

## UNITED STATES BUNG MANUF'G CO. v. ARMSTRONG.

(Circuit Court, S. D. Ohio, W. D. February 29, 1888.)

**EQUITABLE SET-OFFS—INDEPENDENT DEBTS—WAIVER.**

The voluntary payment by the maker of a promissory note, with a full knowledge of all the facts, operates as an abandonment and waiver of all right to set off cross-demands or independent debts, and a bill disclosing such facts presents no case for equitable relief by way of equitable set-off.

**In Equity.** On demurrer to bill.

The United States Bung Manufacturing Company, as maker, paid David Armstrong as receiver of the Fidelity National Bank a certain promissory note, and afterwards filed their bill in equity to secure right of offset. The defendants demurred to plaintiff's bill.

*M. B. Hagans*, for complainant.

*E. W. Kittredge* and *W. B. Burnet*, for respondent.

**JACKSON, J.** The demurrer to this bill is well taken, and must be sustained. The complainant's right of offset was waived or abandoned by its payment of the note described in the bill. That payment was made voluntarily, with full knowledge of all the facts. It was made by the maker of the note,—the party legally bound to pay. Such payment does not operate as an equitable assignment of the collecting bank's rights as against the Fidelity Bank or its receiver. If the complainant had intended to rely upon its debts against the Fidelity National Bank as a set-off against its note, it should have declined payment of the note, stood suit thereon, and set up its counter-claim as a set-off. This was not done, but it paid its note voluntarily, and now invokes the aid of this court to enforce what is called its "equitable right of set-off." The facts presented by the bill do not raise any such equitable right.

It is well settled that the mere existence of cross-demands or independent debts does not create any right to an equitable set-off. There must exist a mutual credit between the parties, founded at the time upon the existence of some debt, due by the crediting party to the other. "By mutual credit," says Story, Eq. Jur. § 1435, "in the sense in which the terms are here used, we are to understand a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on and trusting to such debt as a means of discharging it." Mutual credit means something different from mutual debts. Mutual credit, such as will give rise to an equitable set-off, applies only to that class of cases where there has been mutual trust or understanding that an existing debt should be discharged by a credit given upon the ground of such debt. The bill presents no such case. It discloses nothing more than the existence of cross-demands or independent debts, which could have been set off at law, if complainant had asserted its right to do so at the proper time, and in the proper mode. Having voluntarily waived or abandoned this legal right and remedy by paying the note to avoid

being sued thereon, it presents no case for equitable relief by way of equitable set-off under the authorities.

This demurrer is accordingly sustained, and the bill is dismissed with costs.

### FAZENDE *et al.* v. CITY OF HOUSTON.<sup>1</sup>

(Circuit Court, E. D. Texas. March 1, 1888.)

#### 1. MUNICIPAL CORPORATIONS—BONDS—DIVERSION OF FUNDS—INJUNCTION.

A municipal corporation, under an ordinance authorized by its charter, issued some bonds to provide a fund for building a market-house. By the terms of the bonds the revenue of the market was to be devoted to the payment of the interest on the bonds and to form a sinking fund to redeem them. After the issuance of the bonds, the corporation obtained a new charter, authorized by which they devoted the revenue of the market to other purposes than that provided for in the ordinance authorizing the bonds. Plaintiffs, holders of some of these bonds, brought a bill in equity to compel specific performance, and asked for an injunction to prevent further diversion of the market-house revenues. *Held*, the facts being admitted, that an injunction *pendente lite*, as prayed for, should issue.

#### 2. SAME—ORDINANCES—CONSTITUTIONAL LAW—IMPAIRING OBLIGATIONS OF CONTRACTS.

A municipal corporation, under an ordinance authorized by their charter, issued some bonds to provide a fund for building a market-house. By the terms of the bonds the revenue of the market was to be devoted to the payment of the interest on the bonds, and to form a sinking fund to redeem them. *Held*, that as the ordinance was authorized by the charter, and therefore valid, it constituted a contract between the holders of the bonds and the city, and that subsequent ordinances of the city making any other disposition of the market revenue were void, and that so much of a charter granted the city after the issue of the bonds as authorized the city council to divert any of such revenue from the special fund as contracted in the ordinance under which the bonds were issued was inoperative, as impairing the obligations of a contract in violation of Const. U. S. art. 1, § 10.<sup>2</sup>

In Equity. Bill for specific performance and injunction.

The city of Houston, authorized by its charter, passed an ordinance providing for the issuance of bonds to raise a fund for building a market. Under the terms of the ordinance the revenue from the market was to be devoted to the payment of the interest on the bonds, and to constitute

<sup>1</sup> Reported by Chas. B. Stafford, Esq., of the New Orleans bar.

<sup>2</sup> By the obligation of a contract is meant the means which, at the time of its creation, the law affords for its enforcement. Where a contract is made upon the faith that taxes will be levied, legislation repealing or modifying the taxing power of a corporation so as to deprive the holder of the contract of his remedy, is unconstitutional, because impairing the obligation of a contract. *State v. Police Jury*, 4 Sup. Ct. Rep. 648.

Respecting other legislation, considered with respect to the constitutional inhibition against impairing the obligation of contracts, see *Seibert v. U. S.*, 7 Sup. Ct. Rep. 1190; *Water Co. v. Borough of Easton*, Id. 916; *Water-Works Co. v. Water-Works Co.*, Id. 405; *Fisk v. Police Jury*, 6 Sup. Ct. Rep. 331, and note; *Bridge Co. v. Railway Co.*, (Pa.) 8 Atl. Rep. 233; *State v. Jersey City*, (N. J.) Id. 123; *State v. Railroad Co.*, (N. J.) 7 Atl. Rep. 826, note; *Railroad Co. v. City of Savannah*, 80 Fed. Rep. 646; *Willis v. Miller*, 29 Fed. Rep. 233; *Gas-Light Co. v. City of Saginaw*, 23 Fed. Rep. 529, and note; *Com v. Maury*, (Va.) 1 S. E. Rep. 185; *Com. v. Weller*, Id. 102; *Com. v. Jones*, Id. 84, and note; *Bockover v. Superintendent*, (Mo.) 3 S. W. Rep. 833; *Tait's Ex'r v. Asylum*, (Va.) 4 S. E. Rep. 697.