them, except in the Supreme Court of Indiana,* which followed an adverse decision of Mr. Justice McLean in the Circuit Court for the district of that State.† Its validity has also been sustained by Mr. Justice Nelson in the Circuit Court for the District of Connecticut.‡

We have no doubt of its validity. The commencement, therefore, of the present action within the period designated was a condition essential to the plaintiff's recovery; and this condition was not affected by the fact that the action, which was dismissed, had been commenced within that period.

JUDGMENT AFFIRMED.

RAILROAD COMPANY *v.* HOWARD.

1. Under the laws of Iowa, a railroad company, having power to issue its own bonds in order to make its road, may guaranty the bonds of cities and counties which have been lawfully issued, and are used as the means of accomplishing the same end.
2. A sale under foreclosure of mortgage of an insolvent railroad company, expedited and made advantageous by an arrangement between the mortgagees and the *stockholders*, under which arrangement the mortgagees, according to their order, got more or less of their debt (100 to 30 per cent.), and the stockholders of the company the residue of the proceeds —a fraction (16 per cent.) of the par of their stock—held fraudulent as against general creditors not secured by the mortgage, and this although the road was mortgaged far above its value, and on a sale in open market did not bring near enough to pay even the mortgage debts; so

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Pennsylvania State, 449; Brown and Wife *v.* Savannah Insurance Company, 24 Georgia, 101; Portage Insurance Company *v.* West, 6 Ohio State, 602; Amesbury *v.* Bowditch Insurance Company, 6 Gray, 603; Fullam *v.* New York Insurance Company, 7 Gray, 61; Carter *v.* Humboldt, 12 Iowa, 287; Stout *v.* City Insurance Company, Id. 371; Ripley *v.* Ætna Insurance Company, 29 Barbour, 552; Gooden *v.* Amoskeag Company, 20 New Hampshire, 73; Brown *v.* Roger Williams Company, 5 Rhode Island, 394; Brown *v.* Roger Williams Company, 7 Id. 301; Ames *v.* New York Insurance Company, 4 Kernan, 253.

* The Eagle Insurance Company *v.* Lafayette Insurance Company, 9 Indiana, 443.

† French *v.* Lafayette Insurance Company, 5 McLean, 461.

‡ Cray *v.* Hartford Insurance Company, 1 Blatchford, 280.

Statement of the case.

that in fact, if there had been an ordinary foreclosure, and one independent of all arrangement between the mortgagees and the stockholders, the whole proceeds of sale would have belonged to the mortgagees.

3. A sale by a railroad corporation not authorized in its corporate capacity to make it, may be yet validly carried into effect by the consent of all parties interested in the subject-matter of it.
4. Stockholders in a corporation need not be individually made parties in a creditor's suit where their interest is fully represented both by the railroad company and by a committee chosen and appointed by them.
5. Contracts are not necessarily negotiable because by their terms they enure to the benefit of the bearer. Hence a receipt by which a person acknowledges that he has received from another named so many shares of stock in a specified corporation, entitling the bearer to so many dollars in certain bonds to be issued, is not free, in the hands of a transferee, from equities which would have affected it in the hands of the original recipient.
6. The fact that a creditor has a remedy at law against a principal debtor, does not prevent him, after the issue in vain of execution against such principal, from proceeding in equity against a guarantor.

APPEAL from the Circuit Court for Iowa. The case was thus:

The Mississippi and Missouri Railroad Company—a company in Iowa, and by the laws of that State, having power to issue its bonds to carry into effect the purposes for which it was created—was incumbered by five several mortgages, given to secure bonds which it had executed, amounting, with arrears of interest, to $7,000,000; a sum greatly beyond what the road was worth. The interest was largely in arrears, and the company was insolvent. The Chicago and Rock Island Railroad Company—another company—made overtures for the purchase of the former road, offering to give for it $5,500,000, a sum more than it was worth, though, as just said, much less than what it owed. But the offer was contingent upon getting a title at once. The directors of the insolvent road had power, under its charter, to sell it on payment of its debts, and with the assent of two-thirds of its stockholders; but the only mode to make a satisfactory title which now seemed possible, was by a foreclosure under one of the mortgages; a matter which it was supposed, apparently, that it might be in the power of the stock-

holders, by the interposition of difficulties, to delay. Under these circumstances, a meeting of the *holders of the stock* and of the various classes of mortgage bonds of the company was called, to determine what should be done with the road. And it was resolved, at this meeting, to sell the road for the $5,500,000 offered; *provided*, that the purchase-money be distributed among the bondholders and *stockholders* of the company, according to a plan or "scale" specified, by which the different classes of bondholders were to be paid certain specified amounts, varying from 100 to 30 per cent. of the amount of their bonds, and the *stockholders were to receive* 16 *per cent. of the par value of their stock*, amounting to $552.400. A committee was appointed to arrange the details of the sale, and the mode of payment with the purchasing company; and the committee was instructed "to make an arrangement with some trust company to receive the bonds and stock of the parties assenting and issue certificates therefor, *setting forth what the holder thereof is entitled to receive.*"

In pursuance of these resolutions, a written contract was made between the Mississippi and Missouri Railroad Company and the purchasing company, which in its caption was stated to be made "in pursuance of resolutions passed by the meeting of the *bondholders* and *stockholders*" of the former company, by which it was agreed,

1. That the Mississippi and Missouri Company "will take the proper steps, with all possible despatch, *to cause the mortgages upon its line of road*," &c., &c., "*to be foreclosed*, and its entire property, real and personal, *sold*, so that the purchaser shall be able to transfer a perfect and unincumbered title to such incorporated company as the Chicago and Rock Island Railroad Company may designate to become the purchaser and owner thereof."

2. That the Chicago and Rock Island Company shall cause a company to be incorporated under the general law of Iowa, which shall purchase the said property for $5,500,000; and the Mississippi and Missouri Company agree that the purchaser, at the foreclosure sale, shall sell to such company so to be incorporated, "for the sum and upon the terms herein stated and set forth."

Statement of the case.

The committee appointed at the meeting, to carry into effect the sale of the road, made arrangements as instructed by the resolution appointing them with the Union Trust Company of New York, to act as their agent to receive from the holders of bonds and stock, assenting to the plan agreed on, their bonds and stock certificates, and to give receipts to them therefor. A written agreement was subscribed by the committee, and by each party so depositing bonds or stock, entitled, "Agreement made between A. B., and other subscribing holders of the stock and bonds of the Mississippi and Missouri Railroad Company of the first part, and G. W. S., J. E., &c. (the committee), of the second part." By this instrument (after reciting the action of the meeting, and the agreement of sale between the two railroad companies, "in furtherance of" the resolutions of the meeting; and that the committee to effectuate this clearance and sale were about to foreclose the various mortgages, in order subsequently to convey a clear title to the purchaser or purchasers thereof) the subscribing bond and stock holders ratified and confirmed the authority given to the committee by the meeting, and consented to the foreclosure of mortgages, and sale of the Mississippi and Missouri Road thereunder; and to surrender their bonds and *stock certificates*, on signing the agreement, to the Union Trust Company, as agent of the committee, to be used in carrying out the sale and foreclosure.

The committee agreed to use all diligence in foreclosing; to convey the road, after foreclosure, "as more fully set forth in the agreement between the two companies for $5,500,000; and to distribute the same among the holders of *stock* and bonds, according to the following scale, viz." (specifying the amounts to be paid on the different classes of bonds, and the 16 per cent. to the stockholders, as agreed on at the meeting), the amounts to be paid in the form in which the proceeds of sale were received, and to be either money, or bonds secured as provided in agreement of sale between the railroad companies.

The trust company issued certificates to the depositors of stock, acknowledging the receipt of their old certificates

of stock, and declaring them to be held subject to the agreement made by the depositors and other holders of the stock and bonds of the company, with the committee; and that the receipt now issued entitled "the *bearer*" to so many dollars in the new bonds to be issued, and interest thereon at the rate of 7 per cent. per annum, from December 1st, 1865, less the excess, if any, of the cost of foreclosure, sale, and other expenses of the committee, &c.; over and above $32,164, unappropriated balance of $5,500,000, derived from the sale of said road, and any and all the rights of the said depositor, under and by virtue of the agreement aforesaid.

On the back of the receipt was printed the scheme of distribution, specifying the proportion to be paid on each class of bonds and on the stock.

The holders of the stock and bonds (with unimportant exceptions) became parties to this agreement by depositing their stock and bonds with the trust company, signing the agreement, and taking their receipts as above.

The foreclosure was effected thus: Some holders of bonds, secured by the last mortgage, being dissatisfied with the above plan, caused a suit to foreclose that mortgage to be commenced in the Circuit Court for Iowa, in the name of the trustees of the mortgage, early in 1866. The Chicago and Rock Island Railroad Company subsequently purchased the bonds of these parties, and obtained the control of the suit, which was then turned over to the committee. Under their direction, cross bills to foreclose the other mortgages were filed, and a final decree of foreclosure of all the mortgages and for a sale of the road was had. A sale under this decree took place soon after, and the road was bid off by a new corporation, which had been organized under the Iowa law, for $2,200,000, which sale was afterwards confirmed, and a deed made in pursuance of it. The new company after the sale was consolidated with the Chicago and Rock Island Company, the consolidated company assuming the name of "The Chicago, Rock Island and *Pacific* Railroad Company." The $5,500,000 of bonds, agreed to be given for the property of the Mississippi and Missouri Company, were distributed as

agreed on, except that portion thereof which was to have been divided among the stockholders. In regard to *that*, new claimants now appeared. These were, Howard, Weber, and numerous other persons, who had obtained judgments against the Mississippi and Missouri Railroad Company, on certain bonds of the cities of Davenport, Muscatine, &c., *guarantied* by the railroad company, but making no part of the bonds already mentioned, as executed by the Mississippi and Missouri Company, nor secured in any way by the mortgages foreclosed, nor provided for in the transactions above set forth. These creditors, on whose judgments executions had been issued and returned *nulla bona*, now filed a bill in the court below, to obtain satisfaction of their claims out of the fund of 16 per cent. allotted to the stockholders; making the committee who negotiated matters, all three railroads, and the city of Davenport (against which also they had obtained judgment) defendants. Answers were filed by the members of the committee, and by the Chicago, Rock Island and Pacific Railroad Company. The decree made in the case declared the complainants entitled to the fund, as creditors of the Mississippi and Missouri Railroad Company, directed its payment by the Chicago, Rock Island and Pacific Railroad Company to a receiver, its conversion by him into money, and distribution *pro rata* among the different creditors; providing also for subrogating the defendants to the rights and remedies of the plaintiffs, against the municipalities issuing the bonds, so far as they were paid out of the fund in controversy. From this decree the committee, and the Chicago, Rock Island and Pacific Railroad Company appealed; and this appeal constituted the present case: the principal question being, whether the court below, in allowing the creditors unprotected by mortgage to take away the 16 per cent. which had been allowed to the stockholders, had decreed rightly. The Mississippi and Missouri Railroad Company did not appeal.

Messrs. Emmot, Cook, and Drury, for the appellants:

1. We submit as a preliminary point that the guaranty made by the Mississippi and Missouri Railroad Company,

of the Davenport city bonds, was beyond the power of the corporation, and void. A railroad corporation can no more guaranty the payment of a bond issued by a town or a county, than it can the payment of a similar obligation made by an individual, to enable either to raise money to pay their subscriptions to its stock.*

2. Passing to the main matter. The decree below assumed that the 16 per cent. was a dividend of capital on the dissolution of the railroad company to its stockholders, something saved from the bondholders for the company, *its* property, therefore; and assuming this, it would argue, and argue rightly enough, that the stockholders were entitled to nothing till all creditors were paid. But the assumption made is a false one. This company was hopelessly bankrupt. Its bonded debt was about seven millions, while the proceeds of the sale amounted to but five and a half millions, even this sum being more than it was worth; the real price was, of course, below $2,200,000, that being as much as the road actually brought at a fair public sale. This fact makes it clear that the bond debt of the company completely exhausted its property, and left nothing for general creditors and stockholders. The property of every corporation is a *trust* fund for payment of the debts of the company, but a fund for their payment in the order in which they are due. This fund was held in trust, not for creditors generally, but for the bond creditors primarily. It was theirs; and as the bond debts far exceeded the fund, it was theirs only. The stockholders were entitled to nothing as a matter of right.

How, then, do they get it? The explanation is obvious. From the fund going to the bondholders, they agree to give to the stockholders 16 per cent. Whatever form, show, or courtesy toward the stockholders (whom it was desired to conciliate, and to treat as if they had some rights of value, though they had really none) the thing had, such was the

* Bank of Genesee *v.* Patchin Bank, 3 Kernan, 309–314; Bridgeport City Bank *v.* Empire Stone-dressing Co., 30 Barbour, 421; Morford *v.* Farmers' Bank of Saratoga, 26 Id. 568.

real operation. No other operation which should have the same effect was possible. Now in this view, a true one, what legal claim have these complainants, creditors of one sort though they be, to this fund; a fund which is really but a surrender by the bondholders of *their* property to the stockholders? What have the complainants lost by this arrangement? Nothing. If the 16 per cent. had not been given to the stockholders, it would have been retained by the bondholders, and then, certainly, the complainants could not contend that they would be entitled to it.

The argument will be that this was a *contract* between the bondholders, stockholders, and the railroad company, to divide the proceeds in a certain way, and that the railroad company should sell the road, and should procure a foreclosure of the mortgages.

Any agreement, however, by which the railroad company bound itself to have the mortgages foreclosed and the property sold, so that the purchaser might transfer a perfect title to any company whom the Chicago and Rock Island Road might designate, was, independently of the bond creditors, impossible. How could the railroad company or the stockholders procure a foreclosure of its mortgages? They had no control of them. Suppose that the bondholders had refused to foreclose the mortgages, how could the railroad company or any one else procure the title under the foreclosure so as to transfer a perfect title to any designated person? There would have been no agreement of any value then by the company, even if the *company* agreed at all.

But the meeting where all was done that was done in this matter was a meeting of the bondholders and stockholders only. The railroad company as a corporation had nothing to do with it. The bondholders and stockholders acted, each man for himself. The question was: "We being all interested in an insolvent corporation, what can we best do to promote our common interest?" The bondholders say to the stockholders, "We wish to sell. Confessedly the road will not bring anything like the amount of our mortgages. You have no real interest in the thing under any circumstances.

But do not interpose captious and unjust objections. Let us have the money confessedly due to us, and ours, and we will give you a small part of it." Is there anything unfair in that?

We suppose that no question will be made but that, in the first instance, and aside from any agreement, the bondholders were entitled to every dollar of this money. The road was mortgaged for near three times its value, and the equity of redemption was supremely worthless. If, then, these stockholders have got anything, it must be because the bondholders have *surrendered* a part of *their* fund to them. If the fund belonged to the bondholders, they had a right so to surrender a part or the whole of it. And if the bondholders did so surrender their own property to the stockholders, it became the private property of these last; a gift, or, if you please, a transfer for consideration from the bondholders, whose it had before exclusively been in absolute property. What right have these complainants to *such* property in the hands of the stockholders?

If the road had been worth anything above the mortgage they would have some case. But it is a *datum et concessum* of this controversy that the road was worth very far less than the mortgage debts upon it, and that these were increasing, while the road of necessity was growing less valuable. In one sense the mortgagees held but liens on the road, but in fact they were the owners; and so, in strict view, they were in form, a mortgage being *a conveyance* in fee subject to defeasance by redemption; a right that here it was absolutely certain neither would or could ever be exercised.

Some additional points apart from the main one deserve to be suggested, as that—

3. The *corporation* could not sell its road, and did not undertake to sell it. It could not, because the directors of the company were authorized to sell only *provided* that, 1. Its debts were first paid. 2. That two-thirds of its stockholders assented to such sale. Now the agreement between the railroad companies was not an agreement for any such sale, and did not satisfy these conditions.

4. There is a defect of parties. Here is a fund amounting to over half a million of dollars, claimed by the stockholders and sought to be recovered by the general creditors of the railroad company, and yet, not a single one of the stockholders is made a party. Their right to this fund is to be determined without allowing them a hearing, or a day in court.

5. The certificates issued by the Union Trust Company were payable to *bearer*, and therefore negotiable. They have doubtless been sold in the market as other certificates of stock, and are now in the hands of persons other than the stockholders not parties to this suit. If payment of the 16 per cent. is arrested and diverted to the payment of the debts of the railroad company, these innocent third parties will be sufferers. This proceeding thus partakes of the character of a garnishment at law. The trustees are called on to pay these bonds to the creditors of the defendant. Their answer is: "Our liability is on negotiable paper, and we can't say that we are indebted to the defendant."

6. The complainants have a remedy at law. Numerous decisions recently made in this court, and especially the late one in *Riggs* v. *Johnson County*,* show that vigorous measures have been taken against these defaulting cities and counties to enforce payment of these judgments. These measures are about to be crowned with success. Writs of mandamus against several cities and counties are now in the hands of the officers of the law. Let them proceed to collect their money. These are the parties who ought to be made to pay, and let the stockholders enjoy the small amount saved by them from a wreck.

Messrs. Grant and Rogers, contra:

1. As to the guaranty and its effect. We doubt not that the road which had, confessedly, power to borrow by executing bonds as a principal, had power to borrow by guaranty as well. But however this may be, as the Mississippi and

* 6 Wallace, 166.

Missouri Railroad Company, the guarantor, though made a party defendant, made no defence in the court below, and does not appeal, the other defendants are thereby concluded from controverting the *status* of the complainants as creditors of the railroad company.*

2. Passing to the principal point. The appellants deny our right to the fund in controversy, on the ground that it belonged absolutely to the mortgage bondholders of the railroad company, who have seen fit, as a matter of favor, to surrender it to the stockholders.

Now, the fund in question is a part of the purchase-money agreed to be paid for the road and other property of the Mississippi and Missouri Company, on a *voluntary private* contract of sale of it to another company, to which contract the two companies and the bondholders and stockholders of the Mississippi and Missouri Company were all alike parties.

The foreclosure and sale thereunder were simply the form of conveyance, concerted and agreed on by the parties, and effected in pursuance and execution of the contract. They bear the same relation to the real transaction, which the forms of a fine, or common recovery (when those ancient modes of conveyance were in use), bore to the real contract in pursuance of which they were gone through with. Those old proceedings wore, on their face, all the outward insignia of a suit at law. There was a plaintiff and a defendant, formal pleadings, and a judgment entered of record. But the whole thing was a form, intended to carry into effect a previous private agreement, and was for centuries before it went out of use, regarded as a mere mode of conveyance, one of the common assurances of the realm, and so treated by legal writers. We read, in connection with the subject, of previous or concurrently executed deeds, in which the one or the other party covenants to levy a fine or suffer a common recovery of the property to be conveyed, and of deeds

* Holyoke Bank *v.* Goodman Paper Manufacturing Company, 9 Cushing, 576.

to declare or lead the uses of such fine or recovery, when levied or suffered; in which deeds, of course, the substance of the whole transaction was to be found. These instruments have their counterpart in the case now before the court. The contract between the two railroad companies, by which the Mississippi and Missouri Company agrees to "cause the mortgages on its line of road, &c., to be foreclosed, and its entire property, real and personal, sold, so that the purchaser shall be able to transfer a perfect and unincumbered title," &c., fulfils the same office as the deed covenanting to suffer a recovery and declaring its uses, while the formal foreclosure proceedings answer exactly to the recovery itself.

It is said by appellants' counsel that the contract of sale was void, because the Mississippi and Missouri Railroad Company had no power, under its articles of incorporation, to sell the road without the assent of two-thirds of its stockholders.

But it is in fact unimportant whether the transaction of the sale and agreement to divide the proceeds thereof were the result of regular and formal corporate action on the part of the Mississippi and Missouri Railroad Company, or not. If the officers of a corporation see fit to turn over the control of its affairs and property to an outside caucus of its stockholders, and the agents thereby appointed, and permit such irregular agencies in fact to dispose of its assets, the rights of its creditors are just the same in the proceeds realized as though the sale had been regularly ordered at a corporate meeting and formally entered on the corporate records. No distinction, for the present purpose, can be taken between the stockholders and the corporation. The stockholders *constitute*, collectively, the corporation. They control its action; and whether they do so in a regular way, or undertake and are permitted to do it in an irregular one, can make no difference as to the rights of creditors to compel the appropriation of the corporate property, or its avails, to the payment of the corporate debts.

The fund in question being thus part of the proceeds of a

sale of the railroad, by voluntary contract, assented to by its mortgage bondholders, and its attitude being the same as though the road had been conveyed to the new company, in consideration of the $5,500,000, directly by deed of the railroad corporation, the mortgagees joining therein, and releasing the lien of their mortgages, we may consider the main argument urged by the appellants, viz., that the fund was never, in favor of creditors, part of the assets of the corporation, but was the absolute property of its mortgage bondholders, and has been bestowed by them upon the stockholders.

We deny both branches of this proposition. We maintain (1) that this fund was never the property of the bondholders; and (2) that their agreement to relinquish their *lien* upon it, or rather upon the property by the sale of which it was realized, for a less sum than their whole debt, *leaving* this remainder, so far from being a gratuity, was made upon a perfectly adequate consideration.

The error in the argument on the other side is, that it treats the *mortgagees* of the railroad as its absolute owners, with full power to sell and dispose of it at their sole will and pleasure, and to do with the proceeds whatsoever seemed to them good. But they were simply creditors of the railroad company, secured by a pledge of its property; merely lienholders. The ownership, subject to the liens, was in the company. It alone could sell and convey the road, subject to the liens of the mortgagees, if without their concurrence, or free from such liens if such concurrence were obtained.

The rights and powers of the mortgagees, in respect to the property, were simply either to release their mortgages, or to foreclose them by judicial proceedings. It is said that their claims amounted to more than the road was worth, and more than the $5,500,000 realized by the sale. Whether or not they were more than the value of the road (whatever conjectures may be hazarded), no court can now judicially say; for the only test of the question recognized by the law has been rendered impossible by a public judicial sale of the road, under an *actual* foreclosure. But were it as asserted

by the appellants, the fact could not enlarge the rights of the mortgagees to those of proprietors. And as to the $5,500,000 purchase-money, it was obtained by a sale which the mortgagees had neither the right nor the power to make without the co-operation of the railroad company; which co-operation, if given, constituted an ample consideration for any concessions which the mortgagees agreed to make in order to obtain them.

3. What, then, did these two parties, the railroad company and its mortgage bondholders, standing in these relations to each other and to the property, actually do? The bondholders in effect say to the stockholders: "If you, who constitute and control the Mississippi and Missouri Railroad Company, will agree to sell the road to the Chicago and Rock Island Company for the $5,500,000, which they offer to give for it, and will procure the company's co-operation in the necessary steps to consummate the sale and transfer the title, with all possible despatch, we will agree, in consideration of such consent and co-operation, to receive, in full satisfaction of our bonds, so much of the purchase-money as will leave a balance of it sufficient to pay you sixteen per cent. on your stock; and will release all claim upon such balance, and let you divide it, if you choose, among yourselves." This offer was accepted (as well it might be) by the stockholders, and the scheme was carried into effect in the manner already detailed.

In short, the company effected a *compromise* of its obligations to its mortgage-bondholders, and thereby saved a remnant of its property from their grasp. And this compromise was effected with the intent that the remnant thus saved, and which when *released* by the mortgagees became in law assets of the Mississippi and Missouri Company, should go to the stockholders. That is, the parties intended to commit a fraud upon the complainants and all other general creditors of the company.

The idea is implied in the argument on the other side, that the mortgage-bondholders have some interest in having this money go to the stockholders, and that some wrong will

be done to *them* by giving it to the complainants. But such is not the case. The bondholders have no interest in the matter. They have received all they bargained for, viz., the proportion stipulated to be paid them on their bonds; and it is obviously wholly indifferent to them what becomes of the residue. That residue, as already shown, *they* agreed, on sufficient consideration, to *relinquish*. Their bonds were in no case to be *returned* to them. They were *cancelled and satisfied* by the completion of such sale and the payment to the receipt-holders of the agreed share of the purchase-money, as specified in their respective receipts.

We pass to the minor points.

4. If the stockholders were necessary parties, it amounts to a denial of justice; for it was impossible to make them parties. Their number was very great; their names were unknown to the complainants; and many, without doubt, resided beyond the reach of the process of the court. But on no principle were they necessary parties. Their rights and interests are doubly represented by parties brought before the court, viz., 1st, by the corporation itself, the Mississippi and Missouri Company, of which they were members; 2d, by their own committee, chosen and appointed by themselves.

5. The proposition that the receipts issued by the trust company were payable to bearer, and therefore negotiable, hardly requires refutation. A written contract is not negotiable, simply because by its terms it is to enure to the benefit of the bearer. These receipts were not negotiable. They were assignable, no doubt, and would have been so had the word "bearer" been omitted. But assignees take them subject to every equity affecting them in the hands of the original holder.

6. The remedies at law against defaulting cities have, as is commonly known, thus far practically proved of no value in Iowa; and whether they "are about to be crowned with success," remains to be seen. They are, therefore, not an "adequate remedy." The complainants will, at all events, if the relief prayed for is granted, enjoy them by subrogation.

Opinion of the court.

Mr. Justice CLIFFORD delivered the opinion of the court.

Subscriptions were made to the Mississippi and Missouri Railroad Company by certain municipal corporations through which the railroad was located, and the proper authorities of those municipalities issued their bonds in payment of such subscriptions to the stock of the railroad company.

Coupons were attached to the bonds providing for the payment of interest semi-annually, and the railroad company, as the immediate transferees of the bonds, guaranteed that the principal and interest of the bonds should be paid as stipulated by an instrument in writing on the back of each bond, duly executed by the proper officers of the railroad company.

Obvious purpose of that guaranty was to augment the credit of the bonds in the market, and to facilitate their sale to capitalists to raise money to construct their railroad and put it in operation. Complainants became the lawful holders for value of a large number of these bonds, and the guarantors as well as the obligors neglecting and refusing to pay the coupons as the same fell due, they brought separate suits against those parties, and recovered judgments against them respectively, as alleged in the bill of complaint.

Executions were issued as well on the judgment against the obligors of the bonds, as on the judgment against the guarantors of the same, and the return of the officer in each case was that he found no property. Prior to the date of those judgments, the railroad company had executed several mortgages of their railroad to secure the payment of their bonds, issued at different times, to the amount of seven millions of dollars, and the company had become insolvent. They had also become liable as guarantors of the municipal bonds already described, and others of like kind received and used for the same purpose, to the amount of three hundred thousand dollars, the payment of which was repudiated by the respective municipal corporations, by whose officers the bonds were issued.

Unable to pay the debts of the company, the stockholders

of the same determined to sell their railroad. Arrangements were accordingly made between the stockholders and the holders of the mortgage bonds to get up the stock of the company through certain agents or trustees, and to execute and deliver to the several holders of those bonds and to the owners of the stock of the company, certificates of the amounts that they respectively would be entitled to receive under a distribution of the consideration of the proposed sale. Amount of the consideration, as assumed in the arrangement, was five millions five hundred thousand dollars, and the terms of the arrangement were that the consideration should be distributed among the parties interested therein, according to a prescribed scale as set forth in the bill of complaint.

By that scale of distribution sixteen per cent. of the amount, to wit, five hundred and fifty-two thousand four hundred dollars were to be paid to the owners of the capital stock, but none of the stipulations in the arrangement made any provision for the payment of the bonds or coupons belonging to the complainants. Authorized to carry the arrangement into effect, the proper agents of the company offered to sell the entire property of the railroad to the Chicago and Rock Island Railroad, and the latter company, on the first day of November, 1865, accepted the proposition, and the parties entered into written stipulations upon the subject.

Those proposing to sell agreed that they would, with all possible despatch, cause the mortgages on the railroad to be foreclosed, and that the entire property of the company, real and personal, should be sold and conveyed to trustees, and that the same should be transferred to such incorporated company in that State as the other contracting party should designate as the purchaser of the property, if such designation was made within the time therein prescribed.

By the terms of the agreement the Chicago and Rock Island Railroad Company agreed to cause to be incorporated in that State a company which should make the purchase, as proposed, for the sum of five million five hundred thousand dollars, and complete the railroad to the place therein men-

tioned, and the other party stipulated that the purchaser at the foreclosure sale should convey the railroad to the new company for that consideration. Pursuant to that agreement the mortgages were foreclosed, and the new company, to wit, the Chicago, Rock Island, and Pacific Railroad Company, was created under the general laws of the State, and the entire property of the railroad was sold at the foreclosure sale, and the purchasers conveyed the same to the new company as stipulated in the agreement. All the stockholders in the old company became thereby entitled, as against all those who joined with them in negotiating the sale, to a *pro rata* share in the sixteen per cent. of the consideration reserved to their use under the scale of distribution prescribed in that arrangement.

Statement of the bill of complaint is, that the new company is ready to pay that amount to the stockholders of the old company, and the complainants contend that the facts herein recited show that they are entitled to have their whole debt paid before any portion of the fund derived from that sale shall go to the stockholders of the old company, which is insolvent, and will become extinct when that arrangement is fully carried into effect.

Views of the complainants were sustained in the court below, where it was ordered, adjudged, and decreed, that the complainants and the other parties who were duly admitted as such, and joined in the prosecution of the suit, were entitled, as creditors of the railroad company, to so much of the purchase-money as was agreed between the parties, and intended to be reserved and distributed among the stockholders of the company, and from that decree, as more fully set forth in the record, the respondents appealed.

I. Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosesoever possession it may be transferred, unless it has passed into the hands of a *bonâ fide* purchaser; and the rule is well settled that stockholders are not entitled to any share of the

capital stock nor to any dividend of the profits until all the debts of the corporation are paid.

Assets derived from the sale of the capital stock of the corporation, or of its property, become, as respects creditors, the substitutes for the things sold, and as such they are subject to the same liabilities and restrictions as the things sold were before the sale, and while they remained in the possession of the corporation. Even the sale of the entire capital stock of the company and the division of the proceeds of the sale among the stockholders will not defeat the trust nor impair the remedy of the creditors, if any debts remain unpaid, as the creditors in that event may pursue the consideration of the sale in the hands of the respective stockholders, and compel each one, to the extent of the fund, to contribute *pro rata* towards the payment of their debts out of the moneys so received and in their hands.

Valid contracts made by a corporation survive even its dissolution by voluntary surrender or sale of its corporate franchises, and the creditors of the corporation, notwithstanding such surrender or sale, may still enforce their claims against the property of the corporation as if no such surrender or sale had taken place. Moneys derived from the sale and transfer of the franchises and capital stock of an incorporated company are assets of the corporation, and as such constitute a fund for the payment of its debts, and if held by the corporation itself, and so invested as to be subject to legal process, the fund may be levied on by such process; but if the fund has been distributed among the stockholders, or passed into the hands of other than *bonâ fide* creditors or purchasers, leaving any debts of the corporation unpaid, the established rule in equity is, that such holders take the fund charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the same to the satisfaction of their debts.*

* Story's Equity Jurisprudence (9th ed.), § 1252; Mumma *v.* Potomac Company, 8 Peters, 286; Wood *v.* Dummer, 3 Mason, 308; Vose *v.* Grant, 15 Massachusetts, 522; Spear *v.* Grant, 16 Massachusetts, 14; Curran *v.* Arkansas, 15 Howard, 307.

Regarded as the trustee of the corporate fund, the corporation is bound to administer the same in good faith for the benefit of creditors and stockholders, and all others interested in its pecuniary affairs, and any one receiving any portion of the fund by voluntary transfer, or without consideration, may be compelled to account to those for whose use the fund is held. Creditors are preferred to stockholders on account of the peculiar trust in their favor, and because the latter, as constituent members of the corporate body, are regarded as sustaining, in that aspect, the same relation to the former as that sustained by the corporation.

None of these principles are directly controverted by the appellants; but they deny that the sixteen per cent. agreed to be paid to the stockholders belonged to the corporation.

Claim of the complainants to the fund in controversy rests mainly upon two propositions, which present mixed questions of law and fact:

1. That they are creditors of the railroad company, as evidenced by the judgments set forth in the record.

2. That the fund in question was assets of the railroad company.

Authority of the municipal corporations to issue the bonds purchased by the complainants is not denied; but the appellants contend that the railroad company had no power to guarantee their payment, and they also deny that the railroad company had any title or interest in the fund in controversy. On the contrary, they insist that it was a concession made by the holders of the mortgage bonds to the stockholders as a "gratuitous favor" to save them from a total loss, and to induce them not to interpose any obstacles in the way of a speedy foreclosure of the several mortgages.

Express allegation of the bill of complaint is, that the bonds issued by the municipal corporations were received by the railroad company in payment for subscriptions to the stock of the company, and that the corporation, as the holders of the same, guaranteed their payment and sold

them in the market, and the stipulation of the parties is, that all the allegations of the bill of complaint not denied in the answer are to be considered as admitted. Apart, therefore, from the effect of the judgments, those allegations must be taken to be true, as they were not denied in the answer.

Power to make contracts, and acquire and transfer property, is conferred upon such corporations, by the laws of the State, to the same extent as that enjoyed by individuals; and the record shows, to the entire satisfaction of the court, that the instrument of guaranty was executed and the bonds sold in the market as the means of raising money to construct the railroad and put it in operation.

Counties and cities may issue bonds under the laws of that State in aid of such improvements; and railway companies are expressly authorized to receive such securities in payment of subscriptions to their capital stock, and to sell the bonds in the market for such discount as they think proper.

Abundant proof exists in this record, that railway companies may issue their own bonds to raise money to carry into effect the purposes for which they were created; and it is difficult to see why they may not guarantee the payment of such bonds as they have lawfully received from cities and counties, and put them upon the market instead of their own, as the means of accomplishing the same end. Undoubtedly they may receive such bonds under the laws of the State, and if they may receive them, they may transfer them to others; and if they may transfer them to purchasers, they may, if they deem it expedient, guarantee their payment as the means of augmenting their credit in the market, and saving the corporation from the necessity of issuing their own bonds to accomplish the same purpose.

Considered, therefore, as an open question, the court is of the opinion that the objection is without merit. Private corporations may borrow money, or become parties to negotiable paper in the transaction of their legitimate business, unless expressly prohibited; and until the contrary is shown,

the legal presumption is that their acts in that behalf were done in the regular course of their authorized business.*

Railroad companies are responsible in their corporate capacity for acts done by their agents, either *ex contractu* or *ex delicto*, in the course of their business and within the scope of the agent's authority.†

Corporations as much as individuals are bound to good faith and fair dealing, and the rule is well settled that they cannot, by their acts, representations, or silence, involve others in onerous engagements and then turn round and disavow their acts and defeat the just expectations which their own conduct has superinduced.‡

Tested by any view of the evidence, it is quite clear that the corporation possessed the power to execute the instruments of guaranty appearing on the back of the bonds, and the necessary consequence of that conclusion is that on the default of payment they became liable to the holders of the same to the same extent as the obligors.

Present suit is not one against stockholders to compel them to pay a corporate debt out of their own estate, but it is a suit against the corporation and certain other parties holding or claiming assets which belong to the principal respondent, to prevent that fund from being distributed among the stockholders of the corporation before the debts due to the complainants are paid. Viewed in that light, it is obvious that the stockholders are precluded by the judgment from denying the validity of the instruments of guaranty, and that the judgments are conclusive as to the indebtedness of the corporation.

II. Second defence is that the fund in question did not belong to the corporation, as contended by the appellees.

* Canal Company *v.* Vallette, 21 Howard, 424; Partridge *v.* Badger, 25 Barbour, 146; Barry *v.* Mer. Ex. Co., 1 Sandford's Ch. 280; Angell and Ames on Corporations, § 257; Story on Bills, § 79; Farnum *v.* Blackstone Canal, 1 Sumner, 46.

† Railroad Co. *v.* Quigley, 21 Howard, 202.

‡ Bargate *v.* Shortridge, 5 House of Lords' Cases, 297; Zabriskie *v.* Railroad, 23 Howard, 397; Bissell *v.* Jeffersonville, 24 Id. 300.

Extended discussion of that proposition is not necessary, as the evidence in the record affords the means of demonstration that it is not correct. Mortgage bondholders had a lien upon the property of the corporation embraced in their mortgages, and the corporation having neglected and refused to pay the bonds, they had a right to institute proceedings to foreclose the mortgages, but the equity of redemption remained in the corporation. Subject to their lien, the property of the railroad was in the mortgagors, and whatever interest remained after the lien of the mortgages was discharged belonged to the corporation, and as the property of the corporation when the bonds were discharged, it became a fund in trust for the benefit of their creditors. Holders of bonds secured by mortgage as in this case, may exact the whole amount of the bonds, principal and interest, or they may, if they see fit, accept a percentage as a compromise in full discharge of their respective claims, but whenever their lien is legally discharged, the property embraced in the mortgage, or whatever remains of it, belongs to the corporation.

Conceded fact is that the property and franchises of the railroad were sold for the consideration specified in the record, and that the mortgage bondholders discharged their lien for eighty-four per cent. of that amount, and that the residue of the purchase-money remained in the hands of the purchaser discharged of the lien created by the mortgages, and the complainants contend that it was clear of all liens, except that of the creditors. Such a corporation cannot be said to own anything separate from the stockholders, unless it be the tangible property of the company and the franchises conferred by the charter, and it is conceded by both parties that the fund in question was derived from a voluntary sale and transfer of those identical interests. They were heavily incumbered by mortgages, and our attention is called to the fact that the provisional arrangement was negotiated by the stockholders and bondholders; but the decisive answer to that suggestion is, that the two railroad companies were parties to the subsequent contract of sale, and that they both agreed to all the terms of sale and purchase, and to the mode

of transferring and of perfecting the title. Prompt payment was secured by the bondholders, and it is highly probable that they received under that arrangement a larger portion of their claims than they could have obtained in any other way.

Another suggestion of the appellants is that the contract of sale was unauthorized, but the suggestion is entitled to no weight, as the contract was ultimately carried into effect by the consent or subsequent ratification of all parties interested in the subject-matter of the sale.

Next objection is that there is such a want of parties that a court of equity cannot grant the relief as prayed. Principal suggestion in support of this proposition is that the stockholders should have been made parties, but the court is of a different opinion, because their interest is fully represented by the parties before the court. Respondents in the suit are the two railroad companies and the committee or trustees chosen and appointed by the stockholders and bondholders through whom the provisional arrangement was perfected and the contract of sale was carried into effect. Neither the stockholders nor bondholders were necessary parties under the circumstances of this case.*

Remaining objection is, that the certificates issued to the stockholders in lieu of their stock, were negotiable, and that they may be in the hands of innocent holders; but the objection is entitled to no weight, because it is based upon an erroneous theory.

Written contracts are not necessarily negotiable simply because by their terms they enure to the benefit of the bearer. Doubtless the certificates were assignable, and they would have been so if the word bearer had been omitted, but they were not negotiable instruments in the sense supposed by the appellants. Holders might transfer them, but the as-

* Bagshaw *v.* Railway Co., 7 Hare, 131; Holyoke Bank *v.* Manufacturing Co., 9 Cushing, 576; Hall *v.* Railroad, 21 Law Reporter, 138; 1 Redfield on Railways, 578; Boon *v.* Chiles, 8 Peters, 532; Story *v.* Livingston, 13 Id. 359.

signees took them subject to every equity in the hands of the original owner. *

Particular mention is not made of the defence that the complainants have an adequate remedy at law, as it is utterly destitute of merit.

DECREE AFFIRMED.

SHEETS *v.* SELDEN.

1. The action of an inferior court as to the terms on which it will allow a complainant to amend a bill in equity to which it has sustained a demurrer, is a matter within the discretion of such court, and not open to examination here on appeal.
2. Where, under a clause of re-entry for non-payment of rent reserved, a landlord sues in ejectment, in Indiana (in which State a judgment in ejectment has the same conclusiveness as common law judgments in other cases), for recovery of his estate, as forfeited, and a verdict is found for him, and judgment given accordingly, the tenant cannot, in another proceeding, deny the validity of the lease, nor his possession, nor his obligation to pay the rents reserved, nor that the instalment of rent demanded was due and unpaid.
3. Where, in a lease of a water-power, the lease provides in a plain way and with a specification of the rates for an abatement of rent for every failure of water, the tenant cannot, on a bill by him to enjoin a writ of possession by the landlord, after a recovery by him at law for forfeiture of the estate for non-payment of rent reserved, set up a counter claim for repairs to the water-channel made necessary by the landlord's gross negligence. He is confined to the remedy specified in the lease; a covenant that a lessor will make repairs not being to be implied.
4. In such a case, before he can ask relief from a forfeiture, he should at least tender the difference between the amount of rents due, and the amount which he could rightly claim by way of reduction for failure of water.

ERROR to the Circuit Court for Indiana.

The State of Indiana, owning a certain canal and its adjacent lands, made *two* leases of its surplus water; the first being made, February, 1839, to one *Yandes* and a certain Sheets (this Sheets being the appellant in this case), and the other made January, 1840, to Sheets alone. Each lease was for the term of thirty years. Certain rents, payable semi-annually, on the first of May and November, were

* Mechanics' Bank *v.* Railroad Co., 13 New York, 599.