Macy, Charles v Kendall, Miram 1862 486/3

622/3 33/164

Macy (K) (P)

v

Kendall (A) (D)

Melvin L Gray (A)
7 Sharp. (R)

PN - 25 Aug. 1850 owed by Kendall to Berdan
2500 Park - City of NY
transfer - Macy

St Louis

Oct 62
Sept 54

- cannot transfer

1862 - Affirm Bury w/ 10% damage

Caddo Parish

Charles Olivier

vs

Jessonia Vidrine

Transcript

Alcibiade Landry

vs

Appeal from 4th Louis

Court of Common Pleas

Filed October 1st 1859

Wm

Adam & Gray Atty

Attorney for Appellant

Ch. Claiborne

Attorney for Respondent

$10.00 paid Ch. Glanville & Wm. L. Gray atty for applt.

a bright / res. stat. / res. bf. / apts. stat. / apts. bff

1862 Nov 19 dismissed on Pltf. costs

1862 Nov 29 affirmed with costs & damages 2.5% 53

$ 213.80

Aug 25 1859

2133.53
1.75
10.00
18.05

$ 2171.80

State of Missouri }
County of St Louis } s.s. Be it Remembered that on the Seventeenth day of March A D. 1859 there was filed in the Office of the Clerk of the St Louis Court of Common Pleas within and for the County aforesaid, a Petition which is in the words and figures following, to wit:

Petition

Charles A. Macy Plaintiff	In the St Louis Court of Common Pleas
vs	
Niram N. Kendall Defendant	To April Term 1859.

Plaintiff states that defendant by his promissory note hereto annexed, dated on the Twenty fifth day of August A.D. 1858 promised by the name, and description of "N. N. Kendall" to pay six months, after the date thereof to the order of one N. Berdan Twenty five hundred Dollars for value received payable, at the Park Bank in the City of New York, and defendants then, delivered said note to said N. Berdan That afterwards, and before the maturity of said note the said N. Berdan, duly, assigned said note by his, assignment thereon in writing, and, delivered the same so assigned to plaintiff for value received. That the sum of money in said note specified together with interest is yet, due to plaintiff from Defendant, and for which plaintiff asks Judgment

F. C. Sharp
Atty for Plff.

William N. Barksdale, agent for plaintiff on his oath says that the foregoing petition, and the matters therein, as stated he believes to be true.

W. N. Barksdale.

Subscribed, and sworn to before me this 17th day of March A.D. 1859, as witness my hand, and notarial Seal. C. S. Hayden Not Pub.

L. S.

Thereupon the following Summons issued: to wit:

Summons

County of St Louis: The State of Missouri, To the Sheriff of St Louis County, Greeting: We command you to summon Niram N Kendall to appear before the Judge of our Court

of Common Pleas on the first day of the next term thereof to be held in the City of St Louis within, and for the County of St Louis on the first Monday of April next then and there to, answer the complaint of Charles A. Macy as set forth in the, annexed Petition: and have you then, and there this writ.

(L.S.)

Witness Charles H. Nicks Clerk of our said Court with the Seal thereof hereto affixed at Office in the City of St Louis this Seventeenth day of March in the year of Our Lord 1859

C.H. Nicks Clk.

To the foregoing Writ the Sheriff made the following Return to wit:

Sheriffs Return

Executed this writ in St Louis County on the eighteenth day of March 1859 by delivering a Copy of the writ, and Petition, as furnished by the Clerk to Hiram H. Kendall

Michael J. Keerr Shff
by Eugene Alcan Deputy

On the fifth, day of April A.D. 1859 the following Answer was filed to wit:

Answer

For, answer to said Petition defendant says he denies that said sum of money specified in said note is due to plaintiff from defendant or any part thereof, or that plaintiff is entitled to Judgment, against Defendant for or on account of said note. Defendant, avers that said note was made and, delivered to said A. Berdan, at St Louis in the State of Missouri defendants place of busineſs, and wholly without consideration to defendant either from said Berdan or otherwise, and neither, at the time of making, and delivering said note nor at the time of assigning the same by said Berdan, if assigned nor at any time since has this, defendant owed said Berdan, any thing nor has defendant, at, any time received, any consideration for or on account of said note in any way whatever.

Defendant, avers that by the laws of the State of Missouri, where said note was made, and defendants place of busineſs was, and is, the said Berdan had no right or claim on defendant by reason of said note, as it was wholly without consideration, and said Berdan, assumed if it should be assigned to take it up himself, and return it to defendant, it being for his accomodation and defendant, avers that at said Plaintiff neither has obtained or could obtain, any greater title or interest in said

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note than said Berdan-

Wherefore, defendant, denying all liability thereon asks to be hence, discharged with his costs.

M. L. Gray Atty for Defendant

State of Missouri
County of St Louis Ess. Hiram N. Kendall defendant makes oath and says he believes the foregoing answer, and the matters therein as stated are true

H. N. Kendall

Sworn to and subscribed before me this 5th day of April A.D. 1859

George Denison Notary Public.

At the April Term A.D. 1859 the following further proceedings were had, to wit: Saturday July 2nd 1859

Submission to Court & Judgt for plaintiff $2538.50

Now come the parties by their attorneys and waiving a Jury submit this cause to the Court, and the Court being fully advised in the premises doth find for the plaintiff and assess his damages at the sum of twenty five hundred and thirty eight dollars, and fifty cents: Therefore it is considered by the Court that said plaintiff recover of said defendant the damages aforesaid as assessed and also his costs herein expended and have execution therefor: Whereupon the defendant files a Motion for a New trial which motion is overruled, and he thereupon files a Bill of Exceptions and an Affidavit for an Appeal and an appeal is allowed them to the Supreme Court, and an Appeal Bond is thereupon filed with Hiram N. Kendall, as principal, and Melvin L. Gray, and Theneas J. Thompson, as securities which bond is approved by the Court.

Mo for New Trial overd.

Bill of Exceptions affdt & Bond for Appt filed and Appeal allowed

The Affidavit, and Bond for Appeal are in the words and figures following to wit.

Affidavit for Appeal

Hiram N. Kendall, Defendant being duly sworn on oath says that the Appeal in the above case is not made for vexation or delay but because the affiant believes that the appellant is aggrieved by the Judgment or decision of the Court

Sworn to and subscribed before me this 2nd day of July A.D. 1859

H. N. Kendall

C. W. Hicks Clerk

Bond for Appeal

Know all men by these Presents that we, Hiram N. Kendall, as principal, and Melvin L. Gray, and Theneas J. Thompson, as securities, are indebted to Charles A. Macy in the sum of five thousand two hundred Dollars for the payment whereof we bind ourselves, our heirs, executors and administrators joint-

ly, and severally, firmly by these Presents. Sealed with our Seals, and, dated, at St Louis this Second, day of July one thousand eight hundred and fifty nine.

The condition of this obligation is such that whereas Hiram N. Kendall has appealed from the judgment rendered against him, and in favor of Charles A. Macy in the St. Louis Court of Common Pleas for the sum of Twenty five hundred, and thirty eight, dollars, and fifty together with costs. Now if the said appellant shall prosecute his appeal with due diligence to a decision in the Supreme Court, and shall perform such judgment, as shall be given by the Supreme Court or such, as the Supreme Court may, direct the St Louis Court of Common Pleas to give, and if the Judgment of such Court or any part thereof be affirmed that he will simply with, and perform the same so far, as it may be affirmed, and will pay all, damages and costs which may be awarded against him by the Supreme Court then this obligation to be void otherwise to remain in full force

Approved. Attest,
Chas Hicks Clk }

N. H. Kendall
Melvin L. Gray
Thineas J. Thompson

The Bill of Exceptions is in the words and figures following to wit:

Bill of Exceptions

Be it Remembered that on the trial of this cause plaintiff read the note sued on, as follows and endorsement thereon

Note

$2500. St Louis Mo. August 25. 1858 Six months after date I promise to pay to the order of A. Berdan Twenty five hundred Dollars value received payable at Park Bank in the City of New York N. H. Kendall
Endorsed Pay to Charles A. Macy for value received. A Berdan

Defendant here admitted the assignment of the note to plaintiff, as stated in the Petition. Plff then read deposition of Frederick Serry as follows: to wit:

Deposition of Serry

Frederick Serry of lawful age being produced sworn and examined on the part of the plaintiff, deposeth and saith that he resides in the City of New York, that he knows A. Berdan; that he has seen said Berdan write, and is acquainted with his handwriting, and that the name "A Berdan endorsed on the promissory note for $2500, dated St Louis Mo.

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August 25. 1858. made by N. N. Kendall, and which note is hereto annexed marked Exhibit A & I. A. is the genuine signature of said N. Berdan the payee of said note, that said endorsement was made, and the said note assigned and delevried by said Berdan to the plaintiff before the said note became due, and in the City, and State of New York

F. Seny

Plaintiff then offered in evidence the Statute of New York. Revised Statutes of 1835 Vol 1 pages 576 577 to prove the note was negotiable under the laws of New York. Defendant objected to this testimony, as illegal irrelevant, and as not being responsive to the allegations of the Petition but the Court admitted it, and defendant there at the time duly excepted. Plaintiff then closed his case.

Defendant then introduced ——

Testimony of Pierce

I. O. Pierce who testified as follows I have seen this note before. I filled it up on the day of its date, at the request of Kendall and in the presence of Berdan. It was executed by Defendant to Berdan without any consideration, and for the accomodation of Berdan. It was not expected the note would be used, but if it was used by Berdan he was to take it up. It was made, at the Office of Defendant in the City of St Louis in this state, and there delivered to Berdan on the 25th August 1858. Berdan thought it might be used in getting Machinery in Philadelphia. Plaintiff, at the proper time objected to the said evidence, which objection was overruled, and plaintiff, duly excepted. The witness proved the execution by N. Berdan of the following letter, and its delivery to defendant by Berdan believes on 20 or 25th August 1858, about the time of the execution of the note.

Berdans Letter to Dft.

N. N. Kendall Esqr. Dear Sir. I did not intend to ask you for your note for the installment on your stock to be paid by me, but as I am to be so much in advance on all of my contracts before the 2d payments are due, it might be of importance for me to have some paper which I could get discounted in my Bank. I therefore ask as a special favor, and accomodation to me that you give me your note at six months for 2500. payable at the Park Bank in the City of New York, and if I should have occasion to use it I hereby agree to pay the same, and return it to you when due

I put this in writing that you may have evidence that the note is for my accomodation, the chances are not one in fifty that I should use it but as I have to advance the cash I would feel stronger, if I knew I had something insted which I could get the money on in case of necessity Very Truly Yours H. Berdan
St Louis August 20th /64 P.S The stock of course will be in your name H.B.

Plaintiff at the proper time objected to said letter, as evidence which was overruled, and plaintiff excepted. The, date of the letter is a mistake, This letter was alluded to by the parties, at the time of executing, and delivering the note and defendant was to hold it for his protection, against the note. It was handed to defendant in his Office in August 1858
Cross examination. There was no partnership between Berdan and, defendant that I know of. Berdan had taken 10000 worth of stock in defendants name in, a stock Co. Bakery. Berdan was to pay for it, and at the end of a year Defendant was take the stock if he thought proper to do so. The stock stood in defendants name. Kendall was interested in that way, he had the privilege of keeping it. Berdan had an agreement with the said Company to furnish machinery for them in ten months, and he expected to buy it in Philadelphia.

The note was an, accomodation one. it was intended that if necessary Berdan might use this note It was, an, accomodation note to be used if Berdan saw proper to raise money on it.

Testimony of Barksdale

Wm H. Barksdale for plaintiff in rebuttal testified. This note was sent to me from New York in the Spring for collection and I saw defendant, about it. He said he had given it for the, accomodation of Berdan, and could not pay it, and that he would not pay it, that it was given to Berdan for his accomodation, and that Berdan was to pay it, Witness told him he would be sued on it. Defendant said he had given it to Berdan, as, an accomodation note to enable him to raise money on it, this was shortly, after note was due.
Cross examined Witness said, he gave the note for Berdans accomodation, and expected him to pay it. This was all the evidence in the cause.

The defendant, asked the Court to give the

following instructions.

7 Defendants Instructions Refused

The defendant asks the Court to declare the law to be that if the note sued on was made, and delivered by the maker to the payee in the State of Missouri, and that it was made for the accomodation of the payee, and without consideration to the defendant the defendant is entitled to Judgment. If said note was made, and, delivered to the payee in the State of Missouri, the nature, interpretation, validity, or invalidity of the contract, and its obligation on Defendant is governed by the law of Missouri, where the contract was made, and where it is sought to be enforced, and if it was executed without consideration to defendant, and for the accomodation of the payee defendant is entitled to Judgment. Which the Court refused, and defendant then, and there duly excepted to such refusal.

The Court then gave the following instruction asked by plaintiff.

Plaintiffs Instruction given

The plaintiff, asks the Court to declare the law to be, as follows: If the note sued on was made by defendant, and, delivered to H. Berdan, and he was, authorized by defendant to use the note, or negotiate it for the purpose of obtaining money thereon and said Berdan, did transfer said note to plaintiff for value in the City, and State of New York before its maturity then the plaintiff should recover

To the giving of which, defendant there, at the time excepted Judgment being for plaintiff defendant filed on the same day the following motion and reasons for a new trial

Motion and Reasons for New Trial

Defendant moves the Court for a New Trial herein, and for that purpose to set aside the Judgment herein

1st Because the Court, admitted on the part of plaintiff illegal, and improper evidence, against objections of Defendant.

2nd Because the Court erred in refusing proper instructions, asked for by defendant.

3rd Because the Court gave an improper instruction on the part of plaintiff.

4th Because the judgment is against the law and, against the evidence, and the weight of evidence

M. L. Gray

Atty for Defendant

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Which the Court overruled, to the overruling of which defendant there at the time, duly excepted, and because said proceedings do not appear of record: Defendant files this his Bill of Exceptions, and prays the Court to sign, and seal the same, and make it a part of the record. Which is accordingly done this Second, day of July 1859.

Sam[l] Reber (Seal)
Judge &c

State of Missouri }
County of St Louis } ss. I, Charles W. Nicks, Clerk of the St Louis Court of Common Pleas within and for the County aforesaid certify the above, and foregoing to be a full, true, and complete Transcript of the record and proceedings in the case of Macy vs Kendall, as fully as the same remain in my Office.

In Testimony Whereof I hereto set my hand, and affix the Seal of said Court, at Office in the City of St Louis this 15th day of July A.D. 1859

C. W. Nicks
Clerk

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Charles A. Macy Respt
vs
Hiram N. Kendall Applt

IN SUPREME COURT,
Oct TERM, 1857

AND now come the said Appellant H N Kendall and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Appellant assign the following, to wit:

1. That said Court admitted improper and illegal testimony offered by said Macy Respondent
2. ~~That said Court rejected proper and legal testimony offered by~~
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by Appellant H N Kendall
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Respondent when it should have been rendered for the Appellant
10. That said Court overruled the motion for a new trial, made by appellant

M L Gray atty for Applt.

And now come the Respondent and for joinder in error say, that there is no error in the record and proceedings of said Court below in said cause, as assigned by said appellant

F C Shaw
for Respt

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In Sup Court
Oct Term 1859

Charles A. Macy Respt
vs
Hiram N. Kendall
appt

Assignment of errors

M. L. Gray

Filed 31 Oct. 1859.
W. L. Scranton
Clk

Charles A. Macy. Plaintiff & appellee
against
Hiram N. Kendall - Deft & Appellant -
= Supreme Court =

Statement of the Case by Appellee -

The appellant Kendall made to one Berdan his note for $2,500 in August 1858. dated at St Louis. and payable on its face. at the Park Bank in New York. at six months. Berdan negotiated the note in New York. with plaintiff and obtained the money therefor. he assigned it to the plaintiff. for value -
Plaintiff sued the Maker Kendall. on the note. Kendall pleaded that the note was made for the accommodation of Berdan and without Consideration -
The evidence showed that by an arrangement between Kendall and Berdan - Berdan had subscribed for & taken $10.000 of Stock in a joint Stock Company (a Bakery) - The Stock so subscribed for was in the name of Kendall & the certificates issued to him. and he was to take & own all of it, at the end of the year if he chose -
Berdan had an arrangement with said joint Stock Co. to furnish Machinery for it.

which he expected to purchase in the East.
The note ~~made~~ was made to him to enable him to use it & raise money for that purpose—

He did negotiate it— and assign it to plaintiff—

The Court ~~instructed~~ declared the law to be— That if the note was made by Kendall to Berdan. & he was authorized to use or negotiate it. to raise money. ~~& Berdan did transfer the note to plaintiff~~. and Berdan did transfer the note to plaintiff for value, the plaintiff should recover = and the court gave judgment for plaintiff—

F. C. Sharp
Atto for plff
(Appellee)

No 81 —

Charles A Maury
vs
Hiram A Kendall

Statement of the
case by Appellee
By F. C. Sharp

Filed 29 March 1861.
W. L. Glanville
ck.

Macy
vs
Kendall

In the Supreme
Court

Respondents' Brief—

1st A promissory note, or other contract is construed, as to its nature, effect & obligation according to the law of the place, where by its terms, it is to be performed. Story on Conflict of Laws §280, 331 et seq. Story on Bills §147— Lord Mansfield in 2 Burr 1077— 8 Paige 261— 8 Johnson 189— 13 Peters 65, 7 B. Munroe 378, 6 Paige Ch. R 627, 13 Mass 23, 12 Barb 631, 11 Pick 36— 2 Meke 381, 3 Comstock 267—

The petition shows on its face that this note was payable in New York; and that the note contains all the elements which, by the law merchant make it a negotiable note, viz, 1st That it is for a sum certain payable in money 2d That it is payable to order, 3d That it is payable absolutely & is for value received— It was not necessary that there should be an averment that the note was negotiable— This was a conclusion of law. The facts on which this legal conclusion rests, were stated—

This being the case, and the Court knowing & being bound to follow the rule of law that a contract is to be construed as to its nature & obligations by the law

of the place of performance), the question
came before the Court, What is the law
of N. York on the subject? Waiving the
question whether the plaintiff, not having
pleaded the law of New York, could bring
it in as evidence under his petition,
the question arises, Was not the Court
~~yesterday~~ obliged to indulge in one of
two presumptions, viz: either to presume
that what at the present time is the law
merchant of England and this country
(and as such a part of the common law)
prevailed in New York, or that the special
and peculiar statute of Missouri prevailed
in N. York. If it be held that the Court
being obliged to interpret a New York contract
could not itself resort to the New York Stat-
ute for the purpose, which, considering the
relations between the different states, would
seem the more reasonable view, the Court
must necessarily resort to one of the
above presumptions.

It is a settled rule that on questions
in regard to which the general law of the coun-
try (as opposed to a special statute or local law)
has laid down a rule, the Courts will, in
the absence of proof as to the law of a par-
ticular state, presume that the general law
of that state corresponds to the general

law of its own. Warren vs Luck 16 Mo. 111. There can be no presumption that a special statute peculiar to one state, and in derogation of the commercial law of the country, prevails in another state because it prevails here.

Promissory notes, were in fact negotiable before the 3d & 4th of Anne Chp 9. 1; though to satisfy the scruples of Lord Holt, this act was passed — See Appendix to Vol 1. of Cranch's R. 367-454 — See Brown v Harraden, 4 Term 151 — ~~[illegible]~~, Since that time, the provisions of the statute of Anne have been adopted as a part of the commercial law; and prevail in states even where no statute on the subject exists — 1 Alabama 527 — Story on Prom Notes 6. 10 = 3 Kent's Comrs. 70-72

In the absence of proof to the contrary a promissory note will be presumed to be negotiable in a sister State 1 Alab. 527

II — There was ample consideration for the giving of the note. Kendall was interested in the success of the project, and had stock taken in his name. The ~~[illegible]~~ note was given to raise money upon to further the success of the business. The letter of Berdan itself shows a good legal consideration — Money could be raised upon the note only by passing or pledging it to other parties; and to this Kendall assented. It was so passed & money raised, and now Kendall seeks to avoid his contract.

T. C. Sharp & C. S. Heyden } for Respt

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In the Supreme Court

C

Macy
v
Kendall

Respondents
Brief

Filed 5 April 1861.
W S Glanville
Ck.

Charles A Macey Pltff & Res
vs
Hiram N Kendall Deft & Appt

In Supreme Court
March T 1861

Plaintiff sued Deft. on an assignable, non-negotiable note under our statute, dated & made in St Louis Missouri by Deft to H. Berdan, for 2500 Dollars, payable at the Park Bank New York
The Petition alleged an assignment of this note before maturity by Berdan to Pltff for value received
Deft in his answer denied indebtedness to Pltff & alleged that said note was made in St Louis Missouri Defts place of business & wholly without consideration & Deft neither at the time of making said note or afterwards received any consideration for said note — that said Berdan had no claim on Deft. on account of said note & no assignee of his could acquire any right of recovery against Deft. & that said Berdan assumed if it should be assigned, to take it up himself.
On the trial of the case Pltff proved the assignment of said note by said Berdan to Pltff in the State of New York
Pltff offered in evidence Revised Statutes of New York of 1835 Vol 1 pp ~~576-7~~ 756-7, to prove the note was negotiable under the laws of New York

Dfpt objected to the testimony as irrelevant & not responsive to any allegation in the Petition - The Court admitted the evidence & Dfpt excepted. Pltf then closed.

Dfpt proved by J O Pierce that he filled up the note at request of Kendall in presence of Bordan It was executed by Dfpt to Bordan without any consideration. It was not expected to be used but if it was used by Bordan he was to take it up. It was made at Office of Dfpt in St Louis in this State & then delivered to Bordan on 25th Augst 1858. Bordan thought it might be used in getting Machinery in Phila

Witness proved a letter of Bordan to Dfpt & its delivery to Dfpt about 25 Augst 1858, the time of executing the said note.

H. N. Kendall Dr Sir

I did not intend to ask you for your note for the installment on your Stock to be paid by me. but as I am to be so much in advance on all of my Contracts before the 2nd payments are due, it might be of importance for me to have some paper which I could get discounted in my Bank. I therefore ask as a special favor and accommodation to me that you give me your note at Six Months for $2000 payable at the Park Bank in the City of New York, and if I should

have occasion to use it. I hereby agree to pay the same, and return it to you when due. I put this in writing that you may have evidence that the note is for my accommodation, the chances are not one in fifty that I should use it, but as I have to advance the cash I would feel stronger if I knew I had something in hand which I could get the money on in case of necessity Yours

A. Bordan

The witness continued. This letter was alluded to by the parties at the time of executing & delivering the note & Dft was to hold it for his protection against the note & it was known and to Dft. at the time.

Cross-ex

Bordan had taken $10.000 worth of stock in Dft's name in a Stock Co Bakery. Bordan was to pay for it & at the end of the year Dft was to take the stock if he thought proper to do so. Dft had the privilege of taking it.

Bordan had an agreement with said Co., to furnish machinery for them on 10 months & he expected to buy it in Phila.

The note was an accommodation one to be used if Bordan saw proper to raise money on it.

Dft's testimony closed

Wm H Barksdale in rebuttal Stated.
Dfpt told me he had given the note for the accommodation of Burdan & that Burdan was to pay it. – that he had given it as an accommodation to Burdan to enable him to raise money on it, but that Burdan was to pay it.

The Dfpt. asked the following instructions which the Court refused & Dfpt at the time Excepted.

1. The Dfpt asks the Court to declare the law to be, that if the note sued on, was made and delivered by the maker & the payee in the State of Missouri, and that it was made for the accommodation of the payee, and without consideration to the Dfpt, the Defendant is entitled to judgment.

2 If said note was made & delivered to the payee in the State of Missouri, the nature interpretation validity, or invalidity of the contract, and its obligation on Dfpt is governed by the law of Missouri, where the Contract was made, and where it is sought to be enforced; and if it was executed without consideration to Dfpt, and for the accommodation of the payee Dfpt is entitled to judgment

At the request of Plff the Court gave

the following instruction, to the giving of which Deft. at the time Excepted.

The Plff asks the Court to declare the law to be as follows: If the note sued on was made by Deft and delivered to H. Bordan & he was authorized by Deft to use the note, or negotiate it for the purpose of obtaining money thereon, and the said Bordan did transfer said note to Plff for value in the City & State of New York, before its maturity, then the Plff should recover.

Judgment being for Plff, Deft moved for new trial, because the Court admitted on the part of Plff illegal & improper evidence - & because the Court refused proper instructions asked by Deft & gave an improper instruction for Plff.

Which motion the Court over-ruled & Deft. at the time excepted, & brings the case to this Court.

The errors assigned in this Court are the same stated as grounds for new trial.

No 81
In Supreme Court
March 7, 1861

Chas A Macy

vs

A N. Kindall

Appellant's Statement

M. L. Gray

Filed 9 April 1861.
Wm. S. Glanville
Clk.

Charles A. Macey Respt
vs
Hiram N. Kendall Appt

In Supreme Court
Mch Term 1861
Appellant's Brief

I. The Court erred in admitting in evidence the Statutes of New York.

1. Because said statute was not plead. nor was any right asserted or Claimed in the Petition under the Laws of New York. If the Plff claimed anything under the laws of New York it was his duty to have plead that right & that law. Leake vs Elliott 4 Mo 446. 7 Mo R 22. Not having done so, it was irrelevant and Error to introduce the laws of New York.

2. Plff not having plead the Law of New York, there was no notice to Dept that Plff claimed rights thereunder. & it was a surprise on Dept to set up claims out-side of the pleadings and issues made.

3 The averment in the Petition that the note was payable in the City of New York was not any pleading of the Statutes of that State sufficient to entitle Plff to introduce said Statute. The Court will not take judicial notice, without an averment to that effect, that New York is in the State of New York 2 Barnes & Alden R 302-3. 6 Mo 568. 1 Chitty's Plg 247 & note (c)

There was no such averment.

By the present practice act 2 R.S. 1855 p 1239 § 51 it is clearly implied that matter of which the Court will not take judicial notice, must be plead.

By §§ 52 & 53 same page, the mode of pleading a private statute is prescribed. I think it is clear that the Statute of a foreign or sister Statute must be plead with equal certainty. In fact the only way to plead a statute of a sister State is to set it out on the Record by copying it.
See 11 Mo 431. 19 Mo 551

4. Again by § 2 of act concerning evidence 1 RS 1855 p 723. The Statutes of sister States "purporting to be printed by the authority of such States shall be evidence" &c — It was not made to appear that the Book introduced in evidence, so purported to be printed.

III. The 1st instruction asked for by Dft & refused, should have been given

1. The statute § 3 & 5 of Chapter 21. 1 RS 1855 page 322. declares that the maker shall be allowed every just ~~defence~~ set-off or other defence against the assignee or assignor, existing at time of assignment unless the note is expressed to be for value rec'd, negotiable & payable without defalcation. & Sect 5 says "nor shall any assignee ever obtain greater title to, or interest in, any bond, note &c than the person had from

whom he acquired it"

These 2 sections are equivalent to the proposition, that if the payee, at the time of assignment could not recover from the maker the assignee cannot. For the assignee is to get no greater title to, or interest in the note than the payee had.

Now if Burdan himself could not sue on & recover of Dyft, at the time he (Burdan) assigned the note to Pfff, neither could Pfff recover as his rights are not to be any better than Burdan's. It seems to me the statute means Exactly this & nothing less. The assignee stands or falls with the Payee. If the payee can recover, the assignee can - if the payee cannot the assignee cannot.

6 Mo 265. 7 Mo 402. 8 Mo 107. 20 Mo 354. See also 28 Mo. 330.

The proof showed that the note was without consideration & therefor judgment should have had judgment. At any rate there was proof enough of want of consideration to base an instruction upon & thus have left the question of consideration or no consideration to be found on.

But Respondent assumes that the note was payable in the State of New York. The note does not say so. nor the petition. nor does the proof show it.

There is no evidence. nor allegation in the

Petition to justify the assumption that the note was made payable in the State of New York

All rights & law therefore claimed by Plff upon the said assumption entirely fail him.

The case in 6 Mo p 568. is conclusive agst Plff's assumption or presumption that the note was payable in the State of New York.

As then the note was made in this State, & must be presumed to be payable in this State, & (the contrary not being averred, nor shown) certainly is sought to be enforced here, our Mo Statute. Sects 3 & 5 p 322 of Vol 1 R. S. 1835. clearly applies to this note & makes it a non-negotiable note, on which an assignee before maturity cannot recover, where it was without consideration & where the payee could not recover.

IIII Defts 2nd instruction should have been given. The 1st part of it. in regard to the nature interpretation. validity of a contract being governed by lex loci contractus &c. is beyond question the settled law. 2 Kent p 454, ~~57~~ 457-8. vide passim

The latter part of the instruction, as shown in regard to the 1st instruction. is fully authorized by the Statute.

IV. The instruction given at the instance of Plff. was also erroneous. If the object of the transaction was to make Defts liable without regard to consideration or no consideration in the note the note should have been a negotiable one & then such object would have been accomplished on the negotiation of the note.

By making the note non-negotiable, whether intentional or not, they have made an instrument with such inherent vice in it, that it could not obtain greater validity in the hands of an assignee, than it had in the hands of the payee.

The authorities referred to by Mr Broadhead are entirely inapplicable to the case before the Court, for they apply to negotiable paper and not to assignable paper, such as the note sued on in this case. The hardship of the case on Plff. furnishes no argument for Plff and certainly cannot give to non-negotiable paper the qualities of negotiable paper. The Court must deal with & treat the note as the parties have made it & as the law fixes it. Is the note a non-negotiable one under our statute? If it is, then the rights & disabilities of the holder are irrevocably fixed by the Statute & no hands

Ships on the Pacific. can change his responsibilities. nor enlarge his rights.

No 81

In Sup Court

Mich Term 1861

Chas A. Macy

v

A. N. Kendall

Appellants Brief

M. L. Gray

Filed 9th April 1861.

Wm Blanville

Clk.

Charles A. Maury. Respondent

vs

Hiram A Kendall. Appellant—

No 81—

In the Supreme court

Appeal from St Louis Court of Common Pleas— Transcript filed Sept 30. 1859.

Now comes the said respondent and moves this Honorable Court to docket this cause for trial— and shows that in its proper place on the docket it is proper for hearing at the present term

F. L. Sharp—

Counsel for respondent

Charles A Maery
vs
Hiram A Kendall

mo to dismiss
F. C Sharpe
for respondent

Filed May 22d 1862
A. W. McEad
Clk

Macy – Appellee
vs.
Kendall – Appt.

Supreme Court
Oct: T. 1862 –

James. O. Broadhead Atty for Appellee submits the following:

The Instruction given by the Court below to the Plaintiffs embraces the law of the case –

1 – It matters not whether the note was negotiable by the law of the State of New York or not – If the note was given for the accomodation of the payee Berdan – the maker is liable to the holder who has paid value for it –

See Edwards on Bills & promissory notes p. 316 – 6. Kendall p. 66 –

3. Espinasse p. 46 – Story on Promissory notes p. 210 –

The making of the note for the accomodation of the payee to enable him to raise money on it – is a sufficient consideration to the party who advances the money ~~on it~~ –

See Story Prom: Notes p. 203 –

The maker stands in the attitude of security for the payee so far as the holder is concerned – as he in fact authorises the payee to sell the note upon the credit of his name and to raise the money on it — and this is as good a consideration as if he had received the money himself – See 9. Yerger p. 6 – 5 – B. Monroe p. 399 –

2- If the foregoing positions be correct on general principles - then I cannot perceive that the 5th section of the Statute on the subject of bonds & notes providing that "no assignee shall ever obtain greater title to a interest in any bond note or account, than the person had from whom he acquired it" has any application to the question - This Statute evidently applies to assignees who have given value for the note -

If the Statute be held to apply to notes made for accommodation - then the assignee of such a note could never recover even from the assignor, though he had paid him the money in it for according to the 6th section of the act - he must shew the maker to insolvency - or he must shew that he is insolvent, or not a resident of the State so that a suit against him would be unavailing - before he can sue the assignor

unless the maker is insolvent or a non-resident -

Broadhead Atty
~~for Appellee~~

3- But what does the accommodation amount to if it cannot be made available? - who does it accommodate?

Broadhead Atty
for Appellee

Chas. a. Macy
vs.
H. A. Kendall

C

Brief for Appellee
Broadhead
Att'y —

Filed November 11, 1862
A. W. Mead Clerk

Macy
vs
Kendall

Defendant was Sued in the St Louis Court of Common Pleas upon a promissory Note in the words & figures following, to wit,

$2500 St Louis Mo. August 25. 1858

Six months after date I promise to pay to the order of H. Bredan twenty five hundred dollars value receive payable at Park Bank in the City of New York

H. N. Kendall

The Note was assigned upon maturity to plaintiff for value —

The answer of defendant admits the Execution of the Note and the assignment, but sets up as a defence that it was an accommodation Note and Executed without any consideration

Upon the trial it was shown that the Note was Executed for the accommodation of Bredan ~~that~~ and to enable him to realise money by negotiating it in the East.

The court Court instructed the jury as follows

" If the note sued on was made by
" defendant and delivered to Purdam
" and he was authorized by defendant
" to use the note & negotiate it for the
" purpose of obtaining money thereon
" and said Purdam did transfer
" said note to plaintiff for value in
" the City & State of New-York before its
" maturity, then the plaintiff should
" recover -

The jury having found for the plaintiff, the defendant in due time moved for a new trial which being denied he ~~brings the Cause~~ appeals to this Court -

It is insisted by the defendant that he is protected by the 3d Sec of our statute relating to Lands Notes and Accounts (RS 1855 Vol 1 p 322) which reads as follows -

" The obligor or maker shall be allowed every just set off or other defence against the assignee, or the

" assignee existing at the time of, or
" before notice of the assignment unless
" it shall be expressed in the body of
" note that the same is for value
" received negotiable and payable
" without defalcation ")

In the view we take of this statute we do not see (even supposing the note not to be negotiable according to the laws of New York) how it can be made available to the ~~plaintiff~~ defendant - By no reasonable construction of the statute can it be made to embrace a case of this kind. ~~The object~~ is simply to make a matter in a contest between himself and the assignee to avail himself of any Equities existing between the original parties, and has reference to a subsisting existing liability - In this case no liability was imposed upon the defendant nor did any liability attach to the note until it passed out of the hands of Berdan - Between Kendall and Berdan it

was a mere loan of credit designed to enable Burdan to borrow money in market, and until negotiated was without vitality — V. Kendall executed it for no other purpose and it was a part of the contract that it should be negotiated in the event that Burdan should need the money. Having thus executed the note with an eye to its negotiation, and being instrumental in its negotiation, it would be a strange statute indeed which would protect him from its payment ~~because it was a mere accommodation to the payee~~ in the hands of an assignee for value, because it was a mere accommodation to the payee — We can find nothing in the statute which will warrant any such construction —

The other judges concurring the judgment will be affirmed with ten per cent damages —

W. V. N. Bay

V. Edwards on Bills & Promissory Notes 315 — Story on Promissory Notes 207 —

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95

May
vs
Kendall

Opinion

W. T. V. Bay

Filed November 29/62
A. W. Mead Clerk

Aff. 10% damages
$2585