Case No. 924. BANK OF THE UNITED STATES v. LYMAN ET AL.

{1 Blatchf. 297;[1] 20 Vt. 666; 11 Law Rep. 156.}

Circuit Court, D. Vermont. May Term, 1848.[2]

CORPORATIONS—ORGANIZATION—BANK OF UNITED STATES—NEGOTIABLE INSTRUMENTS PAYABLE TO CASHIER—EVIDENCE.

1. Where the act of incorporation of a banking company provided that notice of its organization should be given on or before a certain date, and the bank was found in operation afterwards under the act, it is to be presumed that it was organized as early as the time prescribed.

2. The Bank of the United States chartered by congress {Act April 10, 1816, 3 Stat. 266.} had no power to carry on banking operations after the 3d of March, 1836, though it continued in existence two years longer for the settlement of its affairs, &c. But on the 18th of February, 1836, {P. L. 36.) the state of Pennsylvania incorporated a banking company by the same name, in anticipation of the dissolution of the old one—the new company having, with one exception, the same stockholders and capital, the same name and style, and the same capacity, so far as a state institution could have the capacity of a national one. On the 10th of March, 1836, the defendants proposed "to purchase of the Bank of the United States the property of the office at Burlington, as it was upon the 2d day of March, 1836." This contract was perfected on the 1st of April, 1836: *Held,* that it was a contract with the new company.

{See Bellows v. Hallowell & Augusta Bank, Case No. 1,279.}

3. The acts and admissions of one of several joint contractors or promisors, are admissible, for some purposes, as evidence against all. And his acts and admissions while acting as the agent of all in the joint business, relative to anything within the scope of his authority, are binding upon all.

4. If the plaintiff's bill of particulars states his claim to be two particular promissory notes, he is confined to them, and cannot recover upon the preexisting debt or original consideration. Per Prentiss, District Judge.

{See note at end of case.}

5. If a negotiable promissory note is payable to "S. J., cashier, or order," but is not endorsed by him, parol evidence is inadmissible, to show that the bank of which S. J. is cashier, is the real party in interest, so as to permit the bank to recover upon it, without its endorsement by S. J.

{Distinguished in Bank of Newbury v. Baldwin, Case No. 892.}

{See, contra, Commercial Bank v. French, 21 Pick. 486; Barney v. Newcomb, 9 Cush. 46; Eastern R. Co. v. Benedict. 5 Gray, 561; Folger v. Chase, 18 Pick. 63; Bank of U. S. v. Davis, Case No. 915; Blair v. First Nat. Bank, Id. 1,485; Mechanic's Bank v. Bank of Columbia, 5 Wheat (18 U.S.) 326; Baldwin v. Bank of Newbury, 1 Wall. (68 U. S.) 234.}

6. In an action brought by the bank, such a note is not evidence of money had and received to its use, or of an account stated with it.

7. The note, however, having been given to Jaudon for property sold and delivered by the plaintiffs to the defendants, the plaintiffs could, perhaps, surrender and cancel the note, and recover on the original consideration, if the declaration contained a count founded thereon. Per Nelson, Circuit Justice.

{See note at end of case.}

8. If the bank, though not the payee, were the real owner of the note, and there had been an actual accounting with it or its agents, those facts might perhaps, with the note, constitute sufficient evidence to support an action by the bank for money had and received, or on an account stated; but an accounting with third persons, to whom the beneficial interest of the bank in the note had been assigned, in trust for specified purposes, would not.

[See note at end of case.]

9. Facts stated, from which notice to an endorser, of the presentment and nonpayment of a promissory note, will be inferred.

10. Questions of evidence examined, in regard to certain notes alleged to be included in

the purchase by the defendants, and to have been controlled or discharged by the plaintiffs. [See note at end of case.]

[At law. Action by the Bank of the United States against Wyllys Lyman, George P. Marsh, John Peck, and John H. Peck. Verdict was given for plaintiffs. Heard on motion for a new trial. Granted. Thereafter plaintiffs had judgment, which was affirmed by the supreme court in Lyman v. Bank of U. S., 12 How. (53 U. S.) 225.]

In this case, a verdict was taken for the plaintiffs at a former term, subject to the opinion of the court on certain questions reserved at the trial. It appeared that the Bank of the United States, created by congress in 1816, had established a branch or office at Burlington, in Vermont, which was several years in operation, and continued to do business until September, 1835. On the 10th of March, 1836, the defendants made a proposition in writing, "to purchase of the Bank of the United States the property of the office at Burlington, as it was upon the 2d day of March, 1830," for the sum of 5141,777.87, on an estimate made separately of the real estate, the good notes and demands, and the demands forming what was called the suspended debt. The proposition was accepted on the 15th of the same month; and on the 1st of April the contract was carried into execution, the defendants executing four promissory notes for the sum of 535,500 each, payable in one, two, three, and four years, and taking a conveyance and delivery of all the property, except certain bills or notes which had been paid into the office before the sale was consummated. In consequence of some of the bills or notes having been so paid, and to make up an even amount, the sum of 510,020 was paid in cash to the defendants, so as to make the exact sum of 8142,000, the amount of the four notes. The other facts in the case, as well as the questions reserved, will sufficiently appear from the opinions of the judges.

Samuel S. Phelps, for plaintiffs.

Rufus Choate and Asahel Peck, for defendants.

PRENTISS, District Judge. The declaration in this case contains two counts, one for money had and received, and the other on an account stated. In support of the counts two promissory notes were given in evidence, with several accounts current, letters of correspondence, and other documents and testimony. Out of the evidence so given, various questions have arisen, some involving the admissibility, and others the effect or sufficiency of the evidence. The questions possess different degrees of importance, both intrinsically and in their bearing upon the case; and I shall notice them in such order and manner, as will enable me to dispose of them with as much brevity and as little repetition as practicable, entering no further into the facts than may be necessary to present, fully and Intelligibly, the grounds of decision upon each particular point.

1. The plaintiffs were incorporated as a banking company, by the name of the Bank of the United States, by an act of the state of Pennsylvania, passed February 18th, 1836, [P. L. 36.] The contract which is the origin or foundation of the principal claim in question,

was made sometime after the 10th of March, and was carried into execution on the 1st of April, in the same year. The precise day of the organization of the plaintiffs as a banking company not being shown, it is objected that it does not appear that they were organized, and competent to act as a corporate body, at the time the contract was made. To this, it seems to me, an answer was given by the counsel for the plaintiffs, which is quite sufficient. The act of incorporation having provided, that notice of the organization should be given on or before the 3d of March then next ensuing, and the bank being found in operation afterwards under the act, it is to be presumed that it was organized as early as the time prescribed, which was of course before the making of the contract.

2. It appears that the Bank of the United States, incorporated many years before by an act of congress, {Act April 10, 1816; 3 Stat 266,} although it ceased to have any power to carry on banking operations after the 3d of March, 1836, continued in existence two years thereafter, for the purpose of suits, for the final settlement of its affairs, and for the sale and disposition of its estate and effects. As that company established the branch at Burlington, and was in existence at the time the contract for the purchase of the property of the branch was entered into, it is insisted that it must be taken, in the absence of direct proof showing it to be otherwise, of which it is said there is none, that the contract was made with that company; and consequently, that the plaintiffs, as to one and much the most considerable of the claims in question, are mere strangers, for anything that appears, without right or interest.

But it is to be observed, that the company established by the act of Pennsylvania, was established in anticipation of the dissolution, so far as banking powers were concerned, of the company established by the act of congress; the new company having, with one exception, the same stockholders and capital, the same name and style, and the same capacity, so far as a state institution could have the capacity of a national institution. It was the substitution of a new charter under the state government in place of the old charter under the general government, so that the banking operations which would cease under the one, might be continued, without intermission or Interruption, under the new powers given by the other. Accordingly, the new company, as we have seen.

was to come and did come into existence, as an organized corporate body, before or simultaneously with the termination of the banking powers and operations of the old company; and all the estate and effects of the old company were transferred to the new. The particular time of the transfer, it is true, does not appear. But it is obvious that it would naturally follow the organization immediately, In order to fulfil the purpose in view; and one of the witnesses states expressly that it included the estate and effects sold the defendants. This, therefore, connected with the bringing of the action and possession of the written evidences of the debt by the plaintiffs, is sufficient and very decisive evidence that the contract was in fact made with the new company.

3. To establish several material facts in the case, various letters, acts, and admissions of John Peck, one of the defendants, were given in evidence. This evidence, it is said, was inadmissible, at least so far as it concerns any of the defendants but Peck himself. The objection to it rests upon the ground that though the defendants were joint purchasers of the property, and gave their joint notes for the price, they were not partners, at least in such a sense as to make the acts and admissions of one evidence against the others. Admitting that the defendants are to be regarded, not as partners, properly and strictly speaking, but only as joint contractors or promisors, still the evidence, for some purposes, was undoubtedly admissible. It is a familiar rule of law that an acknowledgment by one of several joint debtors, either by word or act, is evidence to take the debt out of the statute of limitations as to all. Thus, "payment by one," says Lord Mansfield, in Whitcomb v. Whiting, 2 Doug. 652, "is payment for all, the one acting, virtually, as. agent for the rest; and, in the same manner," he adds, "an admission by one is an admission by all." This principle, however, does not extend to the creation of a new substantive obligation, or a new additional liability; nor to anything which is necessary to be done by the party claiming, to perfect or give effect to a conditional or imperfect obligation or liability—such, for instance, as a demand of payment and notice of non-payment of a promissory note endorsed by several joint payees. There, the admission of one of the endorsers, either as to the demand or notice, is probably no evidence against the others; especially so, as notice is necessary to each. But, payment by one on a note, in pursuance of an existing joint liability, or an admission by one that the note is unpaid, or that a particular balance is due upon it, whether by stating an account or otherwise, is good evidence against all, in an action for the money due upon the note. That neither creates a new contract nor enlarges the preexisting obligation or liability, but merely shows that that obligation or liability has not been discharged, or discharged but in part only.

But, however that may be, if it sufficiently appears that Peck was the agent to take care of the joint concern, and transact the business growing out of it, in behalf of the other defendants as well as himself, his acts and admissions while so acting, relative to any thing within the scope of his authority, are, undoubtedly, In law, the acts and admissions of all

and binding upon all. Now, it very fully appears that the business was in fact conducted and transacted wholly by and through Peck. The original proposition for the purchase was signed, "John Peck for himself and others;" and this was ratified by the others, by their joining in the notes and completing the contract in pursuance of that proposition. As at the first, so throughout to the last, Peck acted as the ostensible manager, without the appearance, from any thing that is disclosed in the evidence, of any objection or interference on the part of the other defendants. It is obvious that it would be quite inconvenient, in a joint concern of such a nature, for all to take part personally in the correspondence, or to sign every letter and paper that passed, or for notices, accounts current, and other necessary communications, to be sent to and answered by all. It is usual, In such cases, to commit the transaction of the business and the charge of the correspondence to some particular one, and have it done by and through him for all. And where It is done by and through one, professedly for and in behalf of all, for a series of years, as in this case, without objection, all residing in the same neighborhood, and having daily intercourse and communication with each other, the assent of the others, they having adopted the first act, is to be presumed from their silence and acquiescence.

4. The bill of particulars filed by the plaintiffs having stated their claim to be two promissory notes particularly described, it is made a question, and it becomes necessary to decide, whether it was competent for them to give evidence of and recover upon the preexisting debt or original consideration. According to the general rule of practice, as established by the authorities, It seems that the particulars are considered and treated as incorporated with the declaration, and the plaintiff is not allowed to give any evidence out of them. Thus, it has been held, that where the particular of the plaintiff's demand was a promissory note only, and on being produced it appeared to be improperly stamped, so that it could not be given in evidence, the plaintiff, though he might otherwise have gone into the consideration of the note, was precluded therefrom by his particular. Wade v. Beasley, 4 Esp. 7; Brown v. Watts, 1 Taunt. 303; 1 Tidd, Pr. 537. On these authorities, which are obviously directly in point, the plaintiffs in the present case were confined, by the terms

of their bill of particulars, to the two notes specified, and were not at liberty to proceed upon the original consideration or cause of action.

5. The note first specified in the bill of particulars, and first given in evidence, if the plaintiffs could maintain an action upon it in any form, was undoubtedly admissible under either count in the declaration—not only under the count for money had and received, but also, being a liquidated debt, under the count on an account stated. To the admission of the note, however, an objection was made, arising upon the face of the instrument, which presents the principal and most important question in the case.

The note is signed by the defendants, and is in this form: "We jointly and severally promise to pay to Samuel Jaudon, Esqr., cashier, or order, &c." On the one side it is insisted, that Jaudon Is the payee of the note; that the legal interest and right of action are in him; and that the plaintiffs, the note not being endorsed by Jaudon, can neither maintain an action directly upon it in their own name, not an action in any form in their own name to recover the money due upon it On the other side it is "urged, that as it appears from the evidence in the case, that the note was given for a debt due the plaintiffs, and that Jaudon was their cashier, acting merely as their agent in taking the note, having no personal interest whatever in it, the plaintiffs are to be regarded as the real payee of the note, and, as such, may sue and recover the money in their own name. Upon this question I might content myself with a general statement of the conclusion at which I have arrived, with a summary reference to authorities and reasons; but the nature and importance of the question seem to entitle it to more full and particular consideration.

It seems now to be settled in England, whatever difference of opinion there may have formerly been in regard to it, that parol evidence is admissible to show, that a person not named in a written simple agreement is the real party to it, either for the purpose of charging him upon it, or enabling him to take the benefit of it, as the case may be; but not, however, to discharge a party who has contracted in his own name. Thus, the real principal, or a partner, from or to whom the consideration has moved, may sue or be sued upon a written simple agreement, though he do not appear upon its face to be a party to it. This was so decided in the court of exchequer, in the case of Beckham v. Drake, 9 Mees. & W. 79, afterwards affirmed in the exchequer chamber, in Drake v. Beckham, 11 Mees. & W. 315. But, however clear, undoubted, and now well established this doctrine may be as to mere written simple agreements, the question is, is it applicable to negotiable instruments.

In a very early case, (Evans v. Cramlington, Garth. 5, affirmed in the exchequer chamber, in Cramlington v. Evans, 2 Vent 307.) it was determined, that where a bill Is payable to A. for the use of B., the right of action and of transfer is only In A., he having the legal interest, and B. only the equitable or beneficial interest. This decides that the person named as the payee in a bill, and not the person for whose use or benefit it is made

payable, is the party entitled to sue upon it. If this be so where the trust Is expressed and declared upon the face of the bill, the case must be much clearer and stronger where neither the trust, nor the name of the party having the beneficial interest, appears at all upon the instrument The observations of Buller, J., in Fenn v. Harrison, 3 Term It 757, show very plainly, that, in his opinion, no person could be considered as a party to a bill, unless his name, or the name of his firm, if a partner, appeared upon it. In Siffkin v. Walker, 2 Camp. 308, where a person not appearing to be a party to a promissory note, was joined as a defendant in an action upon it, Lord Ellenborough said, that a note made and signed by one in his own name", could not be treated as the note of him and another person neither mentioned nor referred to. And in Emly v. Lye, 15 East, 7, the same eminent judge, with the concurrence of all his learned associates, held, that on a bill of exchange drawn by one only, it could not be allowed to supply by intendment the names of others in order to charge them; and that the plaintiff, if he would rest his claim on the bill, must confine it to the party who signed the instrument in the case of Beckham v. Drake, to which I have before referred as settling the general rule as to written simple agreements, Lord Abinger said: "Cases of bills of exchange are quite different in principle from those which ought to govern this case. By the law merchant, a chose in action is passed by endorsement, and each party who receives the bill is making a contract with the parties upon the face of It, and with no other party whatever. That is a class of cases quite distinct in its nature from the present." And Parke, B., said, that where a contract in writing, not under seal, was made in another name than that of the real principal the real principal could sue and be sued. "But," he added, "the case of bills of exchange is an exception, which stands upon the law merchant; and promissory notes another, for they are placed on the same footing by the statute of Anne. In neither of these can any but the parties named in the instrument, by their name or firm, be made liable to an action upon it" Thus It appears, that negotiable instruments, according to these authorities, are exceptions to the rule which governs written simple agreements In general, and that this, for supposed good and sound reasons, is the established doctrine in England.

The same doctrine, I may safely say, prevails in general in this country, though there

may have been, now and then, an occasional departure from it There can be little doubt, I think, when we refer to the case of Van Ness v. Forrest, 8 Cranch, [12 U. S.] 30, how the rule of law on the subject is understood in the national court. There a note was executed to Joseph Forrest, president of the Commercial Company, for merchandize belonging to and sold as the property of the company. On the question whether an action could be maintained upon the note in the name of Forrest, Marshall, Chief Justice,[3] said: "The suit is instituted on a promissory note given, not to the company, but to Joseph Forrest, president of the company. Although the original cause of action does not merge in this note, yet a suit is clearly sustainable [maintainable] on the note itself. Such suit can be brought only in the name of Joseph Forrest It can no more be brought in the name of the company, than if It had been given to a person, not a member, for the benefit of the company. The legal title is in Joseph Forrest, who recovers the money in his own name as a trustee for the company."

To notice particularly all the decisions in the various state courts, having a bearing upon the question one way or the other, would not only take up much time, but be assuming an unnecessary task. I have looked, however, into a very considerable number of these local decisions, and it will be sufficient for every useful purpose, without going further, to state the purpose of such as have been made in the courts of some of the older and more commercial states. The decisions in the courts to which I refer present three classes of cases. The first is, where a promissory note is expressed to be payable, for instance, to A. B., agent of C. D., both agent and principal being named in the note. In such case it is decided, that the principal cannot sue, though named. It is held that a note payable to a person by name, though he is described therein as the agent of another, is a note payable to the person so described as agent, and that a suit upon it must be in his name, or in the name of his endorsee. The second class is, where a promissory note is made payable to the cashier of a particular bank, giving the name of the bank without the name of the cashier. In such case, it is determined, and very rightly, as I think, that the interest and right of action are in the principal who is named, rather than in the agent who is not named. The third class is, where a bill or note is made payable to, or is signed by, a person designated as agent generally, as A. B., agent, without naming the principal. In such case, it is held that the simple addition of agent, and of course the simple addition of cashier, without any specification whatever of the name of the principal, will not authorize the admission of parol testimony to show who the principal is, and make him a party to the instrument.

There may be, and Indeed are, decisions in some of the state courts, not entirely reconcilable with the doctrine of the authorities which have been cited and referred to; but however much such local decisions may be entitled to consideration and respect, on account of the source from which they proceed, they can have no influence upon the ques-

tion before us, so far as they are at variance with the general prevailing rule of commercial law. In suits in the courts of the United States, as is laid down in Swift v. Tyson, 16 Pet {41 U. S.} 1, the true interpretation and effect of contracts and other instruments of a commercial nature, are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.

Upon the whole, it appears to me that the true rule of law, as deducible from the adjudged cases, American as well as English, is, that no person, although in fact a principal or partner, can sue or be sued upon a bill or negotiable note, unless he appears upon its face to be a party to it A promissory note, according to the expression of very great judges, partakes in some measure of the nature of a specialty, importing a consideration and creating a debt or duty, by its own proper force. Being assignable, and passing by mere endorsement, it is necessary that the parties to it should appear and be known by bare inspection of the writing; for, it is on the credit of the names appearing upon it that it obtains circulation. It is for these qualities and on these considerations, that it is distinguished from written simple contracts in general, and made subject to a different rule.

The note in question here is a perfect instrument, without ambiguity in form or purpose, and must have operation and effect according to the terms in which it is expressed. It is made payable to "Samuel Jaudon, Esqr., cashier, or order." The promise therefore is to pay him, or the person to whom he shall order it to be paid; and it would be repugnant to the terms of the instrument to allow the Bank of the United States, or any one else without his order, to demand and enforce payment of it by suit The bank is not named in the note at all, either as principal or otherwise; nor can it be inferred from anything contained in the note, that it was made even in trust for or for the benefit of the bank, or that the bank has any interest whatever in it. To let in parol evidence to show that the bank is the real principal, and hold that it may sue upon the note as such, would be to subject negotiable paper to the very uncertainty the law intended to avoid. It would be putting promissory notes on the footing of other written simple contracts, and prostrate entirely the distinction which sound policy, as well as the nature and purpose of negotiable securities, demands should

be kept up between the two classes of cases.

As the plaintiffs cannot be regarded as the payee of the note, it is almost superfluous to say that the note is neither evidence of money had and received to their use, nor evidence of an account stated with them. The note creates no privity whatever between them and the defendants; and we have already seen that, by the bill of particulars, they are limited to the note, and cannot go upon the antecedent cause of action, supposing they might otherwise do so under the declaration.

It is insisted, however, that there is evidence, aside from the note, of an actual stated account, showing the balance due, and that that, with the note, is sufficient to enable the plaintiffs to recover under either count. This might be so if the plaintiffs, though not the payees, were the real owners of the note, and there had been an actual accounting with them, personally or through their agents. But it appears that the accounting, whatever there was, was with Robertson and others, to whom the beneficial interest of the bank in the note, with the other effects of the bank, had been assigned in trust for certain purposes, and who, for aught that appears, are still owners of the property in the note. There is no evidence that the account of April, 1840, which was prior to the assignment, was ever delivered or sent to the defendants; and as to the accounts of April, 1842, and November, 1843, each is stated and rendered by the assignees, and each states the balance as due to them. The letter to Peck enclosing the account of April, 1842, is signed "Herman Cope, agent for J. Robertson et al., trustees," and states the account to be an account with them. The letter to Peck, of May, 1844, is signed in the same way, and speaks of the account of November, 1843, as an account with the same persons. The accounts being stated and rendered as accounts with the assignees, to whom the property in the note belonged, I do not well see how the accounts can be treated as stated accounts of money due and owing upon the note to the plaintiffs, or as evidence of indebtedness to them. Even viewed as implying a promise which would follow the right of action on the note, or simply as evidence of indebtedness on the note generally, it would not help the plaintiffs; for, as we have already seen, they are not the payees of the note and have no right of action upon it.

If there had been an account stated by the defendants directly with the plaintiffs while owners of the note, recognizing their right to be accounted with for the note, or such an admission of their title to the money due upon it as would amount or be equivalent to an express promise to pay them, so that a cause of action might be considered as having accrued to and vested in the plaintiffs before the assignment, I do not mean to say that, in such case, the assignees might not sue and recover upon such cause of action in the name of the plaintiffs. How that might be it is unnecessary to inquire, because the evidence presented, in any just view of it, falls short, as it appears to me, of making out any such case.

6. The other note given in evidence is the promissory note specified in the bill of particulars, executed by Lyman & Cole to the defendants, and by them endorsed to the plaintiffs. The plaintiffs being endorsees, and the defendants endorsers, the note was unquestionably admissible in evidence under the count for money had and received, if not under the other count But the defendants can be chargeable only as endorsers; and this would be so, without any reference to the limited terms of the bill of particulars, whether the transaction be treated as a discount, and therefore a purchase of the note, or as a loan of money, taking the note in payment, or even as a taking of the note in payment of an antecedent debt. Viewed in either light, due presentment for payment and due notice of non-payment were indispensable to create any liability on the part of the defendants. There is proof sufficient of due presentment of the note for payment, but there is no direct proof of notice of non-payment The only question, therefore, is, whether there is evidence from which notice may be inferred.

It has been often held, that part payment, a promise to pay, or an acknowledgment of liability by the endorser after the note becomes due, is prima facie evidence, not only of notice, but of presentment. Now, what are the facts in relation to the note in question? We have already seen that there is sufficient presumptive evidence that Peck was the agent of the defendants, acting for himself and the others, and that his acts and admissions, relating to the joint interest, within the scope of his presumed authority, which of course extended to this note as a part of the joint concern, are to be considered as the acts and admissions of all. It appears that after the note became due, several payments were made upon it; but as it does not appear but that these payments were made by the makers of the note, they will be passed by. What is material to be noticed is, that after the note had been duly protested for non-payment, it was charged and kept in a separate account, and that Peck, on a proposal to him to have it transferred to the general account, requested that it might continue, for the sake of convenience, to remain charged and kept, as it had been, in a separate account. In May, 1842, an account of this note, together with an account of the other note, separately stated, was rendered to Peck. He acknowledged the receipt of both accounts in June following, making no objection whatever to the account of this note, nor indeed any objection to the account of the other note, except that credit was not given the defendants for certain demands,

called the Truesdell and Burrows notes, for which they claimed an allowance. Now, is not the request to have this note remain charged and kept, as it had been, in a separate account, coupled with the fact of an account so charged and stated being rendered, received, and retained without objection, an acknowledgment of liability to pay the note, and can it be at all material whether the acknowledgment was before or after the assignment, or whether to the plaintiffs or the assignees?

I have said that no objection was made to the account of this note; and such, I think, is the just inference from the letter of Peck. But if the objection was intended to apply to the account of this note as well as to the account of the other note, it was not an objection to the justness or correctness of any Item in either account, but merely to the amount of the balance claimed. The objection was that a certain credit had not been given, thereby impliedly admitting that the note was a proper item in the account. In Campbell v. Webster, 2 Man. G. & S. 258, where the defendant, in answer to an account sent him by the plaintiff, admitted it to be all correct, except that the plaintiff had not credited him for a certain claim he had, and said he would pay the bill mentioned in the account If the plaintiff would allow that claim, it was held that this amounted to an admission of liability to pay the bill, a counter-claim being made the only objection to paying; and that an admission of liability amounted to an admission that all had been done which was requisite to constitute such liability. This is decisive, that the setting up, in the present case, of a claim for a credit as the only objection, with total silence as to the want of notice, is an acknowledgment of liability to pay the note in question, and thereby an admission that notice had been given.

7. The only remaining question in the case arises upon the claim set up by the defendants on account of certain demands, called the Truesdell and Burrows notes, alleged to have been included in the purchase from the plaintiffs, and to have been controlled or discharged by them.

The circumstances attending the Truesdell debt appear to be these: On the 10th of January, 1835, resolutions were passed by the directors of the branch bank, recommending a compromise of the debt, and an acceptance of an offer which had been made by the Truesdells to pay fifty per cent, as a composition. The resolutions were transmitted the same day to the parent bank, and the compromise so recommended was approved of by the parent bank on the 16th of the same month. The return made by the branch to the parent bank on the 1st of June thereafter, contains the debt in the list of the suspended debt, marked as "desperate," that is, of little or no value. The same return states that the compromise had been carried into effect. So it appears that the debt had not only been marked and returned as bad and hopeless, as early at least as the 1st of June, 1835, but had in fact then been compounded, and was so stated in the return, by the payment of fifty per cent. The debt, notwithstanding, still continued on the books of the branch bank,

through some inadvertence or negligence, in the list of suspended debts, up to the 2d of March, 1836, to which time the contract of purchase had relation; the debt never having been transferred, as it is said it should have been, to the general loss account. The inference from all this is, that though the debt stood on the books, apparently as a subsisting debt for a balance of fifty per cent., it was not in fact a subsisting debt, but had been cancelled and discharged. If this fact was known to the defendants at the time of the purchase, the circumstance of the debt continuing on the books in the list of suspended debts can be of no real importance. It appears that two of the defendants, Peck and Lyman, acted as directors of the branch, from some time in 1834 to September, 1835, when the branch office closed. This of course included the time when the resolutions referred to were passed, and the compromise in pursuance of them was carried into effect These two defendants, therefore, one of them being, as we have seen, the agent in making the purchase, must be presumed to have had knowledge of the facts in relation to the debt; and, if so, it would seem to be very clear that the defendants, especially as the purchase of the suspended debt was in the lump, on an estimate of its value in gross, and at a great discount on that estimate, cannot make the debt in question the foundation of a claim.

The other debt, the Burrows debt, consisting of two notes, also stood on the books of the branch, in the list of suspended debts, apparently a debt due, at the time of the contract of purchase. It appears that a compromise of this debt had been agreed upon by and between the parent bank and Burrows, and that the compromise was carried into effect on the 1st of May, 1835, by giving up the two notes to Burrows, and taking his note for 33 1/3 per cent, of the amount. Burrows failed to pay the note so given by him, and the compromise, by its own terms, became null and void; but the two notes which had been given up were retained by him. In the return made by the branch to the parent bank on the 1st of June, 1835, before spoken of, this debt is mentioned, in a memorandum at the bottom, as having been compromised at 33 1/3 per cent, which memorandum is signed by Mr. Lyman, one of the defendants, as director. The defendants, therefore, are to be taken as having full knowledge of the condition and circumstances of the debt at the time of the purchase. They purchased the claim, whatever it was, in the state in which it then existed, as they purchased the other claims composing the lump

of the suspended debt. For anything that appears, the claim exists in the same state now as it did then. The plaintiffs have not discharged it, interfered with it in any way, or done anything to deprive the defendants of any right or benefit they could claim in or out of it under the purchase. The plaintiffs sold the debt as it was, as they sold the rest of the suspended debt, without any guaranty or representation whatever on their part; and the appearance of it, as presented by the books, could not have deceived or misled the defendants, two of them having officiated as directors of the branch at the time the compromise was effected. It must be presumed that these ftwo defendants, one of whom, as before remarked, was the agent in making the purchase, knew the terms of the compromise, and all that had been done in pursuance of it. I am obliged, therefore, to say, that I see no legal grounds on which this claim, any more than the other, can be sustained.

Having thus disposed of all the questions raised in the case, I have only to say in conclusion, that the result from the whole is, that, for the reasons given on some of the points reserved, the verdict, in my opinion, [and such is the result of the opinion of the judge who presided at the argument,][4] ought to be set aside, and a new trial granted.

NELSON, Circuit Justice. 1. The plaintiffs cannot recover the amount of the large note made by the defendants on the 1st of April, 1836, and payable to Samuel Jaudon, four years after date, because they do not show a legal title to the same. That is in Jaudon. The addition of "Cashier" is but a description of the person. I find no authority which will authorize the admission of parol evidence for the purpose of showing that the note arose out of a transaction between the parties to this suit, in which Jaudon acted as agent, and took the note in his own name for the benefit of the bank. The parties to the note must appear upon its face. If the name of the principal appears there, that will be sufficient, though the note is taken in the name of his agent. It is then, in contemplation of law, taken in the name of the principal, and he is the payee. Any other rule would very much embarrass the negotiability of this species of commercial paper.

2. The legal interest in the note being in Jaudon as payee, the note is evidence under the money counts only of money had and received by the defendants from him, and not from the plaintiffs, and is not available to sustain the count for money had and received. If the declaration had embraced a count founded on the original consideration, it may be that on cancelling the note the plaintiffs could have sustained the suit. It is a note given to Jaudon for property sold and delivered by the plaintiffs to the defendants; and I do not see but that upon surrendering it the plaintiffs might have gone on the original consideration, the same as if the note had been given to themselves.

3. The plaintiffs cannot recover on the count for an account stated. The accounts were rendered to Robertson and others, assignees and owners of the demands by virtue of the assignment of the 14th of September, 1840. The accounts were stated between them and the defendants, and any promise, express or implied, arising therefrom, or to be predi-

cated upon the rendering of such accounts is a promise to Robertson and others, not to the plaintiffs. No foundation is laid for implying a promise to the latter. Robertson and others were not their agents. They were owners, acting for themselves, as trustees for the creditors. The plaintiffs are neither the legal nor beneficial owners of the note.

4. The plaintiffs are entitled to recover in their name the balance due on the small note of 85,000, made by Lyman & Cole and endorsed by the defendants. The proofs in the case are full to show that John Peck acted as the agent of the other defendants throughout the transaction, both in negotiating the purchase, and in conducting and arranging the payments subsequently. This being so, his acts and admissions afford satisfactory evidence that all the defendants were properly charged as endorsers of the note. Payments were made and arrangements entered into, wholly irreconcilable with the idea that they or any of them had become discharged from their obligation by the laches of the holder or otherwise. The rendition of the accounts, also, including this note, and the claiming of a balance without any objection being made to this item, lead to the same conclusion.

5. The debt of Truesdell & Son was compromised conditionally at the branch office at Burlington for 50 per cent, on the 10th of January, 1845; the transaction was approved by the parent bank on the 10th of January; and the amount was paid before the purchase of the assets of the branch; all which was known to some if not all of the defendants at the time.

The S. E. Burrows debt of §2,766.57, including interest, was compromised on the 11th of April, 1845, for 33 1/3 per cent, and his note was taken for that amount, §922.19, on the 1st of May thereafter, and the original paper given up. This was the Burlington debt, and the transaction was well known at the branch office. The compromise, as it regarded other debts due the parent bank, was afterwards annulled on account of the failure of Burrows to carry it into effect, and another was then effected with the bank; but it had nothing to do with the Burlington debt. That remained as it stood at the time of the purchase by the defendants. The defendants, or some of them, must have been

fully acquainted with the situation of these debts, at the time of the negotiation for the purchase; and the bank has not interfered or changed the condition or character of them since. There was no guarantee of the amounts due; and as the demands had accrued at the Burlington office, where two of the defendants were directors, they, it is to be presumed, knew more about them, in every respect, than the officers of the parent bank.

6. The proof is sufficient to show that the purchase was made by the defendants from the bank chartered by the State of Pennsylvania, and not from the old bank.

For these reasons, I think there should be a new trial, with costs to abide the event. New trial granted.

This decision was affirmed by the supreme court at the December term, 1831. (See {Lyman v. Bank of U. S.} 12 How. {53 U. S. 225.}

{NOTE. This judgment was affirmed on writ of error by the supreme court, Mr. Justice Nelson delivering the opinion, in which it was held that the bank having become insolvent, and having made an assignment of its effects to trustees for the benefit of its creditors, it should be allowed to sue in its own name for the benefit of the creditors; the case being the same as if the law had permitted the suit to be brought, and the same had been brought in the name of such trustees.

{Although the bank had endorsed a note among its other assets to its trustees, yet. under the circumstances, it could maintain a suit upon the note, because, where the party who is a holder of a note has transferred it for the purposes of collection, and the same is not paid, but is found in the possession of the original holder, he can recover, as he is remitted to his original rights notwithstanding the endorsement, and if the note is not paid the plaintiff may give it up, and recover upon the original consideration.

{Before the defendants became indebted to the bank, the bank had made a compromise of a certain claim, which, among, others, was the subject of a sale and purchase by the defendants. Two of the defendants had knowledge of the conditions of this compromise, and their knowledge must be considered as extending to the other defendants. It was a question of the jury to determine what the defendants purchased. Lyman v. Bank of U. S., 12 How. (53 U. S.) 225.}

[1] {Reported by Samuel Blatchford, Esq., and here reprinted by permission.}

[2] {The judgment of the circuit court upon a subsequent trial of this cause was affirmed in 12 How. (53 U. S.) 225.}

[3] {20 Vt 666.}

[4] {From 20 Vt 666