DUNCAN ET AL. *vs.* BISCOE ET AL. TRUSTEES R. E. BANK.

The assignees of the Real Estate Bank have no interest, general or special, in the mortgages executed by the stockholders of the Bank to secure the payment of the stock subscribed.

Such mortgages are held for the benefit of the bondholders, and to guarantee the State against loss for her bonds loaned to the bank to procure her capital.

The stock held by the stockholders is a security for their stock debt, and may be sold to satisfy such debt.

Appeal from the Chancery side of the Circuit Court of Monroe County.

THIS was a bill to foreclose a mortgage, filed by Biscoe et al. as Residuary Trustees of the Real Estate Bank against William B. Duncan, Francis Surget and John Ker in the chancery side of the Monroe circuit court, and determined at the September term 1845, before the Hon. WM. E. BUTTS, special judge. The bill set out a

stock mortgage executed by Duncan, July 22, 1837, in conformity to the charter of the bank, to secure 234 shares of stock afterwards duly awarded to him; which was duly executed, acknowledged and recorded: and one executed December 4th, 1839, of the same tenor, correcting a mistake in the description of some of the lands. The bill averred that 234 shares of stock were awarded to Duncan, and he so became a stockholder, and borrowed on the stock secured by his mortgages, $11,700 payable by certain installments nearly all which was due and unpaid: that on the 2d of April 1842, the bank by deed conveyed and assigned all her assets, including the said mortgages and the notes given for the money so borrowed, to certain trustees, to whom, under the deed, the complainants had succeeded. Surget and Ker were defendants, Duncan having subsequently conveyed to them. The bill prayed foreclosure and sale, and exhibited copies of the Mortgages, bonds, notes and deed mentioned in it.

Demurrer to bill by all the parties overruled, and decree for want of plea or answer. Defendants appealed.

NOTE—As this is a case of much importance, the arguments of the counsel, though considerably reduced, are given at greater length than usual.

W. H. RINGO AND RINGO & TRAPNALL, for appellants. The following questions present themselves for the consideration of this court:

Have the trustees or the complainants any title in the stock bonds and monies arising therefrom and the deeds of mortgage given to said bank for the purpose of securing the subscriptions of stock taken by the said Duncan in said bank?

2d, Whether the State of Arkansas has any sufficient interest in said mortgages or lands therein mentioned as to require the parties foreclosing said mortgages to make her a party to the suit?

3d, Whether or not the owners and holders of the bonds of the State of Arkansas issued to said bank are not sufficiently interested in said lands as to require, before an effectual foreclosure could be made, they should be made parties to the title?

And out of these questions others will necessarily arise for the

consideration of this court —that is, whether the State of Arkansas, in the organization of the central board under the charter was sufficiently represented as to enable said board or said bank to contract any and all interests of said State away, that she might have in the concerns of said bank; or, in other words, whether the State of Arkansas was a party contracting and selling by the said deed of assignment made by said bank to said complainants.

The decision of the first question presented depends upon the construction to be given to the 14th section of the charter, which provides "That for the guarantee of the bonds to be emitted by the State in favor of said Real Estate Bank and of the interests thereof, and for which the State pledges its faith and credit, all the bonds with the privileged mortgages executed for stock are hereby transferred to the State and the holders of the bonds, which may be issued by the State in virtue of this act." The above language is too plain to require any argument to illustrate its meaning.

If the bank is the exclusive and sole owner of the bonds and mortgages, why declare by the act of incorporation where they shall be deposited? If she had the title and exclusive right to foreclose them, and sell the lands and collect the money due or becoming due on said bonds or stock subscriptions, why declare them to be deposited in a particular place by the charter? Why could not the bank or the bank's agents provide a place for their deposit and safe keeping? If such was the case, is it not perfectly idle to require the owner of them to put them in a particular place? The bank, the owner of a thing and no authority to control it! Is not such an idea perfectly futile and absurd, and is it not equally so for the State to require a thing transferred as a security, and then leave the securities in the hands and absolute control of the persons from whom the security is required, leaving the title to the securities in the persons giving them. And if the bonds and privileged mortgages belong to the bank, or her trustees, or assignees, where is the security the State has for the bonds she has issued to the bank? And if the bank is not the owner, or her assigns under the charter, where do the present appellees get their right to foreclose them? We confess we are not able to conceive: for it is a clear and un-

disputed principle of law that the person having the title must and only can bring suit and in his, her, or their names.

And again, the Legislature, still acting upon the idea that the State is owner and has the title to the bonds and privileged mortgages invested in her, by the "act approved Dec. 19th, 1837, to increase the rate of interest on the bonds of the State issued to the Real Estate Bank" declare that when the bank shall deliver to the Governor the five per cent bonds issued to said bank under the charter, he shall issue to said bank in lieu thereof two thousand bonds of one thousand dollars each bearing any rate of interest not exceeding six per cent; but upon express proviso, that "the president and directors of said central board of said Real Estate Bank, will by special ordinance, and under the seal of the institution, enter into bond of indemnity and guaranty, in the name of and in behalf of said bank, to keep harmless the State for any increase of the rate of interest over and above the five per cent for which the stockholders of said bank have executed bonds and mortgages." Now we would ask why the Legislature require a bond of indemnity for the increase of interest, if she did not evidently consider and look upon the stock bonds and privileged mortgages as the security for the bonds issued and interest thereon except all over five per cent? The Legislature, we think, evidently considered the bonds and privileged mortgages originally given to the bank by the stockholders as belonging to and vesting in the State as a security and indemnity for the two thousand bonds of one thousand dollars each. Then considering, as we are bound to do that the Legislature intended to require the State to be fully indemnified against any risk she might run by issuing to said bank her negotiable bonds to so large an amount as two millions of dollars, we can find no other meaning for the 14th section of the act of incorporation of said Real Estate Bank than that the bonds and privileged mortgages, the moment of their execution and issuing of the bonds of the State by the Governor to said bank, became the property of the State and bondholders, and as we are bound to give such construction to acts and laws as to make them all operative if possible, the 14th section of the bank charter can have no effect and must be wholly inoperative,

unless it transfers to the State and bondholders the title to said stock bonds and privileged mortgages.

We think it very clear that the title to the said stock bonds and privileged mortgages is in the State and the bondholders. What right have the present complainants or appellees to foreclose the mortgages? The deed of the Real Estate Bank to the original fifteen trustees and assignees purports only to convey to said trustees all the property and assets of the said Real Estate Bank. Now it will not be contended for a moment that the present complainants and appellees have any control, right or interest in anything but what was the property and assets of said bank at the date of the deed of assignment, and the charter having transferred the stock bonds and privileged mortgages to the State it was beyond the power of the Bank to convey any title to them in the present complainants; and it would hardly be contended that the mere fact of their being deposited in the bank, gave the bank or the trustees or assignees any title by which she or they could sue on or foreclose them.

But say the complainants these mortgages are conditional for the payment of all monies received from said bank on account of subscriptions for stock as well as the final payment of the bonds of the State and the interest thereon, and as the said appellant Duncan, borrowed out of said bank the sum of eleven thousand seven hundred dollars at different times by virtue of the privileges guarantied under the charter as a stockholder, and has substituted his notes or obligations for the payment which are given and made payable to the bank, and which notes are now due, and as the condition of the mortgage is for the payment of all sums procured by the stockholder on account of his stock, that therefore we have a right to take those mortgages and foreclose them on the land and sell them to pay said notes disregarding all the rights or interests of the State and bondholders. We ask is there any reservation of the right or of the interest in said privileged mortgages made by the 14th sec. of the charter. Most certainly not: for it declares in express language, too plain to mistake its meaning, that "all the bonds with the privileged mortgages executed for stock are hereby transfer-

red to the State and the holders of the bonds which may be issued." Therefore we think we have clearly shown that the bank or the present complainants as her assignees or trustees have no title to or in the mortgages mentioned in the deed, and the court below for that reason should have sustained the demurrer and decreed in favor of the defendants.

In considering the second question raised by the demurrer and assignment of errors we will first refer the court to some authority on the doctrine that is so well established in equity jurisprudence. That is, that all persons who have any interest either legal or equitable in the subject matter of the suit must be made parties either as plaintiffs or defendants in the bill. In Story's Equity Pleading we find the following, "it is a general rule in equity that all persons materially interested either legally or beneficially in the subject matter of a suit, are to be made parties to it, either as plaintiffs or defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all. *Story's E. Pleading,* 74, and authorities there referred to. Now will the present complainants contend for a single moment that the State of Arkansas and the holders of the bonds of the State issued to said bank are not interested in the subject matter of this suit? We apprehend not. See *Story's Equity Pleading,* 76, 77.

Taking it for granted then that it is necessary for the State and bondholders to be made parties to the suits for the foreclosure of stock mortgages, the inquiry then is, are they sufficiently and legally represented by the present parties to this suit for the court to adjudicate their rights and secure them effectually, and at the same time to give to the purchaser, under a decree, a clear title when the debts prayed to be paid are settled or the lands stricken off? If not, undoubtedly the demurrer should have been sustained and a decree for the defendants.

The only power or authority whatever that we are enabled to find delegated to the bank over the stock bonds and mortgages, is that they shall have the privilege of substituting new mortgages for old ones on the sale of any of the shares of the bank stock by the stockholders owning them, on their petition, and retaining the bonds

and mortgages on deposit. See *Bank Charter, sec.* 31. We apprehend that no one would contend that that gave the bank any authority to sell the title and interest of the State to them. Nor could the mere fact of the Governor's appointing two directors in each local board, and one of which is to be a member of the central board of directors, convey to the bank any authority to trade, contract for, or bargain and sell for the State, so as to divest her of any of the rights she might have in the stock mortgages, when the State is neither a stockholder nor owner of any portion of the capital of said bank, and the powers of the directors are specially delegated and defined by the charter. Then, if the State was not represented by the Real Estate Bank, and the bank clothed with ample and full power to buy and sell for the State, how can it be possible that the present appellees have any right whatever to represent the interests of the State to these stock mortgages and lands therein contained? It may be urged that the State is a *cestui que trust,* and that consequently her rights are legally and fully protected and adjudicated through them. 'Tis true, the trustees are to collect the assets of the bank and with them settle off all the liabilities of the bank, but does that clothe them with power and authority to use and dispose of the rights of the State in any and all the stock mortgages?

It is true, that by the 27th section of the charter the said Real Estate Bank is authorized to have seized and sold the property mortgaged in whose hands soever the same may be found in the same manner and with the same facilities as it was seized in the hands of the mortgagor, notwithstanding any sale or change of title, by inheritance or otherwise: but how can the said bank have them seized and sold? Why only according to law; and how is according to law? By bill in chancery making all persons interested in the lands or property parties to the suit. See *Story's Eq. Pl.* 74. You must have all persons parties before the court of chancery, who will be necessary to make the determination complete and to quiet the question. 2 *Atk.* 515. *Ewd. on Parties,* 16.

PIKE & BALDWIN, contra. The appellants claim that the demurrer should have been sustained. So far as we are now advised

they raise but two questions: *First,* that that bank had no interest in the bonds and mortgages which she could assign to her trustees: and that consequently they had no such interest as will enable them to maintain this suit. And *second:* that in any event the State of Arkansas and the bondholders are necessary parties to the suit.

This is a suit brought to foreclose solely for the amount of money by Duncan borrowed from the bank. The bill asks no foreclosure for any amount due the State or the bondholders, or charged in their favor on the lands, but leaves that charge and lien, whatever it may be, untouched.

The provisions of the charter bearing upon the questions here presented are not very numerous, but significant.

The capital of the bank, originally fixed at two millions, was to be raised by the sale of the bonds for $1000 each, given by the State, payable to the Bank. The bonds the Bank was to endorse and negotiate. To secure the repayment of the principal and interest of these bonds to those by whom they should be purchased, and to guarantee and indemnify the State, the stockholders were required to execute stock bonds and mortgages, to be approved by a board of agents before the bonds should be issued. After the capital was so raised each stockholder was to be entitled to borrow from the Bank in its paper, one half of the amount of his stock, giving, as he should use this "*credit,*" notes or obligations for it, and being bound to repay it in equal installments so as to pay the whole by the 25th of October 1856, and paying interest annually in advance. *Sec.* 17.

That the moneys so borrowed, were to be loaned under, and secured by the stock mortgages, is plain from Sec. 13, which expressly provides that the mortgages shall be conditioned "for the payment of all moneys received from said bank on account of subscriptions for stock: and for the final payment of the bonds of the State and the interest thereon: and also, from Sec. 16, which provides that property already mortgaged might be received for stocks, granting stock only on the residue of its value after deducting twice the amount of the prior mortgage: which deduction was not to

be made, however, "whenever the sum to be received by the stockholder or borrower was to be employed in the extinction of said mortgages."

Sec. 14 declares that the bonds and mortgages to be after executed, "are hereby transferred to the State and the holders of the bonds to be issued by the State," for the guaranty of said bonds, and Sec. 31 provides that they should be deposited in the Bank as security for the re-imbursement of the capital and the interest on the State bonds; and by Sec. 31, power is given the Directors to release and discharge such mortgages, receiving other lands in substitution. Sec. 27 provides that mortgages for stock shall bear ten per cent. interest, if not punctually paid; evidently meaning the amount borrowed thereon from the bank; and that the bank, on failure to pay, may seize and sell the property mortgaged in whose hands soever it might be found—thus clearly giving to the bank a right of action on the mortgages for the money borrowed, and sections 28 and 29 still further show that a right of action is given to the bank.

From these provisions it seems to us to be perfectly clear that the loans made to Duncan, for which this suit is brought, were by the charter secured by the mortgages, and constituted a charge and lien upon the lands. So also the mortgages themselves expressly stipulate. Upon this point argument is entirely unnecessary.

No doubt the State bonds are also secured by the mortgages. But the State can have no right of foreclosure or action, until she has first paid some portion of the principal or interest of the bonds; because as to her the mortgages are given merely for indemnity and guaranty.

Whether the lien of the State and bondholders is paramount, or inferior and secondary to that of the bank for the money loaned, is not at all material to inquire in this case. Probably it is paramount; and even after the lands are sold for the lien of the Bank, they will still remain charged with the older lien. But that older lien is only for whatever deficiency there may be found to exist, and so far as the assets fall short of paying the bonds and interest.

Now, what is the legal effect of the provisions that the mortgages "are hereby transferred to the State and the bondholders? If that provision had not been inserted, how would the law have stood? It would have been thus. The bank would have held the mortgages as a trustee for the benefit of the State and bondholders. If its assets failed to pay the bonds, the bondholders, by law of substitution, would have become entitled to sue on the mortgages in the same manner as if they had been executed to themselves; and if the State had been compelled to pay any portion of the bonds, she could have sued on the mortgages and foreclosed by the same law. This is an elementary principle. 1 *Story Eq.* 592. *Belcher vs. Hartford Bank,* 15 *Conn.* 382. *New London Bank vs. Lee,* 11 *Conn.* 112. *Hodgson vs. Shaw,* 3 *Myl. & K.* 190. 1 *J. C. R.* 110. *Russell vs. Clark's Ex'r,* 7 *Cranch* 69. *Phelps vs. Thompson,* 2 *J. C. R.* 418.

Now, what is the effect of the provision above cited? Did it intend so to transfer the mortgages to the State and bondholders that they should take therein, the whole legal interest: and that they should be held as in law executed to them and not to the bank, or did it intend to declare the bank a trustee for them? Clearly the latter: because a right of action is expressly given to the bank upon the mortgages, which of itself determines it—because the bank had the power to release and discharge the mortgages—because they were to be deposited and remain in the bank, and because, otherwise, the State and all the bondholders would hold a joint interest in the bonds and be jointly trustees for the bank, which is clearly contrary to the actual interests of the State and bondholders—those interests being served—and to the obvious design of the charter.

We must keep in mind what this court said in *The State vs. Ashley,* 1 *Ark.* 542—that the charter is so exceedingly vague and uncertain that it is almost impossible to apply to it any thing like legal accuracy: that many of its most important clauses are contradictory and irreconcilable as well with each other, as with the general objects and spirit of the act: and that the court, in considering it, must keep in view the nature and design of the grant and

its general intention and scope. Now recollecting this, there can be no difficulty in determining the meaning and intention of the particular provisions above cited.

The right of action of the bank, being the first in order of time, is given to her expressly; and therefore it is that the mortgages stand in her name. The bank therefore took the mortgages not only to secure to her the moneys borrowed, but also as a trustee for the creditors of the bank by virtue of the bonds; and for those creditors too she holds as trustee the very moneys collected from the stockholders. It would be a glaring absurdity that the State and bondholders should be held trustees for the bank—the creditor for the debtor.

If the bank as mortgagee did not retain the legal interest, and an equitable one alone vest in the State and bondholders, the most absurd and pernicious consequences would continually have resulted. Those consequences can easily be imagined.

There can be no doubt that in either event the bank had, and its assignees have an interest in the mortgage which they can assert in equity; and therefore the only real question is, whether (admitting the lien of the State and bondholders to be paramount) a second mortgagee can bring a bill to foreclose, leaving the older mortgage unnoticed and so foreclose and sell for his own debt, leaving the property charged in the hands of the purchaser with the older debt; or must he foreclose as well for the older mortgagee as for himself.

The rule is laid down in another case to be, that all prior incumbrancers, whose right ought to be ascertained and provided for by the decree, are necessary parties to the cause. *Tuite vs. Pallas*, 1 *Hogan* 122, cited in 2 *Barb. & Har. Dig.* 107. The rights of the State and bondholders cannot be now ascertained, and therefore they are not necessary parties.

The principle is founded in inconvenience, and courts have not hesitated to depart from it, with the view, by original and subsequent arrangement, to do all that could be done for the purposes of justice, rather than hold that no justice shall subsist among persons who may have entered into contracts. *Cockburn vs. Thompson,*

16 *Ves.* 328. It is useless to bring in the prior incumbrancers, unless the amount of their incumbrances can be ascertained. If brought in they must be ascertained. *Adair vs. The New River Company,* 11 *Ves.* 443.

Indeed, the number of bondholders and the continual change of persons holding that character, would of itself obviate the necessity of making them parties under all the authorities. *Wendell vs. Van Rensselaer,* 1 *J. C. S.* 349, 350. *Wiser vs. Blackley, id.* 437. *West vs. Randall,* 2 *Mason* 190 *to* 196. *Story's Eq. Pl.* 94. *Ex'rs of Brasher vs. Van Cortlandt,* 2 *J. C. R.* 247.

Moreover no person ever need be made defendant against whom no decree can be made at the hearing. *West vs. Randall,* 2 *Mason* 192. *De Galls vs. Ward,* 3 *P. Wms.* 310, *note. Story's Eq. Pl.* 199. *Smith vs. Snow,* 3 *Madd.* 10. *Petch vs. Dalton,* 8 *Price* 12.

The primary principle in every case is to afford to the complainant the equitable relief to which he is entitled. A secondary one is, to make all interested persons parties to the proceedings. If the two conflict, the primary principle prevails. *Hallett vs. Hallett,* 2 *Paige* 18, 19. *Jay vs. Wirtz,* 1 *Wash. C. C. R.* 517. *Elmendorf vs. Taylor,* 10 *Wheat.* 152. *Story's Eq. Pl.* 95.

The rule as to prior incumbrancers, in suits for foreclosure, is, not that they are indispensable, but merely proper parties to the bill; and if not made parties, it only follows that they are not bound. Many cases hold that they are not even proper parties. *Story's Eq. Pl.* 177, *Delabere vs. Norwood,* 3 *Swans.* 144. *Shepherd vs. Gwinnett, id.* 151. *Rose vs. Page,* 2 *Sim.* 471. *Bishop of Winchester vs. Bearor,* 3 *Ves. J.* 314.

There is no joint interest here between the State and bondholders, and the trustees of the bank. The cases do not apply. *Lowe vs. Morgan,* 1 *Bro. C. C.* 168 was a case of joint interest.

A court of equity never fetters itself with its own rules so as to incapacitate itself from doing justice.

The trustees are supposed to represent the creditors. *Story's Eq. Pl.* 145, 192. *Wakeman vs. Grover,* 4 *Paige* 23.

The State is not, nor can be robbed of her security by the decree, because it leaves her lien and charge whatever it may be, untouch-

ed. The decree can, in no manner, affect the primary paramount lien of the State and bondholders.

OLDHAM, J. This was a bill filed by Biscoe and others, as Trustees of the Real Estate Bank to foreclose a mortgage executed by Duncan, to secure the amount of stock awarded to him as a stockholder of said bank. The bill seeks a sale of the mortgaged premises for the payment of $11,700 borrowed from the bank by Duncan upon the credit and security of his stock under the 17th section of the charter. The defendants below demurred to the bill upon several grounds; the demurrer was overruled and the case has been brought into this court by appeal.

It is insisted by the appellants in support of their demurrer to the bill in the court below, that the Real Estate Bank, at the time of the execution of the deed of assignment by her to the complainants as trustees, had no legal interest or title in or to the bonds and mortgages executed by the stockholders in accordance with the provisions of the charter, and that consequently the complainants acquired no such interest by virtue of the assignment as will enable them to maintain their suit for the purposes indicated in their bill. The determination of the question so presented depends entirely upon the provisions of the charter. The often contradictory provisions contained in that instrument, the vague and indefinite manner in which many of them are expressed have often been a source of much perplexity both to the bar and to the bench, when called upon to investigate questions arising and to determine rights brought into litigation under its enactments. In such case the only safe guide to a correct conclusion is a strict adherence to the rational rule of construction laid down by this court in the case of *The State vs. Ashley*, 1 *Ark. R.* 542, "that the court must keep in view the nature and design of the grant, and its general intention and scope."

If we inquire as to the object which the legislature had in view in providing for the execution of bonds and mortgages by the stockholders of the bank, we will have no difficulty in arriving at the conclusion that such bonds and mortgages were intended to fill

the requirements of the constitution by providing "such security from the individual stockholders as would guarantee the State against loss or injury," in consequence of the pledge of the public faith and credit to obtain the capital of the bank. The capital was obtained by a sale of bonds issued by the State to the bank, and the legislature, for the purpose of guarding the public interest and to secure the State against loss or injury, enacted "that all subscriptions to the capital stock of said bank shall be guaranteed and secured by mortgages and bonds, executed to said Real Estate Bank of the State of Arkansas, to be in all cases at least equal to the amount of stock subscribed, which said mortgage shall be conditioned for the payment of all moneys received from said bank, on account of subscriptions for stock, and for the final payment of the bonds of the State and the interests thereon, subject to such rules, regulations and restrictions as may be hereinafter provided, which said mortgages shall form the basis of and stand as a full security for the loan or loans and interests thereon, which the said directors are authorized to make, and designated in the first section of this act." See *Charter, sec.* 13. It was also further enacted "that for the guarantee of the bonds to be emitted by the State in favor of the Real Estate Bank and of the interests thereof, and for which the State pledges its faith and credit, all the bonds with the privileged mortgages executed for stock, are hereby transferred to the State and the holders of the bonds, which may be issued by the State in virtue of this act; and the Governor shall only emit the State bonds after it shall have been proven to him by the certificate of the president of said bank, that mortgages shall have been executed by the stockholders of said bank in conformity with and according to the true intent and meaning of this act for at least one eighth more than the bonds required." *Charter, sec.* 14.

It is manifest from these provisions of the charter of the bank, as before stated, that the main object of the legislature in requiring bonds and mortgages of the stockholders, was to fill the requirements of the constitution by affording an indemnity to the State against loss or injury in consequence of the pledge of the public faith and credit, in the form of State bonds, upon which the capital

of the bank was obtained. It is equally clear, and needs no argument to establish the proposition, that the lien of the State and bondholders upon the lands and premises mortgaged under and by virtue of the provisions of the charter just quoted, is paramount to all others, claiming under the charter. By keeping in view the general intention and scope of the grant, a careful examination of the provisions of the charter leads to the clear and manifest conclusion that the bank, in receiving subscriptions for stock, as well as bonds and mortgages from the stockholders for the security of the stock awarded to them respectively, acted solely as the agent or trustees of the State, and those who should thereafter become the purchasers and holders of the bonds emitted by the State to the bank, and in the negotiation of those bonds she acted as the agent of the stockholders. Her whole character in these transactions was strictly fiduciary. By receiving bonds and mortgages from the stockholders to secure the stock respectively awarded to them, she was securing the interests of the State and the bondholders, and in the negotiation of the State bonds emitted by the State upon the guarantee and security of the bonds and mortgages of the stockholders, she was acting in behalf of the stockholders and thereby procured the capital necessary to commence and carry on banking operations, which is usually paid in directly by the stockholders themselves. Although her corporate name was used as the obligee of the bonds and mortgages executed by the stockholders, as well as of the bonds issued by the State, yet it is evident that it was only intended to facilitate the accomplishment of the purposes intended by the charter—the interest subserved being those of the stockholders, the State and holders of the State bonds. After the bonds and mortgages were executed, the State bonds emitted and negotiated, and the capital received by the bank, her legal and beneficial interests attached in the same manner as though she had received the capital stock directly from the stockholders, without the intervention of the State by a pledge of the public faith and credit.

Having determined the capacity in which the bank acted in receiving the bonds and mortgages executed by the stockholders, and

in negotiating the bonds issued by the State as well as the original interests of the parties, and the rights and objects intended to be secured by the bonds and mortgages of the stockholders, we will next proceed to the inquiry for what purpose were those bonds and mortgages retained in the custody of the bank, and by what title did she continue to hold them? The purpose for which they were deposited and retained in the custody of the bank is declared by the 31st section of the charter, viz: "that the bonds and privileged mortgages shall be deposited in the offices of the said principal bank and branches respectively, when the said stock shall have been subscribed as security for the re-imbursement of the capital as well as the interest of the bonds granted by the State, and whenever application shall be made by a stockholder to transfer his stock and be discharged, such transfer and discharge may take place upon the new stockholder's furnishing mortgage to the satisfaction of at least a majority of the directors," &c. It is thus clearly and explicitly expressed and declared by the charter, that the bonds and mortgages were to be deposited in the principal bank and her several offices or branches as a security for the re-imbursement of the capital as well as the interests of the State bonds, and to facilitate the transfer of stock and the substitution of stockholders.

It thus appears from the charter that the bonds and mortgages of the stockholders were required in compliance with the constitution to guarantee the State against loss or injury in consequence of the pledge of the public faith and credit, to raise the funds to carry the bank into operation; that they were transferred by the charter to the State and holders of the State bonds, and were deposited in the principal bank and branches respectively as security for the re-imbursement of the capital and interests on the State bonds. No other than a fiduciary interest in, or title to the stock bonds and mortgages is conferred upon the bank by the express provisions of the charter. If she held any other interest or title in or to them, it is derived by implication from the provisions of the charter, and results as a necessary consequence from the provisions of the grant.

It is contended on the part of the appellees that the amount of

credit to which the stockholders were entitled under and by virtue of the seventeenth section of the charter was based upon the stock mortgages, and that in case of a failure of payment by a stockholder, to whom such loan may have been made, according to the provisions of that section, the bank is entitled to foreclose the mortgage and sell the mortgaged estate. Had such been the intention of the legislature, such a power and right would not have been left to mere implication, but express language would have been used. Furthermore, it would seem that the legislature would have required that the mortgages should bear upon a sufficient amount of property to cover both the bonds executed by the stockholders as well as the amount of notes and obligations given to secure the amount so loaned. But the mortgages and stock bonds were to be for the same amount which was to be in all cases at least equal to the amount of stock subscribed, and the same condition was to be annexed to each. Will it be contended that the bank can sue upon the bonds of the stockholders given under the 13th section of the charter for recovery upon a loan made to a stockholder under the 17th section? The right is equally clear as to sue upon the mortgage.

The amount of credit to which the stockholders were entitled, was not based upon the security of the stock mortgages, but upon the stock owned and held by the borrower—the amount of stock subscribed by him having already been paid into the bank for him by the State and purchasers and holders of the State bonds. His stock bond and mortgage stood as a full security to them for the re-imbursement of the capital stock for him, as well as the subsequently accruing interest, and the stock so paid in and held by the borrower formed the basis of the loan to him and security for the repayment of the amount so borrowed. It was not supposed that the stock would ever depreciate so low as not to afford ample security for one-half of its nominal amount. This security could be made available by a judgment and execution at law. A note or obligation was required by the borrower upon which suit could be brought by the bank, and upon judgment and execution obtained against him, his stock was by the 30th section of the charter

made subject to seizure and sale. The case between the stockholder and the bank as debtor and creditor stands as though the amount of stock owned by the stockholder had been originally paid into the bank by him, without the intervention of the State and a loan and negotiation of State bonds. In such case the stock would have been ample security for one-half of its nominal amount, its subsequent value being dependent upon the good or bad management of the affairs of the institution. If those who were intrusted with the management of the interests of the bank performed their duties so unskillfully and unsucessfully as to deprive her of that security by rendering the stock valueless, she cannot resort to a security to enforce payment, which is designed for another and different purpose.

Sections 16, 27, 28 and 29 of the charter are cited and relied upon as conferring upon the appellees the right sought to be enforced by this action. Section sixteen provides that property already mortgaged may be received in guarantee upon the excess remaining after twice the amount of said mortgages shall be deducted from the whole value of the property. It also provides that money may be loaned upon the security of mortgages upon such property to stockholders or others, whenever the sum so borrowed was to be employed in the extinction of such prior mortgage or mortgages.

The 27th section provides "that mortgages for stock or loans granted by virtue of this act shall bear ten per centum interest per annum after maturity if not punctually paid, and that the mortgaged property may be seized and sold," &c. As we have already seen, the mortgages for stock, with the bonds executed by stockholders were intended as a security for the reimbursement of the capital of the bank, and in case of failure to comply with their conditions by the stockholders, the mortgages are under this section to bear ten per cent interest. Mortgages by loans as spoken of by this section are mortgages authorized by the 18th section of the charter to persons not stockholders. These sections, as well as the 28th and 29th have reference to entirely distinct matters than those contended for by the appellees, and do not either expressly or by

implication in the most remote manner sustain the right claimed by the trustees and sought to be enforced by this action.

From a careful examination and consideration of the various provisions of the charter, we are of opinion that the bank possessed no other interest whatever in the stock mortgages executed by the stockholders under the thirteenth section of the charter than a fiduciary one, and the only action which she could have maintained upon them during her corporate existence would have been in her fiduciary capacity in the execution of the specific trusts conferred upon her by the charter.

If it should prove that the assets of the bank are insufficient to discharge her liabilities (and the reimbursement of the capital is made her duty by the charter, and is consequently a portion of her liabilities) it is the interest of the State as well as the holders of the bonds that the stock bonds and mortgages should be held strictly as a security for the repayment of the capital obtained upon the credit of the State, and as a guarantee to the State against loss or injury. While the claim here asserted by the trustees of the bank is wholly unsupported by the charter, either expressly or by implication, it is contrary to public policy as well as the interests of the State and the bondholders that it should be sustained. It is well calculated to incumber the property mortgaged with conflicting titles requiring future litigation to determine them, and would consequently depreciate the value of the property. Purchasers would not bid a fair and full price for property at a sale under a decree of foreclosure, when the property should be already held by a previous purchaser at a sale under prior decree upon the same mortgage. Although the title under the last decree might be the better and paramount title, yet prudent men will not risk their money in the purchase of property at a full and fair price when it is incumbered with a lawsuit. The allowance of such a claim would therefore weaken the security of the State and the bondholders, and would *pro tanto* deprive the State of that guarantee against loss and injury required by the constitution and provided by the charter of the bank. The bank held the bonds and mortgages as a mere trustee for specific purposes, she therefore had no power to transfer or dis-

pose of them except in the exercise of the powers and execution of the trusts with which she was specifically clothed. She had no power to transfer them to trustees, or to provide other and different depositories for them, than those provided by the charter and an attempt to do so was a breach of the trust and confidence reposed in her.

We are therefore of opinion that the complainants have no interests whatever, either general or special in the mortgages executed by stockholders to secure the amount of stock subscribed for by them, and that they possess no right of action whatever, upon such mortgages for the purposes designated by their bill. The decree of the circuit court sitting in chancery must therefore be reversed, and this cause be remanded with instruction to the court below to dismiss the bill for want of equity.