

No. 13079

Supreme Court of Illinois

McCarty

vs.

Howell

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State of Illinois, } THE COURT OF COMMON PLEAS
 KANE COUNTY, } ss. Of the City of Aurora,
 City of Aurora. } March Term, A. D. 1859.

ORRIN D. HOWELL, }
 versus } *Assumpsit.*
 SAMUEL McCARTY. }

Abstract of the Record in the above cause.

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 Record.

2 Summons issued 23rd day of February, A. D. 1859, returnable to said
 3 term, against said defendant for trespass on the case, upon promises,
 damages \$200 directed to the Sheriff of Kane County. Returned, served
 March 2nd, 1859, filed in Clerk's office March 11th.

March 2nd, 1859, Declaration filed.

4 First count avers that the defendant on the 26th day of August, A.
 D. 1858, made a promissory note, bearing date on that day, and then and
 there delivered the same to Gideon Marlett by which said note the said
 defendant by the name of S. M. Carty promised to pay to Gideon Mar-
 lett, or bearer, by the name of G. Marlett, one hundred and twenty-five
 dollars with use, four months after the date thereof, or as soon as the
 said defendant shall be able to collect a certain note against Abram
 Davis of Chicago, for value received, and the said Gideon Marlett then
 5 and there endorsed and delivered the said note to plaintiff, for value
 6 received. Also, common money counts, and count for goods sold, and
 count on account stated.

8 Plea of general issue, non assumpsit, sworn to, with joinder by the
 9 plaintiff. On back of narr. was a copy of the note and accounts.

10 On the 15th day of June, 1859, one of the days of the regular June
 Term, &c., the said parties come, and a jury is empaneled to try the
 issue joined, and after hearing the evidence for a verdict, say that they
 find the issue joined for the plaintiff, and assess his damages at one
 hundred and thirty one dollars. Motion by defendant for new trial and
 in arrest of judgment.

12 On 2nd day of July, same term, motions for new trial and in arrest
 of judgment, argued, and motions overruled and judgment upon verdict.

To which decisions of the said Court, in overruling said motions, and rendering judgment upon verdict, the said defendant excepted, and prayed an appeal. Appealed allowed defendant to have twenty to file bond, and thirty to file bill of exceptions.

12

On the 23rd day of March 1859, being one of the court days of the March term of said court, this cause was continued till the next term of said court by agreement of parties.

13

July A. D 1859, bill of exceptions filed, the plaintiff on his part introduced the following witnesses.

A. D. Warner; know Gideon Marlett, was acquainted with him in the summer and fall of the year 1858, counsel for plaintiff; then shows witness a promissory note of which the following is a true copy.

Aurora August 26th 1858.

Four months after date or as soon as I shall be able to collect a certain note against Abram Davis of Chicago, for value received I promise to pay G. Marlett, or bear one hundred and twenty five dollars with use.

(Signed)

S. McCarty.

14

And upon the back of said note is the following endorsement.

"Pay this note to Orrin D. Howell.

(Signed) "Gideon Marlett".

Said witness after inspecting said note and endorsement, testified that on the 15th day of September 1858, he bought the said note of Gideon Marlett the payee and that the said Gideon Marlett there endorsed the same in blank, by writing his (the said Marletts) name on the back of it. He (the witness) saw the said Marlett write his name on the back of said note at the time, in the manner in which it now appears; that said Marlett wrote his name on said note in E. & A. Woodworths office in Aurora; that he handed Marlett the pen to do it with, and then he received the note of Marlett by purchase. Marlett then delivered the note to him, the note was endorsed in blank by Marlett, that he (the witness) sold the note and delivered it to the plaintiff in this suit in October 1858.

15

Edward R. Allen testified that he was acquainted with the handwriting of Gideon Marlett, that the signature on the back of said note in his, (the witnesses) opinion, was the signature of Gideon Marlett, the payee of said note and was in his, the said Marletts handwriting.

16 James G. Barr, testified that he was acquainted with the handwriting of Samuel McCarty, defendant from having seen him write, the said note was then shown to the witness: and he testified that the signature at the bottom of the same purporting to be the signature of S. McCarty the defendant in this suit.

The plaintiff by his counsel then offered the said note and endorsement in evidence; defendant objected, objection overruled, exception taken by defendant.

17 This was all the evidence offered by either party.

The plaintiff then asked the following instruction:

"The jury are instructed that this note of McCarty the defendant became absolutely due at the expiration of the four Months after the date thereof; whether McCarty has been able to collect the Abram Davis note or not. But if McCarty had collected the Abram Davis note before the expiration of the four months then he would be liable to pay this note before the four months elapsed mentioned in this note. If the jury believe from the evidence that it is the true and genuine signature of McCarty attached to said note and Gideon Marlett endorsed the same," which instruction was given to the jury by the court.

The Defendant then asked the following instructions;

1st, the jury are instructed before the plaintiff can recover upon the note introduced in evidence, the plaintiff must aver and prove that the condition provided for in said note has transpired.

2nd, the jury are instructed that when the maker of a note reserves to himself the privilege of a certain contingency to happen before said note becomes due, then it is necessary for the plaintiff to aver and prove that such contingency has happened before he can recover, and if the jury believe that the note introduced in evidence contained such contingency then the plaintiff cannot recover, and the jury should so find. Both of which instruction was refused by the court, to which refusal to give said instructions and to the giving of the said plaintiff's instructions the said defendants excepted.

The jury found the issue joined for the plaintiff and assessed his damages at one hundred and thirty one dollars, upon which the Court rendered judgment.

Motion for a new trial, by defendant; motion overruled by Court.

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Record

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To which decision of the court in overruling said motion for a new trial, the defendant then and there excepted, and prays that this his bill of exceptions may be allowed &c., which is done.

B. F. PARKS,
JUDGE, &c.

SEAL.

Commercial Print, 33 Main St., Aurora.

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Howell

vs

McCarty

Abstract

Filed April 17, 1860

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Commercial Print, 33 Main St., Aurora.

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Thornell

vs.

McCarty

Abstract

Filed April 17, 1860

L. Leland

Clerk

13079

Appellant's Brief of Points and Authorities.

SAMUEL McCARTY, Appellant,

VS.

ORRIN D. HOWELL, Appellee.

The April Term of the Supreme Court of the State of Illinois, A.D. 1860.

1st. There are two periods fixed upon, for the payment of this note, one is "in four months from date," the other, "as soon as the maker will be able to collect a certain note against Abram Davis, of Chicago." The maker has the right to elect to pay this note at either of these periods. He has the right to elect to pay it when he collects the Abram Davis note—this privilege was inserted for his benefit. He might never be able to collect the note against Abram Davis. Therefore, this note at the election of the appellant is payable on a contingency, and for that reason not a good note. See 15th Ill. 326, also 5th Denio, 444.

2nd. The decision in the 7th Mass. Reports, page 240, which holds, "that a note payable on the 20th day of May, 1807, when he (the payer) completes the building according to contract, is a good note, is *clearly wrong*, (see note to this in the edition of 1857). But, this decision may be correct, and still the note of the appellant in our case, not valid. In that case the note is as due "when the *payee* shall complete the building," and therefore this clause was inserted for his—the *payee's* benefit, and, consequently *he* can elect at which of these periods the note shall be due. In our case, the *maker* is the party who is to perform the condition; that is to collect the Abram Davis note; this clause is inserted for *his* benefit, and, consequently *he* is the party who can elect when the note shall be due.

3rd. A note payable "on or before" a certain day, or "in one week, or if not then, in two weeks from date," can not be enforced until the latter time has elapsed. See same case as above.

4th. The right to pay the note "as soon as the maker could collect a certain note against Abram Davis," was inserted for the benefit of the maker, and therefore he could elect to pay at that time, or in "four months from date." See 15 Ill. Reports, page 326, and 5th Denio, 444.

If he collect the Abram Davis note, before the expiration of the four months, he could retain the money until that time, or he could pay it at the end of the four months, whether he had collected the Davis note or not; or he could elect to wait until he "was able to collect the Abram Davis note," and this must be the meaning of the parties.

5th. Contracts are to be construed so as to give effect to the intentions of the contracting parties. See Chitty on Bills, marginal page 167, Chitty on Contracts, page 73.

6th. Not only the language, but the "situation of the parties," the "subject matter," and the "state of things" will be considered by the court in determining the meaning of a contract. See Chitty on Bills. Page, 77, and note 2, see also 2 Cow. 195, and 1st Barbour, 464.

7th. Where a clause in a contract is susceptible of two meanings it must rather be understood in that, according to which it may have some effect, than in that whereby it cannot produce any. Chitty on Contracts, note c., page 78. This note cannot be construed to be payable at the expiration of four months from date *absolutely*, without violating this rule of construction.

8th. There is a variance between the note described in the declaration and the one offered in evidence. The Declaration describes the note as being made by the defendant, by the name of S. M. Carty, The note introduced in evidence is signed S. McCarty. A variance in the name of a party to a note, is generally fatal when it operates as a description of the note. See Chitty on Bills, marginal page, 560.

S. W. BROWN, Att'y for Appellant.

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vs

Howell

Appellants Brief

Filed April 17, 1839

L. Deland

clerk

13079

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S. W. BROWN, Att'y for Appellant.

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Howell
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Atty

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