Mandeville & Jameson *v.* Joseph Riddle & Co.

Promissory notes.—Action against remote indorser.

In Virginia, an indorsee of a promissory note cannot maintain an action against a remote indorser, for want of privity.[1]

Riddle *v.* Mandeville, 1 Cr. C. C. 95, reversed.

Error from the Circuit Court of the district of Columbia, sitting at Alexandria, in an action on the case, brought by the defendant in error, for money had and received, which was the only count in the declaration; and to which the defendant pleaded the general issue.

*291] *The evidence offered and admitted to support the declaration was a promissory note, made by Vincent Gray, dated at Alexandria, on the 2d of March 1798, by which he promised to pay, sixty days after date, to the order of Mandeville & Jameson, $1500 for value received, negotiable at the bank of Alexandria. This note was indorsed by Mandeville & Jameson to James McClenachan, and by him to Joseph Riddle & Co., the defendants in error. The protest of a notary-public, made on the 5th May 1798, attesting that he had on that day demanded payment of the note of the maker, who refused, and of Mandeville & Jameson, the first indorsers, who also refused, and that James McClenachan, the other indorser, did not dwell in his district. The record of a suit on the same note, brought by Joseph Riddle & Co., on the 14th of June 1798, against Vincent Gray, the maker, prosecuted to final judgment and execution, upon which execution he was committed to jail, took the oath of an insolvent debtor, and was discharged on the 6th of February 1799. The present action was commenced in July 1801.

A bill of exceptions was taken by the defendants below, stating these facts, and that they prayed the opinion of the court, 1st. Whether this action could be sustained by the present "plaintiffs against the present defendants, there being an intermediate indorser between them;" and 2d. "Whether, if the said action is sustainable, the said evidence is admissible upon a single count for money had and received;" and that the opinion of the court below was, that the action might be sustained, notwithstanding the intermediate indorser; and that the evidence was admissible, upon the single count for money had and received. Verdict and judgment for the plaintiffs for $1919 and costs; to reverse which, the defendants below sued out the present writ of error.

E. J. Lee and *Swann*, for the plaintiffs in error. *Simms*, for the defendants.

*292] **E. J. Lee.*—1st. The action of *indebitatus assumpsit* will not lie for the holder against a remote indorser, because there is no privity of estate or privity of contract. It is an action at common law; and by the common law, no action of *indebitatus assumpsit* for money had and received will lie except between privies. Kyd 175 (113, 114).

2d. There being only one count in the delaration, and that being only for

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[1] Bradley *v.* Knox, 5 Cr. C. C. 297. But such remote indorser may be made liable in equity, though not at law. Harris *v.* Johnston, 3 Cr. 311; Riddle *v.* Mandeville, 5 Id. 322; United States Bank *v.* Weisiger, 2 Pet. 331.

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money had and received, the note ought not to have been given in evidence, because it must have been a surprise to the defendants. In England, it is usual to give notice of the plaintiff's real ground of action, either by a special count, or by a formal notice. The defendants could not come prepared to defend the action. The action for money had and received is said to be in the nature of a suit in equity. But here, the defendants were in a worse situation than if a bill in chancery had been filed against them; for in that case, the bill must have stated the grounds of the claim, and shown the equitable circumstances which entitled the plaintiffs to recover.

A remote indorser is liable to the holder, only upon the custom of merchants, and therefore, there ought to have been a special count stating the custom. The English statute of Anne, respecting promissory notes, is not in force in Virginia; and the act of assembly which supplies its place only allows an assignee to bring an action of debt, in his own name, against the maker of the note, but gives no remedy against the assignors. Hence, it results, that the remedy of the assignee against the assignors is either at common law, or under the custom of merchants. By the common law, the action of *indebitatus assumpsit* lies only between privies; and here is no privity. And if resort be had to the custom of merchants; that custom must be averred in the declaration.

Simms, contrà.—Every indorser is as the maker of a new note. *Smallwood* v. *Vernon*, 1 Str. 479; Esp. N. P. 33; **Heylin* v. *Adamson*, 2 Burr. 674. He undertakes to pay the sum mentioned in the note, if the original maker does not. As soon as the original maker fails to comply with his engagement, that of the indorser becomes absolute. He then becomes the holder of so much money as is expressed in the note, to the use of his immediate indorsee, or of such person as he shall name. It is true, the plaintiffs below have sought their remedy at common law; and by common law, they are entitled to recover. Every man ought to be compelled to pay money which he has in his hands belonging to another, and which in equity and good conscience, he has no right to retain. And the principle is now well established, that at common law, he may be compelled to pay it by an action for money had and received. [*293

As to the evidence offered on this count, it was long doubted, before the statute of Anne, whether any other than an action of *indebitatus assumpsit* for money had and received, or for money lent, would lie upon a note. This was the ground of contention between Lord Holt and the merchants of Lombard street; he strenuously contending, that the action for money had and received, or for money lent, was the only proper remedy; and they endeavoring to bring into use the form of declaration upon a note as a specialty. Although a note may now, under the statute, be declared upon as a specialty, yet the statute has not taken away the common-law remedy which existed before.

As to surprise, the objection made would go to almost every case where money had and received is the proper action; such as where the consideration happens to fail, or where money has been paid by mistake, &c. Indorsement is evidence that the indorser has received money of the indorsee. And at and from the time of the indorsement, the indorser is debtor to the indorsee, and the debt may be proved under a commission of bankruptcy against the

indorser, before the note is payable. In this case, however, there could be no surprise; the defendants below had notice of the non-payment of the
*294] note, and that they would be held liable: and it is immaterial *by what means notice is given. *Longchamp* v. *Kenny*, 1 Doug. 138. In the case of *Grant* v. *Vaughan*, 3 Burr. 1516, the cases upon promissory notes, before the statute of Anne, are taken up and considered with great clearness and ability by the court. Every principle established in that case furnishes an argument for the original plaintiffs in this. The case there was, that Vaughan drew a check or order on his banker in these words: "Pay ship Fortune, or bearer, 70*l*.," and gave it to Bicknell, who lost it. It was found by some person, and honestly taken in payment for goods, by the plaintiff, in his way of trade as a mercer. Payment of the check being stopped at the banker's, the plaintiff brought suit against Vaughan, the drawer, and declared upon an inland bill, and for money had and received to his use. It was held, that these notes are, by law, negotiable, and were so before the statute of Anne, and that the bearer of them might maintain an action, as bearer, where he could entitle himself to them on a valuable consideration, and for this was cited *Hinton's Case*, 2 Show. 235 (in the reign of Charles II.); *Crawley* v. *Crowther*, 2 Freem. 257 (in the year 1702, before the statute of Anne); *Anon.*, 1 Salk. 126, pl. 5 (10 Wm. III.); and *Miller* v. *Race*, 1 Burr. 452 (31 Geo. II.).

That the only dispute, before the statute of Anne, was as to the mode of declaring: but that it never was disputed, "that an action upon an *indebitatus assumpsit* generally for money lent, might be brought upon a note payable to one or order;" citing *Clerke* v. *Martin*, 2 Lord Raym. 758. "Upon the second count," Lord Mansfield said, "the present case is quite clear, beyond all dispute. For, undoubtedly, an action for money had and received to the plaintiff's use may be brought by the *bonâ fide* bearer of a note, made payable to bearer. There is no case to the contrary. It was certainly money received for the use of the original advancer of it; and if so, it is for the use of the person who has the note as bearer."

And Wilmot, Justice, said, that it was notorious, that such notes were
*295] in fact and practice negotiated. "Probably, *the jury took upon themselves to consider, whether such bills or notes as this is, were in their own nature negotiable; but this is a point of law; and by law, they are negotiable." And again he says, "but this is a negotiable note; and the action may be brought in the name of the bearer. Bearer is *descriptio personæ*, and a person may take by that description as well as by any other. In the nature of the contract, there is no impropriety in his doing so. It is a contract to pay the bearer, or to the person to whom he shall deliver it (whether it be a note or a bill of exchange), and it is repugnant to the contract, that the drawer should object that the bearer has no right to demand payment from him. The reasons given in the cases that are opposite to this are altogether unsatisfactory. Even before the statute of 3 & 4 Anne, Lord Chief Justice Holt himself thought that an *indebitatus assumpsit* for money lent, or for money had and received, might be maintained upon such a note."

And Yates, Justice, said, "Nothing can be more peculiarly negotiable than a draft or bill, payable to bearer; which is, in its nature, payable from hand to hand, *toties quoties*. It had been doubted, it is true, whether that species of action, where the plaintiff declares upon the note itself, as upon a

specialty, was proper; but here is a count upon a general *indebitatus assumpsit*, for money had and received to the plaintiff's use. The question, whether he can maintain this action, depends upon its being assignable, or not. The original advancer of the money manifestly appears to have had the money in the hands of the drawer, and therefore, he was certainly entitled to bring this action. And if he transfers his property to another person, that other person may also maintain the like action. Whoever has money in the hands of another, may bring such an action against him. This appears from the determination in the case of *Ward* v. *Evans*, reported in 2 Lord Raym. 930, where not a shilling of money had passed between the plaintiff and defendant; and yet HOLT and POWELL both held, that an *indebitatus assumpsit*, for moneys received to the plaintiff's use, properly lay."

This case clearly shows, that actions upon promissory notes payable to bearer, or order, might have been maintained *before the statute of Anne; and that such actions did not depend upon the privity of contract. [*296 There certainly is not more privity of contract between the maker of a note, and the bearer (especially, after that note has been lost by the lawful owner, and comes to the hands of the plaintiff through the finder), than between the maker of a note payable to order, and the indorsee. It also shows, that there are certain instruments, which are negotiable in their own nature, by force of the contract itself, independent of statute law; and that a promisee may as well be described by being the bearer of a certain paper, as by being named with his Christian and surname. And if he may be designated by the fact of being the bearer of a paper, there is no reason why he may not equally be described by the fact of his being the nominee of a certain other person, and the holder of a certain note.

There is no doubt, that before the statute of Anne, notes were passed from one to another, and actions for money had and received were, on common-law principles, maintained by the bearers and indorsees. The indorsement was considered as conveying or assigning the money of the payee in the hands of the maker; and the original contract of the maker was, to hold the money to the use of the payee, or of such person as he should appoint. Privity of contract is not the ground of the action for money had and received. And among the many cases of that kind, there will be scarcely found one in which such a privity has existed. If I lose money, I may have this action against the finder. If A. delivers money to B., to be paid over to C., the latter may maintain this action against B. If a man, under pretence of authority from me, receive money due to me, I may recover it of him, in this form of action. So, if I pay money to another by mistake. So, if a man obtains money from me by fraud and deceit. So, if the consideration of a bargain fail. So, if one pretending a right to an office receive fees, the rightful officer may, by an action for money had and received, recover of him the amount of fees so received.

The indorser is a new maker as to all the subsequent parties. He has received money from his indorsee which he engages to hold to his use, or to the use of such person as he shall appoint, in case the maker does not pay *the note on demand. This principle results from the custom of mer- [*297 chants; for the moment a promissory note, payable to order, is indorsed, it becomes, in its nature, independent of any statute, an inland bill of exchange, both in form and substance. The indorser orders the maker to

pay to the indorsee, or his order, the sum of money mentioned in the note. The maker, by signing the note, acknowledges that he has effects of the payee, to the amount of the note, in his hands; and by making the note payable to the order of the payee, he authorizes the payee to draw upon him for that amount, and pledges himself to honor the draft. An acceptance may be made, before the bill is issued, and is equally binding as if made after. Kyd 48, 49. The signature of the maker to the note is an acceptance of the payee's bill. No part or circumstance of a bill of exchange is wanting.

The plaintiffs below, therefore, were clearly entitled to recover the money from the defendants; and therefore, the defendants ought not, in justice and good faith, to withhold it. In such a case, there never has been a doubt but that the bill may be given in evidence, on the count for money had and received.

Swann, in reply.—If the indorser is liable, it must be under the act of assembly. But the act of assembly gives an action only against the maker, as is evident from the provision for allowing all just discounts, not only against the holder, but against his assignor, before notice. No case can be found of an action for money had and received, brought by an indorsee against a remote indorser, either before the statute of Anne, or after. The cases cited are of a note payable to bearer. If any action will lie, it must be on the statute of Virginia.

Marshall, Chief Justice.—It is decided, in Virginia, that an action is maintainable by the assignee against the assignor, and not under the act of assembly.

*298] *February 26th, 1803. The Chief Justice delivered the opinion of the court.—The only question in this case is, whether an action of *indebitatus assumpsit* can be maintained by the assignee of a promissory note, made in Virginia, against a remote assignor.

The act of the Virginia assembly which makes notes assignable, gives the assignee an action of debt, in his own name, against the maker of the note, but is silent with respect to the claim of the assignee against the assignor. It was, therefore, long a doubt, whether the assignor became liable, on his mere assignment, without any special agreement, for the contents of the note, in the event of the insolvency of the maker. This doubt has at length been settled in Virginia, so far as to declare the liability of the assignor on such assignment; but not the amount for which he is liable. It seems to be yet a question, whether he is answerable for the sum mentioned in the note, or for only so much as he received for it, provided he shall be able to prove the sum actually received. It is also a question, whether the assignee can have recourse to any other than his immediate assignor.

As the act of assembly gives no right to sue the assignor, such an action can only be maintained on the promise which the law implies from the assignment, and consequently, can only be sustained by and against the persons to and from whom the law implies such a promise to have been made. As the assignment is made to a particular person, the law implies a promise to that person: but it raises no promise to any other. There is no fact on which to imply such promise. In the language of the books, there is a privity between the assignor and his immediate assignee; but no privity is perceived

between the assignor and his remote assignee. The implied promise, growing out of the indorsement, is not considered as having been made assignable by the act of assembly, and therefore, the assignee of that promise cannot maintain an action of *indebitatus assumpsit* on it.

*It is, therefore, the opinion of the court, that this action is no maintainable, and that the judgment ought to be reversed."(*a*) [*299

Stuart *v.* Laird.

Constitutional law.—Courts.

Congress has power to establish such inferior tribunals as it thinks proper, and to transfer pending proceedings from one such tribunal to another.

It is not required, that the judges of the supreme court should have distinct commissions as judges of the circuit courts.

A contemporaneous construction of the constitution, practiced under and acquiesced in, for a period of years, fixes the construction, and the courts will not shake or control it.[1]

Error from the Fifth Circuit, in the Virginia district.

An action of covenant was brought in January 1801, in "the court of the United States for the middle circuit, in the Virginia district," by John Laird, a citizen of the state of Maryland, for and on behalf of Laird & Robertson, of Port Glasgow, and subjects of the King of Great Britain, against Hugh Stuart, a citizen and inhabitant of the state of Virginia.

At the rules, in February 1801, there was an office judgment against the defendant for damages, &c., "which damages," said the record, "are to be inquired of and assessed by a jury to be summoned by the marshal, and empannelled before the next court of the United States for the middle circuit, in the Virginia district, which commences on the 22d day of May next ensuing; and so the cause aforesaid stood continued, by virtue of the statute in such case made and provided, until the court of the United States for the fourth circuit, in the Virginia district, continued by adjournment, and holden at the capitol in the city of Richmond aforesaid, on Thursday, the 17th day of December 1801; at which day, to wit, at a court of the United States for the fourth circuit, in the eastern district of Virginia, continued by adjournment, and holden at the capitol, in the city aforesaid, before the honorable the judges of the said court, came as well *the plaintiff," &c.; and the office judgment being set aside, and issue joined upon the plea of [*300 covenants performed, there was verdict and judgment for the plaintiff; upon which a *fieri facias* issued, reciting, in the usual form, the judgment recovered "in the court of the United States for the fourth circuit, in the eastern Virginia district," and returnable "before the judges of the said court, at Richmond, in the eastern Virginia district, on the 26th day of April next." "Witness, Philip Barton Key, Esq., chief judge of the said court." The return on this execution was as follows, viz:

"Executed on Maria and child, Paul, Jenny, Selah, Kate and Anna, and a bond taken with Charles L. Carter, security, for the delivery thereof at the

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(*a*) See note (A) in the appendix to this volume, p. 367.

[1] See Martin *v.* Hunter, 1 Wheat. 304; Cohen *v.* Virginia, 6 Id. 264; Prigg *v.* Pennsylvania, 16 Pet. 621; Cooley *v.* Board of Wardens, 12 How. 315.