simply to protect the vendors, and if we except the three years before considered in its relation to California, its restraining effect extended no farther than was necessary for their protection.

We are unable, therefore, to see anything in the contract, so far as it is now in question, which militates against public policy.

There are no other points adverted to which demand the serious consideration of the court.

JUDGMENT REVERSED, and the case remanded to be proceeded in

ACCORDING TO LAW.

Dissenting, Justices CLIFFORD, SWAYNE, and DAVIS.

NATIONAL BANK OF WASHINGTON *v.* TEXAS.

1. A note payable to bearer, though overdue and dishonored, passes by delivery the legal title to the holder, subject to such equities as may be asserted by reason of its dishonor.
2. Any one disputing the title of the holder of such paper takes the burden of establishing, by sufficient evidence, the facts necessary to defeat it.
3. There is no competent evidence in this chancery suit that the bonds in controversy, which were issued by the United States to the State of Texas, though overdue when they passed from the treasury of the State, were issued by the State or received by the person to whom they were delivered for any treasonable or other unlawful purpose.
4. The absence of the indorsement of the governor of the State on the bonds does not raise a presumption of such unlawful purpose under the circumstances of this case.
5. The cases of *Texas* v. *White and Chiles* (7 Wallace, 718), *Same* v. *Hardenberg* (10 Id. 68), and *Same* v. *Huntington* (16 Id. 402), considered, and their true result ascertained and applied to the present case.

APPEAL from the Supreme Court of the District of Columbia; the case being thus:

The United States, on the 1st of January, 1851, issued to the State of Texas for the sale of a portion of her north-

western territory, five thousand coupon bonds of $1000 each, numbered successively from No. 1 to No. 5000, and "redeemable after the 31st day of December, 1864." They were made on their face all payable "to bearer," and declared to be transferable on delivery. The coupons, which extended to December 31st, 1864, and no farther, were equally payable "to bearer." These bonds were known as Texas indemnity bonds.

On the 16th of December, 1851, in anticipation of the bonds being delivered to it, the State of Texas passed an act authorizing their governor to receive them from the United States,

"And when received, to deposit them in the treasury of the State of Texas, *to be disposed of as may be provided by law; provided*, that no bond issued as aforesaid, as a portion of the said $5,000,000 of stock, payable to bearer, shall be available in the hands of any holders *until the same shall have been indorsed in the city of Austin, by the governor of the State of Texas.*"

After this act of December 16th, 1851, and between that day and the 11th of February, 1860, the State of Texas passed thirteen different acts, providing for the sale or disposal of the whole $5,000,000 of these bonds; for lawful State purposes; as *ex gr.*, paying the public debt of the State; the erection of a State capitol; to establish a system of schools, &c., &c., the construction of railroads: the terms of none of *these* acts requiring an indorsement of the bonds by the governor, as required in the above-quoted act of December 16th, 1851, nor any of them designating by numbers on them the particular bonds to be appropriated to the particular objects authorized. Subsequently to this again, the rebellion having broken out, and the State having gone over to the rebel side, and there being a large number of the bonds still undisposed of in the State treasury, the legislature of Texas, by an act of January 11th, 1862, repealed the act of December 16th, 1851 (making an indorsement necessary), and the then authorities of Texas, through its "military board," in January, 1865, sold or transferred, as was said, and as in former cases in this court was sup-

posed to be shown, *certain* of the bonds, but not all of them, to two persons, White and Chiles, *for the purpose of aiding the rebellion.* In those cases—the cases, namely, of *Texas* v. *White and Chiles*,* and *Texas* v. *Hardenberg*,†—it was determined that as against the true, that is to say, the loyal State of Texas (particular citizens of which had stopped payment of them at the Federal treasury), no title had passed to bonds which had been thus transferred; and that notwithstanding the transfer, the reconstructed State might reclaim the bonds or their proceeds.

How many bonds were transferred to White and Chiles, or what were their exact numbers, was not well ascertained; but, as already said, it was well known that the bonds transferred to White and Chiles did not comprise the whole issue for $5,000,000, and that a considerable number of them had been transferred under one or other of the thirteen enactments already mentioned.‡ In particular, it appeared that one hundred and forty-eight of them (numbered from 4694 to 4842 inclusively) had been transferred, in pursuance of a statute, to the Southern Pacific Railroad Company; some of which the company paid out to contractors for work done on the road. These bonds were not indorsed by the governor.

In this state of things the State of Texas brought her complaint in chancery in the court below against the First National Bank of Washington, W. S. Huntington, its cashier, and others, for discovery and relief in regard to certain of these Texas indemnity bonds, of which the bill alleged that the State had been dispossessed by fraud or treasonable practices. The number now claimed was nineteen; thus numbered:

"Numbers 4226, 4227, 4229, 4703, 4705, 4706, 4748, 4813, 4825, 4843, 4844, 4912, 4927, 4928, 4929, 4960, 4961, 4962, 4963."

* 7 Wallace, 700, where the history of the bonds is given in full.

† 10 Id. 68.

‡ See Report of Mr. Comptroller Taylor, submitted to Mr. Secretary McCulloch, August 15th, 1865.

Statement of the case.

The bill alleged that these indemnity bonds were each for the sum of $1000, dated January 1st, 1851, redeemable after December 31st, 1864, and that those in controversy were received and remained in the treasury of the State of Texas until after the period fixed for redemption. It was alleged that in the year 1865 the insurrectionary power which had usurped control of the State, made a contract with White and Chiles by which from one hundred and forty-five to one hundred and sixty-two of the bonds were delivered to them, in consideration of which they agreed to furnish means to carry on the war against the United States in which that State was then engaged, with others, under the name of the Confederate States of America.

It was further alleged that these bonds, then overdue, afterwards came to the hands of the defendants, who purchased them with full notice of the purpose for which they had been delivered to White and Chiles.

It was also alleged that said bonds were never indorsed by the governor of the State of Texas in such manner as by the law of Texas was required, by reason of which no legal title to the same passed from the State, or was vested in the parties to whom they were delivered. The defendants were required to answer under oath, and a decree against them in regard to the bonds left with Taylor, or for other relief, was prayed.

The bank and Huntington answered and admitted the purchase of some of the Texas indemnity bonds, and having others as agents for the owners of them. They gave a list of all these, specifying those held in their own right and those held as agents. They averred that the bonds had all been paid to them in full by the Treasury of the United States before this suit was commenced, and that those owned by themselves were purchased for value (namely, ninety-eight cents to the dollar), without notice of any of the matters set up in the complainant's bill.

They denied all knowledge on their part, that the bonds claimed by them were part of the bonds issued to Chiles and White, or had been issued in aid of the rebellion; and

they denied also the facts that they were so issued. And they denied the statements of the bill in these matters. A general replication was filed and testimony taken.

To make out its case, the State of Texas adduced the testimony of Mr. R. W. Taylor, the Comptroller of the Treasury of the United States, and of Mr. G. W. Paschall, one of the attorneys for the complainant. Mr. Taylor's deposition was a long one. What follows are extracts which bear principally on the case. He is under examination by the complainant's counsel.

"*Question.* I see it stated that these bonds came through the hands of J. P. White. Do your investigations enable you to say they were part of the bonds received by White and Chiles?

"*Answer.* I do not know anything more about that than what is to be gathered from the *general appearance* of the transaction. There was nothing at that time known here about the White and Chiles purchase; at least I had heard nothing of it.

"*Question.* But *from this general appearance* of which you speak, what is your opinion as to their having been part of the same bonds?

"*Answer.* From all the circumstances, *my opinion is*, those were of the White and Chiles bonds. *That is only an opinion, however.*"

CROSS-EXAMINED.

"*Question.* Do you know of your own knowledge that White and Chiles, or either of them, ever saw one of these bonds?

"*Answer.* I knew it only from the papers on file in the department, that is, *from my opinion of what those papers show.*

"*Question.* It would be a very tedious process (and I presume you could not do it) to furnish the various papers from which you make up your opinion?

"*Answer.* They are too numerous for me to present now, and I might add, that one would have to study them very carefully and make his calculations as to the different bonds.

"*Question.* Would you not have to do so by ascertaining the entire number of bonds, and then tracing those bonds into the hands of persons other than White and Chiles; would not your opinion be based upon the conclusion that, inasmuch as so many bonds were in the hands of other people, it followed, as a neces-

sary result, that if White and Chiles had any, they must be those?

"*Answer.* It would be by taking the seven hundred and eighty-two bonds that were not indorsed, and tracing them back, by the evidence, into the hands of those parties who held them at different times, and ascertaining in some instances, the particular numbers that were known to be in the hands of particular parties before the transaction between White and Chiles and the military board, and taking others again, that came from the State of Texas, and then drawing my conclusions as to what were White and Chiles bonds."

Mr. Paschall said in reply to questions in chief and on cross-examination:

"I was employed by Governor Pease to prosecute this suit, and caused it to be instituted in 1868; and judging from a careful examination made in Texas and in the Treasury Department here, I feel confident that the bonds redeemed for the bank, described by Mr. Taylor, were part of the bonds which passed through the hands of White and Chiles. *I judge this from circumstances which he has stated.* . . . I did *satisfactorily to myself*, identify those paid to Huntington, &c., because I found an affidavit of a brother of White attached to them, and was thus able to trace them as having come through White. I *inferred* so from the fact that they passed through the hands of White's brother, and through the hands of a Nashville man named Douglass. I *thought* I saw clearly that they appertained to that class, and from those numbers, knowing that the authorities of Texas had taken off the bonds, consecutively, from No. 1 of the 782. I knew *about* where these numbers would begin, but *I was at a loss about the precise numbers, because I wanted to describe them in Texas, and I could not certainly identify them.*"

Such, in the main, was the complainant's case. As this court held that it was in itself insufficient, the evidence by the other side is but adverted to. That evidence tended to show that in the case of all the bonds the cashier of the bank had gone, prior to purchasing them, to the Treasury of the United States, and had made full inquiry about them, that the Comptroller of the Treasury had advised that *bonâ fide* holders of such bonds should be paid; that many such

bonds were paid, and that the purchases here were made in view of this action; that of the nineteen bonds now in question, fifteen or sixteen had been bought in December, 1865, and in August and September, 1866, from Jay Cooke & Co., and three from Simon Wolf, of New York, acting as agent for various residents there; that of the fifteen or sixteen bought from Jay Cooke & Co., at least six were of the number transferred to the Southern Pacific Railroad Company;* that four had never been delivered to the military board;† that leaving the remaining to rest on the fact (among other facts) that they came from Jay Cooke & Co., who were not shown to have ever stood in relations of any sort with Chiles and White.

The court below decreed in favor of the complainant as to the nineteen bonds, and the defendants took this appeal.

Messrs. E. R. Hoar and J. Hubley Ashton, for the appellants, contended that on the complainant's own case, as proved, the bill ought to have been dismissed; that the testimony of Taylor and Paschall fell within the case of *Carter* v. *Boehm*,‡ in which Lord Mansfield said of such testimony: "It is mere opinion, which is not evidence;" that all the allegations of the bill were denied by answers responsive to it; and was not sustained by any evidence overcoming the denials; that *Huntington* v. *Texas*§ had decided that the State must prove not only unlawful issue and use, but also the *further fact of notice* to the defendant; that though express notice was here averred, none was proved; that the doctrine of constructive notice, applicable to dishonored private mercantile paper, payable to order on a day certain, could not be applied to public securities like these, under the circumstances attending them, when purchased in the open market after the day had passed when, by their tenor, they were redeemable; that they were issued as stock, not payable to bearer on any certain day, but "*redeemable after the* 31*st day of December*,

* Nos. 4703, 4705, 4706, 4748, 4813, 4825.
† Nos. 4960, 4961, 4962, 4963.
‡ 3 Burrow, 1905.
§ 16 Wallace, 412.

1864;" that they stated that interest would be paid for fourteen years, but that *after* December, 1864, the bonds *might* be redeemed at the pleasure of the United States; that the bonds were not *dishonored;* that *dishonor* and non-payment at maturity, in the case of private mercantile paper, were not necessarily the same thing; that a note on demand was mature and demandable at once, but was not dishonored until after such a lapse of time that the law considered the paper ought to have been paid, and that every one was bound to suppose that payment must have been demanded and refused within that time; that Mr. Attorney-General Black had held, after full consideration, that the reason of the rule which makes ordinary bills and notes, when transferred after maturity, subject to prior equities, did not apply to treasury notes of the United States, redeemable after one year from their date, and that a purchaser for value of such a note, *after* maturity, was entitled to the same protection as the *bonâ fide* holder of ordinary commercial paper taken before maturity.*

The counsel contended further, that it was clear enough, viewing the bonds specifically, that these particular bonds had not been the bonds of White and Chiles; ten of them assuredly had not been so, and the presumptions were that the others had not been.

That even if it were clear that they all *had* passed under the White and Chiles transaction, that the State ought not to recover; that this court was reviewing the decree below in its capacity as a court of equity; that the property had been acquired honestly and in good faith for a full consideration, without knowledge or notice of that transaction, and after due and full inquiry instituted at the Treasury Department, whose duty it was, as this court has said, to ascertain and decide whether the bonds had or had not been issued in aid of the rebellion.

Messrs. R. T. Merrick and T. J. Durant, having referred to the case of *Texas* v. *White and Chiles*, to show the history of

* 9 Opinions of the Attorneys-General, 413; and see 11 Id. 332.

the Texas indemnity bonds, and referred to the testimony of Messrs. Taylor and Paschal as that of persons intimately acquainted with the history of the bonds now specifically involved, submitted—

That upon the state of facts shown, the absence of the indorsement of the governor raised a presumption against the validity of the alienation of the bonds; and that the cause of justice would best be subserved by giving effect to this presumption, and requiring the holder of a bond not indorsed to prove that it had been issued by the State for some lawful and proper purpose.

That circumstances having been proved establishing illegality in the original transfer of the bonds, the burden of showing that value was given for them *before maturity* was cast upon the holder; and if it appeared that he took them after they became due, he would be regarded as having taken them subject to all the rights and equities of the State, and could not protect a defective title by any rule of commercial law.*

That the questions involved in this case were all decided in *Texas* v. *White and Chiles;* that they again came before the court in the case of *Texas* v. *Hardenberg*, in which the court, referring to the opinion in the case of *White and Chiles*, says:

"This conclusion leaves but one question for consideration, namely, whether Hardenberg at the time he purchased the bonds had notice of the equity of the State of Texas. This question was not concluded by the decree, but it was *fully considered by the court upon the former argument,* and our conclusion, as stated in the opinion, as then delivered, was that Hardenberg, as well as the other purchasers of indemnity bonds about the same time, was affected by such notice. We will not restate what we then said; it is only necessary to say, that we have reconsidered the grounds of that decision, and are still satisfied with it."

That the expressions in the opinion delivered in *White and*

* Smith *v.* Sac County, 11 Wallace, 146; Lardner *v.* Murray, 2 Id. 121; Andrews *v.* Pond, 13 Peters, 65; Swift *v.* Tyson, 16 Id. 1; Goodman *v.* Simonds, 20 Howard, 365.

Chiles, and referred to in the above extract, would be found on page 732 of 7th Wallace, and were as follows:

"We think it clear, if a State, by a public act of her legislature, imposes restrictions upon the alienation of her property, that every person who takes a transfer of such property must be held affected by notice of them. Alienation, in disregard of such restrictions, can convey no title to the alienee."

The learned counsel, referring to the opinion of the court in the subsequent case of *Huntington* v. *Texas*, as qualifying and explaining the fundamental principles announced in the preceding cases, and regulating their application, submitted that it did not in any way annul the fundamental principles declared in those previous cases, but, on the contrary, reaffirmed them.

Mr. Justice MILLER delivered the opinion of the court.

Waiving for the present the question whether the bonds were overdue in the sense which puts a purchaser of dishonored negotiable paper on the inquiry as to defences which may be set up against it, it is quite clear that they were transferable by delivery after due the same as before. To invalidate the title so acquired by a purchaser, it is necessary to make out some defect in that title.

The main allegation of the bill is that these are part of the bonds issued to White and Chiles, in aid of the rebellion. All knowledge of this fact is denied by defendants, and the fact itself is denied. Conceding that their denial of the fact, about which perhaps they know nothing, had no other effect than to put in issue the allegation of plaintiff's bill on that subject, it remained for plaintiff to establish its truth by evidence.

This it attempted to do. Two witnesses alone are relied on for this purpose, namely, Taylor, the Comptroller of the Treasury of the United States, and Paschal, one of the attorneys for complainants. The former was examined at much length, and gave it as his opinion, from certain calculations made by him, based upon papers in his office and

information received by him from officers of the State of Texas, and other sources, that these bonds were of the White and Chiles issue. He says that it is only an opinion, and it is evident from his deposition that the data on which he bases that opinion are far from conclusive. It is not worth while to waste words in proving that such testimony is wholly incompetent to establish any fact, or rather to show that it is not evidence at all.

The deposition of Paschal is to the effect that by reason of his connection with the suit of *Texas* v. *White and Chiles*, he had become familiar with a number of facts from which he had satisfied himself that these bonds were of the White and Chiles lot. As the matters on which this conclusion was founded were all of them statements of others, some verbal, some written, and all of them capable of being proved, no reason is perceived why the witness should be substituted for the court in weighing these facts, and making the proper inferences. The same observation applies with equal force to Taylor's testimony.

Not only is there no evidence that these bonds were irregularly or improperly issued, or were issued for any treasonable or other unlawful purpose, but there is evidence that there were at the time these depositions were taken, bonds greatly exceeding in amount those in controversy, issued lawfully to a railroad company, which were not identified by their numbers, or in any other manner, so as to prove that the bonds in controversy were not these bonds. Nor was there any evidence tracing all the bonds lawfully issued so as to show where these were or to repel the presumption that they were of that class. In short, the testimony on this branch of the subject is an absolute failure.

But it is said that as these bonds did not bear the indorsement of the governor of the State of Texas, this fact alone was sufficient to prove that they were unlawfully obtained from its treasury, and that the rights of the State should therefore be protected in this suit.

The opinions of this court in the cases of *Texas* v. *White*

and Chiles,* and *Same* v. *Hardenberg*,† are much relied on in support of this proposition, and in fact are supposed to control this case in all respects. But while it is true that the bonds in question in both those cases (they were, in fact, but one case) were the bonds delivered to White and Chiles, and that some very important questions were decided concerning the relation of the State of Texas to the Union, and the validity of her legislation while under control of the enemy during the war of the rebellion, it is also true that the very matters of which the present bill is full, but of which there is a flat denial and no proof whatever, were supported in that case by sufficient evidence. On an examination of the report of that case it will be seen that the court was of opinion that it was established both in evidence and by the answers of some of the parties that the bonds then in controversy were all of them issued to White and Chiles, and the illegal contract on which they were issued was in evidence, and the court was further of opinion that the parties defendant had notice of those facts.

It is true that in the first of these cases the eminent judge who delivered the opinion, in addition to deciding that the bonds were overdue when delivered to White and Chiles, and for that reason subject to an inquiry as to the manner in which they obtained possession of them, gave as an additional reason why defendants could not hold them as *bonâ fide* purchasers, that they had not been indorsed by the governor as required by the statute of Texas. And for that purpose he entered into an argument to show that the State could by statute, while those bonds were in her possession, limit their negotiability by requiring as one of its conditions the indorsement of the governor. He also said in reference to the repeal of that statute by the rebel legislature of Texas, in view of the supposed treasonable purpose of it, that it was void. All of this, however, was unnecessary to the decision of that case, and the soundness of the proposition may be doubted.

* 7 Wallace, 718.

† 10 Id. 68.

In the subsequent case of *Texas* v. *Huntington*,* which was an action at law in reference to some of the bonds in the same category as those now before us, the justice who delivered the abovementioned opinion, qualifies it so far as to say that the repealing statute, though passed by a rebel legislature, is not void in its application to bonds not issued for treasonable purposes. This is sufficient to relieve the present case of any embarrassment growing out of that branch of the opinion in the case of *Texas* v. *White and Chiles.*

This latter case, *Texas* v. *Huntington*, on a careful examination of it must be held to dispose of the one before us. It is said, among other things, "that no one other than a holder of the bonds, or one who having held them has received the proceeds, with notice of the illegal transfer, for an illegal purpose, can be held liable to the claim of the reconstituted State." Again: "Whether there was evidence in the present case establishing the fact of the unlawful issue and use, and the further fact of notice to defendants, within the principles heretofore laid down, as now explained and qualified, is a question for the jury."

In the case before us, which is a suit in equity, it was a question for the chancellor, to be established by evidence. As we have already said, there is no proof either of the unlawful issue or use, or purpose, nor of any notice to defendants of the probable existence of these facts.

DECREE REVERSED, with directions to

DISMISS THE BILL.

Mr. Justice SWAYNE:

I concur in the judgment of the court just announced, but as the case involves important legal principles I prefer to give my views in a separate opinion.

Pursuant to the act of Congress of September 9th, 1850,† the United States issued to the State of Texas their bonds to the amount of five millions of dollars. They were denominated on their face "Texas Indemnity Bonds." They

* 16 Wallace, 402.

† 9 Stat. at Large, 446.

all bore date January 1st, 1851. Each one was for $1000. It was certified on their face "that the United States of America are indebted to the State of Texas or bearer" in that sum, "redeemable after the 31st of December, 1864, with interest at the rate of five per cent. per annum, payable on the first days of January and July in each year, at the Treasury of the United States, on presentation and surrender of the proper coupon hereto attached," and that the bond "is transferable by delivery." Coupons were attached extending to December 31st, 1864. Texas received them and placed them in her treasury. On the 16th of December, 1851, her legislature passed an act whereby it was provided "that no bond issued as aforesaid, as a portion of the five million of stock payable to bearer, shall be available in the hands of any holder until the same shall have been indorsed in the city of Austin by the governor of the State of Texas." A large portion of the bonds were indorsed by the governor and disposed of pursuant to other acts of the legislature. Acts were passed from time to time appropriating other portions for different purposes. Some of these acts prescribed a different mode of transfer, and some were silent upon the subject. Transfers were made in such cases without the governor's indorsement. On the 11th of January, 1861, the provision requiring his indorsement was repealed. On the same day a military board was created and authorized to prepare the State for defence, and for that purpose to use the bonds still in the treasury to the extent of a million of dollars. This action was taken by the State with the view of engaging in the war of the rebellion, then impending, against the United States. On the 12th of January, 1865, the military board entered into a contract with White and Chiles, in pursuance whereof $135,000 of the bonds were sold and delivered to them. On the 15th of February, 1867, the State of Texas filed in this court an original bill against White and Chiles and others, wherein it was charged that the repeal of the requirement of the governor's indorsement and the contract with White and Chiles were in aid of the rebellion and therefore void, and it sought to recover back

the bonds or their value from White and Chiles and the other defendants to whom it was alleged White and Chiles had transferred portions of them. This court decreed against White and Chiles.* The case stood over as against Hardenberg, one of the other defendants. Subsequently a decree was rendered against him.† The State also sued William S. Huntington, at law, in the Supreme Court of the District of Columbia, for the conversion of certain of the bonds redeemed at the Treasury, the proceeds whereof had gone to him. The State recovered as to thirteen of these bonds and failed as to the residue. The judgment was brought to this court upon error and reversed.‡

The case made in the record before us by the complainant, so far as is necessary to state it, is as follows:

It is alleged that the military board for insurrectionary purposes sold and delivered to White and Chiles one hundred and thirty-five of the bonds; that thirty-three of these bonds, after becoming past due, were sold to the bank, or were placed in its hands to collect for White and Chiles, with full knowledge of the manner in which White and Chiles had obtained them, and in bad faith on the part of the bank; and that the bonds had never been indorsed in such manner as to pass the title out of the State of Texas. The prayer is that the bank be enjoined from receiving the amount due on the bonds from the United States; that they may be delivered up to the State, if still in the possession of the bank, and if not, that the bank may be decreed to pay their value to the State. A copy of the contract of the military board with White and Chiles is annexed to the bill.

The bank and Huntington answered jointly. The answer, among other things—

Denies all knowledge of the transactions between the military board and White and Chiles; it denies that they hold or claim the bonds described in the bill; it denies that they were in any way the agents of White and Chiles or bought any bonds from them; it denies that they had any knowl-

* 7 Wallace, 700. † 10 Id. 68. ‡ 16 Id. 402.

edge that their bonds came through White and Chiles; it avers that they had heard there would be difficulty about the White and Chiles bonds, and before purchasing made diligent inquiry at the Treasury Department; that no one there could identify the bonds in question as White and Chiles's bonds, and that the bank bought them believing they were not such; it avers that they knew the Secretary of the Treasury had paid similar bonds, and gives a large list of such bonds; it denies all knowledge of White and Chiles.

The court below decreed against the bank for the value of nineteen bonds and interest. Those bonds are numbered in the decree as follows: 4226, 4227, 4229, 4703, 4705, 4706, 4748, 4813, 4825, 4843, 4844, 4912, 4927, 4928, 4929, 4960, 4961, 4962, and 4963.

The bank removed the case to this court by appeal, and it is now before us for review. The complainant did not appeal. This defines the ground of the controversy in this court between the parties, and narrows the circle of inquiry to the bonds numerically specified in the decree.

There is neither proof nor admission in the record of the execution of the contract of the military board with White and Chiles. It must, therefore, be laid out of view.

Averments by the complainant, vital in the case, are denied by the answer. The answer is responsive and the denials absolute. This throws the burden of proof upon the complainant, and the denials are conclusive unless overcome by the testimony of two witnesses to the contrary, or the testimony of one witness, and circumstances established otherwise equal in effect to the direct testimony of another.

The effort of Texas to leave the Union was revolutionary. All her legislative acts for the accomplishment of that object were void. Her position has been aptly resembled to that of a county in rebellion against the State.* While her enactments outside of the sphere of her normal authority were

* Hickman v. Jones, 9 Wallace, 197.

without validity, those within it, passed for the ordinary administration of her powers and duties as a State, had the same effect as if the rebellion had not occurred. The latter principle springs from an overruling necessity. A different rule would involve the dissolution of the social compact, and resolve society back into its original elements.

The repeal touching the governor's indorsement was an act of ordinary legislation. It was, therefore, within the rule last mentioned. If it had in view the promotion of the rebel cause it was too remote from that end, and its tendency too indirect to render it fatally liable to that objection. The repeal put an end to the existence of the restriction. But if the restriction had not been repealed I cannot admit that the want of the indorsement would have in any wise affected a *bonâ fide* holder, or in other words, one who had honestly bought the bonds for a valuable consideration without knowledge of any infirmity in the title of his vendor. The United States made them payable "to the State of Texas, or bearer." Delivery passed the title. Texas could not restrain their transferability in the markets of the world, according to the law merchant, in any case without bringing home notice to the party sought to be implicated or putting upon the bonds something which must necessarily operate as a notice to every buyer.

Winston v. *Westfeldt** has an important bearing upon this subject. There the holder of a promissory note had been enjoined from transferring it. He transferred it, underdue, by indorsement. The indorsee gave a valuable consideration and took it without notice of any defect. It was held that the title of the indorsee was valid, notwithstanding the injunction.

The fact that the bonds were overdue when the bank bought them does not affect the case. The transferee of overdue negotiable paper takes it liable to all the equities to which it was subject in the hands of the payee. But those equities must attach to the paper itself, and not arise

* 22 Alabama, 760.

from any collateral transaction. A debt due to the maker from the payee at the time of the transfer cannot be set off in a suit by the indorsee of the payee, although it might have been enforced if the suit had been brought by the latter.* The result is the same whether the transfer be made by indorsement or delivery. But the protection of this principle is confined to the maker or obligor. It does not apply as between successive takers. Actual notice is necessary to affect them. There is no adverse presumption. Each one takes the legal title, and his equity is equal to that of his predecessors. "The equities being equal, the law must prevail."† The position of the transferee must be at least as favorable as that of the assignee of a chose in action. There the assignee takes subject to the equity residing in the debtor, but not to an equity residing in a third person against the assignor.

Chancellor Kent, speaking of this rule in this class of cases, says: "The assignee can always go to the debtor and ascertain what claims he may have against the bond or other chose in action which he is about purchasing from the obligee, but he may not be able with the utmost diligence to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries, and for this reason the assignee, without notice, of a chose in action, was preferred in the late case of *Redfearn* v. *Ferrier et al.*,‡ to that of a third party setting up a secret equity against the assignor. Lord Eldon observed in that case that if this were not so no assignment could ever be taken with safety."§ This reasoning is strikingly applicable in the case before us. It was the duty of the cashier to inquire at the Treasury Department. He did so, and learned that there was no objection to any of the bonds but those which had been delivered to White and Chiles, and he be-

* Burrough *v.* Moss, 10 Barnewall & Cresswell, 558; Whitehead *v.* Walker, 10 Meeson and Welsby, 696; Hughes *v.* Large, 2 Pennsylvania State, 103; Gullett *v.* Hoy, 15 Missouri, 400; Story on Bills, § 220.

† Judson *v.* Corcoran, 17 Howard, 614.

‡ 1 Dow, 50. § Murray *v.* Lilburn, 2 Johnson's Chancery, 443.

came satisfied that those involved in this controversy did not belong to that class. It was impossible for him to find and consult all those through whose hands they might have passed before they were offered to the bank.

If negotiable paper, underdue, be in the hands of a *bonâ fide* holder, any subsequent holder may avail himself of that fact against the equity of the maker.* Every holder is presumed to have acquired his title before the maturity of the instrument and *bonâ fide*. The burden of proof rests upon the party alleging the contrary.† It is only in case of dishonor that the equities of the maker, or obligor, can be set up against a *bonâ fide* holder. It may be doubted whether these bonds belonged to that class.‡ I have preferred to consider the case in this aspect, upon the hypothesis most favorable to the complainant. It is unnecessary to resolve, in this case, either way the doubt suggested.

The rights of the holders of commercial paper were largely considered by this court in *Goodman* v. *Simonds*,§ and in *Murray* v. *Lardner*.‖ What was there said need not be repeated.

It remains to consider the case in the light of the evidence. In order to maintain the decree it is necessary for the complainant to establish the following facts:

(1.) That the bonds specified in the decree were of those disposed of by the military board to White and Chiles;

(2.) That the transaction was in aid of the rebellion;

(3.) That the bank, before it bought, had notice of the infirmity of the title of White and Chiles.

And these facts must be established by the measure of proof requisite to overcome the responsive denials of the answer.

It is shown by the complainant's own testimony—and there is none to the contrary—that six of the bonds here in

* 3 Kent's Commentaries, 92; Chitty on Bills, 221; Smith *v.* Hiscock, 14 Maine, 449; Fairclough *v.* Pavia, 9 Exchequer, 690; Oulds *v.* Harrison, 10 Id. 579.

† Byles on Bills, 165.

‡ 9 Opinions of the Attorneys-General, 413; 11 Id. 332.

§ 20 Howard, 343.

‖ 2 Wallace, 110.

question were transferred and delivered by the authorities of the State pursuant to an act of the legislature to the Southern Pacific Railroad Company. They are numbered 4703, 4705, 4706, 4748, 4813, and 4825. It is proved by the same testimony that four more were not of those delivered to White and Chiles. They are numbered 4960, 4961, 4962, and 4963. It is also proved that five of the bonds, Nos. 4843, 4844, 4927, 4928, and 4929, were sold to the bank by Jay Cooke & Co. It is not shown when Cooke & Co. acquired them. It is, therefore, presumed they bought them under-due and *bonâ fide*, and their title enures to the benefit of their vendee. Three of the bonds, Nos. 4226, 4227, and 4229, were bought by the bank of Wolf. There is some testimony tending to show that he bought after they were due. But there is no such proof as to his vendor. The presumption as to the latter is, therefore, otherwise. This ends the controversy as to these eighteen bonds. The remaining bond is No. 4912.

The only testimony in the record in any degree adverse to the bank upon the points in issue, is that of Comptroller Taylor and that of Judge Paschal.

In his examination-in-chief the comptroller said:

"From all the circumstances, my *opinion* is those were of the White and Chiles bonds. *That is only an opinion, however.*"

On cross-examination:

"Q. Do you know, of your own knowledge, that White and Chiles, or either of them, ever saw one of these bonds?

"A. I know it only from the papers on file in the department; that is, *from my opinion of what those papers show.*

"They are too numerous for me to present here now, and I might add, that one would have to study them very carefully, and make his *calculations* as to the different bonds.

"It would be by taking the seven hundred and eighty-two bonds that were not indorsed, and tracing them back by the evidence into the hands of those parties who held them at different times, and ascertaining, in some instances, the particular numbers that were known to be in the hands

of particular parties before the transaction between White and Chiles and the military board, and taking others, again, that came from the State of Texas, and *then drawing my conclusions as to what were White and Chiles's bonds.*"

With these admissions before us it is sufficient to remark that his testimony is clearly incompetent.* And, if not so, it would be insufficient to maintain, in behalf of the complainant, the issue between the parties. The same remarks are applicable to the testimony of Judge Paschal. So far as it affects this case it is liable to the same objections. He says, among other things: "I was employed by Governor Pease to prosecute this suit, and caused it to be instituted in 1868; and judging from a careful examination made in Texas, and in the Treasury Department here, I feel confident that the bonds redeemed for the bank, described by Mr. Taylor, were a part of the bonds which passed through the hands of White and Chiles, and I judge this from the circumstances which he has stated." This is mere opinion, founded upon data not disclosed and in part upon the opinion of another witness. Further remarks upon the subject are unnecessary. There are other defects in the evidence for the complainant, but it is unnecessary to advert to them. Altogether it fails wholly to sustain the case made by the bill. The decree of the court below is, in my opinion, properly reversed.

THE CONFISCATION CASES.

[SLIDELL'S LAND.]

1. An information *in rem* under the fifth, sixth, and seventh sections of the Confiscation Act of July 17th, 1862, for the confiscation of the real estate of a person falling within the provisions of those sections—such information not being in any sense a criminal proceeding—is not, after default made and entered, and after a final judgment of condemnation, to be held fatally defective because it has averred that the property

* Armstrong *v.* Boylan, 1 Southard, 76; Morehouse *v.* Mathews, 2 Comstock, 514.