

Finn Vs. Brown

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Court : US Supreme Court

Decided On : Dec-14-1891

Appeal No. : 142 U.S. 56

Appellant : Finn

Respondent : Brown

Judgement :

Finn v. Brown - 142 U.S. 56 (1891)

U.S. Supreme Court Finn v. Brown, 142 U.S. 56 (1891)

Finn v. Brown

No. 106

Argued November 24-25, 1891

Decided December 14, 1891

142 U.S. 56

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF COLORADO

SYLLABUS

Fifty shares of the stock of a national bank were transferred to F. on the books of the bank October 29. A certificate therefor was made out but not delivered to him. He knew nothing of the transfer and did not authorize it to be made. On October 30, he was appointed a director and vice-president. On November 21 he was authorized to act as cashier. He acted as vice-president and cashier from that day. On December 12, he bought and paid for 20 other shares. On January 2 following, while the bank was insolvent, a dividend on its stock was fraudulently made, and \$1,750 therefor placed to the credit of F. on its books. He, learning on that day of the transfer of the 50 shares, ordered D., the president of the bank, who had directed the transfer of the 50 shares, to retransfer it, and gave to D. his check to the order of D., individually, for \$1,250 of the \$1,750. The bank failed January 22. In a suit by the receiver of the bank against F. to recover the amount of an assessment

Page 142 U. S. 57

of 100 percent by the Comptroller of the Currency in enforcement of the individual liability of the shareholders, and to recover the \$1750.

HELD

(1) In view of provisions of 5146, 5147 and 5210 of the Revised Statutes, it must be presumed conclusively that F. knew from November 21 that the books showed he held 50 shares.

(2) F. did not get rid of his liability for the \$1,250 by giving to D. his check for that sum in favor of D. individually.

The Court stated the case as follows:

This is an action at law, brought in the Circuit Court of the United States for the District of Colorado by the receiver of the First National Bank of Leadville, Colorado, against Nicholas Finn, to recover \$8,750, with interest upon \$7,000

thereof from September 28, 1885, and upon \$1,750 thereof from January 2, 1884. The bank was a national banking corporation, and, it becoming insolvent, the Comptroller of the Currency, on the 24th of January, 1884, appointed one Ellsworth receiver of the bank, who afterwards resigned, and the plaintiff became his successor. The amended complaint alleges that the defendant, on the 29th of October, 1883, became the holder of 50 shares of the capital stock of the bank, and on the 12th of December, 1883, the holder of 20 others of such shares, the shares being of the par value of \$100 each; that certificates of stock were duly issued to the defendant for such shares, respectively; that on the 28th of September, 1885, the Comptroller of the Currency, under 5151 of the Revised Statutes, determined that in order to provide the money necessary to pay the debts of the bank, it was necessary to enforce the individual liability of its shareholders to the full extent of 100 per centum of the par value of the shares of its capital stock, and thereupon, on that day, made an assessment to that effect and directed the plaintiff to take the necessary proceedings to enforce such individual liability; that thereupon there became due from the defendant \$7,000; that due notice was thereupon served upon him, but that he had paid no part of the assessment. The amended complaint then sets forth, as a second cause of action, that on the second of January, 1884, and for a long time

Page 142 U. S. 58

prior thereto, the defendant was a shareholder and director and acting cashier of the bank; that on that date and for a long time prior thereto, the bank was insolvent; that on that date, by its board of directors, it fraudulently and wrongfully declared a dividend of 25 percent on its capital stock to be paid to its shareholders; that the defendant, as such director, was present at the meeting of the board at which such dividend was declared, and united in such action with full knowledge of such insolvency; that on that date, the defendant received from the bank \$1,750, as his proportion, on said 70 shares, of said dividend, and retained, and still retains, that sum, with full knowledge that at that date there were then no net profits of the bank, and that the dividend was wrongfully withdrawn from its capital stock, and that repayment of the \$1,750 had been demanded of the

defendant, and refused. The answer denies that the defendant ever became the holder of the 50 shares of stock, or that there was issued to him a certificate for 50 shares, but admits that on the 12th of December, 1883, he became the holder of 20 shares, and that there was issued to him a certificate therefor. It admits the defendant's liability for \$2,000 on the 20 shares of stock, and alleges that after the commencement of the suit, he paid to the plaintiff the \$2,000. It denies that at the time stated in the second cause of action set forth in the amended complaint, as to the \$1,750, the defendant was a director of the bank, or that he ever was its acting cashier. It takes issue as to the declaring of the 25 percent dividend and denies that the defendant, as a director of the bank or otherwise, was present at the meeting of the board at which it was declared, or that he united in such alleged action with any knowledge of the insolvency of the bank or otherwise, and denies that he received the \$1,750 as his proportion of such dividend, but admits that he received \$500 as a dividend of 25 percent upon the 20 shares. The cause was tried before the court and a jury, and a verdict was rendered for the plaintiff for \$7,833.33, and a judgment for the plaintiff for that amount was entered. The defendant has sued out a writ of error to review that judgment. There is a

Page 142 U. S. 59

bill of exceptions which contains all the evidence given on the trial. The facts of the case appear to be as follows:

The doors of the bank were closed on the 22d of January, 1884. Immediately thereafter, Ellsworth was appointed receiver, and continued to be such until February 1, 1884, when, on his resignation, the plaintiff was appointed in his place. According to the stubs of the book of certificates, and as shown by the stock register, 50 shares of the stock were transferred to the defendant, by issuing a certificate for 50 shares, dated October 29, 1883, 40 shares of which were issued to the defendant from the stock of one McNany and 10 shares from the stock of Frank W. De Walt, the president of the bank. Those 50 shares constituted the only stock which stood in the name of the defendant until December 12, 1883. On the 30th of October, 1883 at a directors' meeting, the defendant was appointed a director, and on the same day at a directors' meeting, he was appointed vice-

president of the bank. On the 21st of November, 1883 at a directors' meeting at which the defendant was present and voting, the resignation of P. J. Sours, the cashier, was accepted, and the defendant, as vice-president, was authorized to act as cashier until a new cashier should be regularly appointed. On the same day, the defendant and De Walt, the president, were authorized to pass judgment on all notes, etc., offered for discount. The defendant discharged the duties of vice-president from the 21st of November, 1883, until the bank failed. It appeared from the book of share certificates that the defendant, at the time of the failure of the bank, was the owner of 70 shares of its stock. It also appeared that since this suit was brought, he had paid the \$2,000 assessment on the 20 shares. It further appeared that the defendant, as vice-president, wrote a number of letters to correspondents of the bank, notifying them of the resignation of Sours as cashier and enclosing the defendant's signature, which was to be recognized on bills of exchange, etc., subsequent to that time, and that he signed, as vice-president, between November 21 and December 12, 1883, and also between December 12, 1883, and January 22, 1884, a large number of

Page 142 U. S. 60

certificates of deposit and bills of exchange issued by the bank. No regular stockbook was kept in the bank, but a list of stockholders and transfers of stock appeared in one of its books, in which was entered a credit to the defendant of 50 shares of stock on October 29, 1883, and of 20 shares more, purchased by him from Sours, on December 12, 1883. It appeared that no demand had been made upon De Walt or McNany to pay the assessment on the 50 shares. The defendant claimed that the 50 shares were transferred to him without his knowledge or consent; that no transfer appeared upon the books, to the credit of either De Walt or McNany from the defendant, of any sum of money for the 50 shares, and that the certificate for the 50 shares was not among the papers of the bank so far as the receiver could ascertain. The defendant, on cross-examination as a witness, gave evidence tending to show that in connection with De Walt, he had fulfilled the duties of cashier of the bank from the time of his election as vice-president. The books of the bank showed that it was insolvent on January 2, 1884. Sours owned

20 shares of the stock on the 29th of October, 1883. On that day, he tendered his resignation to the president, and on the same day the president instructed him to issue a certificate of stock for 50 shares in the name of the defendant, transferring 40 shares thereof from the stock of McNany, and 10 shares from the stock of De Walt. Sours wrote the certificate, signed it as cashier, and left it in the book of certificates, but did not deliver it to the defendant. On the 21st of November, 1883, Sours attended a meeting of the directors at which time his resignation as cashier was accepted, and at that meeting the defendant was elected a director, and on the same day at a meeting attended by the defendant, the latter was elected vice-president. On December 12, 1883, the defendant paid Sours \$2,400 for his 20 shares, and Sours handed to him the certificate therefor, duly assigned. It was customary for Sours, as cashier, to sign new certificates of stock as issued. He resigned because he was not satisfied with the manner in which the bank was conducted, and had his fears of coming disasters. He knew that no cashier had been elected to take his place, and that the

Page 142 U. S. 61

duties of that office had been performed by the defendant, and Sours ceased his active connection with the bank after the defendant had been elected vice-president, and before he disposed of his stock to the defendant.

The defendant testified that he knew nothing of the transfer of the 50 shares of stock to his name, and was absent from Leadville at the time; that, after he returned, he was urged by De Walt to invest in the stock of the bank, and become one of its active officers, which he consented to do; that on the 21st of November, 1883, he was elected a director, he being present at the meeting; that at the same meeting, he was elected vice-president, and entered at once upon the discharge of his duties; that he was then urged to obtain some stock in the bank, and was informed by the president that 20 shares of the stock could be secured from Sours for a premium of \$20 per share, and was advised by the president to take it, the latter representing the bank to be in a prosperous condition; that the defendant then purchased the 20 shares from Sours, and had them transferred to his name on the books, and took a certificate therefor; that, from the time of his election as

vice-president, he performed some of the business of the bank, had his headquarters in the bank, wrote some letters, and signed some certificates of deposit and bills of exchange, the business being of a routine character, and he having little knowledge of the books and no knowledge of the condition of the bank, and relying almost entirely upon the representations and management of the president, and that he never had a certificate for the 50 shares or any other shares, except the 20 shares.

On the second of January, 1884, a dividend of 25 percent on the capital stock of the bank was declared, and the sum of \$1,750 was transferred to the credit of the defendant, as his share of such dividend on 70 shares of stock. At that time, the bank was wholly insolvent, and the declaration of the dividend was fraudulent. According to the record of the directors' meeting at which the dividend was declared, the defendant was present, and seconded the motion to declare the dividend. The entry in the book of records of the bank of

Page 142 U. S. 62

the declaration of the dividend was thought to be in the handwriting of a female relative of the president. The defendant testified that on the second of January, 1884, he was informed by De Walt, the president, that a dividend of 25 percent had been declared, and by someone else that the sum of \$1,750 on account of such dividend had been transferred to his credit by order of De Walt; that, being the owner of only 20 shares, he at once inquired of De Walt about it, when, for the first time, he was informed that the 50 shares had been transferred to his credit, and stood in his name on the books of the bank, in consequence of which \$1,250 had been transferred to his credit as soon as the dividend was declared; that he inquired of De Walt why the 50 shares were in his name, and was informed that they had been so transferred merely because De Walt thought the defendant might desire to purchase them as a good investment; that the defendant at once repudiated the transaction, and refused to purchase the stock or have anything to do with it, and ordered De Walt to retransfer the same back to his own name without delay; that the defendant immediately sat down and drew his check for \$1,250 to the order of De Walt individually, and handed it to the latter; that the

check was duly charged on the books of the bank to the defendant, and credited to the account of De Walt; that almost immediately thereafter the defendant was summoned on a jury, and was kept in attendance thereon almost constantly until the 21st of January, 1884, the day but one before the suspension of the bank; that during a part of such jury service, he was confined with the other jurors, and not permitted to separate from them; that, the next day after the agreement of the jury, he was engaged in looking after the affairs of the bank, and did not think of the stock, or whether it had been transferred by De Walt, and that the bank almost immediately suspended.

The defendant also gave evidence tending to show that he never attended a meeting of the directors for the purpose of declaring the dividend of January 2d and knew nothing about the fact that the books contained such an entry, and that he had no knowledge of the declaration of the dividend beyond

Page 142 U. S. 63

the statement of De Walt to that effect. He recognized the handwriting of the entry of the meeting at which the dividend was declared as being that of a lady cousin of De Walt, and testified that according to the best of his information, the entry was written at the house of De Walt, and not at the bank; that he never examined the book of certificates of shares, or any other entry or any other book, with reference to the shares; that he had no knowledge of the insolvent condition of the bank, and was assured by De Walt that the bank was doing a large business and making money, and that the shares were a profitable investment; that to the best of his recollection, he had not sworn that the bank was in good condition on January 1st, but, as one of the directors, he attested a sworn statement of its condition, which was verified by the president; that at the time the dividend was declared, he was of the belief that the president had the right to set apart from the profits of the bank such an amount as would represent the dividend which might be declared; that he paid no further attention to it after that, and that he was not aware that the bank was then insolvent and not in a condition to pay its debts, nor aware at the time of the suspension of the bank that there was less than \$100 in currency on hand.

At the close of the evidence, the court refused to submit the cause to the jury, to which refusal the defendant excepted. The court then instructed the jury that under the evidence of the defendant himself, as well as under the testimony for him, he was estopped from denying his ownership of the 50 shares, and that inasmuch as he had not repaid the \$1,250 of dividend to the bank, but had paid it to De Walt, he had not refunded that amount in the manner in which he should have done. The court thereupon instructed the jury to find a verdict for \$5,000, the par value of 50 shares at \$100 per share, and interest on such par value at the rate of ten percent per annum from the date of the demand for payment by the plaintiff, together with \$1,750 dividend on the 70 shares of stock. The defendant excepted to that instruction. The defendant then asked the court to give seven several instructions, which were refused, and to each refusal the defendant excepted.

Page 142 U. S. 64

The defendant then moved for a new trial, which was denied by the court in an opinion reported in 34 F. 124. The ground of the denial of the motion for a new trial was stated by the court in its opinion to be that the defendant was chargeable with notice of the transfer of the 50 shares to him, he having acted as vice-president and cashier during the time when those shares were transferred to him; that any investigation of the books of the bank would have led to the discovery that he was a stockholder to the extent of the 50 shares in question; that when he was informed of the dividend of January 2d, all he did was to pay the \$1,250 to De Walt, who, he supposed, was the owner of the shares, and that he did not return the money to the bank.

Page 142 U. S. 67

MR. JUSTICE BLATCHFORD delivered the opinion of the Court.

The contention on the part of the defendant is that the circuit court erred in not allowing the cause to go to the jury. It is undoubtedly true, as contended by the defendant, that, as the 50 shares of stock were transferred to him originally without

his knowledge and consent, he had a right to repudiate the transaction; but he is presumed to be the owner of the stock when his name appears upon the books of the bank as such owner, and the burden of proof is upon him to show that he is in fact not the owner. *Webster v. Upton*, [91 U. S. 65](#) , [91 U. S. 72](#) ; *Turnbull v. Rayson*, [95 U. S. 418](#) , [95 U. S. 421](#) ; *Deyser v. Hitz*, [133 U. S. 138](#) . We think it entirely clear on the evidence that the defendant did not sustain such burden of proof, and that there was no question thereon for the jury. It is provided as follows, in regard to national banks, by 5146 of the Revised Statutes:

"Every director must, during

Page 142 U. S. 68

his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the state, territory, or district in which the association is located for at least one year immediately preceding their election, and must be residents therein during their continuance in office. Every director must own in his own right at least ten shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of ten shares of the stock or who becomes in any other manner disqualified, shall thereby vacate his place."

Section 5147 reads as follows:

"Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this title, subscribed by him or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. Such oath, subscribed by the director making it and certified by the officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency, and shall be filed and preserved in his office."

The meaning of 5146 is that every director must own in his own right, during his whole term of service at least 10 shares of the stock, and that, if he does not own such 10 shares, he cannot become or continue a director. In the absence of any proof on the subject, it is to be presumed that the defendant took the oath prescribed in 5147 when he was appointed, that he owned 10 shares of the stock. As he was appointed a director and vice-president at least as early as November 21, 1883, and acted as such from that time, and did not purchase the 20 shares from Sours until December 12, 1883, he was violating the law during that interval unless he owned during that space of time at least 10 shares of the stock, and, if he took the oath prescribed by 5147, he took it untruly if he did not own when he took it 10 shares of the stock. According to his own testimony, he was elected

Page 142 U. S. 69

vice-president on the 21st of November, and acted as such from that time, and also from that time fulfilled the duties of cashier of the bank covering the period prior to December 12th, when he purchased the 20 shares from Sours. The only state of facts consistent with the truth, according to the books of the bank, is that he owned the 50 shares from October 29, 1883, the day those shares were transferred to him, and the day before the records of the bank show that he was elected a director. It would appear that those 50 shares may have been transferred to him at par, and he paid a premium of \$20 a share for the 20 shares which he purchased from Sours.

It is provided as follows by 5210 of the Revised Statutes:

"The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted

to the Comptroller of the Currency."

It was the duty of the defendant, as acting cashier and in the absence of any regular cashier and of any other person authorized to act as cashier, to cause to be kept under 5210 the list of shareholders, and of the number of their shares, therein specified, and the conclusive presumption must be that he kept such list, and was cognizant of its contents. It necessarily showed his ownership of the 50 shares. Irrespective of the general duties imposed by law upon the cashier of a bank or a person who acts as such cashier, the statute imposed upon him in the present case the specific duty mentioned in 5210, and it must be presumed conclusively that he knew from the 21st of November, 1883, that the books showed that he was a shareholder to the amount of the 50 shares. The instruction of the circuit court to that effect was therefore proper.

Page 142 U. S. 70

In regard to the dividend of 25 percent, it was clearly fraudulent and unlawful. The defendant did not get rid of his liability for the \$1,250 by drawing his check for that sum in favor of De Walt individually and handing the same to De Walt. The money belonged to the bank, and ought to have been restored to the bank. The dividend being unlawful, and the \$1,250 having been paid to the defendant by the bank by being transferred to his credit by the bank on its books, it was not for him to take the place of the bank and to pay the money to De Walt. Whatever might have been the case if the dividend had been a lawful one and if the \$1,250 had been transferred by the bank to the credit of the defendant through inadvertence, the \$1,250 was no more the lawful property of De Walt than if the 50 shares (10 of which had been the property of De Walt) had not been transferred to the defendant by the instruction of De Walt to Sours to that effect. The various instructions asked by the defendant, and refused were all of them predicated in substance on the assumption that the conduct of the defendant and his connection with the bank were not such as to estop him from denying his ownership of the 50 shares of stock, and upon the alleged fact that the defendant, by paying the \$1,250 to De Walt in respect of the 25 percent dividend on the 50 shares, had

freed himself from his liability to repay such dividend to the bank.

No general rule can be laid down as to what will constitute in any particular case an acceptance of the transfer of stock or the equivalent thereof in a case where the transferee is in fact ignorant of the fact of transfer, but each case must be decided on its own facts. In the present case, the defendant testifies that on the second of January, 1884, when he was informed of the 25 percent dividend and of the transfer to his credit of \$1,250 thereof, he at once repudiated the transaction and ordered De Walt to transfer the 50 shares to his own name without delay. But this was of no more effect than his drawing his check for the \$1,250 to the order of De Walt individually and handing it to De Walt. The defendant, as vice-president and acting cashier of the bank, had the power himself to transfer

Page 142 U. S. 71

the 40 shares back to McNany and the 10 shares back to De Walt. He did not do so, but, knowing that the 50 shares had been transferred to his credit and stood in his name upon the books, he suffered the matter to remain in that shape for 20 days, until the doors of the bank were closed. He states that he did not go upon the jury until after the transaction which resulted in the drawing of the check to the order of De Walt for \$1,250. It was the defendant's duty, and he had the power, himself to make the transfer upon the books of the bank, *Whitney v. Butler*, [118 U. S. 655](#) , [118 U. S. 662](#) ; *Richmond v. Irons*, [121 U. S. 27](#) , [121 U. S. 58](#) , and it made no difference as to his power to transfer that the certificate for the 50 shares had not been delivered to him, *Pacific National Bank v. Eaton*, [141 U. S. 227](#) , [141 U. S. 233](#) . It appears by the evidence that the bank had a stock register and a book of certificates of shares, and that a list of stockholders and of transfers was kept in one of its books, although it had no regular stock-book.

The jury would not have been justified in holding the defendant not liable for the assessment on the 50 shares, or for the \$1,750 dividend. The dividend was undoubtedly fraudulent, and the records of the bank were falsified in showing that the defendant was present at the meeting at which the dividend was declared. It was declared, probably, by De Walt himself alone, for the purpose of showing a

fictitious prosperity and of concealing from the public and the directors the real condition of the affairs of the bank. The defendant had had no previous connection with banking business, and was deceived by De Walt. But all this cannot relieve him from liability. The statutes of the United States are explicit as to the necessary ownership of stock in a national bank by a director thereof, and as to his taking an oath to that effect, and as to the keeping by the cashier of a correct list of the shareholders and of the number of shares each of them holds, and it cannot be held with any safety to the interests of the public and of those who deal with national banks that a director who also is vice-president and acts as cashier can shield himself from liability by alleging ignorance of what appears by the books of which he has charge.

Page 142 U. S. 72

It has been held in England that the fact that a person acts as director will not of itself make him liable as a holder of the number of shares required to qualify him to be a director, *Marquis of Abercorn's Case*, 4 De G. F. & J. 78, 95, 110; *Roney's Case*, 4 De G., J. & S. 426; but we decide this case on the fact that the defendant appeared by the books of the bank to be the holder of the 50 shares prior to the time when he became a director or vice-president and prior to the time when he began to act as cashier, and we hold that, acting in those capacities down to the time when the doors of the bank were closed, he must be presumed conclusively to have had knowledge during that interval of what the books of the bank showed in regard to his holding the 50 shares, and that his action in respect of the 25 percent dividend, after he learned of it on the second of January, 1884, was such as not to relieve him from his liability for the \$1,250.

In some of the English cases cited, there was no requirement that in order to be a director there should be ownership of a specified number of shares. In the present case, the statute required an ownership of at least 10 shares to become or to continue a director, and as the books of the bank showed that 50 shares were transferred to the defendant before he was elected a director, and that those shares were in one certificate, the defendant could not have been advised that he

held 10 shares without learning at the same time that he held 50 shares. But in view of the requirements before referred to of the statute of the United States, no rule of law deduced from the English authorities can apply.

Judgment affirmed.

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