

court to compel the trustees of the railroad to enforce the payment of interest. He might have done so of his own motion. Any other taxpayer, advised, as all of his class must have been, of that which was being done on behalf of the city in the enforcement and construction of the lease, might have brought into litigation, and settled thereby, the question of the obligation of the lessee company to pay interest on delayed installments. No such action was taken. Municipal corporations, acting in their proprietary capacity, especially when engaged in business enterprises for profit, like that of owning and leasing a railroad, cannot, any more than private individuals, avoid inferences from their inaction and silence as to their acquiescence in and ratification of the acts and omissions of their agents after so long a period of time as 15 years, when the acts and omissions complained of have been constantly recurring four times a year, and have been well known to the public at large. I hold, therefore, that by the construction put upon this lease by the parties to it as shown by 15 years of operation thereunder there is no obligation upon the lessee company to pay interest upon installments of rent within the 90 days after said installments become due, and before the right of re-entry and forfeiture under the lease accrues, and that an order must be made requiring the trustees of the Cincinnati Railway to accept from the receiver in future the installments of rent due under the lease, and to receipt therefor in full of said installments if paid in full at any time within the period of 90 days from the day fixed for payment in said lease.

JEWETT et al. v. YARDLEY.

(Circuit Court, E. D. Pennsylvania. April 6, 1897.)

BANKS—INSOLVENCY—TRUST DEPOSIT.

Where a depositor in a bank obtains from it two drafts upon another bank, paying therefor by checks against his deposit, the relation between the bank and the depositor with respect to such drafts remains that of debtor and creditor, and is not changed to a fiduciary relation, entitling the depositor, upon the bank becoming insolvent before the drafts are paid, to have the assets in the hands of its receiver applied by preference to the payment of such drafts in full.

This was a case stated, filed by agreement of the parties, to be of the same force and effect as if the facts set out had been found by the court in an equity proceeding.

From the case stated it appeared that on May 5 and 6, 1891, the plaintiffs, who were depositors with the Spring Garden National Bank, purchased from it two drafts, one for \$1,092.98 and the other for \$1,049.69, drawn upon the Hanover National Bank of New York, in favor of Swift & Co. of Chicago; that plaintiffs paid for these drafts by checks drawn against moneys previously deposited by them with the Spring Garden Bank; that the drafts were sent by plaintiffs to Swift & Co. at Chicago, and were by the latter's agent, the Metropolitan National Bank of Chicago, presented for payment to the Hanover National Bank on May 11, 1891. The Spring Garden National Bank failed on May 8, 1891. Payment of these drafts was refused by the Hanover National Bank, it having previously appropriated, on May 8, 1891, the funds of the Spring Garden National Bank in its hands to the payment of the debt due from that bank to itself. At all times from the time of the making of the draft to

the time of its failure, the Spring Garden National Bank had in its hands more than the amount of the drafts in cash, and more than that amount on deposit to plaintiffs' credit; and this amount of cash was turned over to the receiver. Subsequent to the failure of the bank, upon suit by the receiver against the plaintiffs, the latter claimed and were allowed, on a trial by jury, a set-off which included the amount of these two drafts.

Joseph Leedom, for complainant.
Read & Pettit, for defendant.

DALLAS, Circuit Judge. There are neither pleadings nor proofs in this case, but a "case stated" has been agreed upon and filed, which counsel have desired me to deal with as if the facts therein stated had been set forth in a bill of complaint, and the bill had been demurred to. The questions involved have been fully argued, and I perceive no reason for declining to decide the case in compliance with the joint request of counsel, without regarding the manner of its presentation.

It is not necessary to consider all the points which have been made and discussed, for, in my opinion, the fundamental proposition of the plaintiffs, upon which their supposed right to relief in equity absolutely depends, cannot be sustained. The plaintiffs, being depositors in the Spring Garden National Bank, "purchased" of the said bank two drafts on the Hanover Bank in New York, and paid therefor by their checks upon the Spring Garden National Bank, to meet which their then deposit account was more than sufficient. This transaction did not create a trust. The Spring Garden Bank was simply the debtor of the plaintiffs for the money which had been deposited by the latter, and, when that bank issued the drafts on the Hanover Bank, it assumed no fiduciary relation to the plaintiffs, but merely gave them orders upon the Hanover Bank for payment of indebtedness of the Spring Garden Bank. The drafts proved to be worthless, and, consequently, the Spring Garden Bank remained debtor to the plaintiffs for the money represented by them; but it was not converted into a trustee of the price which had been paid for purchase of the drafts.

I have read the opinion of Judge Butler in the case of *Massey v. Fisher*, 62 Fed. 958, to which the plaintiffs' counsel has referred. The facts of that case plainly distinguish it from this one.

Let a decree for defendant be prepared, and, upon notice, be submitted.

COMER et al. v. POLK COUNTY et al.

(Circuit Court of Appeals, Fifth Circuit. June 21, 1897.)

No. 589.

TAXATION—RAILROADS—LIABILITY OF FORMER RECEIVERS.

Taxes against a railroad cannot be collected from receivers who had the control and management of the property during the years for which such taxes were assessed, as a part of the system owned by the company for which they are receivers, but whose connection with the road has ceased, except in an equitable proceeding, and upon proof that they have assets of such railroad in their hands, or have diverted its revenues.

McCormick, Circuit Judge, dissenting.