

Cases Omitted in the Reports.

RISHER *v.* SMITH.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 246. October Term, 1877. — Decided April 22, 1878.

In equity, parol testimony is admissible to show that a conveyance, absolute on its face, was in fact a mortgage.

It is clear from the evidence that the order which was the subject matter of this action, was for the purpose of security only, and that the debt for which it was security was paid before the defendant Taylor received the government drafts.

THE case is stated in the opinion.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

It cannot be considered an open question in this court that in equity parol testimony is admissible to show that a conveyance absolute on its face was in fact a mortgage. *Russell v. Southard*, 12 How. 138, 147; *Babcock v. Wyman*, 19 How. 289. Upon the evidence in this case it is clear that the order on Taylor given Biddle & Co. by Sawyer, Risher and Hall, and which is the subject matter of the action, was for the purpose of security only. All the parties must have so understood it.

The order was not negotiable commercial paper. Consequently Smith, the plaintiff, took it subject to all equities between the original parties, and there is nothing to show that either the drawers or the acceptor have incurred any obligations to him except such as they were under to the drawees. The case is, therefore, to be considered the same as if Biddle & Co. were now themselves seeking to reach the fund in the hands of Taylor.

After a careful consideration of the evidence we are satisfied that the debt to Biddle & Co. was paid and discharged long before either of the government drafts was received by Taylor. The order was dated June 20, 1867. On the 13th of September in that year Biddle & Co. stated their account, showing a balance in their favor of \$25,476.33. Of this amount \$12,948.91 was paid the same day, and \$1014.53 September 19, leaving a balance at that date of \$11,412.89. They then held as collateral, besides the order in question, certain notes of Mace Sawyer, on which \$10,000 were afterwards collected. On the 19th October Biddle & Co. accepted two drafts for \$6180.50 each, payable in ninety days and six months respectively, to settle a judgment against Sawyer, Risher and Hall

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in favor of Lathrop, Luddington & Co. At the same time Risher and Hall, "in consideration of indebtedness and advances made and to be made by Biddle & Co.," gave Biddle an irrevocable power of attorney to collect all moneys that might become due to them from the United States for carrying the mails on certain designated routes for the year ending July 1, 1868. The amount paid by the government for this service after the date of the power of attorney was not far from \$19,000, and as the power was filed in the office of the auditor of the treasury for the Post-Office Department on the 12th October, the payments must have been controlled at least by Biddle. On the 24th July, 1868, another power of attorney of like character was executed to Biddle for the year commencing July 1. About \$25,000 were paid by the government on this account, and on the 5th of October, 1868, drafts on the department were drawn by Biddle in favor of Theodore Crane, president, amounting in the aggregate to \$20,000 of this \$25,000. In addition to this Biddle testifies that at one time he borrowed of Risher and Hall ten thousand dollars, upon a draft of his upon one Sampson, a resident of Texas. Under these circumstances certainly the burden is thrown upon Smith to show that the balance due Biddle & Co. was not paid out of the moneys thus received. This he has failed to do.

Taylor received one draft from the government about October 1, 1868, for \$4744.19, and another March 22, 1869, for \$1332.52. He is entitled to one-fourth of the two amounts for his services. Shortly after the first draft was obtained Taylor drew the money upon it, under an arrangement by which he was to give security for its payment when required. He should, therefore, be charged with interest upon the balance in his hands, after deducting his commissions of twenty-five per cent upon the amount of the two drafts. This balance is conceded to be \$3225.01.

The decree is reversed, and the cause remanded with directions to dismiss the original bill at the costs of Smith, the plaintiff, and to enter a decree upon the cross-bill, requiring Taylor to pay Risher the balance in his hands, being \$3225.01, with interest from the date of its receipt, and also to deliver to Risher the treasury draft of \$1332.52 in his possession. The appellee, Smith, to pay the costs of the appeal.

Mr. T. T. Crittenden and Mr. George W. Paschal for appellant.
Mr. F. C. Wood and Mr. Thomas Jessup Miller for appellees.