been enforced on execution. A view that leads to such a singular, not to say absurd, result, ought not to prevail.

And finally, we entertain the opinion that litigants ought not to be encouraged to try the experiment in the first instance of obtaining a new trial for cause in an appellate court, by conceding to them the privilege after such attempt, and, after years of litigation, to then demand a new trial as a matter of right.

It follows that the circuit court properly denied the motion to vacate the judgment of November 21, 1885, and its action in that behalf is hereby affirmed.

IRON SILVER MIN. CO. v. MIKE & STARR GOLD & SILVER MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. June 26, 1893.)

No. 256.

In Error to the Circuit Court of the United States for the District of Colorado.

Harvey Riddell, (Frank W. Owers, James C. Starkweather, and Edward L. Dixon, on the brief,) for plaintiff in error.
Thomas M. Patterson, for defendant in error.

Before BREWER, Circuit Justice, SANBORN, Circuit Judge, and THAYER, District Judge.

THAYER, District Judge. This case was submitted in connection with case No. 255, which was a suit between the same parties. 56 Fed. Rep. 956. The record in the two cases discloses the same state of facts; and the questions discussed are the same. On the authority of our decision in No. 255 the judgment in the present case is hereby affirmed.

FLANNAGAN et al. v. CALIFORNIA NAT. BANK et al.

(Circuit Court, S. D. California. June 19, 1893.)

No. 534.

NATIONAL BANKS—CASHIER—PROMISE TO PAY DRAFT.

Rev. St. § 5136, empowers a national bank to "exercise, by its board of directors or duly-authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, * * * and other evidences of debt; * * * by loaning money on personal security," etc. *Held*, that the cashier of a national bank has no power to bind it to pay the draft of a third person on one of its customers, to be drawn at a future day, when it expects to have a deposit from him sufficient to cover it, and no action lies against the bank for its refusal to pay such a draft.

At Law. Action by P. Flannagan and J. W. Bennett, partners in business under the firm name of Flannagan & Bennett, against the California National Bank and others. Judgment for defendants.

Burnett & Gibbon, for plaintiffs.
M. T. Allen, for defendants.

ROSS, District Judge. The plaintiffs, who are citizens of Oregon, and bankers doing business at the city of Marshfield, in that state, bring this suit to recover the amount of a certain draft drawn by one Baines on the defendant Graham. By their complaint the plaintiffs seek to charge the defendant the California National Bank of San Diego, now in the hands of the defendant receiver, with the payment of the draft; and a demurrer filed by the receiver, on behalf of the bank, raises the question of the latter's liability.

The complaint alleges that on the 15th of September, 1891, Graham, through his agent, Baines, applied to the plaintiffs, at their bank in Marshfield, for a loan of $6,000, "to be paid by draft upon said California National Bank of San Diego." This allegation in respect to the proposed drawee was probably a mistake of the pleader, for that allegation is immediately followed by this:

"At the same time, plaintiffs received a telegram, sent by said California National Bank to plaintiffs, in which it stated that Baines' draft on Graham for $6,000 was [would be] good on the 16th of the next month."

To which telegram plaintiffs replied by a telegram as follows:

"Marshfield, Coos Co., Or., Sept. 16, 1891.

"To California National Bank, San Diego, California: Will you pay Baines' draft on Graham for $6,000.00 on October 15, next?

"Flannagan & Bennett."

In reply to this telegram, plaintiffs received, on September 18, 1891, the following, by telegraph, from the defendant bank:

"San Diego, Cal., Sept. 18, 1891.

"To Flannagan & Bennett, Marshfield, Or.: See our telegram of 15th. Should Graham money arrive earlier, we will pay when it comes, possibly tenth. California National Bank."

To which plaintiffs, on the 19th of September, replied by telegraph as follows:

"Marshfield, Coos Co., Or., Sept. 19, 1891.

"To California National Bank, San Diego, Cal.: Are we to understand that you will pay Baines' draft on Graham for $6,000.00 not later than 16th of next month? Flannagan & Bennett."

Receiving in reply the following:

"San Diego, Cal., Sept. 21, 1891.

"To Flannagan & Bennett: Yes. G. N. O'Brien, Cashier."

O'Brien was at the time the cashier of the California National Bank. Upon the receipt of the last-mentioned telegram the plaintiffs paid to Baines, for the use of Graham, $6,000, and received from Baines a draft, signed by him, in words and figures as follows:

"$6,000.00. Marshfield, Sept. 23rd, 1891.

"On October 16th, 1891, pay to the order of Flannagan & Bennett six thousand dollars, value received, and charge the same to account of

"W. E. Baines.

"To R. A. Graham, California National Bank, San Diego."

On the 16th of October, 1891, the draft was duly presented to the defendant bank, and payment demanded, which was refused, and subsequently payment was demanded of defendant Graham, who likewise failed to pay the same.

It is apparent from the averments of the complaint that at no time did the defendant bank, or its cashier, promise to pay any draft drawn on the defendant bank. Had such promise been made, and plaintiffs had parted with their money on the strength of it, the case would be like that of Garrettson v. Bank, 47 Fed. Rep. 867, and a like ruling would be made here, for I have no doubt of the correctness of that decision. But the present case is altogether unlike that. The promise here counted on was the promise of the cashier of the defendant bank to pay Baines' draft on Graham, who, it would seem from the telegrams, was a customer of the defendant bank, and an anticipated depositor; and the question for decision is, whether such a promise of the cashier of a national bank is binding upon the bank. A national bank is empowered, by the seventh subdivision of section 5136 of the Revised Statutes, "to exercise, by its board of directors or duly-authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of" the title providing for the organization of such banks. Everyone dealing with such a bank does so with notice of, and subject to, the powers conferred, and limitations imposed, by the law of its creation. The provision of the statute quoted, under which the defendant bank was organized, did not authorize its board of directors, or any of its officers or agents, to bind it to pay a draft of one of its customers or depositors. The telegraphic correspondence in the case at bar shows that the defendant bank was anticipating that it would have funds of Graham not later than the 16th of October, 1891, out of which it proposed to pay the draft to be drawn by Baines on Graham; and the definite promise made by the cashier of the bank, by his telegram of September 21, 1891, in answer to that of the plaintiffs, asking, "Are we to understand that you will pay Baines' draft on Graham, for $6,000, not later than 16th of next [October] month?" was, in effect, a promise to answer for the obligation of Graham. Such a promise was beyond the power of the cashier to make, and the defendant bank was unaffected by it. It was organized to carry on the business of banking "by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes, according to the provisions of" the statute under which it was organized. None of these things embrace, directly or incidentally, a promise to pay, without consideration moving to it,

a draft drawn by a third party on one of its customers or depositors. In Bank v. Dunn, 6 Pet. 51, the court would not permit the president and cashier of the bank to bind it by their agreement with the indorser of a promissory note that he should not be liable on his indorsement. It said it is not the duty of the cashier and president to make such contracts, nor have they power to bind the bank, except in the discharge of their ordinary duties.

In the case of U. S. v. City Bank of Columbus, 21 How. 356, the cashier of the defendant bank wrote to the secretary of the treasury, saying that the bearer of the letter, one Miner, who was one of the directors of the bank, was authorized to contract for the transfer of money from New York to New Orleans. Upon that representation the secretary turned over to Miner $100,000 of the government money for transfer from New York to New Orleans, and, Miner having failed to deliver or account for it, the government sought to recover the amount from the bank. But, it appearing that the action of the cashier was without the authority or knowledge of the president or board of directors, the supreme court held that it was outside of his duties and powers, and that the bank was not liable. In West St. Louis Sav. Bank v. Shawnee County Bank, 95 U. S. 557, where it was attempted, but unsuccessfully, to bind a bank as an accommodation indorser on the individual note of its cashier, the court said:

"Ordinarily, the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the powers necessary for such an officer in the transaction of the legitimate business of banking. Thus, he is generally understood to have authority to indorse the commercial paper of his bank, and bind the bank by the indorsement. So, too, in the absence of restrictions, if he has procured bona fide rediscount of the paper of the bank, his acts will be binding, because of his implied power to transact such business; but certainly he is not presumed to have power, by reason of his official position, to bind his bank as an accommodation indorser of his own promissory note. Such a transaction would not be within the scope of his general powers; and one who accepts an indorsement of that character, if a contest arises, must prove actual authority before he can recover. There are no presumptions in favor of such a delegation of power. The very form of the paper itself carried notice to a purchaser of a possible want of power to make the indorsement, and is sufficient to put him on his guard. If he fails to avail himself of the notice, and obtain the information which is thus suggested to him, it is his own fault, and, as against an innocent party, he must bear the loss."

The principle controlling the decisions cited is equally applicable to the case at bar. Demurrer sustained.

MURRAY v. PAULY et al.

(Circuit Court, S. D. California. June 19, 1893.)

No. 489.

BANKS AND BANKING—CERTIFICATES OF DEPOSIT—FRAUD OF OFFICERS.

Certain persons, who were directors both of a savings bank and of a national bank, procured money from the former on two notes made by a third person to them, and given for the payment of stock of the national

bank, issued in the name of such third person for their benefit. They represented that the savings bank would have to carry the notes but a short time, and that the national bank would take care of them. These persons were behind in their accounts with the national bank, and the savings bank allowed them to overdraw their accounts with it to a large amount, which was used in settling their accounts with the national bank. Thereafter the savings bank delivered the notes and the check to the national bank, which issued to it a certificate of deposit for an amount covering the whole amount represented by them. *Held*, that this certificate of deposit was without consideration and void, and any loss accruing to the savings bank by virtue of the transactions was due to the fraud or incompetency of its own officers.

At Law. Action by Eli H. Murray, receiver of the California Savings Bank, against the California National Bank of San Diego and Frederick N. Pauly, its receiver. Judgment for defendants.

Luce & McDonald, for plaintiff.
M. T. Allen, for defendants.

ROSS, District Judge. This is a suit by the receiver of the insolvent California Savings Bank of San Diego against the receiver of the insolvent California National Bank of San Diego, based upon a certain certificate of deposit of the last-named bank issued to the California Savings Bank for $40,000, in May, 1891, as of date April 15, 1891, and while the two institutions were in running condition. Both banks occupied the same room, though there were partitions between them. A man named Collins was president of the national bank, and vice president and general manager of the savings bank, and a man named Dare was vice president of the national bank, and one of the directors of the savings bank; and the two were also carrying on some business under the firm name of Dare & Collins. F. T. Hill was cashier of the savings bank. The evidence in the case shows that in January, 1891, there was an increase of the capital stock of the national bank, and that, on or about the 20th of that month, Dare & Collins requested one T. R. Gay, who was also a director of the national bank, to take 100 shares of the stock in his name for them, giving as a reason for the request that they were carrying too much of the stock of the bank, and to execute to them, payable at the savings bank, his note for $12,500, upon which Dare & Collins would get the money from the savings bank, and pay for the national bank stock. Gay first objected, but then consented to do so as an accommodation to Dare & Collins, and upon their representation that he would not be called upon to pay anything by reason of the transaction.

On or about the same day, Dare & Collins approached one Daniel Stone, and requested him to subscribe for and take 100 shares of the stock of the bank. He replied that he did not have any money with which to buy stock, but they said it did not make any difference about the money; that he could give them his note, and they could get the money from the savings bank. After some objection and hesitation on Stone's part, he finally consented to give his note and take the stock; Dare & Collins, however, agree-

ing, in writing, to purchase the stock from him, on 60 days' notice, at the same price, "and allow said Daniel Stone ten per cent. in dividends, or otherwise, on his money so invested." In accordance with these arrangements, Gay executed to Dare & Collins his promissory note for $12,500, payable at the savings bank. Collins annexed thereto a certificate for 100 shares of the stock of the national bank, which he caused to be issued; and Stone executed to Dare & Collins his promissory note for a like amount, also payable at the savings bank. Both notes were delivered to Collins, who took them to Hill, the cashier of the savings bank, and asked him to cash them, saying at the same time that he only wanted the savings bank to carry the notes a short time, as the national bank would take care of them. The cashier of the savings bank took the notes,—that of Gay having annexed to it the certificate for 100 shares of the national bank stock, issued in his name; and for them he gave Collins a check on the national bank, payable to itself, for the aggregate amount of them,—$25,000,—which was paid. The notes were entered in the books of the savings bank in the account headed "Loans and Discounts." Within a few days thereafter, Collins applied to the cashier of the savings bank for the Gay and Stone notes, saying that he was going north, and would negotiate them; and Hill turned them over to him, taking Collins' receipt for them. Whether Collins negotiated the notes, the record does not show, but it does not appear that either of the banks ever realized any money on them.

March 27, 1891, Dare & Collins, who had an account with the savings bank, but a small amount to their credit, drew a check on that bank, payable to the order of "S. D. C. Co. SopBk," for $15,000. That check, referred to in the testimony of Hill as a "memorandum check," and which was largely an overdraft, was taken to the cashier of the savings bank by the cashier of the national bank, without any indorsement on it, with the statement that Collins would like the savings bank to pay it, and carry the overdraft for a few days; and accordingly the cashier of the savings bank paid this $15,000 check by a check on the national bank in favor of that bank. The amounts thus paid by the savings bank for the Gay and Stone notes and on the $15,000 check aggregated $40,000, and in May following the cashier of the savings bank took the so-called memorandum check for $15,000, and the receipts for the Gay and Stone notes that had been delivered by Hill to Collins for negotiation, to the national bank; and upon the delivery of these papers to that bank the certificate of deposit for $40,000, upon which the present suit is based, was, by Collins' direction, issued to the savings bank by the cashier of the national bank.

The certificate of deposit so issued was issued without consideration, and is void. It is enough for the stockholders and creditors of the insolvent national bank to suffer for the rascality of Collins committed in connection with that bank. They are not legally or justly responsible for the acts of the savings bank, committed through the fraud or incompetency of its own officers. The case

shows that, at the time of the overdraft by Dare & Collins on the savings bank, Collins was behind in his account with the national bank, and that the money paid by the savings bank in honoring it went to make good that account. But the stockholders and creditors of the national bank cannot be held liable for the misplaced confidence of the savings bank in the reliability and responsibility of Dare & Collins. That bank saw proper to allow that firm to overdraw its account, and must suffer the consequences. The circumstance that one of the members of that firm was vice president of the savings bank and president of the national bank, and that the other member of it was one of the directors of the latter bank, is unimportant. The fact remains that the savings bank honored and paid their check on it, and must look to them for reimbursement of that sum.

Nor can the $25,000 paid by the savings bank for the Gay and Stone notes be legally or justly treated as a deposit by that bank of its money in the national bank. That money was paid on the strength of those notes, (Gay's having attached to it a certificate in his name for 100 shares of the stock of the national bank,) supplemented, it is true, by Collins' assurance that he only wanted the savings bank to carry the notes for a short time, and that the national bank would take care of them. But that promise of Collins did not convert the purchase of the notes by the savings bank into a deposit by that bank of its money in the national bank, for which a certificate of deposit of the latter could be legally issued.

There must be judgment for the defendants, and it is so ordered.

YARDLEY v. WILGUS.

(Circuit Court, E. D. Pennsylvania. July 6, 1893.)

No. 188.

BANKS AND BANKING — NATIONAL BANKS — STOCKHOLDER'S LIABILITY — STOCK HELD IN NAME OF TRUSTEE.

A person who is entered on the books of a national bank as the owner of stock, but who is admitted to hold the stock in trust for the true owner, is not liable as a stockholder for the debts of the bank, when the true owner has been adjudged so liable, although nothing is realized upon the execution of such judgment.

At Law. Action by Robert M. Yardley, receiver of the Keystone National Bank, against George S. Wilgus, to enforce defendant's liability as a stockholder. Verdict was given for plaintiff, subject to the opinion of the court on a question reserved. Judgment for defendant.

Read & Pettit, for plaintiff.

Jos. H. Taulane and R. P. White, for defendant.

DALLAS, Circuit Judge. This action was brought to enforce the alleged individual liability of the defendant upon four shares of the stock of the Keystone National Bank standing in his name.