Case No. 4,169.

DUNLOP v. SILVER et al.

{1 Cranch, C. C. 27; 1 Cranch (5 U. S.) Append. 367.}[1]

Circuit Court, District of Columbia. July Term, 1801.

NEGOTIABLE NOTES—ACTION AGAINST REMOTE INDORSER—NOTICE—PAYMENT—EVIDENCE—COMPARISON OF HANDWRITING.

1. In Virginia the indorsee of a promissory note may recover at law against a remote indorser; and it is not necessary that he should have given the defendant notice of the non-payment by the maker, nor of his insolvency. If the holder receive an inland bill for the money due by the note, it is a discharge of the note unless the parties otherwise agree.

{Cited in Riddle v. Mandeville, Case No. 11,807.}

{See, contra. Mandeville v. Riddle, 1 Cranch (5 U. S.) 290.}

2. Comparison of handwriting is admissible evidence in civil cases.

Assumpsit by an indorsee against a remote indorser of a promissory note.

James Cavan made a promissory note by which he promised to pay to {William} Silver et al., or order, sixty days after date, six hundred dollars for value received, negotiable at the Bank of Alexandria. Silver et al indorsed the note to Downing and Dowell in these words: "Pay the contents to Downing and Dowell." Downing and Dowell indorsed "Pay the contents to John Dunlop or order." Dunlop brought suit against Cavan, in due time, as the jury thought, and recovered judgment and sued out execution, upon which Cavan was taken, and took the oath of an insolvent debtor. It was proved on the trial that Cavan had given Dunlop an order on some person in Philadelphia for the money due on the note, which order was returned protested and delivered back to Cavan. The declaration had two counts,—1. A special count stating the making and indorsing the note, the suit, judgment and execution against Cavan, and his insolvency. 2. Indebitatus assumpsit for money had and received to the plaintiff's use. The plaintiff offered to prove the handwriting of one of the indorsers, by comparing it with the signature of the bail-bond filed in this case; and contended that as it was a bond taken by a sworn officer and filed in court, it could not be denied.

This evidence was admitted by KILTY, Chief Judge, and MARSHALL, Circuit Judge. CRANCH, Circuit Judge, contra, because the bond itself was not proved to be signed by the defendant.

On the trial four points were made on the part of the defendants:—1. That notice of Cavan's refusal to pay was not given by Dunlop to Silver et al. 2. That no notice was given by Dunlop to Silver et al. that suit had been brought against Cavan and that he had taken the oath of an insolvent debtor. 3. That an action at law will not lie by an indorsee

against a remote indorser. 4. That the debt due by the note was discharged by Dunlop's taking an order on Philadelphia.

As to the 1st and 2d points the court was of opinion (under the authority of the case of Lee v. Love, 1 Call, 497, and in conformity to what was understood to be the practice of Virginia,) that notice was not necessary. That the liability of the indorser did not arise until the maker had been sued and proved to be insolvent upon the execution. That notice is of no use to the indorser, for he cannot be called upon until the maker's insolvency is proved; and that the maker's simple refusal to pay was an immaterial fact.

As to the 3d point it was agreed that the verdict of the jury, if for the plaintiff, should be subject to the opinion of the court upon the question whether an indorsee can maintain an action against a remote indorser of a promissory note payable to order.

Upon the 4th point the court directed the jury that if they should be of opinion from the evidence that a draft on Philadelphia was received by Dunlop for the money due by the note, it should be considered as a discharge of the note, at least as to the indorsers, unless it should appear to the jury from the whole evidence in the case that there was an agreement of the parties at the time that it should not be a discharge, or only a discharge if paid.

A verdict was found for the plaintiff, and upon argument on the point reserved, it was contended by.

Mr. Jones, on behalf of the defendants,

That there was no privity of contract between an indorsee and the remote indorser, that the custom of merchants does not apply to bonds and promissory notes, and perhaps not to inland bills. Kyd, c. S, p. 175; Lambert v. Oaks, 1 Ld. Raym. 443; Mackie's Ex'rs v. Davis, 2 Wash. (Va.) 219.

Swann, contra.

No privity of contract is necessary on either count.

If the paper is negotiable the obligation goes along with it Even the money due upon a respondentia bond has been held to be assignable with the consent of the obligor, and the assignee has recovered in his own name. Fenner v. Meares, 2 W. Bl. 1269. The action for money had and received does not depend upon privity. If a man gets money into his hands to which I am in equity entitled, I may have the action. Moses v. Macferlan, 2 Burrows, 1012; Tatlock v. Harris, 3 Term R. 174; Grant v. Vaughan, 3 Burrows, 1516; Ward v. Evans, 2 Ld. Raym. 930.

KILTY, Chief Judge, and CRANCH, Circuit Judge, were of opinion that the action

for money had and received was supported. MARSHALL, Circuit Judge, contra.

Judgment for the plaintiffs. Overruled by the supreme court of the United States, in Mandeville v. Riddle, 1 Cranch {5 U. S.} 290.

See the grounds of this opinion at length In 1 Cranch {5 U. S.} Append. 367.

[1] {Reported by Hon. William Cranch, Chief Judge.}