DYER, CARLOS v KRAYER, FREDERICK C. AND SHRICK, CHARLES R. (A FIRM AND STYLE OF KRAYER AND SHRICK) MARCH 1866 COUNTY OF ST. LOUIS 5645

OLD 653/4

-AFFIRMED

INVOLVED:
- PRACTICE
- PLEADING
- NOTE

INCLUDED:
GOODE, GEORGE W.

Carlos Dyer Plaintiff

vs } In the St Louis Court of Common Pleas

Frederick C. Krayer &
Charles R. Schrick
Defendants

To the above Defendants, or
Their Attorneys of record
Mess Babcock & Pope.

You are hereby notified that a writ of Error has issued from the Clerks office of the Supreme Court of the State of Missouri in the above case, at the instance of the Plaintiff, returnable to the next term of said Supreme Court to be begun & held in the city of St Louis on the third Monday in October 1864 — ~~October 17 1864~~ & that a transcript of said case has been duly filed in accordance therewith

Carlos Dyer Plff
By his Attorney
P. C. Morehead

October 1st 1864

191

Carlos Dyer Plff

vs. } ~~[illegible]~~ Notice

F. C. Krager &
C. R. Shrick
Defts

Due Service of the within Notice is hereby acknowledged
Oct 1st 1862
Geo. Babcock
atty for Defts

Filed Oct 1. 1862
A W Mead
Cx

The State of Missouri, ss.

The State of Missouri, to the Honorable the St Louis Court of Common Pleas within & for St Louis County **in said State—Greeting:**

WHEREAS, In the record and proceedings in a certain cause lately pending in the said Court of Common Pleas

wherein Carlos Dyer is plaintiff and Frederick Krayer and others are defendants

in a Civil action manifest error hath intervened, to the great damage of said plaintiff as by his 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, Andrew W. Mead ~~WILLIAM S. GLANVILLE,~~ Clerk of our said Supreme Court, at office in the City of Saint Louis, the 9th day of March in the year of our Lord one thousand eight hundred and ~~fifty-~~ sixty four

A. W. Mead CLERK.

$15 00/100 paid by A. C. Morehead Esq

State of Missouri }
County of St Louis } I, Leon Papin Clerk of the St Louis Court of Common Pleas within and for the County aforesaid, in obedience to the command of the within writ, herewith transmit a full true and complete transcript of the record and proceedings in the ~~within~~ named cause as fully as the same remains 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 Ninth day of March A.D. 1864

Leon Papin Clk

SEAL OF THE ST. LOUIS COURT OF COMMON PLEAS MISSOURI

Henry Stagg, agent for Carlos Dyer, the plaintiff, states on oath that he believes the petition and the matters therein as stated are true. H. Stagg

Subscribed and sworn to before me April 16. 1863. John C. H. Cunningham, Justice of the Peace

Thereupon the following summons issued

State of Missouri, County of St Louis, ss.

To the Sheriff of St Louis County. Greeting:

We command you to summon Frederick C. Krayer and Charles R. Shrick 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 Saint Louis, within and for the County of St Louis on the Third Monday of November 1863. then and there to answer the complaint of Charles Dyer, as set forth in the annexed petition; and have you then and there this writ.

(Seal) Witness Leon J. Papin, clerk of our said Court, with the seal thereof hereunto affixed, at office in the City of Saint Louis this 27. day of May, in the year of our Lord Eighteen hundred and sixty-three. Leon J. Papin, Clk

Upon said summons the sheriff made the following return: "Executed this writ in the County of St Louis on the 2d day of June 1863 by delivering a copy of the writ and petition as furnished by the Clerk to Charles R. Shrick. I further executed this writ on the same day by delivering a copy of the writ as furnished by the Clerk to Frederick C. Krayer.

John C. Vogel, Shff. by Geo H. Engelman, Dpty.

And afterwards on the 27th day of November 1863. the following demurrer was filed to said petition:

The defendants now come and demur to the plaintiffs petition, for the reason that it does not set forth a sufficient cause of action in this, that it does not appear by said petition, and it is not averred that the note sued on was ever endorsed by the payee thereof to L. A. Dame, through whom the plaintiff claims title; and said petition does not show that the plaintiff has any claim or legal interest in said note or right to bring this suit. Hill + Babcock, attys for defendants.

And afterwards, on Saturday, November 28th 1863. the following further proceedings were had in said cause, to wit:

The Court having duly heard and considered the demurrer to the petition, and being thereof fully advised doth order that the same be sustained. Leave is given said plaintiff to file an amended petition.

And afterwards, on Tuesday March 1st 1864. the following proceedings were had in said cause.

" The Court having duly heard and considered the motion to set aside the continuance of this cause, doth order the same to be sustained. And the said parties come by their attorneys and the plaintiff still refuses to amend his petition herein, and the defendants rely upon the matters and things pleaded in their

former document. Wherefore, it is ordered, decreed and adjudged by the Court that the said plaintiff take nothing by his suit in this behalf, but that the said defendants go hence without day and recover of said plaintiff their costs and charges herein expended and have execution therefor.

State of Missouri } ss.
County of St. Louis } I Leon J. Papin, clerk of the Saint Louis Court of Common Pleas within and for the County aforesaid, certify the foregoing to be a true and complete transcript of the record and proceedings in the above entitled cause, as fully as the same remains in my office.

In Witness whereof I hereto set my hand and affix the seal of said Court at office in the City of St. Louis this 5th day of March 1864.

Leon J. Papin, Clk

42 (4)

March Term, 1866.

Carlos Dyer P.E.

vs Transcript

Frederick C Krayer
and Charles R Shrick
D.E.

Error to St Louis Court
of Common Pleas

P C Morehead
for Pfff

Hill & Babcock
for Defts

Filed March 9. 1864
A.W. Mead
Clerk

$2.00 paid by atty Morehead
$10.00/100 " " " "

1866 March 28 Assignment of Errors filed
" Apr. 2d St Shr. P.E. filed
" " 4 Sub. on br. by P.E. taken as Sub. by D.E.
" " 16 Affirmed

Carlos Dyer Plff in Error

vs } In the Supreme Court
} March Term 1866

Frederick C. Krayer Deft in Error

The Plaintiff in error comes and assigns as error in the above case
The court erred in sustaining the demurrer to the petition

P. G. Morehead
for Plff in Error

No 54

Carlos Dyer Plff
in Error

vs } Assignment of Errors

Frederick C. Kragenbaker
Defts in Error

Supreme Court
March 7. 1866

Filed Mch 28 '66.
O. S. Fishback
Clk

Moseheed for Plff in Error

Carlos Dyer Plff in Error

vs } In the Supreme Court
} March Term 1866.

Frederick C. Krayer & others

Defts in error

Plaintiffs Statement & Brief

As the only questions in this case arise upon the petition & Demurrer they are copied

Petition.

St Louis County S.S.

Plaintiffs states that the defendants Frederick C. Krayer & Charles R. Strick, by their promissory negotiable note herewith filed, dated October the 20th 1860, promised to pay to the order of George W. Goode, three months after date for value received, negotiable & payable without defalcation or discount, the sum of two hundred and fives dollars 50/100 with ten per cent interest from maturity — That said note was endorsed to the Plaintiffs by L. A. Dame for value received, who as appears by the endorsements thereon, was the endorsee of the said George W. Goode, whereby the Plaintiffs who is the holder & last endorsee thereof is entitled to the same, and the same remains unpaid wherefore Plff asks judgment &c

Demurrer.

It does not appear by said petition, & is not averred that the note sued on, was ever endorsed by the payee thereof to L. A. Dame, through whom Plff claims title, And said petition does not show that Plff has any claim, or legal interest in said note, or right to bring this suit

As to the sufficiency of the petition, see
16. Mo 166. & 268 — Secs 6 & 49 Art 6. Prac. civil cases

Whether the note was assigned by the payee or not, to Dame is an issue to be made by the answer in this case

The averment ~~that~~ of the the endorsement on the note is as much as can generally be stated in such transactions and even if the proof showed there was no such assignment, personally Dame may have been an agent

If there is any fraud, it is not by the Plff & it ought to be sifted through an answer which cannot prejudice the defendant if they are right —

The Plffs does not rely simply on possession of the note for title but on possession with the endorsement for value (paid)

The endorsement on the note with possession are prima facie evidence of title, but may be resisted by facts

P. C. Marchand for Plff in Error

No 54

Carlos Dyer Plff in Error
vs. Statement & Brief
of Plffs in Error
F. C. Krayer Sothers
Defts in Error

Supreme Court
March Term 1866

Filed Hon. April 2 1866
O. T. Tillebaak
Clk.

Marchand for Plffs in Error

Carlos Dyer
v. Pltf. in Error
Frederick C. Krayer et al.
Deft. in Err.

On the Supreme Court
March 1. 1866.

The case is presented here on demurrer to the petition. The demurrer being sustained, and the plaintiff refusing to amend his petition, there was judgment for the debendant on the demurrer. The petition was founded upon a negotiable note payable to the order of George W. Goode. It contained no distinct allegation of the indorsements through which the plaintiff derived title to the note, but averred "that said note was indorsed to the plaintiff by L. A. Dame for value received, who as appears by the indorsements thereon, was the indorsee of the said George W. Goode, whereby the plaintiff who is the holder and last indorsee thereof is entitled to the same". ~~The was no averment of demand and notice of non-payment~~ The ground of demurrer was, that the petition did not set forth a sufficient cause of action, for the reasons that it did not aver that the note was ever indorsed by the payee to L. A. Dame, nor show that the plaintiff had any claim or legal interest in the note, or any right to bring this

sent.

The usual averment of an indorsement is that the one party indorsed and delivered the note to the other. The allegation that "the note was indorsed to the plaintiff by L. A. Dame for value received", might be deemed sufficient; but as to the indorsement of the paper to Dame, there is no positive averment whatever, but only that he was indorser as appears by the indorsements thereon. These indorsements were no part of the petition. It was not enough that it should so appear on the note filed. There should have been some distinct and positive averment of the fact in the petition. Then, the note might have been admissible in evidence to prove the allegation. We think the demurrer was well taken.

Judgment affirmed
Judge Wagner concurs.
Judge Scullan not sitting.

N. A. Ames.

54

C

Carlos Dyer
P.E.

v.

Frederick C. Krayer et al.
D.E.

Opinion
affirmed.
Holmes.

Filed April 16. 1866
O. F. Fishback
Clk