

*MANDEVILLE v. WELCH.

Assignment of choses in action.

Bills of exchange and negotiable promissory notes, are distinguished from all other patrol contracts, by the circumstance, that they are *prima facie* evidence of valuable consideration, both between the original parties, and against third persons.

Where a *chose in action* is assigned by the owner, he cannot interfere to defeat the rights of the assignee, in the prosecution of a suit brought to enforce those rights.

It makes no difference in this respect, whether the assignment be good at law, or in equity.

But this doctrine only applies to cases where the entire *chose in action* has been assigned, and not to a partial assignment.¹

ERROR to the Circuit Court for the district of Columbia. This was an action of covenant brought by the plaintiff, James Welch, for the use of Allen Prior, against the defendant Mandeville, one of the firm of Mandeville & Jamesson, for the breach of certain articles of agreement set forth in the declaration. Several pleas were pleaded by the defendant; but as the opinion of this court turned altogether upon the fourth set of pleadings, on which issue was joined, and at the trial, a bill of exceptions taken, it is unnecessary to state the other pleadings.

The fourth plea alleged a release of the cause of action by the plaintiff, before the commencement of the present suit. The plaintiff replied, in substance, that Welch being indebted to Allen Prior, in a sum exceeding *278] \$8707.09, and Mandeville & Jamesson *being indebted to Welch, by virtue of the covenant in the declaration mentioned, in the same sum of \$8707.09, Welch did, in the year 1799, appropriate, assign and transfer to Prior, by a good and sufficient assignment in equity, the same debt due by reason of the same covenant, of which appropriation and assignment to the use and benefit of Prior, Mandeville, afterwards, in 1799, had notice; that the present suit was brought for the sole use and benefit of Prior, and Mandeville, at its commencement, had notice thereof, and knew the same suit was depending for the use and benefit of Prior, at the date of the pretended release; that the release was obtained, without the knowledge, consent or approbation of Prior, or of his attorney in court; and that Welch had no authority from Prior, or his attorney, to execute the release, which was known to Mandeville, at the time of the release; and that the release was made, with the intent to defraud Prior, and to deprive him of the benefit of this suit. To this replication, there was a rejoinder and issue, upon which the parties went to trial.

At the trial, the plaintiff, to prove that Welch did transfer and assign to Prior, by a good and sufficient assignment in equity, the debt in the replication mentioned, gave in evidence to the jury, the articles of agreement in the declaration mentioned, and sundry indorsements of payments thereon, and a memorandum also thereon, dated the 1st of January 1798, and signed by Welch, stating that there then remained owing to him, on the articles, *279] payable at the times therein mentioned, the sum of \$8707.09. *The plaintiff further offered three bills of exchange, drawn by Welch, in favor of Prior, upon Mandeville & Jamesson, dated on the 7th of September 1799, each for \$2500, payable to Prior, or his order: one on the 24th of November 1800, another on the same day and month 1801, and the third on

¹ Tiernan v. Jackson, 5 Pet. 580.

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the same day and month 1803, being the respective times at which certain instalments for like sums would become due on the articles of agreement stated in the declaration. Each of these bills purported to be "for value received" of Prior, and were directed to be charged "to account as advised." The plaintiff further offered in evidence to the jury, an account rendered to Welch by Mandeville & Jamesson, dated the 31st of January 1798, stating the balance of \$8707.09, due to Welch, and payable by instalments, in the manner mentioned in the articles of agreement; and proved that this account had been delivered to Prior by Welch.

The defendant then gave in evidence the bill and proceedings in a suit of chancery, in Fairfax county, by Prior against Welch and Mandeville & Jamesson (excepting the answers of the latter), which suit was brought to recover the amount of the three bills of exchange from Mandeville & Jamesson, as debtors of Welch, and was discontinued by the plaintiff, Prior, after the answer of Welch had come in, denying that Prior was owner of the bills, and asserting that Prior held them merely as his agent, and for his use. And the defendant further proved, that Welch had never authorized the present suit to *be brought, unless the circumstances above stated [*280 would have given Prior authority to institute the same.

The defendant then prayed the court to instruct the jury, that if, from the evidence so given, they should be of opinion, that the sums for which the bills were drawn amounted to less than the sums payable by Mandeville & Jamesson to Welch, under the covenant, and were known to be less by Welch, then Prior is not such an assignee of the covenant as would authorize him to sustain this suit in the name of Welch; which instruction the court gave; but further instructed the jury, that if they should be of opinion, from the evidence, that the bills were drawn for the full and valuable consideration expressed on the face of them, paid by Prior to Welch, and if there was no other evidence, than what is before stated, they ought to infer from the evidence, that Prior was, and is, such an assignee of the right of action upon the covenant, as authorized him to sustain this action in the name of Welch's administrator (Welch having died pending the proceedings, and his administrator having been made party to the suit), for the whole debt due by the covenant, at the time of Welch's delivering the account above stated to Prior; and further, that the bills were *prima facie* evidence of such value having been paid by Prior to Welch. The jury found a verdict for the plaintiff, under this instruction; and the cause was brought before this court by a writ of error, to revise this among other supposed errors assigned upon the record.

*March 2d. *Swann and Taylor*, for the plaintiffs in error, argued:

1. That the court below erred in its instruction to the jury that the words "value received" were evidence against Mandeville & Jamesson, that money had been actually paid by Prior to Welch, or the bills. They do not claim under the bills, nor under Welch as the drawer. They claim as assignees of the fund on which the bills were drawn. In the case of *Evans v. Beatty*, 5 Esp. 26, Lord ELLENBOROUGH held, that on a guarantee to pay for goods sold to a third person, the declarations of the latter were not evidence to charge the person giving the guarantee; because there might be collusion between the third person and the plaintiff. So, in this case, if the defend-

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ant proved an assignment to him, Welch's declaration that he had previously assigned to the plaintiff, would not be admissible, and his declaration in writing cannot have any greater effect.

2. It was not the intention of Welch, and of Prior, that the whole covenant should be assigned, nor does the law imply such an assignment. The bills are general, not payable out of any particular fund, and there is no proof of any agreement between Welch and Prior, that the latter should have a lien on the funds in the hands of Mandeville & Jamesson. The legal consequence of the decision of the court below is, that the drawing of a bill of exchange amounts, *per se*, to an assignment in law of the funds of the drawer, in the hands of the drawee, so as to authorize a suit in the name of *282] the drawer, without his consent, against the drawee, and when recourse might be had to the former. There is no case to support the idea that the drawing of a bill, under any circumstances, will amount to an assignment at law. Cases, indeed, have occurred, where, under peculiar circumstances, a court of equity has considered the drawing of a bill as giving to the payee a superior claim or equitable lien. Thus, in the case of *Yeates v. Groves*, 1 Ves. jr. 280, the creditor surrendered a security he held, under an express agreement that he should be paid out of the money to arise from a particular specified fund, on which the bill was drawn, and the drawer became bankrupt. But the proposition, that the drawing of a bill on a specific fund would, *per se*, have created such a lien, is repelled by Lord THURLOW. It would be highly impolitic, to consider the drawing of a bill, under any circumstances, as amounting to an assignment, or creating a lien, in a court of law. These questions generally arise on the bankruptcy of the drawer. His general creditors have an interest, and ought to be heard; they cannot be made parties to a suit at law.

Jones and Lee, contra, insisted: 1. That bills and negotiable notes, expressed upon their face "value received" are evidence of that fact, both as between the original parties, and against third persons.

2. The facts and circumstances of the case establish, by legal inference, that the articles of agreement were wholly assigned in equity. The bills *283] being *prima facie* evidence of an equivalent advance by Prior, the possession by him of the articles of agreement, and the delivery to him of the account signed by Mandeville & Jamesson, furnish a legal presumption, that both were delivered as security for the payment of the advance. He thus acquired a lien on them, similar to that acquired by the delivery of title deeds as security for a debt, which lien has always been deemed by courts of equity equivalent to a mortgage. *Sweas v. Camelford*, 1 Ves. jr. 235; *Walwyn v. Sheppard's Assignees*, 4 Ves. 119; *Jones v. Gibbons*, 9 Ibid. 411; *Ex parte Langston*, Rose 26; *Russel v. Russel*, 1 Bro. C. C. 269. So also, the deposit of a note or bill, as security for a debt, entitles the creditor to enforce his lien in equity. *Ex parte Crossbey*, 3 Bro. C. C. 237; *Ex parte Byas*, 1 Atk. 148. But supposing this position not to be correct, still it is contended, that there was here a partial lien or appropriation of the debt due from Mandeville & Jamesson under the articles, to the extent of the sums due on the bills, which is sufficient to authorize Prior to maintain this action. The drawing of a bill of exchange is, in itself, an assignment by the drawer to the payee of the money due from the drawee.

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The acceptance is not necessary to make the assignment complete, but only to give an action against the drawee in the name of the payee. *Gibson v. Minet*, 1 H. Bl. 569, 602; *Tatlock v. Harris*, 3 T. R. 174. In the case of *Clark v. Adair*, cited by Mr. Justice BULLER in *Masters v. Miller*, 4 T. R. 343, it was determined, *that an unaccepted bill was such an assignment as entitled the payee to the money. In *Yeates v. Groves*, 1 [284 Ves. jr. 280, an order to pay out of a particular fund, though not accepted, was considered such a transfer as to prevent the assignee of the party who became bankrupt after drawing the order, from claiming the fund on which the order was drawn.

March 7th, 1820. STORY, Justice, delivered the opinion of the court.—Two questions arise upon the instruction to the jury: 1. Whether the bills were *prima facie* evidence that value had been paid for them by Prior to Welch? 2. Whether, under all the circumstances of the case, Prior was an assignee in equity, entitled to maintain the present action?

Upon the first point, we are of opinion, that the law was correctly laid down by the court below. The argument of the defendant's counsel admits, that where a bill imports, on its face, to be for "value received," it is *prima facie* evidence of that fact, between the original parties; but it is stated, that it is not evidence of the fact against third persons. We know of no such distinction. In all cases, where the bill can be used as evidence either against the parties, or against third persons, the same legal presumption arises, of its having been given for value received, as exists in relation to a deed expressed to be given for a valuable consideration. In this respect, bills of exchange and negotiable notes are *distinguished from all [285 other parol contracts, by authorities which are not now to be questioned. *Chitty on Bills* (2d edit.) 12, 62; 1 Wils. 189; 3 Burr. 1516; 1 Salk. 25; 1 Bos. & Pul. 651.

The other question requires more consideration, though it does not, in our judgment, present any intrinsic difficulty. It has been long since settled, that where a *chose in action* is assigned by the owner, he shall not be permitted, fraudulently, to interfere and defeat the rights of the assignee, in the prosecution of any suit to enforce those rights. And it has not been deemed to make any difference, whether the assignment be good at law, or in equity only. This doctrine was fully recognised by this court when this case was formerly before us. (1 Wheat. 235) It was then applied to a case, where the whole *chose in action* was alleged to have been assigned; and it was certainly then supposed, that the doctrine in courts of law had never been pressed to a greater extent. We are now called upon to press it still further, so as to embrace cases of partial assignments of *choses in action*.

It is contended on behalf of the plaintiff, in the first place, that the facts of this case establish, by legal inference, that the articles of agreement were entirely assigned in equity to the plaintiff. If this ground fails, it is, in the next place, contended, that an assignment was made of the debt due by the articles, to the extent of \$7500, the amount of the bills drawn on Mandeville & Jamesson, and that *this, *per se*, authorizes Prior to [286 sustain the present action.

In support of the first position, it is argued, that the bills being *prima facie* evidence of an equivalent advance made by Prior, the possession, by

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the latter, of the articles of agreement, and the delivery to him of the account signed by Mandeville & Jamesson, afford a legal presumption, that the articles and account were delivered to him as security for the payment of such advance, and thereby he acquired a lien on them, like that acquired by the delivery of title-deeds as security for a debt, which lien has always been deemed to be equivalent to an equitable mortgage. It may be admitted, that according to the course of the authorities in England, and as applicable to the state of land-titles there, a deposit of title-deeds does, in the cases alluded to, create a lien, which will be recognised as an equitable mortgage, and will entitle the party to call for an assignment of the property included in the title-deeds.¹ It may also be admitted, that a deposit of a note, not negotiable, as security for a debt, will entitle the creditor, after notice to the maker, to enforce, in equity, his lien against the depositor, and his assignee in bankruptcy. Such was the case cited at the bar from Atkyn's reports.^(a) But in cases of this nature, the doctrine proceeds upon the supposition, that the deposit is clearly established to have been made as security for the debt; and not upon the ground, that the mere fact of a *287] deposit, unexplained, affords such proof. In the case at the bar, it was not proved, that the articles were delivered by Welch to Prior at all, much less that they were delivered as security for the bills. The delivery of the account is certainly an equivocal act, and might have been as a voucher of the right of Welch to draw on Mandeville & Jamesson. There is this further deficiency in the proof, that the bills do not appear ever to have been presented to the drawees for acceptance, which not only rebuts the presumption, from the face of the bills, that they were received for value (since a *bona fide* holder could not be supposed guilty of such fatal *laches*), but draws after it the auxiliary presumption, that they were in the hands of Prior, as agent, and therefore, that he had not any assignment of the articles as security. And it may be added, that the suit commenced in chancery, by Prior, for this very debt, and afterwards discontinued, does not assert any assigned title in himself, but proceeds against Mandeville & Jamesson, as the mere debtors of Welch. Under such circumstances, this court cannot say, that the instruction of the circuit court was correct, that the jury ought to infer, that Prior was an assignee, entitled to sue for the whole debt due upon the articles.

The ground, then, that there was a deposit of the articles, as collateral security, failing, we are next led to examine the position of the defendant's counsel, that there was a partial lien or appropriation of the debt due from Mandeville & Jamesson, under the articles, to the extent of the sum due on *288] the bills, which is equivalent to an equitable assignment of so much of the debt. It is said, that a bill of exchange is, in theory, an assignment to the payee of a debt due from the drawee to the drawer. This is undoubtedly true, where the bill has been accepted, whether it be drawn on general funds, or a specific fund, and whether the bill be, in its own nature,

(a) Ex parte Byas, 1 Atk. 148.

¹ In Pennsylvania, an equitable mortgage court of equity will not enforce a return of cannot be created by a deposit of title-deeds. them, without performance of the condition. *Bowers v. Oyster*, 3 P. & W. 239; *Shitz v. Sidney v. Stevenson*, 11 Phila. 178. *Diffenbach*, 3 Penn. St. 233. Nevertheless, a

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negotiable or not ; for, in such a case, the acceptor, by his assent, binds and appropriated the funds for the use of the payee. And to this effect are the authorities cited at the bar. *Yeates v. Groves*, 1 Ves. jr. 280; *Gibson v. Minet*, per EYRE, C. J., 1 H. Bl. 569, 602; *Tatlock v. Harris*, 3 T. R. 174. In cases also, where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee, it binds the fund in his hands. But where the order is drawn, either on a general, or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien, as against the drawee, unless he consent to the appropriation, by an acceptance of the draft ; or an obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties, as a part of their contract. The reason of this principle is plain. A creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities, not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments, by which it may be broken *into fragments. When he undertakes to [*289 pay an integral sum to his creditor, it is no part of his contract, that he shall be obliged to pay in fractions to any other persons.¹ So that, if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit. But in the present case, there is no proof any presentment of the bills, much less of any acceptance by the defendant, to establish even a partial assignment of the debt. And if there were, it would still be necessary to show, that there was an assignment of the articles, as an attendant security, before the plaintiff could found his action upon them. Indeed, by the very terms of the pleadings, the plaintiff undertakes to establish an assignment of the whole debt due by the articles ; and if he fails in this, there is an end to his recovery. So that, in whatever view we contemplate the facts of this case, or the law applicable to it, the plaintiff has not shown any sufficient title to sustain his replication to the fourth plea.

Several other objections have been taken at the bar, to the plaintiff's right of recovery, which under other circumstances would have deserved serious consideration ; but as, upon the merits of the case, as they are apparent upon the record, the judgment of this court is decidedly against the plaintiff, it is unnecessary to give any opinion upon those objections.

Judgment reversed.

JUDGMENT.—This cause came on to be heard, on *the transcript [*290 of the record of the circuit court for the district of Columbia, in the county of Alexandria, and was argued by counsel : on consideration whereof, this court is of opinion, that the said circuit court erred, in instructing the jury, "that if they should be of opinion, from the evidence, that the said bills were drawn for the full and valuable consideration expressed on the face of them, paid by the said Prior to the said Welch, and if there be no other evidence than what is herein before stated, they ought to infer from the said evidence, that the said Prior was, and is, such an assignee of the

¹ See *Jermyn v. Moffitt*, 75 Penn. St. 399.

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right of action upon the covenant aforesaid, as authorizes him to sustain the action in the name of the said Welch's administrator, for the whole debt due by the said covenant, at the time of the said Welch's delivering the said account to the said Prior : " it is, therefore, adjudged and ordered, that the judgment of the said circuit court in this case be, and the same is hereby reversed and annulled : and it is further ordered, that the said cause be remanded to the said circuit court, with directions to issue a *venire facias de novo*.

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Quo warranto.

An information for a *quo warranto*, to try the title to an office, cannot be maintained, except at the instance of the government ; and the consent of parties will not give jurisdiction, in such a case.¹

ERROR to the Circuit Court of Ohio. This was an information for a *quo warranto*, brought to try the title of the defendant to the office of principal surveyor of the Virginia military bounty lands north of the river Ohio, and between the rivers Scioto and Little Miami.

The defendant had been appointed to the office by the state of Virginia, and continued to exercise its duties, until the year 1818, during all which time, his official acts were recognised by the United States. In that year, he was removed by the governor and council of Virginia, and the plaintiff appointed in his place. The writ was brought, by consent of parties, to try the title to the office, waiving all questions of form, and of jurisdiction. Judgment was given in the court below, for the defendant, and the cause was brought by writ of error to this court.

March 6th, 1820. The cause was argued by *Hardin*, for the plaintiff, and by the *Attorney-General* and *Scott*, for the defendant. But as the cause was dismissed for want of jurisdiction, it is deemed unnecessary to insert the argument.

*292] *March 8th. MARSHALL, Ch. J., delivered the opinion of the court, that a writ of *quo warranto* could not be maintained except at the instance of the government, and as this writ was issued by a private individual, without the authority of the government, it could not be sustained, whatever might be the right of the prosecutor, or of the person claiming to exercise the office in question. The information must, therefore, be dismissed.

Judgment reversed.

JUDGMENT.—This case came on to be heard, on the transcript of the record of the circuit court for the district of Ohio, and was argued by counsel : on consideration whereof, this court is of opinion, that no writ of *quo warranto* can be maintained, but at the instance of the government ; and as this is a writ issued by an individual, without the authority of government, it is the opinion of this court, that the same cannot be sustained, whatever may be the right of that individual, or of the person who claims to exercise

¹ Nebraska v. Lockwood, 3 Wall. 236 ; Commonwealth v. Burrell, 7 Penn. St. 34.