

MARSHALL & JAMES vs. HAWKINS.

The plaintiffs declared on a bill of exchange, drawn by defendant upon M. G. & Co., payable to E. and by him endorsed to the plaintiffs. They set out the instrument and endorsement, and then alleged that, after its endorsement by E. to them, "*and before the payment of any part thereof,*" it was presented to M. G. & Co. for acceptance, and acceptance refused, &c.: HELD, That the payment of the bill to E. before he endorsed it to plaintiffs, was sufficiently negatived, in general terms as above.

Appeal from Pulaski Circuit Court.

Assumpsit by Marshall & James against Hawkins.

Declaration—"John R. Marshall and Andrew B. James, partners, &c., complain of Richard C. Hawkins, of a plea of trespass on the case on premises.

For that, whereas, &c., on the 12th day of August, 1850, at, &c., the said defendant made his certain bill of exchange of that date, and now here to the court shown, and then and there directed the same, &c., to Messrs. M. Greenwood & Co., New Orleans, La., and thereby then and there requested said M. G. & Co., on the first March next after the date thereof, to pay to the order of E. H. English the sum of five hundred and ninety-three dollars and eighty-one cents, for value received, and charge to his account, waiving protest and notice, and then and there delivered the same to the said E. H. English; who then and there, by his written endorsement thereon, which is now to the court shown, endorsed the same, and thereby directed the said sum of money in said bill specified to be paid to the said plaintiffs, and

then and there delivered the same to them. And plaintiffs in fact further say, that afterwards, and before the payment of any part thereof, to wit: on the 14th day of January, 1851, at the city of New Orleans, in the State of Louisiana, to wit: at the county aforesaid, the said bill of exchange was duly presented and shown to said M. Greenwood & Co. for acceptance, and they were then and there required to accept the same, but neither then, or at any time before or afterwards, did or would they, or any other person, accept or pay the said bill, and totally neglected so to do, and then there the said bill was duly protested for non-acceptance thereof, of all which premises the said defendant then there had notice. By means whereof," &c., &c.—Concluding with the usual negation of payment to plaintiffs by defendant.

The defendant demurred to the declaration, on the grounds: 1st. That the declaration failed to negative the payment of the bill of exchange to E. H. English, the payee, before the assignment: 2d. That it was not shown that said bill was assigned by writing upon, or attached to, the bill.

The court sustained the demurrer, the plaintiff rested, suffered final judgment to go for defendant, and appealed.

PIKE & CUMMINS, for the appellant.

WATKINS & CURRAN, contra.

Mr. Justice SCOTT delivered the opinion of the Court.

It was not necessary, certainly, for the plaintiff to negative the payment to English before his endorsement, with particularity of time and place, or in any way otherwise than in general terms; because, if an issue had been raised as to such payment, it would not have rested upon the negation of payment in the declaration, but upon its averment in the plea setting it up. And that such negation is embraced in the terms, "and before the payment of any part thereof," (used by the pleader in reference to the sum of money specified in the bill,) when the whole declaration is considered together, is, in our opinion, entirely clear.

The other cause of demurrer specified, is without any semblance of foundation.

Let the judgment be reversed, and the cause remanded, to be proceeded with.

Chief Justice WATKINS not sitting.

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