present at, and actively participated in the proceedings of, a special meeting of the stockholders, at which provision was made to borrow $40,000 upon mortgage, and a committee, consisting of the plaintiff and others, was "appointed to take into consideration the advisability of selling the interest of this company in the capital stock of the Etiwan Phosphate Company," with authority to direct the officers to make said sale; and that the plaintiff, as a witness on his own behalf, upon being asked by his counsel, "Did you afterwards discover that any statement contained in the prospectus was untrue, and, if so, in what respect, and when did you discover it?" in substance testified, in response to this question and to several which followed, that he was told that the company was in urgent need of money; that he went to a meeting of which he could not fix the date, but which plainly appears to have been that of June 13, 1893; that this meeting was held "to consider ways and means"; that it was then and there suggested that the Etiwan property should be sold at a much lower figure than it had been taken at in valuation; that he then asked Messrs. Walton & Buck how it came that this asset, which had been represented as such a very valuable one, had suddenly become worth so much less money, and then it was that he discovered that a large amount of the preferred stock of the company had never been sold, and that the valuation of the Keystone Chemical Companies was based on a bid of Capt. Lemaister; that these were the principal matters as to which the statements contained in the prospectus were untrue and misleading; and that he purchased on the faith of the truth of the statements contained in the prospectus, which he afterwards found to be untrue by his examination of the affairs of the company within a short time after his purchase. In June, 1894, the company being then insolvent, Messrs. Winchester and Buck became its receivers, and to them the demand for rescission was made, but not until seven months after their appointment, and about one year and seven months after the stockholders' meeting of June 13, 1893.

In a case of this sort, even when clearly made out, it is the diligent only, and not the supine, that equity will relieve; and diligent this complainant certainly was not. He sought to repudiate a contract which he had made with the expectation of profit, but not until after it had become manifest that it had entailed a loss. He alleges that he was led into it by fraud, but he should have made it clear that it was the discovery of the fraud, and not the failure of the enterprise, which impelled him to retreat from it, and this he has not done. It cannot be pretended that he was prevented from examining for himself into the affairs of the company. Indeed, he has said that he did so a short time after his purchase, and then found that the statements on the faith of which he had purchased were untrue; and I am fully convinced that all that he now complains of was as well understood by him at least 18 months before as at the time he filed his bill, and certain it is that at least as far back as June, 1893, he had knowledge of facts which not only should have put him upon inquiry, but which did actually lead him to inquire; for this he has practically admitted in his testimony. It is needless to multiply citations (as might readily be done) to show that, under these circumstances, any right

of rescission, which he might otherwise have had, was lost by failure to assert that right in due season. Ogilvie v. Insurance Co., 22 How. 380–390; Wallace v. Hood, 89 Fed. 11. The learned counsel for the complainant has pressed upon my attention the case of Bank v. Newbegin, 20 C. C. A. 339, 74 Fed. 135; but the judgment in that case does not go far enough to avail the plaintiff in this one. It was there decided that recovery could be had notwithstanding the insolvency of the defendant bank; but here the obstacle to the right of the complainant to maintain his bill is not merely that the Walton & Whann Company had become insolvent before he claimed to avoid his contract, although that fact is, in my opinion, properly for consideration, in connection with the other facts, upon the question of the motive which actuated him in making that claim. Much that was said by the court in the Newbegin Case is pertinent to the present one, as tending, not to uphold, but to defeat, the complainant's contention. It was an action at law. That the plaintiff's purchase had been induced by false and fraudulent representations was conceded. The questions whether the plaintiff exercised reasonable diligence in discovering the fraud, and in electing to cancel his subscription after he had become aware that he had been defrauded, had been submitted to the jury; and this the appellate court held to have been properly done, and that the verdict on those issues was conclusive. It was said that it was "clear that the jury were entitled to determine whether the plaintiff was guilty of any want of diligence, either in discovering the fraud, or in notifying the defendant bank of his intention to rescind, or in bringing a suit for that purpose after the fraud was discovered"; and these are precisely the questions which the court has considered in the present case, and with respect to which the conclusion has been reached that the plaintiff was plainly not diligent.

The bill is defective in that it contains no offer to return the amount of the dividends which the plaintiff admittedly received upon this stock, or to submit himself to have that amount deducted from the sum for which he prays to be declared a creditor of the Walton & Whann Company. I think, however, that, as matter of form and pleading, this point need not at this stage be insisted upon; but, as matter of substance, it seems to me to be perfectly clear that a decree which, without requiring the complainant to refund the money which was paid to him upon this stock, should annul the contract under which it was acquired, would (even if otherwise proper) be manifestly inequitable and unjust. The bill will be dismissed, with costs.

In re EARLE.

(Circuit Court, E. D. Pennsylvania. February 27, 1899.)

NATIONAL BANKS—SALE OF COLLATERALS BY RECEIVER—POWER OF COURT TO ORDER.

The courts are not vested with any general supervisory or directing power over the liquidation of insolvent national banks, and cannot order or authorize a receiver to sell at private sale securities held by the bank as pledgee, which do not come within the authority given by Rev. St. § 5234, to order the sale or compounding of bad or doubtful debts, or the sale of real or personal property of the association.

This was a petition by George H. Earle, as receiver of the Chestnut Street National Bank, for an order authorizing him to sell certain collaterals.

Asa W. Waters and W. H. Addicks, for petitioner.

DALLAS, Circuit Judge. The prayer of the annexed petition is for a decree authorizing the petitioner, as the receiver of a national bank, to sell certain certificates of stock, which were held by the bank as pledgee, and not as owner, at private sale, "the proceeds thereof to be applied by him to the part payment of said notes," etc. The authority to make such a decree is supposed to be conferred by section 5234 of the Revised Statutes. But it is not. That section provides that a court of record of competent jurisdiction may make an order to sell or compound bad or doubtful debts, or for sale of real or personal property of the association. The order now asked is for neither of these. It is obviously not for the sale or compounding of a debt, and the property which it is contemplated to sell is not the property of the association. No general advisory or directing power is vested in the court. It is for the receiver, under the direction of the comptroller, to collect all debts, dues, and claims belonging to the bank, in accordance with the provisions of law. It is only when debts are bad or doubtful, and it is deemed expedient to sell or compound them, that the court can be called upon to make any order respecting them.

The learned counsel of the petitioner have referred me to the cases of Ellis v. Little, 27 Kan., 707, and In re Third Nat. Bank, 4 Fed. 775. I find nothing in either of them to lead me to doubt the correctness of the views I have hastily expressed. The petition is dismissed, without prejudice.

CHICAGO, R. I. & P. RY. CO. v. ST. JOSEPH UNION DEPOT CO.

(Circuit Court, W. D. Missouri, St. Joseph Division. January 31, 1898.)

1. JUDGMENT—EFFECT AS ADJUDICATION—SUIT ON DIFFERENT CAUSE OF ACTION.

While a judgment is an absolute bar to a second suit between the parties on the same cause of action as to all matters which were, or which might have been, litigated in the suit, where the second suit is on a different cause of action, a different rule applies, and the effect of the former judgment as an estoppel is limited to matters which were actually litigated and determined.