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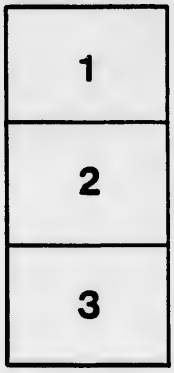

No. 11.

QUEEN'S BENCH.

APPEAL SIDE.

WRIGHT CHAMBERLIN,
(Plaintiff in Court below,)
Appellant.

AND

ORVIS BALL,
(Defendant in Court below,)
Respondent.

APPELLANT'S CASE.

Fyled *August*, 1859.

RITCHIE & BORLASE,
Attorneys for Appellant.

Salter & Ross, Printers.

No. 11.

Province of Canada, Lower Canada, to wit: } IN THE QUEEN'S BENCH.

APPEAL SIDE.

WRIGHT CHAMBERLIN,
(Plaintiff in the Court Below,)
Appellant,

—AND—

ORVIS BALL,
(Defendant in the Court Below,)
Respondent.

APPELLANT'S CASE.

This appeal is from a judgment of the Superior Court at Sherbrooke, rendered on the 18th day of June last, dismissing the action of the Appellant.

The action was brought against the Respondent, Ball, as endorser of a Promissory Note, dated Sherbrooke, May 17th, 1858, made by one John Turner, and payable ten days after date to the order of the Respondent. The note was endorsed by the Respondent, by endorsement in blank, and delivered to the Appellant upon the day it bears date, and was duly protested for non-payment on the 31st day of May, 1858, (the 30th being Sunday) and the Respondent duly notified of such protest.

Besides a *défense en droit* (which was dismissed) and a *défense en fait*, the Respondent pleaded two peremptory exceptions, which are in substance as follows, to wit:—

1. That the Promissory Note was not presented to the maker, and no demand of payment made of him when it became due, and was not legally protested for non-payment. That the protest is irregular and insufficient in several particulars, and that the defendant had no legal notice of protest, the notice not having been sent to the post office nearest to his residence.

2. "That when the Promissory Note sued upon in this cause was made "over to the Plaintiff by Defendant, it was sold to said Plaintiff at a large dis- "count, and Plaintiff purchased it upon the sole credit and responsibility of "the maker thereof, John Turner, and that the Plaintiff accepted the same as "such, and agreed to release the Defendant from all liability thereof as endor- "ser; and the Defendant simply put his name upon said note to convey the "same to him, and order the said John Turner to pay the same to Plaintiff; "and it was distinctly agreed by and between the Plaintiff and Defendant that "Defendant should incur no liability upon said note to Plaintiff by reason of "his endorsing his name upon the same, and the Plaintiff accepted the same "and gave as consideration therefor only the value of one hundred and sixty "dollars in consideration of taking the sole risk of the collection thereof of "John Turner, the maker thereof."

Issue having been joined, and the *défense en droit* disposed of, the Respondent proceeded to evidence in support of his second plea. Upon his attempting to adduce parol evidence, by proposing a question to the witness Seth Lougee (paper 21 of record) whether at the time of the transfer of the note he

heard any *agreement or conversation* between Plaintiff and Defendant with regard to the note, the Appellant placed of record a formal objection to the adduction of parol evidence to contradict the terms of the written contract declared upon. This objection was reserved by the Judge at Enquete, and the evidence ordered to be taken *de bene esse*. All other evidence of a similar nature was taken under reserve of objections. The Respondent adduced evidence, also under reserve of Appellant's objections, to show that the consideration given to the Appellant for the note was a horse of the value of about one hundred dollars, and sixty dollars in money. This evidence as to the value of the horse is rebutted by the testimony of several witnesses for the Appellant, who proved the horse to be worth one hundred dollars. In support of his first peremptory exception, the Respondent adduced no evidence, nor did he fyle any affidavit with his pleas.

The cause was heard on the 14th day of June last, when the Appellant moved to reject the evidence to which he had fyled objections.

On the 18th day of the same month, the following judgment was rendered, viz :—

" The Court having heard the parties by their respective Counsel, as well " on the Plaintiff's motion to reject the Defendant's evidence as upon the " merits, and examined the pleadings and proceedings of record, and upon the " whole deliberated, considering the evidence adduced herein by the Defendant " is legal, and he hath maintained the allegations of the exceptions by him " pleaded, that the Promissory Note sued upon was transferred by the Defen- " dant to the Plaintiff on the expressed agreement of the Plaintiff's looking for " payment solely to John Turner, the maker, and no legal presentment for " payment of said note was made at the maturity thereof, and no notice of " non-payment was given to the Defendant, and the endorser thereon is fully " discharged from all liability therein, doth overrule the Plaintiff's motion to " reject the evidence adduced by the Defendant, and doth dismiss the action of " the Plaintiff, and doth condemn him to pay the Defendant the costs of this " suit, distraction of which is awarded to Messrs. Sanborn & Brooks, the De- " fendant's Attorneys."

The legal pretensions of the Appellant, and upon which he relies for a reversal of the judgment appealed from, may be briefly stated in the following propositions :—

1. The Promissory Note sued upon was duly presented for payment, and the protest and notice are regular and sufficient.

2. That even if there be any irregularity in such presentment, protest and notice, it was waived by the Respondent, who neglected to avail himself of the only legal method of objecting to the sufficiency of such protest and notice.

3. That in the absence of an allegation of fraud, parol evidence is inadmissible in support of a contemporaneous verbal agreement to contradict a valid written instrument ; and, consequently,

4. That the evidence adduced by the Respondent in support of his plea was illegal, and ought to have been rejected.

These propositions the Appellant will, he apprehends, be able to support by numerous and undoubted authorities.

But the allegations of the Respondent's pleas are not, as Appellant humbly maintains, established by the evidence, (illegal though it be) which he has placed of record in the cause. The Respondent pleads *that at the time when the note was transferred* the Appellant agreed to release him and look to the maker only, *in consideration of Appellant's not giving the full value of the note.* Longee, the Respondent's principal witness, and the only one who professes to have any personal knowledge of the transaction, admits that he never saw the note in question, and " *was not present when the bargain was made* between " the Plaintiff and Defendant in this cause. The conversation which I have

" mentioned in my examination in chief *took place shortly after* the bargain I " have spoken of. I was not shewn the said note by either party, and I did " not know what were the terms or the conditions of the said note, nor even " who was the maker of the said note." The pretended agreement attempted to be proved was *subsequent to the endorsing of the note*, and is not pleaded by the Respondent, being entirely different from that referred to in the Respondent's second plea. No evidence whatever is adduced to show that, at the time of the transfer of the note, it was understood to be sold for less than its full value, and the evidence of the Appellant proves conclusively that such was not the case.

The Appellant humbly maintains that the judgment appealed from is contrary to law and is not supported by the evidence illegally admitted, and he confidently looks for its reversal by this Honorable Court.

T. W. RITCHIE,
G. H. BORLASE,
For Appellant.

Montreal, August, 1859.