

CLARK et al. v. SIGUA IRON CO.

(Circuit Court of Appeals, Third Circuit. June 1, 1897.)

EQUITABLE ASSIGNMENT—CORPORATIONS—UNPAID SUBSCRIPTIONS.

Defendants entered into a contract with the S. Co., by which they agreed to surrender certain bonds of the S. Co. held by them as collateral to its demand note in consideration of an agreement by the S. Co. to pursue certain stockholders indebted to it on subscriptions, and use every effort to collect from them, by litigation if necessary, which should be conducted by attorneys selected by defendants, any sums collected to be received by the S. Co. for defendants, and paid to them, and any judgment to be assigned to defendants on request; all sums received by defendants to be applied on the S. Co.'s note. *Held*, that this contract constituted an equitable assignment of the claims against the stockholders to defendants, and in an action by the S. Co. against defendants to recover a sum paid to them by one of the stockholders against whom judgment was obtained as money had and received to the use of the S. Co., a statement of such contract constituted a sufficient affidavit of defense.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Joseph S. Clark and Richard C. Dale, for plaintiffs in error.

George Tucker Bispham, for defendant in error.

Before ACHESON, Circuit Judge, and BUTLER and BUFFINGTON, District Judges.

BUFFINGTON, District Judge. This case arises on a writ of error to the circuit court of the United States for the Eastern district of Pennsylvania, sued out by Edward W. Clark and others, defendants in a suit brought against them by the Sigua Iron Company. That court made absolute a rule to enter judgment for want of a sufficient affidavit of defense, and its action in so doing is here assigned for error. The statement of claim averred the plaintiff company on January 6, 1894, recovered judgment against F. F. Vandervort in the court of common pleas No. 3 of Allegheny county for \$3,855.21, which judgment was subsequently affirmed by the supreme court of Pennsylvania (164 Pa. St. 572, 30 Atl. 491); that on February 4, 1894, the plaintiff company was placed in the hands of a receiver by the United States circuit court for the Eastern district of Pennsylvania; that on January 5, 1895, the defendants in the present suit received from Vandervort, for the use of the plaintiff, the amount of said judgment and interest; that "having so had and received the said moneys for the use of the plaintiff, the defendants became and are liable to pay the said moneys to the said plaintiff, with interest"; that demand for such payment was made before suit brought, and refused. It will be noted that by the plaintiff's statement its right to recover is based upon the receipt by the defendants "for the use of the plaintiff" of the amount of its judgment against Vandervort, and that, having so received it, and refused to pay it over, a right of action accrued to the plaintiff. It would, therefore, appear that the liability of defendant to pay arises from the averred fact that defendant received the moneys for the plaintiff's use, for, if they did not so receive it, no other grounds of legal or equitable liability are set

forth. In the affidavit of defense filed this averment is traversed in the most explicit language, to wit: "And the statement contained in the plaintiff's statement of claim that said money collected under said judgment and paid to the defendants was due and received by the defendants on behalf of the plaintiff is absolutely false." This explicit traverse placed in issue the question of fact upon which, by the plaintiff's only showing, its right to recover rested, and was in itself sufficient to prevent judgment.

It is said, however, that the foregoing traverse was merely the defendants' deduction or conclusion, based upon the written contract between the parties, a copy of which defendants filed with their affidavit. As the court below based its action upon the construction of the contract, we deem it proper this court should express its views upon that point as well. By the recitals of such contract, which was between the Sigua Iron Company, the plaintiff, and E. W. Clark & Co., the defendants, it appears that on its date, June 15, 1893, the defendants held \$24,500 of the Sigua Iron Company's bonds as collateral security for the payment of \$30,000 owing to them on that company's demand note. The company had claims aggregating \$24,500 against certain named shareholders in designated sums for unpaid capital stock, among others F. F. Vandervort, who owed \$30 per share on 100 shares. Clark & Co. agreed to surrender the \$24,500 collateral bonds "upon the terms and conditions hereinafter set forth," which terms, as pertinent to the present question, were as follows:

"First. Messrs. E. W. Clark & Co. will release the aforesaid twenty-four thousand five hundred (24,500) dollars of bonds when and as the same are needed for sale or pledge by the Sigua Iron Company, the amounts realized from said sales or pledges to be deposited with Messrs. E. W. Clark & Co. to the credit of the Sigua Iron Company, to be held subject to be drawn out at will, from time to time, by the Sigua Iron Company on its check or checks. Second. The Sigua Iron Company agrees to pursue the aforesaid stockholders, to wit, Messrs. Greene, Vandervort, Berlin, and Loring, and use every effort to collect the amounts unpaid on the stock standing in their names respectively, and by litigation, if necessary. This litigation shall be placed in the hands of such attorneys as may be appointed for the purpose by Messrs. E. W. Clark & Co. Any sums collected by the company from these stockholders shall be received by the company for the benefit of Messrs. E. W. Clark & Co., and shall be paid to said Clark & Co. And any judgment which may be recovered against any or all of said stockholders shall, at the request of Messrs. E. W. Clark & Co., be assigned to them. Any sums of money realized by said Clark & Co. out of any such judgment or judgments, or any money collected by the company from the said stockholders, and paid over to said Clark & Co., shall be received by said Clark & Co. as part payment of the aforesaid note of thirty thousand (30,000) dollars."

The affidavit recites that by the contract the iron company assigned and transferred to the defendants its claim against Vandervort; the fact that the suit against him was instituted by the iron company for the benefit of the defendants under the terms of the contract, and that the money was collected and paid over to Clark & Co. as their proper money; and that they expected to prove all these facts on the trial of the case. Assuming the averments of the affidavit are true,—and they must be so assumed upon a motion for judgment,—was the plaintiff entitled to judgment? In considering that question

it is to be observed that the general principles applicable to equitable assignments are clear, the difficulty being in the application of such principles to the varying facts of individual cases. To constitute a writing an assignment, no particular form of words is necessary. "The phraseology employed is not material provided the intent to transfer is manifested." *Christmas v. Russell*, 14 Wall. 84. "Any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund. The reason is, that the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity." *Spain v. Hamilton's Adm'r*, 1 Wall. 624. "It is certainly the tendency of all modern authorities to maintain the general doctrine, which may, indeed, be stated as a formula, that wherever a party has the power to do a thing (statute provisions being out of the way), and means to do it, the instrument he employs shall be so construed as to give effect to his intention. It is but the application of the old maxim, 'Interpretatio chartarum benigne facienda est, ut res magis valeat quam pereat;' 'quando res non valet ut ago, valeat quantum valere potest.'" *Bond v. Bunting*, 78 Pa. St. 218. "An equitable assignment is an agreement in the nature of a declaration of trust, which a chancellor, though deaf to the prayer of a volunteer, never hesitates to execute where it has been made on valuable, or even good, consideration." *Nesmith v. Drum*, 8 Watts & S. 10. "It leaves the legal ownership and consequent right of action in the assignor; and it has, therefore, been treated as a declaration of trust for the assignee, or an agreement that he shall receive the money to his own use; or, as the case may be, to the use of the persons beneficially concerned. Any binding appropriation of it to a particular use by any writing whatever is, consequently, an assignment, or, what is the same, a transfer, of the ownership." *Watson v. Bagaley*, 12 Pa. St. 167; *Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439.

Turning, then, to a consideration of the paper in connection with the situation of the parties at the time it was drawn, we note that the facts of the case in hand are not those which characterized a number of cases where the debtor, without any additional consideration given, promised to pay or expressed an intention of paying a previous existing debt from money thereafter received from a specified source. Here a present, valuable consideration passed. In consideration of the iron company's covenants, Clark & Co. covenanted to surrender the \$24,500 of bonds they held as security for their note. What did they receive in return? On plaintiff's contention, nothing save the iron company's general covenant to collect assets (which, by the recitals of the paper, were doubtful in character), and when collected apply the proceeds to defendant's debt if it chose to do so. If it refused to do so, then, so far as the money collected was concerned, the defendants were remediless, and were remitted to a suit for breach of contract against a company which, even at that time, by the statements of the contract, was procuring the released bonds "for sale or pledge." As the defendants upon their demand note already had a present right to subject all the

assets of the company, including these very claims, to process to enforce payment of its \$30,000 indebtedness, it would follow—to adopt the plaintiff's construction of the paper—that the defendants, in substance, took nothing by the paper in lieu of the \$24,500 of bonds they agreed to release. Testing such a construction by the standard of ordinary business prudence, it cannot reasonably be conceived that Clark & Co. gave up their bonds without acquiring possession, or the means of acquiring possession, of other equally valuable or tangible assets, but rather that both parties intended to make a particular appropriation of specific property in lieu of the to be surrendered bonds. It will be noted that for some reason the paper was explicit in the designation of its subject-matter. The names of the company's debtors, the nature and amount of the claims, were set forth in detail, and its provisions, whatever they were, extended to the whole amount of each individual claim. The company on its part covenanted, so far as its provisions relate to what was done in the Vandervort claim,—First, to pursue Vandervort by litigation, if necessary; secondly, that Clark & Co.'s attorneys should conduct such litigation; thirdly, that the judgment recovered should be assigned to Clark & Co. at their request; and, fourthly, that Clark & Co. should credit the money on the judgment realized upon plaintiff's note. It will be noticed that, so far as the claims collected by judgments were concerned, not a dollar of them was ever to come into the plaintiff's hands. This was, in substance, agreed to by specific provisions for a procedure in which money would not come into the iron company's hands, and that such was the intent of the parties is shown by the fact that provision was expressly made where the claim was collected without suit for receipt of the money by the company and payment of it to the defendants. Suit was instituted against Vandervort in the fall of 1893 by the iron company. Judgment was recovered on January 6, 1894, and by the terms of the agreement the plaintiff was then bound to assign the judgment to Clark & Co. The contract made no provision for the company to receive the money collected upon the judgment, but simply for the assignment of the judgment to Clark & Co. on request. It could not refuse to do so, for a court of chancery would have enforced compliance with its covenant obligation, and for such assignment it had already been compensated by Clark & Co.'s covenant to surrender the bonds. Such assignment was a mere formal duty, necessary, as against Vandervort, to clothe Clark & Co. with legal ownership, for the equitable ownership was already vested in them. As against Vandervort, the legal ownership and right of action had remained in the trustee, but when the right of action was merged in the judgment, and that, too, by the action of the attorneys of cestui que trust, the iron company was a mere dry trustee, whose sole remaining duty was to assign such judgment on request. With notice of this agreement, Vandervort could not thereafter have paid the money to the iron company, and the fact that the right to it had irrevocably passed from the iron company is one of the earmarks which stamp is as an equitable assignment. Such being the relation of the plaintiff to the judgment, and its duty to Clark & Co., it is

clear that the plaintiff was not relieved of its duty, or Clark & Co. deprived of their rights, by the subsequent appointment of a receiver. This judgment was not an asset of the company, and, if the company had no right to it, it goes without saying the appointment of a receiver created none.

Upon full and careful consideration, we are of opinion the affidavit of defense was sufficient, and the court erred in entering judgment. That judgment is therefore reversed, and the cause remanded for further proceedings.

HUGHES COUNTY, S. D., v. WARD.

(Circuit Court, D. South Dakota, C. D. May 3, 1897.)

No. 17.

1. **MOTIONS—ADDITIONAL EVIDENCE AFTER SUBMISSION.**

After a motion by defendant to dismiss has been argued and submitted with leave to file briefs on the law, the case will not be reopened in order that additional evidence offered by plaintiff may be heard, in the absence of anything to show that it was unknown to him when the case was argued.

2. **POWERS OF STATE'S ATTORNEY—SUITS ON BEHALF OF COUNTY.**

Under the statutes of South Dakota a state's attorney has no authority to commence a suit on behalf of a county without a lawful direction to do so by the board of county commissioners.

3. **SAME—RATIFICATION OF ATTORNEY'S ACTION.**

Where an attorney has general authority to prosecute and defend suits already instituted by or against his client, his unauthorized action in commencing a suit may be ratified by the client.

Action by Hughes county, South Dakota, against James A. Ward.
On motion by defendant to dismiss.

John A. Holmes, for plaintiff.

John F. Hughes, for defendant.

SANBORN, Circuit Judge. On April 20, 1897, pursuant to a written stipulation between the parties to this action, their attorneys appeared and submitted the motion of the defendant to dismiss it, on the ground that the state's attorney who brought it never had any authority to commence the suit. In support of this motion the defendant introduced in evidence the affidavit of George M. Coates, a member of the board of county commissioners, to the effect that the board of county commissioners never authorized this action to be commenced, and the affidavit of John F. Hughes, the attorney for the defendant, to the same effect. No evidence in contradiction of these affidavits was offered, and it was agreed between the counsel for the respective parties that the facts were that the state's attorney commenced the action at the suggestion of one member of the board of county commissioners, without any action whatever on the part of the board, but that in July, 1896,—more than two months after this action was commenced,—the board passed a resolution by which they ratified and approved the action of the state's attorney in commencing this suit. The evidence upon the motion was then closed

under this agreement, and the motion was argued. At the close of the argument the court intimated the opinion that a state's attorney had no authority to commence a suit on behalf of the county without any action on the part of the board of county commissioners. Thereupon counsel for the plaintiff asked for a few days' time in which to prepare a brief in support of the proposition that the board could properly ratify the action of the state's attorney in commencing the suit so that it might be maintained. Time was granted to him for that purpose, and to counsel for the defendant to reply to his brief. The time for the presentation of these briefs has expired. On the last day of this time counsel for the defendant presented copies of affidavits made on April 24, 1897, by D. A. Stinger, A. G. Swanson, and K. M. Foote, a copy of an affidavit made on April 26, 1897, by W. H. Gleckler, and a copy of an affidavit of T. H. Conniff, made on April 26, 1897, and objected to their receipt in evidence on the grounds that, although they had been served upon him since the hearing on April 20, 1897, he had refused to accept service of them; that they were not introduced in proper time; that no foundation was laid; and that they were incompetent, irrelevant, and not the best evidence. At the same time he presented a copy of the brief of counsel for the plaintiff in this matter, and the affidavits of John F. Hughes and W. L. Shunk, sworn to on April 27, 1897, and a paper to which is attached the certificate of T. H. Conniff, county auditor for Hughes county, S. D., to the effect that it contains an exact copy of the proceedings of the board of county commissioners of Hughes county since January 1, 1896. He also presented a brief, in which he insisted upon his objections to the affidavits served upon him since April 20, 1897, by counsel for the plaintiff, and prayed that the affidavits of Hughes and Shunk and the certificate of Conniff might be received in evidence in rebuttal if the questions of fact were to be reopened and reconsidered.

Upon this state of facts, the objections of counsel for the defendant to the affidavits served upon him since April 20, 1897, must be sustained. The case upon the facts was closed on that day. The counsel for the respective parties appeared, agreed upon the facts, argued the law, and submitted the case, with permission to each of them to file a brief upon the law prior to this date. If the plaintiff had been surprised by the affidavits or testimony produced upon the hearing, it would have been given ample opportunity to rebut that evidence. If, after the hearing, it had discovered important evidence unknown to it before, from which it would appear that there was a serious error in the agreed statement of facts upon which the motion was submitted, the case might have been opened, and the newly-discovered evidence received. There is no such showing here. It does not appear that any of the evidence which has been prepared since this case was submitted was unknown to the plaintiff when it was argued. The notice of motion to dismiss this action was given in July, 1896, and it was brought on for hearing by written agreement between the parties on April 20, 1897. Here was certainly ample time for the plaintiff to prepare any evidence which it desired to

present. The objections to the affidavits of D. A. Stinger, A. G. Swanson, and K. M. Foote, sworn to on April 24, 1897, and the objections to the affidavits of W. H. Gleckler and T. H. Conniff, sworn to on April 26, 1897, are sustained. The affidavits of John F. Hughes and W. L. Shunk, sworn to on April 27, 1897, and the certificate of T. H. Conniff, together with the newspaper to which it is attached, have not been considered, because the objections to the foregoing affidavits were sustained.

Two questions are presented by this motion: (1) Whether or not a state's attorney has authority, under the statutes of South Dakota, to commence a suit on behalf of a county of that state without the passage of any resolution or any other action on behalf of the board of county commissioners authorizing him to take such action; and (2) whether or not the board of county commissioners can subsequently ratify the unauthorized action of a state's attorney in commencing such an action. I am of the opinion that the authority of the state's attorney in this regard was limited to prosecuting and defending suits already instituted by or against the county, and that he exceeded his power when he brought this action without a lawful direction to do so by the board of county commissioners of Hughes county. *Comp. Laws Dak. 1887, §§ 428, 591; Frye v. Calhoun Co., 14 Ill. 132; Town of Kankakee v. Kankakee & I. R. Co., 115 Ill. 88, 3 N. E. 741; Jerauld Co. v. Williams (S. D.) 63 N. W. 905; Machine Co. v. Snedigar, 3 S. D. 626, 54 N. W. 814.* Some of these authorities tend to sustain the proposition that the act of an attorney in bringing such an action without authority is incapable of subsequent ratification. That may be true when a stranger assumes to act as the agent of one from whom he had no authority whatever. But I am unable to concur in the view that the act of commencing an action by an attorney who is vested with the authority and burdened with the duty of prosecuting and defending suits for his client is incapable of ratification by the latter. This is not a case where the attorney who brought the suit was without any authority from his client, or where no relation of attorney and client existed. On the other hand, it is a case where the lawyer who instituted the suit was the general attorney of the plaintiff, charged with the duty of enforcing and protecting its rights in the courts, but unauthorized to commence litigation on its behalf. The attorney was not without authority to act for his client, but his action in this case was in excess of that authority. The general rule is that a principal may ratify an act of his agent in excess of his authority which he might have authorized in the first instance. The board of county commissioners had express statutory authority to empower the state's attorney to commence this action when he began it. As soon as his action became known to that board it passed a resolution of ratification and approval, and directed him to prosecute the suit. The case falls under the general rule to which I have referred, and I am unable to persuade myself that this action of the board was ineffectual. A party to an action may subsequently ratify the unauthorized act of his attorney, if he could have authorized it before it

was done. *Erwin v. Blake*, 8 Pet. 16, 26; *Robb v. Vos*, 155 U. S. 13, 39, 15 Sup. Ct. 4; *Robb v. Roelker*, 66 Fed. 23; *Dresser v. Wood*, 15 Kan. 264, 277; *Ryan v. Doyle*, 31 Iowa, 53. The motion to dismiss the action must be denied.

PENNSYLVANIA CO. v. CITY OF CHICAGO.

YAZOO & M. V. R. CO. v. SAME.

(Circuit Court, N. D. Illinois. June 1, 1897.)

CONSTITUTIONAL LAW—LIABILITY OF CITY FOR DAMAGE BY MOB.

A state may constitutionally compel its counties and cities to indemnify against losses of property arising from mobs and riots within their limits, independently of any misconduct or negligence on the part of such city or county to which the loss can be attributed. The Illinois statute to that effect (Rev. St. 1895, c. 38, § 256a) is therefore valid.

These were actions on the case against the city of Chicago, brought by the Pennsylvania Company and the Yazoo & Mississippi Valley Railroad Company, respectively. Plaintiffs demur to defendant's pleas.

George Willard, for plaintiff Pennsylvania Co.

C. B. Gwinn, for plaintiff Yazoo & M. V. R. Co.

Charles S. Thornton, for defendant.

GROSSCUP, District Judge. The action is brought under that section of the Criminal Code of the state of Illinois which provides as follows:

"Whenever any building or other real or personal property, except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in a city, then the county in which such property was destroyed shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three-fourths of the damages sustained by reason thereof." Rev. St. Ill. 1895, c. 38, § 256a.

The declaration avers the possession of property by the plaintiffs, and its destruction within the city of Chicago, at the time named, in consequence of a mob of 12 or more persons, and there is in its averment substantially nothing more. The declaration in no feature proceeds upon any grounds of negligence or misconduct upon the part of the city or any of its agencies, nor upon the ground of any contract relation between the city and the plaintiffs. The defendant pleads that it in fact exercised all its power to prevent the loss complained of; that the state of Illinois and the United States of America, equally with the city of Chicago, were interested and engaged in protecting the property eventually lost, and that the city of Chicago has no property or funds except such as can hereafter be raised by taxation to meet the payment of such losses. The plaintiffs have demurred to these pleas, the consideration of which carries the case back to the declaration.

The statute upon which the case proceeds is one of indemnity, pure and simple, and can be sustained only upon the principle that a state may rightfully and constitutionally compel its subdivisions, such as counties or cities, to indemnify against losses arising from mobs