

defendant alone could have had any cause to complain. When I made it I must have had in mind that no specific contract upon the subject had been proved, for that there was evidence from which the jury might rightfully deduce the inference that the parties had agreed upon a place or places of delivery other than the point or points of shipment is unquestionable. Upon careful re-examination of the whole case, I find nothing which, in my opinion, would justify the court in setting aside this verdict, and therefore the motion for a new trial is denied.

LAMSON et al. v. BEARD. C. B. CONGDON & CO. v. SAME. PHELPS et al. v. SAME.

(Circuit Court of Appeals, Seventh Circuit. May 19, 1899.)

Nos. 526, 555, and 561.

1. REVIEW—JUDGMENT—SUFFICIENCY OF FINDINGS.

In determining whether a judgment is supported by a special finding, the sufficiency of the facts found is the sole question to be determined, and hence the admission of evidence of immaterial facts is not error.

2. BANKS AND BANKING—AUTHORITY OF PRESIDENT—MISAPPROPRIATION OF FUNDS.

If the directors of a bank, trusting the president's integrity or individual responsibility, authorized him to use drafts drawn on its funds for private purposes, whether paid for at the time or not, any loss resulting from the misuse of such authority would fall on the bank, and not on a third person, who had taken the drafts for value and in good faith, which in such case would be determined by the established rules governing the transfer of negotiable paper.

3. BILLS AND NOTES—PAYMENT BY BANK DRAFT—INQUIRY BY DRAWEE—NECESSITY.

A creditor, receiving a bank draft drawn to his order from his debtor in payment of the debt, is entitled to accept the draft without inquiry, not because of a presumption that the debtor had paid for the draft, but because it was drawn by the authorized officer of the bank in the usual course of business, acting without apparent or known interest in the transaction.

4. SAME—BONA FIDE PURCHASER—EQUITIES.

The receiver of such draft, though apparently an original party, as against the drawer is in effect an indorsee, and hence is only affected by equities of which he had notice before accepting it.

5. BANKS AND BANKING—DRAFTS BY PRESIDENT FOR PERSONAL USE—AUTHORITY TO DRAW—INQUIRY BY DRAWEE.

Where the president of a bank, as such, drew drafts on the bank's funds on deposit with its correspondents, payable to the order of certain brokers, for margins on transactions in futures carried for him personally, such payees are not bona fide holders of such drafts, but are put on inquiry as to the president's authority to draw the same on the bank's funds for his personal use, which inquiry they should have made from the directors of the bank; but they were under no obligation to undertake an examination of the bank's books to ascertain whether the president had reimbursed the bank.

6. SAME.

In the absence of special authority, conferred by the directors of a bank by resolution, acquiescence, or implied assent, the president of a bank has no authority to draw drafts on its funds in payment of personal debts.

7. SAME—RECOVERY OF MONEY—FINDINGS—CONSTRUCTION.

In an action by a bank to recover money fraudulently paid out by its president by means of drafts, a finding that the president was not a de-

positor, and that such wrongful appropriation constituted embezzlement, was not nullified by the fact that it was also found that the entries on the bank's books tended to show that the bank was paid for the drafts so drawn.

8. SAME.

Where a transaction between the president of a bank and defendants, in which the president paid defendants money belonging to the bank, which he wrongfully appropriated, was concealed from the bank, and the mere statement of the facts to the directors would have disclosed the fraud, defendants are liable to the bank for the money so received.

9. SAME—FRAUDULENT WITHDRAWALS BY PRESIDENT—NOTICE.

Possession of books by a bank, containing entries of drafts fraudulently drawn by the president in personal brokerage transactions, is not notice thereof to the bank, where the books were under the sole control of the president, and kept in such a manner as to conceal his defalcations.

10. SAME.

Knowledge by the president of a bank of his misappropriation of its funds in personal transactions is not notice to the bank.

11. SAME—COURSE OF DEALING—ESTOPPEL.

Where the president of a bank wrongfully appropriated the bank's funds to his personal use by means of drafts, which he so entered on the bank's books as to conceal their fraudulent character, the bank is not estopped by the president's course of dealing from denying his authority to draw drafts for such purpose.

12. SAME—TRIAL—FINDINGS—EFFECT.

A finding that money of a bank, appropriated by the president to his personal use by means of drafts, was wrongfully taken by him, is equivalent to a finding that he had no authority to draw and use the drafts.

13. SAME—DEFENSE—NEGLIGENCE.

In an action by a bank to recover the proceeds of drafts wrongfully drawn by its president and used for his personal benefit, the defense that he was permitted to draw them through the culpable negligence of the directors is unavailing, where there was no finding of such negligence, or that defendants were influenced thereby to accept the drafts, of which they had notice the president was making improper use.

14. BILLS AND NOTES—BANK DRAFTS—WRONGFUL ISSUANCE—ACCEPTANCE BY PAYEES—EFFECT.

Where the president of a bank, as such, drew drafts on its funds, in favor of certain brokers as payees, for margins on brokerage transactions, such drafts are neither commercial paper, nor contracts, until accepted by the payees; and by acceptance the payees become parties to their original execution, and hence are put on inquiry whether the president exceeded his authority in drawing them, and, if so, such payees are liable to the bank for their proceeds.

15. TRIAL—SPECIAL INSTRUCTIONS.

It was not error for the court to refuse a special instruction on an issue not pleaded, and impliedly excluded from the consideration of the jury.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

These are actions of assumpsit, brought by Robert R. Beard, as receiver of the First National Bank of Pella, Iowa, to recover of the respective plaintiffs in error, who are commission merchants at Chicago, the proceeds of drafts of the bank, drawn in their favor and delivered to them by E. R. Cassatt, then president of the bank, in discharge of individual liabilities incurred in transactions conducted by them for him on the board of trade at Chicago.

The plaintiffs in error in the first case are co-partners under the name of Lamson Bros. & Co.; in the third case, under the name of Milmine, Bodman &

Co.; and in the second case C. B. Congdon & Co. is the name of a corporation. The declaration in each case contains the customary common counts, and also special counts, to which the drafts therein sued upon are made exhibits. Plea in each case, non assumpsit; and in the first case a trial by jury. The errors assigned in that case have reference to the giving and refusing of instructions. The evidence is in the record, and is without substantial conflict. The drafts, of which there were ten, were all drawn upon a lithographed or printed form, and, excepting dates and amounts, are like the first, which reads as follows:

"First National Bank.

"Pella, June 27, 1892.

"Pay to the order of Lamson Bros. & Co. \$400, four hundred dollars.

"E. R. Cassatt, Pt.

"To National Bank of Illinois.

Cashier."

The word "Cashier" is in print, and the letters "Pt.," opposite the name of Cassatt, were written by him to indicate his office as president of the bank. He sent the drafts by mail to Lamson Bros. & Co., in response to their demands, in order to maintain his margins, and in each instance they acknowledged receipt by a letter addressed to Cassatt individually. In their letter of December 20, 1893, they say, "Your a/c has credit for \$200, received from First National Bank of your city," and in that of January 22, 1894, they say: "We received today from the First National Bank of your city their favor of the 20th instant, containing draft for \$400, which we have credited to your account."

Under the court's charge, which upon the main question in the case followed the opinion of Judge Wallace in *Anderson v. Kissam*, 35 Fed. 699, the jury returned a verdict, upon which judgment was entered in favor of the plaintiff for the sum of \$3,588, of which it is conceded the sum of \$688 was for interest. In support of the court's charge there have been cited (in addition to *Anderson v. Kissam*, supra) *Chrystie v. Foster*, 9 C. C. A. 606, 61 Fed. 551; *Moore v. Bank*, 15 Fed. 141; *Id.*, 111 U. S. 156, 4 Sup. Ct. 345; *Clafin v. Bank*, 25 N. Y. 293; *Gerard v. McCormick*, 29 N. E. 115, 130 N. Y. 261; *Wilson v. Railway Co.* (N. Y. App.) 24 N. E. 384; *Shaw v. Spencer*, 100 Mass. 384; *Bank v. Wagner* (Ky.) 20 S. W. 535. Per contra, the plaintiffs in error have cited *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316; *Bank of New York Nat. Banking Ass'n v. American Dock & Trust Co.*, 143 N. Y. 564, 38 N. E. 713; *Hanover Nat. Bank v. Same*, 148 N. Y. 612, 43 N. E. 72; *Kissam v. Anderson*, 145 U. S. 435, 12 Sup. Ct. 960. This case was argued at the October session, 1898, Judge Showalter with the other circuit judges composing the court. In each of the other cases a trial by jury was waived by written stipulation, and the court made a special finding of facts, based in the main upon an agreed statement of the parties, and gave judgment for the plaintiff.

The findings in No. 555 are as follows:

"First. The plaintiff was before and at the time of the commencement of this suit, and is now, the receiver, duly appointed by the comptroller of the currency, of the First National Bank of Pella. The plaintiff was at the time of the commencement of this suit, and is, a citizen of the state of Iowa.

"Second. The defendant C. B. Congdon & Co. is a corporation organized under the laws of the state of Illinois, having its principal place of business in Chicago, in the Northern division of the Northern district of said state. Said corporation is a resident and citizen of the state of Illinois, and of the Northern division of the Northern district thereof, and was so organized and incorporated, and was such resident and citizen, at the time of the commencement of this suit.

"Third. The said First National Bank of Pella is situated at Pella, a town of about 3,000 inhabitants, in the midst of a farming community, and was organized in 1871, under the banking laws of the United States, with a capital stock of \$50,000. E. R. Cassatt was the principal person engaged in its organization, and after the year 1883, together with his relatives, owned a majority of the stock, all of which was controlled by Cassatt. From the time of the organization of the bank to its failure Cassatt was president, and the principal executive officer of the bank, and enjoyed in a high degree the confidence of its stockholders and of the people of Pella and of the surrounding country.

Subsequent to 1881 the management of the bank was entirely under the control of E. R. Cassatt. The board of directors performed their duties largely in a perfunctory manner, and their knowledge as to the affairs of the bank was derived almost exclusively from the statements made to them by Cassatt. Cassatt dictated the persons to whom loans should be made, and had the entire discretion as to the acceptance of all bills receivable which became part of the assets of the bank. The method by which the affairs of the bank were conducted, the duties which the clerks performed, the manner of selling exchange, and the other executive methods of the bank were devised by said Cassatt, and carried on under his directions, without interference from the directors. The board of directors reposed implicit confidence in Cassatt, and accepted his statements as true in regard to all the affairs of the bank, and made no examination of the bills receivable to ascertain whether they were spurious or not. Cassatt had charge of the bills receivable of the bank and of the cash chest. Cassatt was accustomed, from the organization of the bank down to the time of its failure, to draw drafts on the funds of said bank on deposit in other banks, signing such drafts in the name of himself as president. The affairs of the bank were examined twice a year by the examiner appointed by the comptroller of the currency of the United States. At the time of such examinations Cassatt was accustomed to exhibit to the examiner the bills receivable and the cash on hand, and then return them to the safe. At such times the proper amount of cash was on hand and such bills receivable as the books of the bank showed to be on hand. The balance of the stock of the bank, outside of Cassatt's holdings, were held in small amounts, the average being about \$2,000 of stock (at its par value).

"Fourth. The said First National Bank of Pella went into the hands of a receiver June 25, 1895. At the time of its failure it was for the first time ascertained by its stockholders, and by the other officers, that said Cassatt was a defaulter to the bank in the sum of about \$65,000. Such sum had been taken by Cassatt, from time to time, from the moneys of the bank, and had been concealed by means of forged, spurious, and other fictitious notes; other evidences of loans having been put into the bank by Cassatt. The forged and fictitious notes were so adroitly executed that there was nothing that would suggest to the ordinary observer that the notes were not genuine, as they purported to be. The said Cassatt has since that time been duly indicted, tried, and convicted for the embezzlement of said \$65,000, and is now serving his sentence on account of such conviction.

"Fifth. The said Cassatt began to have business dealings with C. B. Congdon & Co., a firm consisting of C. B. Congdon and A. C. Davis, commission merchants on the Board of Trade in the city of Chicago, in 1894, continuing to have such transactions down to and including a portion of September, 1894. On or about September 24, 1894, the defendant corporation of C. B. Congdon & Co. was duly organized under the laws of the state of Illinois and authorized to begin business. On said September 29, 1894, said corporation duly purchased the good will and property of the said firm of C. B. Congdon & Co. and of the firm of A. C. Davis & Co., said A. C. Davis being a member of both firms. The stockholders of said corporation were, and at the time of said transaction continued to be, and still are, the same men who constituted the firm of C. B. Congdon & Co. and the firm of A. C. Davis & Co. The officers of said corporation, at the time of its organization and at the time the drafts were made in the suit here, were C. B. Congdon, president; A. C. Davis, vice president; William S. Warren, secretary; Charles H. Hulburd, treasurer,—the said C. B. Congdon being the same C. B. Congdon who belonged to the previous firm of C. B. Congdon & Co., and the said A. C. Davis being the same A. C. Davis who belonged to the firm of C. B. Congdon & Co. The directors of said corporation were at the beginning, and have ever since continued to be, C. B. Congdon, A. C. Davis, C. H. Hulburd, William S. Warren, and E. A. Lancaster. From the time said corporation of C. B. Congdon & Co. was organized the said Cassatt continued his dealings, formerly had with C. B. Congdon & Co., with the said corporation. The said dealings with the said corporation and its predecessor, C. B. Congdon & Co., were substantially as follows: The said Cassatt would, either personally or by wire, direct the said corporation or firm to purchase or sell certain futures in either wheat,

oats, or provisions, which said direction would be executed by the corporation on the Chicago Board of Trade by buying of or selling to some other broker on such board the futures stipulated. Such purchases or sales would thereupon be carried by said corporation or firm in the name of and for the benefit of said Cassatt, until another order was received by Cassatt closing out the same, either by purchase or sale, as the case might be. Under the rules of the Board of Trade the corporation or firm would have been obliged to have delivered, in case of sales, or accepted, in case of purchases, from the brokers with whom they had transactions, the cereals or provisions in question when the deals matured, and the said Cassatt would have been obliged to have taken or delivered to the corporation or firm the cereals or provisions called for in such deals at the time they would have matured. As a matter of fact, however, none of the sales made by the corporation or firm on account of Cassatt ever resulted in the delivery of any grain or provisions, and none of any of the purchases made on his account ever resulted in obtaining, or the acceptance of, any grain or provisions. The deals were, in nearly every instance, closed before the future to which they related had arrived, and without the passing or intention to pass of any actual grain or provisions. All the transactions of Cassatt with the said corporation or firm were intended by him to be purely speculative transactions in futures on the Board of Trade, and were so understood by the said corporation or firm, and none of the said transactions contemplated the purchase or sale of grain or provisions with any other purpose than the subsequent disposal of the same without the actual delivery or acceptance of the grain or provisions involved. The purchases and sales were numerous, and represented, in the aggregate, a large amount of dealing. The defendants and the firm were protected from losses by margins put up from time to time with them by said Cassatt for that purpose. The general course of said speculation was unfavorable to Cassatt. He occasionally had some profits, but more frequently suffered losses. The whole course of the transactions would have disclosed to an ordinary observer, fully informed of the facts, that Cassatt was gradually losing, and that some funds owned or controlled by him must have been gradually eaten into by the losses from time to time incurred and the margins put up. The defendants themselves must have known this prior to and at the time they received the drafts sued upon, unless they willingly suffered themselves to be deceived.

"Sixth. The said Cassatt, in order to carry on his deal with the said firm and defendants, kept two accounts in the said First National Bank of Pella, one in his own name, and the other in the name of E. R. Cassatt & Co. During the period of said deals Cassatt remitted to the said firm, on account of the margins aforesaid, from time to time, drafts similar to the drafts sued on in these cases, including the drafts sued upon; that is to say, the drafts signed by the First National Bank of Pella, by E. R. Cassatt, president, drawn upon the National Bank of Illinois, and payable to the firm. These drafts drawn upon the firm of C. B. Congdon & Co. bore the dates, and were for the amounts, as follows: 1894: January 10th, \$400; January 24th, \$200; February 10th, \$500; February 16th, \$600; April 25th, \$500; May 12th, \$500; May 15th, \$500; May 17th, \$1,100; July 18th, \$600; July 20th, \$400. Also, there were sent to the defendant the corporation of C. B. Congdon & Co. drafts as follows: 1894: October 3d, \$2,000. 1895: January 23d, \$2,000. Said drafts, having been received by the said firm of C. B. Congdon & Co. and the said corporation of C. B. Congdon & Co., and credited to the said Cassatt on their books, respectively, were indorsed on the back by the said firm of C. B. Congdon & Co. and the said corporation of C. B. Congdon & Co., respectively, and deposited to the credit of their account in their bank of deposit in Chicago, the Corn Exchange Bank, by which bank they were passed to the National Bank of Illinois, and charged by said last-named bank to the First National Bank of Pella. Such drafts were, at a date subsequent to their issue, duly credited to said National Bank of Illinois, and charged to some account on the books of said Pella Bank having a credit balance appearing upon said books of sufficient amount to pay or offset such charges, except, however, in so far as the facts stipulated in this paragraph may be modified by the following statement, to wit, that at the time of the failure of the Pella Bank the books of said National Bank of Illinois showed that drafts to the amount of

\$3,000 had been drawn by said Pella Bank upon said National Bank of Illinois and not credited to it upon the books of said Pella Bank.

"Seventh. None of said drafts were used or intended to be used to pay off any debt or obligation of said bank, but all were used to supply the margins in the private transactions of the said Cassatt with the said firm of C. B. Congdon & Co. and said corporation of C. B. Congdon & Co., as aforesaid. Said transactions were all kept secret from the bank by said Cassatt.

"Eighth. There is no evidence from either side, other than the foregoing, tending to show that the said Cassatt was or was not a man of means, independently of his holdings in the said First National Bank of Pella. Both the firm of C. B. Congdon & Co. and the corporation of C. B. Congdon & Co. knew that Cassatt was president of the bank, and had access to its funds, but made no inquiry as to whether said Cassatt had means, independently of his holdings in said bank, and made no inquiry of said Cassatt, the other officers of the bank, or any one else likely to know, whether said Cassatt was using his own means in the speculative transactions aforesaid, and no inquiry looking in that direction.

"Ninth. The court finds that the avails of the drafts sued upon in this case, through the means already described, were taken purposely by the said Cassatt, without authority of law, but as an act of theft and embezzlement from the funds of said bank, and that the defendants, in receiving the avails of said drafts, were in fact receiving the moneys stolen by said Cassatt from said bank. The court further finds that reasonable and prudent men, having no selfish interests to subserve, would have been led, by the facts in possession of the firm of C. B. Congdon & Co. and of the defendant, to suspect that said Cassatt might be unlawfully using the funds of said bank to supply the margins transmitted to the firm of C. B. Congdon & Co. and the corporation of C. B. Congdon & Co., respectively.

"Wherefore, the court finds the issues for the plaintiff and against the defendants, and assesses the plaintiff's damage at the sum of \$2,323.61, of which \$2,000 is principal and \$323.61 interest. P. S. Grosscup, Judge."

In No. 561 the findings, with a change of the names of the defendants, are the same, with the following exceptions:

The fifth commences with this statement: "Fifth. The said Cassatt began to have business dealings with the defendants, commission merchants on the Board of Trade, in the city of Chicago, in 1884, continuing to have such transactions down to and including a portion of the year 1894,"—and also contains the following: "The money which was sent to Milmine, Bodman & Co. to pay the losses aforesaid was in turn paid out by Milmine, Bodman & Co., for the purpose of discharging the contracts made in behalf of Cassatt by them, upon which the losses occurred, and no profit resulted to Milmine, Bodman & Co. by reason of any of the dealings with Cassatt, except the commissions which they earned as brokers in negotiating the transactions for him."

The sixth, after the first sentence, proceeds as follows: "During the period of said deals, Cassatt remitted to the defendants, on account of margins aforesaid, from time to time prior to the drafts sued on in this case, 27 drafts, each of which was exactly similar to the drafts sued on in this case; that is to say, each was signed, 'First National Bank of Pella, by E. R. Cassatt, President.' All of these drafts were collected by the defendants in the same way as the drafts in the suit. The earliest of the series of drafts, prior to the drafts in suit, was August 21, 1884, and the latest was April 6, 1891. Of these drafts, there were 5 in 1884, 8 in 1885, 6 in 1886, 2 in 1887, 1 in 1888, 1 in 1890, and 2 in 1891, and were for the amounts and bore the dates as follows: 1884: August 21st, \$500; October 11th, \$300; November 19th, \$300; December 1st, \$500; December 9th, \$300. 1885: January 5th, \$200; February 19th, \$250; March 25th, \$500; April 27th, \$500; July 27th, \$425; October 5th, \$300; October 10th, \$1,500; October 15th, \$1,000. 1886: April 12th, \$1,000; April 17th, \$1,000; September 11th, \$300; September 25th, \$300; October 11th, \$300. 1887: February 19th, \$300; July 8th, \$300. 1888: December 3d, \$1,000. 1889: March 18th, \$800; April 13th, \$500. 1890: February 13th, \$500. 1891: January 6th, \$500; April 6th, \$1,000. Each of said drafts was charged by the National Bank of Illinois to the First National Bank of