

sponsibility of the indorsers of a nonnegotiable note, the supreme court of Kansas there said:

"In Iowa the court held that an indorsement of a nonnegotiable note, or any other instrument of writing except negotiable paper, without the proof, oral or written, of an undertaking to become responsible in some manner for a good consideration, means nothing, and an indorser incurs no liability. *Fear v. Dunlap*, 1 G. Greene, 334. *Daniel on Negotiable Instruments* (709) says: 'If the note be not negotiable, it is plain that such party cannot be regarded as an indorser, for the simple reason that there is no such thing as an indorsement, in its strict sense, of any other than negotiable paper.' See, also, *Graham v. Wilson*, 6 Kan. 490. We are inclined to the latter view,—that the indorsement of a name upon a nonnegotiable note simply transfers the title of a party, and does not make him liable as if said note were a negotiable instrument. *Story v. Lamb*, 52 Mich. 525, 18 N. W. 248; *Bank v. Gay*, 71 Mo. 627. Such party guaranties the note to be genuine, and that it is what it purports to be; nothing more. He does not guaranty its payment, although he might do this; but to do so would take a contract, either expressed in the indorsement, or by an independent contract between the parties."

This seems to have been understood by the parties to the transaction here under consideration, for the assignment of the note by the John D. Knox Land & Investment Company to F. S. De Hass contained an express guaranty. The views of the supreme court of Kansas above quoted seem to be decisive of the second question of law reserved, and the ruling thereon must be favorable to the defendants.

3. The third reserved question relates to interest only, and, in view of the conclusion just stated, need not be considered.

The opinion of the court being with the defendants upon the second question of law reserved, in each case judgment will be entered in favor of the defendants non obstante veredicto.

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RODECKER et al. v. LITTAUER.<sup>1</sup>

LITTAUER et al. v. RODECKER et al.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

Nos. 250, 251.

**1. REVIEW ON ERROR—TRIAL TO COURT—GENERAL FINDING.**

When the case is tried to the court without a jury a general finding has the same effect as the verdict of a jury, and prevents all inquiry into the special facts and conclusions of law upon which the finding rests. *Walker v. Miller*, 59 Fed. 869, and *Bowden v. Burnham*, Id. 752, followed.

**2. USURY AS DEFENSE—ACCOMMODATION PAPER.**

An answer averring that the note sued on was made by defendants for accommodation of the payees, who discounted it with plaintiffs at an illegal rate of interest, states a good defense under the New York law, without averring that plaintiff knew it to be accommodation paper at the time of taking it.

**3. SAME—BONA FIDE HOLDERS.**

No one can become a bona fide holder of a note or bill which, by statute, is void for usury.

In Error to the Circuit Court of the United States for the District of Kansas.

<sup>1</sup> Rehearing pending.

**At Law.** Actions by Harriett Littauer, Oscar L. Richards, and Lucius N. Littauer, executors of Nathan Littauer, deceased, against Jacob Rodecker and Samuel Cohen, partners under the name of J. Rodecker & Co., and by Lucius N. Littauer against the same defendants, on certain promissory notes. In both cases a jury was waived, and the causes were tried together by the court, which rendered judgment for defendants in the first-named action and for plaintiff in the second. Plaintiffs in the first action and defendants in the second action appeal. The appeal in the first-named cause is numbered 250 and in the second 251. Both judgments affirmed.

J. D. McCleverty and W. R. Biddle, for Rodecker and others.

W. C. Perry, for Littauer and others.

Before CALDWELL, Circuit Judge, and THAYER, District Judge.

CALDWELL, Circuit Judge. These cases are between the same parties, and involve substantially the same issues. They were tried together in the lower court, and, by stipulation of the parties, have been submitted in this court, in the same manner. The parties filed with the clerk below a stipulation in writing, waiving a jury, as provided by section 649, Rev. St., and the cases were tried by the court, whose finding was general in both cases.

The only error assigned in case No. 251, in which the judgment below was for the plaintiff, is that, upon the facts proved, the judgment ought to have been for the defendants, and we are asked to review the evidence, and reverse the general verdict of the lower court on the facts. We have decided in two cases at the present term (*Walker v. Miller*, 59 Fed. 869, and *Bowden v. Burnham*, Id. 752,) that when a case is tried by a court without a jury a general finding of the court has the same effect as a verdict of a jury, and prevents all inquiry in this court into the special facts and conclusions of law upon which the findings rest. No exceptions were saved to the rulings of the court in the progress of the trial. The judgment in case No. 251 must therefore be affirmed.

In case No. 250 the judgment was for the defendants upon a general finding in their favor by the court. All the assignments of error in this case, with a single exception, rest on the asserted insufficiency of the evidence to support the general finding of the court below, and need not be further noticed.

The defendants filed an answer, to which the plaintiffs filed a reply. Upon this state of the pleadings the plaintiff in error at the trial objected to the introduction of any evidence, upon the ground that the answer did not state facts to constitute a defense to the petition. The objection was overruled, to which ruling exception was taken. It is said that under the Kansas practice such an objection can be made to perform the office of a general demurrer to a pleading after issue has been joined thereon. It would seem to be an untimely and unsatisfactory mode of testing the sufficiency of a pleading. Assuming that it is proper prac-

tice under the Kansas Code, we will consider the sufficiency of the answer. It avers, in substance, that the note sued on was accommodation paper made by the defendants payable to the order of Levy Bros. & Co., to be discounted by them in the city of New York, where the note was payable, solely for their accommodation and benefit, and to be paid by them at maturity, and that Levy Bros. & Co. discounted the same in the city of New York to the plaintiff at a rate of discount which made the interest reserved amount to 8 per centum per annum,—2 per centum in excess of the rate allowed by the laws of the state of New York,—and that by the laws of that state this rendered the note usurious and void. It is said the answer is defective in that it does not allege the plaintiff knew at the time he discounted the note that it was accommodation paper.

This allegation was not necessary. Upon the averments of the answer, while the note remained in the hands of Levy Bros. & Co., it was not a binding contract. They could not have maintained a suit upon it. It was only by the negotiation of the note by Levy Bros. & Co. that it could become a binding contract. Its negotiation by them was essential to give it life. It seems to be well settled by the court of appeals of that state that the discount of accommodation paper is merely a loan of money, the purchaser being the lender and the seller the borrower; and that if, in making such discount, the rate of interest reserved is in excess of the rate of interest allowed by the laws of the state, it avoids the contract. *Clafin v. Boorum*, 122 N. Y. 385, 25 N. E. 360; *Eastman v. Shaw*, 65 N. Y. 522; *Dickinson v. Edwards*, 77 N. Y. 573; *Jewell v. Wright*, 30 N. Y. 259; *Bank v. De Shon*, 41 Ark. 331; *Tilden v. Blair*, 21 Wall. 241.

The plaintiff cannot shelter himself under the plea of a bona fide purchaser for value before maturity of negotiable paper. The note, being accommodation paper, did not become a binding contract until after the negotiation; and in the very act of negotiation the plaintiff did that which rendered it void by statute, so that it never, at any time, took effect as a valid and subsisting contract.

Moreover, no one can become a bona fide holder of a note or bill which the statute declares to be void for usury. Such a note is void in its inception, and the rights of a bona fide holder for value do not attach to an instrument made void by statute. See authorities cited above, and particularly *Bank v. De Shon*, *supra*, where there is a full collection of the authorities by Battle, J., who delivered the opinion of the court.

The judgment of the circuit court is affirmed.

## ATCHISON, T. &amp; S. F. R. CO. v. McCLURG.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1894.)

No. 326.

1. RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—QUESTION FOR JURY.  
The question of contributory negligence is properly submitted to the jury, when there is much contradiction as to the care exercised by plaintiff in approaching the crossing, and it appears that there were obstructions to his view of the track, and that no bell was rung or whistle blown.
2. SAME—DEGREE OF CARE REQUIRED—INSTRUCTIONS.  
The obligations of railroad companies and of travelers crossing their tracks are mutual and reciprocal, and an instruction is erroneous which requires "ordinary" care of the traveler, and "a high degree of care" of the company. Caldwell, Circuit Judge, dissenting, on the grounds that the alleged error was not assigned, was not prejudicial, and that the charge, by specifying the acts required of the traveler, did in fact require of him as high a degree of care as that required of the company.
3. APPEAL—HARMLESS ERROR—PRESUMPTIONS.  
An error in giving instructions must lead to reversal, unless it clearly appears from the record that the error was harmless.

In Error to the United States Court in the Indian Territory.

At Law. Action by James McClurg against the Atchison, Topeka & Santa Fe Railroad Company to recover damages for personal injuries received at a crossing. Verdict and judgment for plaintiff. Defendant brings error. Reversed.

Henry E. Asp and J. W. Shartel, (Geo. R. Peck, on the brief,) for plaintiff in error.

Amos Green and W. A. Monroe, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. This was a suit for personal injuries which the defendant in error sustained at a railroad crossing in the suburbs of the town of Purcell, in the Indian Territory, on March 4, 1891. The record discloses that on that day he started home from Purcell, in company with a neighbor of his by the name of Wear, who owned and was driving the team behind which they were riding. The road taken to get out of town lay for some distance along the west side of the railroad company's main and side tracks, leading north from its depot in Purcell, but at a point about 950 feet north from the depot the road turned east, at right angles, and crossed the tracks. When they reached this crossing on their way home, a switch engine approached from the south, which was pushing in advance of it three box cars and a coal car. Anticipating a collision from the proximity of the train and its rapid approach, the defendant in error leaped from the wagon when it was about on the crossing, and was run over and seriously injured. A number of exceptions that were taken on the trial have been argued in this court, but the view that we have taken of the case only renders it necessary to consider two questions. The first is whether the lower court should have declared,