

WITTERS V. SOWLES ET AL.

Circuit Court, D. Vermont.

March 1, 1888.

NEGOTIABLE INSTRUMENTS—ASSUMPSIT—COMMON COUNTS AGAINST
MAKER AND INDORSEE—JUDGMENT—EFFECT.

Under Rev. Laws Vt. § 938, which provides for a judgment against the defendants found liable in an action founded on contract, and in favor of those who are not liable, a judgment in favor of one of the defendants, upon the report of a referee, in an action brought upon the common counts in *assumpsit*, in which plaintiff sought to hold the defendants as makers of a company note, given to one of the defendants and indorsed to plaintiff, is not a bar to a judgment, in the same suit against the indorser, the indorsement being within the scope of the cause referred, since a common count may be amended so as to cover a count upon an indorsement of a note.

Exceptions to Report of Referee.

Chester W. Witters, pro se.

Edward A. Sowles, pro se.

WHEELER, J. This action was brought upon the common counts in *assumpsit*. By agreement of the parties it was referred to a referee, who has made report. It has now been heard on exceptions of the defendant Sowles to the report. From the report it appears that the Glens Falls Shirt Company made a note payable to defendant Sowles or order, which was indorsed by him to the bank of which the plaintiff is receiver. The plaintiff claimed that the defendants were the Glens Falls Shirt Company, and that they were liable as makers of the note. The referee has found against this claim, and that they were not so liable. On that finding the defendant Burton has judgment in his favor.

The plaintiff claims to hold the defendant Sowles as indorser. The defendant Sowles claims that he is not liable as indorser upon the common counts, and that the judgment in favor of the other defendant is a bar to any judgment against him in this suit. By the statutes of the state provision is made for judgment against the defendants found liable in an action founded on contract, and in favor of those who are not. R. L. Vt. § 938. The procedure of the state courts is adopted in common-law cases in the United States courts. Rev. St. U. S. § 914. Therefore that judgment in favor of defendant Burton was proper, and has no effect upon the liability of the defendant Sowles. Also, by that procedure, when a cause is referred, all is referred that belongs to it, and which might be brought into it by any proper amendment of the pleadings. *Eddy v. Sprague*, 10 Vt. 216; *Granite Co. v. Farrar*, 53 Vt. 585. The common counts may be so amended as to cover a count upon an indorsement of a note. *Austin v. Burlington*, 34 Vt. 506. Therefore this indorsement was within the scope of the cause referred to the referee. The exceptions to the report merely raise these questions.

Exceptions overruled, and judgment on report for the plaintiff against the defendant Sowles, for the amount of the note, \$5,736.44, ordered.

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