BOWDEN v. MORRIS et al.

Case No. 1,715.
{1 Hughes, 378.}[1]

Circuit Court, E. D. Virginia. July and September, 1876.

BANKS AND BANKING—NATIONAL BANKS—LIABILITY OF STOCKHOLDERS—ACTION FOR CONTRIBUTION—PROOF OF INSOLVENCY—NEW TRIAL—FAILURE OF PROOF—RELIANCE ON OBITER DICTA.

1. In the trial of a suit at law, brought by the receiver of a national bank against it's stockholders, for a contribution of a hundred per cent, to meet the liabilities of the bank, under section 5151 of the Revised Statutes of

the United States, no evidence was presented to show that the hank was insolvent, or that it was so to the extent of a hundred per cent, of its capital stock; but the plaintiff, as to such liability, produced only a letter of the comptroller of the currency to the receiver, alleging that he had "determined that, in order to discharge the legal debts and liabilities of the bank, it would be necessary to enforce and collect the whole amount of the personal liability of the individual stockholders." Held, that the plaintiff was not entitled to recover, as no proof, established by legal evidence, had been presented at the trial, of the fact that the bank was insolvent, and insolvent to the extent of one hundred per cent, of its capital.

2. On motion afterwards for a new trial, based on the ground that the plaintiff's attorney had relied upon the language used by the learned justice of the supreme court of the United States, in his decision in the case of Kennedy v. Gibson, 8 "Wall. [75 U. S.] 498, held, that this was a sufficient ground for awarding new trial.

These were actions of assumpsit [by George E. Bowden, receiver of the First National Bank of Norfolk, against "W. H. Morris and others, shareholders thereof, for contribution. There was judgment for defendants, but a new trial was thereafter granted. The cases] were heard together, the facts of all being the same. Plea of non-assumpsit. By stipulation between counsel a jury is waived, and the issues of fact, as well as law, are submitted to the court.

L. L. Lewis, U. S. Atty., for plaintiff. Richard H. Walke, W. H. C. Ellis, and Harmanson & Heath, for defendants.

HUGHES, District Judge. These suits are founded upon section 5151 of the "Revised Statutes of the United States, which provides that: "The shareholders of every banking association shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested insuch shares," etc.

At the trial of these causes, the only evidence presented by counsel for the plaintiff bearing on the point on which the cases turn, are: 1st, the comptroller's certificate of the organization of the First National Bank of Norfolk, with a capital stock of a hundred thousand $s, dated the 23d of February, 1864. 2d. A list of the subscribers to the capital stock to that amount, among whom are the defendants in these suits, for the respective numbers of shares set forth in the declarations. 3d. A certificate of protest showing that the bank failed and suspended payments on the 28th of May, 1874. 4th. The comptroller's certificate, dated June 3d, 1874, of the appointment of the plaintiff as receiver of the bank, with power to act as such under the general banking law. 5th. Printed copies of the demand of the plaintiff upon the defendants for the amounts sued for, sent through the mail. 6th. The following letter from the comptroller to the receiver:

"Treasury Department, Office of Comptroller of Currency, Washington, August 13th, 1875. Sir: Having determined that in order to discharge the legal debts and liabilities of the First National Bank of Norfolk, it will be necessary to enforce and collect the whole amount of the personal liability of the individual stockholders owning stock at the date

of the suspension of said bank, so far as the same can be done by legal proceedings, you are directed at once to institute such legal proceedings in the proper court, as may be necessary to enforce against each and every shareholder of said bank owning stock or any interest therein at the time said bank suspended, his or her personal liability as such stockholder, under the provisions of section 5151 of the Revised Statutes of the United States, and this order must be held to extend to all cases save those where, because of bankruptcy or apparent insolvency, such legal proceedings would be of no avail. Very respectfully, John Jay Knox, Comptroller of the Currency.

"George E. Bowden, Esq., Receiver First National Bank, Norfolk, Va."

Except this letter, and the certificate of the protest of a single ten $ note of the bank, made on the 28th of May, 1873, there is no evidence in the cause tending to show that the bank is liable for contracts, debts. or engagements of any sort, or to any amount beyond its assets.

In order to establish the liability of these defendants, it must appear from the evidence—1st, that the receiver is authorized to bring these suits; and 2d, that the bank owes "contracts, debts, and engagements" beyond its assets, requiring the contributions sued for from these shareholders. Of the authority of the receiver to sue, and to sue for the amounts for which these suits are brought, the certificate and the letter of the comptroller are sufficient proof. The supreme court of the United States has so decided in the case of Kennedy v. Gibson, 8 "Wall. {75 U. S.} 498. At page 505, Justice Swayne says," It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholder is sought to be enforced, and must precede the institution of suifby the receiver. The fact must be distinctly averred in all such cases, and if

put in issue must be proved." See, also, Cadle v. Baker, 20 Wall. [87 U. S.] 650, to the same effect. Of course, this decision is the law of the present case; and accordingly I am authorized to hold that the comptroller's certificate of Juno 3d, 1874, is sufficient proof that the plaintiff is the receiver of the bank, and that his letter, dated 13th of August, 1875, is conclusive proof that the receiver had authority to sue in these cases. No stockholder can dispute that authority, and none of these defendants do dispute it. Whether to sue, when to sue, and for how much to sue, are matters for the exclusive determination of the comptroller, who directs the receivers according to his determination, and whose determination can be controverted or resisted by no stockholder of the insolvent bank.

But the United States attorney, who is counsel for the plaintiff, assuming that the comptroller's letter of August 13th, 1875, was proof, not only of the receiver's authority to sue, but of the fact that the bank owed "contracts, debts, and engagements" a hundred per cent, over and above its assets, and that the defendants were liable for such contracts, debts, and engagements to the amount of a hundred per cent, on the par value of their shares, presented no evidence whatever (unless this letter of the comptroller, not sworn to, be deemed evidence) of the fact that the bank owed debts of any sort, to any amount, for which the shareholders were liable, under section 5151 of the Revised Statutes, insisting that the decision in Kennedy v. Gibson made the comptroller's letter of August 13th, 1875, conclusive proof of that fact, which the defendant stockholders could not controvert.

I cannot possibly assent to such a construction of that decision. That case turned wholly and exclusively upon the authority of persons and officers connected with the subject-matter, and not at all upon any question of evidence affecting the merits of the controversy. The principal question in thecase was, whether the receiver could sue before being directed to do so by the comptroller, and it was decided that he could not, and that he should allege in his bill or declaration that instructions to sue had been given. Another point decided was, that creditors of the insolvent bank cannot sue its shareholders for contribution under section 5151, and that the receiver alone can sue. The remaining point decided was, that although it was made by law the duty of the United States attorney to bring such suits, yet the receiver, by approval of the treasury department, might retain other counsel to bring and conduct them. No question but one of authority to sue was raised in the case, and, of course, no other point was decided. What value thecomptroller's instruction to the receiver possessed as evidence of the liability of the shareholders to contribute to the debts of the bank was not a point in the case, and, of course, was not decided. It is true that some of the expressions of the learned justice who delivered the opinion of the court seem to hold that the comptroller's instructions to the receiver to sue, and for how much to sue, are sufficient proof at the trial of the insolvency, or of the extent of the insolvency, of the bank over and above its assets, but even if those expres-

sions were intended to bear such a construction (which I do not think they were), they are but obiter dicta, and, as such, canhave no authority in the decision of the questions necessary to be decided in these causes. Moreover, this dictum was predicated only of suits in equity brought by receivers of national banks. A court of equity may very well call in, from the stockholders of such a bank, even a greater contribution than might be actually necessary to meet its engagements, for, under the elastic practice in chancery, any surplus could afterwards be readily refunded to the stockholders. But the judgment of a court of law is absolute, and the dictum under consideration was never intended to be applied in actions at law brought by these receivers.

It is a constitutional provision that no person shall be deprived of his property except by due process of law. Except in cases where property is taxed, or otherwise taken for public purposes, by due process of law is meant by suit in a court of justice, and upon judgment according to the law and evidence. In the present cases suit is duly brought, and the court is bound to render its judgment according to the law and the evidence. The law makes these defendants liable only for the debts of this bank which it may owe beyond the value of its assets, and there must be proof in these cases that its debts are a hundred per cent, more than its assets can meet. How is such a fact to be proved? Clearly it can only be proved by legal evidence, evidence taken under the usual tests, for instance, of the oath, and of cross-examination. Surely the "determination" of the comptroller of the currency, that the stockholders of this bank are liable to the extent ofa hundred per cent, above its assets, however correct it may be in fact, is not legal evidence of the fact such as a court of justice must accept as conclusive and incontrovertible. Surely the supreme court of the United States could not have intended, in Kennedy v. Gibson, to hold that such"determination" is not only evidence, but conclusive proof, which the "stockholders cannot controvert." Congress has sometimes gone as far as to enact that the transcript of a public officer's accounts, certified to be taken from the books of the treasury department, shall be prima facie evidence of their correctness as against that officer, but it has never gone so far as to declare such evidence to be conclusive and incontrovertible. So, the law of Virginia makes the signature of the maker of a promissory note, alleged in the declaration of the

plaintiff to have been signed by the mater, prima. facie genuine, but it nowhere declares that the genuineness of such a signature shall not be questioned or controverted. There is no law of congress making the "determination" of the comptroller even evidence of the insolvency of a bank or of the extent of it, much less prima facie or conclusive evidence.

If this letter of the comptroller to the receiver were conclusive evidence against the defendants in these causes, not only as to the receiver's authority to sue, ag he has done, but also as to the liability of these defendants for "contracts, debts, and engagements" of the bank to the extent of 100 per cent, on their shares, why resort to a court of law at all? Surely a court of justice is something more than a mere machine for obediently executing the foregone determinations of some other tribunal; something more than the registering omce of the judgment of another branch of the government. Surely the court has higher functions to perform in cases tried before it, than the ministerial duty of Tendering such judgment as may be prescribed to it by subordinate officers of an executive bureau. If the mandate of the chief officer of a bureau at Washington were binding as to those matters submitted to a court in the trial of a cause which go to the very merits of the demand, why try it elsewhere than at the bureau itself?

It may be ever so notorious that this bank is insolvent to the extent of a hundred per cent beyond its assets, and that the payment of its debts may require contrioutions from its stockholders to full one hundred per cent on their stock; but courts and juries must be deaf and blind to all facts except those which are submitted to them in evidence. They are sworn to try and decide according to the evidence submitted at the trial; and facts of the widest notoriety, if not so submitted, not only cannot be considered but must be studiously excluded from consideration.

The comptroller's letter of August 13th, 1875, is conclusive no farther than as to the receiver's authority to sue, and as to how much he shall sue for. It proves nothing at all as to the extent of the insolvency of the bank, and as to the liability of the defendants on their stock. This liability must be shown affirmatively by some sort of positive evidence; it cannot be inferred from hearsay or from the mere fact that the comptroller has ordered suit for the par value of the shares of the defendants. As nothing but the comptroller's letter was offered in evidence, it is impossible for me to hold that the liability of the defendants has been proved. As there was no evidence whatever presented at the trial, save this letter of the comptroller (itself not having the dignity of an affidavit) that this bank was bound for any contracts, debts, or engagements beyond what its assets could meet, no case is proved against the defendants. The court accordingly decides that upon the evidence submitted at the trial they are not liable as set forth in the declaration; and finds for the defendants ineach of these cases.

{Motion for New Trial.}

These cases were further heard on the 2d September, 1876, on a motion of the United States attorney for a new trial. The ground of the motion was, that as counsel for the plaintiff, he had relied confidently upon the strong language of Justice Swayne, in the supreme court of the United States, used in delivering its decision in the case of Kennedy v. Gibson, 8 "Wall. [75 U. S.] 505, to the effect that the" determination" of the comptroller that suits should be brought against the stockholders of an insolvent national bank for a percentage on their subscriptions was conclusive against the stockholders as to their liability, and the extent of it, and incontrovertible; and therefore it was that he had not submitted evidence which was abundantly at his command showing that the First National Bank was in fact insolvent to the full amount of its capital stock; thinking it unnecessaiy to do so in view of the decision of the supreme com-t referred to.

HUGHES, District Judge. This motion is of course addressed to the discretion of the court; and its success must depend upon the two considerations, 1st, whether substantial justice was done at the former trial; and, 2d, if not, whether that was the result of inexcusable negligence or. other fault in the plaintiff or his counsel.

I suppose that it will be conceded that substantial justice was not done at the former trial. The allegation of the district attorney is, that he had full proof at command that the First National Bank of Norfolk is insolvent to the extent of a hundred per cent of its capital stock beyond its assets. If so, and the law making its stockholders liable severally for that amount on their stock, substantial justice was not done in a trial in which that liability was not established by proof which was readily available.

The only remaining question, therefore, is, whether the district attorney's excuse for not producing evidence which he had at his command is admissible and sufficient; which is, that he relied upon the language used by the supreme court in Kennedy v. Gibson, 8 "Wall. [75 U. S.] 505, as dispensing with the necessity of proof. The language referred to, used by Justice Swayne, who delivered the unanimous opinion of the court, was this: "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or part, and if only a part, how much shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders

cannot controvert it. It is not to he questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver."

I have already shown that this language, so far as the question of proof of the liability of stockholders as distinguished from the authority of the receiver to sue was concerned, was obiter dictum. But it was certainly calculated to mislead. If used by the judge of any inferior court, there would have been less excuse for relying upon it; but, used as it was by a justice of the supreme court of the United States, in pronouncing the unanimous opinion of that august bench, I feel bound to concede the validity of the excuse of the district attorney. See Starkweather v. Loomis, 2 Vt. 573. I will therefore allow a new trial, and continue there these causes to the next term of the court

NOTE {from original report}. At the second trial of the cases the proper proofs were submitted and verdict and judgment were for the plaintiff in all the cases.

{NOTE. For decisions in other actions by the same plaintiff to enforce personal liability of the shareholders, see Cases Nos. 1,714and 1,716.}

[1] {Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.}