GRACIE *vs.* SANDFORD.

Plaintiff declared against defendant as drawer of an inland bill of exchange, made in New York, and added the common counts. On the trial it was proven that plaintiff sold defendant goods, and received, in part payment thereof, the bill sued on, which was drawn by defendant in favor of plaintiff upon M. & Co., and accepted by them, but there was no proof that plaintiff demanded payment of the bill, at maturity, of the acceptors, and that payment was refused by them. On this evidence, the plaintiff obtained judgment on the common counts for the price of the goods. Held, that it is well settled in New York, where the contract was made, that a plaintiff is not allowed to resort to the common counts, and base his recovery upon the original consideration after he has lost, by his own laches, his action against defendant upon the bill or note which has been passed to him either as absolute or conditional payment.

On the contrary, the rule seems to be that a plaintiff can never recover on the original consideration for which the note or bill was given, until he shows such a state of facts as will authorize him to recover on the note or bill itself.

In this case, the plaintiff having failed to fix the liability of defendant as drawer of the bill, by proving demand and refusal of the acceptors, could not resort to the common counts, and recover the original consideration for which the bill was drawn.

Writ of Error to Pulaski Circuit Court.

Assumpsit, brought by Francis P. Sandford, against Pierce B. Gracie, determined in the Pulaski circuit court, in November, 1847, before the Hon. WM. H. FEILD, judge.

The plaintiff declared on a bill of exchange drawn by defendant, at New York, on the 25th October, 1845, upon L. Mudge & Co., of the same place, in favor of plaintiff, for $250, payable ninety days after date, and accepted by said L. Mudge & Co. Presentment to the acceptor at maturity for payment, non-payment, and notice to defendant as drawer, were alleged. The common counts were also added. The case was submitted to the court, sitting as a jury, on the general issue, and finding and judgment in favor of plaintiff for $281.82, damages. Defendant moved for a new trial on the grounds that the finding was contrary to law and evidence, which the court refused, and he excepted, and put the evidence on record. From his bill of excep-

tions it appears that, on the trial of the cause, the plaintiff proved by the deposition of John George, that, in Oct., 1845, the plaintiff sold and delivered to the defendant, goods amounting, in value, to between $290 and $300. Deponant was plaintiff's clerk at the time, and, as such, sold the goods to defendant. The particulars of the sale were, that the defendant went to the store of plaintiff, in the city of New York, and desired to purchase a bill of shoes for cash: he selected them, agreed upon the prices, and they were sold to him, the bill amounting to a sum between the sums aforesaid. That, before the goods were packed, defendant wished to know whether an acceptance, for a part of the amount, at a short date, of a respectable house, would answer instead of the payment of cash for the goods, if interest were added to the amount for the time the acceptance had to run. Deponant asked defendant whose acceptance he proposed to give, and he answered that of L. Mudge & Co. Defendant then left plaintiff's store to go after Mudge, and soon returned with him. Mudge furnished references as to his responsibility, agreed to accept the draft of defendant for $250, and then left the store. Defendant then wanted to know if the acceptance of Mudge of his draft, for $250, would relieve him from any further responsibility, and deponant told him that it would not; that, in the event Mudge did not pay the acceptance, he would still be liable as the drawer of the draft. Defendant then paid, in cash, about $43, the amount of the purchase over and above $250, (the amount of said acceptance,) and then made and delivered to plaintiff the draft, accepted by L. Mudge & Co., (which was annexed to the deposition,) and the goods were afterwards delivered to him. Deponant informed plaintiff of the transaction, and he approved it. At the time defendant made the purchase, he informed deponant that he was going to Van Buren, Arkansas, having been advised by a friend that that place offered inducements to a "new beginner;" but that he might remove from thence if he should not be pleased with the place.

Plaintiff also proved, by the deposition of Ebenezer Platt, a clerk of his, that, on the 27th January, 1846, he deposited in the

post office at New York, a notice of a notary public of protest for non-payment of said draft by L. Mudge & Co., addressed to defendant at Van Buren, Arkansas, which notice was handed to him, to be forwarded, by a clerk of the notary public. This was all the evidence introduced on the trial, whereupon the defendant asked a verdict in his favor on the ground that plaintiff had failed to prove demand of payment of the said bill of exchange at maturity of the acceptors, and refusal by them to pay, but the court found for plaintiff on the common counts contained in the declaration. Defendant brought error.

CARROLL, for plaintiff. The plaintiff relies upon the following points:

1st. The acceptor of the bill, L. Mudge & Co., is the principal debtor and is primarily liable. *Chit. on Bills, 10th Amer. Ed.* 304, *note* (*h*). 1 *Sel. N. P.* 286, 308.

2d. As days of grace on mercantile bills constitute a part of the original contract, (see 8 *Conn. Rep.* 505,) it was necessary for the defendant in error to prove a demand of L. Mudge & Co. on the third day of grace, and a refusal by them to pay, in order to render Gracie liable. *Chit. on Bills,* 353, 388. *Kent's Com.* 103. *Mills vs. U. S. Bank,* 11 *Wheat.* 431, *and notes. Bank of Washington vs. Triplett & Neal,* 1 *Pet.* 31. *Munroe vs. Easton,* 2 *John. Cas.* 75.

3d. The averment in the declaration that the bill was presented for payment when it became due, and that L. Mudge & Co. refused to pay, has not been substantiated by proof. *Chit. on Bills,* 575, 652. The only evidence produced at the trial below, in proof of the averment, is the letter sent to Gracie, directed to "Van Buren, Arkansas," and signed "John T. Irving, Notary Public, Merchants Bank." In cases of foreign bills a regular protest, under seal of the notary, is *prima facia* evidence of a demand and refusal, and notice from a notary in that case is good. *Peak's Ev.,* 4 *Edit.,* 80, *and notes.* 6 *Serg. & Rawle,* 484. 7 *Yerg.* 477. But there is no such protest here, and, as this is an

inland bill, protest was not necessary, nor would it be evidence. 6 *Wheat.* 572. (*Union Bank vs. Hyde.*)

4th. Demand and refusal must be proven by some other source, and may have been proven by the clerk of the notary public, or by the person who actually demanded payment, if it was demanded. *Chit. on Bills,* 655. *Peake's Ev.,* 18, 5. Notice must have been given by a party to the bill, and due diligence used to find out residence of drawer. *Chit. on Bills,* 492, 3, 4, *and notes. Hall vs. Varrell,* 3 *Greenlf. Rep.* 233.

6. As no demand and refusal were proven, nor notice of dishonor given, the plaintiff is not only discharged from his liability on the bill, but also from the debt in respect of which the bill was given. *Chit. on Bills,* 172, 3, 4, *and notes*; *Ib.* 180, *note* (1); 433, *and notes. Story on Sales,* 171. *Smith vs. Witson, Andr. R.* 187. *Bridges vs. Berry,* 3 *Taunt.* 130. *Jones et al. vs. Savage,* 6 *Wend.* 658. *Austin vs. Rodman,* 1 *Hawks,* 195. *Long vs. More,* 3 *Esp.* 155, *note. Cruger vs. Armstrong,* 3 *John. C.* 5. *Clark vs. Young,* 1 *Cond. Rep.* 287. 4 *Esp. Rep.* 46, *and Mr. Day's note. Ward vs. Evans,* 2 *Ld. Raym.* 930.

7th. Sandford, having received the bill for a debt contracted at the same time, took the bill as payment. *Everett vs. Collins,* 2 *Camp.* 515. *Denniston vs. Embree,* 3 *Wash. C. C. Rep.* 396. *Ward vs. Evans,* 2 *Ld. Raym.* 930. *Whitbeck vs. Van Ness,* 11 *John.* 409.

8th. The plaintiff below could not resort to the common counts if he has been guilty of laches in regard to the bill. *Chitty on Bills,* 578, and cases cited in notes (6) and (1): or where there has been a special agreement. *Robertson vs. Lynch,* 11 *John. Rep.* 451.

PIKE & BALDWIN, contra. The law of New York governs in this matter. In that State it is well settled that taking the note, bill, or acceptance, of the debtor, or a hired person, does not operate as payment, or in any way discharge or end the original simple contract, or suspend the remedy on it, unless it is expressly agreed to be taken as payment, and where the note, or

acceptance, of a third person is taken, it does not affect or impair the original contract, unless it is taken as absolute payment, and the original debtor is wholly discharged from any responsibility on the original contract, or on the paper so received. The cases on this point will be found fully discussed in *The R. E. Bank vs. Rawdon, Wright & Hatch,* 5 *Ark.* 588. The principal and leading ones are *Picott vs. Rathbone;* 5 *Wend.* 490. *Reid vs. Van Ostrand,* 1 *Wend.* 424. *Raymond vs. Merchant,* 3 *Cowen,* 147. *Porter vs. Tallcott,* 1 *Cowen,* 359. *Muldon vs. Whitlock, id.* 290. *Tobey vs. Barber,* 5 *J. R.* 68. *Putnam vs. Lewis,* 8 *J. R.* 389. *Johnson vs. Weed,* 9, *id.* 310. *Burdich vs. Green,* 15, *id.* 247.

These cases establish the principle that, in New York, unless the original debtor is absolutely and entirely discharged, and the creditor takes the note or bill of the third person, and agrees not to look to the original debtor at all,—unless he absolutely takes the note or bill at his own risk, and looks to the responsibility of the third person alone, the original consideration may be still sued on. The plaintiff, however, must have possession of the note or bill, so that it may appear that he has not passed it away, in which case the defendant might be twice liable. The plaintiff here produced it on the trial, and it is in court attached to the depositions to be cancelled. The simple question is, did Sandford agree to take the acceptance of Mudge & Co., as an absolute payment—to look to Mudge & Co., and in no event to look to Gracie. If not, his right of action for goods sold remained.

The law of New York must prevail here, and it has been so held in other States, as to transactions which took place in New York, though the *lex fori* was different as to the question of payment. *Vancleef vs. Therasson,* 3 *Pick.* 12, where the authorities on this subject are collected in the note.

The court is further referred, on the main question, to *Wathen vs. Bush,* 16 *J. R.* 233. *Wathen vs. Wendell,* 19, *id.* 153. *Holmes vs. De Camp,* 1, *id.* 36.

SCOTT, J. Recognizing the position that the contract, out of

which this cause originated, having been made in the State of New York, with reference to its laws, it is to have the same effect here which it would have there (*Story's Conflict of Laws,* 274. 3 *Pickering,* 12,) we have examined the numerous decisions of that State that have a bearing upon the question that arises upon this record, (reported in Johnson, Cowen, and Wendall's Reports,) and finding the law clearly laid down in several of these cases, and more especially in the case of *Dayton vs. Trull,* reported in 23 *Wendall,* and the numerous cases therein cited, recognized, and commented upon, we have found but little difficulty in arriving at a satisfactory conclusion.

The finding and judgment of the court below in favor of the defendant in error were upon the common counts. It is admitted that the evidence was not sufficient to authorize a finding and judgment on the special count; and the question presented for our decision is, whether or not this judgment can be sustained consistently with the exposition of the law in the cases cited above.

In our researches we have not found a single case where a plaintiff was allowed to resort to the common counts, and base his recovery upon the original consideration, after he has lost, by his own laches, his action against the defendant upon the bill or note, which has been passed to him either as absolute or as conditional payment. On the contrary, the reasonable doctrine that a plaintiff can never recover on the original consideration for which the note or bill was given until he shows such a state of facts as will authorize him to recover on the note or bill itself, is distinctly and emphatically recognized in several of these cases.

In case a plaintiff has lost by his own laches his legal recourse against the defendant upon the bill or note, it is in vain that he brings it into court and offers to cancel it, with the expectation of being allowed, after cancellation, to proceed to recover on the original consideration. As well might he hope, by such means, to revive a cause of action that had been barred by the statute of limitations. And in case some third party had been prima-

rily liable (as maker or acceptor) on such note or bill, upon which the right to recover, of the defendant had been so lost by lachess, no less vain would it be to show that such party so primarily liable upon the note or bill was still so liable. As well might this argument be used to charge any endorser who had been discharged by the *lex mercatoria*. And still not less vain would it be to show that, by actual agreement, much less by any agreement that the laws of New York might have set on foot, that the bill or note was not taken as payment absolutely, but only to apply the proceeds, when collected, to a debt for which no other security was taken. Because, in each of these three cases the legal effect of the party's own laches has been to make the bill or note his own; for, whether received as payment, or on agreement, either express or implied, to apply the money, when collected, to a debt for which no other security had been taken, the duty of presenting the bill or note, and demanding the money, and giving due notice, results from the nature of the security. When a bill, it purports to be a transfer of funds which the drawer has in the hands of the drawee: and there is an an implied undertaking on the part of the holder that he will take the proper steps to have these funds applied to the satisfaction of his debt. When a note, the undertaking to make demand, and, in case of payment, to apply the funds, is no less implied. When a draft is given upon a third party, as in the case before us, it is not like the ordinary case of a note given upon the purchase of goods, which may be cancelled on the trial and a recovery had on the original consideration. In such a case there is no doubt of the defendant's liability on his note. So also when there is no doubt of the defendant's liability, as drawer or endorser on a bill, the same rule will apply; but not so in any case where the defendant is discharged from all liability on the written instrument.

But although the note of a third person, or a draft of a defendant on a third person, when received on account of a pre-existing debt, as for instance to be applied when collected, may operate as payment, if the creditor disposes of all parts with

the note or bill, or is guilty of laches in not presenting it for payment in due time, and giving the proper notice of non-payment, yet he is not bound to sue, but may return the security when dishonored on due presentation, and then resort to the original consideration, because the effect of receiving such security, when not expressly agreed to be taken as payment and at the risk of the creditor, is only to postpone the time of payment of the old debt until a default be made in the payment of the bill or note on its presentation for payment at the proper time and place, and notice given of dishonor to the maker or drawer. Considering it is well settled, by the authorities to which we have referred, that the plaintiff in this case was bound to present the draft in question to L. Mudge & Co. for payment on the very day of its maturity, according to the *lex mercatoria,* and give due notice to the drawer, if was not paid, and that the burthen lay on him of proving that due diligence had been used, and that until he makes out due diligence, or such facts as will excuse the want of presentment and notice, as well as produce the draft in court for cancellation, he cannot recover on the common counts. It follows necessarily that the court below erred in its finding and judgment, and that its judgment must be reversed, and the cause remanded to be proceeded in.