

## FOSTER et al. v. JETT et al.

(Circuit Court of Appeals, Eighth Circuit. May 2, 1896.)

No. 656.

## PROMISSORY NOTES—SEALS—ARKANSAS STATUTES.

Under the statutes of Arkansas and the constitutions of the state of 1868 and 1874, as interpreted by its courts, two kinds of promissory notes are recognized, those under seal and those not under seal, which differ only in the periods of limitation applicable to them, respectively, the former being barred in ten and latter in five years. Accordingly, *held* that, where a deed of trust in the nature of a mortgage recites that it is made to secure promissory notes, though not specifying that such notes are under seal, one who accepts a subsequent mortgage on the same property, more than five but less than ten years from the making of the first mortgage, cannot claim the benefit of the Arkansas statute (Acts 1889, c. 58) limiting suits to foreclose mortgages to the period within which actions may be brought on the debts secured, and providing that payments to continue the life of the debt, as against third parties, must be indorsed on the record before the statute has run. *Held*, further, that in such case the subsequent incumbrancer was bound to inquire whether the notes secured by the first incumbrance were executed under seal, and having failed to do so the first incumbrancer was not estopped from showing that the notes by him held were sealed instruments.

## Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

D. F. Jett, as trustee, and W. B. Mallory and W. J. Crawford, who are the appellees, filed a bill against Thomas Foster and Vienna Foster, his wife, and against E. C. Hornor, trustee, Sidney H. Hornor, and Hamilton S. Hornor, who are the appellants, to foreclose a certain deed of trust in the nature of a mortgage, which was executed by Foster and wife on March 5, 1884, to secure the payment of certain notes that were drawn by said Thomas Foster in favor of the firm of Mallory, Crawford & Co., said firm being composed of the appellees W. B. Mallory and W. J. Crawford. A statute of the state of Arkansas, which was approved on March 25, 1889 (Acts Ark. 1889, c. 58, p. 73), contains the following provision:

"Section 1. That in suits to foreclose or enforce mortgages or deeds of trust, it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given. Provided, that when any payment is made on any such existing indebtedness, before the same is barred by the statute of limitation, such payment shall not operate to revive said debt, or to extend the operations of the statute of limitation with reference thereto, so far as the same affects the rights of third parties, unless the mortgagee, trustee or beneficiary shall, prior to the expiration of the period of the statute of limitation, indorse a memorandum of such payment with date thereof on the margin of the record where such instrument is recorded, which indorsement shall be attested and dated by the clerk."

The defendants to said bill of complaint, namely, Foster and wife, Edward C. Hornor, trustee, Hamilton S. Hornor, and Sidney H. Hornor, filed an answer to the bill, wherein they averred, in substance, the following facts: That the deed of trust in favor of Mallory, Crawford & Co. was executed as charged in the bill on March 5, 1884, to secure the notes therein specified, but that said notes were not executed under seal; that, if any payments had been made on said notes as was charged in the bill of complaint, such credits had never been indorsed on the margin of the record where the deed of trust was recorded as the aforesaid statute of the state of Arkansas required; that on January 10, 1894, Foster and wife executed a second deed of trust on a part of the lands covered by the first deed of trust in favor of E. C. Hornor, as trustee, to secure a certain indebtedness which Thomas Foster then owed

to the defendants Hamilton S. Hornor and Sidney H. Hornor; and that at the date of the execution of such second deed of trust, the defendants H. S. and S. H. Hornor had no notice, either in law or in fact, that the prior deed of trust in favor of Mallory, Crawford & Co. was an existing incumbrance on the land by reason of the fact that payments had been made on the notes thereby secured. The Laws of Arkansas (Mansf. Dig. c. 97) contain the following provisions relative to limitations:

"Sec. 4483. Actions on promissory notes, and other instruments in writing, not under seal, shall be commenced within five years after the cause of action shall accrue, and not afterward.

"Sec. 4484. Actions on writings under seal shall be commenced within ten years after the cause of action shall accrue, and not afterward."

In view of the premises, the defendants pleaded that the complainants had not instituted their suit within the time prescribed by the statutes of Arkansas within which suits must be brought to foreclose or enforce mortgages. The circuit court overruled the defense, and the defendants below have appealed.

John J. Hornor (E. C. Hornor, on brief), for appellants.

M. L. Stephenson (Jacob Trieber, on brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

When the notes secured by the first deed of trust were produced and offered in evidence on the trial in the circuit court, they turned out to be instruments under seal, although they were described in the deed of trust as promissory notes. One of these notes, which will serve as a type of all, except as to amounts, was in the following form, to wit:

"\$1,652.41.

La Grange, Ark., March 5, 1884.

"Twelve months after date I promise to pay to the order of Mallory, Crawford & Company, one thousand six hundred and fifty-two and 41/100 dollars, at the banking house of John S. Hornor & Son, Helena, Arkansas, with interest at the rate of ten per cent. per annum from date until paid. Value received.

"Thomas Foster. [Seal.]"

The period of limitation which applies to "writings under seal" in the state of Arkansas, as above stated, is 10 years, and the present suit appears to have been commenced on January 31, 1894. Therefore the suit to foreclose the deed of trust in controversy was brought before the period of limitation prescribed by law for a suit on the debt thereby secured had expired, and the suit was not barred by the provisions of the act of March 25, 1889, above quoted in the statement. The real defense to the suit which the defendants seek to interpose in this court, although it was not pleaded in the answer, is that the written obligations which the deed of trust held by the complainants below was given to secure were not correctly described therein, and that by reason of such misdescription the defendants H. S. Hornor and S. H. Hornor were misled to their prejudice when they accepted the second deed of trust. It is urged, in substance, that as the deed of trust described the obligations thereby secured as "promissory notes," said last-named defendants were entitled to infer from the record that the obligations so described were ordinary promissory notes, not under seal, which would be barred by limitation after the lapse of five years from the date of maturity, and

that because of the lapse of that period before the second deed of trust was executed, the defendants had the right to presume that the first deed of trust had ceased to be a lien. In legal effect, therefore, the defense interposed in this court is that the complainants below are estopped, as against the holders of the second deed of trust, from asserting a prior lien under the first mortgage. We think that this latter defense would not be tenable even if it appeared that it was well pleaded in the answer. It is obvious that the obligations secured by the first deed of trust were not intentionally misdescribed with a view of deceiving a subsequent incumbrancer or purchaser, because the deed of trust was executed long before the passage of the act of March 25, 1889, when it was utterly immaterial whether the obligations were described simply as promissory notes or as promissory notes under seal. As the law stood when the mortgage was executed, the lien thereof was not affected or impaired by the fact that it omitted to state that the instruments evidencing the debt were executed under seal, inasmuch as the mortgage correctly specified the amount of the debt, and contained words of description sufficient to identify the indebtedness intended to be secured. *Curtis v. Flinn*, 46 Ark. 70, 72; *Carnall v. Duval*, 22 Ark. 136. It is obvious, therefore, that the misdescription complained of was not intended to mislead or to deceive any one, and that the junior incumbrancers are not in the attitude of persons who have been intentionally misled to their prejudice.

Moreover, under the laws of the state of Arkansas, as construed by its highest court, the obligations secured by the first deed of trust in favor of Mallory, Crawford & Co. do not appear to have been misdescribed, although they were termed "promissory notes." This conclusion, we think, is warranted by the following facts: The constitution of the state of Arkansas, which was adopted in the year 1868, contained the following provision:

"Private seals are hereby abolished, and hereafter no distinction shall exist between sealed and unsealed instruments concerning contracts between individuals." Const. 1868, art. 15, § 16; *Mansf. Dig.* p. 142.

The subsequent constitution of that state, which was adopted in the year 1874, contained the following paragraph on the same subject:

"Until otherwise provided by law, no distinction shall exist between sealed and unsealed instruments concerning contracts between individuals executed since the adoption of the constitution of 1868, provided that the statutes of limitation with regard to sealed and unsealed instruments in force at that time continue to apply to all instruments afterward executed until altered or repealed." Schedule to Const. 1874, § 1; *Mansf. Dig.* p. 84.

In the case of *Dyer v. Gill*, 32 Ark. 410, these provisions of the two constitutions of the state were considered with reference to a note that had been executed under seal after the adoption of the constitution of 1868, and it was held, in substance, that the addition of a seal after the maker's signature did not alter the character of the instrument, but that it still remained a simple contract, or, in other words, a promissory note. It was further held, however, in the same case, that the provision found in the schedule to the con-

stitution of 1874, *supra*, operated to extend the period of limitation from five to ten years in those cases where a promissory note was thereafter executed under seal. This case has been referred to and approved in the subsequent cases of *Stephens v. Shannon*, 43 Ark. 464, 468; *Vaughan v. Norwood*, 44 Ark. 101; *Wilson v. Pryor*, *Id.* 532, 535. It seems, therefore, that there are now two kinds of instruments in use in the state of Arkansas which are recognized alike as promissory notes, and may properly be described as such. To the one class belong those notes not under seal which are subject to the statutory bar of five years, and to the other class belong notes executed under seal which are subject to the statutory bar of ten years. In all other respects, the two kinds of notes are alike, and notes of both kinds are regarded as simple contracts. The result is that if the maker of a promissory note drawn in the state of Arkansas adds a seal to his signature, it does not change the character of the instrument in any respect, but simply extends the period of limitation.

Such being the local law on the subject, we think that the defendants below are in no condition to complain that they were misled by the provisions contained in the first deed of trust, or by the record thereof. As the statutes of the state and local decisions recognized two kinds of obligations termed "promissory notes," and as the obligations secured by the first deed of trust were thus described, and were in fact promissory notes, the defendants should have ascertained, before accepting the second mortgage, whether they belonged to the class of notes that would be barred in five years or in ten. No sufficient reason exists, therefore, for holding that the owners of the first deed of trust are either barred of their right to foreclose the same, or that they are estopped to assert a prior lien. The decree of the circuit court was for the right party, and it is hereby affirmed.

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CITY OF FINDLAY v. PERTZ et al.

(Circuit Court of Appeals, Sixth Circuit. May 12, 1896.)

No. 377.

1. **PRINCIPAL AND AGENT—AGENT ACTING FOR BOTH PARTIES—RATIFICATION BY PRINCIPAL—MUNICIPAL CORPORATIONS.**

Where a city refused to pay a balance of the price of certain machines purchased by it, on the ground that its agent to make the purchase secretly acted as the agent of the seller, and in a suit for such balance there was evidence fairly tending to show that after discovery of the fraud the city continued to use the machines, and elected to ratify the purchase, *held*, that the court properly refused to direct a verdict for defendant.

2. **APPEAL—OBJECTIONS NOT RAISED BELOW.**

In an action for the contract price of machines furnished to a city, a defense that the contract was void because of noncompliance with a state statute forbidding the city council to make any contract involving the expenditure of money, unless the auditor of the corporation shall first certify that the money required was in the treasury (*Rev. St. Ohio, § 2702*), cannot be taken for the first time in the appellate court.

3. **SAME—ASSIGNMENT OF ERRORS.**

To obtain the benefit of any error in respect to the action of the trial court in failing to give effect to a particular statute, there should be some

specific assignment definitely pointing out the action against which complaint is made.

**4. SALE—ACTION FOR PRICE—ADMISSIBILITY AND WEIGHT OF EVIDENCE—INSTRUCTIONS.**

In an action against a city for the purchase price of certain "automatic separators," adapted to be attached to the orifice of a natural gas well to separate the oil and water from the gas, there was evidence for defendant that the machines had not worked automatically, and were incapable of doing the work for which they were purchased. Evidence was given for plaintiff that the separators had worked automatically and successfully at other places, and that they had not been properly put on or cared for by defendant. *Held*, that the evidence as to use elsewhere was properly admitted, and there was no error in charging the jury that it was material and important, if they found that the machines were all constructed alike.

**5. SALE—EVIDENCE OF VALUE—MARKET PRICE.**

In an action to recover the reasonable value of machines kept and used by a city after attempting to rescind the contract of purchase, proof of market value, or the value at which the owner offers them for sale on the market, is not conclusive of actual value, but it may be taken into consideration in arriving at the actual value.

In Error to the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

W. F. Duncan and Jason Clackford, for plaintiff in error.

C. C. Shirley (J. C. Blackledge, B. C. Moon, Harvey Scribner, and Frank H. Hurd, with him on the brief), for defendants in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

LURTON, Circuit Judge. The defendants in error, John W. Pertz and George R. Stewart, partners under the name of Pertz & Stewart, are patentees and manufacturers of certain machines called "automatic separators." These machines were adapted to be attached to the orifice of a natural gas well, and purported to separate the oil and water which came to the surface intermingled with the gas, and to do this work automatically. They claim to have sold 32 of these separators to the city of Findlay, a municipal corporation of the state of Ohio, which owned and operated a plant for the distribution of natural gas to consumers within that city. This action was brought by said Pertz & Stewart against the city of Findlay for a balance alleged to be due on account of the sale aforesaid. There was a judgment for the defendants in error, and to review that judgment this writ of error has been sued out. A former judgment in favor of the defendants in error upon the same account was reversed by this court for reasons fully appearing in an opinion of this court then delivered, and reported in 13 C. C. A. 559, 66 Fed. 427 et seq. The defenses against the action upon the former trial are fully set out and discussed in the former opinion of this court, and need not be again here stated, except in so far as shall appear necessary to the determination of the questions involved upon the present writ of error.

Upon both trials there was evidence tending to show that the superintendent of the city gas plant, who bought these separators for the city, and through whom it was sought to charge the city as upon a contract, was at the time also the agent of Pertz & Stew-

art for the sale of their patented machines upon a commission. Upon both trials there was evidence that this double agency of the city's officer was known to Messrs. Pertz & Stewart, and was unknown to the municipal authorities. Upon both trials there was evidence tending to show that, when the city authorities discovered this fraudulent conduct of their agent, they repudiated the contract for the city, and notified the sellers to remove their machines. Before this discovery was made, \$315 was paid by the city, in full payment of the first three machines so purchased. On the last trial, as upon the first there was evidence tending to show that notwithstanding the city had, by a letter, repudiated the contract, it thereafter continued to use the said separators, and to exercise authority over and concerning them. Upon the former trial the learned trial judge was of opinion that if it was established that the agent of the city, from whom the purchase had been made, was also the agent of the sellers, that fact would entitle the city, upon its discovery, to disavow the contract and return the machines to the manufacturers. He was also of opinion that, if the machines were articles proper for the purposes of a municipal corporation, it was capable of ratifying the contract after the discovery of the fraud, and that such ratification might be established by a retention and use of the machines for an unreasonable time after a discovery of the fraudulent conduct of their agent. Being of opinion that the evidence of ratification was practically undisputed, he instructed the jury upon this point in favor of the plaintiffs. This court, upon the former writ of error, held that the trial judge did not err in entertaining the opinion, and so instructing the jury, that the city, upon a discovery of the improper dealing with its agent, might either repudiate or affirm the contract, as it should elect. We did not agree with the trial judge that the evidence of ratification after full discovery of the fraud was so clear and undisputed as to leave no issue for the jury. For failure to submit to the jury the question of whether there had been an intentional ratification, the cause was remanded, with directions to order a new trial. At the conclusion of the trial now under review, a full, clear, and sound charge was delivered to the jury, who, upon the law and facts, again found a verdict for the defendants in error. Many exceptions were taken to this charge, each of which has been made the subject of a separate assignment of error. A large number of requests for special or additional charges were also made, most of which were refused, each such refusal being now assigned as error. Inasmuch as the charge covered the entire case, and was in substantial harmony with the opinion entertained by this court upon the former writ of error, we do not deem it essential or profitable to consider at length the various exceptions taken, or the many requests for further instruction. We shall therefore briefly indicate our ruling upon such of the assignments of error as have been most relied on in argument.

The error assigned for refusal to charge requests Nos. 1, 2, 4, and 5 must be overruled, because they were sufficiently covered by the charge as delivered.

The sixth assignment of error is based upon the refusal of the court to charge as follows: "Under the pleadings and the evidence, the jury should find a verdict for the defendant for three hundred and fifteen dollars, and interest from September 16, 1890." This was properly overruled. There was evidence tending to show that, after the city authorities became fully aware of the double character of the agent through whom the city had made the purchase of the automatic separators, it elected to ratify the bargain. A learned, able, and forcible argument has been made by the counsel representing the city to show that the evidence of ratification was insufficient. We are not authorized to weigh the evidence. That is the province of the jury. There were circumstances in proof tending to show that the city continued to use these machines for a considerable time after it had fully discovered the fraud of its agent; and there was also evidence of negotiations between the city authorities and the sellers, contemporaneous with and subsequent to their notice of an intention to disaffirm the contract, which tended to cast doubt upon the real purpose of the city in respect of affirming or disaffirming the transaction. As to whether the retention and continued use of the machines was, under all the circumstances, unreasonable, and inconsistent with an intention to annul the contract, was a matter about which reasonable men might draw different inferences. We may concede that the facts and circumstances tending to show an intent to disaffirm, and to adhere to such disaffirmance, were meager, and that the weight of evidence was against the verdict, still there was evidence tending to show ratification. The matter was therefore one for the consideration of a jury. The refusal of the court to grant a new trial because the weight of evidence was against the verdict, or for any other reason, is not assignable as error. This has been so frequently decided that it is not needful to cite authorities.

Counsel for plaintiff in error have argued that this contract for the purchase of these machines was void under section 2702 of the Revised Statutes of the State of Ohio, which provides that:

"No agreement, contract or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the appropriation or expenditure of money, be passed by the council or any board or officer of a municipal corporation, unless the auditor of the corporation \* \* \* shall first certify that the money required for the contract, agreement or other obligation, or to pay the appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn," etc., "\* \* \* and all contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed, contrary to the provisions of this section shall be void."

It is enough to say that a careful examination of this record shows that this question is now for the first time raised. No demurrer was filed to the petition of the plaintiffs below because it did not affirmatively show that the contract sued upon had been authorized according to the terms of the statute, and no reference to any such defense is made in any pleading or answer filed by the city. No proof appears in the bill of exceptions concerning the action of the city council or of the authorities of the city of Find-

lay, and no request was made for any charge to the jury touching this statute. The question is not presented by any assignment of error, unless it be contended that it is embraced within the assignment of error now under consideration. That assignment of error is altogether too broad and general, under the eleventh rule of this court (11 C. C. A. cii., 47 Fed. vi.), to bring up any such specific objection as is now sought to be raised in respect of the effect of this Ohio statute. *Railway Co. v. Ives*, 144 U. S. 408-415, 12 Sup. Ct. 679. To have obtained the benefit of a consideration of this question, it should have been presented to the trial court in some form. It may be that proof of compliance with this statute was made. The bill of exceptions would probably omit all matter not necessary to the decision of questions of law intended to be relied on. To obtain the benefit of any error in respect to the action of the circuit court below in failing to give effect to this Ohio statute, there should have been some specific assignment, definitely pointing out the action of the court against which the complaint is made.

The third request involves a matter which has now become immaterial. It presented the question as to whether, under the pleadings, there could be a recovery by the plaintiff in error against the defendants in error of the money already paid by the city upon the contract, or of the difference between the sum paid and the value of the machines bought. Inasmuch as the jury have found a large sum due from the city, after crediting the sum theretofore paid, the question involved by this request is of no importance.

An exception was taken to the following portion of the charge to the jury:

"The court further charged the jury as follows: 'The manner in which these machines did their work elsewhere is not proof that these machines did their work well at Findlay, but is a fact important and material, if you find the separators were all constructed alike, as showing whether the Findlay machines were properly put on, properly cared for, and fairly tested. Because two or more machines, equally well made, and similarly constructed and used, ought to work alike, and if one worked well at Kokomo, Indiana, and another failed to work at Findlay, and both were tried and used under substantially similar conditions, the fact that the Kokomo separator did work is a circumstance which ought to help you very much in deciding whether the failure of the separator to work at Findlay was from plaintiffs' failure to properly make them, or from defendant's failure to properly put them upon the gas wells, and properly care for and use them after they were attached.'"

Numerous exceptions have also been taken to the evidence upon which this portion of the charge bore. We think there was no error in the admission of the evidence, and none in the charge, in respect of its weight and force. If the jury should find that the city had elected to affirm the contract, it would then devolve upon them to determine whether the city was liable for the value as per full contract price, or was liable only for their actual value. There was evidence that the machines had been represented as capable of working automatically. There was also evidence tending to show that these machines upon the Findlay oil wells had not worked automatically. The court charged the jury fully and clear-



ly upon the effect of proof that these machines were not capable of doing the work which they were represented as able to do. Upon the one side it was contended that the machines had been improperly adjusted upon the wells, and that they had been neglected and improperly cared for, and that their failure to work was not due to any fault in their original construction, or any fault with which the manufacturers and patentees were chargeable. Evidence that the same machines, upon other wells, did work automatically, was a circumstance important or unimportant as it might appear from other evidence that the conditions were similar or dissimilar.

The court charged the jury that if they found that the city of Findlay had ratified this contract, and waived its right to rescind the same, they should find for the plaintiffs, and for such amount to be due them as they should determine these machines were reasonably worth—

“Having reference to their market value as shown by proof, and from other evidence of value, which includes evidence of the way in which they discharged the purposes for which they were sold and designed; and upon such an amount you will give the city credit for the sum of \$315, which they have already paid, and for the commissions which the plaintiffs say they are entitled to as stated in the account.”

To this the court subsequently added:

“I deem it proper to call your attention to the fact that I said, in determining the value of these machines, you might consider, as one of the elements, the market price at which they were sold in the place where used. I still think that this is an element of consideration of their value, and I will let the charge stand as it is.”

Exception was taken to so much of the charge as permitted the jury, in determining the reasonable value of these machines, to look to the “market price at which they were sold in places where used” as one of the elements of actual value. The market value, or the value at which the owner or producer holds them for sale and offers them on the market, is not conclusive evidence of actual value, but it is clearly a matter which may properly be taken into consideration in arriving at the actual value. *Dwight v. Commissioners*, 11 Cush. 201.

Other errors have been assigned and argued. We think there is no substance in any of them. The judgment must be affirmed.

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ZIMMERMAN v. GIRARDI.

(Circuit Court of Appeals, Second Circuit. June 17, 1896.)

CONTRACTS—QUESTION FOR JURY.

Plaintiff sued defendant for the value of certain goods alleged to have been sold to him, but which defendant claimed were placed with him by the plaintiff on consignment. The contract originally made between the parties was contained in certain letters and other documents, but there was oral evidence of a conversation between the parties which, if the plaintiff's version of it were believed, tended to establish a new agreement between the parties, after the original contract, by which the defend-