Case No. 4,860.

FIRST NAT. BANK OF ASHLAND v. CLEAVER ET AL.

{4 Wkly. Notes Cas. 480.}

Circuit Court, E. D. Pennsylvania. Oct. 20, 1877.

NEGOTIABLE INSTRUMENTS—ACCOMMODATION INDORSER—PAROL EVIDENCE.

{An accommodation indorser of renewal notes given to a bank is entitled to show by parol that he indorsed the notes only upon the cashier's assurance that the bank owed a considerable sum to the maker, who was also engaged in rendering it services, all of which should be set off against the notes, so that defendant would be held for nothing, and that the indorsement was required only because the bank wanted two-name paper.}

{This action was brought by an indorsee of promissory notes against the indorser. The case was heard upon a rule to open the judgment}

The following facts appeared: In the absence of defendants' attorney, in the summer vacation, the defendants, without legal advice, made and filed their own affidavits, and judgment was given for plaintiff, for want of sufficient affidavits of defence. The court subsequently permitted supplemental affidavits of defence to be filed, which set forth that at the time the notes in suit (which were renewal notes) were indorsed, the defendant, who was on the original notes as an accommodation indorser, refused to indorse the said renewal notes, now sued on. He was thereupon assured by the plaintiff's cashier, that there was due by the plaintiff to the maker a considerable sum, which the cashier then agreed should be set off against the amount of the notes. He further stated that the maker was from time to time rendering services to the plaintiff, and that the value of such services should be set off against the balance of the notes; so that defendant should not be held liable for any part of the notes by plaintiff, but the latter wished to have two-name paper; and that it was upon this express understanding that the defendant indorsed.

R. Schick, for plaintiff.

The affidavit must be read most strongly against the party making it The promise of the cashier, as stated in the affidavit, was without consideration and void. He had no authority to make such a stipulation.

(McKENNAN, Circuit Judge. Was not the alleged agreement of set-off the real consideration and inducement?)

The facts alleged cannot be shown by parol to contradict the writing.

(McKENNAN, J. If the oral agreement of

set-off made by the plaintiff's agent were the consideration of the indorsement would not a use of the indorsement by the plaintiff, contrary to the stipulation of set-off, be such a fraud on the defendant as to enable him to file a bill to restrain an action at law by the plaintiff against him?)

As a matter of fact the maker was indebted to the plaintiff largely in excess of the note, for another account, and the cashier had no right to agree to apply the set-off against this debt

(McKENNAN, J. Granted that position as between the maker and the plaintiff, but how does it alter the defendant's equitable right, as between himself and the plaintiff, to have the set-off made as agreed upon?)

A. Sidney Biddle and M. P. Henry (with whom were James and Bartholomew, of Schuylkill county), contra, were not called on.

THE COURT (McKENNAN, Circuit Judge, and CADWALADER, District Judge) ordered that the judgment be opened, and that the case be tried before a jury.