Case No. 4,657.

FARMERS' & MECHANICS' BANK T. STICKNEY ET AL.

{Brunner, Col. Cas. 543;[1] 8 Law Rep. 161.}

Circuit Court, D. Massachusetts. May Term, 1845.

AGENCY—LIABILITY OF PRINCIPAL—DEBTOR AND CREDITOR—APPLICATION OF PAYMENTS.

1. A principal is liable for drafts drawn by an agent after the expiration of his authority, to pay for prior purchases, duly authorized.

2. Where an assignee of certain drafts, in trust for the payment of debts incurred thereon, recovers on some and not on others, the amount recovered should be applied pro rata to the several drafts.

This was an action of assumpsit on three bills of exchange, drawn by one Orkin Rood upon the defendants {William Stickney and others}, in favor of Lewis Rood or order, November 22, 1838; one for $2,000 and one for $4,000, both payable in three months, and one for $4,000, payable in four months. The drafts were refused acceptance by the defendants; and this suit was brought by the plaintiffs as indorsees, to recover the amount of the bills of exchange, upon the ground that they were drawn by Rood for the benefit, and by the authority of the defendants, and were discounted by the plaintiffs upon the credit of the defendants. The declaration contained special counts upon a promise to accept the bills; and also the money counts as for money advanced and paid for the use of the defendants. The general issue was pleaded.

At the trial, it appeared, among other evidence, that Rood, the drawer, was employed by the defendants in the spring of 1836, to purchase upon their account large quantities

of butter and cheese, not exceeding certain prices, and that the agency was to end early in the month of November of the same year. Rood made purchases to a large amount under this agency, which he paid for in part by cash furnished by the defendants, and in part by the proceeds of drafts, drawn by him on the defendants, and discounted by the plaintiffs. All of these drafts were accepted and paid by the defendants, except the three upon which the present action was founded. The latter were drawn after the expiration of the agency, the extent of which, according to evidence in the case, was communicated to the president and one or more of the directors of the bank; but there was also evidence to show that the two drafts of $4,000 each were to pay for the purchases of butter and cheese, actually made before the agency expired. The draft of $2,000 was in fact specially authorized by the defendants, for the purpose of procuring money to be sent by Rood to the defendants for another purpose; but the letter containing this authority was not shown by Rood to the plaintiffs. He stated to them that the draft was required for payment of amounts due on old bills, for the purchases made under the agency, which, in fact, was untrue. Soon after dishonor of the drafts, Rood brought an action in the circuit court in Boston, against the defendants, for the supposed balance due him under the agency, and also for damages sustained by reason of the dishonor of the drafts, which suit was ultimately referred to arbitrators. On the 24th of December, 1836. Rood made an assignment to the plaintiffs, which, after reciting that he owed them $10,000 or thereabouts upon the three drafts, proceeded to assign to the bank the claims of Rood against the defendants, in trust, to apply the proceeds, after deducting expenses, "towards the payment and satisfaction of all moneys due or owing from the said Rood to the said Farmers' and Mechanics' Bank," and to pay the balance, if any, to Rood or his assigns. There was also a clause, giving authority to the bank to prosecute the suit, or any other suits to recover the demands assigned. The proceedings before the arbitrators were conducted by persons employed by the bank. In June, 1840, the arbitrators awarded the sum of $4,962.35, as due by the defendants to Rood. In the proceedings before the arbitrators, no credit was given to the defendants for the drafts so dishonored, and no credit was claimed by them therefor.

The defendants contended, (1) that the award and proceedings under the arbitration by the plaintiffs were an estoppel of their demands in the present suit; (2) that Rood had no authority to draw the drafts on the defendants now in controversy, so as to bind them to accept and pay the same; (3) that the bank did not discount the drafts on the credit of the defendants, but solely on the credit of Rood and the payee; (4) that the evidence did not establish that the drafts were drawn in order to pay for butter and cheese purchased for the defendants; (5) that the defendants, at all events, were not liable for the draft of $2,000, as the same was not drawn in pursuance of the authority given by the letter before referred to, but was drawn upon a false statement made by Rood.

The court after summing up the evidence applicable to these points, left the case to the jury upon the evidence, with the suggestion that upon the first three points the evidence seemed to preponderate in favor of the plaintiffs, and, as to the fifth point, that the defendants were not, upon the admitted facts, liable upon the $2,000 draft. Upon this suggestion, the counsel agreed that the jury should give a verdict for the plaintiffs in the sum of $10,000; and that it should be referred to an auditor to settle the exact amount, according to the suggestion of the court; and that the verdict should be amended accordingly.

The case was referred to George T. Curtis, as auditor, who, after hearing the parties, reported the amounts due upon the several drafts, and also the amount of the award deducting the costs and expenses. The report stated further, that the plaintiffs' counsel claimed the right to appropriate the money received under the award, after deducting the charges, being $3,823.48, first to extinguish the draft for $2,000, and then to apply the balance towards the two drafts found by the verdict, as due from the defendants to the plaintiffs; and that, to show that the plaintiffs had never made any appropriation inconsistent with their present claim, the plaintiffs called several witnesses, who were objected to by the defendants. Their evidence was reported by the auditor, and was to the effect, that the president or directors had never directed any appropriation of the payments under the award, and that the entries were made by the cashier, without any authority from the other officers, simply to show how much was due to the bank. The case now came on to be heard upon the auditor's report.

Choate and Crowninshield, for plaintiffs.

C. G. Loring and S. Bartlett, for defendants.

STORY, Circuit Justice, afterwards delivered the opinion of the court. He said that, although the question respecting the correctness of the charge to the jury, upon which the draft of $2,000 was disallowed, was not open upon the present report, yet, if it were, he remained of the same opinion which he then expressed. The ground upon which the defendants were held liable for the two drafts of $4,000 each was, that they were drawn under the authority given to him by the defendants, for the payment of debts incurred in purchases for them and advances made by the bank with a full knowledge of his authority. But at the time the

draft of $2,000 was given, the authority had expired, and the bank knew the fact. The new draft was not obligatory upon the defendants, unless drawn in conformity with some new authority. It was not drawn in pursuance of such new authority, for the letter of the defendants was never shown to the bank. The original authority was limited to the amount of purchases made before the expiration of the authority. This limitation was known to the bank, and they, consequently, could not bind the defendants by any discounts, after the original authority had expired, except so far as the same were necessary to pay for the purchases, made before the expiration thereof. The draft of $2,000 was not required for any such purchases so made, and the defendants ought not to be bound by it.

The remaining question was, how was the money received under the award to be appropriated? It was to be applied precisely as required by the terms of the assignment. The law made no appropriation different from the intention of the parties. By that assignment, the expenses were to be first deducted, and the balance only applied to the discharge of all the debts contemplated in the assignment, which were the three drafts now in suit. The balance must be applied to all the debts, and consequently must be applied pro rata. Four fifths were to be appropriated to the two drafts of $4,000, and one fifth to the draft of $2,000.

To the suggestion, that an actual appropriation was made by the cashier, there were two answers, either of which would be decisive against it First. No such appropriation was authorized by the directors, and without their authority no such appropriation could be validly made by the cashier; and, in fact, the cashier testified that he himself never intended to make any appropriation. Seconds Under the assignment, no such appropriation could be made, unless by the positive consent of both parties, dispensing with, and recalling, the original appropriation made in the assignment.

The result of the opinion of the court was, that the defendants were liable upon the two drafts of $4,000 each, with interest from maturity, until the receipt of the money under the award. The expenses were then to be deducted from the award, and four fifths of the balance ($3,823.48) were to be credited against the amount of those drafts. Upon the balance of the two drafts, after such deduction, the plaintiffs were entitled to interest up to the time when the verdict was rendered.

[1] {Reported by Albert Brunner, Esq., and here reprinted by permission.}