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State Bank of Southern Utah v. Thomas A. Stallings, dba Allyn Electric and Ruthi A. Stallings. his Wife v. Hurricane Branch of the Bank of St. George v. T. E. Kaze and Max Gammon, dba Kaze & Gammon Construction Company : Brief of Appellant

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**In the Supreme Court of the
State of Utah**

STATE BANK OF SOUTHERN UTAH,
Respondent,

vs.

THOMAS A. STALLINGS, dba ALLYN
ELECTRIC and RUTH A. STALLINGS,
his wife,

Defendants.

vs.

HURRICANE BRANCH OF THE
BANK OF ST. GEORGE,

Garnishee,

vs.

T. E. KAZE and MAX GAMMON, dba
KAZE & GAMMON CONSTRUCTION
COMPANY,

Intervenors and Appellants.

CASE NO. 1000

BRIEF OF APPELLANT

Appeal from Fifth District Court
Iron County, Utah
Honorable C. Nelson Day, Judge

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INDEX

	Page
STATEMENT OF KIND OF CASE.....	1
DISPOSITION IN THE LOWER COURT.....	2
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS.....	2
ARGUMENT	4

POINT I

THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING THE PLAINTIFF JUDGMENT BECAUSE THE UNDISPUTED FACTS SHOW THAT \$2200.00 WAS PAID TO ALLYN ELECTRIC FOR THE USE AND BENEFIT OF WESTINGHOUSE SUPPLY CO., AND AN EQUITABLE ASSIGNMENT WAS THEREBY CREATED.

CASES CITED

Austin v. Public National Bank (Tex) 2 SW 2nd 463...	6
Central Trust Co. v. Bank of Mullens (W. Va.) 150 S.E. 137	6
Farrington v. F. E. Fleming Commission Co. (Neb) 142 N.W. 297	5
Merchants National Bank v. State Bank (Minn) 214 N. W. 750.....	6
Salburger Bank v. Standard Oil Co., (Geo) 161 SE 854	6
Slaughter v. First National Bank, (Tex) 18 SW 2nd 754	6

AUTHORITIES CITED

50 ALR p. 403.....	5
84 ALR p. 412.....	5

STATUTE

Rule 64 D (g) Utah Code Annotated.....	5.
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BANK OF ST. GEORGE,

Garnishee,

vs.

T. E. KAZE and MAX GAMMON, dba
KAZE & GAMMON CONSTRUCTION
COMPANY,

Intervenors and Appellants.

**CASE
NO. 10782**

BRIEF OF APPELLANT

STATEMENT OF KIND OF CASE

This case involves a question of law as to whether or not the right of a judgment creditor, in a garnishment proceeding against the bank account of the debtor, is su-

perior and entitled to priority over the holder of check where the facts clearly show an assignment in fact of the bank account to the amount a check written by the maker thereof at the time of making a bank deposit and as part of the consideration for his obtaining the monies so deposited.

DISPOSITION IN LOWER COURT

The lower court held that there was no issue as to any material fact and granted plaintiff summary garnishee judgment against the Bank of Hurricane to the extent of the full amount of plaintiff's two judgments against defendants, Stallings.

RELIEF SOUGHT ON APPEAL

By this appeal plaintiffs seek to have the judgment of the lower court reversed and to have the trial court instructed to enter judgment in favor of Appellants for payment to Westinghouse Electric Supply Company.

FACTS

The facts, so far as material for the purpose of resolving the controversy involved in this proceeding, were stipulated by the parties at the hearing before the trial court.

Kaze and Gammon, a co-partnership, had the General Contract for the construction of a public school at Hurricane, Utah. They subcontracted, without bond, the electrical work to Mr. Thomas A. Stallings, dba Allyn Electric Co. In the course of his work, Mr. Stallings had become indebted to Westinghouse Electric Supply Company for some \$8,000.00 for material supplied by that company on

the Hurricane School job and the supply company had called on Kaze & Gammon for the payment to it of either \$2200.00 or \$2250.00.

On or about August 16, 1966, Kaze & Gammon drew a check payable to Allyn Electric Company in the amount of \$2250.00, anticipating that Allyn Electric would endorse the same to Westinghouse Electric Supply Co. On August 16, 1966, Mr. Kaze (of Kaze & Gammon), and Mr. Stallings (Allyn Electric) met and Mr. Stallings stated that only the sum of \$2200.00 was being requested at that time by Westinghouse Electric Supply. Whereupon Mr. Stallings wrote his check in the sum \$2200.00 to Westinghouse and handed the same to Mr. Kaze for delivery to Westinghouse in exchange for the Kaze & Gammon draft in the amount of \$2250.00 which was payable to him. He agreed to deposit the Kaze & Gammon check in the Hurricane Branch of the Bank of St. George to cover the Westinghouse check when presented. That draft was deposited to Allyn Electric checking account at the Hurricane Branch of the Bank of St. George on that date and Mr. Stallings issued no other checks against that deposit.

The following day Mr. Kaze personally carried the Allyn Electric check to Salt Lake and delivered it to Westinghouse Supply.

State Bank of Southern Utah, a Utah Banking corporation, secured judgments against Thomas A. Stallings, dba Allyn Electric Company and his wife Ruth, in Civil No. 4890 for some \$1264.00 and obtained a deficiency of some \$1085.00 after the security therefor had been sold, and in Civil No. 4891 against the same defendants, for some \$1267.00. These judgments were obtained on or about

July 21, 1966. The judgments were unrelated to the work Mr. Stallings was doing for Kaze & Gammon Construction Co.

Before the check in the sum of \$2200.00 payable to Westinghouse could be processed through the clearing house and presented for payment, two Writs of Garnishment, one in each of its suits against Stallings, were served by the State Bank of Southern Utah on the Hurricane Branch of the Bank of St. George thereby freezing the Stallings bank account and the Westinghouse check was not paid when presented and has never been paid. Plaintiff then filed a Motion for Garnishee Judgment against Hurricane Branch, Bank of St. George.

Kaze & Gammon filed a Motion to Intervene and a complaint in intervention claiming \$2200.00 of the Stallings deposit for the use and benefit of Westinghouse Electric Supply Co. The motion to intervene was granted by the court. Plaintiff, State Bank of Southern Utah, filed a Motion for Summary Judgment. At the hearing the facts were agreed and orally stipulated by respective counsel. Thereafter the court granted plaintiff's motion for Summary judgment.

ARGUMENT

POINT I

THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN HOLDING THAT THE PLAINTIFF WAS ENTITLED TO GARNISHEE JUDGMENT IN THIS CASE WHEN THE FACTS CLEARLY SHOW THAT THE CHECK ISSUED TO WESTINGHOUSE SUPPLY COMPANY CONSTITUTED AN ASSIGNMENT IN FACT.

The funds were and are in the hands of the drawee bank. That bank, although a party at all stages in the various proceedings, did not appear and has no interest in the outcome, except to pay the money as directed by the court. Under Utah law the garnishee bank was not at liberty to pay any part of the Stallings deposit over to the plaintiff, but at its election could hold the deposit until further order of the court or could pay the same into court to be dealt with as thereafter ordered by the court. Rule 64 D (g) Utah Rules of Civil Procedure.

The old "Law Merchant" and Negotiable Instruments Acts contained a provision to the effect that a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank was not liable to the holder, unless and until it accepts or certifies the check. However, a provision of that nature is not applicable to the facts in the case here before this court, because neither the appellant nor the respondent are claiming under the Negotiable Instruments Act. The effect of service of the Writ of Garnishment upon the garnishee bank was to impound the funds in its hands for payment of the money to the party having the better right to it, as determined by the court. *Farrington v. F. E. Fleming Commission Company (Nebraska)* 142 N.W. 297. When the funds are still in the hands of the drawee bank and where the check or draft, together with other evidence shows an assignment in fact, the assignment is generally recognized as against an attaching creditor. Annotation 50 ALR 403, Supplemented in 84 ALR 412.

A check or draft, while it will not of itself operate as an assignment pro tanto of the fund drawn upon, may, together with other evidence of an intent by the drawer to assign, prove an assignment, as between the drawer or holder of such draft or check, which will be given effect by the courts. *Salburger Bank v. Standard Oil Company* (Georgia) 161 S. E. 854; *Merchants National Bank v. State Bank*, (Minn) 214 N. W. 750; *Austin v. Public National Bank* (Tex) 2 S. W. (2) 463; *Slaughter v. First National Bank*, (Tex) 18 S. W. (2) 754; *Central Trust Company v. Bank of Mullens* (W. Va.) 150 S. E. 137.

On principal, all of the foregoing cases support the appellant's position. From a factual standpoint *Slaughter v. First National Bank*, supra, is very similar. In that case a cattle buyer, at the time of purchase gave the seller a check for the purchase price, agreeing with him that when the cattle were sold the buyer would deposit the money in a certain bank for the purpose of meeting the check. The court in that case held that the check together with the agreement showed an equitable assignment of so much of the deposit as was necessary to pay the check, and that the payee of the check had a right to the deposit superior to that of one who served a Writ of Garnishment on the depository bank before the check was presented for payment.

CONCLUSION

There is no dispute as to the facts in the instant case. Appellants contend that the facts show an equitable as-

signment for the amount of the Westinghouse check of \$2200.00 and request the Supreme Court to so order.

Respectfully submitted,

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