

annual rent for the period of 12 years from the 1st day of June, 1892, should be 8 per cent. upon the sum or value first mentioned, to wit, \$132,574.50.

The decree will be to correct the findings of the parties appointed under the lease to fix the value, in accordance with this opinion.

PULLMAN PALACE-CAR CO. v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. May 2, 1893.)

No. 30.

INJUNCTION—RESTRAINING ACTION AT LAW.

A railroad company sold an interest in certain cars to a car company, leased the remaining interest therein to the car company, and made a contract with the car company for the operation of the cars by the latter, with a division of the profits. The contract provided that the railroad company might terminate the lease, and should then pay the car company for its interest in the cars. The railroad company terminated the lease without paying for the car company's interest. *Held* that, on being sued at law for the value of the car company's interest in the cars, the railroad company could not enjoin the prosecution of such action on the ground that the car company had not fairly divided the profits, since the various branches of the contract were totally distinct. 49 Fed. Rep. 409, reversed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

In Equity. Bill by the Chicago, Milwaukee & St. Paul Railway Company against the Pullman Palace-Car Company to surcharge an account, and to restrain the prosecution of an action at law. Complainant obtained an injunction. See 49 Fed. Rep. 409. Defendant appeals. Reversed.

For a subsequent opinion relating to the accounting, see 50 Fed. Rep. 24.

Isham, Lincoln & Beale, for appellants.

Edwin Walker, for appellee.

Before WOODS, Circuit Judge, and BUNN and JENKINS, District Judges.

JENKINS, District Judge. On the 22d day of September, 1882, the parties entered into agreement, whereby—First. By the first article thereof, the railway company sold to the Pullman Company an undivided one-fourth of each of 28 named sleeping cars then operated on the appellee's line of railway, and leased to the Pullman Company the remaining undivided three-fourths of each of such cars for a term commencing September 30, 1882, and continuing until the termination of the contract set forth in the third article of the agreement, and agreed that if additional sleeping or hotel cars should be required for the accommodation of travel, or if it should become necessary to replace the cars named with new ones, the railway company would defray three-fourths of the expense of the manufacture of such cars. Second. By article third of the agreement

the Pullman Company was given the exclusive right, for the term of 15 years from September 30, 1882, to furnish such sleeping cars as should be required upon lines owned or controlled by the railway company, with certain exceptions not necessary to be considered. The Pullman Company should provision and operate the hotel cars, and operate the sleeping cars, and receive the fares for their use, and for meals, and have the general control of the sleeping and hotel car service of the railway company, according to the particular provisions and regulations of the contract. The Pullman Company was required to keep accurate accounts of receipts and expenses arising from the operation of such cars over the lines of railway contemplated, which were to be open to the inspection of the railway company at all reasonable times; the books of account to be balanced at least monthly, and the balance to be borne or paid by or to the party thereto entitled should be paid during the succeeding month, the parties sharing in the profits or losses of the venture in the proportion of their respective ownership of the cars. There was reserved to the railway company the option to terminate the contract at the end of 5, 8, or 11 years from September 30, 1882, upon notice, in writing, of six months prior to the day on which it might elect to have the agreement end. The railway company agreed, in case of such termination by its election, to purchase the undivided interest of the Pullman Company in the hotel and sleeping cars so jointly owned, and pay the fair cash value thereof, to be determined by arbitrators to be selected as provided in the contract.

The cars were operated under this agreement until its termination. On the 23d day of October, 1889, the railway company exercised the option reserved, and elected to terminate the agreement on the 30th September, 1890, and notified the Pullman Company thereof. Subsequently, as charged by the appellee, the value of the cars was adjusted by the parties at \$416,906.38, less the amount due for certain repairs, and, as charged by the appellant, the value of its interest in the cars was adjusted by the parties at \$105,000, which was agreed to be paid by the appellee on the 10th day of November, 1890; but payment was refused upon the ground that the correctness of the monthly accounts of the Pullman Company was disputed, and the railway company, without payment of the sum or any part of it, took possession of and retained the cars to its exclusive use. On the 24th June, 1891, the Pullman Company brought suit in trover in the court below against the railway company for the conversion of its interest in the cars, and for damages. On the 3d day of August, 1891, this bill was filed by the railway company, seeking to surcharge, for error, the monthly accounts rendered by the Pullman Company, and to enjoin the suit at law brought by the latter company. On the 31st day of December, 1891, an order was made by the court below, restraining the prosecution of the action at law, with leave to the Pullman Company to file a cross bill herein, if it should be so advised. This latter pro-

vision was presumably made to permit that company to assert and recover in this suit the value of its interest in the cars. The Pullman Company brings here for review this restraining order.

We are of opinion that the order restraining the prosecution of the suit at law was improvidently granted. The written agreement of the parties comprehends several distinct contracts: (1) a sale by the railway company of an undivided one-fourth interest in the cars; (2) a lease by the railway company to the Pullman Company of its undivided three-fourths interest in the cars; (3) a contract for the operation by the Pullman Company of the sleeping and hotel car service, with division of profits; (4) a contract by the railway company, if it terminated the lease as it might, to pay the Pullman Company the value of its undivided one-fourth interest in the cars. These contracts are not inter-dependent, but totally distinct. They are not so related to each other that the enforcement of one in any way affects the other, or requires investigation of the other. The proceeding to surcharge the account is an equitable proceeding. The claim for the value of the cars is wholly a legal demand. Equity cannot enforce the latter claim, or entertain jurisdiction thereof, the bill to surcharge the accounts in no way attacking the claim involved in the suit at law. The principles upon which equity intervenes to restrain the prosecution of proceedings at law are elementary and familiar, but this case does not fall within them. There is not here even the pretense that the prosecutor of the suit at law is irresponsible, so that it would be inequitable to permit the recovery of a large sum of money, when the complainant would be unable to collect the amount which might be awarded upon the accounting, if one should be decreed. Nor is there here any ground for equitable set-off. There is as yet no ascertained balance found due the complainant, and there is shown no equity demanding that the railway company should be protected against the demand asserted against it. *Rawson v. Samuel, Craig & P.* 178.

Without stopping now to consider whether the bill in equity can be sustained, it is sufficient to say that, if it can be, we perceive no valid reason for interfering with the prosecution of the suit at law. The railway company, during a period of eight years, was furnished monthly statements of the expenses and receipts attending the operation of the cars. It was paid monthly the amount thereby shown to be due. There was no objection to the accounts until the contract had been terminated by its election, and it was called upon to pay the value of the interest of the Pullman Company in the cars, of which the railway company desired to become the sole owner. It took no steps then to surcharge the account for error, remaining inactive for some nine months, and until suit at law had been brought to recover the value of the interest of the Pullman Company in the cars. It now does not, here, attack that claim, or assert any equity against its enforcement, but insists that it may retain the cars to the exclusion of the Pullman Company,

and without payment for them, pending a proceeding to investigate the accounts. We are not impressed with the equity of the claim, and can find no ground upon which to sustain it.

The order appealed from is reversed.

ANHEUSER-BUSCH BREWING ASS'N v. CLAYTON.

(Circuit Court of Appeals, Fifth Circuit. May 22, 1893.)

No. 71.

1. BANKS AND BANKING—COLLECTIONS—INSOLVENCY.

A bank holding a draft for "collection and returns," which accepts a check of the drawee, one of its depositors, and, without separating the amount from the general mass of its moneys, charges the same to the drawee, and credits the drawer on its books, holds the money as agent for the drawer, and not as trustee; and after the bank becomes insolvent the drawer is a mere general creditor, and not entitled to priority of payment out of the bank's assets.

2. SAME.

Nor is the drawer entitled to priority under Const. Ala. art. 14, § 17, providing that "depositors who have not stipulated for interest shall for such deposits be entitled, in case of insolvency, to preference of payment over all other creditors."

Appeal from the Circuit Court of the United States for the Middle District of Alabama.

In Equity. Bill by the Central Railroad & Banking Company against the John McNab Bank and John W. Tullis for a receiver of the bank. The Anheuser-Busch Brewing Association intervened, and claimed the amount of a draft collected by the bank on intervener's account, and asked that the same be paid to it by Henry D. Clayton, receiver of the bank. The matter was referred to a master, who reported that the intervener was a general creditor. From a decree confirming the master's report the intervener appeals. Affirmed.

W. C. Swanson, for appellant.

A. H. Merrill, (Roquemore & White, of counsel,) for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge. The appellant, a corporation, having its chief place of business in the city of St. Louis, Mo., on the 20th of March, 1891, drew its draft for the sum of \$793.80, with exchange, on one P. H. Morris, who resided at Eufaula, Ala., and sent the draft to the McNab Bank for "collection and returns." On the 26th of March, 1891, Morris paid the draft with his check on the McNab Bank. He had at that time about \$3,000 to his credit as a depositor in said bank, and there was as much as \$10,000 in cash in the vaults of the bank belonging to it. On the same day—the 26th of March, 1891—the McNab Bank forwarded to appellant its exchange drawn on the Hanover National Bank

of New York, which, being sent forward by appellant for collection in New York, was protested for nonpayment, the McNab Bank having failed and made an assignment between the time it forwarded the draft to St. Louis and the date of its presentation in New York. It appears that the McNab Bank was insolvent at the time of this transaction, but was engaged in business as a "going concern" down to the 30th of March, 1891. While the McNab Bank was largely indebted to the Hanover National Bank of New York, it had a line of credit with it, and all drafts drawn on said bank by the McNab Bank were duly paid down to and including the date of the latter's suspension. On the 30th of March, 1891, the McNab Bank made an assignment for the benefit of its creditors of all its property and assets. A short time thereafter, on a bill filed by a large creditor, the assignee was removed from the control and possession of the bank's estate, and the appellee was appointed receiver in his stead, to take charge of and administer the same. The assignee delivered to the receiver all the property and assets transferred to him by the bank. Among the assets so delivered was a sum in cash of \$9,200.

Appellant's contention is that in the collection of its draft on Morris the McNab Bank acted as its agent and trustee, and that it is entitled, as against other creditors of the bank, to priority of payment out of the bank's assets; that, notwithstanding the money collected from Morris was intermingled with the general assets of the bank, or was in a common mass with moneys of the bank, and cannot be identified or specifically traced into the hands of the receiver, yet a court of equity will subtract the amount due appellant from the funds in the hands of the receiver, and will compel him to restore it to appellant, because the amount had been collected by the bank as its agent and trustee, and had increased pro tanto its general assets. And appellant further contends that, if not entitled to this relief, it at least has a right to be classed among depositors who had not stipulated for interest on deposits, these being a class preferred for payment out of the general assets of the bank under the constitution of the state of Alabama. Article 14, § 17.

The relation between appellant and the McNab Bank as to the draft on Morris sent by the former to the latter for collection was that of principal and agent; but, in order to enforce a trust in favor of appellant as to any money collected on said draft, it must be specifically traceable into the hands of the receiver. *Commercial Nat. Bank v. Armstrong*, 39 Fed. Rep. 684; same case in supreme court of the United States, (Oct. term, 1892; not yet officially reported,) 13 Sup. Ct. Rep. 533. Accepting Morris' check in payment of his debt to appellant, and charging the amount of it on Morris' account by the bank, was but a shifting of its liability, whereby it became appellant's debtor, and assumed the obligation to pay to it the amount of the check less exchange. There is nothing to indicate that this amount was separated and kept unmingled with the bank's own money; but, on the contrary, it is conceded

that it is undistinguishable from the mass of the bank's own money, and cannot be traced to and identified in the hands of the receiver. This being so, appellant has no better equity than the other creditors of the bank, and is entitled to no priority over them. It can only come in as a general creditor, unless it was a depositor in contemplation of article 14, § 17, of the constitution of the state of Alabama, which provides that "depositors who have not stipulated for interest shall for such deposits be entitled, in case of insolvency, to preference of payment over all other creditors." Such are the decisions in Alabama, where the transaction occurred, and the text-books and the decisions in the federal courts are in accord with the Alabama decisions. *Maury v. Mason*, 8 Port. (Ala.) 212; *Goldsmith v. Stetson*, 30 Ala. 164; *Parker v. Jones*, 67 Ala. 236; 2 Story, Eq. Jur. 1259; *Bolles, Banks*, § 474; 2 *Morse, Banks*, § 590; *Wait, Insolv. Corp.* § 659; *Illinois Trust & Savings Bank v. First Nat. Bank*, 15 Fed. Rep. 858; *Bank v. Dowd*, 38 Fed. Rep. 172; *Bank v. Russell*, 2 Dill. 215; *Commercial Nat. Bank v. Armstrong*, supra; *First Nat. Bank v. Armstrong*, 42 Fed. Rep. 193; *Commercial Nat. Bank v. Armstrong*, (Oct. term, 1892; opinion rendered March 6, 1893; not yet officially reported,) 13 Sup. Ct. Rep. 533.

Was appellant a depositor who was entitled to preference of payment over all other creditors? "A bank depositor is one who delivers to or leaves with a bank money subject to his order." And. Law Dict. 343, 344; *Newmark, Bank Deposits*, § 12. Deposits made with bankers are either general or special. In the case of a special deposit of money the bank merely assumes the charge or control of it, without authority to use it, and the depositor is entitled to receive back the identical money deposited. 1 *Morse, Banks*, § 183. The relation thus created is that of bailor and bailee. Money received by a bank on general deposit becomes the property of the bank, and can be used by it as other moneys belonging to it, the relation between the bank and the depositor being that of debtor and creditor; "that kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker." *Commercial Nat. Bank v. Armstrong*, supra; *Wray v. Insurance Co.*, 34 Ala. 58; *Alston v. State*, 92 Ala. 124, 9 South. Rep. 732.

The contention of the learned counsel for appellant is that his case meets this definition of a general depositor. We cannot agree with this contention. Appellant did not leave its money with the McNab Bank subject to its order, or to be returned to it on call. It did not, for its own convenience, part with the title to its money, and loan it to the bank. There was no contract, express or implied, that the collection from Morris on appellant's account was to be a deposit of any kind, but it is clear that it was intended that the money received from Morris should be remitted in "a reasonable time" from date of collection. Appellant inclosed its draft on Morris to the McNab Bank "for collection and returns." Morris took up the draft with his check on the McNab Bank, and on the same day the latter forwarded to appellant exchange on a New

York bank for the amount of Morris' indebtedness. The draft was not paid, but this did not alter the relation between appellant and the McNab Bank. The bank still owes the debt. But we find that under the facts of the case appellant has no lien on the funds of the bank in the hands of the receiver, and was not a depositor entitled to preference over the other creditors of the bank, within section 17, art. 14, of the constitution of the state of Alabama. The decree of the court below is affirmed.

LESLIE v. TOWN OF URBANA.

(Circuit Court of Appeals, Seventh Circuit. February 17, 1893.)

No. 70.

RES JUDICATA—BILL OF REVIEW—JUDGMENT ON APPEAL.

A bill of review will not lie to set aside for alleged error of law a judgment which has been affirmed by the supreme court, even though such affirmation was the result of an even division between the judges of the supreme court.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

In Equity. Bill by George Leslie against the town of Urbana. Defendant obtained a decree. Complainant appeals. Affirmed.

George A. Sanders, for appellant.

J. O. Cunningham, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge. This cause comes before us upon appeal from the decree of the court below sustaining a demurrer to the bill of complaint, and dismissing the bill for lack of equity.

The bill charges that in 1867 the appellee issued its bonds to the amount of \$100,000 in aid of the Danville, Urbana, Bloomington & Pekin Railway Company, afterwards known as the Indianapolis, Bloomington & Western Railway Company, in payment of its subscription to the stock of such railway corporation; that the appellant, prior to the maturity of the bonds, purchased in open market seven of such bonds, which he caused to be duly registered with the state auditor in 1872; that in 1878 the appellant brought his suit at law in the court below to recover the amount of those bonds. Several other holders of the bonds, at about the same time, brought their suits at law in that court to recover upon the bonds respectively held by them. Demurrers were interposed, urging the invalidity of the law under which the bonds purported to be issued. The demurrer in the case of the appellant was sustained by Judge Drummond upon the supposed authority of *Township of Elmwood v. Marcy*, 92 U. S. 294. The appellant's case was selected to be taken by writ of error to the supreme court of the United