

BIZZELL vs. THE BANK OF THE STATE.

An endorsement without delivery does not divest the legal interest of the holder of a bill: both are necessary. Where endorsements are in blank, the holder may make himself the immediate endorsee of any one of them, or he may derive his title through all in succession.

Writ of Error to Pulaski Circuit Court.

The facts are stated by the court.

RINGO & TRAPNALL, for the plaintiff. A plea that a bond or note had been assigned by the plaintiff before the commencement of the suit, and that he, at that time, had no legal interest in it, is good in bar of the action. *Block v. Walker*, 2 *Ark. Rep.* 4. *Dickerson et al. v. Burr*, 2 *Eng. Rep.* 34. By endorsement the payee divests himself of the legal interest in the bill of exchange. *Jordan v. Thornton, use of Mewborn*, 2 *Eng. Rep.* 224. *Sterling & Snapp v. Bender*, 2 *Eng. Rep.* 201. *Wilkinson v. Nicklin*, 2 *Dallas R.* 296. And after the bill has been so endorsed, the endorser can acquire interest in it again alone by re-endorsement to him. 3 *Ark. Rep.* 467. 1 *Ark. Rep.* 220. 2 *Ark. Rep.* 4.

The variance between the allegations and proof was fatal. 1 *Ch. Pl.* 333. *Bower v. Green*, 6 *Monroe* 340. The absolute and natural identity of the claim or charge alleged, with that proved consists in the agreement between them in all particulars. 3 *Starkie's Ev.* 1530, and as the identity between the bill of exchange and the en-

dorsements, as alleged, which were essential to support the plaintiff's claim, differed from the bill of exchange and endorsements offered in evidence, the latter should have been rejected; because it proved affirmatively that the plaintiff below had no interest in the bill produced on the trial, and could maintain no action on it.

And, notwithstanding, the bank may be the holder of the bill in fact, yet nothing appearing to the contrary, she must be regarded as having derived her title to it, through the endorsement of Crease, who appears to be the last endorser: and so, even in that event, there is a manifest variance between the allegations and proof, for which the testimony ought to have been excluded.

It is also urged that the holder under a blank endorsement, must, to enable him to recover, fill up the endorsement either before suit brought, or before or on the trial, otherwise cannot recover; at least, without affirmative proof that he holds the bill *bona fide*.

LINCOLN, contra.

OLDHAM, J. This was an action of assumpsit, brought by the Bank against Bizzell, in the Pulaski Circuit Court, upon a bill of exchange for eleven hundred dollars, drawn by Selden Taylor, in favor of Ezra Crowell upon, and accepted by Bizzell, on the 15th December, 1840, and payable three months after date, at the Union Bank of Louisiana, in New Orleans. The declaration avers that Crowell endorsed the bill to Alvin McDonald, who then endorsed the same to the plaintiff. The defendant pleaded *non assumpsit*. Upon the trial the plaintiff introduced, and offered in evidence, a bill of exchange, similar to that described in the declaration, with the additional endorsement of "J. H. Crease, Cash." The defendant objected to the bill being read in evidence, which being overruled by the court, he excepted, and judgment having been rendered for the plaintiff the defendant has prosecuted his writ of error to this court. If Crease was the cashier of the Bank, his endorsement did not divest her legal interest in the bill of exchange unless the endorsement was consummated by delivery to the endorsee. *May v. Cassady*, 2 *Eng. Rep.* 376. *Watson v. Higgins*, *ib.* 475. If he were not the cashier of

the Bank, but the person or agent from whom she received the bill, the endorsement did not constitute a variance between the bill offered in evidence, and that described in the declaration. Where all the endorsements are in blank, the holder may make himself, at his pleasure, the immediate endorsee of any one of them, or he may derive his title through them all in succession. *Story on Bills, p. 231, sec. 208, and note 3.* Judgment affirmed.

