No. 13299

Supreme Court of Illinois

Born

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vs.

Staaden

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IN THE SUPREME COURT

OF THE STATE OF ILLINOIS.

APRIL TERM, A. D. 1860.

BALTHASER BORN,

vs.

NICHOLAS STAADEN,
GARNISHEE OF
MICHAEL HAMBRECHT.

PLAINTIFF'S POINTS AND BRIEF.

1. Garnishee's answers to be construed strongly against him, because incomplete and evasive.

2. That though evasive, his answers admit an indebtedness on Sept. 27, 1859, on the building contract, of $613.00.

And the sum of $8.00 in liquor on demand.

And, also, the sum of $11.00 for extra work.

3. That Garnishee having once been charged, he must show enough to discharge himself. The *onus* of so doing is upon him. *McCoy vs. Williams*, 1 *Gilm.* 584.

4. How does he undertake to do this?

1. By setting up the legal effect of the contract—by stating Hambrecht was to forfeit $2.00 per day for every day building was unfinished after July 15, '59.

2. By stating architect had estimated damages, and that after deducting them there was but $467 due on contract.

4. But the Court will observe by reference to contract set out in Garnishee's second answer, that the part of it in reference to the forfeiture is unintelligible, and being so, the Court can but disregard it.

5. But should the Court attempt to construe that part of the contract, in other words, conclude it is intelligable, then, *quere*, is it simply a penalty or stipulated damages?

6. I contend it is clearly a penalty, if so, Garnishee should have shown the extent of the damage occasioned by the delay. Not having done this, he can claim nothing thereby.

7. But I contend, as the contract price of house was $1345.00, and he has paid but $576, the balance due on the contract is actually $769.

8. That although his answers state that house is unfinished, yet it is not stated what is to be done.

9. That the fact Garnishee had architect, on Sept. 27, 1859, estimate what was done on contract, shows that he knew or might have known, what remained to be done on house, and his not answering fully in that respect is an evidence of want of candor—it is an evasion.

10. The next method by which Garnishee seeks to discharge himself is that on the 13th day of September, 1859, (just three days before answer filed,) and two and a half months after service of process, he was served with a notice of what purported to be an assignment of said building contract by Hambrecht to one August Lupsch--same purporting to have been acknowledged May 25, '59.

11. To this I reply, in first place, that the answers show it a fraud. The contract was made April 11, 1859. The assignment purports to be made May 25, 1859. By the contract, payments were to be made as work progressed. These were made to the extent of $576, before service of process, to Hambrecht, without objection by the assignee.

12. In the next place, I contend that the assignment of a chose in action before service of process of garnishment, but without notice of the fact given to the garnishee, until after such service, but before answer, does not discharge the garnishee.

In England, I believe, the decisions are uniform that notice of an assignment of chose in action given after service of process of garnishment comes too late. *See Ryall vs. Rolle*, 1 *Atk.* 165. *Jones v. Gibbons*, 9 *Ves.* 410. *Dearle vs. Hall & Loveridge*, 3 *Russ.* 1, 22, 28 & 29. *Lord Bacon's Maxims of Law*, *max.* 16.

In that maxim Lord Bacon says: "If you omit to give notice" (to the debtor) "you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession and under the absolute control of another person."

The same doctrine is fully established in this country in the following cases: *Judah v. Judd*, 5 *Day* 534; *Bishop v. Holcomb*, 10 *Com.* 444; 14 *Id.* 141, 20 *Id.* 395 & 73; *Ward v. Morrison*, 25 *Verm't* 593; *Barney v. Douglass*, 19 *Verm't* 98; *Richards v. Griggs*, 16 *Missouri* 416; *Clodfeldt v. Cox*, 1 *Sneed* 330.

Nor does the pendency of an action by the assignee of a chose in action in name of assignor, commenced after service of garnishee process, and while garnishee can plead the garnishment, discharge him. *Foster v. Dudley* 10, *Foster* 463, *Trombly v. Clark*, 13. *Verm't* 118, *Bingham v. Smith*, 5 *Alab.* 651, *Wallace v. McConnell*, 13 *Pets.* 151.

Again, there is nothing in garnishee's answer to show Hambrecht indebted to Lupsch, to whom it is alleged the contract is assigned. This should appear, according to decision of this Court, in case of the *People, &c. v. M. Y. Johnson* 14 *Ills.* 342.

Finally, the judgment of the Court below is erroneous, because garnishee admits two items of indebtedness, one of $8 and another of $11, independent of the building contract, and which it is not claimed has been assigned.

S. A. Irwin
atty for Pltf

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Brief of Pltfs

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L Leland

Clerk

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