

to make the loan, and would do so, but that the individual loans were so large in proportion to its deposits in other banks, and so near the limit allowed, that the loan to him could not be made; that it could deposit in one bank as well as another, and would deposit that amount with the defendant if he desired. He assented to this proposal, and they agreed that the deposit, while it remained, should draw interest at 6 per cent., and that the same collaterals should be deposited as security. Thereupon the manager of the plaintiff drew two drafts of \$25,000 each in favor of the defendant on the National Exchange Bank of Boston, delivered them to the president of the defendant, and received the collaterals, and entered the transaction in the plaintiff's books as a loan to the defendant. The president made the transaction known to the Montreal director, who made no question about it, and took the drafts to the banking-house of the defendant, in St. Albans, and delivered them to the cashier in the presence of the vice-president, who were directors, and acquainted them with the transaction, to which neither made any objection, and they received the drafts into the assets of the defendant, and credited the amount as a deposit to the plaintiff in the books of the defendant. No other such loan was ever made by the defendant; no vote of the directors was ever taken authorizing or ratifying it; and no conference was ever had among them concerning it, except as stated, and no objection was ever made by any of them to it. The drafts were indorsed in the usual course by the officers of the defendant, and forwarded to its correspondent in Boston, from which it received credit for them, and it has always retained their avails.

It is claimed that in reality this was a loan to the president of the defendant, individually, and not to the defendant, and that it was put in the form it was to avoid the limit upon individual loans by the plaintiff. But it is found, as a matter of fact, from the evidence, that the loan to the plaintiff was refused because of that limit; that the loan was made to the defendant upon its own credit as a real transaction between the two banks, and not as a cover for any other transaction, and that it was proposed by the manager and assented to by the president, and carried out between them, because it would accommodate the defendant and enable it to accommodate the president. This result was accomplished to some extent, but no loan or advancement of this amount, or of any amounts aggregating this amount, or near this amount, was made by the defendant to the president. It was enabled to accommodate him more by means of this deposit, and did so, but made no particular advance to him because he procured the deposit to be made. He was endeavoring to promote the interests of all his enterprises, including the defendant as one of them, without intending to sacrifice that to any of the others; the plaintiff's manager was intending to make what would be for it a proper loan to or deposit with the defendant. The defendant twice paid interest to the plaintiff on the loan, bringing it up to May 21, 1883,

and by letter from its cashier, twice acknowledged at other times, acknowledged the deposit.

The drafts were dated and delivered to the president of the defendant, September 20, 1882, and charged in the books of the plaintiff at the same time. They were received at the defendant's banking house, and credited to the plaintiff on its books, September 22, 1882. The defendant suspended August 6, and the receiver was appointed August 9, 1883. This claim was presented to the receiver, and was finally rejected by him, November 27, 1883. This suit was commenced January 3, and the writ served on the president and receiver January 21, 1884. It is objected in behalf of the receiver that the making of this loan or negotiating for the deposit was not within the scope of the corporate powers of the defendant; and that, if it was, it was not done so by those having the right to exercise those powers in such a case as to bind the defendant. If this was a deposit, there can be no question about the power of the association to receive it and become liable for it. To receive deposits is among the powers specifically delegated to national banks. Rev. St. § 5136, subd. 7. It was called a deposit between the officers of the two corporations. It became, in form, a deposit on the books of the defendant. It bore interest like a loan. If it was a loan, then the question is as to the power to borrow money. Among the powers of such banks specially named is that to make contracts. Section 5136, subd. 3. There is no apparent limit to this power, except that contained in section 5202. That section provides that no association shall at any time be indebted or in any way liable to an amount exceeding the amount of its capital stock actually paid in and undiminished, except for circulation, deposits, and drafts drawn against existing funds, and to its stockholders. This implies that it may become indebted within the limit, even if the power to make contracts generally should be held to apply to something else. Powers impliedly given are as well conferred as those expressly given. *National Bank v. Graham*, 100 U. S. 699. This debt did not come up to the limit alone, and it is not shown that there were any others of the kind to which the limit applies.

The power seems to be clear. The transaction was had with the officers usually intrusted with financial business. The president, vice-president, and cashier all participated in it. These, with the director at Montreal, made a majority of the board; and, although he did not act as a director before, he appears to have been a director in fact, if not by right; but nothing is shown why he was not a lawful director. All are required to be citizens of the United States, and three-fourths must be residents of the state, territory, or district. This director may have been a citizen of the United States, and probably was, or he would not have been elected, and enough others appear to have been residents. If this were not so, the retention of the funds is a ratification by all of the means by which they were acquired. They could not both retain the funds and repudiate the

transaction. Those who assumed to act for the defendant in the transaction were its agents, and acted as such; and, as said by Mr. Justice SWAYNE in *People's Bank v. National Bank*, 101 U. S. 181, "if there were any defect of authority on their part, the retention and enjoyment of the proceeds of the transaction by their principal constituted an acquiescence as effectual as would have been the most formal authorization in advance, or the most formal ratification afterwards." From these considerations it follows that there must be a judgment for the plaintiff. Execution cannot issue upon the judgment, but it is to be paid by the comptroller from the assets ratably with other claims. Rev. St. § 5236. The amount of the claims on which dividends are to be made should, apparently, be adjusted as of the time when the comptroller took possession by appointing a receiver. In this case this time appears to be August 9, 1883. The amount of this claim to that time was \$50,650. The judgment is to be certified by the receiver to the comptroller, to be paid in the due course of administration. *Case v. Bank*, 100 U. S. 446.

Judgment for plaintiff for \$50,650, to be certified by receiver to comptroller, with costs.

O'RORKE v. UNION PAC. RY. CO.

(Circuit Court, D. Colorado. 1884.)

MASTER AND SERVANT—INJURY TO RAILROAD EMPLOYEE SENT UNDER CAR—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—WAIVER.

Where a railroad company calls upon an employe to go under a car on a side track, on which other cars are liable to be moved or switched, to repair such car, it is its duty to provide him with a red flag as a danger signal; but if the employe is an old railroad man, and fully aware of the danger, and has continued for months to perform such duties, and neglected to demand and procure a flag, he may be considered as having waived his right to recover for any injury received in consequence of such neglect.

Motion for New Trial.

Markham, Patterson & Thomas, for plaintiff.

Teller & Orakood, for defendant.

BREWER, J. In No. 1,176, *O'Rorke v. Union Pacific Ry. Co.*, a motion was made for a new trial. It was an action for personal damages, and a verdict was found for the plaintiff. The substantial facts are these: This plaintiff was a car repairer, engaged in repairing cars along the line of the defendant's road. On the day of the accident he went to the station at Malta, I believe, and found there three cars standing on a side track, with a freight train on the main line. The conductor of the freight train told him that the rear car of the three side-tracked cars needed repairing, and that he should wait there about 20 minutes, which would be time enough to do the work.