

Case No. 7,133.  
[1 Dill. 311.]<sup>1</sup>

JACKSON v. BURKE.

Circuit Court, D. Nebraska.

1871.

STATUTE OF LIMITATIONS.

As to the right of creditor to apply payments so as to prevent the bar of the statute of limitations.

Action brought in 1870, on eleven promissory notes, made in Illinois, by the defendant to plaintiff. These notes became due in 1857. Each of the notes contains an indorsement of a partial payment under the date of April 1, 1866, a date within five years of the time when the suit was commenced. Plea: statute of limitations. The statute of Nebraska provides that actions on notes shall be barred in five years, but adds, that "when any part of the principal or interest shall have been paid an action may be brought in such case within five years after such payment." On the trial the evidence tended to show that the notes in suit were made for the same consideration, and at the same time. In 1866, it appeared that the defendant went to Illinois, and left with the plaintiff, a resident of that state, a draft on St. Louis for \$475; with directions to pay \$240 to two other persons, and to apply the balance on the debt or notes due the plaintiff. The plaintiff paid those two persons as directed, and then indorsed the balance in equal amounts upon the eleven notes in suit, and these are the endorsements now appearing thereon. The defendant then lived in a different state from the plaintiff, and there was no evidence that the endorsements he thus made were communicated to the defendant. At the time of such payment all the notes were due and drew interest alike, and none were barred by

JACKSON v. BURKE.

the laws of Illinois. On these facts, the plaintiff contended that he was authorized to make the application of the payment to all the different notes; while the defendant maintained that it was the duty of the plaintiff, or of the court, to make the application so as to pay as far as it would do so, certain notes in full (which would fully pay two of them), and leave the others wholly unpaid, and therefore barred.

Baldwin & O'Brien, for plaintiff.

Mr. Redick, for defendant.

Before DILLON, Circuit Judge, and DUNDY, District Judge.

DILLON, Circuit Judge. The notes in suit are not barred. The evidence tends to show that the defendant, the debtor, expressly directed the payment to be applied and indorsed on all the notes equally, without discrimination. But if this was not his direction, there was no restriction shown on the creditor's right to make the application, and under the circumstances and in the absence of such restriction, the creditor had the right to make the application in the manner he did, namely, equally to all the notes, and thus protect all from the bar of the statute. Judgment for plaintiff.

<sup>1</sup> [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.]