

## Syllabus.

Judgment, in that case, was given by Lord Campbell, and in a subsequent case he repeated and enforced the reasons on which the former judgment rested.\* Voyage, in the last case, was from Liverpool to Callao. Ship was driven on a bank by a storm, near the port of departure. Cargo was discharged and transported back to the port whence it came, and some days afterwards the ship was got off, taken to the port, and repaired, and again took the cargo on board and proceeded on the voyage; and it was held that the saving of the ship and of the cargo was one continued transaction, and that the expenses were general average, to which the ship, freight, and cargo must contribute. Considering that the goods remained under the *control of the master* until the ship was got off, repaired, and was enabled to take the goods on board and prosecute her voyage, it is clear that the decision was correct, and entirely consistent with the previous adjudication.†

Applying those principles to the present case, we are of opinion that there was no community of interest remaining between the ship and the cargo when the master, as declared in the statement of the case, abandoned the ship, and left her in charge of the agent of the underwriters, after the consignees of the ship had declined to authorize the master to incur any further expense.

Judgment of the Circuit Court is therefore reversed, and the cause remanded, with directions to issue a

NEW VENIRE.

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BROWN v. TARKINGTON.

¶ Promissory notes given for a balance found due on settlement in a transaction itself forbidden by statute and illegal, or for money lent to enable a party to pay bills which the person taking the promissory notes

\* Moran v. Jones, 7 Ellis & Blackburne, 532.

† Maclachlan on Shipping, 573, 576.

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had himself assisted, in violation of statute, to issue and circulate, cannot be enforced.

2. The fact that such promissory notes are given for a balance found due, or to enable a principal party in the illegal transaction to pay notes that have got into public circulation and are unpaid, does not purge them from the infirmity which belonged to the original vicious transaction.
3. Where a deposition, after a motion on grounds set forth has been unsuccessfully made at one term to suppress it, as irregularly taken, is at another read on trial without objection or exception, it cannot be objected to here on the grounds that were made for its suppression, or at all.

THIS was a writ of error to the Circuit Court of the United States for the District of Indiana.

The case was this: The suit was brought by Brown, the plaintiff in error, to recover against Tarkington and others, defendants, the amount of four promissory notes, and another small sum, in the aggregate exceeding twelve thousand dollars. The defendants were stockholders in the Bank of Tekama, in the Territory of Nebraska, organized under a charter granted by the legislature, February 13, 1857. The notes were signed by its president, S. L. Campbell.

By an act of Congress passed July 1, 1836, it was provided, "that no act of Territorial legislature of any of the Territories of the United States, incorporating any bank, or any institution with banking powers and privileges, hereafter passed, shall have any force or effect whatever, until approved and confirmed by Congress." The charter of this bank, as already observed, was passed in 1857. Three of the notes were given on the 9th June, 1858, and the fourth on the 28th April of the same year. The consideration of the three notes of the 9th of June, was for a balance due the plaintiff from the Bank of Tekama *on a settlement of accounts*; and of the other, for moneys advanced to Campbell, the president, *to enable him to redeem the paper of the bank in circulation*.

Much evidence was given, in the course of the trial, tending to prove that the plaintiff was connected with the officers and directors of the bank in conducting its operations, in aiding and assisting, personally, and by his credit and means,

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to extend the circulation of its bills; and also tending to prove that the plaintiff was familiar with the charter of the bank, and the articles of association, and knew of the illegality of the association, and participated, in common with the officers and directors, in very unscrupulous, if not fraudulent contrivances, to keep up the credit of the bank and its bills, to the injury and loss of the business public, after they had knowledge of its utter insolvency and inability to redeem the paper already in circulation.

Indeed, it was apparent from the evidence that the institution possessed very little, if any, capital, during the whole term of its existence. The nominal capital was \$300,000, divided into shares of one hundred dollars each, payable in instalments of ten dollars each. The third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth instalments were made due and payable at such times as the board of directors might designate. The bank began business in September, 1857, and ceased in the May following, with an outstanding circulation of its bills of some ninety thousand dollars.

In the course of the trial the plaintiff read without objection the deposition of Campbell; and, of course, being thus read, no exception was taken to it. The record however disclosed the fact that at *a former term* there had been a motion to suppress and exclude this deposition, as not having been taken in conformity with the 30th section of the Judiciary Act of 1789, under which the counsel moving to suppress, assumed it to have been taken; and disclosed also the fact that the motion had been overruled.

At the trial, the court below, after referring to the act of Congress forbidding the Territorial legislature to pass any law chartering a bank without its consent, and to the violation of this organic law in the present charter, and to the facts which had been proved, instructed the jury that the charter and the organization of the bank under it, as well as the banking business conducted and carried on through the means of this organization, were all illegal and void; and that if the plaintiff participated in these transactions, aiding

## Argument for the plaintiff.

and assisting the officers and directors in giving credit to the bank, and to its bills in circulation, thereby co-operating in the imposition and fraud upon the business community, with a knowledge of the illegality of the charter and of the organization of the bank, and that the consideration of the notes in question grew out of these illegal transactions, he was not entitled to recover.

Verdict and judgment went accordingly for the defendants.

On error here, *Mr. G. M. Lee*, for the plaintiffs, contended that various instructions requested below and which he presented,—but which, as having been aside from the ground on which the case was put before the jury, need not perhaps, here, by the reporter, be particularized—were not given by the court below, as asked. He argued further that the charge as given was, in itself, wrong: for conceding *argumenti gratiâ*, what was otherwise not to be conceded,—to wit, that the bills of the Tekama Bank as originally issued were not obligatory on the persons by whose authority they were put forth—still that here the plaintiff, in so far as he lent his money to the defendants to enable them to *pay* debts, and the *payment* of which was not illegal whatever the incurring of them might have been—was not censurable, but, contrariwise, praiseworthy; that here too was a promise, not the immediate nor necessary offspring of the old acts, nor tainted by their infirmity, if they had any; and that thus standing on its own and on new ground, such promise was good.\* He contended that the court below had disregarded the purpose to which part of the money was applied, and disregarded the new and independent promise; and by charging, substantially, that if the plaintiff had furnished funds to enable the bank to do business he could not recover, had cast into the background or out of view entirely,

\* *Petrie v. Hannay*, 3 Term. 418; 6 Id. 410; *Bird v. Appleton*, 8 Id. 562; *Faikney v. Reynous*, 4 Burrow, 2069; *Farmer v. Russell*, 1 Bosanquet & Puller, 296; *Ex parte Bulmer*, 13 Vesey, 313; *Hodgson v. Temple*, 5 *Taunton*, 181; *Toler v. Armstrong*, 4 *Washington*, 297; *Armstrong v. Toler*, 11 *Wheaton*, 258; *Catts v. Phalen*, 2 *Howard*, 376.

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one of the most salient and distinguishing features of the case; herein, he argued, committing error in the charge.

*Mr. Eames, contra.*

Mr. Justice NELSON delivered the opinion of the court.

We perceive no valid objection to the charge given by the learned judge below. It referred to the facts with great particularity and accuracy. The principle of law which it laid down is familiar, and the evidence in the case called for its application. The illegality of the charter of the bank, and of the organization under it, as well as the business of banking conducted through its means, were matters not in controversy upon the evidence. The only material question open was, whether or not the plaintiff was *particeps criminis*? If he was, he was disabled, under the maxim, to recover. The law leaves the party thus situated where it finds him. If either has sustained loss by the bad faith of his associates, it is but a just punishment for the illegal adventure.

To the argument of the counsel for the plaintiff—that admitting the banking transactions to be illegal, yet that the settlement of the balance and giving notes for the same purged the new promise, as he calls it, from the original taint—the answer is, that the new promise is founded upon the illegal consideration; a debt or demand growing out of the illegal transactions: and is as infirm, in the eye of the law, as the implied promise that existed previous to the giving of the notes.

There were several prayers for instructions on the part of the plaintiff, which were refused in the form presented. Most of them were irrelevant and immaterial, and neither even alluded to the ground upon which the case was placed before the jury. The court embraced in its charge all that was material or pertinent in the instructions prayed for.

It is also insisted for the plaintiff that the deposition of S. L. Campbell, the president of the bank, was improperly admitted on account of an irregularity in taking it under the act of Congress. It appears that a motion had been

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made, at a previous term of the court, to set aside this deposition on the ground stated; which was denied. On the trial, when the deposition was offered, no objection was made to it. The question, therefore, is not in the bill of exceptions; on the contrary, if any valid objection existed, it was waived by not taking advantage of it at the trial.

JUDGMENT AFFIRMED.

[See *Orchard v. Hughes*, 1 Wallace, 73; *Brooks v. Martin*, 2 Id. 70.—REP.]

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McGUIRE v. THE COMMONWEALTH.

## (MOTIONS.)

1. Where a party is indicted in a State court for doing an act contrary to the statute of the State, and sets up a license from the United States under one of its statutes, and the decision of the State court is against the right claimed under such last-mentioned statute, this court has jurisdiction under the 25th section of the Judiciary Act of 1789.
2. A writ of error from this court is properly directed to the court in which the final judgment was rendered, and by whose process it must be executed, and in which the record remains, although such court may not be the highest court of the State, and although such highest court may have exercised a revisory jurisdiction over points in the case, and certified its decision to the court below. The omission in the record of these points, and the action in the highest court upon them, make no ground for *certiorari* on account of diminution.
3. Circumstances under which the inability of leading counsel to prepare for argument, within a time previously fixed by the court, and the sickness of his associate, do not make a sufficient ground for continuance of a cause.
4. Where the counsel of a plaintiff in error withdraw their appearance, the defendant in error, under the 16th rule, has the right either to have the plaintiff called and the suit dismissed, or to open the record and pray an affirmance.

A STATUTE of Massachusetts makes it an indictable offence, punishable with heavy fine and imprisonment, to keep any building for the sale of intoxicating liquors. Under this