No. 13384

Supreme Court of Illinois

Morrison et al

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vs.

Cassell et al

SUPREME COURT, SECOND GRAND DIVI)N,

JANUARY TERM, 1861.

ISAAC L. MORRISON *et als*, Appellants
vs.
BENJAMIN CASSELL and JOHN R. JORDAN, Appellees.

Appeal—Morgan.

R 1 June 23d, 1860, Appellees filed their bill in the Morgan Circuit Court, on the equity side thereof against Appellants, alleging that, on the 20th day of February 1857, Frederick Truog and John Selby who were partners un-
R 2 der the firm of John Selby & Co., for the uses of said firm borrowed of Murray McConnel $1,000—to secure which with 12 per cent. interest at one years date gave note to said McConnel signed with their individual names, the said Appellees signed said note as sureties. That Appellees on the 5th day of June 1860, satisfied and paid to McConnel said note by payment of the sum of $1139,25—that McConnel receipted to Appellees on said note for that sum—offer in the bill to produce note on the hearing: that Selby & Truog being insolvent in their partnership enterprise—On the 10th of February 1860—executed a deed of assignment of all their partnership effects to Isaac L. Morrison, to secure the payment of their partnership liabilities—that ~~them~~ them
R 2 is attached to said deed of assignment a schedule of liabilities specifying certain amounts opposite to each name except the name of Murray McConnel:
R 3 charges that in behalf of said McConnel the aforesaid note and also another note to him with Kirkman as security for $430,00—made February 1859—was intended to be provided for *as firm* liabilities, but whether so or not, note signed by Appellees was a firm liability—was so regarded by assignee, who has declared a dividend of 30 per cent., but witholds the same on some fraudulent or mistaken suggestion made by said Selby—that this note was not a firm liability—charges that John Selby and Frederick Truog are insolvent as partners and individually. That if dividends declare and to be declared are not paid Appellees may be greatly wronged and damaged.—
R 4 Bill prays for process—that Defendants—Morrison answer on oath—oath of other Defendants waived—that on hearing ~~that~~ said Morrison as assignee pay to *them* the 30 per cent. dividend declared—and also any other dividend
R 4 that may be declared and prays for injunction: defendants entered appearance
R 5 and ruled to answer in 40 days, and case referred by consent of parties to William Thomas to act in lieu of the Court.

ANSWERS.

July 31st 1860, seperate answer of Isaac L. Morrison filed—admits partnership of Selby & Truog—does not know at what time firm commenced business—that said firm was dissolved as he believes Dec. 31st 1859—be-
R 6 lieves it is true that John Selby, Frederick Truog and Appellees—each signing individually, gave their note to Murray McConnel for the sum named in the bill, that consideration was as he believes $1,000—money loaned by McConnel, but whether John Selby and Frederick Truog borrowed said money as a firm or not, does not know—that so far as he is informed this is a disputed point. Admits assignment to him by Selby & Truog, February 10th 1860—of their partnership effects to pay firm liabilities—Made copy of assignment a part of his answer—Admits acceptance of said trust, that according to the terms of said assignment Resp. ascertained amount of indebtness and attatched a schedule to said assignment—Note set up in the bill was not admitted by respondent because Selby denied that it was a debt of said firm
R 7 —Admits payment of dividend of 30 per cent. on debts set out in schedule, hold in his hand dividend on $1,120—to apply to this debt if the court shall so order. Admits payment of dividend on note to McConnel for $430,00—but says both Selby & Troag agreed that said last note was a debt due from said firm—that the consideration of said note was received by said firm—Answer sworn to—Deed of assignment made part of said answer—provides

R 8 generally that the assignee should take possession of effects of said concern
R 9 —And convert them into cash—shall ascertain amount of debts of said firm
R 10 —schedule them and pay in *pro rata* proportion—first paying cost—sched-
R 11 ule of debts attatched to said deed of assignment—Other Defendants except
R 11 Murray McConnel and Fred. Truog—Answer July 31st 1860
—Admit partnership alleged in the bill—that same was dissolved—Ad-
R 12 mit assignment of Selby and Truog to defendant, Morrison—And that the
schedule of debts attatched is correct—denies that the note set up in the bill
was as to complainants and these respondents a partnership liability, charge
that money was loaned by McConnel to Truog—a part of which Truog used
in making up his capital in said firm and the balance used by him individ-
ually—That John Selby and Complainants were sureties, for said
Truog—Respondents charge that Complainants paid said note with funds
furnished by Truog—if they paid it at all—that the debt has been paid by
R 13 Truog. Denies that Complainants have lost or will lose one cent by reason
of said transaction: charge that, if the dividends on this debt are required
to be paid, the funds thus absorbed would be taken for the sole use of said
Truog—who is legally liable to pay all of said debts—Farther answer that
on the 14th January 1860—and before said assignment Truog and wife exe-
cuted a mortgage to Complainants on lot 70 in Jacksonville to secure them
against loss by reason of their having signed said note as his security—In-
sist that Complainants, if this debt should be treated as a debt due from
said firm that Complainants should be compelled first to resort to mortgage
R 14 property—that Complainants released of record said mortgage June 29th
1860, that the same was released because Truog had paid said debt. Makes
R 14 certified copy of Mortgage a part of answer—Said mortgage contains this
clause, "that Whereas the said Frederick Truog together with the said Ben-
jamin Cassell, John R. Jordan and John Selby executed their note to Mur-
ray McConnel for the sum of eleven hundred and twenty dollars dated the
day of and Whereas the said note was given for money
R 15 borrowed by said Frederick Truog for his use and benefit, which note still
remains unpaid."

R 17 August 28, 1860, William Thomas as Master in Chancery filed his report.

EVIDENCE.

R 20 David A. Smith testified that he loaned the money to complainants with
which note to McConnel was paid—that subsequently the money was paid
to him out of proceeds of draft by, or in favor of deft. Truog, that Truog
had mortgaged his individual property to secure the payment of money used
in payment of this debt. Payment of note to McConnel was before bill was
R 21 filed—the payment to Smith was after the bill was filed. June 29, 1860,
complainant satisfied the mortgage of Truog to them. Horaec E. May testi-
fied insubstance he heard a conversation between Selby and Truog, in which
Truog insisted—on the firm paying the McConnel debt, that McConnel
wanted his money, and he, Truog, did not want the debt standing out
against him. Selby replied that they could make 50 per cent. on the mon-
ey, and were paying only 12, that if they paid McConnel they would have
to borrow the money of some one else—did not deny that this debt was a
debt of the firm, after the fire and before assignment Truog refused to join
in assignment until this debt was provided for. Selby said all should be
satisfactorily arranged.

Edward L. Dawson testified that Truog told him, after the fire and before
the assignment, that he had put into the firm $600 and $1000 borrowed of
R 27-8 M. McConnel against Selby's capital. M. McConnel testified that Selby
wrote to him at Washington before February 20, 1357 to borrow the money
for which this note was given—had lost the letter—wrote to his agent in Ill-
inois to let the money go, and $1000 was loaned, and the note in question
taken. Witness supposed it was loaned to the firm, as he had loaned the
firm money before, and taken notes signed individually.

R 24 Nov. 2d, 1860 Complainants filed general replication to answer of Def'ts.

R 25

On same day Defendants—Frederick Truog and Murray McConnel filed answers in this case, neither admitting or denying allegations of the bill—Complainants moved the Court for a decree on the report of Thomas and Defendants entered cross motion to dismiss the bill—because the refverence Thomas in lieu of the Court was a discontinuance—and secondly because—
R 28 the report of the evidence shows—that Complainants are not entitled to any
R 29 decree in this case. The Court overruled cross motion to dismiss—and rencred decree that said Morrison, assignee, pay $336, to the Complainants—and also *pro rata* of any other dividend that might be declared—and that he pay cost of this suit out of funds in his hands as assignee.

ERRORS ASSIGNED.

1st. The Court erred in overruling motion to dismiss the bill.

2d. The Court erred in rendering decree in favor of the Complainants.

I. L. & C. M. MORRISON.
Atty's for Appellants.

BRIEF.

The question in this case is—what were Complainants entitled to.

The payment to Smith by Truog—of the money he had advanced Complainants to pay McConnel, was an extinguishment of all liability of Complainants to pay this debt: and completely destroyed their right to any claim against said firm, or their assignee. See Collyer on pat. 4th Amer. from 2 English ed. set. 609, p. 585. Such payment by Truog either with individual or partnership funds, by law, inures to benefit of Complainants and Appellees—See Collyer *Supra*: 18 Pick 351, Averill *vs.* Lyman.

The payment of the debt by Truog to Smith, was a discharge of the obligation of Complainants, and took from them all right to further maintain this suit: there being no other parties Complainants, the bill should have been dismissed. See 11 Ill., Hoar *vs.* Harris, 24: Bradly *vs.* Amidum, 10 Page 239.

If any one is entitled to dividend on the McConnel debt, it is Truog, or those of whom he borrowed the money paid Smith; the decree, however, is that the assignee pay the same to Complainants: Truog is not entitled, even though he occupied such a position with reference to the pleadings, as to enable him to assert it. Payment of this debt should de treated as an advance to the firm, and he is not entitled any portion of the assets in hands of assignee until the creditors of the firm are paid. See January *vs.* Poyntz, 2 B. Monroe 405, Cammanck *vs.* Johnston 1st Green ch'y. 163. & Dana 278

Those who may have advanced him the money are not parties to the suit, they are not asserting any right here, if they were, the claim could not be maintained. Having taken mortgage security from Truog, they must abide it, the firm is not liable. January *vs.* Poyntz—2 B. Monroe 405.

Neither Truog nor any one acquiring any equitable right in this controversy through him, could have any affirmative relief in the case. Truog neither asserts his right to it by cross-bill—nor even in an answer. See 23 Ill. R. McConnel vs Smith 610–626 –

But suppose the foregoing positions are incorrect, we contend that Complainants having a mortgage on property, to which other creditors of the firm could not resort, they must exhaust it before they can claim a dividend of the assignee. 4 Gilmer, Ladd *vs.* Griswold 25.

Does the evidence show—that the debt set up by Complainants in their bill, to be, as between the firm of Selby & Co., and the creditors schedule, a firm debt? We say no. The evidence of McConnel is merely his supposition, amounts to a positive knowledge of no fact, going to prove that this was the debt of Selby & Co. May's testimony, is that Selby did not deny the liability of the firm, and spoke of it as "Our debt," that he promised that all should be made satisfactory. This is all consistent with the idea, that as between the members of the firm this was a partnership liability.—On the other hand we have the unequivocal statements of Truog that he, and not the firm, borrowed this money of McConnel, and also the distinct admission of Complainants of that fact. See mortgage—Record page.

The reference by consent, to Thomas, to act in lieu of the Court, was a reference to an arbitration, and not being according to Sec. 2, chap. 7, Revised Stat. 1845, the Court had no jurisdiction to render decree, on his report, but should on motion have dismissed the case. See—15 Ill.

I. L. & C. M. MORRISON,
Atty's for Appellants.

165

Isaac L. Morrison
Adsr
v
Correll & Jordan

Abstract &
brief

165

Filed June 18-1861
L. Leland
Clerk

1338+

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Wm A Turney
clk