

the full amount of the \$60,000 loan. It is not shown that in pursuance of, or relying upon, any or all of said acts, the appellants changed their relation to the transaction, or that they have thereby been placed in any different position from that in which they would otherwise have been. The letter of January 10, 1893, rejecting their proposition, and declining to give the matter "further attention at present," was not inconsistent with an intention upon the part of Hopkins to rely upon his rights as he understood the same to be then defined and fixed by the antecedent facts; nor was it inconsistent with his present contention, that their mortgage upon lots 9 and 10 was, in equity, postponed to his. The fact that he demanded and obtained of Parkinson further security in no way affected their rights, nor were they injured by his foreclosure of his mortgage; nor can the fact that he failed to make them parties to his foreclosure suit, or that he paid interest upon their mortgage, or that he requested them to delay the commencement of their foreclosure suit, be construed to be a ratification of their mortgage, or an admission of the priority of their lien. He held a lien second to theirs upon a portion of the property, and claimed a prior lien upon the remainder. While so asserting his claim, he waived none of his rights by paying the appellants the interest on their mortgage, or by requesting them to delay their foreclosure, or by any other act of which the record advises us. We find no error for which the decree should be reversed. It is therefore affirmed.

RICHARDSON v. DENEGRE et al.

(Circuit Court of Appeals, Fifth Circuit. March 14, 1899.)

No. 748.

BANKS—RECEIVING DEPOSITS WHEN INSOLVENT—RECOVERY OF UNCOLLECTED CHECKS BY DEPOSITOR.

Checks delivered to a bank by a depositor for collection and deposit at a time when the bank was insolvent, as must have been known by its officers, and which had not been collected when the bank closed its doors, remain the property of the depositor, and may be recovered by him from the receiver.

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

The case made by the pleadings and sustained by the testimony is as follows: On August 5, 1896, the appellees, regular depositors in the American National Bank at New Orleans, deposited therein, a few minutes after the bank closed at 3 o'clock p. m., the following checks:

"No. 8,935.

New Orleans, July 30, 1896.

"New Orleans National Bank, pay to the order of J. P. Blair, Esq., forty-one and $\frac{60}{100}$ dollars.

R. E. Craig, Vice President.

"Fergus G. Lee, Secretary.

"\$41.66."

On end: "Sun Mutual Ins. Co., 52 Camp St."

Indorsed: "Pay Denegre, Blair & Denegre. J. P. Blair.

"Pay to American National Bank for collection and deposit. Denegre, Blair & Denegre."

"No. 655.

Citizens' National Bank of Louisiana.
New Orleans, August 5, 1896.

"Pay to the order of Mess. Denegre, Blair & Denegre, Attys., twenty-one hundred and twenty-two $\frac{72}{100}$ dollars. Chas. J. Theard."

Indorsed: "For deposit. Denegre, Blair & Denegre, Southern Pacific Company, Atlantic System."

"New Orleans, August 5, 1896.

"Pay to the order of J. P. Blair five hundred dollars.

"Jno. B. Richardson, Local Treasurer.

"To the Citizens' Bank, New Orleans.

"\$500.00."

Indorsed: "Pay to Denegre, Blair & Denegre. J. P. Blair.

"Pay to American National Bank for collection and deposit. Denegre, Blair & Denegre."

These deposits were made in the usual course of business, for the purpose of having the checks collected, and the proceeds placed to their credit. At the time the deposits were made, while credit was given upon the bank book of appellees, the checks themselves were set aside like all other deposits received that day, and kept separate and apart from the funds of the bank, until after the meeting of the directors in the evening, at which meeting the said separation of that day's deposits was affirmed and ratified. Appellees were not indebted to the bank, but had over \$2,000 to their credit on deposit. The bank never opened its doors again for business after the receipt of the said checks, but was taken charge of by the bank examiners, and subsequently placed in the hands of a receiver, the appellant herein. For a long time the bank had been in such a condition of insolvency as must have been known to its managing officers. The appellees subsequently stopped payment of the checks, and they were never collected, and are still in the hands of the bank's receiver. Demand was made for their return, which was refused. The present suit was brought to recover possession of said checks in the court below, which gave judgment for the complainants, and perpetually enjoined Frank L. Richardson, as receiver, from making any other disposition of the said checks than to return the same to complainants; from which judgment said receiver appealed, and assigned said ruling as error, and contended: (1) The court erred in rendering a decree in favor of complainants; (2) in not holding that the relations of the complainants to the bank, as a depositor of checks in controversy, was that of debtor and creditor; (3) in holding that the check for \$2,122.76 drawn by Charles Theard, and then indorsed "For deposit," did not vest in said bank; and (4) that the court erred in holding that it appeared from the evidence that the bank was hopelessly insolvent, to the knowledge of its officers, at the time of the deposit of the checks in controversy.

Chas. S. Rice, for appellant.

E. B. Kruttschnitt, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge (after stating the facts as above). While it is well established that the checks of depositors, in the ordinary course of business with the bank, do not become the property of the bank, and the relation of debtor and creditor is not established, but that of principal and agent prevails up to the time the check is collected, and money is received by the bank, yet we think the decision of this case need not rest upon that well-established proposition of law. It is true that the late president of that bank vigorously denied that he had any knowledge of the insolvency of the bank before the night in question. It is plainly evident, not

only from the conditions which the bank has since been shown to have been in,—conditions which he could not avoid knowing,—but also from the records of the president and cashier, of which this court will take judicial notice, he could not have been telling the truth. His action setting these checks and other deposits of the 5th of August aside, failing to mingle them with the moneys of the bank, is strong proof that he was aware that the bank was hopelessly insolvent. The testimony of the bank examiners shows that the bank had been hopelessly insolvent for months. The officers were where they could have known, they should have known, and must have known its actual condition. Of this insolvency, however, it is evident that the appellees had no knowledge or intimation, for they not only allowed their large deposit to remain in the bank, but sent that which is in controversy here, which they would not have done if they had had the slightest intimation that the bank was in trouble. The action of the bank in thus receiving said checks for collection was such a fraud upon the appellees as gave them the right to demand the return of the checks. We do not feel called upon to cite any authorities to establish the doctrine that the checks received under such circumstances did not become the property of the bank, but remained that of depositors, who have, under the circumstances, the right to recover the same; and the judgment of the lower court is therefore affirmed.

GIRARD POINT STORAGE CO. v. ROY.

(Circuit Court of Appeals, Third Circuit. February 28, 1899.)

No. 19, September Term.

WHARF—LIABILITY OF OWNER—NEGLIGENCE.

A wharf constructed in 1865 was from time to time thereafter repaired, and in the fall of 1893 some of the old posts were replaced, and all the new posts and those that were reset were fastened and braced in the wharf. The evidence was uncontradicted that the wharf, as repaired, including the mooring posts, was considered by wharf builders staunch and strong. After a storm of unusual violence had prevailed for several days, the river on which the wharf was situated became much swollen, and its current very rapid. Two ships moored side by side at the wharf broke adrift, by the pulling out, under the stress of the wind and tide, of mooring posts to which they were fastened, and struck a ship as she lay moored in the river, causing the damage sued for. *Held*, that the owners of the wharf were not negligent nor liable for the injuries received.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

John Hampton Barnes and Geo. Tucker Bispham, for appellant.
John F. Lewis, for appellee.

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

BRADFORD, District Judge. This is an appeal from a decree against the Girard Point Storage Company on account of alleged negligence in the maintenance and management of a wharf, result-