

PATTERSON *vs.* WILSON ET AL.

Where the summons, issued by a Justice of the Peace, does not designate the nature of the instrument sued upon, but it is in fact a bond, it should not be excluded from the jury as evidence in a trial on appeal to the circuit court, because in his transcript, the justice calls it a promissory note.

*Writ of error to the circuit court of Johnson county.*

This was a suit commenced before a justice of the peace of Johnson county, by Wilson & Co. against Patterson, in January, 1843. The justice gave judgment for the plaintiffs, and the defendant appealed to the circuit court, where the case was determined, in January, 1845, before BROWN, Judge.

The transcript sent up to the circuit court by the justice of the peace commenced thus: "*Wilson et al. against Patterson*—suit brought on *promissory note*, drawn by James P. Patterson, payable to John Wilson & Co. for \$99.76, dated June 14th, 1839, due one day after date, and on which is a credit of \$13, 10th March, 1841—filed before writ issued." Then followed a history of the trial, the entry of the judgment, together with a copy of the instrument sued on, the summons, and other papers in the cause.

The following is the instrument sued on as copied into the transcript of the justice:

"One day after date, I, for value received, promise to pay John Wilson & Co. ninety-nine dollars and 76 cents: witness my hand and seal; January 14th, 1839.

JAMES P. PATTERSON, [SEAL.]"

CREDIT—"Rec'd on the within note thirteen dollars, March 10th, 1841.

JOHN WILSON."

The summons is substantially in the form prescribed by *Rev. Stat.*, page 495, sec. 24, and does not specify the cause of action.

In the circuit court the parties submitted the case to a jury, and the plaintiffs obtained a verdict and judgment for the balance due upon the bond.

Pending the trial a bill of exceptions was taken by the defendant, from which it appears that the plaintiffs offered to read as evidence to the jury a writing obligatory, which is copied in the bill of exceptions, and which is the same as copied above, to the reading of which he objected, but the court permitted it read, and he excepted.

The defendant brought error.

BATSON for the plaintiff.

WATKINS & CURRAN, contra.

The only question in this case is, did the court err in permitting the instrument to go to the jury? It is true that the justice says in his transcript that the suit was founded upon a *promissory note*; but he also sets it out and shows that it was a *writing obligatory*. The question then whether it was in fact a bond or note will be determined, not by what the justice conceived it to be, but by what it really is. Although the justice called it a note, he shows by the transcript and papers returned to the circuit court, that he was mistaken—that it was a writing obligatory. The instrument which the plaintiff in error moved to exclude was the same one filed before the justice and upon which the suit was based. If the defendant had been called upon by the writ to answer an action founded upon a promissory note, the objection might be tenable; but by the writ he is simply summoned to answer the complaint of the plaintiffs, without any specification of the complaint.

JOHNSON C. J., delivered the opinion of the court.

The circuit court decided correctly in permitting the instrument offered by the defendants in error to go to the jury. The statute requires that a summons issued by a justice of the peace shall call upon the defendant to appear and answer the complaint of the plaintiff. The only objection urged is that the court below permitted the defendants to give a writing obligatory in evidence to the jury when the action was founded upon a promissory note. This objection is not sustained by the record. The plaintiff in error is summoned to answer the complaint of the defendants, and that without any description of the cause of action. Under the summons, the defendants were at liberty to introduce a writing obligatory or any other evidence which could constitute the foundation of an action instituted before a justice of the peace. It is admitted

that the justice in his transcript of the proceedings had before him designates it as a promissory note, but any thing that he could say concerning it would not change its legal character, or deprive the defendants of their right to introduce it. Judgment affirmed.

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