JORDAN *vs.* THORNTON, USE MEWBORN.

Under our statute of assignments a bond payable to an individual, or order, may be transferred by blank endorsement so as to vest the legal interest in the assignee: so too in Tennessee.

Where the assignor of a bond, note or bill, although a remote one, pays it to the last endorsee, and it is thereupon delivered to him, the legal interest thereby vests in such assignor, and he may bring suit in his own name against a previous endorser or the maker notwithstanding his endorsement; but he cannot bring suit in the name of the original payee for his use: so too in Tennessee.

Appeal from the Circuit Court of Bradley County.

DEBT, by attachment, determined in the Bradley circuit court at the May term 1846, before the Hon. Wm. H. Sutton, judge.

The suit was brought by Wm. B. Thornton, for the use of Joshua Mewborn, against James S. Jordan upon a writing obligatory for $3600, executed, at Somerville, Tennessee, to the plaintiff by the defendant, and one Spencer Jackson, on the 18th November 1842, payable to plaintiff or order at the Branch of the Bank of Tennessee, at Somerville, and due at twelve months from its date. After setting out the obligation in the usual form, the declaration alleges

"that after the making thereof, and before the payment of the same or any part thereof, at &c. for value received, the plaintiff delivered the said writing obligatory to the said Mewborn of which defendant had notice," &c. The defendant craved oyer of the bond, and endorsements thereon, which was granted. It was endorsed thus:

"WM. B. THORNTON, Laurel creek P. O.

W. E. DAVIS, Laurel creek.

JOSHUA MEWBORN, Somerville P. Office."

Defendant then filed a plea as follows: "Defendant comes, &c. and says *actio non*, because he says that after the making of said writing obligatory upon which this suit is founded, by him the said defendant, and before the commencement of this suit, the said plaintiff by his endorsement upon said writing obligatory endorsed and transferred all his right, title, and interest and claim in and to said writing obligatory to one Wm. E. Davis, and delivered the same to him, and the defendant became liable to pay said Davis; and for that afterwards the said Davis by his endorsement upon said writing obligatory transferred and endorsed all his right, title, interest and claim, in and to said writing obligatory to one Joshua Mewborn for whose use this suit is brought, and the said defendant became liable to pay said Mewborn; and that the said plaintiff had no interest in said writing obligatory at the commencement of this suit, but that the legal interest in the same was in the said Joshua Mewborn, and this defendant is ready to verify," &c. To which plaintiff replied, "*precludi non* because he says that the legal interest to the said writing obligatory upon which this suit is founded did not exist in the said Joshua Mewborn at the time of the commencement of this suit"—concluding to the country. Defendant took issue to the replication, the cause was submitted to the court, sitting as a jury, and the court found for plaintiff. Defendant moved the court for judgment *non obstante veredicto*, which was overruled, and judgment rendered for plaintiff for amount due on the bond. Defendant moved for a new trial and in arrest of judgment, which were overruled, he excepted, and took a bill of exceptions, setting out the evidence, which follows:

"Defendant introduced the deposition of William Hunter by which he proved that the bond for $3600, and endorsements, given on oyer, was endorsed by Mewborn to the Branch of the Bank of Tennessee, at Somerville; was protested for non payment; and $1223.80 paid on the bond by E. L. Evans Trustee of Jackson, and the residue paid by Mewborn, on the 12th March 1844, and the bond then delivered to Mewborn. This, with the bond and endorsements, was all the evidence in the case."

Defendant appealed, and the refusal of the court below to render judgment *non obstante veredicto* for defendant, to grant a new trial, or arrest the judgment, are assigned for errors.

RINGO & TRAPNALL, for the appellant. The plea of the defendant was a complete bar to the plaintiff's action. *Block vs. Walker,* 2 *Ark.* 4. *Purdy vs. Brown & Taylor,* 4 *id.* 536. *Gray & Co. vs. R. E. Bank,* 5 *id.* 93. *Lafferty vs. Rutherford, id.* 649. The facts were established and therefore the motion for a new trial should have been sustained. *Reip vs. Reip,* 16 *Wend.* 663. 1 *Caine's Rep.* 162. *Benedict vs. Lawson,* 5 *Ark.* 514. *Howell vs. Webb,* 2 *id.* 300.

The replication of the plaintiff tenders an issue on the fact, whether the interest was in Mewborn, and does not deny the allegation that, at the commencement of the suit, the legal interest was not in the plaintiff, and thereby admits it to be true. The issue was immaterial and the finding determines nothing. 2 *Tidd,* 921. 2 *Salk.* 579. 3 *id.* 121. 2 *Lord Raymond* 922. The judgment should have been arrested and a repleader ordered. *Staple vs. Hayden,* 2 *Salk.* 579. 3 *idem.* 14. 6 *Mod.* 1. 5 *Taunton* 386. 1 *Marsh.* 95, *S. C.*

YELL, contra. The defendant, in his plea in bar, tenders no issue but that the legal interest was in Mewborn, and the replication denies this: and this being the only fact material, it is a good replication to the whole plea, and the evidence introduced into the case fully sustains the finding of the court by showing that the legal interest is in Thornton and the equitable interest in Mewborn.

The proof further shows that the suit was correctly brought in the name of the payee to the use of the equitable holder of the writing obligatory sued on.

"The blank endorsement and delivery of a bond give the holder a right to sue and collect the money due thereon, in the assignor's name. *McNulty vs. Cooper,* 3 *Gill & Johns.* 214. Where a promissory note payable to order is endorsed in blank, the holder has the right to fill it up with any name he pleases: and if, in fact, the endorsement in blank was intended as a transfer for the benefit of the other persons, yet he would be considered as a trustee suing for the benefit of the persons having the legal interest. 11 *John Rep.* 52. A note endorsed in blank may or may not be filled up at the election of the endorser. 15 *Johnson* 249.

The holder of a negotiable paper may bring an action upon it in the name of a person having no interest in it, and it is no defence that the suit is brought without the knowledge or consent of the nominal plaintiff. As a general rule suits should be brought by persons having the legal interests in the contracts, but in the case of negotiable paper a suit may be brought in the name of a person having no interest in the contract—he may sue for the use of those who have the equitable interest. 15 *Wendall* 640, 641.

Where an action is brought in the name of an assignor, by the assignee or any other person beneficially interested, the defendant cannot avail himself of the plaintiff's want of interest, or that some other person than the one for whose benefit the suit is brought is the party beneficially interested. *Raymond vs. Johnson,* 11 *J. R.* 488. *Mosher vs. Allen,* 16 *Mass.* 452. The death of the assignor does not defeat the remedy; the assignee may use the name of the administrator of the assignor to enforce his remedy at law. 9 *Mass.* 337. *Cuts vs. Perkin,* 12 *Mass.* 206.

This note having been executed and paid by Mewborn in the State of Tennessee, this case must be governed by the laws of Tennessee and the law merchant. Then it is wholly immaterial whether the suit is for the use of Mewborn or in the name of Mewborn. The suit is good either way for it does not affect the defendant's right of defence. The whole plea is therefore a nullity, and even

if it were unanswered, would be no bar to plaintiff's action. To recover in either case Mewborn would only have to show that he is the lawful holder of the note. *Chitty on Bills, 1st note* 234. *Louisiana Bank vs. Roberts,* 4 *Miller's Lou. R.* 530. *Chitty on Bills* 237. In Tennessee, justice Green delivered the following opinion: "This is an action of covenant upon a writing obligatory executed by the defendant to the plaintiff for five thousand five hundred dollars in current bank notes (which is assignable by statute). The first plea of the defendant alleged that before the commencement of the suit the plaintiff assigned the said covenant to one George H. Wyatte and delivered the covenant to him, and that he is the true and legal owner and possessor thereof. To this plea the plaintiff demurred. In such case the legal interest of the payee is transferred to the person named in the assignment. *Chitty on Bills* 116, 117, 118. 15 *John. R.* 249. It is true this does preclude the legal owner from suing in the name of the payee for his benefit. 11 *John. R.* 52. 15 *Wend. R.* 640; but it must appear that the suit is for the benefit of the legal owner; and that fact should have been replied to the defendant's plea and would have constituted a good answer to it. 11 *Wend.* 27. 13 *Wend. R.* 641." (a)

The case of *Block vs. Walker,* 2 *Ark. R.* 4, is only applicable to assignments and contracts made and concluded in this State; and is not applicable to blank endorsements. That case is only applicable to regular assignments according to the statute of Arkansas. Assignments as to bonds and notes implies more than blank endorsements. *Bank of Marietta vs. Pindall,* 2 *Rand.* 465.

The law of the place where a contract is entered into is to govern as to every thing which concerns the proof and authenticity of the contract, and the faith which is due to it, that is to say, in all things which regard its solemnities or formalities. *Story's Conflict of Laws* 199, *sec.* 240. *Ringgold vs. Newkirk,* 3 *Ark. R.* 108. See 3 *Haywood* 105.

(a) Mr. Yell omitted to refer to the book from which this case is taken.—Reporter.

CROSS, J. This case comes up by appeal from Bradley circuit court. Thornton for the use of Mewborn brought debt on a writing under seal whereby S. Jackson and James S. Jordan or either of them twelve months after the date thereof promised "to pay William B. Thornton or order three thousand six hundred dollars, payable at the Branch of the Bank of Tennessee at Somerville for value received," and bearing date the 18th day of November 1842. On oyer it appeared that said writing was endorsed, "Wm. B. Thornton, Laurel creek P. O." "Wm. E. Davis, Laurel creek," and "Johnson Mewborn, Somerville P. O." By the pleadings and at the trial Jordan contested the right of Thornton to sue, upon the ground that the legal interest in the writing was in Mewborn at and before the commencement of the suit. A judgement, however, was rendered by the court against him and the appeal is prosecuted to reverse this judgment.

The only question material to be considered is whether Thornton, under the circumstances, could maintain the action. From the evidence as set forth in the bill of exceptions taken on the trial and transcribed into the record, it is shown that Mewborn's endorsement was to the Branch of the Bank of Tennessee at Somerville in the State of Tennessee; that the obligation was protested for non payment, and that afterwards having been paid in part by Jackson's trustee and the balance in full by Mewborn, was on the 12th of March 1844 delivered by the bank to said Mewborn. The transfer from Thornton to Davis and again from Davis to Mewborn is not questioned. Our Statute on the subject of assignments declares that "all bonds, bills, notes, agreements and contracts in writing for the payment of money or property or for both money and property shall be assignable;" that "the assignee of any such instrument," &c. "may sue for the same in his own name," that the assignment authorized shall not "change the nature of the defence or prevent the allowance of discounts or offsets either in law or equity, that any defendant may have against the original assignor previous to the assignment, or against the plaintiff or assignee after the assignment," that "all blank assignments shall be taken to have been made on such day as shall be most to the advantage of the

defendant," and that "no assignor shall be able to release any part of the consideration of the instrument by him assigned, after the assignment thereof." See *Rev. Stat. p.* 107-8 *sec.* 1, 2, 3, 7 and 8. Under this Statute such obligations may be transferred either in full or in blank and the legal interest vested in the assignee, subject to the terms and with the consequences imposed by its provisions. In the case of *Block vs. Walker,* heretofore decided by this court, it was held that an assignee could not "restore the legal interest in the assignor by the erasure or cancellation of the assignment;" that if it were otherwise the party of his own accord might "not only destroy the mutual obligation of a subsisting contract, but at the same time create another without the agreement of the other parties and in prejudice of their rights." 2 *Ark. Rep.* 12. It was also held in the same case that after the assignment and delivery of a writing obligatory, the assignor had "no longer any power or control over the contract, because by the assignment and delivery of the writing, all his interest is vested in the assignee and he alone has the right of action in his own name." Where the assignor, however, although a remote one, of an obligation, note or bill, pays it to the last endorsee, and the same is thereupon delivered to him, the legal interest thereby vests in such assignor and he may bring suit in his own name against a previous endorser or the maker, notwithstanding his endorsement. See note and references to *Strong vs. Spear,* 1 *Haywoods R.* 214. *Peck's R.* 268. This principle is also recognized in the case of *Block vs. Walker.* In such case it is a fair business transaction and contract between the parties resting upon a valuable consideration and consummated by the delivery. In the case before us, therefore we entertain no doubt but that under our laws the right of action was with Mewborn, the party having the legal interest and consequently that the judgment was erroneously rendered for Thornton.

If in the State of Tennessee, where the obligation appears to have been executed, transferred and made payable, a recovery could be affected on such obligation in the form adopted in this case, it remains to be considered whether the *lex loci contractus* ought not to govern. The law of a place or country where a contract is made

and is to be executed, must govern as to its validity, nature, interpretation and effect. *Story on Prom. Notes* 170. But as to the form of action or remedy, it is well settled that the recovery must be sought according to the *lex fori*, not the *lex loci contractus*. *Dixon's Exrs. vs. Ramsey's Exrs.* 3 *Cr. R.* 324. *Nash vs. Tupper*, 1 *Caine's Rep.* 402. *Ruggles vs. Keeler*, 3 *John. Rep.* 268 *Chitty on Bills* 192-3. In the statute laws of Tennessee, as compiled by Carruthers & Nicholson, page 499, 500, we find the following provision: "All bills, bonds or notes for money," &c. "shall be held and deemed negotiable and all interest and property therein shall be transferable by endorsement in the same manner and under the same rules, regulations, and restrictions, as notes called promissory or negotiable notes have heretofore been, and the endorsee or assignee may have and maintain his action," &c. It will be seen from the same compilation, page 550, that promissory notes at the time the foregoing provision was enacted, were assignable in the same manner "as inland bills of exchange by the custom of merchants in England." Hence, it is clear that under her laws, the legal interest in bonds &c. for the payment of money when transferred by assignment, vests in the assignee, and that there, as here, the right of action follows such interest. The adjudication of the courts of that State are clear, we think, on this subject as well that a remote assignor, after payment and re-delivery may sue a previous assignor or the payor. See note to case of *Strong vs. Spear*, and *Peck's R.* 258, above referred to. Applying therefore either the law of the place where the contract was made and to be executed, or of this country where it is sought to be enforced, the action was improperly brought in the name of Thornton. The judgment therefore of the court below must be reversed and set aside with costs.