

8FED.CAS.—53

Case No. 4,550.

IN RE EUREKA MANUF'G CO.  
IN RE INVENTORS' MANUF'G CO.

[1 Lowell, 500.]<sup>1</sup>

District Court, D. Massachusetts.

1870.

BANKRUPTCY—PRIORITY OF CLAIMS.

Where A. had fraudulently overdrawn his bank account by collusion with the cashier of the bank, and had given the checks to an incorporated manufacturing company of which he was the principal shareholder, and A. was always largely in advance to the company, and both A. and the company became bankrupt: *Held*, the bank could prove as a creditor directly against the company to the exclusion of the assignee of A.

In bankruptcy. These manufacturing companies were duly organized as bodies corporate under the general statute of Massachusetts; they had their general place of business at Boston, and their factories in Connecticut, and became bankrupts in this judicial district. Alexander C. Felton, who was the principal stockholder, and president of both companies, is also a bankrupt, and the controversy here was whether his assignees could prove for a large balance of account against the estate of the respective companies, or whether proof could be made against them for a nearly equal amount by the National Hide & Leather Bank of Boston, to the exclusion of Felton's assignees. This was a very important question to the parties, because the companies were expected to pay a considerable dividend, which, in the one case would go to all Felton's creditors, and in the other to the bank only. The evidence tended to show that Felton in fact transacted most of the financial business of the manufacturing companies, and furnished them with the money they needed, usually by checks on the Hide & Leather Bank; but that he was not the treasurer, and the form of dealing between the parties was that Felton was credited with all moneys that he paid, and charged with all moneys which he received, and having paid out much more than he received, there was a large balance appearing to be due him on the books of each of the companies. Neither corporation kept any bank account, and Felton was in reality their banker. He had dealt with the Hide & Leather Bank for some years, beginning before these corporations were organized; and his pass-book was always in the name of "A. C. Felton, Treasurer," and this form was adopted when he was treasurer of a mining company. The evidence did not show that the bank was ever notified or had reason to believe that the title "Treasurer," on his book, was intended to apply to either of these companies. Felton was in the habit of overdrawing his account at the bank, and the balance against him was constantly increasing, until, at the time of his failure it had reached the amount of at least three hundred thousand dollars, and probably much more. It could be proved that many of the checks drawn by Felton were for the use and

benefit of the corporations respectively. Sometimes the checks were drawn by Felton, and the bank-notes were paid to the treasurer here or sent to the superintendent, or paid to the creditors; and in other instances the checks were paid directly to creditors, or sent by Felton or by the treasurer here, to the superintendents of the factories in Connecticut. In what way these last were collected by the superintendent was not explained in evidence. [James D.] Martin, the cashier of the bank, was fully acquainted with the overdrafts; but it did not appear that any other officers of the bank or of the manufacturing companies, excepting Felton and Martin, had such knowledge.

[For proceedings against Felton and Martin for conspiring together to abstract funds from the National Hide & Leather Bank, see [U. S. v. Martin, Case No. 15,728.](#)]

G. O. Shattuck, for the bank.

A. A. Ranney and N. Morse, for assignees of Felton.

LOWELL, District Judge. I cannot presume, as it is argued that I should, that the cashier's action was approved by the bank, and that these enormous advances were made as an ordinary debt from Felton to the bank. Special authority must be proved for the action of the cashier so far beyond the limits of his ordinary duty and authority. Upon the face of the transaction it was a fraud on the bank.

The question then is whether the bank can follow the moneys into the hands of the companies, or must be content with holding the debt against Felton. And this is substantially

the same question as would arise in an action of assumpsit between the same parties, if they had all remained solvent. The right to maintain an action for money had and received does not always depend on privity of contract, or upon contract at all. It is often sustainable on the same evidence that would support trover if chattels and not money were in question: *Neate v. Harding*, 6 Exch. 349; *Clarke v. Shee*, Cowp. 200; *Mason v. Waite*, 17 Mass. 560. It is enough to prove that the defendant has money of the plaintiff, which in equity and good conscience he ought not to retain. Where, indeed, the defendant is bound by a valid contract (to which the plaintiff is not a party or privy) to pay the money to some one else, the plaintiff cannot prevail, not because privity of contract is essential to this form of action, but because it is essential to that particular case, which has its foundation in a valid contract; or, in other words, because the plaintiff, in that particular case, has failed to show, that, as between the parties, the money is equitably his. The law does not imply a contract to pay A., when the debtor is already bound by a valid contract to pay B. In cases not founded on a direct contract, the inquiry is, not concerning privity of contract, but concerning identity of property.

I have not thought it necessary to consider, in this case, whether Felton was so far the agent of the manufacturing companies that his fraud can be imputed to them, because it appears that his balance of account against each corporation is about equal to the amount of checks which the bank can prove were used for the benefit of the corporation. In this state of the accounts, I am of opinion that the bank can prove the amount of these checks against each company to the extent of its debt to Felton, without showing knowledge of the fraud. The reason is, that to this extent the corporations were not holders for value. All that they ever gave for these checks was an implied promise to repay the amount of them when able, and they never have repaid it, but have always been indebted to Felton by a constantly increasing balance of account. They cannot set up Felton's title to the checks, because that was fraudulent. Their obligation to pay him, must yield as soon as the fraud is shown. In this respect the case is analogous to an asserted title to a chattel derived through a thief. The only difference is, that in the case of money, the defendants may rely on any payment or set-off made or acquired without knowledge of the fraud: *Lime Rock Bank v. Plimpton*, 17 Pick. 159; *Watson v. Russell*, 3 Best & S. 40; but this defence is wanting here, as we have seen, to the extent of Felton's balance of account against the companies. Is there, then, such identity shown, such a tracing of the money, as will enable the bank to say that its money has come to the hands of the corporations respectively? I think there is. In those instances in which the officers of the corporation acting in its behalf, drew out the bank-bills upon the fraudulent checks, it is impossible to deny that the bank might instantly have reclaimed those bills, on discovering the fraud, and proving that the corporation gave no value for the checks. And the same result would follow whenever the proceeds of checks were traced to their possession, whether in the

identical bills or not: *Allanson v. Atkinson*, 1 Maule & S. 583; *Follett v. Hoppe*, 17 Law J. C. P. 76. And in the case of all checks paid directly to the treasurer or superintendent of the company, it would be presumed that they drew them or caused them to be drawn. In those instances in which the checks were paid directly to creditors of the manufacturing companies, it might be somewhat more difficult to say that the money of the bank had come to the hands of the companies themselves. Whether any of these checks are now traced and relied on in this offer of proof, I am not advised. This hearing was merely preliminary, to enable the parties to argue the questions of law; the accounts are now to be settled either by the parties or by an assessor, and when the details are found, my final order will be made, and either party aggrieved thereby, can appeal. In settling that account, I should wish that discrimination should be made, if now practicable, between those checks which were paid to the creditors of the companies and to the companies themselves. I do not mean to say that the former cannot be proved; perhaps they may be on the ground that the checks being fraudulent, and the corporations having received full value for them, on the credit of the bank, the latter may allege that its money has gone directly to the corporations, or has been paid to their use.

Order, that it be referred to the register to ascertain the amounts due from each of the corporations respectively upon the basis of this opinion. The claim of Felton's assignee is suspended until the above-mentioned accounts are taken. Either party may apply for further directions at any time.

<sup>1</sup> [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]