SCULL ET AL. *vs.* EDWARDS, SURV.

When one makes a promissory note, payable to his own order, and then endorses and delivers it to another, he has, in legal effect, but made an ordinary promissory note; because, until endorsed, the instrument is imperfect, and has no validity as a promissory note.

The first endorsee of such a note, does not take a derivative but a primitive title, and therefore the endorsement, as to him, is not technically such, but a part of the instrument itself, thus made valid.

Where suit is brought upon such instrument, and the defendant craves oyer of the "writing sued on," grant of oyer both of the body of the instrument and the endorsement is strictly responsive to the prayer of oyer, and both become part of the record.

Appeal from Jefferson Circuit Court.

This was an action of assumpsit by Edwards, survivor of Mygate & Edwards, against Scull & Bro., on a note made by defendants, payable to their own order, and endorsed by them to Mygate & Edwards.

The defendants craved oyer of the "writing sued on," and the record states that it was granted, but does not state how, nor does the instrument appear of record until copied in a bill of exceptions taken at the trial.

Defendants pleaded non-assumpsit—there was a trial and judgment in their favor, which was reversed by this court on appeal. See *Edwards, surv. v. Scull et al.*, 6 *Eng. R.* 325.

After the case was remanded, there was a trial, and verdict for plaintiff. Defendant moved for a new trial on the grounds, that the verdict was contrary to law and evidence, and that the court erred in refusing instructions moved by defendants, and in giving others to the jury. The motion was overruled, defendants excepted, and took a bill of exceptions, as follows:

"Be it remembered that on the trial of this cause, the plaintiff

offered in evidence, the following instrument of writing, it being the same given on oyer, and which is in the following words and figures, to wit:

"$1,556.75. *New Orleans,* Dec. 14th, 1847.

On the first day of June after date, we promise to pay to the order of ourselves, fifteen hundred and fifty-six 75-100 dollars, at the store of Mygate & Edwards, in this city, value received.

H. SCULL & BRO.

And endorsed thus:

Pay Mygate & Edwards.

H. SCULL & BRO."

The counsel of defendants objected to said instrument being read to the jury, because of the variance between it and the instrument described in the declaration; but the court overruled said objection and permitted the same to be read in evidence, to which defendants excepted, &c. This being all the evidence that was offered or received on the issue, &c., the defendants' counsel moved the court for the following instructions to the jury:

1st. That the allegations in the declaration and the proof must agree.

2d. If there is a material variance between the allegations in the declaration and the proof, the jury will find for defendants.

3d. A promissory note is a writing which contains a promise of the payment of money to another, at or before a time specified, in consideration of value received by the promisor.

The court refused to give said instructions, but gave the following, of its own motion:

Under the declaration, the instrument offered in evidence is sufficient to enable the plaintiff to recover.

To all which, &c., defendants excepted, &c., &c.

Defendants appealed.

ENGLISH, for the appellants. The court erred in refusing to give the first and second instructions. They were clearly law, and not abstract, because the instrument sued on was not put

upon the record by grant of oyer, nor was the endorsement. The record does not show a grant of oyer by acceptance *(Kelly v. Matthews,* 5 *Ark.* 227*)* or filing a copy *(Renner v. Reed,* 3 *Ark.,* 349.) The statement in the bill of exceptions that oyer was granted, amounts to nothing. *(Clark v. Gibson,* 2 *Ark.* 112.*)* Oyer of the note was craved, but not granted; and if granted, there was certainly no oyer of the endorsement. *(McLain et al. v. Onstott,* 3 *Ark.* 617.) Hence, there was no proof of the note and endorsement set out in the declaration; and the instructions should have been granted.

The instrument sued on was not a promissory note, *Ch. on Bills,* 516; nor capable of being assigned as such.

The evidence did not sustain the verdict. The declaration declares upon a note of a certain date, and averred an endorsement on the day of the date. The record shows that the note was read, but there is no evidence that the plaintiff read the endorsement, which was necessary to be done, to warrant a verdict in his favor. The plea admits the execution of the note, (1 *Eng.* 186. 2 *Eng.* 212,) but does not dispense with the reading of the note and endorsement. (2 *Eng.* 112. *Stark. on Ev.'* 2 *vol.* 202.)

But if the endorsement was read, there was a variance; because the endorsement is without date; and the party was bound to show an endorsement on the day of the date of the note. As the endorsement was without date, he should have described it as such, and proved an endorsement before suit brought.

WATKINS & CURRAN, contra. The legal effect of the instrument sued on, when endorsed, was the same, as if, in its face, it had been made payable to the plaintiffs. Such notes and bills are very common in the commercial world. 2 *Bl. Com.* 467. *Story on Prom. Notes,* 4. *Ch. on Bills,* 553.

This court has already decided that there was no variance between the note set out in the declaration and the one read in evidence, (6 *Eng.* 325,) nor can a variance be objected at the trial, after oyer craved and granted. (5 *Ark.* 223.)

There was no evidence except the note, the execution of which is admitted; and as the construction of a written instrument is the province of the court, there was no error as to the instructions.

Mr. Justice SCOTT delivered the opinion of the Court.

Where one makes a promissory note payable to his own order, and then endorses and delivers it to another, he has, in legal effect, but made an ordinary promissory note, at last by all this circumlocution; because, until endorsed, the instrument is imperfect, and has no validity as a promissory note. The first endorsee, then, does not take a derivative but a primitive title, and therefore the endorsement, as to him, in that case, is not technically such, but a part of the instrument itself, thus made valid. (*Lee & Langdon v. Br. Bk. Mobile*, 8 *Porter R.* 124, and *Roach v. Ostler*, 1 *Man. & Ryland R.*, there cited.) It would be otherwise in a case where a firm made a promissory note to one of its members who endorsed it: and in such case the endorsee would take a derivative title, as to all the other members at least, although, even in that case, the note could not be sued on at law before the endorsement. *(Smith et al. v. Lurhee et al.*, 5 *Cow. R.* 688, 708.*)*

The grant of oyer in the case at bar, both of the body of the instrument and of the endorsement thereon to the plaintiff below, was therefore strictly responsive to the prayer of oyer for "the writing sued," and placed the latter upon the record in the same sense that it did the former, the two together, in legal effect, constituting the writing itself, on which the plaintiff below sought the recovery in his primitive title set out in the declaration. And, when afterwards, at the final trial, it appears, as the bill of exceptions shows, that the plaintiff read "in evidence the following instrument of writing, it being the same given on oyer, and which is in the following words and figures, to wit:" &c, (setting out, *in haec verba,* not only the body of the note, but the full endorsement thereon,) we cannot intend, in the face of such a record, that the endorsement was in fact not read

in evidence, but must conclude, as is manifestly true, that it was read in evidence. And when we do so, it is not only clear that the verdict and judgment are fully sustained by the evidence, but that there was no error in the refusal of the court below to give the first two instructions asked; because, there being evidence in, or want of evidence upon which to found any pretext for variance between the allegations and the proof, they were purely abstract: there being no more necessity to prove a distinct date for the assignment in this case, than there would be to prove two dates to any one ordinary promissory note alleged to have been executed on one certain day only. Nor was there any error in the refusal to give the third, because, in its terms, it was not, in strictness, law, and was calculated to mislead the jury. Nor was there any error in the instruction given.

. All three of the grounds, then, upon which the motion for a new trial was made, being wholly unsustained by the record, and in no other wise supported than upon very technical and flimsy grounds, in a matter of plain indebtedness, where no defence at all was offered on the merits, we shall not only affirm the judgment of the court below with costs, but award the appellee five per centum damages on its amount.