

the statute have been determined and adjudged by a proper court, in a suit brought for that purpose by the comptroller of the currency, and a dissolution of the association, as provided by said section. Counsel for the defendants affirm that no action against directors to recover damages which the association shall have sustained in consequence of violations of the statute can be commenced until after the association has ceased to exist. More concisely stated, the proposition is that the same law which creates a liability denies to the injured party all right to enforce it. The following authorities are relied upon: *Welles v. Graves*, 41 Fed. 459-468; *Bank v. Peters*, 44 Fed. 13-16; *Hayden v. Thompson*, 67 Fed. 273-277; *Gerner v. Thompson*, 74 Fed. 125-131; *Kennedy v. Gibson*, 8 Wall. 498. The first two of these cases may be fairly regarded as decisions sustaining the defendants' side of the argument. The case of *Gerner v. Thompson* was originally brought in a state court, and was removed by the defendants into the United States circuit court for the district of Nebraska, and was remanded for want of jurisdiction. The court held that, if the action were to enforce only a common-law liability, there would be no federal question upon which the jurisdiction could be founded; and, if the action be considered as one to enforce a liability under a statute of the United States, it could not be maintained by the plaintiff, for the reason that the circuit court of appeals for that circuit had previously ruled in the case of *Bailey v. Mosher*, 11 C. C. A. 304, 63 Fed. 488, that, after the appointment of a receiver of an insolvent national bank, an action of this character, based upon the provisions of the national banking act, could be brought only in the name of the receiver. All of the opinion touching the question as to the necessity for an adjudication dissolving a national banking association, before the liability of its directors, for violations of the national banking act, could be enforced under the provisions of section 5239, Rev. St., was a mere voluntary expression, not necessary to the disposition of the case. In the case of *Kennedy v. Gibson* a receiver of an insolvent national bank brought a suit against stockholders as a means of assessing them to make up a deficiency in the assets. In his bill, the complainant averred that it was necessary to collect the amount sued for to meet the balance of the bank's indebtedness. The court held that under the law it is for the comptroller of the currency to decide when it is necessary to institute proceedings against the stockholders of an insolvent national bank to enforce their personal liability, and whether the whole or a part, and, if only a part, how much, shall be collected; and, as these matters are referred to the judgment and discretion of the comptroller of the currency, action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver, and the bill was held to be defective and insufficient for failure to aver that the comptroller had directed the receiver to commence the suit, or that he had made any order assessing the stockholders. Good and sufficient reasons are given in the opinion for requiring action by the comptroller in the exercise of his discretionary powers to precede the commencement of suits by a receiver, and to my mind the argument in the opinion

of the supreme court in that case takes from the decision any possible bearing, by analogy or otherwise, upon the question now under consideration. The decision and judgment of the circuit court, by Judges Dundy and Riner, in *Hayden v. Thompson*, was reversed by the circuit court of appeals for the Eighth circuit, in a decision reported in 17 C. C. A. 592, 71 Fed. 60-70, and by the opinion of the appellate court it is shown that the court was not authorized to consider or pass upon this question. So that case may also be eliminated from consideration. I will not extend this opinion by commenting on the decisions in *Welles v. Graves* and *Bank v. Peters*, further than to say that the reasons assigned do not impress me as being sound. I am not able to adopt the conclusions arrived at by the learned judges in those cases, for the reason that the words of the statute do not in any wise suggest the idea that congress intended to deny to an association which has the strength, ambition, and honesty to continue its existence after having sustained losses in consequence of willful violations of law on the part of its directors, the right to recover the amount of such losses from the wrongdoers. If the comptroller finds reasons in any case to forbear prosecuting for a forfeiture of the franchise, his exercise of discretion should not be a shield to the real culprits, nor have the effect to make the damage to innocent shareholders irreparable. 3 *Thomp. Corp.* §§ 4113, 4303. The opposite ruling of the circuit court for the Eastern district of Missouri, in *Stephens v. Overstolz*, 43 Fed. 771-775, in my opinion comes nearer to being a correct interpretation of the law. The opinion in that case was delivered by Judge Thayer, and was concurred in by Mr. Justice Miller. It shows plainly that a decision of this question was necessary to a determination of the case, and that part of the opinion which bears upon this question was in fact a solemn adjudication, and not mere obiter dictum, as counsel for the defendants have supposed.

2. This suit relates to the execution of a trust, and is for the recovery of money alleged to have been fraudulently dissipated by unfaithful agents, who are the defendants called to account. Cases of this nature are cognizable in equity, whenever a suit in equity affords the only complete and adequate remedy. I have made reference to section 5239 as a law creating a liability. It is a positive declaration of the lawmaking power defining the extent of liability of directors of national banking associations for willful breaches of trust. And yet the liability is not a new creation of the statute. If the statute does more than to re-enact the common law, and principles previously familiar to equity practice, all that is new consists of an extension of the liability in favor of shareholders and other persons who may be damaged by acts of the directors in violation of the statutes, so as to authorize suits and actions by persons who otherwise would be compelled to look to the association alone to make good their losses. It has been decided in a number of cases that, where the affairs of an insolvent national bank have been placed in the hands of a receiver, who alone has the right to collect its assets, actions to enforce the liability of directors cannot be prosecuted by shareholders or creditors, so that practically the rule of the statute as to the liability of directors and the remedy is the same as the rule in equity. Possibly

there may be cases in which a suit based upon the statute may be maintained by a plaintiff who would otherwise be debarred, but I am unable to discover any enlargement of the rights of a banking association. In equity, the relation of the directors to the association are similar, if not identical, to that of trustee and cestui que trust (3 Pom. Eq. Jur. §§ 1089, 1090); and in equity "the trustee's personal liability to make compensation for the losses occasioned by a breach of trust is a simple contract equitable debt. It may be enforced by a suit in equity against the trustee himself, or against his estate after his death." 2 Pom. Eq. Jur. § 1080. I hold that, even if the statute does create a liability enforceable by an action at law, nevertheless it does not diminish the jurisdiction of the courts in equity, unless the conditions are such that the remedy at law is equally adequate and complete. In this case the transactions involved are complicated by the subsequent exchanging of promissory notes and taking of property as security for the loans which are alleged to have caused the losses complained of. These securities must be converted into money, or otherwise disposed of, before the amount of the loss can be definitely ascertained. It is obvious, therefore, that the complainant is entitled to relief in equity, because the remedy at law is not adequate or complete.

3. In their argument the defendants' counsel show that at the time of the institution of this suit the comptroller of the currency could not have brought suit against the complainant to forfeit its charter on account of the alleged violations by the defendants, because such action at that time was barred by section 1047, Rev. St., which provides that "no suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from, the time when the penalty or forfeiture accrued," and on this foundation build an argument to the effect that, because the comptroller of the currency could not then have maintained an action to forfeit the charter, the complainant cannot maintain this action. This might be a logical conclusion if it were true that an adjudication forfeiting the charter in a suit instituted by the comptroller of the currency were a necessary prerequisite to an action against the directors to recover the amount of losses sustained in consequence of violations of the banking act, committed by them; but, that proposition failing, the argument based upon section 1047, Rev. St., must likewise fail. The statute of limitations of this state provides that the right to commence an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument, is barred after three years from the time the cause of action accrued. But it must be remembered that at the time of making the loans which caused the losses complained of the defendants were the managing officers of the bank. I hold that in cases of this nature the statute of limitations will not begin to run so long as the cestui que trust is under the control or influence of the trustee (2 Perry, Trusts [3d Ed.] § 864, p. 512; 2 Pom. Eq. Jur. § 1089), and, as this suit

was commenced within three years from the time when the defendants gave up control of the bank to their successors, it is not barred by the statute of limitations. Demurrer overruled.

JOHNSON CO. et al. v. THOMSON-HOUSTON ELECTRIC CO.

(Circuit Court of Appeals, Third Circuit. September 21, 1897.)

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

This was a suit in equity by the Thomson-Houston Electric Company against the Johnson Company and others for alleged infringement of a patent. The circuit court made an order granting a preliminary injunction (78 Fed. 361), from which order the defendants appealed. On September 17, 1897, the following stipulation, signed by counsel for the respective parties, was filed:

"In view of the decision of the circuit court of appeals for the Second circuit in the suit of the complainant and appellee herein against the Hoosick Railway Company, filed July 21, 1897, it is hereby consented that the order for a preliminary injunction granted herein in the circuit court upon the 6th, 7th, 8th, 12th, and 16th claims of Van Depoele patent, No. 495,443, be reversed, with costs, without prejudice to the rights of either party at final hearing upon the said claims or other claims of said letters patent."

G. J. Harding, for appellants.

Frederic H. Betts, for appellee.

Before DALLAS, Circuit Judge, and BUTLER and BRADFORD, District Judges.

PER CURIAM. And now, this 21st day of September, A. D. 1897, in view of the stipulation between counsel attached hereto consenting to the same, it is ordered that the decretal order of the circuit court of the United States for the Western district of Pennsylvania, made January 28, 1897, enjoining the Johnson Company, of Pennsylvania, the Steel Motor Company, and R. T. Lane from infringing the 6th, 7th, 8th, 12th, and 16th claims of patent No. 495,443, issued to C. A. Coffin and Albert Wahl, administrators of Charles J. Van Depoele, deceased, assignors to the Thomson-Houston Electric Company, be reversed, with costs, without prejudice to the rights of either party at final hearing upon the said claims or other claims of said letters patent.

CARTER v. SWEET et al.

(Circuit Court, S. D. California. November 1, 1897.)

No. 730.

1. WITNESS FEES.

Under Rev. St. § 848, witnesses are not entitled to any per diems for time occupied in going to and returning from court. Their only compensation is the prescribed mileage.