Phillips & Boswell, printers, Trenton.

New-Jersey Court of Errors and Appeals.

BETWEEN

JOHN YARD, jun., appellant,

and

THE PACIFIC MUTUAL INSURANCE COMPANY and JOSEPH C. POTTS, president, &c., defendants,

On appeal from decree of Chancellor.

STATE OF THE CASE.

BILL OF COMPLAINT.

To his Honor Benjamin Williamson, Chancellor of the State of New Jersey.

Humbly complaining, showeth unto your Honor your orator, John Yard, jun., of the city of Philadelphia—That the legislature of the state of New Jersey, on or about the nineteenth day of February, in the year of our Lord one thousand eight hundred and fifty-one, passed an act entitled, "An act to incorporate the Pacific Mutual Insurance Company," by the first section of which act it was enacted, "That all such persons as shall become stockholders in the capital stock herein after mentioned, their successors and assigns, are hereby made a body politic and corporate, by the name of the Pacific Mutual Insurance Company."

And by the second section of the said act it was enacted, "That the capital stock of the said company shall be two hundred and fifty thousand dollars, divided into shares of fifty dollars each, and that the whole of said capital stock shall be actually paid in before it shall be lawful for said company to commence the business of insurance."

And by the fifth section of the said act it was enacted, "That John F. Hagerman, Xenophon J. Maynard, Philemon Dickinson, and William Ingham are hereby appointed commissioners to open books for subscription to the capital stock of said company at Trenton, upon one week's notice published in all the daily papers of that city, and, as soon as two thousand shares are subscribed, the said

commissioners shall, by like notice, appoint the hour and place for holding the first election for directors."

And by the eighth section of the said act it was enacted, "That it shall and may be lawful for said company to take and hold any real estate or securities bona fide mortgaged or pledged to said company to secure the payment of any debt which may be contracted with them, and also to proceed on said mortgages or other securities for the recovery of the moneys thereby secured either at law or in equity, and to purchase on sales made under such proceedings, or otherwise to take and receive any real estate in payment or towards satisfaction of any debt previously contracted with or due to said company, and the said real estate to mortgage, sell, exchange, or otherwise dispose of; and said company may invest their capital and accumulating premiums from time to time in public stocks, bonds, and mortgages, and such others securities as the directors may approve," as by reference to said act, which your orator prays may be considered as a part of this his bill, will more fully and at large appear.

And your orator further shows unto your Honor, that the capital stock of two hundred and fifty thousand dollars, mentioned in the said second section of the said charter of incorporation, was never actually paid in; and that, in consequence of the non-payment of the said capital stock of two hundred and fifty thousand dollars, the said company never had any right to commence the business of insurance.

And your orator further shows unto your Honor, that, in lieu of the cash which the said charter required to be paid for subscriptions to the capital stock of the said company, the directors of said company, in direct violation of the provisions of the second section of the said act, and in fraud of the said act and for the purpose of evading and avoiding the salutary provisions of the said act of the legislature, took in payment of subscriptions for stock in said company the bonds and mortgages of individuals, and, in gross violation of their duty as directors in said company, agreed to receive the bonds and mortgages of individuals, instead of cash, in payment of subscriptions for stock in said company, and to consider the same as a part of their capital stock.

And your orator further showeth unto your Honor, that being entirely ignorant of the terms of the charter, and putting implicit confidence in the representations of Joseph C. Potts, president of said company, that your orator could lawfully and rightfully pay for any amount of stock which he might subscribe in the said Pa-

cific Mutual Insurance Company without paying any money, but simply by giving your orator's bond and mortgage for the amount, and it further being represented that your orator would not be called on to pay any money, and that the dividends on the stock would more than pay the interest on said bonds and mortgage, and that the business of the company would be very profitable to the stockholders, and your orator further knowing that said Joseph C. Potts was a lawyer, and that he was also president of said company, and trusting confidently to his representations, was induced to give his bonds to the said the Pacific Mutual Insurance Company, viz. one for the sum of four thousand dollars, conditioned for the payment of the sum of two thousand dollars to the said company, and one for the sum of sixteen thousand dollars, conditioned for the payment to the said company of the sum of eight thousand dollars; and also to give to the said the Pacific Mutual Insurance Company a mortgage upon a tract of land and premises, situate in the city of Trenton, county of Mercer, and state of New Jersey, to secure the payment of the said bonds, according to the conditions thereof.

And your orator further shows unto your Honor, that the said the Pacific Mutual Insurance Company, having thus obtained the possession of the said bonds and mortgage of your orator through the fraudulent misrepresentations of the said Joseph C. Potts, the president of said company, the same should be considered fraudulent and void as against your orator.

And your orator further shows unto your Honor, that though by the terms of the said bonds the same were absolute, yet by the agreement made between the said Joseph C. Potts, president, and your orator, and according to the representations made by the said Joseph C. Potts, president, to your orator, the said bonds were not to be paid until the same were required for the purpose of paying the losses which might occur by fire to houses, buildings, and property lawfully insured in said company.

And your orator further shows unto your Honor, that the capital stock of two hundred and fifty thousand dollars never having been actually paid in, the said company were never authorized to commence the business of insurance, and that all the policies or contracts of insurance made by the said company are illegal, and that the said company have no right, in justice and equity, to call upon your orator to contribute to the payment of the same, or to collect the money mentioned in his said bonds for the purpose of

appropriating the moneys that may be collected thereon to the payment of any losses or policies or contracts of insurance made by the company.

And your orator further shows unto your Honor, that the said bonds and mortgage were not given to the said company, or pledged to them *bona fide* to secure any debt contracted with them, or for any other consideration than in payment of the amount of stock which your orator had agreed to subscribe, and for which stock your orator received a certificate, signed by Joseph C. Potts, president, and countersigned by J. Fisk, treasurer, in the following words: "This is to certify, that John Yard, jun., is entitled to one hundred and sixty shares in the capital stock of the Pacific Mutual Insurance Company, transferable, personally or by attorney, on the books of the treasurer on surrender of this certificate. Witness the seal of the company, at Trenton, New Jersey, this twenty-third day of August, A. D. 1851," as by reference to said certificate, now in possession of your orator and ready to be produced, and to which your orator prays leave to refer, will more fully and at large appear; and also another similar certificate, bearing date the second day of February, A. D. 1852, for forty shares.

And your orator further shows unto your Honor, that he never subscribed for any stock in said company on the books of subscription, at the time the books of subscription were opened by the said commissioners authorized by the charter of incorporation to open the same; and he humbly insists that the said Joseph C. Potts, president, and Jonathan Fisk, treasurer, had no authority in law to issue any such certificate of stock, without a regular subscription for the same on the books of the company made by your orator.

And your orator further shows unto your Honor, that the said company, with the view and for the purpose of evading and defeating the provisions of the said act of the incorporation, which required that the capital of two hundred and fifty thousand dollars should be actually paid in, falsely and fraudulently caused entries to be made in the books of the said company, stating that they had loaned to your orator, on his bond, the sum of ten thousand dollars, and caused a certificate to your orator, signed by J. Fisk, treasurer, stating that "the Pacific Mutual Insurance Company, having loaned to John Yard, jun., on his bond, the sum of ten thousand dollars, hereby acknowledge that they have received from the obligee the following stocks, to be held as collateral security for the payment of said bonds, with permission to the said obligor to receive the dividends which may from time to time accrue thereon until the

said company shall make order to the contrary. Dated February 2d, 1852. Schedule of collaterals, sixty shares of Mercer Cemetery stock. J. Fisk, treasurer."

And your orator showeth unto your Honor, that the allegation, in the said certificate, that the said company had loaned to your orator the sum of ten thousand dollars, is wholly false and fraudulent, and only made for the purpose of deception and to enable the said company to evade the provisions of their charter of incorporation.

And your orator further shows unto your Honor, that the said pretended loan being a mere pretence and deception, the said sixty-six shares of stock in the Mercer County Cemetery, received and held by said company as collateral security for said pretended loan, rightfully belongs to your orator.

And your orator further shows unto your Honor, that the whole plan and system upon which the said capital stock of the said company was attempted to be created, and loans of the same pretended to be made, was in direct opposition to the whole policy of the act of incorporation, and was intended to evade the provisions thereof, and is fraudulent and void, and the conditions upon which alone the said company had a right to do any business having never been complied with, the said company had no right to issue any certificate of stock, or to take any collateral securities or bonds and mortgages for the same, nor to make any insurance whatever, or to make any loan to your orator or to any other person, and that said corporation never became legally organized under or in conformity to the provisions of the said act of incorporation, so as to enable the directors thereof to be chosen, or any business whatever to be done by said directors.

And your orator has been informed, and he believes that no books of subscription were ever opened by the commissioners named in said act of incorporation, and that the whole of the pretended subscription to the capital stock was a fraud upon the law and a palpable violation of the terms of the said act of incorporation, and that the said Joseph C. Potts, president of said company, had no authority to accept or receive collateral security or a bond and mortgage for a certificate of stock in said company, and that the said bonds and mortgage of your orator are illegal and void.

And your orator further shows unto your Honor, that under pretence that the whole of the capital stock of two hundred and fifty thousand dollars had been subscribed, and the money actually paid in, the directors of said company commenced the business of in-

surance, and, by the gross and culpable carelessness and negligence with which they transacted the business of the company, and by the hazardous and extraordinary risks which they took, and by their improper and illegal mode of doing business, they sustained losses, within the short period of about eighteen months, to the amount of upwards of one hundred and ninety thousand dollars, and have reduced said company to a state of insolvency.

And your orator further shows unto your Honor, that the said company, not having any money in their treasury to pay said losses, resorted to the expedient of taking the notes of some of those persons who had pretended to become subscribers to the capital stock of the said company (by giving their bonds and mortgages), and that the directors caused said notes to be sold at large and usurious discounts, and charged the said discounts to the said company.

And your orator further shows unto your Honor, that, for the purpose of obtaining money to pay the losses of said company, the directors have settled with some of their pretended stockholders, who had given their bonds and mortgages in lieu of or in exchange for certificates of stock in said company, and have accepted from them a less sum than their proportional shares of said losses.

And your orator further shows unto your Honor, that all those persons who gave their bonds and mortgages for certificates of stock in said company, or in exchange therefor, are bound to contribute ratably, in proportion to the amounts of their respective bonds and mortgages, towards the payment of the losses of said company, if said company are liable to pay such losses.

And your orator further showeth unto your Honor, that soon after the Pacific Mutual Insurance Company went into operation, an arrangement was entered into by and between the said the Pacific Mutual Insurance Company and the Trenton Mutual Life and Fire Insurance Company, that they should mutually insure each other's excesses, and in pursuance of which arrangement, the Pacific Mutual Insurance Company, having taken a risk of ten thousand dollars on goods of Wythe, Rogers & Company, and another of like amount on goods of Lewis and Company, reinsured one half of each risk in the Trenton Mutual Life and Fire Insurance Company, that the original risk of Wythe, Rogers & Company was taken by the said Pacific Mutual Insurance Company upon the first day of December, eighteen hundred and fifty-one, and that the original risk of Lewis & Company was taken by the said Pacific Mutual Insurance Company upon the twenty-fourth day of January, eighteen hundred and fifty-two, and they were afterwards reinsured

in the Trenton Mutual Life and Fire Insurance Company; and the said reinsurance is entered on the books of the Pacific Mutual Insurance Company under the date of the first day of February, in the year of our Lord one thousand eight hundred and fifty-two, but when the said reinsurance was actually made your orator is ignorant, and that the fire by which the property so reinsured was destroyed occurred on the twenty-eighth day of March, in the year of our Lord one thousand eight hundred and fifty-two.

And your orator further shows unto your Honor, that in consequence of the said arrangement and of the division of risks originally taken in large sums by the Pacific Mutual Insurance Company, and divided with the Trenton Mutual Life and Fire Insurance Company, upon a portion of which risks losses took place, the said the Trenton Mutual Life and Fire Insurance Company became indebted to the said the Pacific Mutual Insurance Company, on the tenth day of December, in the year of our Lord one thousand eight hundred and fifty-two, in the sum of eight thousand dollars.

And your orator further shows unto your Honor, that he is informed and believes that, by the by-laws of the said the Pacific Mutual Insurance Company, neither the directors or agents of the said company were authorized to effect any insurance or to take any risk for an amount larger than five thousand dollars; and that the insurance made by the said Pacific Mutual Insurance Company on the property of Wythe, Rogers & Company, to the amount of ten thousand dollars, and on the property of Lewis & Company, to the same amount, was in direct violation of the said by-laws of the company and unauthorized.

And your orator further showeth unto your Honor, that the said Pacific Mutual Insurance Company had no authority by law to enter into any agreement or arrangement with the Trenton Mutual Life and Fire Insurance Company that they should mutually insure each other's risks, and that such an agreement was a gross violation of the powers of the said company and of the duty of the directors of said company, and is in no way binding on the stockholders of the said company or upon the creditors thereof, and that all reinsurance by the Pacific Mutual Insurance Company of property insured in the Trenton Mutual Life and Fire Insurance Company, in consequence of such arrangement, are illegal and void, the consequence of such arrangement being to make the stockholders of the Pacific Mutual Insurance Company liable for risks taken by the agents and directors of another company without the

knowledge or approbation or authority of the stockholders of the said Pacific Mutual Insurance Company.

And your orator further shows unto your Honor, that he is informed and believes that at the time the said arrangement was made between the said the Pacific Mutual Insurance Company and the said the Trenton Mutual Life and Fire Insurance Company, the said last named company was insolvent, and the said insolvency known to the said Joseph C. Potts, the president of both of said companies.

And your orator further shows unto your Honor, that if your orator should be deemed liable as a stockholder to pay any part of the losses sustained by the said the Pacific Mutual Insurance Company, yet that he cannot and ought not in equity to pay any more than his ratable proportions of such losses as may have been legally incurred by said company, and that such *pro rata* proportion cannot be ascertained until the amount of the losses which will accrue to the said Pacific Mutual Insurance Company, by reason of its reinsurances in the Trenton Mutual Life and Fire Insurance Company and of the insolvency of said company, can be ascertained.

And your orator further shows unto your Honor, that if he is liable to pay any portion of the losses sustained by the said Pacific Mutual Insurance Company, that he is liable only to contribute his proportion or share with the other individuals of said company who have given bonds and mortgages for certificate of stock in said company, and that he is informed and believes that the whole amount of the losses of said company will not exceed the amount of forty per cent. on the aggregate amount of the bonds and mortgages taken of individuals by said company, and that it is not only unjust and inequitable (but a direct violation of the agreement and understanding entered into by and between your orator and the said Joseph C. Potts, president of the said company) to call upon your orator to pay the whole amount mentioned in the condition of his said bonds, and that it is the duty of the said directors of said company to ascertain the amount of said losses, and then to assess the same ratably upon such of the members of the said company as may be liable to pay the same, and to call upon said members to contribute *pro rata* to the payment of said losses.

And your orator further showeth unto your Honor, that the said company have caused an action of debt to be commenced against your orator in the Circuit Court of the county of Mercer, on one of his said bonds, for the sum of five thousand dollars, returnable to

the term of October, in the year of our Lord one thousand eight hundred and fifty-three, and have filed their declaration in the said case, and threaten and intend to proceed in the said case on said bonds, and recover the amount of money mentioned therein, unless they are restrained by the injunction of this honorable court.

And your orator further shows unto your Honor, that he has applied to the treasurer of said company, X. J. Maynard, (the president of the said company being absent from the state of New Jersey) and requested him to deliver up to him your orator's said bonds, your orator offering to deliver up to the said treasurer the said certificate of stock above mentioned, but that the said treasurer refused so to do.

And your orator well hoped that the said company would have given up his said bonds and mortgage, and have received from your orator the said certificate of stock, or that they would have desisted from prosecuting their said suit in said Mercer Circuit Court on your orator's said bond.

But now so it is, may it please your Honor, that said company, combining and confederating together with the said Joseph C. Potts, pretends that the said the whole amount of two hundred and fifty thousand dollars for the stock of said company was lawfully and *bona fide* subscribed, and the sum of two hundred and fifty thousand dollars was actually paid in, the contrary of which pretences your orator charges to be true. And sometimes the said confederates pretend that all the commissioners named in the said act of incorporation opened books of subscription for said capital stock, the contrary of which pretence your orator charges to be true. And sometimes the said company pretends that it was not necessary for all the commissioners to meet together to open the books, but that a majority of said commissioners might meet together and open the books and receive subscriptions in the absence of the other, the contrary of which pretence your orator charges to be true. And sometimes the said confederates pretend that the said commissioners received subscriptions to the said capital stock to the amount of two hundred and fifty thousand dollars, and that amount of said subscription was actually paid to the said commissioners, the contrary of which pretence your orator charges to be true.

And sometimes the said confederates pretend, that although the whole amount of two hundred and fifty thousand dollars was never subscribed to the stock of said company, and although such part of said amount as was subscribed was never paid for in cash, but was only exchanged for bonds and mortgages of individuals, yet that

such kind of subscription and payment was a sufficient compliance with their charter, and that the said company were authorized to commence the business of insurance, the contrary of which pretences your orator charges to be true.

And sometimes the said company pretend the president and directors of the said company had a right to sell or to issue certificates of stock, and to receive in exchange therefor the bonds and mortgages of individuals, and to take collateral securities for the payment of the same, the contrary of which pretence your orator charges to be true.

And sometimes the said confederates pretend that the president of the said company had a right to issue the certificate herein above set forth to your orator, and to have the same countersigned by the treasurer of the said company, and that the same is a legal and valid certificate of stock, and entitled your orator to the number of shares therein named, the contrary of which pretence your orator charges to be true.

And sometimes the said confederates admit that they had not given to your orator any consideration for his said bonds and mortgage, except the said certificate of stock; but then they pretend that the directors or president of the said company had a right to issue such certificates, and had a right to exchange them for the bonds and mortgage of your orator, the contrary of which pretence your orator charges to be true.

And sometimes the said confederates pretend that your orator was justly indebted to the said company for a debt contracted with them, and that they hold the said bonds and mortgage to secure the payment of said debt, the contrary of which pretence your orator charges to be true.

And sometimes the said confederates pretend that the taking of the bonds and mortgage of your orator in exchange for the said certificates of stock, and in lieu of the money required by the charter of said company, was not a fraud and a gross violation of the terms of the said act of incorporation and of the duty of the directors of the company, the contrary of which pretences your orator charges to be true.

And sometimes the said confederates pretend that Joseph C. Potts, esquire, the president of the said company, did not represent to your orator that he might lawfully subscribe for said two hundred shares of stock by giving his bonds and mortgage for the same and that he would not be called upon to pay any money, the contrary of which pretences your orator charges to be true.

And sometimes the said confederates pretend that the said Joseph C. Potts, president as aforesaid, did not represent that the said company had been duly organized, and the whole amount of the stock necessary to enable them to commence business been duly subscribed and paid, the contrary of which pretences your orator charges to be true.

And sometimes the said confederates pretend that said Joseph C. Potts, president as aforesaid, did not represent to your orator that the business of the company would be very profitable to the stockholders, and that your orator would never be called upon to pay any part of the amount of money mentioned in said bonds and mortgage without the company met with very extraordinary losses in their business of insurance which they had commenced, the contrary of which pretences your orator charges to be true.

And sometimes the said confederates pretend that the said company lawfully commenced the business of insurance, and that, in the prosecution of their lawful business of insurance, they have met with heavy losses, and that it is necessary for the said company to collect the amount of the said bonds and mortgage from your orator, in order to enable them to pay the amount of said losses, the contrary of which pretences your orator charges to be true.

And sometimes the said confederates pretend that it was not necessary, under their said charter of incorporation, to make a person a subscriber to the stock of the said company that he should subscribe his name to the book of subscription of said company, or pay any money at the time of said subscription, or immediately thereafter, but that the said directors had a right to consider any person a subscriber to the stock of the said company who they could induce, by any representation, to receive a certificate of stock in lieu of or in exchange for his bond and mortgage, the contrary of which pretence your orator charges to be true.

All which actings, doings, and pretences are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises. In tender consideration whereof, &c.

The bill proceeds in usual form, and the prayer of the bill is as follows:

And that the said defendants may answer the premises, and that the said defendants may be decreed to deliver up to your orator his said bonds and mortgage upon the delivery of the certificates of two hundred shares of stock delivered to your orator by the president of the said company, and that the said bonds and mortgage of your orator, so given to said company as aforesaid, may

be declared void, and that the said certificates of stock may be decreed to have been illegally and improperly issued, or, if the said bonds of your orator shall be deemed by this court a valid security for the proportional share of the losses of the said company, may be ascertained under the order and direction of this court, and the proportionate share of each stockholder ascertained, and, that for that purpose, an account of the losses of the company may be taken and ascertained under the direction of this honorable court, and the amount paid by each stockholder for his certificate of stock may be determined, and his liability ascertained, and that, in the mean time, the said company may be restrained and enjoined from further prosecuting their said action of debt upon his said bond in the Circuit Court of the county of Mercer, and that he may have such further relief as to your Honor shall seem meet, &c.

WM. HALSTED,

Solicitor and of counsel with complainant.

The answer of the Pacific Mutual Insurance Company, and of Joseph C. Potts, president thereof, to the bill of complaint of John Yard, jun., complainant.

These defendants saving and reserving to themselves all manner of benefit and advantage of exception to the many errors, inaccuracies, and insufficiencies in the complainant's said bill contained, for answer thereunto, or unto so much thereof as they are advised is material for them to answer unto, they answer and say—they admit that the legislature of New Jersey did, on or about the time mentioned in the complainant's said bill, pass an act incorporating the said "the Pacific Mutual Insurance Company," and containing, among other provisions, those set out in the complainant's said bill of complaint; but, for greater certainty, these defendants refer to said act of incorporation, when the same shall be produced in evidence; and these defendants admit the issue of the stock certificates, &c., as stated, though not on the terms and agreements set out in said bill; and these defendants, further answering, deny that the said capital stock of two hundred and fifty thousand dollars, mentioned in said second section of the charter, was never actually paid in, and that in consequence thereof the said company never

had a right to commence its business of insurance, and they deny that, in violation of the provisions of the said act, and for the purpose of evading the same, they took in payment of the said pretended subscription to said capital stock of said company the bonds of some persons, and the bonds and mortgages of others, in place of cash and in payment of subscriptions for the stock of said company, and to be considered part of the stock of said company; but these defendants respectfully submit to the court, that if they had done so, as is alleged, it would be no defence, either in equity or at law, against the payment of said bonds and mortgages by the stockholders who constituted the company aforesaid, and who were parties to said wrongful transaction, and acted in fact and in contemplation of law with a full knowledge of their respective rights, obligations, and duties.

And these defendants further answering, stating here to the court the actual facts in reference to the subscription for said stock and the investment of the amounts thereof, they aver that two thousand one hundred and sixty-five shares, upon opening the books by the commissioners pursuant to the charter, having been duly subscribed, and the company organized under the act of incorporation, and directors elected at a time and place appointed by commissioners, when Benjamin Fish, Jonathan Fish, and X. J. Maynard were appointed a finance committee, and whose duty it was, by a resolution of the board and by by-laws, to receive said capital, and to invest the same, and generally to supervise the finances of the company, and report to the executive committee and the board whenever called upon to do so, that it was generally understood by the subscribers to the stock that the said company would, agreeably to common usage, invest the capital in some safe securities until the same might be required to meet losses, and it was hoped, and indeed confidently believed, that the premiums which would come in immediately upon the commencement of business would be sufficient to meet the current losses of the company without drawing upon the capital stock; that the directors and officers of the company (who were large stockholders) embarked in the business with this confident hope and expectation; that in this view it was the manifest right and duty of such officers to invest on some safe security the capital of said company, so that the same might be productive for the general interest of all the stockholders, and such they believe to be the uniform course of other companies; that these defendants have no doubt that these general views were communicated to subscribers, and they were informed that the stock-

holders of the company would have the preference when the finance committee came to invest the funds of said company, if they would severally give to said company full and satisfactory security for the amount of moneys loaned them, and that in point of fact such moneys were generally loaned to the subscribers to the amount of their several subscriptions, and so reported by the said finance committee to the company; that this arrangement was expressly understood by the parties interested not as a deposit of securities in payment of stock, but as a loan of money, and the bonds and mortgages, or other securities given therefor, were absolute and unconditional, as for so much money loaned; that in all cases where the finance committee reported such investment, they did not require, as the said defendants are informed and believe, that the mere form of counting out the money to and from said finance committee should be gone through; that the said arrangement was not only made in good faith and within the spirit, as the defendants submit, of the charter of said company, but upon the advice of able counsel learned in the law, and it was executed with great prudence and discretion upon the part of said committee, and the capital was thus invested safely and securely, and it yet remains safe and secure to said company; that all the subscribers have promptly responded to the call of said company to pay in so much of the several amounts loaned to them as the company has required of them, except as herein after stated.

And these defendants further answering say, that by the fifth section of the act incorporating said company, they were authorized to organize the company so soon as two thousand shares of stock were subscribed, and before any payment for said stock had been made; and that as soon as said company were organized they had the right, by the said act of the incorporation, to enter into any agreement or contract (with persons desiring to borrow) for loans, although they could not insure property until the capital was paid in.

And these defendants further answering admit, that they believe it to be true that the said complainant understood, from the said Joseph C. Potts, president, or some of the directors of the company, that they did not suppose he would be called upon to pay the moneys so loaned to him by said company, except in the event of some extraordinary loss or losses, and then only his proportion, or so much thereof as might be needed; but these defendants expressly deny that such conversations were any part of said contract, or that they were any thing more than the representations of a be-

lief, upon the part of those indulging it, that this investment would be a good one, of the correctness of which belief the defendant would judge for himself; that at that time, and for some years prior thereto, insurance companies were and had been making large dividends in different sections of the country, and enjoying great general prosperity; that the officers of this company confidently anticipated success and profit, and not loss and sacrifice of capital, and doubtless so expressed themselves. Their confidence in the success of said undertaking was likewise made more strongly manifest by their conduct and acts, the said Joseph C. Potts, president, being the largest stockholder in said company, and the directors in the aggregate taking eighty-three thousand dollars, or nearly two-fifths of the entire stock; but the said defendants expressly deny that they informed or agreed with the defendant that he would or could pay for his stock by his bonds and mortgage, or that there was any understanding or agreement that the said bonds and mortgage should only be good for said complainant's proportion of the losses, or any other understanding or agreement varying or changing the legal character and force of said instruments; all the conversations referred to, as far as these defendants know and believe, were the mere expression of the expectations and hopes of these defendants, and were perfectly understood to be such by the complainant, as these defendants believe and aver; but these defendants respectfully submit to the court that no such understanding varying the obligations of the contract of said complainant, as shown by his said bonds and mortgage, would be of any avail, either at law or equity, even if such understanding did exist, but which said alleged understanding is hereby again expressly denied.

And these defendants further answering insist, that they have always claimed the right of collecting the whole amount of said bonds and mortgages, nor has it ever been denied, so far as these defendants know, until the said complainant and some others in like default with himself were about to be prosecuted, and then the same was set up by way of defence; but these defendants admit that they have heretofore claimed of the said debtors of said corporation only their proportions, respectively, of the losses of said company, and that no more would have been claimed of the complainant at the time his said bonds were prosecuted in a court of law had he paid up his proportion; but the said complainant utterly refused so to do, and set the company at defiance, repudiating his said bonds and mortgage as invalid and worthless. The said company

were thus driven to enforce their legal rights, and prosecuted said complainant on his said bonds, and not for fractions of them, as they have done others who have assumed the same position as respects the rights of the company; and these defendants further show to the court, that after the said company was organized they did a large business, and suffered within something over two years losses amounting to the sum of two hundred and seventy-two thousand and one hundred and seven dollars and fifty-nine cents, which was paid by the company, besides a large amount, to wit, about $43,000 of adjusted, unadjusted, and contested claims for losses against the company. Having paid out a large sum from the premiums and being without other funds in hand to meet just claims upon them over and above said sum paid out, they commenced applying the capital of the company to that purpose, as was their duty, and in view of the misfortunes which had befallen all the stockholders alike; and to relieve from the inconvenience and pressure incident to calling in the whole amount of their said loans at once, as in law and equity they had a right to do, they determined to call upon all of said borrowers to pay in the amount of said loans, or so much as might be necessary, in instalments of ten per cent. each, as the wants of said company should require; that pursuant to this policy, four instalments, of ten per cent. each, have already been assessed by the board or called for on said bonds, and paid in upon call of the company, except as herein after stated, the said complainant and two others only having refused to pay any part of their said indebtedness; that he and six others are the only persons out of sixty subscribing stockholders whose bonds are held by the company who have refused to pay the forty per cent.; that suits at law have been commenced in four of these cases, and the remaining three it is hoped and believed will be settled and paid without suits by the company; that the instalments have been paid promptly upon two hundred and sixteen thousand dollars, and no director of said company is a dollar in arrears, although holding in the aggregate, as before said, eighty-three thousand dollars of the stock originally, and at present holding one hundred and four thousand six hundred dollars of it; and the defendants submit to the court that the attempt upon the part of the complainant to avoid the payment of his said bonds, &c., is dishonest and fraudulent, as against the company, the other stockholders, and their creditors; that the company demanded of the said defendant no more of the amount due than of every other debtor of the company, and that the prosecution of his bonds for the whole amount was forced upon

the company by his own neglect and refusal aforesaid, and now the said company (without meaning to compromit in the slightest degree or vary their legal rights, but solely to a peaceful and speedy settlement of the question for the interest of all the parties) are willing and do hereby offer to receive from said defendant the amount of the instalments unpaid by him, with interest thereupon, together with the costs at law and in equity, and the plaintiff in the action at law to discontinue said suit, or to enter judgment thereon, said bonds to stand security for such amounts as the company may hereafter require from said debtor, as to the Chancellor may seem most agreeable to equity and good conscience.

And these defendants further answering say, that even if the company could set up a technical defence against the payment of their fair losses, it would be against honesty and good conscience and they are not bound so to do, nor can the said defendant avail himself of any such defence through them or on their behalf; and these defendants in further answering deny that the said complainant has any right to call for any account in this court, as against said company, by reason of his liability as a debtor, merely for the amount of his said bonds and mortgage, and that he is estopped by his own acts from questioning the same; that the said company is not insolvent, that their entire losses cover about one half of their capital stock only, and that said defendant, as a stockholder, has never applied for a statement of the account and condition of said company, and that in point of fact the whole of the books and accounts of the said company have been open to his inspection, and to the inspection of every stockholder who chose to apply, to examine the same; that the said defendant, without any such application or examination, has wholly neglected and refused, when called upon, to pay his said bonds, or any part thereof.

And these defendants further answering say, that if it shall so happen that the said complainant shall pay up a greater amount upon his said bond than is his proportion, as compared with others, it will be the result of his own default and his unlawful and dishonest denial of all liability, and he will be entitled after the settlement of losses and closing up the business of the company to a return, as one of the stockholders, of an amount proportioned to his payments; that there are now outstanding admitted and adjusted losses against said company amounting to about thirteen thousand dollars, of unadjusted or estimated losses about five thousand dollars, and of contested losses about twenty-five thousand dollars; that the conduct of the complainant in this cause, and the

three others against whom suits have been brought, and by whom likewise bills of a like nature have been filed in this court, in resisting the payment of the amount due from them, respectively, is the sole barrier to the prompt payment of said adjusted losses and the speedy settlement of the affairs of said company; that every debtor of said company, so far as these defendants know or believe, are ready and willing to pay as soon as these defendants pay up.

And these defendants further answering say, that the said complainant authorized a subscription of eight thousand dollars to be made in his name originally to the stock of said company, and that some months afterwards, at his earnest request and solicitation, he procured two thousand dollars additional of the said stock, and that certificates therefor were issued to him, as stated in his bill of complaint, and which said certificates were rightfully issued by said company; but it is admitted that the complainant has offered to give up said certificates to the said company in exchange for his said bonds and securities deposited as collateral thereto, which the company have declined.

And these defendants further answering admit, that for want of experience in the business of insurance, though not from gross negligence and carelessness, they (acting then according to their best judgment) took risks and hazards which a company with greater knowledge and more experience would have declined, and that they suffered very heavy losses, as alleged in the bill, and that certain directors of the company, with a view to meeting instant and unexpected demands, did deposit their own paper, at different times and in the aggregate to a large amount, to raise money thereon for the company, though not at a ruinous discount, as alleged, but at the rate generally of six per cent., a small portion thereof and for a short time, when the company was much pressed, at the rate of twelve per cent.; but how the said complainant, who with others (neglecting to pay their just debts) made this conduct upon the part of the directors necessary to protect the credit and character of the company, can complain of their incurring such personal responsibilities, is to these defendants unknown; that they did no more than they had a right to do, and as is common and usual under like circumstances.

And these defendants further answering, expressly deny that they have settled with some of the stockholders who have given their bonds and mortgages, and have accepted a less sum than their proportionate share of the said losses, though if they had done so it

would not affect, as these defendants submit, the liability of the said complainant upon his said bonds.

And these defendants further answering admit, that there was an arrangement between said company and the Trenton Mutual Life and Fire Insurance Company to insure each other's excesses, and that Joseph C. Potts was president and interested in both companies, and such insurances were effected as in said bill is alleged, and the losses paid by the said Pacific Mutual Insurance Company, and that the said the Trenton Mutual Life and Fire Insurance Company owes the Pacific nearly the amount as in said bill is stated, and that the only effect of declaring such transactions void would be to discharge the said Trenton Mutual, &c., and encumber the said Pacific Mutual, &c., to the same extent further than it is now encumbered; that the complainant, at most, has no ground of complaint therefor, and that in fact such modes of insuring excesses are a common and familiar mode of doing business in prudent and well regulated companies; and these defendants deny the existence of any such by-law as is referred to in the bill, or that said insurances therein referred to were taken in violation of any such by-law, or not binding on the company, though were this all true, as alleged, it would be no defence, as these defendants submit, against a suit upon the bonds of said complainant; and these defendants deny that at the time of the arrangement between the two companies for reinsurance, as aforesaid, that the said Mutual Insurance, &c., was insolvent, and known to the said Joseph C. Potts to be so.

And these defendants further admit, that they have ceased to do business from about the first of January, A. D. 1853, and are engaged in winding up their affairs and the payments of their losses, the said business being placed principally in the hands of X. J. Maynard, esq., one of said stockholders and directors of said company; but that the money already raised is not sufficient to pay the amount of the just debts of said company, and if it were sufficient the said complainant would have no defence, since he is bound to pay his whole debts, but in fact has not paid even his just proportion; that the said directors, being by far the heaviest stockholders, are the more deeply interested than any other person or persons in reducing the amount of said debts to the lowest possible sum, but the admitted balance against them they are constrained to say is as is before herein stated; and the said defendants expressly deny the charge that they, having violated their duty, and being personally responsible, are endeavoring to collect large sums to pay off debts,

that they may release themselves from personal responsibility; and these defendants deny that the business of said company has been conducted in violation of law or of the by-laws of said company; but were it so, as alleged in the bill, it would not in equity or at law relieve said complainant from the payment of his said debts.

And these defendants further admit, that they have commenced a suit in the Mercer circuit upon said bonds of the complainant, as alleged; and they answer further, that books of subscription were opened at Trenton, upon due notice according to law, by Messrs. X. J. Maynard, Philemon Dickinson, and William A. Ingham, commissioners, &c., John F. Hagerman, one of the commissioners, being absent, and subscriptions received from time to time, until the stock was taken, as follows:

Joseph C. Potts,	$15,650	Samuel S. Stryker,	$1,600
John Whittaker,	12,500	O. D. Wilkinson,	3,000
B. W. Titus,	11,500	L. R. Titus,	5,000
John McKelway,	5,000	Philip G. Reading,	1,000
G. A. Perdicaris,	12,250	Samuel R. Hamilton,	3,000
John A. Weart,	14,000	John A. Hutchinson,	3,000
James Hoy, jun.,	8,000	Henry Parker,	4,000
Benjamin Fish,	4,000	Charles Burroughs,	1,000
X. J. Maynard,	13,500	Anna Maria Lloyd,	2,000
Joseph G. Brearley,	5,000	John Sager,	1,250
Samuel Evans,	10,000	R. H. Shreve,	1,800
Joseph H. Blackfan,	1,250	Clemens Jones,	2,000
Jonathan S. Fish,	2,500	William P. Sherman,	2,000
Charles Scott,	2,500	Charles G. McChesney,	5,000
Jonathan Fisk,	2,500	William H. Potts,	2,000
William Grant,	2,000	Charles B. Smith,	2,000
David H. Mount,	4,000	Smith & Murphy,	10,000
Philip P. Dunn,	1,250	John B. Anderson,	1,000
Isaac Dunn,	2,500	Benjamin S. Disbrow,	1,000
Richard W. Furman,	700	Henry B. Bechtel,	1,000
Joseph Hannum,	2,500	Mahlon Williamson,	4,000
Henry P. Welling,	5,000	Reuben P. Davis.	10,000
Welling & Titus,	6,000	William A. Burk,	1,000
David Shuster,	2,000	Enoch Hinckley,	1,000
James H. Clark,	2,000	Ernestus Schenck,	10,000
Joseph Cunningham,	1,500	Richard B. Brinton,	1,000
John S. Noble,	2,000	Nathaniel L. McCready,	1,250
John Yard, jun.,	8,000	Lorenzo Burge,	1,500
John L. Taylor,	1,000	E. Russell Hinckley,	1,500
William Taylor, jun.,	500	Andrew Melick,	5,000

And the said subscriptions were paid as herein before stated, and that the amounts were loaned to the subscribers upon bond and mortgage, or other safe security, as before stated, and that the said company were, as they believed, authorized, by the charter and resolutions of said board of directors, to make such arrangements; that the defendants make profert in court of a printed copy of their said by-laws, which they pray may be made part of this their answer; that the company did commence the business of insurance in the latter part of August, A. D. 1851, at which time the capital had been subscribed, paid in, and invested, as above stated; that no one of said subscribers has been relieved without the payment in full of his share of all the losses, and that all have been called upon equally; that the said Joseph C. Potts and no other director of said company, so far as these defendants know or believe, have bought up or are interested directly, or indirectly, in any claim against the company; that one claim was bought up or compromised by said company, but it was for and in behalf of the company, and not in behalf of any person or persons connected therewith; that while the said directors and all the other subscribers to the stock of said company, except as herein after stated, have paid forty per cent. upon the amount of their said bonds, the said complainant has paid nothing—he with six others, whose aggregate subscriptions amounted to thirty-four thousand dollars only, are the only defaulters, and three of these, it is believed, will settle without suit.

W. L. DAYTON,

Solicitor and of counsel with defendants.

Replication in usual form.

FINAL DECREE.

This case coming on to be heard at the last regular term of this court, on motion to dissolve the injunction, &c., held at the state house in the city of Trenton before the Chancellor, in the presence of William Halsted and Mercer Beasley, esquires, counsel for the complainants, and William L. Dayton, of counsel for the defendant, upon the pleadings filed, and the arguments being heard and duly considered, and the Chancellor having taken time to decide thereon, and now, on this eighteenth day of October, A. D. eighteen hundred and fifty-four, it appearing to the Chancellor that the complainant is not entitled to the relief sought and prayed for in the said bill of complaint—It is ordered, adjudged, and decreed that the complainant's said bill be and the same is hereby dismissed, and the injunction dissolved, with costs, on motion of William L. Dayton, solicitor of defendant.

B. WILLIAMSON, *C.*

PETITION OF APPEAL.

COURT OF ERRORS AND APPEALS.

BETWEEN

JOHN YARD, jun., appellant,

and

THE PACIFIC MUTUAL INSURANCE COMPANY, defendants,

On bill.

Petition of appeal.

To the Honorable the Court of Errors and Appeals in the last resort in all causes of law.

The humble petition of John Yard, jun., the appellant in the above stated cause, respectfully shows, that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery, by his Honor Benjamin Williamson, Chancellor of New Jersey, bearing date the eighteenth day of October, in the year of our

Lord one thousand eight hundred and fifty-four, wherein the said John Yard, jun., was complainant, and the Pacific Mutual Insurance Company were defendants, in this respect, to wit, that the said decree adjudges that the said bill of complaint of the said complainant be dismissed, with costs. And your petitioner humbly appeals from that part of the said decree of the said Chancellor which decrees as aforesaid, upon the ground that the same is erroneous and that the said bill of complaint should not have been dismissed with costs. Your petitioner therefore prays that the said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside, and for nothing holden, and that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

Dated November 25, 1854.

WM. HALSTED,

Solicitor and of counsel with appellant.

OPINION OF CHANCELLOR.

The Pacific Mutual Insurance Company hold two bonds of the complainant, one conditioned for the payment of four thousand dollars, and the other conditioned for the payment of two thousand dollars: they are both secured by mortgage. After the day mentioned for payment, the company commenced an action at law upon the bonds in the Circuit Court of the county of Mercer. Upon filing the bill of complaint, one of the injunction masters, upon application to him, allowed an injunction to issue restraining the further prosecution of that suit. The defendants have answered the bill, and now move to dissolve the injunction.

The first allegation in the bill, and one which is made a distinct ground upon which the complainant claims the protection of the court, is the following: By the second section of the act incorporating this company, it is enacted, "That the capital stock of said company shall be two hundred and fifty thousand dollars, divided into shares of fifty dollars each, and that the whole of said capital stock shall be actually paid in before it shall be lawful for said company to commence the business of insurance." It is further enacted, by the tenth section of the act, that the company may invest

their capital and accumulating premiums, from time to time, in public stocks, bonds, and mortgages, and such other securities as the directors may approve. By another section of the act, four individuals are named as commissioners to open books for the subscription of the capital stock, and are authorized, as soon as two thousand shares are subscribed, to appoint an hour and place for holding the first election for directors. After setting out these portions of the act, the bill states that the capital stock was never actually paid in, and that, therefore, the company had no right to commence the business of insurance; that in lieu of the cash which the said charter required to be paid for subscriptions to the capital stock of the said company, the directors of the said company, in direct violation of the provisions of the second section of the said act, and in fraud of the said act, for the purpose of evading and avoiding the provisions of the said act, took in payment of subscriptions for stock in said company the bonds and mortgages of individuals, and, in gross violation of their duty as directors, agreed to receive the bonds and mortgages of individuals, instead of cash, in payment of such subscriptions for stock, and to consider the same as part of their capital stock; that the complainant, relying upon the representations of Joseph C. Potts, president of the company, that he, the complainant, could lawfully and rightfully pay for any amount of stock which he might subscribe for without paying any money, but simply by giving his bond and mortgage for the amount; and upon the further representation that he, the complainant, would not be called on to pay any money, and that the dividends on the stock would more than pay the interest on his bonds and mortgage, and that the business of the company would be very profitable, was induced to give his said two bonds and the mortgage to the company. The bill further alleges, on this part of the case, that it was agreed, between the complainant and Joseph C. Potts, president, that the bonds were not to be paid until the same were required for the purpose of paying the losses which might occur by fire to houses, buildings, and property lawfully insured. It is then alleged that, the capital stock of $250,000 never having been actually paid in, the company was never authorized to commence the business of insuring, and that all the policies and contracts of insurance made by the company are illegal, and that therefore the company has no right to the bonds of the complainant for the purpose of paying any losses on such policies or contracts. The bill then alleges that the bonds were given for no other consideration than in payment of the amount of stock which the

complainant had agreed to subscribe, and for which stock he received a certificate of the president, and countersigned by the treasurer. The bill alleges that the complainant never subscribed for any stock on the books of the company at the time the books were opened for the purpose by the commissioners, and insists that the president and treasurer had no right to issue any certificate of stock, except for such as was regularly subscribed for before the commissioners. The bill concludes this part of the case by alleging that the complainant has been informed, and believes, that no books of subscription were ever opened by the commissioners named in the act, and that the whole of the pretended subscription was a fraud upon the law, and that Joseph C. Potts, president, had no authority to accept a bond and mortgage for the stock of the company, and that therefore the bonds and mortgage are void.

These statements of the bill present to us *one* feature of the complainant's case, and may be disposed of as a distinct ground upon which the complainant relies for equitable relief.

Admit it to be true that the capital stock of $250,000 was not *bona fide* paid in, and that the company did commence the business of insurance in violation of the express provision of the charter, ought this court to interfere with the suits brought upon these bonds in a court of law for the purpose of aiding the complainants to avoid their payment?

In the first place, the question is a legal one, and the complainant may avail himself of it as far as it is a defence in the suit at law. But, in the second place, if it is a *legal* defence, it is not one which a court of equity will aid a party in making. The bonds were given, in the year 1851, in payment for the stock of the company, and the complainant received his certificate of stock. Upon these bonds, as a portion of their capital, the company embarked in business. The complainant stood ready to receive the gains of the speculation. He has been disappointed; and now, when called upon to pay his bonds in order to enable the company to meet their losses, he sets up that the company insured upon the faith of his bonds, when they should have compelled him to pay the money, instead of receiving his obligations. Now, if it is true that he is not legally liable upon these bonds, upon the ground that it is against public policy to permit the company to enforce a bond given in violation of law, the complainant may have the right, which this court cannot deny him, to *defend* himself at law and in equity upon this ground, and yet not be entitled, as a complainant in this court, to be relieved against their payment. A defend-

ant may have a good defence, of which, as a defendant, he may have the benefit, but of which, as a complainant, he could not avail himself, except upon such equitable terms as the court might impose. A complainant who invokes the equitable powers of this court will be compelled to do equity before he obtains its aid. In the case of Green *v.* Seymour, 3 *Sand. Ch. R.* 285, a case relied upon with much confidence by the complainant's counsel, the court decided that a corporation cannot enforce a mortgage which it has obtained by a transfer taken contrary to the express provision of its charter, and that the mortgagor may avail himself of such illegality, and thereby show that the corporation has no valid title to the mortgage. In that case the defendant, being brought into court, had a right to make the defence, which the court could not refuse him. Had he been the complainant, seeking the equitable powers of the court to relieve him, the court might have controlled his case without regard to strict law. The principle is a familiar one. Usury is a good defence against the foreclosure of a mortgage; but if the mortgagee commenced suit upon the bond and mortgage in a court of law, a court of equity will not remove the case from another jurisdiction to aid a party in such a defence. It would not relieve a complainant in such a case from the usury, without compelling him to do equity by paying the amount actually due, discounting the sum usuriously taken. It appears to me that, under the circumstances of this case, the court ought not to interfere with the proceedings at law to aid the complainant in the legal defence (if it be one) which he seeks to set up against the payment of his bonds; or, in other words, the court ought not, upon such an equity, to change the forum of litigation which the adversary has selected.

But is the defence a good one, either at law or equity?

The charter declares that the capital stock shall be actually paid in before it shall be lawful for the said company to commence the business of insurance, and the company is authorized to invest its capital in public stocks, bonds, and mortgages, and such other securities as the directors may approve. The object the legislature had in view was to have a *bona fide* capital of $250,000 provided, and safely secured, for the benefit of persons who should become insured. If the company had had the $250,000 paid in, in specie, and had turned around immediately and invested it, it is admitted that the transaction would have been in compliance with the charter, and that the company might have proceeded at once to the business of insurance. If, then, the capital stock of $250,000 was

subscribed, and the directors, instead of going through the formality of receiving the money, and then paying it back and taking securities, took the securities without this ceremony, were the provisions of the charter violated, and are all these securities so taken void? It appears that the whole $250,000 capital was securely invested; that the subscription to the stock was made in good faith; that the company went on and extensively insured upon the faith of this capital; should the individuals who gave their obligations to constitute this capital be permitted to repudiate them? In my judgment the complainant cannot be relieved from the payment of his bonds, on this ground, in a court of equity.

But the complainant alleges actual fraud in the procuring of his bonds and mortgage.

First. That Joseph C. Potts, the president of the company, represented to him that he might lawfully subscribe for the stock, and pay for it in his bonds. This was a mere matter of opinion; it was the judgment of Mr. Potts upon the law. The complainant had the charter before him. There was no misrepresentation of facts made to the complainant.

Second. That Mr. Potts represented that the complainant would not be called upon to pay any money, and that the dividends on the stock would more than pay the interest on the bonds, and that the business of the company would be very profitable. The answer admits, in substance, that these representations were made to the complainant, but denies that they were made fraudulently. Mr. Potts himself evinced his confidence in his assertions by taking upwards of $15,000 of the stock of the company. This is not such a misrepresentation as will justify the interposition of a court of equity. (*Story's Eq.* § 191.) If the company, or Mr. Potts, as their lawful agent, had entered into a parol agreement with the complainant that the dividends of the stock should meet the interest on the bonds, and that his bonds should be paid out of the profits of the business, the obligor could not avail himself of such a contract either in this court or a court of law. A valid instrument cannot thus be destroyed by parol evidence; parol evidence for such a purpose would have been inadmissible.

Every allegation of actual fraud charged in the bill is negatived by the answer.

There is one other ground upon which the complainant asks the interfersnce and protection of the court. The whole capital stock of $250,000 is secured by the bonds and mortgages of different individuals. The company having met with heavy losses, it became

necessary to make an equitable assessment upon the respective amounts due from these debtors, in order to enable the company to meet its liabilities. Four assessments, of ten per cent. each, have been made, and out of sixty subscribing stockholders only six, including in this number the complainant, have refused to make payment. The company, on account of the disasters they have met with, have ceased doing business. They are unable to tell what amount will be required upon the bonds and mortgages they held to meet their liabilities. The complainant asks, first, that an account may be taken in this court of all the concerns of the company, and, as he is liable only to pay his proportion of any losses, that the suit at law may be sustained until such accounts are taken and such proportion ascertained. But why should the defendants be compelled to settle their accounts in this court? It would only embarrass the company, and be a useless expense. One stockholder in a company, because he has an unsettled account with them, or any other matter of dispute, has no right to bring a company into this court to settle all their accounts as a company.

But, second, the complainant insists that all the company are entitled to receive of him is the amount of four instalments of ten per cent., being the same amount required of the other bondholders. At law, the company may enforce the payment of the whole amount due upon the bonds, while, it is true, in equity they are entitled to call for no more than the like assessment they have made upon the other stockholders. When the complainant does equity the court will protect him. Let him pay up the instalments already assessed, and the costs of the suit at law, and this court will protect him against any assessment not levied upon other stockholders.

The company demanded of him nothing more than his equal assessment. They offered, and are still willing to take from him his fair proportion. They ask nothing more. He compelled them to sue on the bonds. He must place himself right in court before I will interfere on his behalf.

The injunction must be dismissed with costs.

POINTS FOR APPELLEES.

I. That the respondents, the Pacific Mutual Insurance Company, acquired no legal or equitable title to the mortgage of the appellant, the act by which it was obtained being illegal and against public policy.

II. Neither the treasurer nor the executive committee were authorized to take a bond and mortgage from the appellant.

III. The capital stock of the company was never legally subscribed for and paid *in cash* according to the requirements of their charter.

IV. The books of subscription were never lawfully opened or the stock subscribed, as the whole of the commissioners did not attend or take part in the opening of the books or taking or receiving the subscriptions for stock.