MATHEWS v. COLUMBIA NAT. BANK OF TACOMA et al.

(Circuit Court, D. Washington, W. D. December 2, 1896.)

NATIONAL BANKS—INCREASE OF STOCK—SUBSCRIPTIONS—COMPTROLLER'S APPROVAL.

The stockholders of the C. National Bank voted to increase its capital $300,000, and M. subscribed and paid for 23 shares of the proposed increase. Only $150,000 of such proposed increase was ever paid for, and the directors applied to the comptroller of the currency to approve the increase to the amount of $150,000, which was refused. Afterwards the stockholders voted an increase of $150,000, and applied for approval thereof, which was refused; but later the comptroller, on his own motion, on the eve of the bank's insolvency, approved this increase. M. sued the bank and its receiver to recover the amount paid by him under his subscription to the first proposed increase. *Held*, that the comptroller's refusal to approve the first increase to the extent of $150,000, nullified the vote for the increase and M.'s subscription to the stock, leaving him in the position of a creditor of the bank for the amount paid in, and the subsequent proceedings, he not having participated therein, could not reanimate his contract of subscription.

T. M. Hammond, for plaintiff.
Philip Tillinghast, in pro. per.

HANFORD, District Judge. The plaintiff, L. P. Mathews, claiming to be a creditor of the Columbia National Bank of Tacoma, has brought this action against the bank and Philip Tillinghast, its receiver, to establish his claim. The material facts alleged in his complaint are as follows: The bank was originally organized with a capital of $200,000. In the month of January, 1892, the shareholders of the bank voted to increase the capital to $500,000. The plaintiff, being at that time an owner of 23 shares, which he had paid for, subscribed for 23 shares of the proposed issue of the additional stock, and made full payment for said additional stock, at its par value. Only one-half of the amount of the proposed increased capital was ever paid in by the shareholders, and in July, 1895, the directors of the bank made application to the comptroller of the currency to approve the increase of stock to the amount of $150,000, which had been paid in, and said application was refused. In September, 1895, the shareholders voted an increase of capital to the amount of $150,000, and applied to the comptroller of the currency to approve such increase, which he refused. On October 23, 1895, without any renewal on the part of the shareholders or directors of the bank of the application for approval of an increase of capital, the comptroller, on his own motion, signed a certificate approving the increase voted for by the shareholders in September. The bank was at that time insolvent, and on the next day a receiver was appointed by the comptroller, who took immediate possession of the bank and its assets. The plaintiff's claim for the amount which he paid for 23 shares of additional stock has been disallowed by the receiver.

To this complaint the defendants have demurred, thereby raising the important question as to the validity of the action of the comptroller in assuming to approve the increase of the capital when there

was no application therefor pending, and after he had once exercised his power in the premises by refusing to sanction such increase. Section 5142 of the Revised Statutes of the United States provides for increasing the capital stock of national banks, and it is therein provided that three things must concur, to constitute a valid increase, viz.: First, the association must, by a vote of two-thirds of its stockholders, assent to the increase; second, the entire amount of increase must be paid in; third, the comptroller must, by a certificate, approve the increase, and certify to the fact of its payment. The attempt to increase the capital of the Columbia National Bank to $500,000 failed for lack of two of these essentials; for the amount of the proposed increase was not paid in, and the comptroller did not grant the necessary certificate. In support of the demurrer, the defendants claim that it was in the power of the comptroller to approve an increase to any amount not in excess of the amount assented to by the shareholders, and that his action approving an increase for $150,000 is effective against all who were subscribers to the increased capital authorized by the original vote of the shareholders in January, 1892, and that they are liable as shareholders, although no certificates of stock were issued; and they cite the following decisions of the supreme court: Delano v. Butler, 118 U. S. 634, 7 Sup. Ct. 39; Aspinwall v. Butler, 133 U. S. 595, 10 Sup. Ct. 417; Bank v. Eaton, 141 U. S. 227, 11 Sup. Ct. 984. In deference to these decisions, I should feel constrained to overrule this demurrer if the facts of this case brought it within the rules therein laid down. But in this case the comptroller, instead of complying with the application for his approval to an increase towards which the complainant had subscribed, did the contrary; that is to say, he refused his approval, and thereby nullified the vote of the shareholders for an increase of capital, and canceled the complainant's subscription for 23 shares of the increased capital. This left the complainant in the position of a creditor of the bank for the amount of money which he paid in for stock which he did not get. The subsequent action of the shareholders, in which he did not participate, in making a new application to increase the capital, cannot, by any rule of law, operate to reanimate the complainant's contract of subscription; and I hold that it is contrary to the principles of justice, and beyond the power of the comptroller, to change the rights of the complainant from that of a creditor of the bank to that of a shareholder liable to assessment for the benefit of other creditors, by a mere fiat, after the bank had become insolvent, and after all attempts to increase its capital, whereby it might have been saved from ruin, had failed by reason of the exercise of his power in refusing to approve such increase. The demurrer will be overruled.

NORTHWESTERN MUT. LIFE INS. CO. v. KEITH et al.

SAME v. ROBY et al.

(Circuit Court of Appeals, Eighth Circuit. November 16, 1896.)

Nos. 764, 765.

MORTGAGE FORECLOSURE—DEFICIENCY JUDGMENT.

When, in a suit in the United States circuit court for the foreclosure of a mortgage, the proceeds of the mortgage sale are less than the amount due on the mortgage, the complainant is entitled, under equity rule 92, to a deficiency judgment, as a matter of right.

Appeals from the Circuit Court of the United States for the District of Kansas.

A. B. Jetmore and A. P. Jetmore filed briefs for appellants.

A. H. Vance and M. T. Campbell filed brief for Wilson Keith and Mary I. Keith.

F. G. Hentig filed brief for Henry W. Roby and Sara E. Roby.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. These cases were suits in equity which were brought by the Northwestern Mutual Life Insurance Company, the appellant, against Henry W. Roby and Sara E. Roby in the one case, and against Wilson Keith and Mary I. Keith in the other, for the purpose of foreclosing mortgages on real estate situated in the city of Topeka, Kan. A decree was rendered in favor of the complainant in each case. The mortgaged property was duly sold under and by virtue of the provisions of the decree, by a special commissioner, and the amount realized in each case was found to be insufficient to satisfy the mortgage debt. The circuit court confirmed the reports of sale, but refused to render a judgment against the respective mortgagors for the amount due on the respective mortgages over and above the proceeds of the mortgage sale, which deficiency amounted in the one case to $633.75, and in the other to $974.74. The complainant below appealed, assigning for error in each case the refusal of the circuit court to render a judgment for the deficiency. The sole question to be considered, therefore, is whether the appellant was entitled, as a matter of right, to a judgment for the deficiency found to exist in the respective cases, or whether it was discretionary with the trial court to render such a judgment. Equity rule No. 92 provides:

"That in suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same as is provided in the eighth rule of this court regulating equity practice where the decree is solely for the payment of money."

The rules promulgated by the supreme court regulating the practice in chancery cases were adopted in pursuance of authority conferred by an act of congress (Rev. St. U. S. § 917), and for that reason they have the force and effect of law. No district or circuit court of