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STATE OF ILLINOIS, SUPREME COURT,

APRIL TERM, 1860.

IRA Y. MUNN *et als.*, Appellants,
vs.
I. H. BURCH *et als.*, Appellees.

POINTS AND AUTHORITIES FOR DEFENDANTS.

SCAMMON, M'CAGY & FULLER.
Counsel for Appellants.

The bill, answers, depositions, and exhibits, are printed in full.

In the abstracts, the testimony of Wright could not well be condensed.

POINTS.

1. The drawing and delivery of the $6,500 check to complainants by Wright, was an equitable assignment of that sum to them, and binding on him and Burch & Co.

On the 5th Sep., 1857, Wright's Bank book was written up and delivered to him on the morning of the 7th Sep., 1857, showing he had to his credit $7,108.27. See Roberts' evidence, pages 18 and 19 of abstract; so the money was there, both when the check was drawn, and presented.

"A check on a banker is an absolute appropriation of so much money in the hands of the banker, to the holder of the check."

3 Kent's Com. 105; top paging in note.
Story on Promissory Notes, 655, Section 487, and following Sections to 498, inclusive, and notes.
2 Story's Reports, 502. in the matter of Brown.

In this case the Court says: "It (a check) is supposed to be drawn on funds in the hands of the banker, and it appropriates the amount to the holder of the check."

3 Johnson's Cases, 5.
Cuyer vs. *Armstrong*, and notes.
3 Johnson's Cases, 263.
Conroy vs. *Wallen*. Kent, J.

was made in any case cited above, where the assignment was held sufficient.

But on Monday came news of Holly's failure—his final suspension; and knowing not only of the protest of the two bills already referred to, but that some others maturing after that date would probably not be paid, they, after having by their

This custom amounts to this, that the banker will keep the depositor's money, and pay it out on the depositor's order, as he directs.

The banker agrees to pay it, in partial payments or at one payment, as the depositor shall direct in his checks.

By drawing and delivering a check on his funds in the hands of his banker, the depositor assigns, "appropriates," so much as the sum named in his check to the payee or bearer of the check on presentment of the check.

These considerations distinguish the liability of the banker to his customer, in respect of the payment of the funds on deposit, from those cases where it is said that an entire cause of action shall not be split into several, nor the debtor made liable to several parties, without the assent of the debtor. This is believed to be the true relation and contract between the banker and his customers.

In this view, the drawing and delivery of the $6,500 check by Wright to Munn & Co. was an assignment to them of so much of his funds in the hands of Burch & Co., and Burch & Co. had agreed, by the tacit agreement in all such cases, to pay it on presentment.

This precise point was suggested by Judge Caton, in delivering the opinion of the Court in the case of *Harwood et al.* vs. *Tucker et al.*, 18 Illinois, 544; and though it was not decided in that case, yet the Court adopted principles closely analagaus to the one here insisted on.

That under such circumstances, a check is an assignment of the fund upon which it is drawn, I cite the following authorities:

5 Wheaton, 648, *Mandeville* vs. *Welch*.
1 Washington, C. C. 424, *Corser* vs. *Craig*.
1 Hill's, N. Y. 583, *Morton vs. Naylor*.

In this case, several English authorities hereafter cited, are referred to, approved, and adopted.

2 Selden's Rep'ts. 412, *Chapman* vs. *White*, Opinion of Edmonds, Justice.

There are several cases in the Reports of Mass. and N. Y., in which it is said a check is not an assignment of the funds upon which it is drawn. Such are the cases of *Bullard* vs. *Randall* and Hrs., 1 Gray's, 605; a case reported in American Law Register, Oct., 1857, *Chapman* vs. *White*; 2 Selden, 412, and some others that will be cited for defendants.

All of these cases are at law. In several of them there are dissenting opinions, equal in force of reasoning, at least, to the opinions of the majority, and cannot be regarded as settling any equitable doctrine contrary to that contended for here, or overturning the high authorities here cited from Kent and Story.

But this case is in equity, where a much more liberal doctrine prevails in regard

Among the cases cited by Judge Story in support of the doctrine of the text which are fully in point, are the following:

3 Swanston's 392.
Ex parte South.
1 Vesey Sen'r, 331.
Row vs. *Dawson*.
6 English Chancery, 276.
Lett vs. *Morris*.

These cases were all decided by eminent judges, who held, that in equity, an order given by a debtor to his creditor, on part or all of a fund, operated as an assignment of that fund, even without notice to the debtor of the assignment, and that such assignment would prevail against the assignees in bankruptcy of the debtor.

4 Brown's Ch. 64.
Smith, et al. vs. *Everett et al.*

In Drake on Attachment, sections 610 to 624, will be found a plain, concise statement of the American doctrine concerning equitable assignments; it is full as broad as that maintained in England. The Supreme Court of Illinois have seemed disposed to fully protect the rights of assignees of cheses in action, but it is not necessary to cite the cases here.

Applying these principles to the facts of this case, we find that on the 2d September, 1857, one of Wright's bills, drawn on Holly and discounted by Burch; was dishonored. Burch & Co. knew it, for Valantine spoke to Wright about it on the 4th or 5th Sept. [Page 16, Abstract.] Wright's bank book was written up on Saturday, the 5th inst., and given to him Monday morning, the 7th, showing over $7,000 to his credit, and there was no attempt or claim to charge him with the $9,000 draft protested on the 2d inst.

While he thus had money at Burch & Co.'s, which on Saturday and Monday they admitted to be his, by charging themselves with it in their account with him, he, for a valuable consideration, gives complainant a check, an assignment or appropriation of the amount of it, who in apt time deposit it with Smith & Co., who promptly send it to Burch & Co.'s, when the book keeper of B. & Co. finds it "good" from the books, and directs the teller to pay a check for part of a balance over that sum; all done in the usual business manner and business hours. Unquestionably B. & Co. would have paid Wright the money for the check, as for the $300, at that time, and all of Friday, Saturday, Sunday, and until 11 o'clock A. M. Burch & Co. did not claim any rights against Wright's money on deposit with them, but continued his account and credit as before.

This was a stronger, more complete, and binding assignment of his funds, than was made in any case cited above, where the assignment was held sufficient.

But on Monday came news of Holly's failure—his final suspension; and knowing not only of the protest of the two bills already referred to, but that some others maturing after that date would probably not be paid, they, after having by their clerks and book keepers recognized the check as "good;" having paid the drawer part of a balance over it, without telling Wright his check was thrown out, and while he supposed it was paid to complainants for their wheat; then, as it were, "*in extremis*," they throw out the check, and induced Wright to assign them the bills of lading for the very wheat in payment for which the check was given.

Thus they got, in fact, complainants' money and wheat both, for by the assignment of the bill of lading and the seizure of it at Detroit, they cut off complainants' right of stoppage *in transitu*, and left them nothing to rely upon but the check, which had passed once, at least, through the test of examination at Burch & Co.'s, and been pronounced good.

We insist Burch & Co. are estopped to set up any claim in respect of the $9,000 draft, against complainants' right to the money deposited with them by Wright.

But the case shows that Wright was Holly's agent at Chicago, to buy and pay for grain. Yet he kept his bank account in his own name, and it was subject only to his control. Neither Holly or any one else could draw it out, and Burch & Co. had no right to apply it on any debts of Holly's, without Wright's authority or direction. They did not claim to so apply it on the $9,000 due and protested on the 2d Sept., but dealt with Wright the same as if that bill had been paid, or they had no claim on him, because it was not paid.

Then the next question is, had they a right to apply it on the bill due the 5th Sept.? They had no authority from Wright to take the money he kept with them, and pay themselves a claim against Holly.

Holly himself, even admitting the money to be his, could only withdraw or take it from Burch & Co., subject to the equities and charges upon it, made by Wright, his agent, in the course of his business as such agent.

This fund was before that time (Monday A. M.) assigned by Wright to complainants in payment for wheat bought of them for Holly, and Burch & Co. had notice of it; this $6,500 was then, on Monday A. M., the money of complainants, and not of either Wright, Holly, or Burch & Co. It had been "appropriated," set apart and "assigned" to complainants, within the language and spirit of the decisions cited above.

Burch & Co., in trying to pay themselves a claim against Holly, out of his money, and for the time admitting, for the sake of the argument, that it was Holly's money and not Wright's, were acting as plaintiffs seeking a remedy against Holly, and must be held to make out as clear a case against him, and show as clearly a legal right of action against him, as if they had brought their action at law. Suppose they had brought an attachment against Wright, and levied on the funds in their hands as his, to have maintained that action, at the precise time they sought "to help themselves," they must have proved presentment for payment, non-payment, protest of the bill, and notice to the parties sought to be charged as makers or endorsers.

This would have been about 11 o'clock A. M. on Monday. The bill was protested on Saturday, but the notices of dishonor were not mailed until Monday. [See page 30 of Abstract.]

At what time on Monday is not stated, but it was necessary to prove, if denied, that the proper notice was given before the suit was commenced. [For authority on this point, see 2 Greenleaf's Evi., Sec. 187.] The notice must be actually sent before suit is commenced, and if there is any doubt which was done first, the *onus* is on the plaintiff to prove that the notice was first sent.

In this view they fail to show a right of action against Wright. It will not be contended, they will be allowed greater rights when proceeding *vi et armis*, without law, than by means of the law, and they must have failed under the proof, as it stands.

But suppose them to have judgment against Wright, and seek by enforcing their garnishment of the funds lying in their bank in Wright's name, and the parties holding the funds to be compelled to disclose the facts as they now appear.

Treating these funds as either Wright's or Holly's, it would have appeared that $6,500 of them had been assigned before the time of levying the garnishment to complainants; if these funds were in fact Wright's, the owner had fairly assigned them; if they were Holly's, his agent for that purpose duly authorized had assigned them to the same parties. Upon the authority of the cases above cited from the English Chancery Reports, the garnishees must have been discharged.

In either view, Burch & Co.'s claim will not bear the test of examination.

On this question see following cases, which are full to this point.

Drake on Attachment, Sections 510, 511, 512, and cases cited—it is only necessary for the garnishee to have notice of the assignment of the funds in his hands, before he makes his disclosure so as to protect himself.

We insist, then, that Burch & Co. could not, under the circumstances, have maintained their action, either against the principal defendant or the fund attached, and they ought not to have greater legal or equitable rights, when proceeding without law, than when proceeding by means of the law.

When the notice of protest and the commencement of the suit occur on the same day, it is incumbent on the plaintiff to prove that the notice was given first.

2 Greenleaf Evi. 187.

The mistake seems to us to consist in calling the money at Burch & Co.'s Holly's instead of Wright's. That this is a mistake seems apparent, from the fact B. & Co. did not so regard it, else they would have applied it in payment of the $9,000 bill, due and protested on the 2d Sept., although when Wright's book was balanced, showing a credit to him of more than $7,000, on the 5th and 7th Sept., they knew this bill was protested, yet they admitted this money to be due to Wright, and not to Holly; and further, that Holly could not, himself, draw these funds, as they did not stand in his name, nor was there any privity between him and Burch & Co. that gave them a right to appropriate them against him, and they ought not now to be allowed to make an appropriation of it, which they did not then claim the right to make, against the rights and equities of these complainants.

On the 7th of Sept., Wright delivered to Burch & Co. the bill of lading for the wheat bought by him of complainant. This wheat B. & Co. sold, and received as proceeds of the sale of it the sum of $5,680.99. This was done after he had been at Burch & Co.'s Bank; had seen his check there; supposed it was paid. [Page 13, Wright's testimony.] "Had he known the check for $6,500 was not paid, he would have given this bill of lading to Munn, Gill & Co." [Page 17, Wright's testimony.]

Now see how harsh and inequitable was the conduct of Burch & Co. at that time. Valantine, one of that firm, met Wright on 'change between 11 and 12 o'clock on Monday and tells him Holly had failed; he had been to their banking house before that, and sent back to George Smith & Co. his $6,500 check, and then without telling Wright of this occurrence, or that B. & Co. had charged to him all his funds on deposit with them, on account of their claims on Holly, Valantine persuades Wright to turn out to them this wheat, and he does it under this misapprehension of facts induced by Valantine, and concealing from him the dishonor of his check. (Page 17.)

They are estopped now from thus taking advantage of their own wrong, and ought not to be allowed to take advantage of Wrights misapprehension of their dealings with him, when it was caused by their own fraudulent concealment of facts most material for him to know.

They are equally estopped from setting up a claim in those funds for the payment of the $9,000 draft, as before stated; nor could they thus in advance appropriate either Holly's or Wright's funds to the payment or protection of the $8,000 draft due Sept. 12, 1857, for it was not then due by five days. Wright would in no event be liable on it, until dishonored by the acceptor Holly, and protest and notice to him of those facts; and it might be, notwithstanding his failure, that he would provide for the payment of that debt.

The account between Burch & Co. and Wright stood as follows on the 7th Sept., charging B. & Co. with the amount realized from the wheat that day delivered them:

Amount to his credit on deposit, (Roberts' testimony, p. 19,)....	$7,108 27
Proceeds of wheat, ...	5,680 99
	$12,789 26

On that day he should be charged as follows:

Amount of check paid him, ...	$ 300 00
Check to Munn, Gill & Co.,...........................	6,500 00
Total charges, ...	6,800 00
Which leaves a balance to his credit,........................	$5,989 26

Or almost enough to protect B. & Co. on the $6,000 draft that fell due on that day.

But take what seems to us the view most adverse to the claims of the complainants that can be taken, which is, to first pay the $6,000 bill that fell due that day out of the amount to Wright's credit, $12,789.26, and his account stands as follows;

Amount to his credit, ...		$12,789 26
DR.—Check paid him,..........................	$ 300	
Amount of bill, ...	6,000	6,300 00
Balance,..		$6,489 26

Only $10.74 less than the amount of the check for $6,500 due complainants.

We insist B. & Co. are bound to apply the funds on deposit with them to the payment of the $6,500 check, because the proprietor of that fund directed them so to do, and they had notice of this direction before they had notice of any fact that would induce them to make a contrary disposition of it; that as against Wright and his assignees they could not, for reasons before stated, apply it on the $9000 bill: they could not apply it on the $8000 bill, for that was not due until five days afterwards; they could not apply it on the $6000 draft, because they had prior notice of the assignment of the fund to Munn & Co., there had not been any notice of protest sent at the time of rejecting the check, so far as the case shows, and in the absence of positive proof of that fact, the presumption is against them, according to authority cited above from Greenleaf; and lastly, because Valentine's wickedly concealing from Wright the dishonor of his check given to complainants, induced him to act in a manner adverse to their interests, and as he would not have done but for such deception on the part of Valentine.

We cite Willard's Equity Jurisprudence, 90 to 101, as authority for the positions above taken, with regard to the application of the funds derived from the sale of the wheat, but will not swell this brief by citations.

In conclusion, we insist the case shows an equitable right of the complainants to the payment of the $6,500 out of the funds of the drawer of the check in the hands of Burch & Co., which ought to be enforced by a decree for the amount of it.

SCAMMON, McCAGY & FULLER,
For Complainants and Appellants.

April 19, 1860.