No. 12140

Supreme Court of Illinois

Matt$\overset{E}{\text{A}}$son, et al

---

vs.

Kellogg, et al

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ought to have been rendered for the Plffs in Error.

Upon the first assignment I do not wish or intend to submit an argument But shall confine myself to the second and 3rd assignments which are substantially the same and may well be considered together. There seems to me to be but one material Point in this cause. It is conceded by the defendants in Error that Wright during his lifetime was discharged by the force and operation of the late Bankrupt law from all his liabilities This fact as I understand this case will not be controverted by the defts in error as Wrights final discharge was admitted and read in evidence in the Court below on the Part of the Plffs in Error without objection from the defts.

But it is insisted that after the granting the certificate of Bankruptcy by the dist Court and before the death of Wright he (Wright) promised to pay this debt to the defts. upon this Point I apprehend this case must turn upon this Point both Parties seem willing to put the case. It being admitted then as it is that Wright was discharged under the late Bankrupt Law from all legal obligation to pay the debt claimed in this

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case. It will be conceded on the other hand that if Wright did in his lifetime make a promise which was binding in Law upon him then he should be bound by that promise. And that obligation does and ought to attach with equal force to the Admrs of Wright the plffs in error. But this constitutes the main question in this case did Wright Promise to pay the debt claimed? Here I think that you will serch the record in vain for any word or set of words which can by any reasonable construction be construed or contorted into such promise by Wright as would bind him to pay the debt claimed in this case

In the first place then I maintain that no such promise was in fact ever made by Wright as would create or impose upon him any legal obligation to pay the debt in question Because it appears that the conversation referred to by the Witness Bush (Who I neglected to state was called in person in the circuit court) and relied on by the defendants as constituting a Promise was some mere loose casual conversations had on several occasion Between Wright & Bush the Witness and not between Kellogg & Wright Which to say the most only goe to show some mere intention on the part of Wright to refund the money

without any intention whatever on the part of Wright to make any real or substantial promise which in its legal effect would bind him to pay the debt in question mere loose or vague words or words merely expressive of an intention to pay are not sufficient but the Promise to bind the Promisor must be distinct and unequivocal—

Second that the words relied on to constitute a Promise were not spoken to any Person competent or in any manner authorized to accept or entertain a promise from Wright

I desire now to call the attention of the Court Briefly to the evidence offered in the Court below on behalf of the defts in Error as contained in the record

The first evidence offered on behalf of the defts in error was a receipt purporting to have been executed by C & Wrights to Sylvester Bush the Witness for the sum of four hundred dollars dated the 19th day of May A D 1836 This receipt was admitted by the Court and acted upon. The defts in Error then called Sylvester Bush as a Witness Who testified that he was the person named in the said receipt and that he & Wrights Gave the Money at the time stated

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in the recpt. The Witness then stated by permission of the Court on whose account he let Wright have the money. The Witness then stated that at the time he let Wright have the money he was acting as the agent of the parties to whom the money belonged viz Aaron Kellogg Hubbard Kellogg & Ralph Talcott and that he informed Wright to whom the money belonged and that Right received the money for said Kellogg & Talcott Witness then proved that Talcott died before the commencement of this suit in the County Court and that the said Kellogg are still living. That Wright on several occasions admitted to Witness that he had had invested said money in Lands for said Kellogg & Talcott. Witness then stated that late in the year of 1836 he returned to Connecticut and made a settlement with said Kellogg & Talcott who had furnished him the money for investment in Western Lands. That on such settlement he Blish surrendered to said Kellogg the recpt signed by E.H. Wright above referred to and that Kellogg surrendered to him Witness the recpt given by him to them for the money which they originally furnished to him

And from that time until the death of Wright and shortly before the commen

-cement of this suit in the county court said recpt remained in the hands of Kelloggs Since the death of Wright Kelloggs sent said recpt to Witness with ~~a~~ power of atty authorizing him Witness to collect the debt in question Since 1836 Witness had acted as agent for defts in paying their taxes on lands in Henry County & selling same But had not acted as their agent out of said Henry County. In the letters recd by Witness from Kelloggs the defts they had two or three times enquired as to the solvency of Wright or how he was getting along and refered to this debt and enquired as to the Probability of Collecting it, ~~thereon~~ about the first of January AD 1851 and soon after receiving one of these letters from the Kelloggs in which they enquired about Wright Witness being in Warren County went out of his way on his road home to see Wright in regard to the mony named in said recpt Witness then stated that Wright and the Kelloggs were Bros in Law Witness met Wright on the road and after a little conversation spoke of Kelloggs and of the mony named in the said recpt Wright said he intended to refund it to which witness replied that they expected him to do so Wright said he

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intended to do so both Principal and interest this was in 1831

Withrop stated on cross examination that he did not inform Wright that he was agent for Kellogg nor did Withrop then know that Wright had been declared a Bankrupt Withrop also stated that Wright had Previously told him that he intended to refund the money to the defts.

The Withrop was then requested by the Court (which does not appear in the record but such is the fact) to repeat the language of the Promise to which Withrop replied that "he said "he intended to refund the money"

The defts in Error then offered S. Quimby Esq as a Witness and proved by him that Wright sometime in 1842 made an exposé of his affairs to him as an attorney for the Purpose of going through Bankruptcy Wright then told Withrop that he owed a debt to some persons in Connecticut name Kellogg the amount of debt not recollected but several hundred dollars

Here the defts in Error closed their case and I have thought it best to set out the testimony here in substance at least in connection with what I have to say After this recapitulation of the evidence in this cause may I not appeal with

with the strongest possible degree of confidence that no promise was ever made by Wright, to pay the debt in question, which has in itself really any force or legal obligation by which Wright could or ought to be held liable to pay this debt. I understand the Law to be this that mere loose or vague Promises or Words, Spoken by a certificated Bankrupt even to the Creditor himself will not take the case out of the Statute - But the Promise must be made in words Positive and unequivocal showing upon the part of the Bankrupt a deliberate intention to waive his privilege under his discharge and to take upon him a new legal obligation to pay the debt If such be the law then I ask does the evidence in this case show such an intention on the part of the Bankrupt Wright - The Language of the Witness in its strongest form is that Wright said that he intended to refund the money and this the Witness says was repeated on more than one occasion The Court will observe by an examination of the record that the Witness was not certain as to the words of the promise but in every form as given it shows nothing more than a bare

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intention on the part of Wright to refund the money and I maintain that words merely expressive of an intention to pay are not sufficient to bind a Bankrupt to pay a debt from which he has been discharged But that the words relied on to constitute the promise must be positive and unequivocal

It appears that the Witnesses and Wright had had frequent conversations in regard to this debt and it is all very natural that they should. Wright and Kellogg were Brothers in Law and Col Welch had given Wright the money & stood between Kellogg & Wright in the character of a mutual friend, how natural then I repeat for Wright & the Witness to speak of this money frequently and how natural it would be for Wright to express an intention to the Witness to refund the money; here then we find several intimate friends concerned in a Business transaction Wright & the Kelloggs are brothers in Law and Col Welch the Witness is the mutual friend of both parties Col Welch raises money from Kellogg in connecticut to invest in Western lands and he without any authority so to do at the time as shown by the record, same perhaps a subsequent ratification of the act by Kellogg.

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handed over to Wright four hundred dollars of this money to invest in Lands in Warren County Wright if you please failed to apply this money properly and so became liable to Killoggs in an action for money had and received But afterwards was discharged from this liability by a certificate of Bankruptcy Then I again repeat that under all the circumstances of this case it is perfectly natural that Wright and Bush should speak together in reference to this money and that Wright should manifest and express an intention to refund the money But I think it grossly unnatural to presume from the language used that he intended to waive his rights under his discharge and make an unconditional promise to pay. Taking the strongest Language used by Wright on any occasion as disclosed by the Witness to say nothing of the closing paragraph of the Testimony in the record in which seems to be gathered and concentrated all the power and force of all the conversations had, and they show nothing more than the expression of a mere vague intention to pay. But when you come to examine this record you will find

that whatever judgement upon tender
in this cause must be predicated upon
the ~~the~~ final answer of the Intervp in
this cause, made to an interrogatory by
the Court which answer is in these words
he said "he intended to refund the money"
disregarding all them that has gone before
as we should do him and here only we
have the words of the promise relied on
by the defendants. I feel no hesitancy in
saying & believing that when your honors
come to examine the words of this promise
you will find them conclusive of this
case The promise if any exists must
be found in the last set of words as
given by the Intervp for therein is expres
his upon judgement and most distinct
recollection of the words used after full
and mature reflection - Then I ask once
more are the words relied on as constitu-
ting a Promise such as will show on
the part of Wright the Bankrupt a
deliberate intention to renounce his privile
under his discharge and to incur a new
obligation by the laws of the Land to pay
this debt I cannot think that any such
construction can be given to the language
used

In the second place I hold that granting

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the words of the assumed promise to be sufficiently explicit and clear: Then they were not made to any person authorized or competent to receive such a promise such promise must be made to the bona fide holder of the indebtedness or to some person duly authorized by the creditor to accept such promise from the debtor Depuy vs Swank 3rd Wendell 135 - Now it is not nor will not be contended that Wright ever saw Kellogg from the time he rec'd the money from Blish the Witness until the day of his death nor did he ever make any promise whatever to Kellogg

And there is no Portion of the evidence which goes to show that Wright ever knew or was ever informed that Col Blish the Witness was acting as the agent of the Kellogg - The Witness says that he was acting as the agent of Kellogg at the time he led Wright have the money but he does not even Pretend that he communicated this fact to Wright at all he does say that he informed Wright to whom the money belonged & that Wright received the money as the money of Kellogg and Salcott And now if we are to infer that Wright knew that Blish was the agent of the Kellogg and that he so regarded him

and all this we must presume, if we
if we conclude that Wright was in possession
of this knowledge, came from the intimacy
of the parties Kellogg Blish and Wright
and if we should arrive at this conclusion
and decide that Wright Wright should be
presumed from the intimacy of all the
parties to know that Blish was the agent
of Kellogg at the time he used the money
and so regarded him. Then I say that
by the same rule we must presume that
Wright knew that Blish late in the fall
of 1836 went to Connecticut and made
a full settlement with Kellogg and delivered to them Wrights receipts and took up
from them his note which he had
executed for the money originally
and further that he Blish never since
has acted as the agent of Kellogg beyond
the limits of Henry County

But I presume that this cause will
be decided in this Court at last upon
the Law and upon the evidence as found
in the record and not upon presumptions
which may arise wholly outside of the
record. Then I say that there is no evidence
contained in the record to show that Wright ever
knew that Blish was the agent of Kellogg
or that he ever regarded him as such

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not even at the time that he received the money much less is there anything to show that Wright recognised Blish as the agent of Kellogg at the time he made the supposed promises. If Wrights had known that Blish was the duly authorized agent of Kellogg and then had used the words as stated they would still be insufficient But he was in possession of no such knowledge because the Bishop says expressly that he did not tell Wrights that he was the agent of Kellogg and this portion of the evidence may well be applied to all the conversations referred to because the conversation which on and the one to which this portion of the evidence was directed was the last conversation ever had between the Bishop and Wright So far as shown by the record. So I conclude that upon no occasion did Wright regard Blish as the agent of Kellogg But that he conversed with him and regarded him as a mutual friend between him and his relations the Kelloggs. And here I may say as a fact that appears upon the record that Blish never was the agent of the Kellogs for any purpose except for paying taxes on Lands in Henry County from the fall of 1836 up to the time of Wrights

decease. Soon after Wright's death Blish
he wrote the receipt upon which this claim
is found together with power of atty to
collect Now if Wright had told the
Bishop that he had undertaken and
promised Kellogg to pay this debt or if
knowing Blish to be the agent of the Kellogg
he had undertaken in a legal form to
pay the debt either would be sufficient
But nothing of the kind is to be found in
this case On the contrary all the conversation
had and relied on by the defts was had
with the Bishop Blish who was not authorized
to entertain any Promise or Proposition
whatever. Then I maintain that although
the words of the Promise made under this
state of case may be sufficiently definite
and clear yet they are to be regarded
as spoken to third persons without any
intention on the part of the Bankrupt to
waive his rights under his discharge and of
no force against him. A marked distinction
is taken by the authorities between cases arising
under the Bankrupt Laws and mere Statutes of
Limitation. It is said that the discharge
in Bankruptcy goes back to and extinguish-
ishes the indebtedness of the Bankrupt
while Statutes of limitation affect only
the remedy. So it seems that it has been

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almost universally held that to take a case out of the statutes of Bankruptcy the subsequent promise must be distinct and unequivocal. And that it must be made to the person holding the demand or indebted up or some person duly authorized for him

While a much more uncertain or vague promise will be sufficient to take a case out of the Statute of Limitations

On the part of the defts Below (now plaintiffs) the Certificate of Bankruptcy and Schedule of Wright were offered and admitted in evidence without objection the schedule containing the debt in question The Schedule however appears in an improper part of the record it should appear in the Bill of exceptions as a part of the evidence and it is agreed by Mr Manning and myself that it shall be so considered, as the Schedule was offered and considered as a part of the evidence in the Court below and the Court will find a note to that effect on the margin of the record

In support of the Positions above assumed I beg leave to refer the court to the following authorities to wit

Patten as Ellingwood 32nd Maine 163

Porters Admrs vs Porter 31. Maine 169

Turner as Chrisman Admr of John Moore

20 Ohio 339 Brown vs Collier 8 Humphreys
510, Prewitt vs Carruthers 12 Smedes & Marshall
492, Depuy vs Swart 3 Wendell 135
Stanton vs Eisford 7 Johnson 36
Saxtheimer vs Keyser 11 Pennsylvania 364

But it is also contended that this case falls within the effect and meaning of the first section of the General Bankrupt Law approved August 19th 1841 in other words that it is a fiduciary debt and of course not effected by the discharge in Bankruptcy. Upon this Point I shall not remark further than to say that I presume this point in the case will not be seriously contended for in this Court by the opposite counsel. I think the authorities are clear upon this Point and shall therefore content myself by referring the Court to a few cases on Point as I regard them
" Chapman vs Forsythe 2 Howard 202
Bissell vs Buchanan 15 Ohio 58
Hatten vs Speyer 5 37, Williamson vs
Dickens 5 Iredell 259, Walker Heirs vs
Edwards 5 Littell 349

Upon this Point in the case I apprehend there can be no doubt & the case must turn upon the words of the promise which are claimed by the defts as fixing the liability of the Plffs

[illegible]

and upon the character of the person to whom the supposed Promise was made upon which Points I have said all that I desire to say - It will not be denied on the one hand that Wright received the Money and on the other hand I presume it will not be contended that Wright was not regularly discharged from his debts under the late Bankrupt law from the debt ~~in~~ claimed in this case included - So the case stands upon the naked question of a subsequent Promise to pay and the words relied on by the defts as constituting such promise being in my Judgement wholly insufficient I therefore ask that the Judgement below shall be reversed

And as this is a case where this Court can ascertain beyond any doubt what Judgement should be rendered I ask the Court that Proper Judgement shall be entered here without remanding the cause

Mr Davidson Atty
for Plffs in Error

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Matteson

v.

Kellogg

For plf

Davidson

The action in this case cannot be maintained either upon principle or authority.

1. Upon principle

The rule is well settled, that a legal obligation, is a sufficient consideration to uphold either an express or an implied promise.

But the law will never imply a promise, where the foundation is a mere moral obligation

Edwards v Davis 16 Whn R. 281. Child to support indigent parent.

See the note to this case.

2 Wm's Saund R. 137 d. note (e)

Read: on bankruptcy.
2 W Saund 137a
N.E.
12 S&R. 182.
2 Rawle 351.

In order to found a cause of action, upon a moral obligation, there must be an express promise to perform the duty enjoined by Conscience.

Lee v Muggridge 1 Eng. C. L R 32. When a woman after the death of her husband promised to pay a debt contracted by her during her Coverture, that the time of the contract having a seperate estate.

Greeves v. M'Allister 2 Bin R 591. Plaintiffs and defts were bail for a third party in different actions — they were about to become fixed — plaintiff went to another State — found the debt — arrested & surrendered him — and defendant promised to pay his proportion of the expense.

Cooper v Martin 4 East R 76. A Step Child who was bounded by plaintiffs during his infancy promised to pay when he became of age.

And this rule is limited in its application, to Cases where, at some time or other, a good or valuable Consideration exists.

Mills v Wyman 3 Pick R 207 Where a father promised to pay a debt contracted by his Son who was of age when the debt was created.

Canon v Clark 1 Cam R 113. Where an owner of land promised to pay for improvements made by a squatter upon the land while it belonged to the US.

Frear v Vandenbergh 5 John R 272. Where the owner promised to pay an extender for improvements made without his consent or request.

State v Shepard 7 Conn R. 57. Where a Son promised to pay a debt contracted by an indigent parent.

Littlefield v Shee 2 B & C. L R 187. Where a woman after the death of her husband promised to pay a debt contracted during her Coverture. She having no separate estate.

Parker v Carter 4 Munf R. A promise by a Son to pay the debt of his father.

Chandler v Neale 2 Hen & Munf R 124. A promise to pay a note not founded upon a consideration

Mingo v Freed 2 Wash Va R. 36. A joint bond & debt by principal and surety - Surety died - heed his estate not chargeable in equity.

Pennington v Gittings 2 G & J. 208. Executory gifts.

Smith v Ware 13 John R 257. Deft sold & conveyed a parcel of land supposed to contain a certain quantity - it was deficient & deft promised to pay -

[J 2140-13]

M^c Rheaton v Rees 2 Penrose & Watts R 521. A release of a debt made at the request of the debtor and an express promise afterwards by him to.

Worling v Peters 12 S & R. 177. Same facts.

The principle deduced from all the cases is this:— An express promise, can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original right of action. If the obligation on which it is founded never could have been enforced at law (though not barred by any legal maxim, or statute provision

Wannall v Adney 3 Bos & Pul 249 note

Smith v Wood 13 John 257.
Mills v Wyman 3 Pick R 207.

Now the old debt of the bankrupt is a sufficient
Consideration to uphold a promise.

And the question recurs is there an express
promise in this case.

The rule laid down in England and America is
that the promise must be distinct and
unequivocal - absolute and unconditional
+ Prevett v Carruthers 12 S. & Mo. 491 — S. Vague
+ Fleming v Hayne 2 E. C. L R 144. "
Beesford v Saunders 2 H Black R 116 conditional
Brown v Collins 8 Humph R 570. "
Mason v Hughart 9 B Mon 480 "
Goetheimer v Keyser 11 Penn State R 364. Vague
Porter v Porter 31 Maine R 169. must be express
Patten v Ellingwood 32 Maine R 163. Conditional
Branch Bank of Mobile v Boykin 9 Ala R 320 Cited
1 Annual US. Dig 83 sec 70.
Turner v Chrisman 20 Ohio R 339. absolute
Scouton v Eastard 7 John 36. Conditional promise - not enough

The rule is laid down by our Court as to the kind
of promise necessary to take a case out of
the operation of the Statute of limitations
Kimmel v Schwartz Bruce R 216.
Bell v Morrison 1 Peters R 351.

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The language of the act of Congress is "that such discharge & certificate, when duly granted, shall, in all Courts of justice, be deemed a full and complete discharge of all debts, contracts and engagements of such bankrupt which are provable under this act."

5th US Statutes at Large 444.

There was an express promise in

Haines v. Stauffer 13 Pa St R. 543.

Such may be on the old contract & application shew new promise

Turner v Chrisman 20 Ohio 332. express promise -

Maxim v Morse 8 Mass R 127. amount of judgment

Shippey v Henderson 14 Johns R 178. Lemmon to Application

Williams v Dyde Peake N P Cas 68

Leafer v Tallon 16 East R 423.

Delany v Swan 3 Wend R 141.

The following cases show that the effect of the discharge in bankruptcy is to work an extinguishment of the debt, and not a mere suspension of the remedy.

Douglass R 192. per Mansfield

Roberts v Morgan 2 Esp R. 736 per Eyre C J.

Truman v Fenton Cowper. 544

Walbridge v Harrow 8 Vern R. 450.

And the following cases lay down the rule that the old debt was evidenced by a note or bond & the new promise must be declared on where

Graham v Hunt 3 Bellas R. 7.

Field's estate 2 Rawle R. 351.

Carson v Osborn 10 Bellas R 155

Egbert v McMichael 4 Yeates 44.

A made note to B. & obtained bankrupt discharge - afterwards B assigned note to C. - then a promise by A to B to pay note - C cannot sue upon note or new promise

White v Cushing 30 Maine 267. } Walbridge v Harrow 18 Vern R 448 Delany v Swan 3 Wend 135.

Wardwell v Foster 31 Vt 558 }

5 Mass 509. Moore v Viele 4 Wend R 420.

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The promise must be after decree –

Stebbins v Sherman 1 Sandf S C R 510.

Contra – Between publication & decree

Spooner v Russell 30 Maine 482.

& After decree & before discharge

Otis v Gaylin 31 Maine 567.

Curtis v Shephard 28 Maine 550

So one made on the eve of bankruptcy & in Contemplation of it Kingston v Wheaton 28 & R. 208.

Trueman v Fenton Cowp R 544.

A promise tho' not made to the creditor or his authorized agent is binding

McKinley v. O'Neson 5 Barn R 36 Eq.

Contra Samuel v Cravens 5 Eng R. 380.

Certificate of bankruptcy prima facie evidence

Boas v Kelzel — 3 Barr R. 298
Rowan v Holcomb — 16 Ohio 463.
Blythe v Johns — 5 Ben R. 247
Waller v Edwards — 6 Litt R 348.
Norris v Goss — 2 Spurs 80
White v Hons — 3 McLean 291.

This not a fiduciary debt. ie. receipt of money by one pers another to enter land — failure to perform the trust.

Hayman v Pond 7 Mete R 328.
Chapman v. Forsythe 2 How U R 202.
Austill v Crawford 7 Ala R. 335.
Williamson v Dickens 5 Peded 257.

Omission to schedule debt — no bar to effect of discharge.

Downes v Dana — 22 Penn R 337
Hubbell v Crump — 11 Paige R 310.

~~Chapin~~

"

~~Centennial~~ Tal

Mathison

"

Kellogg.

Chahuna v. Forsyth 2. How 202.
A factor not within statute – it is confined to special ~~trusts~~ – this is one
Haymans v. Pond. 7 Metcalf 328, same point

Williamson v. Dickens 5 Iredell 259. an agent who has collected money & not paid it over is not within it.

It is not necessary the promise should be to the ~~ag~~ legally authorized agent, it may be to a stranger

Comfort v Eisenbis 11 Penn. 13.
~~Hiebock v Hiebock 5 Penn. 367.~~
Mc Kinley v. O'Keson 5 Penn 369
Hassinger v. Solms 5 Serg. & R. 48.
Evidence that Bankrupt said he would "not let [the plaintiffs] stick" is evidence of a promise to go to the jury
Haines v. Stauffer 13 Penn. 541.

Matteson
vs
Kellogg

1 Where there is a new ~~debt~~ promise to pay a debt discharged by a certificate in Bankruptcy, it is competent to declare on the original promise and give the new one in evidence in answer to the discharge
Turner v. Morris 20 Ohio 332
Drake N.P. 68. 1 Chit Pl. 54.
Shippey v. Henderson 14 Johns. 178
Mapin v. Merre 8 Mass 127.
3 Wend 141. 16 East. 423.

2. The Language used by the Bankrupt is a promise to pay. He said to the agent of his creditor "I intend to pay it." The agent answered "They expect you to pay it" The bankrupt replied "I intend to pay it principal and interest" Now is not this in law an express promise to pay? Was it not so understood by the parties? If it was intended and received as an express promise, it was binding as such in law. If being indebted to another I say I intend to pay you so and so, it is a promise to pay accordingly. The court below has so found it.

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and if the court might have so inferred from the circumstances, the court here will not disturb the finding.

3. This was a fiduciary debt within the meaning of the act of Congress. It is true that where a mere factor or agent receives money which by the terms of the contract between him and his principal he is bound to pay over to his principal this is not a fiduciary debt within the meaning of the act: But where the creditor places money in the hands of the bankrupt to use in a particular manner this is a special trust. 1 Parsons on Cont. 101. The money still belongs to the person who placed it in the bankrupt's hands: If a bankrupt use it in any manner different from the trust, it is a breach of that trust: if in this case the money was expended in the purchase of real estate, that real estate would have become the property of the creditor altho the deed were taken in the Bankrupt's name.

The Bankrupt had no power to use the money except according to the terms of the trust.

If it had been placed in his hands to purchase real estate for the use of a 3d. person, it would have been a trust and the Bankrupt would have been a trustee to the use of that 3d. person within the meaning of the most strict definitions of trust and trustee; but any person may create a trust to his own use, so that this circumstance does not vary the case.

If this be not a fiduciary debt, what is?

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Matteson
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Arg. for deft.

Julius Manning
for deft.

Peoria Illinois
July 29th/54

Hon S. S. Prentiss

Dear Sir in the case of Mattison vs. Kellogg - Bankruptcy and - as to what are fiduciary debts, I wish to refer the court to

White v. Platt 5 Dana 269
Kingsland vs. Spalding 3 Barb. Ch. 341.

Yours Very truly
Julius Manning

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Peleg Matteson et al
vs
Aaron Killagg et al
} Error from Warren County

It is hereby agreed by the Parties plaintiff and defendant - To submit this cause upon Written arguments & Briefs to be filed during the Present term June 24th 1854 - provided we (defts) are furnished with Copy in time -

Julius Manning Defts in Er
T. Davidson for Plff in Er

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Peleg Matteson et al

vs

Aaron Kellogg et al

Filed June 24th 1854

L. Leland Clk.

By P. R. Leland Dep.

State of Illinois } In the Warren County Circuit Court of
Warren County } the April term A D 1854

Aaron Kellogg &
Hubbard Kellogg
vs
Peley Mattison &
William W Porter
Administrators of the
Estate of George H Wright
deceased } Warren County Court
September term A D 1853

The following proceedings were
had in the above Entitled Cause, to wit

"At a regular term of the County Court Commen-
-ced and held at Monmouth on the 19th day of
September A D 1853.

Present I Quinby Judge
Chas L Amsbry Sheriff
Wm F Smith Clerk

Aaron Kellogg &
Hurlbut Kellogg
vs
Peley Mattison &
Wm W Porter
Admins of George H Wright
deceased } Claim on Apl
For $400.
May 19. 1836

This Suit Continued by agreement
of Parties till next term

Oct 3. 1853. Court Commenced & held at Monmouth being
regular time Present I Quinby Judge
C L Amsbry Sheriff
Wm F Smith Clerk

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Aaron Kellogg &
Hurlbut Kellogg
vs
Peley Mattison &
Wm W Porter Admrs
of George H Wright
decd

} Claim Ass from last term

This day Came into Court the parties in this Suit, with their attorneys, and after hearing all the testimony in the Cause and the deposition of Sylvester Blish, the Court allowed to the plaintiffs, to be paid with the debts of the 4th Class the Sum of Eight hundred & twelve Dollars & fifty Cents $ 812.50

State of Illinois
Warren County } ss

I William L Smith Clk of the County Court for the County and State aforesaid do Certify that the above is a Correct transcript of the probate record & an allowance given to Aaron Kellogg & Hurlbut Kellogg, against Peley Mattison & Wm W Porter Administrators of the Estate of George H Wright decd, and that Porter & Mattison said Administrators have taken an appeal & filed their approved bond for Costs &c.

Given under my hand and Seal
L S of the County Court at Monmouth
this 14th day of Nov A D 1853

Wm L Smith Clerk

Monday April 10th A.D. 1854

Pleas before the Hon. Nehemiah M. Mead Judge of the tenth Judicial Circuit of the State of Illinois. Began and held at the Court house in Monmouth within and for the County of Warren and State of Illinois. On the tenth day of April in the year of our Lord One thousand Eight hundred and fifty four. It being the second Monday in the month of April aforesaid. And of the Independence of the united States. the Seventy ninth

Present. Hon. N M Mead Judge

Wm L Gourley States atty

Charles L Armsby Sheriff

Wm Billings Clerk

Aaron Kellogg &
Newbutt Kellogg
vs
Peley Mattison &
William W Porter Admrs
George H Wright decd

Appeal from the Court

Be it remembered that on the thirteenth day of April A D 1854. at the term of the Court aforesaid the following Record was made in the above Entitled Cause. to wit.

"This day came the Parties herein. and by consent. and agreement of their respective Counsel. waive a Jury. and

for their trial put themselves upon the Court.

Aaron Kellogg &
Newbutt Kellogg
vs
Peley Mattison &
William N Porter Admrs
of George N Wright decd

Appeal from the Court

Be it remembered, that on the fourteenth day of April A D 1851, at the term of the Court aforesaid, the following record was made in this Cause, to wit,

This day again came the parties by their Counsel, and the Court after hearing the Evidence and argument of Counsel, and being fully advised in the premises It is therefore Considered by the Court, that Judgement be Entered against the said defendants for the Sum of Eight hundred and twenty nine dollars and seventy five cents. It is therefore Considered by the Court, that the said plaintiffs have and recover of & from the said defendants the aforesaid sum of Eight hundred and twenty nine dollars & seventy five cents together with the Cost by them in this behalf Expended. to be paid by the said defendants out of the assets of the said George N Wright deceased in their hands to be administered in the due Course of Administration

the defendant by their Counsel now comes and files their bill of Exceptions to the above Judgement of the Court, which is in the following words and figures. to wit

Aaron Kellogg &
Hubbard Kellogg

vs

Peleg Mattison &
William W Porter
Administrators of the
Estate of George H Wright
deceased

In the Circuit Court
of Warren County
of the April term A D
1854

Be it remembered that the above Entitled Cause came on for trial at the April term A D 1854. of the above Entitled Court, On appeal from the County Court of said County, and on the trial the plaintiff to maintain the issue on their part offered in Evidence an instrument in writing of which the following is a Copy

"Recd of Mr Sylvester Wish four hundred dollars for the purpose of procuring a a quarter section of timber land for Aaron Kellogg and his friends in Vernon Connecticut State Monmouth 19 May 1836

G H Wright

The Execution of said instrument by said Wright was admitted, but the defendants Counsel objected to its introduction in Evidence which objection was Overruled by the Court to which decision, Overruling said objection

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and admitting said Evidence the plaintiff Excepted

The plaintiff then Called Dyer Elitch Blish as a witness. who testified that he was the person named in said instrument and that he let Wright have the money at the time Stated in said instrument. The witness was then asked on whose account he advanced said money. to which question the defendants Counsel objected. but the Court overruled said objection. and permitted said question to be asked. to which decision the defendants Counsel at the time Excepted The witness then Stated that the money so furnished by him to said Wright mentioned in said instrument of writing belonged to Aaron Kellogg. Hubbard Kellogg and Ralph Talcott of the State of Connecticut. that witness at that time was acting as their agent - that he informed Wright to whom the money belonged. and that Wright received the money for said Kellogg and Talcott To do much of which Evidence as went to Show. that said Wright received said Money for the benefit of Aaron Kellogg Hubbard Kellogg and Ralph Talcott. The defendants Counsel at the time Excepted. that his objection was Overruled. and to the decision of the Court overruling said objection the defendants Counsel. at the time Excepted

the Witness then proved that said Talcott died before the Commencement of this Suit. and that the said Kelloggs are Still living and that Wright on Several occasions had admitted to Witness. that he had not invested said

money in lands for said Kellogg and Talcott
Witness further testified that late in the year
A D 1836. he returned to Connecticut and made
a settlement with said Kelloggs. and Talcott
who had furnished him money for investment
in western lands. and on such settlement
surrendered to them the instrument in writing
signed by Wright above set forth. and
said Kelloggs and Talcott surrendered to
witness the receipt given by him to them
for the money they had furnished him
and from that time until since the death
of Wright and shortly before the Commencement
of this suit in the County Court said instr-
ument in writing was retained by said
Kelloggs and Talcott. Since the death of
Wright. said Kelloggs and Talcott have sent
out to said witness in this State said
instrument of writing and a power of
attorney. authorizing him to collect said debt
Since 1836. witness who resided in Henry County
have acted as agent for said Kelloggs and
Talcott. in paying taxes on their lands
in Henry County. and selling said lands
but had not acted as their agent out of
said Henry County - In the letters received
by him from plaintiffs since that time they
had two or three times inquired as to the
solvency of Wright. or how he was getting
along. and referred to this debt and enquired
as to the probability of collecting it. About
the first of January A D 1851. and soon after
receiving one of these letters from the plffs
in which they enquired about Wright.
Witness being in Warren County went out of
his way on his road home to see Wright in

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regard to the money named in said instrument
Wright and the Kelloggs were brothers in law
he met Wright on the road. and after a little
Conversation spoke of Kelloggs and of the
money named in said instrument of writing
Wright said he intended to refund it. to which
the witness replied. that they Expected him to
do so. Wright said he intended to do so. both
principal and interest. this was in 1841

On cross Examination the witness
States that he did not inform Wright. that
he was agent for Kelloggs. nor did the wit
ness then know that Wright had been declared
a Bankrupt. the witness also stated that
Wright had previously told him. he intended
to refund the money to the plaintiff. the witness
was then told to repeat the words used by
Wright. whereupon he said. "he intended to
refund the money."

The plaintiff then here
Called Ivory Linby and proved by him.
that Wright made an Exposé of his affairs
to him in 1842. for the purpose of going
through Bankruptcy. and Wright then told
witness he owned a debt to some person named
Kellogg in Connecticut the precise amount not
being recollected. but several hundred dollars

The plaintiffs here closed their case.
The defendants then introduced in Evidence
without objection the following Certificate of
Bankruptcy under the Seal of the district
Court of the United States. for the State of
Illinois. granted to said Wright under the
Bankrupt law of 1841 (here insert said Certificate)
which is the words & figures following. to wit.

In the district Court U S A
District of Illinois

In the Matter of George N Wright declared Bankrupt
It appearing to the Court from the petition of George N
Wright a Bankrupt on the reports accompanying
the same that the said Bankrupt has bona fide
surrendered all his property and rights of property
for the benefit of his creditors. and that he has
fully complied with. and obeyed all the orders
and directions. which have been from time
to time. passed by this Court: and has otherwise
conformed to all the requisites of the act Entitled
"An act to Establish a uniform System of
bankruptcy throughout the united States approved
August 19th 1841 and no written dissent to
his discharge having been filed by a majority in
number and value of his creditors. who have
proved their debts: and no cause being now
shown to the Court why the prayer of the
petition should not be granted: It is therefore
by virtue of the act aforesaid. ordered
and decreed by the Court. that the said
George N Wright be. and he accordingly
hereby is forever discharged of. and from all
his debts. owing by him at the time of the
presentation of his petition to be declared bank
rupt - And it is further ordered. that the Clerk
duly certify this decree for the use of said
bankrupt.

United States of America }
District of Illinois } ss

I Wm Pope Clerk of the
district Court of the United States. for the district
of Illinois. do hereby certify. that the foregoing

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is a true and perfect Copy of the decree of final discharge, rendered by the district Court of the United States for the district aforesaid on the Sixth day of December A D 1842. in the Case of George H Wright a bank-rupt

L S

In testimony whereof. I have hereunto subscribed my name, and affixed the seal of said Court. at Springfield this 24th day of June A D 1853. And of our independence the 77th year

Wm Pope Clerk

Defendant also introduced in Evidence without objection a certified copy of the Schedule of debts filed by said Wright in said district Court in his going through bank-ruptcy which Schedule Contained a debt listed as due to Kellogg & Talcott for four hundred dollars The foregoing was all the Evidence offered by Either plaintiff or defendant.

Whereupon the defendants moved the Court for Judgement against the plaintiffs dis allowing said plaintiffs Claims. which motion was overruled by the Court. and the Court gave Judgement for the plaintiffs for Eight hundred and twenty nine dollars and Seventy five cents. to which deci-sion and Judgement of the Court the defen-dants Excepted and prays that this their bill of Exceptions may be signed and Sealed by the Court and made a part of the record herein which is accordingly done. ~~done~~. H M Weed Seal

what follows this point is to be taken as part of the bill of exceptions. Julius Manning for deft in error
McDaniel for Pltff in error
#

The following is the Copy of a Schedule filed in the district Court of the United States for Illinois by George A Wright dec'd to wit

"District Court of the United States
For the district of Illinois.

To the Honorable Nathaniel Pope Judge of the district Court of the United States in and for the district of Illinois -

The petition of George A Wright Respectfully sheweth. that your petitioner is a resident of the County of Warren in the State of Illinois. and that your petitioner has become unable to meet his debts and engagements and your petitioner further sheweth. that he is indebted to the persons and in the respective sums mentioned and set forth in the Schedule of debts hereto annexed and marked "Schedule setting forth a list of petitioners creditors their Residences and the amount due to Each" and Signed by your petitioner. which Schedule according to the best of your petitioners knowledge and belief. Contains a true and Correct list of all your petitioners creditors. their Residences. and the Amounts due to Each of them. which Schedule Signed as aforesaid. your petitioner prays may be taken as a part of this his petition. which debts your petitioner sheweth have not in whole or in part been Created in Consequence of any defalcation by your petitioner. as a public officer. or as Executor. guardian. Administrator. or trustee. or while acting in any other Fiduciary Capacity. And your Petitioner further shews. that the Schedule

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hereto annexed and marked inventory of property. and Signed by your petitioner. contains a Correct inventory of your petitioners property. rights and Credits. of Every name kind and description and the location and situation of Each and Every parcel and portion thereof. to the best of your Petitioners knowledge and belief. which your Petitioner prays may be taken as a part of this Petition. Your Petitioner therefore prays. that he may by. decision of this honorable court be declared a bankrupt— according to the provisions of the act of Congress in such case made and provided and that such further order and proceedings as are provided for. directed or required in and by said act of Congress.

Dated this 22nd day of March A.D. 1842

George H Wright

United States of America }
District of Illinois } ss

George H Wright being duly Sworn. doth depose and say that. the foregoing Petition by him Subscribed is true according to the best of his Knowledge and belief

George H Wright

Subscribed and Sworn
before me this 22nd day
March A.D 1842.

Wyatt B Stapp Commissioner of Bankrupts
for Warren County Illinois

Schedule Setting forth a list of Petitioners Creditors. their Residence and the amount due to Each

Names of Creditors	Nature of debt	Amounts		Residence
A and A B. Blair	200	200	"	Rome New York
Saml Walcott	Note & in	130	"	Floyd New York
H H & G W Pope	Note "	135	"	Rome " "
Joseph & Jamison	Judgt	50	"	Henderson Co Ills
Hound & Smith	"	15	"	Warren Co Ills
Stapp & Berry	"	40	53	" " "
James Bacon & Co	"	305	"	St Louis Mo
Stone Field & Mearks	"	324	15	" " "
Charles & Blane	"	869	61	" " "
Kellog & Talcott	Act	400	00	Vernon Tolland Co Connecticut
Danl McNeil	Judgt	6	00	Warren County Ills
Hamilton Rowen	"	6	00	" " "
Joseph Lewis	Note	12	50	" " "
Benj W Allen	account	24	00	" " "
Lafferty & Allen	Note	20	00	" " "
Mrs Walker	acc	8	00	Rome New York
William Brooks	Note	7	50	Warren Co Ills
S S. Phelps	acc	7	00	Oquawka Ills
A & S S Phelps & J Duncan	Note	550	00	& int Oquawka & Jacksonvill Ills
Farrell & Lippincott	acc	24	00	Peoria Ills
Chester Potter	"	12	00	Warren Co Ills
Lewis Mobley	"	2	50	" " "
Alexander Davidson	Judgt	9	00	" " "
Estate of A Allen	Acc	30	00	" " "
Otis Martindale	Note	40	00	" " "
" " "	"	43	00	& int " " "
Bremer Brent W Co Ills	"	1800	00	Note Signed by Geo H Wright and D McNeil as Securities for G S Pierce

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School fund of S&W	Note	100	00	Warren Co Ills. & Turnbull & I became said securities
School fund of S&W	Note	100	00	Warren Co Ills. James McCallen & I said securities
Henry B Hales & Wells	Acc	47	00	& int for money paid as securities

George H Wright

I William Pope Clerk of the District Court of the United States for the District of Illinois. do hereby certify the foregoing to be a full true and correct copies of the Schedule in the matter of George H Wright a Bankrupt. as appears from the files of my said Office

In testimony whereof. I have hereunto affixed the Seal of said Court at Springfield and subscribed my name this 13th day of June A.D 1853 and of our independence the 77th Year

Wm Pope Clerk

State of Illinois } Warren County Court
Warren County }

Peley Mattison &
William Porter as
Administrators of the Estate
of George H Wright deceed

To Aaron Kellogg and Newburn Kellogg
Survivors of Aaron Kellogg, Hubbard Kellogg
and Ralph Sal Outte

To Cash Pd Said Wright by Blitts
to purchase quarter Sec. Land
May 19, 1836 $40.00
Aug 15, 1853 Int. to this date 13.00
$53.00

Copy of Summons

State of Illinois } ss
Warren County }

The People of the State
of Illinois - To the Sheriff of Said County
Greeting - We Command you to summon
Aaron Kellogg & Hubbard Kellogg if they
be found in your County, to be and
appear before the Judge of our Circuit
Court, for the County of Warren
on the 2nd Monday in the Month of
April 1854 next, to answer to an appeal
taken by William H Porter & Peley Mattison
Admrs &c. from a Judgement rendered
against them as Administrators of the
Estate of George H Wright deceased in favor
of Aaron Kellogg & Hubbard Kellogg

[2140-28]

Before the County Court of said County on the third day of October 1853 for the sum of Eight hundred & twelve dollars & 50 cents. and Cost of Suit And have you then and there this writ

L S

Witness William Billings Clerk of said Court. at the Court house this 1st day of December 1853 the Seal of said Court. being hereto affixed

Wm Billings Clerk

On the back of said Summons is as follows.

"I return this Summons defend-ants not found in my County

C L Armsby Shff
By I Hopper depty"

And the said def
ome and say

State of Illinois } ss
Warren County }

I Wm Billings Clerk of the Warren Circuit Court, do hereby certify that the above and foregoing pages contain a full true & perfect copy of all the orders, Judgements and decrees in the Warren County Court, and also in the Warren County Circuit Court made in the above entitled cause as also a copy of all the papers in the above case. Except the depositions of Sylvester Lish - As appears from from the files & Records now in my office

Given under my hand and seal of said Court at Monmouth this 18th day of May A.D. 1854

Wm Billings Clerk

$1 2140-29

And now come the said plaintiff in error by Davidson & Blackwell their attorneys and say that in the record of the proceedings aforesaid and in the rendition of the judgments aforesaid manifest error hath intervened to their prejudice in this, towit,

1 The said circuit court erred in admitting improper testimony

2 The court erred in rendering judgment upon the evidence below in favor of the said defendants in error.

3 The court erred in rendering judgment for the defendants in error when by by the law of the land such judgment ought to have been rendered for the said plaintiffs in error

Wherefore &c

Davidson & Blackwell p q

And the said defendants in error come and say that in the said record and proceedings there are no such errors as above set forth nor any nor either of them

Manning
for defts in error

93.
Riley Mattison et al. admrs.
vs.
Charon Kellogg et al.
Record & Errors.

Filed June 23d 1857,
L. Leland Clk.
By P.K. Leland Dep.

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Polly Matthews vs

Aaron Kellogg

1804

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