

In *Plow Co. v. Lamp*, 80 Iowa, 722, 45 N. W. 1049, the court said:

"The creditors, if permitted to enforce their claims as against the trust, would secure the payment of their claims out of trust moneys."

In *Harrison v. Smith*, the court said, while it would "be impossible to make it a charge upon the estate or assets to the increase or benefit of which it has been appropriated, the general assets of the bank having received the benefit, there is nothing inequitable in charging them with the amount of the converted fund."

We are unable to assent to the proposition that, because a trust fund has been used by the insolvent in the course of his business, the general creditors of the estate are by that amount benefited, and that therefore equitable considerations require that the owner of the trust fund be paid out of the estate to their postponement or exclusion. If the trust fund has been dissipated in the transaction of the business before insolvency, it will be impossible to demonstrate that the estate has been thereby increased or better prepared to meet the demands of creditors, and even if it is proven that the trust fund has been but recently disbursed, and has been used to pay debts that otherwise would be claims against the estate, there would be manifest inequity in requiring that the money so paid out should be refunded out of the assets, for in so doing the general creditors whose demands remain unpaid are in effect contributing to the payment of the creditors whose demands have been extinguished by the trust fund. Both the settled principles of equity and the weight of authority sustain the view that the plaintiff's right to establish his trust and recover his fund must depend upon his ability to prove that his property is in its original or a substituted form in the hands of the defendant. *Little v. Chadwick*, 151 Mass. 109, 23 N. E. 1005; *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504; *Association v. Austin* (Ala.) 13 South. 908; *Shields v. Thomas* (Miss.) 14 South. 85; *Silk Co. v. Flanders* (Wis.) 58 N. W. 383; *Slater v. Oriental Mills* (R. I.) 27 Atl. 443; *Bank v. Armstrong*, 39 Fed. 684; *Multnomah Co. v. Bank*, 61 Fed. 912; *Massey v. Fisher*, 62 Fed. 958.

The decree is therefore affirmed, with costs to the appellees.

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CITY OF SPOKANE v. FIRST NAT. BANK OF SPOKANE et al.

(Circuit Court of Appeals, Ninth Circuit. June 24, 1895.)

No. 210.

TRUSTS—FOLLOWING TRUST PROPERTY.

Where trust funds have been wrongfully invested by the trustee in securities which remain in his hands, the owner of such funds is entitled to follow the same, in the form into which they have been converted, and impress a trust thereon for his benefit. *Spokane County v. First Nat. Bank*, 68 Fed. 979, followed.

Appeal from the Circuit Court of the United States for the Eastern Division of the District of Washington.

This was a suit by the city of Spokane against the First National Bank of Spokane and F. Lewis Clark, its receiver, to impress a trust upon assets of the bank in the receiver's hands. The circuit court

sustained a demurrer to the bill for want of equity. Complainant appeals. Reversed.

James Dawson, for appellant.

C. S. Voorhees, for appellees.

Before McKENNA and GILBERT, Circuit Judges, and KNOWLES, District Judge.

GILBERT, Circuit Judge. This case is similar to the foregoing suit of Spokane County v. Same Defendant, 68 Fed. 979. The bill of complaint differs, however, from the bill in that case in one important particular. It contains the averment that the city treasurer has deposited with the First National Bank of Spokane public moneys of the city, known by the officers of the bank to be such, and that said officers failed to keep said money separate and distinct from other funds, but wrongfully mixed and commingled the same with the money of the bank, and that it has used the same in paying its employes, patrons, clients, and depositors, "and in the purchase by said defendant First National Bank of the property, notes, bills, and securities now constituting and forming the assets of said defendant First National Bank, in the possession of the receiver, hereinafter mentioned." Thereafter follows the allegation that the receiver has, since his appointment, collected of the assets of said bank a sum equal to the amount still due the city. We construe these averments of the bill to distinctly allege that the assets that came into the hands of the receiver were purchased by the bank with the city's money.

In the light of the authorities cited in the foregoing decision, and of the conclusions there reached, we are of the opinion that the demurrer to this bill should have been overruled. It is our judgment, therefore, that the decree be reversed at the cost of the appellees, and that the cause be remanded to the circuit court for further proceedings not inconsistent with this opinion.

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DUGAN et al. v. O'DONNELL.

(Circuit Court, N. D. California. July 2, 1895.)

1. LIMITATIONS—DISAVOWAL OF TRUST.

Though mere lapse of time will not ordinarily bar the enforcement of a clearly-established trust, time will begin to run as soon as the trustee disavows the trust and claims adversely; and unless the cestui que trust was ignorant of the claim and of his own rights, lapse of time is a complete bar to relief.

2. LACHES—RELATIONSHIP OF PARTIES.

The doctrine of laches for delay in the enforcement of rights is not so strictly applied where the parties are relatives as in the case of strangers, but close relationship will not prevent its application if the delay is so great as to affect the memory of witnesses and destroy evidence.

3. SAME—NONRESIDENCE.

The nonresidence of the complainants, in a bill to declare respondent a trustee for them of an interest in an estate alleged to have been procured from them by fraud, will not, of itself, excuse a want of diligence in ascertaining and enforcing their rights.