. FAIRBANKS & CO.

(Circuit Court of Appeals, Sixth Circuit. November 28, 1898.)

No. 601.

1. CARRIERS OF GOODS—CONTRACT OF CARRIAGE—LIABILITY OF CONNECTING LINES.

A carrier receiving goods billed for carriage beyond its own line is presumptively bound only to carry such goods to the end of its own line on their route, and to safely deliver them to the connecting line, to be forwarded; and it is not liable for loss or damage occurring after such delivery, except by special contract.

2. SAME—CONSTRUCTION OF BILL OF LADING.

A bill of lading for goods to be carried over several connecting lines, by which the initial carrier undertakes, for itself and the connecting carriers named, "severally and not jointly," that each carrier on the line shall safely carry and deliver the goods received to the next succeeding carrier, until they reach their destination, expressly stipulating that the liability of each as to the goods destined beyond its own line shall terminate on their delivery to the next succeeding carrier, and that in case of loss or damage to the goods the carrier in whose actual custody they are at the time of such loss or damage shall alone be responsible therefor, although it names a through rate, constitutes a several contract between the owner of the goods and each carrier accepting them thereunder in the course of shipment, and renders any carrier in whose custody they are at the time of loss or damage liable directly to such owner therefor, as a carrier, and not merely for negligence as agent of the initial carrier.

3. SAME—RAILROADS—DEFECTIVE CARS.

It is the duty of a railroad to furnish fit and suitable cars for the carriage of goods, and it cannot avoid responsibility for loss or damage caused by defective cars by devolving upon the shipper the duty of inspecting or selecting the cars in which his goods are to be shipped.

4. SAME—OWNERSHIP OF CARS USED.

The responsibility of a railroad carrier is the same whether the goods are carried in its own cars or those of another.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

This is an action by N. K. Fairbanks & Co. against the Cincinnati, New Orleans & Texas Pacific Railway Company to recover for goods lost in shipment. There was a judgment for the plaintiff, and defendant brings error.

Harmon, Colston, Goldsmith & Hoadly, for plaintiff in error.

Robert Ramsey, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge. This is an action against a railway company to recover the value of a shipment of cotton-seed oil lost while in course of transportation over the railway of the plaintiff in error.