Simmons, Samuel v. Belt, Henry B. et al. 535/4

640/7

Oct. 1862

March 1865

St. Louis

Promissory note

$5812

interest

Simmons

Sherp & Broadhead

Resp

Henry B Belt

John Sexton Jr

John Sexton Sr

Isaac H. Sturgeon

Thomas L. Sturgeon

Bernhard Crichard

Dropped

Reversed & Remanded

The State of Missouri, ss.

The State of Missouri, to the Honorable the St Louis Circuit Court **in said State—Greeting:**

WHEREAS, In the record and proceedings in a certain cause lately pending in the said St Louis Circuit Court

wherein Samuel Simmons was plff and Henry P. Belt and others were defts

in a Civil action manifest error hath intervened, to the great damage of said Defendants as by their complaint we are informed.

NOW, being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held in the City of St. Louis, in the County of St. Louis, in said State, on the Third Monday in October next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right, and according to law, ought to be done.

WITNESS, ~~WILLIAM S. GLANVILLE~~ Andrew W. Mead, Clerk of our said Supreme Court, at office in the City of Saint Louis, the 3rd day of October in the year of our Lord one thousand eight hundred and ~~fifty~~- sixty two

Andrew W. Mead
CLERK.

State of Missouri
County of Saint Louis } ss.

In obedience to the within writ of error I hereby send you, certified under our hand seal, ~~and~~ full true and complete transcript of the Record and proceedings in this cause as fully as the same remains of record in my office

In testimony whereof I hereto set my hand and affix seal of St Louis Circuit Court this 3rd day of October AD 1862

Stephen Lucas Clk

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State of Missouri
County of St Louis } ss.

Be it remembered, that heretofore, to wit: on the thirteenth day of Septemember, in the year of our Lord, one thousand, eight hundred and sixty one, there was filed in the office of the Clerk of the St Louis Circuit Court, a petition, which is in the words and figures, the following, to wit:

Samuel Simmons Plaintiff against Henry D. Pelt, John Sexton Senior, John Sexton, Junior, Isaac N. Sturgeon, Thomas L. Sturgeon and Bernard Crickard Defendants.	In the St Louis Circuit Court. September Term 1861. St Louis County, Mo.

Petition

Plaintiff states that on the 17th day of April 1860, at the county of St Louis, said defendant Henry D. Pelt, made his certain negotiable promissory note, of said date, by which he promised twelve months after the date thereof, for value received to pay said defendants, John Sexton Senior, John Sexton Junior and Hugh Sexton, under the name of John Sexton and Sons, the sum of fifty eight hundred and twelve dollars, and sixty eight cents, ($5812 68/100) which said note is hereto annexed and made part of this petition

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Plaintiff states that the said defendants John Sexton Senior, John Sexton Junior and Hugh Sexton, were on the 17th day of April 1860 (the day of the execution of said note) co-partners in business under the name and style of John Sexton and Sons, and on the said date and before the maturity of the said note, they endorsed the same, and for value received assigned and delivered the said note to the defendants Isaac A Shurgeon, and Thomas L. Shurgeon, who were then co-partners in business under the name and style of Shurgeon and Brother. And they, on the date aforesaid, by their endorsement thereof, assigned and delivered the said note to the defendant Bernard Cricstard, for value received, And afterwards, and before the maturity of said note, the said defendants Cricstard, for value received, endorsed said note and assigned and delivered the same to plaintiff who is now the legal holder thereof.

Plaintiff states that the aforesaid note, although long past due and payable remains unpaid. And that at the maturity thereof, the said note was duly presented at the Bank of St Louis, to the Teller of said Bank, and payment thereof, then and there demanded, and payment of the said note was then and there demanded, and payment of the said note was then and there refused. And upon the day of said presentation, demand and refusal of payment of said note as aforesaid, by

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said defendant Henry B. Bell, the said note was duly and legally protested for non-payment thereof, and the due notice of said demand and refusal, and of the protest in consequence thereof was upon the same day, duly and legally given to the said defendants John Seydon Senior, John Seydon Junior, and Hugh Seydon, composing the firm of John Seydon and Sons. And also a like notice in like manner was upon the said day given to the defendants Isaac A Shurgeon, and Thomas L. Shurgeon, composing the firm of Shurgeon and Brother as aforesaid.

Plaintiff states that said note and interest yet remain due and unpaid, wherefore he asks judgment against the said defendants for the amount of said note and interest thereon, and also judgment against the aforesaid defendants, as aforesaid, for damages at the rate of four per cent per annum, and also for costs.

Samuel Simmons
Atty.

Samuel Simmons, plaintiff, makes oath, and says that the foregoing petition, and the matters, therein as stated he believes to be true

Sworn to and subscribed before me Sept 13th 1861 — Samuel Simmons.

(Seal) Witness my hand and seal of office, date aforesaid — Stephen Rice Clerk.

And on the said 13th day of September 1861, as aforesaid, a Summons was issued out of the Clerk's

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office, of said Court, which is as follows, to wit:-

State of Missouri
County of St Louis } ss.

The State of Missouri,

Summons

To the Sheriff of St Louis County - Greeting

We command you to summon Henry D. Pelt, John Sexton Senior, John Sexton Junior, Isaac N. Sturgeon, Thomas L. Sturgeon, and Bernard Crickard, to appear before the Judge of our Circuit Court, 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 Last Monday of September inst, then and there to answer the complaint of Samuel Simmons, as set forth in the annexed petition; and have you then and there this writ. Witness Stephen Rice, Clerk of our said Court, with the seal thereof hereto affixed, at office in the City of St Louis this 13th day of September, in the year of our Lord, eighteen hundred and sixty one.

L.S.

Stephen Rice Clerk

Sheriff's Return

On the back of said Summons, is endorsed the Sheriff's Return, as follows, to wit:-

Executed this writ in the county of St Louis, on the 14th day of September 1861, by delivering a copy of the same, and petition, as furnished by the Clerk to John Sexton Senr, and by delivering a copy of the writ to Henry D. Pelt, Isaac N. Sturgeon and Thomas L. Sturgeon, and by leaving a copy of

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this writ, at the usual place of abode of John Sex-
-ton Jr, with a white person over the age of fifteen
years, and a member of said Sexton's family.
and further executed this writ, by delivering a
copy of the same to Bernard Crickard, on the 16th
day of September 1861.

John H. Andrews Sh'ff
By J. S. Wilkins Dep'ty

On the 18th day of November 1861, a demurrer, was
filed in said cause, which is as follows, to wit:

Demurrer

These defendants demur to plaintiff's petition, and
say that the plaintiff's petition, shows no cause of
action against them. That there is a misjoinder of
parties, in that these defendants are united with
said Belt.

Whittelsey
Att'y p.d.

And afterwards, to wit: on the 15th day of February,
at the February Term of said Court, further proceed-
-ings were had herein as follows, to wit:
The demurrer to the petition, being heard and fully
considered by the court is overruled. Ten days
are given to John Sexton, Senr, John Sexton Juni-
-or, Isaac H. Sturgeon, Thomas L. Sturgeon and
Bernard Crickard to plead herein
And on the 18th day of November 1861, Henry B.
Belt, one of said defendants filed an answer in this
cause, and which said answer is the following, to
wit:

Answer of H. B. Belt

This defendant for answer, says that whether
said John Sexton Jr, John Sexton Sr and Hugh

Sexton, endorsed said note to said I. N. and P. L. Sturgeon, and they to said Crickard, and he to plaintiff, he does not know, nor whether said note was duly protested for non-payment as alleged, neither has he information upon which to base a belief.

He says there is a defect of parties, in that he is joined with said John Sexton Sr & Jr and Hugh Sexton, and said I. N. and P. L. Sturgeon, and Bernard Crickard.

W. Littlesey
Atty p.d.

Henry D. Pelt, on his oath, says that he believes the above answer, and the matters therein stated to be true

Henry D. Pelt.

Sworn to and subscribed before me this 20th Sept 1861 (L.S.)

Ashton D. Johnson
Notary Public

And on the 20th day of February 1862, at the February term of said Court, an answer was filed by the other defendants, in this cause, which is the following to wit:

Answer

These defendants answering say, whether said Bernard Crickard, endorsed said note to the plaintiff as alleged they do not know, nor whether said note was duly protested for non-payment and protested for non-payment, nor whether notice of said non-payment and protest was duly given as alleged, nor have they information sufficient

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to form a belief, and they require strict proof of the same. They pray to be discharged with costs

Whittelsey Atty p.d.

County of St Louis

Thomas L. Sturgeon, being sworn says that he believes the above answer, and the matters therein as stated to be true

Sworn to and subscribed this 20th Feby 1862 | Thos. L. Sturgeon

S. Rice Clerk

And afterwards, to wit: at the February Term of said Court, on the 26th day of March 1862, further proceedings were had in this cause, as follows, to wit: Now come the parties by their respective attorneys, and the defendants file an affidavit, and move the Court for a continuance of this cause, and the court being fully advised of and concerning the premises doth overrule said motion, and the defendants file a bill of exceptions; and a jury being waived this cause is submitted to the Court upon the pleadings and proofs, and the court having duly heard and considered the same, doth find therefrom that the defendants are indebted to the plaintiff in the sum of six thousand and three hundred and eighty three dollars and forty cents. It is therefore considered by the court that the plaintiff recover of the defendants the debt aforesaid as found, and also his costs herein expended and have execution therefor. Defendants file a motion for a new trial, which being heard and fully considered by the court is overruled, and the defendants file a motion in arrest of judgement, which motion being heard and fully considered by the Court is overruled

Bill of Exceptions

And on the 26th day of March 1862, a Bill of Exceptions, was filed in this cause, which said Bill of Exceptions, is the following, to wit:

Be it remembered that this cause was called for trial before the St Louis Circuit Court, and thereupon the said defendants made their motion for a continu=ance, founded upon the following affidavit. Said Affidavit, is as follows, to wit:

Affidavit for Continuance

Henry D. Pelt, being sworn says that John Sex=ton Jr, is a material witness for these defendants upon the trial of the issues, that said John Sexton Jr is a contractor and builder by occupation and resides in the City of St Louis; that the testimony of said John Sexton is material in this cause; that no other witness is in attendance as known to this affiant, or within reach of the process of this court, whose testimony could have been procured in time upon which the defendants can safely rely to prove the particular facts the absent witness is expected to prove; that these defendants cannot safely go to trial, without the testimony of said witness; that he is not absent by the consent, connivance or procure=ment of these defendants.

This affiant is informed and believes that said witness suddenly left this City during the troubles of last summer and autumn, but whither he went he was unable to learn, but he has heard within the last ten days that said witness is now in the City of Memphis, State of Tennessee, now in insurrection

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against the U.S., for which reason these defendants have been unable to procure the deposition of said witness in time for the trial of said cause.
Defendants expect if a continuance be granted to procure the deposition or attendance of said witness, in time for trial at next term.
Sworn to and subscribed This 25th March 1862 } Henry P. Pelt.
S. Rice Clerk.
Which motion the court overruled because said witness was one of the defendants in this suit, to which decision the above defendants excepted, and pray that this bill of exceptions be signed and made part of the records, which is done } S. M. Breckinridge.

Second Bill of Exceptions

On the 27th day of March 1862 A. Second Bill of Exceptions was filed in this cause, which said Bill of Exceptions is the following, to wit:
Be it remembered that on the trial of this cause, before the Court, on March 26th 1862, without a jury, the plaintiff to prove the issues on his part, proved that John Sr, John Sexton Jr, and Hugh Sexton, composed the firm of John Sexton, and Sons, and that the endorsement of that firm was in the handwriting of John Sexton Jr,; that Isaac H. Shurgeon and Thomas L. Shurgeon, composed the firm of Shurgeon and Brother, and that the endorsement was in the hand of Thomas L. Shurgeon, Plaintiff then called Bernard Brickard, who testified that he was one of the def=

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=endants, and that he made his endorsement on said note. Upon cross-examination, witness said that he endorsed the note to the plaintiff for collection, and delivered it to him, before it was put in bank for collection, that the money due upon said note belonged to the witness, and not to Pla=intiff, and that he considered himself the owner of the note

Plaintiff then read the note, endorsement and protest.

The note is as follows, to wit:

Note

$5812 68/100 St Louis April 17th 1860.

Twelve months after date, I promise to pay to the order of John Sexton and Sons, Fifty eight hundred and twelve 68/100 dollars, for value received, negotiable and payable, without defal=cation or discount, at the Bank of St Louis

Endorsed. Henry B Pelt.

John Sexton and Sons.

Endorsement

Sturgeon and Bro.

Bernard Crickard.

Samuel Simmons.

The protest, annexed to said note, is the following, to wit:

Protest

State of Missouri }
County of St Louis } ss.

Be it known, that on the day of the date hereof, at the request of the Boatmen's Savings Institution, the holder of the original note, a copy of which is on the reverse hereof written,

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I, Leon I. Delisle, Notary Public, for the county of St Louis, in the State of Missouri, duly commission=ed and qualified, residing in the City of St Louis in said state, presented the said note to the Pay=ing Teller at the Bank of St Louis, and demand=ed payment of the same, which was refused, the time therein limited and grace having elapsed.

Whereupon, I the said Notary Public, at the re=quest aforesaid, have protested, and do hereby solemnly protest, as well against all persons, and every party concerned therein, whether as Maker, Drawer, Drawee, Acceptor, Payer, Endorser, Guarantee, Surety, or otherwise howsoever, against whom it is proper to protest for all exchange, Re=Exchange, Damages, Interest and Costs, accrued and to accrue, by reason of the non=payment there=of. Of all which I have given due notice in writ=ing and print, to the parties concerned, in manner following. By notice left for John Sexton and Sons, at their place of business; By notice left for Sturgeon and Co. at their office. By notice left for Bernard Crostand, at his place of business By notice left for Samuel Simmons at his office.

Thus done and protested, at the City of St Louis aforesaid, this Twentieth day of April A.D. 1861.

L.S. In testimony whereof, I the said Notary, have hereunto set my hand and affixed my Notarial Seal, the day and year above written

Leon I. DeLisle

Notary Public

State of Missouri }
County of St Louis } ss.

Before the undersigned, a Notary Public, within and for said county, came Leon I Deslile, who being by me duly sworn on his oath, says that the facts set forth in the foregoing certificate are true. Leon I Deslisle.

Sworn to and subscribed, before me this 22nd day (L.S.) of April A.D. 1861. D. P. Dudley
Notary Public
St Louis County Mo.

Defendants Instructions

Defendants then prayed the following instructions, which the court refused, and defendant excepted, as follows, to wit:

Defendants pray the Court, to declare the law to be. That if Bernard Crickard, did not endorse and deliver to the Plaintiff the note sued upon, for value received, but simply for collection, then said plaintiff cannot recover in this action under the pleadings.

If said Bernard Crickard was the prior endorser, to plaintiff, and now is the legal owner of the note, the Plaintiff cannot recover in this action.

The court gave judgement for the plaintiff, to which defendants excepted

On the same day, defendants filed their motion for a new trial, as follows, to wit:

Motion for a New Trial

These defendants come and move the court to set aside the judgement in this cause, and to grant them a new trial, for the reasons.

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The court erroneously refused the defendants motion for a continuance.

2. The court refused the declarations of law asked by defendants

3. Because the judgement is erroneous.

Whittelsey

Atty p.d.

which the court overruled, and the defendants excepted

Afterwards on the same day ~~all~~ except the said Bill the defendants filed their motion in arrest of judgement.

Motion in Arrest of Judgement

These defendants impleaded &c come and move the court to arrest the judgement against these defendants, because as against these defendants the plaintiff shows no right to recover judgement upon the note in the petition set forth. Because the judgement is erroneous as against these defendants.

Whittelsey

Atty p.d.

which motion the court then and there overruled, and defendants excepted.

Defendants pray that this bill of exceptions, be signed, and made part of the record, which is done accordingly this 26th March 1862.

S. M. Breckinridge (Seal)

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State of Missouri }
County of St Louis } ss.

I, Stephen Rice, Clerk of the Circuit Court, within and for the state and county aforesaid, certify the foregoing to be a true and complete Transcript of the record and proceedings in the cause of "Samuel Simmons vs Henry D. Felt et al," as fully as the same remain on file in my office

In witness whereof, I have hereunto set my hand and affixed the seal of the Circuit Court at office in the city of St Louis this 4th day of June A.D. 1862

Stephen Rice
C.C.C.

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~~2~~ ~~126~~ 83 ~~20~~ (7)

March 7. 1865

Samuel Simmons

~~Plff in Error~~

vs. Deft in error

Henry B. Bell, John Sexton Sr, John Sexton Jr. Isaac H Sturgeon Thomas L. Sturgeon and Bernard Crickard

~~Deft in Error~~

Plffs in error

Writ of Error from the Circuit Court

Filed Oct 3d 1862
A W Mead Jr

Sharp & Broadhead for ~~Respt~~ Defts

Whittelsey for Appts

$4.50 pd by
J. H. Sturgeon
S. Price

1865 March 22d Submitted on Briefs
1865 April 24. Reversed & Remanded
Opinion filed

Lib 314

Samuel Simmons
v
Henry B Bettsel

IN SUPREME COURT,
Oct. TERM, 1842

AND now come the said Bett 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 Bett assign the following, to wit:

1. That said Court admitted improper and illegal testimony offered by plaintiff
2. That said Court rejected proper and legal testimony offered by defendant
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 defendant
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 plaintiff when it should have been rendered for the defendant
10. That said Court overruled the motion for a new trial, made by this defendant
That said Court overruled the motion for a continuance made by the defendants

Whittlesey

And now come the plaintiff and for joinder in error say, that there is no error in the record and proceedings of said Circuit Court in said cause, as assigned by said Defendant.

Sharp & Broadhead
for Plaintiff

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Sam. Simmons

v

Henry B Bell & als

Assignment of errors by Belt

Whittelsey
p. d & ~~p. E.~~

Filed Oct 20. 1862
A.W. Mead
dx

Samuel Simmons
v
Isaac H Sturgeon & als
impd with H B Bett

IN SUPREME COURT,
Oct TERM, 1862

AND now come the said Sturgeon, & als 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 defendants assign the following, to wit:

1. That said Court admitted improper and illegal testimony offered by plaintiff
2. That said Court rejected proper and legal testimony offered by defendant
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 defendants
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 plaintiff when it should have been rendered for the defendants
10. That said Court overruled the motion for a new trial, made by defendants

That said Court refused to arrest the judgment against these defendants

Whittelsey
atty p.a

And now comes the plaintiff and for joinder in error say, that there is no error in the record and proceedings of said Circuit Court in said cause, as assigned by said defendants

Shark & Broadhead
for Peff

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Sam. Simmons

v

Henry B. Bett sal

Assignment of Error
by Isaac H. Sturgeon
T. L. Sturgeon, sals

Whittelsey
p. d.

Filed October 20. 1862
A. W. Mead
Cr

Samuel Simmons
Deft in Error—
Vs
Henry B. Belt. John Sexton
& others— Pltffs in Error—

Statement & brief by Sharp & Broadhead—Counsel for Deft in Error—
In the Supreme Court of Mo.

This was an action commenced in the St Louis Circuit Court by Defendant in error against Belt as maker and the other defendants as endorsers of a negotiable note.

The petition avers that Belt made the note sued on, payable to John Sexton Sr. John Sexton Jr. and one Hugh Sexton composing the firm of "John Sexton & Sons" who endorsed the same to Isaac H. & and Thos. L. Sturgeon—composing the firm of "Sturgeon & Brother" who endorsed the same to Bernard Crickard—who endorsed to Defendant in error—That at maturity thereof—the note was duly presented for payment—payment demanded & refused & the note protested for non-payment, of all which the endorsers were duly notified—judgment was prayed—on the note—

A demurrer was filed on the ground that it was improper to join the endorsers, as defendants with the Maker of the note.

The Demurrer was overruled.

Belt then filed his separate answer, saying that he did not know whether the Sextons endorsed to the Stingers or the Stingers to Crickard, or Crickard to plaintiffs. and alleging that "there is a defect of parties, in that he is made a defendant together with the endorsers."

The other defendants answer, saying that they do not know whether Crickard endorsed to plaintiff, whether the note was protested for payment, whether it was protested for non-payment or whether they were notified thereof.

Afterwards when the cause was called for trial, Belt (alone) applied for a continuance, & presented his general affidavit therefor, on account of the absence of John Sixton Jr. one of the defendants, with the general statements usual in affidavits for continuance, but not indicating in any manner as to what matters he was desired to testify, if present.

The application was overruled by the Court; the person desired as a witness being one of the defendants, as an endorser of the note sued on,

At the trial was then had, upon which plaintiff proved by witnesses the partnership, and endorsement, & the proper presentment, demand, refusal and protest, & notice to the endorser of the note, as averred, & read the note & certificate of protest in evidence. It appeared by the said evidence that Crichard, holding the note as endorsee thereof, endorsed it to plaintiff, & delivered it to him, for collection. this was done before it was placed in Bank for collection or protest.

The defendants below asked the following instructions.

"That if Berman & Crichard did not endorse and deliver to the plaintiff, the note sued upon, for value received, but simply for collection, then said plaintiff cannot recover in this action under the pleadings".

"If said Berman & Crichard was the endorser to plaintiff, and now is the legal owner of the note, the plaintiff cannot recover in this action."

which the Court refused to give.
Judgment was given for plaintiff in error — and motions to set the same aside & for a new trial, for the usual reasons filed & overruled: & exceptions taken —

The questions thus raised are the following —
1st Was there a misjoinder — in suing the maker & endorsers of a negotiable note, in the same action? —

2nd — Can the endorsee of a note, endorsed to him for collection, maintain an action thereon? —

3rd Whether the application of Belt for a continuance was properly overruled? —

1st As to the first point it is difficult to determine why, or on what ground, it can be contended for — As early as [redacted] the first volume of decisions of this Court, that question was settled, that the maker & endorser of a promissory note could be jointly sued, & are liable together —
See Hunter vs Hempstead, 1st Vol Mo Reps page 67 —

Soon after the taking effect of our present Practice Act, the same question was again raised & promptly decided, under the "practice Act"
Holland vs Hunton & White 15th Mo reports page 476.
And in the case of Page & Bacon vs Snow & others. 18 Mo Reps 126: which is but a clear & explicit statement of the Court, by Judge Gamble, that the 6th Section of the 2nd Article (Practice in Civil Cases). 2nd Vol Revised Statutes 1855. page 1218: means what is said, when it declares that persons having a cause of action against several, including parties to bills of exchange & promissory notes &c, may sue thereon against all jointly, or as may as he may choose.

2nd The Second proposition is directly affirmed by this Court in the case of Webb & Hepp vs Morgan McClung & Co. 14th Mo reports page 428: under our present practice Act, where it was admitted on the trial that plaintiff had no beneficial interest in the note or its proceeds, & held it only as endorsee for collection, from the real owner in interest.
Also Beattie & als vs Lett & als 28th Mo Rep's p. 596. &c.

3rd We think the last proposition equal
=ly ~~without foundation~~ clear —
Before the passage of our present
Statutes: as to the competency of Wit
=nesses, it would not be claimed that
the co-defendant would be a com
=petent witness for Belt — nor was he
made so by statute. The issues raised
by Belt's answer, were such, that if
established would not only relieve
him — but also the endorsers (of
whom the witness was one) —
This court has declared — that under
the act of 1857. (Sess act, page 181) ~~that~~
when a security or endorser has set
up a defence, which "concerns him
alone" which "goes to his per
=sonal discharge, and is one in
which his co-defendant is not
=jointly interested or liable with
him": such co-defendant is com
=petent as to such matter —
Such is the extent, to which it is
believed the court can go —
In this case Belt, the maker, asks,
that the endorser may testify for
him, and that too, when the only
matters set up in his answer &
the only issues raised by him — are
such, that if established relieve
the endorsers = the endorser;

sued jointly with him was "jointly interested" with him, in sustaining his answer - was liable - or not liable - just as he might succeed or fail therein: and was clearly incompetent to testify for him -

Even if there was a doubt on this point - if it could be claimed that Sexton was competent, as a witness for Belt, on the issues raised, for any purpose - still the motion for a continuance was properly overruled, because the affidavit did not show that the witness was wanted, to testify on any point, or as to any matter as to which he could legally testify if present - See,
Garnier vs LeBeau & ors. 30th Mo Reps - p 229 - & Schiefer vs Kehlmann 40, 232 - There the endorsers desired the maker as a witness for them - their defence, or endorsee was one personal to themselves - upon which they might have been relieved from liability & a separate judgment rendered against the maker - yet this Court holds (& soundly) that "By our act concerning witnesses, a plaintiff or defendant has no right to examine his co-plaintiff or co-defendant for himself" - that there is

a particular specified exception provided in the act of 1857 - and a party applying for a continuance on the ground of the absence of his co-plaintiff or co-defendant must show himself within the exception - must show, that he is wanted to testify, as to a matter, about which he would be competent - if present, that he had some seperate, personal defence - which would not inure to the benefit of the Witness. & as to which a seperate (not a joint judgment) could be rendered in his favor - and unless the affidavit shows these facts - the court properly rejects the application -

Here the affidavit discloses nothing of the sort & indeed could not for the defence of Belt would not permit it -

The points (& only points) ~~[illegible]~~ raised being ~~[illegible]~~ so obviously frivolous, & were so well and long settled & known & there being no merits either in the defence or appeal - it is obvious the cause is brought here for delay - we respectfully ask & insist the Judgt be affirmed with ten per cent damages

Sharp & Broadhead, for Deft in Error -

Supreme Court

Saml. Simmons
vs Deft in Error

Henry B. Belt &
others -
Defts in Error

Statement &
brief for
Defts in Error

Filed March 22d 1865
A.W. Mead
Clk

Samuel Simmons } No 83 Oct. T. 1864
v } Supreme Court
Henry B Bett et als }
Isaac L Sturgeon et als

This was a suit upon a note against maker and endorsers.

The petition alleged, that Bett made his note dated Apr. 17. 1860, and thereby for value received promised to pay to pay to the order of John Sexton & Sons twelve months after date $5812 $\frac{68}{100}$, that said Sexton & Sons for value received endorsed the same to Sturgeon & Bro. who for value received assigned and endorsed the same to the defendant Bernard Crichard, who for value received before maturity endorsed ~~the~~ and assigned the same to the plaintiff, said note being annexed and made part of the petition. — that said note was duly presented at the Bank of St Louis and payment demanded, which was refused and said note was duly protested, and due notice given to the endorsers.

After demurrer overruled, Bett answered denying endorsements, protest and pleading misjoinder of parties.

Sturgeon & Bro. answered denying endorsement of Crichard to plaintiff for value received & protest

When the case was called for trial, application was made by Bett for a continuance of the cause for the absence of John Sexton one of the endorsers and an affidavit made in due form, which the court overruled, on the ground that said Sexton would not be a competent witness if present, to which defendants excepted at the time, and filed ~~their~~ his bill of exceptions.

At the trial the plaintiff produced and read the note, dated Apr. 17. 1860, made by Bett to the order of John Sexton & Sons, by which he promised to pay twelve months after date $5812.68 for value received

negotiable and payable without defalcation or discount at the Bank of St Louis. Plaintiff then proved the endorsements of Sexton & Sons, Sturgeon & Bro, and then called defendant B. Crickard, who testified that he endorsed the note to plaintiff before maturity for collection, and that he was the owner of the note.

Plaintiff then read the protest, showing that the note was presented at the Bank of St Louis & protested and notice given.

Defendants prayed the following instructions, which were refused and defendants excepted.

If Bernard Crickard did not endorse and deliver to plaintiff the note sued upon for value received but only for collection, then said plaintiff cannot recover in this action under the pleadings.

If said Crickard was prior endorser to the plaintiff and now is the legal owner of the note the plaintiff cannot recover in this action.

Defendants filed a motion for new trial, which was overruled and exceptions taken.

The endorsers Sturgeon & Bro. also filed a motion in arrest of judgment, for want of cause of action stated in the petition as against them which was overruled and exceptions taken.

The case is brought up by writ of error.

Simmons

v

H B Bett impd &c

Brief for defendant Bett

I. The court erred in overruling the motion for a continuance made by Bett, for the reason that John Sexton the endorser was an incompetent witness.

The witness if called must have been sworn, and then all incompetent evidence excluded. Until sworn his competency could not be passed upon.

Kleinman v Boernstein 32 Mo. 188. Alexander v Shotridge 33 Mo. 422.

II. The court erred in refusing the instruction prayed by defendant.

The note described in the petition was not a negotiable note, it was alleged to have been assigned by Crichard one of the defendants for value received. The evidence shows, that he owned the note, and endorsed it not for value but for collection. The issue was ~~not~~ disproved.

The curious case is presented, that the agent has judgment against his principal, for the amount due upon a note owned by himself.

The suit should have been brought in the name of the party in interest.

RC 1855 p. 1217 s. 1.

H Whittelsey
Atty for Bett.

Over

Simmons
v
Sturgeon & als
impl & c

Brief for Sturgeon & Bro.

I. The court erred in overruling the motion in arrest filed by Sturgeon & als. endorsers.

The note described in the petition did not show, that the note was negotiable by the statute, by having the words "negotiable & payable without defalcation". The note not being negotiable, the plaintiff could only recover by alleging and proving that the maker was insolvent &c.

R.C. 1855 p. 298 s. 15. 16. p. 323 s. 6. Jaccard v Anderson 32 Mo. 188, Lindsay v Parsons 34 Mo. 422.

II. The petition did not allege that the note was by its terms payable at the Bank of St Louis, and therefore an allegation of demand at that place, (and not of the maker) and protest upon refusal, did not show a proper demand and refusal of payment, to bind the endorsers by notice of non-payment.

Glasgow v Pratte 8 Mo. 336, Sto. Bills Exch. S. 553.

The petition therefore showed no cause of action against the endorsers, and judgment should have been arrested.

III The judgment, against the endorsers is erroneous upon the record, not being warranted by the pleadings and law and should be reversed.

Whittelsey
Atty for Sturgeon & al

Simmons

v

Belt impl^d &
Sturgeon & als impl^d

Briefs for Belt &
Sturgeon & Bro.

Whittelsey
p. p. c^mr

Filed 24th March 1865

A. W. Mead
Clerk

Samuel Simmons D. E.
vs
Henry B. Bell
and others } Plff. in Error

The plaintiff below being the assignee or endorsee of a promissory note sued the maker and endorsers jointly and recovered a joint judgment against them. The endorsers moved in arrest on the ground that the petition shewed no cause of action as against them. The motion was overruled and the case was brought here by writ of Error. The petition is as follows viz —

"Samuel Simmons plaintiff
vs
Henry B. Bell
John Lexton Senior
John Lexton junior
Isaac H. Sturgeon
Thomas L. Sturgeon
Bernard Buckard } defts.

In the St Louis Circuit Court September Term 1861 St Louis County Mo.

Plaintiff states that on the 17th day of April 1860 at the County of St Louis said defendant Henry B. Bell made his certain negotiable promissory note of said date by which he promised twelve months after the date thereof for value received to pay

said defendants John Sexton Senior, John Sexton Junior and Hugh Sexton under the name of John Sexton and Sons, the sum of fifty eight hundred and twelve dollars and sixty eight cents ($5812 $\frac{68}{100}$) which said note is hereto annexed and made part of this petition. Plaintiff states that the said defendants John Sexton Senior, John Sexton Junior and Hugh Sexton were on the 17th day of April 1860, the day of the execution of said note, co-partners in business under the name and style of John Sexton and Sons and on the said date and before the maturity of the said note they endorsed the same and for value received assigned and delivered the said note to the defendants Isaac H. Sturgeon and Thomas L. Sturgeon who were then co-partners in business under the name and style of Sturgeon and Brother, and they on the date aforesaid by their endorsement thereof assigned and delivered the said note to the defendant Bernard Erickard for value received, and afterwards and before the maturity of the said note the said defendant Erickard for value received endorsed said note and assigned and delivered the same to plaintiff who is now the legal holder thereof.

Plaintiff states that the aforesaid note although long past due and payable remains unpaid and that at the maturity thereof

the said note was duly presented at the Bank of St Louis to the Teller of said Bank and payment thereof then and there demanded, and payment of the said note was then and there refused. And upon the day of said presentation demand and refusal of payment of said note as aforesaid by said defendant Henry A Kell the said note was duly and legally protested for non-payment thereof, and that due notice of said demand and refusal and of the protest in consequence thereof was upon the same day duly and legally given to the said defendants John Sexton Senior, John Sexton Junior and Hugh Sexton composing the firm of John Sexton and Sons. And also a like notice in like manner was upon the said day given to the defendants Isaac H. Sturgeon & Thomas L. Sturgeon composing the firm of Sturgeon and Brother as aforesaid.

Plaintiff states that said note and interest yet remain due and unpaid. Therefore he asks judgment against the said defendants for the amount of said note and interest thereon and also judgment against the aforesaid defendants for damages at the rate of four per cent per annum, and also for costs.

Samuel Simmons atty "

This petition bears a close resemblance to the petition in the case of Laccard vs Anderson 32 Mo R. 189. and for the reasons given in the opinion in that case we hold that the aver=ments of the petition in the case at bar are insufficient to shew that the note sues on is a negotiable instrument. The instrument sues on then not appearing to be a negotiable but a non-negotiable note, it was not enough to allege a demand and refusal of payment in order to render the assignors liable, but for that purpose it ought to have been shewn either that the maker of the note was insolvent or nonresident of the State, or that the assignee ~~the plaintiff~~, in the diligent prosecution of a suit against the maker had been unsuccessful in making the debt. R.L. 1855 p. 323 §6. title, "bonds notes and accounts". Laccard vs Anderson 32. Mo R. 189 - Lindsay vs Parsons 34 Mo R. 422

Again, upon the idea that the note is negotiable, there is no sufficient demand of payment shewn to charge the endorsers. As seen in the light

of the petition the note was payable at no particular place, but generally. In such case the general rule is that presentment for payment ought to be made to the maker either personally or at his dwelling house or place of business; otherwise the endorser will be discharged. Story on Prom. notes §. 251. Yet in the present case the petition shews the presentment was made not to the maker personally or at his dwelling house or place of business, but to a stranger and at a place with which, so far as appears the maker had nothing to do. View the petition as we may it contains no cause of action as against the endorsers.

It appeared on the trial that the assignment to the plaintiff was not intended to convey any beneficial interest in the note, but was merely for collection; and ~~not~~ ~~not~~ it was insisted therefore that the plaintiff could not maintain the action. The court refused to sustain this view, and we think properly — Beathe et al vs Lett et al 28 Mo R 596 -

Let the judgment be reversed & the cause remanded - Judge Bay concurring

John D S Dryden

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C

Simmons
vs
Bett & others.

Opinion of Court
by Dryden

Filed April 24. 1865
A. W. Mead Clk

Reversed & Remanded