*MATLOCK [*492

v.

PUREFOY.

In an action of assumpsit, by the payee, on a promissory note, payable to J. M., or bearer, for value received, it is sufficient, in setting out the note according to its legal effect, to allege that the defendant made his promissory note, and describe it as payable to J. M.—omitting the words "or bearer" and "for value received."

It is unnecessary to allege the place where a bill or note was made, unless made in a foreign country and the plaintiff seeks to recover interest or damages different from that allowed by the law of the forum.

It is a fatal defect in a count upon an account stated, to allege a promise to pay the amount with 10 per cent. interest, without alleging the promise to be in writing; but such defect would be considered as amended under the statute (*Dig., ch.* 126, *p.* 806), unless specially pointed out as a cause of demurrer.

A breach in assumpsit, that the defendant "has not paid any of the said money, or any part thereof, or the said ten per cent. interest, or any part of the said interest," is good enough, although not absolutely certain to every intent in every particular.

When the declaration contains a count on a note and one on account stated, the note is not admissible in evidence, in proof of the account not charged to have been signed by the defendant, until its execution be first proven.

Appeal from the Circuit Court of Ouachita County.

HON. ABNER A. STITH, Circuit Judge.

Strain and *Cummins & Garland*, for appellant.

*SCOTT, J. The action was as- [*493
sumpsit on a promissory note. There was a special count on the note bearing ten per cent. interest, setting it out according to its legal effect, and a count on an account stated, alleging a promise to pay the amount named *with ten per cent. interest.* It was not alleged that the promise to pay this last named interest *was in writing.*

There was a demurrer assigning—1. Because the note was not described as payable to John Matlock *or bearer*—2d. Was not described as given for *value*

received—3d. Was not described as made at *Camden, Arkansas*—4th. The breach was not sufficiently certain in its negative as to the *ten per cent. interest.*

The breach was, "has not paid any of the said moneys, or any part thereof, or the said ten per cent. interest, or any part of the said interest."

The note, which we will presume was given on oyer, although there is no entry to that effect in the record, was dated "Camden, Arks."—was payable to J. M., "or bearer," and "for value received" was upon its face.

The court sustained the demurrer to the *first* count, and overruled it as to the second. The fatal defect in the second count (*Dig. Stat. of Interest*, *sec.* 2, *p.* 614), not having been pointed out in the demurrer, was, no doubt, considered by the court as amended, as by striking out the words "ten per cent. interest," under section 62 of the statute of demurrers. (*Dig., chap.* 126, *p.* 806.)

We think, however, that none of the supposed defects expressed in the demurrer, ought to have been regarded as sufficient to authorize the court to sustain it. No one of them pointed out a substantial defect, as we think. There was no effort to set out the note *in each verba.* 1st. If the plaintiff had declared on a derivative title, and there was no endorsement, then, to *show title* to sue, he would have had to allege the note as payable to "J. M. or bearer;" but in this case, J. M., the payee, was himself the plaintiff. 2. The plaintiff alleged that the defendant "made his promissory note." *A promissory note imports* value received. *Story on Prom.* 494*] *Notes, sec* 51. 3. In *the case of *Semon et al. v. Hill, ad.*, 7 *Ark.* 73, this court cited with approbation the case of *Houriet v. Morris*, 3 *Campbell R.*, in which Lord Ellenborough held it unnecessary to state the place where the instrument was made. (See also, *Chitty on Bills, p.* 564; *Payne v. Brittin, exr.*, 6 *Rand.* 101.) Where a bill may have been made in a foreign country, and the plaintiff seeks to recover interest or damages different from that allowed by the law of the forum, then the place ought to be alleged, because in that case, matter of substance. In general, however, if stated, it would not be traversible, and would be treated as surplusage. (*Swinney v. Burnside*, 17 *Ark.* 38.) 4. As to the breach, although not absolutely certain to every intent in every particular that a sharp lawyer in sharp practice might conceive, it seems good enough. Because, it is easy to see that the plaintiff said that the defendant had paid no part of the money or interest that he had before alleged he had promised to pay him.

But although the court erred in sustaining the demurrer, it is perfectly clear that the decision upon the other question was right—that is, in excluding the note as evidence upon the second count, after the first was quashed, until its execution should be first proven as at common law. Because, *then* the declaration was not "founded upon any instrument or note *in writing charged* to have been *executed by the other party*" (*Dig., ch.* 126, *secs.* 103-'4; *Bank of the State v. Kirby et al.*, 9 *Ark.* 353), but was upon an account stated, not charged to have been signed by the defendant.

Judgment reversed and cause remanded.

Absent, Hon. Thos. B. Hanly.

Cited:—24-190.