

## ENGLISH &amp; JOHNSON vs. BRENEMAN. (a)

Where a note is delivered in blank as to the date, no authority for the payee to fill up the blank is implied by law, but express authority is necessary; but this authority may be directly proven, or inferred from circumstances.

A subsequent ratification of the filling of the blank by the makers, is equivalent to an original authority, but a ratification by the principal is only good as to him, and not as to the security.

Where the payee fills the blank without authority with a date prior to the delivery, it avoids the note.

Where the maker proves that the note was delivered in blank as to the date, the payee must prove authority to fill up the blank: none is implied by law.

Where the blank exists when the note is delivered, the presumption is that it was filled by the person having the legal custody of the note.

The payee cannot insert a date different from the true one without authority from the makers.

As to evidence of authority to fill up the blank, or of subsequent ratification.

*Writ of Error to Pulaski Circuit Court.*

This was an action of assumpsit, originally brought by Brene-

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(a) The law of this case was principally settled in *English et al. vs. Breneman*, 5 Ark. R. 378.

man, assignee of Brungard, against English & Johnson, Wm. Cummins and L. Gibson, on a promissory note for \$3614, dated March 4th, 1839, and payable twenty-four months after date. Gibson was not served with process, and the suit was discontinued as to him. The other defendants pleaded *non assumpsit*, sworn to, upon which issue was taken, the cause tried, verdict and judgment for plaintiff, writ of error by defendants, the judgment reversed and case remanded. See *English et al. vs. Breneman*, 5 Ark. R. 378, for a full statement of the case to that time.

After the mandate of this court was filed in the court below, the death of Cummins was suggested, and the cause abated as to him.

The case was again submitted to a jury in June, 1846, before the Hon. J. J. CLENDENIN, judge, and verdict for plaintiff. The defendants moved for a new trial, upon the grounds, that the jury found contrary to instructions of the court: that they found contrary to law and evidence: that the court erred in instructing the jury as moved by the plaintiff: and that the witness (Hutchings) made a material mistake of fact in giving his evidence to the prejudice of defendants, as would appear by the affidavit of said witness appended to the motion. The court overruled the motion for a new trial, defendants excepted, and took a bill of exceptions setting out the evidence and instructions given by the court to the jury. So much of the evidence as was deemed material is stated in the opinion of this court.

On motion of the plaintiff below, the court instructed the jury: "1st, That if they believed from the evidence that the note sued upon was delivered to Brungard with a blank date, that no authority to fill up the date was implied by law, but that it required express authority to fill up the date, which may be proved by direct testimony or inferred by the jury from the circumstances attending the transaction;" and 2d, as set out in the opinion of this court, to which second instruction defendants excepted.

At the request of the defendants, the court instructed the jury as follows:

"1st. That if the jury find that the note sued on was in blank as to the day of the month when it was delivered to Brungard, then unless the plaintiff has proven that the blank was filled by authority from English & Johnson, it is void and the plaintiff cannot recover.

"2d. That the plaintiff in such case must prove express authority to fill the blank; and this he may prove by direct testimony, or by proving circumstances which are sufficient to authorize the jury to infer that such authority was in fact given.

"3d. That as soon as the defendants proved that the blank existed when the note was delivered, then the proof of authority to fill it became necessary, and devolved on the plaintiff: no such authority was implied by law.

"4th. That if the jury find the blank existed at the time when the note was delivered, then the presumption is that it was filled up by the person who had the legal custody of it: and

"5th. That after the delivery of the note, Brungard could not insert a date different from the true one, without authority from all the persons who signed the note."

CUMMINS, for plaintiffs. Any material alteration of a written contract by interlineation or erasure, by the payee or holder, after delivery, avoids the contract, unless made by mistake, accident or consent of all the parties bound thereby. *English et al. vs. Breneman*, 5 Ark. Rep. 380. *Martindale vs. Bank of Am.*, 19 John. Rep. 391. *Horner vs. Wallis*, 17 Mass. Rep. 309. *Chester vs. Frost*, 1 N. Hamp. Rep. 145. *Bowers vs. Jewell*, 2 N. Hamp. Rep. 543. 10 Cow. Rep. 192, 195. *Derlner's case*, 6 Cow. 59. 4 Cranch. 50. 10 Serg. & Rawle 170. 4 Serg. & R. 405. 8 Cow. 71. *Taylor vs. Mosely*, 6 Car. & P. 273. *Stout vs. McCloud*, 5 Litt. Rep. 205.

The fact of alteration being established the presumption of fraud attaches, and it devolves upon the holder to show that the alteration was innocent. *Same authorities.*

A note negotiated without a date is a perfect and obligatory instrument; and the day of delivery will be considered as the

day of the date. *Ch. on Bills*, 77, 78. *Armit vs. Breame*, 2 *Ld. Raym.* 1076, 1082. 2 *Shaw*, 422. *Godard's case*, 2 *Co.* 5 (a) *Sel. N. P.* 283. *Bac. Abr. "Leases"* 1. 1 *Com. Dig. tit. "Fait"* B. 3. A material mistake of a witness in delivering his testimony, either from failure of memory, negligence or accident, is a good cause for new trial. *Truehody vs. Brain*, 9 *Price Rep.* 77. *Richardson vs. Fisher*, 7 *Moore Rep.* 549. 1 *Bing.* 145. *Ld. Dudley vs. Robins*, 3 *Car. & P.* 26.

WATKINS & CURRAN, contra.

JOHNSON, C. J. The principal question presented by the record in this case, relates to the dating of the instrument, upon which the suit is founded. This is a question of pure fact; and consequently, must be settled by the testimony detailed before the jury. Hutchings, a witness introduced by the defendant in error, fully established the genuineness of all the signatures, and left no doubt as to the execution of the note. He stated that the note, together with two others, was executed for a stock of goods purchased of George Brungard by English & Johnson, that the date was not inserted at the time Johnson delivered the note to Brungard, that they disputed about the date at the time; but that they finally agreed to refer the matter to English, and abide by whatever he should say in respect to it. He also testified that before and about the time Brungard left Little Rock, he became very urgent to have the blank, which had been left for the day of the month, filled up; but that he and Johnson still differed about the time to be inserted, and that they then agreed again to refer the matter to English. He further stated that Brungard and Johnson disagreed as to the time that the interest should commence running, and that this was the cause of the dispute, and further, that English and Johnson were still partners on the tenth day of January A. D. 1840. The defendant in error then introduced a letter, dated at Little Rock, January 10th, 1840, and which purported to have been

written by English and Johnson and addressed to G. C. Breneman. This letter was in answer to one already received by English and Johnson from Breneman in regard to notes, which they had given to G. Brungard. They remarked, when speaking of the notes, that they were entitled to a credit on the first due of \$164.38 for error in the invoice, and also to a credit on the two last of the interest, which had been included, that they were entitled to such credits, and that they should insist upon them, and further, that they held Brungard's obligation for the deduction of the interest in case that English should not say it was the agreement that it should be paid. This is the substance of all the testimony bearing directly upon this point.

The inquiry now is, whether the jury, from this state of facts, were warranted in finding either that the date was inserted before, or at the delivery of the instrument, or that it was subsequently inserted by the party in whose favor it was made, and the act ratified by the makers. Upon the assumption that either state of case is true, the effect is the same in law. The testimony of Hutchings, relative to the execution of the note, coupled with the recognition of English and Johnson in their letter to Breneman, certainly can leave no doubt of its identity. The evidence is clear and conclusive that the day of the month was not inserted at, or any time before the delivery of the note. If there is any evidence of a subsequent ratification, it must be founded upon the slightest and weakest of circumstances. There is nothing in the letter of the plaintiffs to the defendant which can, by possibility, be construed into a ratification of such an act. But the witness testified that the matter of the date was to be referred to English, that he had seen Brungard and that after his interview with him, he had expressed some dissatisfaction in respect to the note. This is certainly very slight evidence that English either fixed upon the date, or ratified that which had been previously inserted. The testimony is wholly silent in respect to the matter, and we conceive therefore that the jury had no sufficient data upon which to base their verdict. The plaintiffs in error urged as one reason why

they should have a new trial that the defendant's witness had committed a mistake in respect to what English had said about having had an interview with Brungard. We do not consider it material to decide whether such mistake was or was not sufficient to entitle them to a new trial as the facts stated by the witness, admitting them to be strictly true, most assuredly were not sufficient to support the verdict; and consequently it is not to be presumed that they had any influence upon the jury. The plea interposed by the plaintiffs had the effect to throw the whole burden of the proof upon the defendant, and having failed in the matter of the date he most unquestionably was not entitled to a verdict. He neither proved that the day of the month was inserted at or before the delivery of the note, or that it was afterwards inserted and ratified by the makers, or that the blank was filled with the date that had been agreed upon by the parties. Under this view of the whole case we are forced to the conclusion that the finding of the jury was not warranted by the evidence.

The only remaining point to be determined, results from the second instruction asked by the defendant. The instruction is as follows: "That a subsequent ratification by the makers is equivalent to an original authority for the filling up the blank in the day of the month, and the jury are bound by law to find for the plaintiff, if they believe from the evidence that such subsequent ratification was made by English and Johnson." It is objected that although the act may have been ratified by English and Johnson, yet they are not bound by it, because it was not shown to have been ratified by the other makers. The instruction was sufficiently broad and technically correct inasmuch as English and Johnson were alone sought to be made liable for the debt. If the suit had been still pending against all or either of the securities, it would not have been sufficiently comprehensive, as the moment the note passed into the hands of Brungard and thereby became perfect as an obligation, the implied authority of the plaintiffs to fill up the blank ceased, and an authority in fact was absolutely necessary to enable

English and Johnson to bind their securities; because any alteration then made without the consent of the securities would either have changed their contract, or have created an obligation where none existed before. 5 *Ark. Rep.* 382.

The other instructions are all believed to be in strict accordance with the principles of law.

We are of opinion that the verdict of the jury is unsupported by the testimony, and that therefore the motion for a new trial should have been sustained. The judgment of the circuit court must therefore be reversed, and the case remanded with instructions to be proceeded in according to law and not inconsistent with this opinion.

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