Ludlam may be subject, are to be surmounted; it is sufficient for my present purpose to show that there is nothing in the fact of such double allegiance to which my conclusion subjects him to demonstrate that such conclusion is unsound. No such difficulty would be likely to arise during his minority, and, on his arriving at maturity, he would have the right to elect one allegiance and repudiate the other, and such election would be conclusive upon him, and would doubtless be respected by the governments.

However this may be, the inconveniences of such double allegiance are rather theoretical than real. Practically the person so situated secures all the rights of citizenship, or at least the right of inheritance in two countries, and discharges the duties of allegiance in only one. The balance of advantages is decidedly in his favor: Halleck, ch. 29, § 4.

I am therefore of opinion that Maximo Ludlam was an American citizen at the time of the decease of his uncle, and is entitled to share equally with his sister in the proceeds of the lands of which their uncle was seised at the time of his decease.

The judgment of the Supreme Court should be affirmed.

All the judges concurring,

Judgment affirmed.

Supreme Court of Vermont, in Chancery, Rutland County.

MILLER AND KNAPP, TRUSTEES, ETC., *vs.* THE RUTLAND AND WASHINGTON RAILROAD COMPANY.

A railroad company being in want of funds to build its road, authorized its president to issue bonds secured by a mortgage on the road and its franchises. The president executed an instrument reciting his authority, and proceeding in his name as president to mortgage the road, &c., but he signed the instrument in his own name simply. Afterwards, the company issued two sets of bonds, secured by second and third mortgages in due form. The first bonds not having been paid when due, the trustees filed a bill to foreclose the mortgage, and thereupon it was *Held*, that

The corporation had a legal competency to pledge its credit for the procurement of rails for its road, and to secure payment by a mortgage.

The instrument executed by the president in pursuance of the votes of the directors, although intended to take effect as the deed of the corporation, yet not being executed by or in the name of the corporation, cannot operate as its deed.

The transaction in a court of equity is to be regarded as an *equitable mortgage*, and thus entitles the complainants, the holders of what was intended to secure the payment of the first mortgage-bonds, to their full right in equity to the said mortgage which was intended to be given.

The trustees under the second and third mortgages were the agents of the holders of bonds under such mortgages, and actual notice to said trustees of the equitable first mortgage, was notice to the bondholders, who therefore took their bonds subject to all the legal consequences of the existence of the said equitable first mortgage.

The corporation had sufficient right or interest in the subject-matter of the mortgages upon which said mortgage would lawfully be operative. The corporation was competent to convey by mortgage what the mortgage purports to cover and convey, viz., the road and its franchise, as now construed. The mortgage was designed to take effect upon the road, as it should exist under the rights of the corporation, at the time the mortgagees should succeed to its rights by virtue of the due enforcement of the mortgage.

There is no need of a preliminary decree for the reformation of the deed, and the court can give immediate effect to the instrument, as if it were reformed in pursuance of a decree of equity. The Court, therefore, grant a decree of foreclosure.

The Rutland and Washington Railroad Company, chartered in 1847, surveyed and located a railroad pursuant to its charter, and put it under contract for its entire completion, including land damages.

The contractors were to receive in payment shares of the capital stock at par, for all but $100,000, which sum was to be in money. They proceeded with the work, and when it became necessary to procure rails, it was found that the capital stock could not be made productive of the necessary means.

Thereupon the directors voted to modify the contracts by making provision for the issue of $250,000 of bonds, for the purpose of procuring the necessary iron, to be secured by mortgage upon the road and its franchises; which bonds the contractors might receive by substitution for an equal amount of stock; it having been ascertained by the officers of the company that such bonds would be received by the dealers in payment for the iron; and

one of the directors, as agent of the contractors, negotiated the purchase.

Bonds were issued accordingly; pursuant to votes of May 3d, 1850, May 4th, 1850, and June 25th, 1850.

Subsequent to this, December 10th, 1852, the corporation issued $550,000 of other bonds, and secured them by a mortgage upon the road and franchises and property belonging to it; $250,000 of which were designed by the parties to the transaction, to be used in retiring the first mortgage, and the residue to paying the other indebtedness of the company. The first mortgage bond-holders did not assent to this arrangement in substitution for the bonds then held by them.

In 1855 the corporation made another mortgage, securing an issue of $1,300,000 of other bonds; the purpose of which was, by substituting the new bonds for the former issues, thereby to retire both the prior mortgages; and also to pay any other existing indebtedness of the company.

Most of the creditors and bond-holders, except those holding the first mortgage-bonds, came into the arrangement. The holders of first bonds declined to do so.

The instrument made by Clark in pursuance of the resolutions of May 4th and June 25th, 1850, recited those votes and proceeded in the name of Clark as president of the company, and by the power and authority vested in him by said votes, to grant and convey; and it is signed by Clark's name without addition or prefix.

The first mortgage-bonds thus issued and secured, not having been paid as provided, this suit is brought to enforce the security by foreclosure.

The cause was argued at the General Term of the Supreme Court, November, 1862, by Mr. *Stoughton* of Bellows Falls and Mr. *Stoughton* of New York, for the orators; by *Judge Bennett* and Mr. *Phelps* of Burlington, for the defendants; in behalf of whom also a printed opinion by Judge *Redfield* of Boston, was presented.

The cause was held by the Court for advisement till the

February Term, 1864, of the Supreme Court in Rutland County, at which the opinion of the Court was delivered by BARRETT, J.[1]

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It is now to be considered how the rights of the orators stand in relation to the second and third mortgages.

We assume, for the present, that subsequent grantees take and hold the estate conveyed, subject, not only to all *legal* incumbrances to which it was subject in the hands of the grantor, but to all equitable incumbrances of which they have notice. A case in point, as propounding and applying the principle is, *Sumner* vs. *Rhodes*, 14 Conn. 134.

The Court are convinced by the evidence, that all the trustees under the second and third mortgages, prior to and at the time such mortgages were executed and they became trustees, had notice and knowledge, in point of fact, that the first bonds had been issued, and that the same were secured by mortgage. All the circumstances and reasonable probabilities concur with the direct evidence, and leave no reasonable doubt of the fact.

This being so, they stand chargeable with the legitimate effect of the right, whether legal or equitable, which existed in virtue of the issuing of the said bonds with such security by way of mortgage as appertained to them; and that too, even though it were to be held, that the validity of that security depended upon acts of the corporation prior to the making of said second and third mortgages, by way of recognising and ratifying the act of the directors in the transaction constituting the creation of the security, and even though the trustees under said mortgages had not, in fact, knowledge of those acts.

When they had notice and knowledge of the issuing and existence of the bonds, and of their being secured by mortgage, if the fact existed, it had full operation and effect to subject the title which they took with such notice and knowledge to the legitimate consequences of that fact.

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[1] [We regret that the great length of the case prevents our giving it in full, but we take pleasure in laying before our readers that part of Mr. Justice BARRETT'S very able opinion which discusses the rights of the complainants in relation to the second and third mortgages.—EDS. LAW REG.]

The bonds, immediately upon being issued, having been received in payment for the rails, thereby became effective in the hands of the holders, with the fixed right in them to the security provided in that behalf; and it was not in the power of the corporation or of any of its officers, without the concurrence of such holders, to divest or affect that right by any act of theirs thereafter; so that, whatever was said or done by or in behalf of the corporation, through its officers, in respect to other bonds and mortgages as affecting the rights of the holders of the first bonds, or by way of making other provisions for the debt evidenced thereby, was entirely nugatory as against the holders of said first bonds.

They stood upon fixed and vested rights, over which the corporation had no control, except by paying said bonds. It makes no difference, as to the rights of the said bond-holders, what provision was made in this respect, either by means of, or under, the second or third mortgage, or whether the corporation, or its officers, acted in good faith or not in making or administering such provision.

It is now to be considered how such notice and knowledge on the part of the trustees under the second and third mortgages affects the title they hold, in view of the relation they sustain to the bond-holders under said mortgages respectively.

In *Pierce* vs. *Emery*, 32 N. H., p. 521, Ch. J. PERLEY says:—"Notice to trustees, who take a conveyance for the mere purpose of upholding an estate, without having any previous connection with the title, is not always, nor perhaps usually, regarded as notice to the *cestuis que trust*. But the trustees under this act must be considered in the light of agents for the negotiating of the loan; they act for those who lend their money on the security of the mortgage; they are charged with the duty of protecting the interests of the bond-holders, who are unconnected individuals, having no ready means of acting together except through the trustees, whom the law appoints to act for them. Notice to the trustees would be all that could be given in this case."

It is well settled, as is said in Hill on Trustees 513, that, "Notice, either actual or constructive, will be equally binding, whether

it be given to the purchaser himself, or to a person acting as his agent, or solicitor, or counsel."

We think, both upon principle, and from due regard to what alone is practicable in such cases, that notice to the trustees should be held to affect the title in their hands with reference to all rights existing in respect thereto under the trust. Though it is obvious and readily conceded, that bond-holders acquire their rights, in reference to the security provided by the mortgage in trust, by the purchase of the bonds, and with such purchase the trustees have no connection, nor any agency in reference to the transfer thereof, yet it is at the same time true, that, in reference to the security, both for holding, enforcing, and administering it according to the provisions of the trust, the trustees are the agents of the parties interested and entitled by reason of being bond-holders. We are unable to assent to the proposition, that the trustees are only agents of the *cestuis que trust* for holding the *legal title.* They are agents for holding just such title as is created by the deed, and for administering it according to the terms of the trust; and whatever title the *cestuis que trust* have, whether legal or equitable, is through, and in virtue of, the title conveyed to, and held by, the trustees. Even if it should be granted that the trustees were agents merely for holding the *legal* title, still, as the rights of the *cestuis que trust* depend upon, and are to be asserted through that legal title, whatever affects such legal title in its creation in the trustees, must affect the rights and interests that are dependent upon it.

If the legal title is charged with an incumbrance in its creation in the hands of the trustees, it is difficult to see how the *cestuis que trust* can have an equity suspended upon that legal title that shall override such incumbrance.

However that might be as a proposition applicable to a *dry trust*, still, as to a trust, which, in addition to the holding of the title, is administrative of the property for the purpose of effectuating the security, the trustees must be regarded as the agents of the *cestuis que trust* with reference to all their rights and interests, both in the title held, and in the administration and fruits of the trust,

according to its terms and legal operation. In *Sturgis & Douglass* vs. *Knapp et als.*, 31 Vt. 34, it was held that a mortgage by a railroad company, where the only trust expressed was, to hold the property to secure the payment of the bonds named, created an active, administrative trust, even after a foreclosure, under which the trustees were authorized to make a lease of the road and property for ten years, against the protest and remonstrance of a large majority in amount of the bond-holders; though contrary to my own opinion. But it is the adjudicated law of the subject in this State. In the present case, however, the second and third mortgages provide specifically, and in detail, for the administration of the property, after the condition shall have been broken, for the satisfaction of the rights and interests of the bond-holders under said mortgages.

The fact, that the bonds are treated as negotiable, and pass from hand to hand like bank bills, does not affect the question of the agency of the trustees in reference to the security provided by the mortgage.

Such bonds purport to be secured by a mortgage in trust to trustees who are designated and known. They are negotiated and purchased upon the security thus existing. That security consists in the property and title which exist in the trustees. By the purchase of the bonds, the purchaser voluntarily adopts the security as it exists in the trustees, and becomes *cestui que trust* under them, thereby adopting said trustees as his agents for holding the existing title, and administering the property held thereby to the intents specified in the creation of the trust.

The question is not as to how *cestuis que trust* would be affected by notice to trustees of transactions subsequent to the creation of the trust, or to their becoming *cestuis* under the trust, but as to how they are affected by notice to the trustees which, as to them personally, affects the legal estate at the time, and in the act of their becoming trustees.

Then as to the practicableness of a contrary doctrine:—The very fact that the bonds pass from hand to hand, and without any record or notice, and are changing hands every day to a greater

or less extent, shows that the matter of fixing an equity by notice would be practically impossible.

It cannot be known in whose hands all, or any considerable portion of the bonds are at any given time, nor in whose hands they will be the next day, or next month. Of course notice would affect only the party to whom it was given, as there is no joint interest, or representative relation, between the different holders of the bonds. Nor would notice to a holder of specific bonds to-day affect a person who, without notice, should, in good faith, be the holder of the same bonds to-morrow.

The result must necessarily be, that however well grounded an equity a party might have against the corporation, and against the trustees personally, attaching upon the legal title held by such trustees, it would prove barren and futile to any beneficial intent, by reason of the impossibility of knowing and notifying the ever shifting parties who have an interest, and claim an equity, subsequently created and subsequently accruing.

On the other hand, it would be easy comparatively for persons, desirous of investing in railroad mortgage bonds, to apply to the trustees holding the security, and elicit the true state of the title. We think it no hardship that they should be required to do so, if they would avoid the hazard of finding their security subject to prior incumbrances, when it might be too late to save themselves from the consequences of such a state of the title.

The only case that has been cited, or that we have been able to find, in which a contrary proposition has been asserted, is *Curtis* vs. *Leavitt*, 15 N. Y. Rep. Several of the judges drew up opinions. Shankland and Paige concur with Comstock and three other of the judges in the result, that the bond-holders were entitled to the securities in the hands of the trustees,—those two putting it on the ground that they were *bonâ fide* purchasers of the bonds, without notice of the defect in the manner in which the securities had been assigned to said trustees, one of whom knew of said defect; holding that the trustees were not agents of the bond-holders, but only of the corporation making the assignment.

The four other judges held the assignment itself to be valid, not-

withstanding such alleged defect in the manner of making it, on the ground that it being within the scope of the power of the corporation to make such an assignment, and the corporation having received the benefits resulting from the issue and sale of the bonds, it had, by its acts of recognition and ratification, cured said alleged defect.

Judges Shankland and Paige cite no authority upon the point to sustain their view; and it was not one of the points decided in the case. The securities assigned were bonds and mortgages, to be held by the assignees, and the avails to be held and applied as security and in payment of the bonds issued by the company, in the manner provided in the instrument of assignment.

We have no occasion to present any critical analysis and discussion of that case, for the purpose of ascertaining whether the trustees and bond-holders in that case sustained such a relation to each other, and to the subject-matter of their respective interests, as to constitute ground for the application of the same principle and rule as the case before us. For if it did, upon the views we have expressed, we should regard the point as held by Judges Shankland and Paige unsound. But it is sufficient to say that it was not so decided in that case, and of course stands only upon the individual views of the judges named.

It is to be noticed, that, in what we have said, as to the trustees being agents of the bond-holders, we confine that agency to the purposes of the trust with which the trustees were clothed, viz.: that of holding the title as security, and enforcing and administering such security according to the provisions of the trust, both express, and by law implied. We do not hold, nor do we assent to the position taken in the argument by one of the counsel for the defendants, in reference to the $250,000 of bonds under the second mortgage, put into the hands of Miller with the design of having them appropriated to the retirement of the first bonds, that the trustees have, under their trust, any agency to discharge, change, or compromise the security which they hold as trustees. They are not general agents of the bond-holders, but special, and limited to the legitimate purposes of the relation they sustain to the se-

curity and to the parties entitled, under the trust with which they are clothed. Any act or omission of theirs, therefore, whether in bad or good faith, outside the scope and purposes and legitimate incidents of the trust, would not affect other parties in their rights under the trust, on the score of the agency existing in virtue of that relation.

But it is insisted that the subsequent mortgagees cannot be subjected to the prior equitable incumbrance, unless the notice to them was such as to make it fraudulent in them to take and register said mortgages, in prejudice to the known title of the other party.

To the principle embodied in this position we have no difficulty in assenting; but we think that the impression, naturally resulting from the manner in which it is put, may not be precisely accurate.

The notice, which the law regards as effectual to charge a subsequent purchaser, is such as, if duly heeded and properly pursued, would lead to a knowledge of the true character, in point of fact, of the prior incumbrance, and thus charges him with the legal consequences of such prior incumbrance, however he may judge of the validity, in point of law, of such incumbrance, or of the legal consequences that may flow from it. By the fact of such notice, being charged with a knowledge of such incumbrance, if in fact it existed, the law regards the taking of a subsequent conveyance in prejudice to such incumbrance, as being in *bad faith* on the part of the purchaser, even though in truth he took such conveyance, either in heedless disregard of the notice, or upon the supposition that the prior claim was invalid, or in doubt whether it was valid or not, and thought best to take his chances in that respect; and not with any wish or design to defraud anybody.

Indeed the true idea of fraud, as involved in this subject, is not so much that there is fraudulent intent on the part of the subsequent purchaser in taking the conveyance, as that, to permit it to be set up and enforced, as against the prior equitable title, would operate a fraud as against that title. This is the elemental idea of an estoppel *in pais*, in its ordinary application; to which, the

principle, upon which a subsequent purchaser is charged by a notice of a prior equitable title is strikingly analogous, if not precisely identical with it.

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Court of Appeals of Kentucky.

NORRIS *vs.* DONIPHAN.

NOTE.—Since the publication of our June number we have received from Mr. Justice BULLITT a complaint of some verbal inaccuracies in the copy of his opinion, from which our report of this case was taken. We therefore subjoin the passages as corrected by him.—EDS. AM. LAW REG.

"If Congress had the power to enact this statute, it can adopt such measures as may be necessary to carry it into effect. It is probable that, in order to carry its provisions into effect, it will be necessary not only to defeat and disperse the Southern armies in the field, but to subjugate the people of the Southern States, and hold them in a condition of permanent subjection to the government of a nominal Union, to be controlled by the people of the other States, unless they also should lose their liberties in an effort to subjugate others. It seems certain that the framers of the Constitution did not mean to clothe Congress with the power thus to destroy the Government." P. 483.

"We are satisfied that if the statements of this answer are true, those principles of the common law which suspend an alien enemy's right of action during war, apply to this case, and forbid our courts from aiding the appellee to recover money which might be used to support the war against the United States." P. 488.