

Plaintiffs were private bankers, and defendant was the assignee for the benefit of creditors of Carpenter & Co., contractors. That firm were engaged in unloading steel rails for Mackenzie & Mann, railway contractors, for which they were paid monthly, and they kept an account with plaintiffs. They occasionally overdrawed their account, and had more than once made written assignments to plaintiffs of their accruing monthly claim against Mackenzie & Mann to secure advances.

On 17th November, 1902, a clerk of Carpenter & Co., duly authorized, went to plaintiff's bank and asked the manager to allow Carpenter & Co. to overdraw. The manager said that the clerk asked for an overdraft against the moneys due from Mackenzie & Mann on steel account, and promised that he would give a draft for it at the end of the month. One of the clerks in the bank said that he heard the conversation, and that the clerk of Carpenter & Co. asked to withdraw the account; that he "would pay for this out of the moneys coming from Mackenzie & Mann—would take it up at the end of the month—cover it"; but that he could not remember the exact conversation. The clerk of Carpenter & Co. swore that he merely asked to be allowed to overdraw the account, saying nothing as to how it was to be repaid. The overdraft was allowed. On 29th November, 1902, Carpenter & Co. assigned to defendant.

At the end of the month Mackenzie & Mann owed Carpenter & Co. \$365 for unloading steel rails, and Carpenter & Co.'s account with plaintiffs was overdrawn \$393.55. Both parties claimed the \$365, which was paid into Court, and an issue directed.

The Judge of the District Court decided that no equitable assignment to plaintiffs had been proved, and ordered that the money should be paid out to defendant.

Plaintiff's appealed.

The appeal was heard by STREET and BRITTON, JJ.

J. H. Moss, for appellants.

H. L. Drayton for defendant.

STREET, J.—In my opinion the conclusion arrived at was clearly right. Even if we assume that the clerk when asking to be allowed to overdraw the account promised to repay the amount out of the moneys coming at the end of the month from Mackenzie & Mann, this would not be more than an indication of the source from which he expected to obtain the funds with which to repay the advances, and would fall far