

warrants drawn upon a treasurer to be paid out of funds not hereinbefore appropriated."

I am satisfied from these considerations that in the former decision we did not give sufficient consideration to all the clauses of this order of June 28th, and by reason thereof we were led to make an order in favor of the intervenor, to which he was not entitled, and which was entirely out of harmony with the other administration of this foreclosure. Therefore, our attention having been called to it by this petition for a rehearing, we change the order heretofore entered to another one, in favor of the respondents and against the intervenor. I am also inclined to think that possibly one or two other reasons given by the respondents are sufficient to compel the ruling we now make, but I do not care to enter into any discussion of them. As I said in the former opinion, the amount involved is so large that, if we have made a mistake, it can be corrected in the supreme court. The report of the master will be confirmed, and judgment entered against the intervenor for costs.

THAYER, J., concurring.

DE GUIRE *et al.* v. ST. JOSEPH LEAD CO.

(Circuit Court, E. D. Missouri, E. D. March 20, 1889.)

1. EJECTMENT—DEFENSES—FRAUDULENT CONVEYANCES—EXECUTION—SALE.

It is a good defense to an ejectment that plaintiff's title is derived from a conveyance to her in fraud of her grantor's creditors, one of whom afterwards obtained a judgment, and issued execution under which the land was sold to defendant's predecessor in title, such fraudulent conveyance being void by the state statutes.

2. SAME.

It is immaterial whether the execution creditor was or was not the purchaser at the sale.

3. SAME—LACHES.

Defendant may rely on his equitable title and possession, and need take no action to obtain the legal title, and lapse of time, therefore, does not affect his right to interpose the defense.

At Law. On demurrer to defense.

Ejectment by Emily and Paul W. De Guire against the St. Joseph Lead Company.

George D. Reynolds and *Samuel L. Isbell*, for plaintiffs.

Charles Nagel, for defendant.

BREWER, J. In addition to the motion heretofore decided by me,¹ there is a demurrer to one defense. The action is in ejectment. That defense is that the female plaintiff holds title by deed from her father,

¹37 Fed. Rep. 663.

made some 30 years since. That conveyance was a conveyance without consideration, and in fraud of the rights of the grantor's creditors, he being then hopelessly insolvent. Subsequently one of these creditors put his claim in judgment, caused execution to be issued and the property sold, and at the sale it was bid in by a third party, under whom the defendant claims. This sale was made over 20 years ago. The demurrer rests upon three grounds. The principal one is that whatever defense exists is purely equitable, and as against a legal title can only be asserted after judgment by a bill in equity. In the cases of *Dickerson v. Colgrove*, 100 U. S. 578, and *Kirk v. Hamilton*, 102 U. S. 68, the supreme court of the United States held that, in an action of ejectment, a law action in which the legal title prevails, a defense based upon an equitable estoppel could be sustained. The action being a possessory one, a defense based upon equitable estoppel showed that the plaintiff was not entitled to the possession, and was available in an action at law. In this case the defendant has a legal title,—a judgment against plaintiff's grantor, followed by execution, sale, and deed. The statutes of Missouri make a conveyance by a debtor in fraud of the rights of the creditors clearly and utterly void as against them. And, while there may be some doubt on the matter, I think that this defense is one which can be successfully interposed in an action of ejectment.

A second ground of demurrer is that the answer does not show that the creditor was himself the purchaser. This is immaterial. If the suit was at the instance of a then existing creditor, and that suit passed into judgment, execution, and sale, the person purchasing succeeds to all the rights that the creditor would have acquired if he had purchased.

The third ground is that whatever rights the defendant had to set aside the conveyance to plaintiff from her father, it has lost by a lapse of time, and that no affirmative relief could be granted to it in an independent suit. But the defendant is not asking any affirmative relief. It has an equitable title and possession, and may rest safely on that for all time. If I, owning land by full legal title, make a contract to sell at a price to be paid thereafter, and the purchaser enters into possession, and pays the price, although I execute no deed, and the legal title remains in me, still the purchaser can always interpose his full equitable title as a perfect defense to any action I may institute. It is not necessary that he should in the first instance have taken action to place the legal title in himself. I think the demurrer must be overruled.

WELLES v. STOUT.

(Circuit Court, N. D. Iowa. March 18, 1889.)

1. BANKS AND BANKING — NATIONAL BANKS — INSOLVENCY — ACTION AGAINST SHAREHOLDER—PLEADING.

In an action by the receiver of a national bank against a shareholder to recover an assessment ordered by the comptroller, an allegation in the petition that on a day named "the comptroller of the currency, in order to pay the liabilities of" the bank, "made an assessment upon all the said shares of the capital stock of said" bank of 100 per cent. upon its par value, "and ordered the stockholders to pay the same on or before" a day named, is sufficient to show that the requisite action was had by the comptroller, not only as to determining upon the necessity of an assessment, but also as to the enforcement thereof by suit against the delinquent stockholders.

2. SAME.

An allegation following, "that by virtue of the premises, and of the statutes in such case made and provided, the defendant became and is indebted to your petitioner in the sum of," etc., sufficiently shows that defendant had become indebted in the sum named, and also that such indebtedness still continued when the petition was filed, and is equivalent to an allegation of non-payment.

At Law. On demurrer to amended petition.

William Graham, for plaintiff.

Henderson, Hurd, Daniels & Kiesel, for defendant.

SHIRAS, J. The plaintiff is, the receiver of the Commercial National Bank of Dubuque, and in that capacity brings this action to recover an assessment of 100 per cent. upon the shares of stock of which it is averred the defendant is the owner. The petition avers the organization of the bank under the laws of the United States, its insolvency, the appointment of plaintiff as receiver by the comptroller of the currency, and the fact that the assets are insufficient to pay the indebtedness. Then follows the averment that "on the 25th day of July, A. D. 1888, the comptroller of the currency, in order to pay the liabilities of said banking association, made an assessment upon all the said shares of the capital stock of said Commercial National Bank of one hundred per cent. upon the par value of said stock, and ordered the stockholders to pay the same on or before the 25th day of August, A. D. 1888, of all of which said defendant had notice; that by virtue of the premises, and of the statutes in such case made and provided, the defendant became and is indebted to your petitioner in the sum of five thousand five hundred dollars, with interest thereon from the 25th day of August, A. D. 1888; that this action is brought under the authority and by the direction of the said comptroller of the currency of the United States." To this petition a demurrer is interposed on the grounds that it is not averred that the amount assessed against the defendant has not been paid, and that it does not appear that, prior to the commencement of the action, the comptroller had decided that an assessment upon the capital stock was necessary, nor that such assessment, if made, should be enforced by suit against the stockholders.