NEW ALBANY *v.* BURKE.

A city subscribed to the stock of a railroad and issued bonds for a part of the subscription, agreeing to issue them for the rest of it when the road should be completed up to a certain point. The sale of the bonds was the chief source which the railroad company had of raising money to make it. The right of the city to subscribe to the road and to issue bonds being denied by taxpayers of the city, they filed bills to enjoin the levy of any tax to pay interest on the bonds. Their value in the market was thus largely destroyed. The company being in debt had pledged the bonds to creditors for a part only of their nominal value, and the embarrassments of the company increasing, the creditors threatened to sell the bonds for whatever they would bring. It being doubtful whether, with the questioned right of the city to issue them, the bonds would bring the principal and interest due on the debts for which they stood pledged, the company applied to the city to pay the sums due, take back the bonds pledged, and be discharged from the issue of the balance of the bonds (not yet issued), which the impossibility of now completing the road showed could never, by the terms of the original agreement, be called for by the company. The arrangement was concluded in 1857, both city and company acting in good faith and for the interests of the road as well as for those of the city. In 1868 a purchaser of a judgment against the company, to execution on which, in 1858, a return of *nulla bona* had then been made, filed a bill against the city, alleging that the compromise was illegal, and praying an ascertainment of what the city owed on its subscription (assuming it to be yet existing), and an application of so much as would pay his judgment. The court admitting that "the subscribed capital stock of a corporation is a fund held by it in trust for its creditors, and that had the company released the city without equivalent consideration, or given its bonds away, its action would have been fraudulent, and might have been set aside by a court of equity;" *Held:*

1. That this transaction was not invalid.
2. That there were laches in filing the bill.

APPEAL from the Circuit Court for the District of Indiana; the case being thus:

Burke and others, complainants in the court below, were equitable owners of a judgment recovered on the 14th day of November, 1857, in the Circuit Court of Floyd County, Indiana, against the New Albany and Sandusky City Junction Railroad Company, an insolvent corporation. The judgment was obtained in a suit brought by certain trustees to foreclose a mortgage given by the company to secure the

payment of 110 bonds of $1000 each, and such proceedings were had in the suit that there was not only a decree of foreclosure and an order to sell the mortgaged property, but a personal judgment against the company. The mortgaged premises were sold under the order, and, the proceeds of sale having proved insufficient to satisfy the judgment, an execution was issued for the residue, which, December 1, 1858, was returned unsatisfied. Nothing further was done until January 29, 1868, when Burke having purchased the interest of several of the equitable owners of the judgment, this bil, was filed by him and the other equitable owners whose interests he had not acquired, against the railroad company, the city of New Albany, and others. It averred the ownership of the judgment by the complainants, the failure of the company to put any portion of its railroad into operation or to lay any part of the track thereof, and its having become insolvent about the 30th day of April, 1857. It charged further that the company, having expended all its means, abandoned all further efforts to build the road, and that its roadbed and right of way had been sold. It also charged that since the year 1858 it had not kept up its organization or elected any new officers. The bill then proceeded to charge that the city of New Albany was indebted to the company in the sum of $393,000, besides interest, growing out of a subscription to its capital stock, made on the 19th of November, 1853, in part payment of which 200 bonds of $1000 each had been delivered to the company, and that certain other parties, whom the bill made defendants, were indebted in smaller sums in a similar manner. The bill further charged that none of these bonds except 7 had been negotiated by the company, but that, on the contrary, 197 of them had been returned to the city in pursuance of an illegal compromise, and that the city subscription to the stock had been cancelled. The complainants therefore charged that the city still remained a debtor to the company, and they prayed relief that the amount of debt that might be ascertained, and that so much thereof as was necessary to satisfy the judgment might be decreed to be thus applied.

Statement of the case.

To this bill the city of New Albany set up several defences; some of form, some to the merits. Among these last, it set up:

1st. That the city was not indebted to the company when the bill was filed; that the adjustment by the city and the company was, at the time it was made (September 7th, 1857), a compromise, made in good faith, by which the city ceased to be indebted to the company, and that the adjustment was effective and valid as against all persons.

2d. That if the complainants had rights against the city and might have impeached the validity of the arrangement by which the city recovered its bonds and obtained a cancellation of its subscription, they had slept so long upon these rights that a court of equity would not afford them relief.

These two defences were the only ones which the court considered; the others having been of such a character, as that if these two were sufficient, it was unnecessary to say anything about *them*.

As to the facts, it appeared that in November, 1853, pursuant to an ordinance of the common council of the city, a subscription had been made by the city to the stock of the railroad of $400,000, payable in city bonds, upon the call of the company, and that the council assumed the power to pass an ordinance which some persons asserted to be void, but which others considered had been subsequently ratified, if void originally, by an ordinance of March 7th, 1855; the railroad company now, upon the passage of this ordinance of ratification, agreeing and binding itself that not more than $250,000 of bonds should be called for until the road should be completed and put into order to its junction with the Ohio and Mississippi Railroad, and then but for the purpose of furnishing it, &c. Pursuant to the subscription, the officers of the city delivered to the railroad company 200 city bonds, for $1000 each, payable to bearer, and redeemable in ten and payable in twenty years. At the time of thus delivering the bonds the railroad company was actively engaged in prosecuting its enterprise, and represented to the officers of the city that it was essential to the completion of

its road that the company should obtain money by the sale of the bonds. Shortly, however, after the delivery of the bonds, and while all of them, except 7, remained unsold, several suits were instituted by taxpayers of the city to resist the payment of a tax levied for the payment of interest; the ground of the suits being that the subscription was void. These suits led to protracted litigation, and raised such doubts as to the validity of the bonds, as to render it impossible for the railroad company to sell or negotiate them except at a ruinous sacrifice. In August, 1857, the railroad company represented to the city that in consequence of this failure to obtain money on the bonds, the company had found itself without means to carry on the work, and had abandoned its enterprise. It had apparently expended all the cash and real estate received by it in payment for stock, and had pledged the 200 city bonds (except the 7 sold) to different persons, for sundry sums, borrowed for the purpose of prosecuting the work. It thus had no means to pay the amounts so borrowed upon pledge of the city bonds, and it appeared that unless the city provided the means, the whole of the bonds were in danger of being sold for the payment of the loans, and that owing to the doubts cast upon their validity, the whole of them would not have sold for more than sufficient to pay the sums for which they were pledged.

The railroad company therefore proposed to the city that if the latter would provide means for the payment of the sums so borrowed, and redeem the bonds from the pledgees, they should be returned to the city and cancelled.

The city, relying, apparently, on the representation of the railroad company as to the condition of its affairs, passed an ordinance, published immediately afterwards, by which it accepted the proposition of the railroad company, upon condition that the latter would cancel the subscription of the city, and consent to the repeal of all ordinances and amendments relating thereto. This condition was accepted by the railroad company, and the agreement was carried into effect. The city paid the sums of money for which the bonds were pledged, amounting to more than $36,000. All the bonds,

except the 7 that had been sold, were returned to the city and cancelled, and the subscription of stock was cancelled.

The arrangement seemed to have been made in good faith by the city, and for the purpose of preventing the large amount of its bonds being sacrificed for the payment of the debts for which they stood pledged.

As to the second of the above-mentioned defences, it seemed that neither the complainants nor any other person, had ever controverted the validity of the adjustment made between the city and the railroad company, nor instituted proceedings to have it set aside as fraudulent and void, until the bill of complaint in this case was filed, more than ten years after the agreement was concluded. However, one of the complainants was a non-resident of Indiana, and swore that he never knew of the city subscription until after the suit was brought. It was shown, nevertheless, that he had gone to New Albany in 1858, in order to examine the company's concerns. His attorney knew of it, and one witness thought that he did also.

The court below decreed in favor of the complainants for the balance due on their judgments, amounting to over $70,000 in the aggregate, against the railroad company and the city, and dismissed the bill as to the other defendants. The city appealed to this court.

Messrs. Burke, Porter, and Harrison, in support of the ruling below:

Is the compromise set up by the city valid?

1. Clearly not, upon the principles settled by this court in the case of *Bell* v. *Railroad Company*,* that the officers of a municipal corporation authorized, by special statute and vote of the people, to subscribe for stock in a railroad company, have no power to compromise such subscription and abandon the enterprise, and that all their power is derived from the statute and the vote of the people, and that whenever the subscription is made and the corporate bonds de-

* 4 Wallace, 598.

livered, their power ceases, and they have no more power to compromise the subscription or abandon the enterprise than any other residents of the municipality.

2. The compromise, as the case shows, was fraudulent in fact, and it can hardly be doubted that there was a design upon the part of the city and railroad officers to withdraw from the reach of creditors all the available means of the railroad company.

3. The compromise is still more clearly fraudulent in law.

The transaction was an attempt upon the part of the officers of an insolvent and failing corporation, which had expended all its cash and other subscriptions in a vain attempt to construct its railroad, and had no means to meet the demands of clamorous creditors, to release its principal debtor and stock subscriber from the payment of what was due to the company without receiving the money due. Now repeated judicial decisions have settled the rule, that the officers of a money corporation are trustees for the creditors, and that they cannot give away the assets of the corporation, release its debtors without payment, or do any other act prejudicial to its creditors. That the capital stock of such a corporation is a trust fund irrevocably pledged to the creditors of the corporation, and that such capital stock cannot be diminished or squandered under the name of dividends or otherwise. No court has more firmly adhered to this rule than this court. In one case* the court say:

"When that portion of the capital, not paid in cash, is required to pay the creditors of the company, the stockholders cannot be allowed to refuse payment unless they show such an equity as would entitle them to a preference over the creditors, if the capital had been paid in cash."

II. Another objection urged is, staleness; that this suit should have been commenced sooner. But it appears that some of the owners of the judgments were non-residents of Indiana, and that they had no knowledge of the facts on which equitable relief is demanded.

* Ogilvie v. Knox Insurance Company, 22 Howard, 380.

Moreover, the bonds of the city, the interest of which is now sought to be subjected, were not to fall due for twenty years, that is, not until 1874; and there was at no time interest enough due on them to pay the amount due on complainant's judgment, up to about the time this bill was filed.

Mr. T. A. Hendricks, contra.

Mr. Justice STRONG delivered the opinion of the court.

Assuming that the subscription made by the city to the capital stock of the company in 1853, though undoubtedly invalid at first, became valid by the ratification ordinance adopted March 7, 1855; that thereby the city came under obligation to give its bonds to the company in payment for the stock, so far as they had not already been given, we come directly to the question, what was the effect of the arrangement made in August and September, 1857? Here the situation of the parties at the time is of importance to be considered.

The railroad company had undertaken to build a railroad from New Albany to Sandusky City, and it had commenced the work, relying mainly upon the bonds of the city to raise the money necessary. It had, however, been disappointed. Suits had been commenced for injunctions to restrain the collection of a tax for paying the interest, and the consequence was that the bonds could not be sold without a ruinous sacrifice, if sold at all. These suits were still pending. Meanwhile the company had borrowed thirty-six thousand dollars, pledging the bonds to the amount of eighty thousand dollars as collateral security. The loan had fallen due, and the holders were demanding payment, and threatening to sell the collaterals. The company was utterly unable to redeem the pledge. Its available means were completely exhausted. It could neither go on with its work nor in any manner relieve itself. According to the weight of the evidence the bonds pledged, together with all the others still held by the company, would not have sold for enough to have paid the thirty-six thousand dollars borrowed.

Turning now to the condition of the city. It had ratified its invalid subscription with an irrevocable engagement on the part of the company, that not more than $250,000 should be called for until the railroad should be completed and put in running order at least to its junction with the Ohio and Mississippi Railroad, and then only for the purpose of furnishing the road with depots, rolling stock, &c. It had paid its bonds to the extent of $200,000 on the subscription, and it was liable to be called upon for $50,000 more. For the remainder it was liable only upon a contingency that has never happened, and that never can happen. The consideration for its subscription, it is true, had not failed, though the motive that induced it, namely, the construction of the railroad, no longer existed. The credit of the bonds which it had issued was gone, and had it issued the remaining fifty thousand dollars, they could not have been sold for more than $8000 or $10,000. It was in these circumstances that the company applied to the city, stating its own helplessness, and it was then that the arrangement was made by which the city assumed to pay the debt of $36,000 due by the company, and sundry other moneys, and in consideration thereof obtained from the company one hundred and ninety-three bonds, which had not been negotiated, and a cancellation of the stock subscription. Was this transaction valid?

The bonds were negotiable instruments, payable to bearer in not less than ten and not more than twenty years, and, of course, passing from hand to hand by delivery. Had the whole subscription been paid, it must have been with similar bonds. And the manifest design of the subscription was to create bonds for sale in the market as the convenience or the necessities of the railroad company might require. There was no restriction in the contract upon the power of disposition, and none at law, or in equity, unless it be that the company could not part with the bonds in fraud of its stockholders or its creditors. And it had the right, which all other debtors had at the time, to make preferences among its creditors—to pay one rather than another. It is not to be disputed that, situated as the company was at the time

when the contract of August and September, 1857, was made, with the debt of $36,000 pressing upon it, and with no other means of relief, it might have sold the entire lot of two hundred and forty-three bonds which it held, or was entitled to call for, at the best price that could have been obtained, and might have applied the entire proceeds, had they been needed, to pay that single debt. Of this, neither the stockholders nor the other creditors could have complained. What more has been done now? No doubt such a course would have involved an equal sacrifice to the company, and would, in the end, have been more disastrous to the city. Time has revealed that the bonds were worth more than they could have been sold for, but we are to look at the circumstances as they were when the transaction took place, in considering what was its nature and whether it was legal. But if a sale by the company at the market price, and an application of the whole proceeds to the payment of the $36,000 debt, would have been unimpeachable, why is it less so because the city became the purchaser? Beyond doubt, the city might lawfully buy its own bonds. Had the company sold to a stranger, and then the city become a purchaser from the stranger, it will not be contended that any creditor of the company could complain. And it can make no difference whether the purchase was made directly or indirectly from the first holder of the bonds, assuming that there was no fraud. The transaction, or the arrangement of August and September, 1857, was, in substance, plainly nothing more than a purchase by the city of its own bonds, some of which had been issued, and others of which it was under obligation to issue, at the call of the vendor. The price paid was $36,000, besides some thousands more which the purchaser undertook to pay. Looking at it in the light of subsequent events, it was no doubt an advantageous purchase for the city; and, if the uncontradicted evidence is to be believed, it was deemed at the time an advantageous sale or arrangement for the company. Certainly it did not place the company in any worse position than it must have held had it not been made.

It is, however, contended by the complainants, that the arrangement was fraudulent, both in law and in fact, and that neither the common councils of the city nor the directors of the railroad company had power to make it. In support of the proposition, that the transaction was *ultra vires*, we are referred to *Bell* v. *Railroad Company*,* but that case is very unlike the present. There a popular vote, under legislative sanction, had instructed the police board to subscribe a defined amount, leaving to them no discretion. The police board were agents to carry out the popular will, with limited powers. It was not, therefore, for them to subscribe a less amount, or make any other contract, than the one they had been directed to make; and this court well said that a municipal corporation, like the board of police, could not modify or alter the stock subscription voted by the people in the absence of power from the legislature. The decision, however, was placed upon other grounds. But in the present case the common council were free to exercise their own discretion. They were under no obligation to subscribe at all, and they might take as little or as much stock as they pleased, not exceeding six hundred thousand dollars. Besides, as we have seen, the arrangement assailed by the complainants was not a modification of the subscription previously made, or a bonus given for a release. It was rather a purchase of the city debt. We think it was not beyond the power of the contracting parties.

And we are not able to perceive that it was fraudulent, either in law or in fact. It may well be doubted whether the complainants can be heard in alleging fraud. It is clear the arrangement made is binding upon the railroad company, through which, as well as against which, they claim. They can, therefore, have no standing in court, unless the arrangement was absolutely null for want of power in the parties to make it, or unless it was fraudulent as against them, and therefore voidable at their suit. We have already seen that it was not a nullity, and the bill does not charge

* 4 Wallace, 598.

that it was fraudulent. It avers that the arrangement and compromise and attempted cancellation of the subscription were entirely null and void, but it does not allege that they were fraudulently made. In urging fraud now the complainants are setting up a case not made by the pleadings. But it is not necessary to place our decision on this ground. No doubt the subscribed capital stock of a corporation is a fund held by it in trust for its creditors, as is also all its other property, and had the railroad company released, without equivalent consideration, or given it away, its action would have been fraudulent, and might have been set aside by a court of equity. But certainly it was in the power of the directors to apply the subscription on bonds taken in payment to the extinguishment of debts, and, if thus applied in good faith, all being obtained for it that it was worth, no one has been wronged. It is, therefore, a question of fact to be determined by the evidence, whether the bonds and the balance of the city's subscription were thus applied. Upon this subject we have already remarked at considerable length. We may add the evidence is convincing that the contract between the city and the company was made in the utmost good faith, with no intention to wrong creditors of the latter; that it was at the time considered advantageous to the company, and it is not proved that all was not paid for the bonds issued and to be issued that they could have been sold for in the market.

We will not pursue this branch of the case further. Were it even conceded that the arrangement of August and September, 1857, might have been set aside at the instance of creditors of the company, the laches of the complainants is fatal to their bill. This suit was not brought until the 29th day of January, 1868. The contract assailed was consummated September 8, 1857. It was not made in secret. There was no attempt at concealment. On the contrary, the ordinance of the city was published at the time. The insolvency of the company, as well as its abandonment of its work on the railroad, was known. It is asserted in complainants' bill. Injunction suits were then pending against the city.

The return of *nulla bona* to the complainants' execution against the railroad company was made on the first of December, 1858. Then their right, if any they had, to attack the compromise as fraudulent was perfect. Yet they remained inactive more than nine years, and it was not until after a speculator had purchased a large part of the judgment that this bill was brought. An attempt has been made to excuse this long delay, by the testimony of one of the complainants that he had never heard of the compromise of the city's subscription until a time which was subsequent to the commencement of the suit. But he does not say that he had not full possession of the means of detecting the fraudulent arrangement, if it was fraudulent, or that there had been any concealment; and the possession of such means of knowledge is, in equity, the same as knowledge itself.* Moreover, the other evidence in the case is irreconcilable with this statement of the witness. He had attorneys who knew of the compromise from the first. He himself went to New Albany, in the spring of 1858, for the purpose of making a thorough examination of the affairs of the company, and another witness thinks he was then informed of the arrangement. There is not the slightest evidence that any other one of the complainants was not fully apprised of what had been done from the time of the transaction, and certainly they all had the fullest means of knowledge. No excuse is, therefore, shown for their long delay, and it is difficult to see why they are not barred by the rule in equity analogous to the statute of limitations. Upon this subject it is unnecessary to cite authorities. They are to be found in numbers in the decisions of this court, as well as elsewhere. It is not to be questioned that a direct suit at law, founded upon alleged fraud in making the compromise, would have been barred by the Indiana statutory limitation of six years. It cannot be maintained that supine negligence and lapse of time are less efficient in a court of equity.

These views of the case render it unnecessary to consider

* Farnam *v.* Brooks, 9 Pickering, 212; 2 Story's Equity, § 1521

the other defences set up against the complainants' right to recover.

DECREE REVERSED, and the cause remanded, with instructions to DISMISS the complainants' bill as against the city of New Albany.

DOWS *v.* CITY OF CHICAGO.

A suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal. There must exist in addition special circumstances, bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant.

APPEALS from decrees of the Circuit Court of the United States for the Northern District of Illinois in two suits; one original, the other a cross suit. The bill in the original suit was filed by the complainant to restrain the collection of a tax levied by the city of Chicago upon shares of the capital stock of the Union National Bank of Chicago, owned by him. The bank was organized and doing business in the city of Chicago, under the general banking act of Congress, and the complainant was a citizen and resident of the State of New York.

The principal grounds alleged for the relief prayed were, that there was, in the tax of the shares of the bank, a want of uniformity and equality with the tax of other personal property in Illinois, as required by the constitution of that State; and that the shares of the bank followed the person of the owner, and were incapable of having any other situs than that of his domicile, and were not, therefore, property within the jurisdiction of the State.

Other objections, relating principally to the manner in which the tax lists were prepared, the want of notice of the assessment to the complainant, and the absence of any deductions for debts, were also urged, tending more to show