CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Arkansas

AT THE JANUARY TERM, A. D. 1852.

[*Continued From Vol. XII.*]

SMITH VS. CAPERS.

To an action on a note, defendant pleaded that the consideration for the note was certain lots and the improvements thereon, and that the payee would add certain other improvements, which he failed to do; that the improvements to be added were worth $100, and that the consideration of the note had wholly failed for so much: PLEA held good, on demurrer, under the doctrine of *Whcat v. Dotson, 7 English Rep.*

Under our statute, a note assigned before due, is subject to the defence of payment, by the maker, to the payee before assignment—so, also, to the defense of off-set.

Error to Union Circuit Court.

This was an action of assumpsit on a promissory note for $432.50, alleged in the declaration to have been executed by Capers, the defendant, on the 3d day of January, 1845, payable to John McLemore, or order, on the 1st January, 1846, and en-

dorsed by McLemore to Smith, the plaintiff, on the 13th August, 1845.

Capers pleaded—1st. That on the— — day of— —, 1845, before the endorsement, and while McLemore was the holder and owner of the note, he paid it in full to McLemore.

2d. That on the 1st day of August, 1845, while McLemore held and owned the note, he, McLemore, was indebted to defendant, &c., (on divers accounts) and offer to set-off.

3d. That the note was made for the sole consideration of the sale by McLemore to Capers of certain lots in Eldorado, with certain improvements; and that McLemore would, by the 25th of January, 1845, at his own expense and labor, have the floor of the house then on the lots laid down and completed in workman-like style, and furnish plank to lay the piazza or gallery floor, to be laid down unplaned; and put on the lots the logs necessary to build a good kitchen, and boards to cover it; and that McLemore had not had the floor of the house completed in a workman-like manner, or put boards on the lot enough to cover the kitchen, which flooring and boards were worth a hundred dollars, and so the consideration wholly and entirely failed as to one hundred dollars.

Demurrer to each of these pleas. The objections to the first plea urged on demurrer were: 1st. That the declaration shows that the note was assigned before it was due, and the plea showed a payment before it was assigned: 2d. That the plea did not show the plaintiff to have been cognizant of the payment when he took the note. The same objections were made to the second plea.

Demurrer overruled. The plaintiff declined to reply to the pleas, and moved for judgment; motion overruled, judgment for defendant, and exceptions.

PIKE, for the appellant. The plea of partial failure of consideration is palpably bad. It merely shows matter for recoupment.

The case presented by the other pleas is, that a negotiable

promissory note is endorsed before due without any notice of payment or set-off. Is it a good defense against it in the hands of an innocent assignee that the maker paid it off before it was due and still left it outstanding, enabling the holder to transfer it and cheat the community? It was a fraud upon the assignee through the fault of the maker, and he ought to bear the loss, if any.

CUMMINS, contra. The plea of payment, at least, was a good plea in this case. The maker of the note sued upon having, under the statute, (*secs.* 1 *and* 3, *ch.* 15, *Dig.,*) the same defence against the assignee as against the assignor. See *Buckner et al. v. R. E. Bank,* 5 *Ark.* 536. *Oldham v. Wallace,* 4 *Ark.* 559. *Bury v. Hartman,* 4 *S. & R.* 177. *Brindle v. McIlvaine,* 9 *S. R.* 74. *Anderson's Exr. v. Mason & Co.,* 6 *Dana* 538. *Harrison v. Burgess et al.,* 5 *Mon.* 417. *Gibson v. Pew & others,* 3 *J. J. Marsh.* 223. *Wheeler ass. v. Hughes Exr.,* 1 *Dall. Rep.* 23. 2 *Dall.* 45. 12 *Wheat.* 605. 1 *Smedes & Marsh.* 22. 3 *Ib.* 56.

Mr. JUSTICE SCOTT delivered the opinion of the Court.

The question in this case as to the plea of partial failure of consideration, has been settled in the case of *Wheat v. Dotson,* 7 *Eng. Rep.*

The remaining question involves the construction of the third section of our statute of assignment, (*Dig. p.* 162, *sec.* 3.) And we think that this statute, in so far as it provides for the negotiability of commercial paper, was but in affirmance of the law merchant, nevertheless that the section in question, when considered in connexion with the first and the other portions of the enactment, is sufficiently broad to embrace not only the additional instruments made negotiable, but also paper negotiable by the law merchant; and must therefore be considered as changing the rule as to defences against such paper when negotiated before maturity.

The pleas of payment and set-off were therefore good; and finding no error in the record, the judgment must be affirmed.