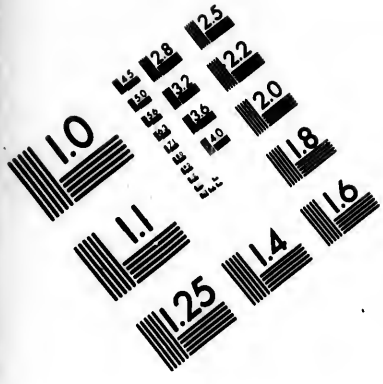

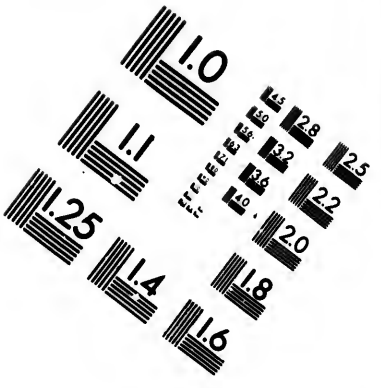

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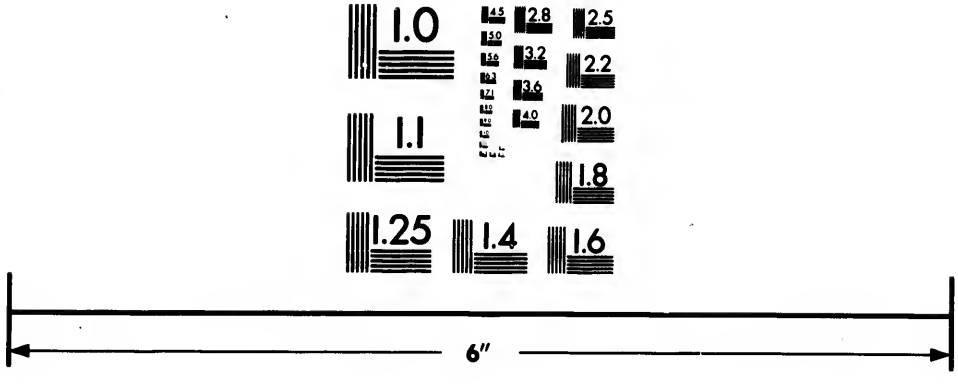

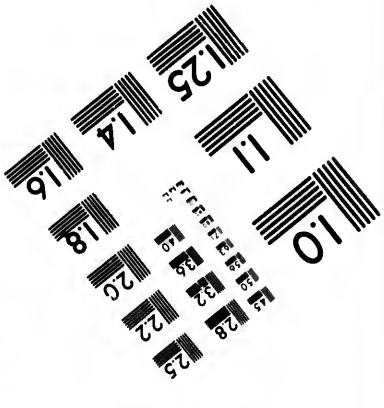

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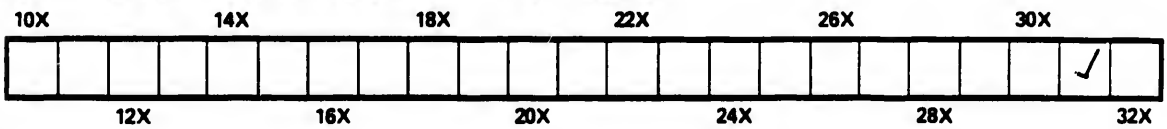

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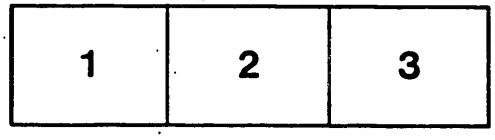

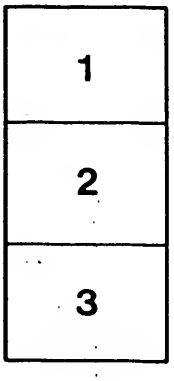

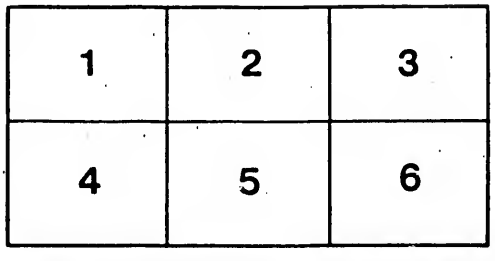

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No. 11.

In the Queen's Bench.

APPEAL SIDE.

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

AND

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

RESPONDENT'S CASE.

Filed September, 1859.

SANBORN & BROOKS,
Attorneys for Defendant.

Walton's Print.....Gazette Office, Sherbrooke.

No. 11.

In the Queen's Bench.

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.

RESPONDENT'S CASE.

In this action the first indorser of a note, Ball is sued, by Chamberlin, his immediate indorsee, for the amount of a note made by one John Turner in following terms:

"Sherbrooke, May 17th, 1858.

Ten days after date I promise to pay to the order of Orvis Ball two hundred fourteen dollars and seventeen cents and interest value received. Signed JOHN TURNER."

This note is indorsed in blank by Ball.

Two points are made in the special defence to the action.

1. The demand and protest was insufficient to bind indorser.

2. That there was a special agreement between Chamberlin and Ball when the note was transferred, that it should be taken by Chamberlin at his own risk and without recourse to Ball.

In support of the first of these points respondent invokes the protest as it is filed of record. It does not meet the requirements of 13 section of 12 Vic. c. 22. The rule of presentment in case of note payable generally is that it shall be presented to the maker personally, or at his then place of residence or business. The exception is in case of absence of maker from his residence or place of business, or of his having no known residence, or of his death, that the demand may be made at his usual residence or place of business or his last known residence. It is conceded here that neither the rule nor the exception has been followed. The certificate of the notary is in these terms—"did exhibit the original promissory note whereof a true copy is above written unto a grown person at the hotel in Sherbrooke, called "the Sherbrooke House," kept by the said Wright Chamberlin, being the usual place of abode and business of the said John Turner the promiser thereof when in Sherbrooke."

This is not a presentment at the residence or place of business of John Turner. The language is quite consistent with Turner's either having or not having a permanent residence or place of business in Sherbrooke, but does not assert either. It is equivocal, and consequently of no value as certifying a fact. The only condition by which such presentment could at all meet the requirements of the law would be the absence or death of Turner; neither of those facts appear by the protest. Of what value is such a protest? It was a presentment to Chamberlin at Chamberlin's Hotel, not to Turner. The demand was made of a grown person. He may have been an idiot or a Chinaman for all that appears to the contrary by the protest.

In support of the second ground of defence respondent calls attention to the circumstances which appear, aside from direct evidence of the contract not to have recourse to Ball. The note was for $214.17. For this Ball received Chamberlin's note for $60 payable at 90 days, and a blemished horse which he sold for $100. Is it reasonable to suppose that Ball would have made himself liable in ten days for $214.17 for cash $60 which he could only realize in ninety days, and a horse which he could not easily realize cash for at $100? Again, why did Ball and Chamberlin call a witness (Lougee) to attest that Chamberlin took this note at his own risk? What occasion of a witness at all if the indorsement were absolute? Another circumstance to enhance the probability that respondent's assertions are correct is the fact proved by Rexford that Chamberlin was indebted to Turner when he acquired the note, and knew he was safe in releasing Ball. The appellant contends that parol testimony cannot be admitted to prove a contract of this kind between first indorser and his immediate indorsee. The authorities cited herewith will show that this position is incorrect. The American authorities are numerous and decisive upon this point, and the principles upon which these American cases are based are laid down by the English books. It is no violation of the maxim that parol evidence cannot be admitted against the terms of a written contract. An indorsement in blank has one, or two meanings, and one or both is or are perfectly consistent with the terms of the writing. The one meaning is that the signature indorsed conveys to the indorsee or holder the right in the note which the indorser as payee has against the maker. The other includes this first, and the further obligation to pay if the maker does not upon due presentment and protest. Parol evidence is admissible to show as between these two parties whether one or both of these contracts are included in the blank indorsement, by showing the circumstances which induced the indorsement, and what objects the parties were desirous to obtain. The authorities cited below will, it is submitted, sustain this view.

The respondent also contends that appellant, although objecting to parol testimony, having adduced it himself, has precluded himself from objecting to the evidence furnished by it. This doctrine is recognized in Lafon's Executrix vs. Gravier et al., Con. La. R., vol. 2, p. 448.

"Parol evidence is admissable in an action by the indorsee against the indorser of a note indorsed in blank to show that at the time of the indorsement the indorsee received the note under an agreement that he should not have recourse to the indorser." Hill vs. Ely, Serg. and Rawle, 363. S. P. Field vs. Nickerson, 13 Mass. Reports, 138. Cummings vs. Fisher, Anthon's N. P. 4.

"So in an action by the assignee against the assignor of a sealed note to recover back the consideration paid on the assignment, parol evidence was held admissible on the part of the defendant to prove that at the time of assigning the note the plaintiff agreed to put it immediately in suit and to take it at his own risk." Mehelm vs. Barnet, 1 Coxe, 86. Storer vs. Logan, 9 Mass. Rep. 55. Am. Ed. of Starkie on Evidence, vol. 2, p. 792, note.

"So it may be shown by parol testimony that an assignment of a mortgage absolute in its terms is a mere security for the performance of a contract." Gilchrist vs. Cunningham, 8 Wend., 641. Am. Ed. Starkie on Ev., vol. 2, p. 757, note.

"There is an intermediate class of cases partaking of the nature of both patent and latent ambiguities, where the words are all sensible and have a settled meaning, but at the same time consistently admit of two interpretations according to the subject matter in the contemplation of the parties. In such case, parol evidence is admissible to show the circumstances, under which the contract was made, and the subject matter, to which the contract referred." Piesch vs. Dickson, 1 Mason's C. C. R., 9. Idem p. 751, note.

"Parol evidence is admissible to prove an agreement between the parties that a bill of exchange which had been given by one of them to the other should not be negotiated." Robertson vs. Nott, Condensed La. Rep., vol. 2, p. 614.

"Parol Evidence may be received that a person not named as payee in a bill of exchange, furnished the value, and is interested therein. Idem, vol. 1, p. 179. Greve's Syndics vs. Sagory.

"Where an executory agreement not within the Statute of Frauds expresses no consideration, you may show what the consideration actually was. Upon a like principle a blank indorsement of a note or bill of exchange does not as between the immediate parties preclude evidence of contemporaneous parol stipulations, showing that a restricted operation was intended to be given by the signature, or that the transfer was upon trust and not absolute, for in these cases the written engagement was left incomplete by the parties." This is sustained by a host of authorities. See Cowen's Notes to Phillip's Evidence, Am. Ed. of 1850, p. 600.

"If there be a verbal agreement between the first indorser and his immediate indorsee, that the indorsee shall not sue the indorser, but the accepter only, it has been held that such an agreement would be a good defence on the part of the original indorser against his immediate indorsee suing in breach of the agreement." Byles on Bills Eng. Edition, p. 86.

"An indorsee of a bill or note, taking it under an agreement not to sue the indorser, cannot sue such indorser though the indorsement be unqualified." Pike vs. Street L. & M., 226 Tenterden. See Harrison's Digest, vol. 1, p. 520. Bills of Exchange and Prom. Notes.

The following is the judgment of the Honorable Edward Short, rendered in the Superior Court at Sherbrooke, on the 18th day of June last, in said cause, which affirms the positions taken in respondent's special pleas:

"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 proceeding 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 Defendant to the Plaintiff on the express 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 Defendants Attorneys."

The respondent has appended hereto the evidence adduced by him in the court below, and upon which in accordance with the law of the case, he asks that the judgment of the court below be affirmed.

SANBORN & BROOKS
for Respondents.

Montreal, September 1, 1859.

RESPONDENT'S EVIDENCE.

SETH LOUGEE, of Ascot, Carpenter—

Question—Were you at the Inn of the plaintiff in this cause in Sherbrooke, when plaintiff and defendant traded with regard to a note of one John Turner, on or about the 17th day of May last?

Answer—I was.

Question—Did you hear any agreement or conversation, between plaintiff and defendant, on that occasion with regard to the said note?

(Plaintiff objects to the adduction of parol evidence to contradict the terms of the written contract.) Reserved by the Judge at enquete, and evidence ordered to be taken de bene esse.

Answer—I did. I was at Mr. Chamberlin's Inn in the afternoon, in the bar-room. This was some (time) after plaintiff and defendant had made the bargain about the note and defendant called me to the bar near which plaintiff and defendant were standing, as a witness. There was a note for about two hundred and fourteen dollars as near as I can recollect it, which defendant let plaintiff have, but whose note I did not know at the time. Defendant said in the presence and hearing of plaintiff that he would let him have this note for a horse and sixty dollars, and that he, plaintiff, was to run the risk of getting the note, but I cannot say that any name was mentioned, but my impression at the time was that he was to get the money for the note from the maker. I cannot say that the plaintiff said anything, but I supposed that it was perfectly understood by the parties at the time. I cannot say that plaintiff made any objection to this, and I suppose they were perfectly satisfied at the time. Plaintiff did not make any objection to the statement of Ball in my hearing. Plaintiff has since spoken to me about this note, and has mentioned Mr. Turner's name as being the maker thereof.

Question—Did you on this occasion hear the plaintiff say that if the maker of the note was not good for it, he supposed the defendant in this cause would be, or anything to that effect?

Answer—No. I cannot say that I did. I did not pay much attention to it. I was called expressly to witness the agreement as stated by Ball, and not objected to by Chamberlin.

Question—Did you or did you not at the time distinctly understand the agreement between plaintiff and defendant to be that plaintiff should run his risk of getting his pay on the note from the maker, and that he should not hold the defendant liable for the amount?

Answer—That was my impression at the time. That is, that was my understanding of the agreement at the time.

Question—Did you or did you not at the time you were called as witness as aforesaid, hear the defendant in this cause say to the plaintiff that plaintiff was to run his risk of getting the pay for the note he had transferred to him of the maker thereof, or words to that effect, and was it not for the purpose of witnessing this agreement that you were called up?

Answer—I cannot say that he was to run the risk of getting his pay from Turner or from somebody else. My impression was at the time that he was to get his pay from the maker of the note, whoever he might be.

Question—Did not the defendant on this occasion say to the plaintiff in stating their agreement that he, defendant, was to be freed from the note, or words to that effect, and did you not so understand the agreement you were called upon to witness?

Answer—Yes. I understood it.

Cross-examined, without waiver of objections. I was not present while the bargain was made between 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 shown the said note by either party, and I did not know what were even the terms or conditions of said note, nor who was the maker of said note.

Question—Did the defendant state distinctly in your presence that plaintiff was to run his own risk of getting his pay from the maker of the note?

Answer—I could not say that he stated that plaintiff was to run his risk of getting his pay from the maker of the note, but I so understood it at the time. There was nothing said about the maker of the note.

Question—Did you not hear the said plaintiff say that "of course if one of the parties was not good he hoped the other was," or words to that effect?

Answer—I cannot say that I heard anything of that kind said. It might have been said without my remarking it, as I did not pay much attention, thinking there was no difficulty between the parties.

Re-examination—As I understood it, this was the completion of the trade at the time when I was called up, and plaintiff was putting the note in his pocket, and was just stepping round from the bar.

ABENER LOWELL, of Hatley, Farmer—

Some time in the forepart of last summer I was at Sherbrooke, and I had some conversation with plaintiff respecting a note against John Turner which he had bought of defendant.

Question—State what the conversation was respecting said note, to the best of your recollection?

(Objected to by plaintiff as illegal. Objection reserved.)

Answer—I asked plaintiff if he had bought a note of defendant, and he said he had. I asked him how he traded for it, and he told me how he traded for it. I asked him if (he) held Mr. Ball responsible for it or Mr. Turner, and he replied Mr. Turner, of course.

Question—Did you or not put the question to him so as to ascertain whether he bought the note solely upon the responsibility of Turner, or whether he meant to hold Turner and defendant?

Answer—I asked him whether he held Turner alone or whether he held Turner and defendant for said note, and he said he held Turner. The note that I referred to was one given by Turner, as I supposed, to defendant for balance due for lumbering two years ago this last winter, and defendant sold his timber to Turner, and I was informed that about a balance of two hundred dollars was due, for which the note was given. I don't know that I ever saw the note.

Cross-examined, without waiver of objection to parol evidence. The conversation which I had with plaintiff took place a short time after the transaction with respect to the note. I don't know whether the note had been protested or not. I cannot be positive as to the date of the conversation, but I think it must have been at the end of May or the beginning of June last.

Question—Will you state the conversation which took place between you and plaintiff, in the precise words used by you both as nearly as you can recollect?

Answer—I cannot recollect precisely the conversation that took place, but I thought that the plaintiff at last answered me shortly as if he thought it was not my business.

THOMAS REXFORD, of Magog, Farmer.

Question—Did you at any time, and when, have a conversation with the plaintiff respecting his being indebted to John Turner, and was anything said respecting the plaintiff's purchasing a note from defendant against Turner? If so, state such conversation. (Plaintiff objects to the adduction of parol testimony. Objection reserved.)

Answer—In the first place, John Turner was owing me fifty dollars, and I had occasion to be back and forth at Mr. Chamberlin's, and speaking to Chamberlin about Mr. Turner's owing me said sum, he said he was owing Turner, he thought, something about seventy dollars, and when Turner came from Portland, he would send up to my place and let me know; and he did so send by Mr. Chapman. I came down on the Sunday following. I think this was about the twentieth day of May last. Mr. Chamberlin said if Mr. Turner would consent to the arrangement he would pay me the fifty dollars. I spoke to Turner; he said he would not, for he said he had agreed to turn it with another man. Mr. Turner spoke of Mr. Ball, but I cannot say that he said that he had agreed to turn the debt with him, but I think he did. Then I spoke to Chamberlin more about this, and he said if he and I did not trade he was going to buy a note against Turner of Mr. Ball.

(Plaintiff being present declines to cross-examine.)

BOND LITTLE, of Hatley, Farmer. (Objected to by plaintiff.)

I met the defendant some time in May last on his way home from Sherbrooke, and he had with him a black horse which he said he got from the plaintiff in this cause, and he said he had given about a hundred and fifty dollars for the horse by letting a note go which he had from one John Turner, a lumberman. I afterwards, on the same day, called at plaintiff's house on my way down. I asked plaintiff how he happened to get so much for that horse of Ball, meaning defendant, he said he supposed defendant had got scared about a note which he had against Turner. I asked him if he considered Turner good for the note. Plaintiff said he did, he had always paid him for what deal he had with him. He said he took Turner for the debt. When I saw said horse with the defendant, I asked him if he had bought him to sell again. He said he had. I told him he could not get over a hundred dollars for him. That if the horse had not the blemish which I saw upon him he might be worth something near the price at which he had called him when purchasing the said horse. The blemish I refer to was a bunch on one of his hind legs which hurt him for market. I considered ninety dollars all the horse would sell for at that time.

Question—What did you understand by plaintiff saying that he took Turner for the note?

Answer—I supposed he had taken Turner as paymaster for the note, and that he would not come back upon Ball for the pay.

Cross-examined, without waiver of objections.

Question—Did the plaintiff at the time of the conversation you have mentioned, tell you that the defendant had backed or indorsed the said note of Turner?

Answer—He did not say to me whether the defendant had or had not indorsed said note. He told me at the time that he had refused one hundred and forty dollars for the said horse in the previous fall.

Re-examined—I cannot say whether plaintiff said the horse had got the blemish on him since the offer made the previous fall, but I understood from the conversation such to be the case.

ELKANAH W. HUBBARD, of Stanstead, stage-driver.

I purchased a horse of defendant a year ago on the 22d day of next month. It was of a black color and a gelding; it was bought by defendant of plaintiff. At the time I bought the horse he had a blemish on his off hind leg; it was a bunch. The blemish depreciated the value of the said horse as a marketable horse. The blemish was of a nature more to injure him for sale than service. I considered the horse worth what I gave for him at the time, which was one hundred dollars. I bought him for the purpose of driving in a stage. I offered the horse for sale once or twice to dealers in horses, and as soon as they saw the blemish they declined to purchase, saying that this injured him for the market. (Objected to as irrelevant. Reserved.)

Plaintiff declines to cross-examine.

JOHN WOODWARD, of Hatley, Inn-keeper.

I know a horse which Elkanah Hubbard purchased of defendant in this cause somewhere about a year ago. The horse was of a black color, a gelding. He stated the horse to be the horse which he bought of plaintiff. At the time Hubbard bought the horse of defendant I did not consider him exactly a sound horse. He had a bunch on his off hind leg. I think I would not have paid so much for the horse as I would without the blemish. I am not able to say how much this blemish would depreciate the value of the said horse as a marketable horse. It would depreciate his value with me considerably. I considered the horse worth what I offered for him at the time defendant sold him to Hubbard, which was seventy-five dollars. The blemish on the horse seemed to be one that had been on the horse for some considerable time. (Objected to as irrelevant. Reserved.)

Cross-examined, without waiver of objections.

I don't know how long the defendant had the horse when I first saw him.

THOMAS SOMERS, of Sherbrooke, Laborer. (Objected to by plaintiff. Reserved.)

I know the horse which plaintiff sold to defendant, and knew the horse at the time plaintiff had it. It had a blemish on one of his hind legs. I should say the horse was worth at the time plaintiff had him last spring from eighty to ninety dollars; and if this horse had been without blemish he would be worth a hundred and fifty dollars. This horse was a gelding of a black color.

(Plaintiff declines to cross-examine.)