KELLOGG & CO. *vs.* NORRIS.

Where suit is brought upon a lost note, its loss may be established by affidavit taken *ex parte*. *Digest, chap.* 126, *sec.* 112.

Where a note is placed in the hands of an attorney to collect, under a general retainer, he cannot delegate his authority to a third person, and authorize him to collect it; and payment by the maker to such third person will not discharge him.

In the absence of testimony to show a privity between such third person, and the owner of the note, possession of the note by him raises no presumption of power to collect it.

Writ of Error to Pope Circuit Court.

Kellogg & Co. brought an action of debt on a promissory note, alleged in the declaration to be lost, against Norris, in the Pope Circuit Court. Defendant pleaded *nil debet* and payment, the cause was tried on issues to these pleas, and judgment for plaintiffs. A motion for a new trial was overruled; defendant brought error, and the judgment was reversed by this Court, and the case remanded. *See Norris vs. Kellogg & Co.*, 2 *English's Rep.* 112.

The case was again determined at the March Term, 1848, of the Pope Circuit Court, before the Hon. W. W. FLOYD, Judge.

The issues were submitted to a jury, and verdict for defendant; plaintiffs moved for a new trial, which was refused by the Court, they excepted and set out the evidence, &c.

By the bill of exceptions it appears, that, on the trial, plaintiffs offered to read to the jury, as evidence, the affidavit of Ed. N. Kellogg, with the certificates of authentication, which were appended to the declaration when filed, as to the loss of the note sued on; defendant objected, and the Court excluded them. The affidavit was made on the 15th January, 1842, before John J. Bryant, Deputy Mayor, and one of the presiding Judges of the Court of Common Pleas, in and for the Borough of Elizabeth, New Jersey, and affiant states that he is the son of Elijah Kellogg, of said borough; that his father possessed and owned a

note made by Samuel Norris (defendant) of Norristown, Pope County, Ark's., dated Oct. 1st, 1832, payable to Elijah Kellogg & Co., eighteen months after its date, for $289, with interest thereon, after twelve months from date, at six per cent, endorsed with payments of $50, 24th Aug., 1835, and $100, 24th Oct., 1835.—That said note was lost, as affiant believed; and the firm of Kellogg & Co. was composed of affiants father and Clark Kellogg, (plaintiffs,) and that no more than the sums above stated had been paid on said note. To this affidavit was appended a certificate of the Clerk of the Court of Common Pleas of said Borough, authenticating, in the usual form, the official character of Bryant, before whom the affidavit was made, &c.; also a certificate by Bryant, as one of the presiding Judges of said Court, as to the official character of the Clerk, &c.,

Plaintiffs then read to the jury the deposition of Frederick W. Trapnall, Esq., as follows:

"This deponent says that about the 25th Oct., 1841, the firm of Trapnall & Cocke (of which he was a member) received the appended letter from Elijah Kellogg, of Elizabethtown, New Jersey, dated September 18th, 1841, purporting to enclose a note of Sam'l Norris, the defendant, to them for $289, dated Oct. 1st, 1832, payable 18 months after date, with interest after twelve months. Whether the note actually came to hand, I do not know, but I presume it did, as we wrote at once to Norris in relation to it, and on the 7th of Dec., '41, received his reply, *marked No.* 1. Afterwards we wrote him again, and received, March 16th, 1842, his reply, *marked No.* 2; and afterwards received from him letter *No.* 3, on 28th July, 1842. All these letters are made part hereof, the first in the hand-writing of Kellogg, and the last 3 in the hand-writing of Norris.

"Norris afterwards called on us and asked for the papers, which were submitted to him. On examining the bunch afterwards, the note could not be found, and we wrote to Kellogg & Co., who, in reply, stated that it had been sent to us; and believing that the note was lost, suit was brought on it as a lost note. We had various conversations with Norris in relation to the matter, and he always promis-

ed to pay it, and asked time on it. He has never paid one cent of the debt except what is credited; and the credits correspond with his recollection as set forth in letter No. 1. How he got the note, as it seems to be in his possession, I do not know, unless he stole it out when he had the papers in our office, as before stated, but that he did so, I do not know or assert. But that he has not paid off the note, I do assert, but he always promised us to pay it. We told him of the loss of the note, but he never intimated that he knew where it was, or that he had it. And he never paid it to Kellogg, as they had no correspondence with him since he called on them, by letter, for the credits as shown by letter No. 1, and further this deponent sayeth not."

The letters referred to by deponent follow, in substance:

"ELIZABETHTOWN, NEW JERSEY, Sept. 18th, 1841.

Messrs. TRAPNALL & COCKE:

Gents:—By the recommendation of our mutual friend, Mr. John Allen, of New York, I enclose you herein a note drawn by Sam'l Norris, of Norristown, Pope county, dated Oct. 1, 1832, payable 18 months after date, with interest after 12 months, endorsed Aug. 24th, '35, $50, and Oct. 24th, '35, $100, as per settlement below. [*Here follows a statement of the amount of the note, interest, payments, &c.*] This note, according to our laws, will be outlawed the 24th of Oct. next, and I send it to you to have it renewed or acknowledged and collected. Should you be able to obtain his written acknowledgment, please do so; but if any uncertainty attends that course, or if time does not allow it, commence suit immediately. Should circumstances prevent the note reaching you before the 24th October, manage as well as you possibly can to get it acknowledged; not that I have any particular reasons to suppose that Norris wishes to avoid the debt in that manner, but because I have made a disposition of the note that renders its renewal necessary. If you should, in bringing the note to settlement, deem it necessary to commence suit (which I would rather avoid) and Mr. Norris wishes time, give him not more than one year, and as much less as you can agree on, he making the debt secure (if not a perfectly responsible man himself) to your

satisfaction. The note is due here, and I dislike to lose any portion of the exchange, but must leave this for you to manage the best you can for my interest. Please acknowledge the receipt of the note, and write me as soon as anything is done.

Yours respectfully,

ELIJAH KELLOGG."

[LETTER No. 1, REFERRED TO IN DEPOSITION.]

"NORRISTOWN, Pope county, Nov. 20, 1841.

Messrs. TRAPNALL & CUMMINS:

Dear Friends—I received a few lines from your honors, a few days since, respecting a note in your hands for collection in favor of Elijah Kellogg, of Elizabethtown, New Jersey. I have such a note out, but it has a credit on it of $100, and I am sure that I have paid $150 on the note. I wish you would be so good as to wait a few weeks, and I will write him respecting it, and I will attend to it soon. Be so good as to let me know what kind of funds will answer to pay with. I shall be at your place (Little Rock) between this and the new year, and will call on you respecting this; perhaps I may receive a line from Mr. Kellogg by that time.

Yours respectfully,

S. NORRIS."

[LETTER No. 2.]

"NORRISTOWN, Pope county, March 12, 1842.

MR. TRAPNALL:

Dear Sir—I received a letter from you some time in the fall, respecting a note that you received from E. Kellogg & Co., of Elizabethtown, N. J., and you informed me that there was a credit on the note for $100. There should be a credit for $50 more. I wrote Mr. Kellogg immediately after receiving your letter, and it is time I had received an answer from him, but I have not; perhaps he has written to you on the subject, if so, please let me know by return mail, for I should like to have that business settled, for I don't want to be sued on it. And further, sir, I should like to know what kind of money you want for that note.

You are aware that any kind of money is hard to get. When I wrote you before, it was my intention to have visited you at the Rock about the holy-day-times, but it was out of my power to do so, but I think that I shall be down some time this spring. Please let me hear from you soon. Yours respectfully,

SAMUEL NORRIS."

[LETTER No. 3.]

"NORRISTOWN, July 7th, 1842.

Dear Friends—I received yours of the 8th of June, and I am sorry to say to you that it is out of my power to do anything for you at present respecting that note. It is impossible to get any good funds at this time in this section of the country, but if I am spared until fall, I intend to take some kind of produce to Little Rock, and try to raise as much and settle that little note. I am sure that Kellogg would have no objections to your waiting that long on me, for the times are very hard for good money at this time—that you know. I understand that you will be up here on your way to the Springs in a few days, and I am in hopes that I shall have the pleasure of seeing you, and if so, I can tell you more about it. Yours respectfully,

SAMUEL NORRIS."

Messrs. Trapnall & Cocke, Little Rock.

"Pray don't sue, for I will surely attend to it. S. N."

Here plaintiff closed.

Defendant then read to the jury the following memorandum: "$289. Eighteen months after date: dated October, 1832, payable to Elijah Kellogg & Co., with two endorsements on it—say fifty dollars, August 1835, and one hundred dollars, Oct. 24th, 1835." (Signed) "Pitcher."

Defendant's attorney then produced, and read to the jury, the note upon which the action was founded, with the endorsements thereon—the signature of Norris being torn off.

Brearly, witness for defendant, testified that about the 10th of July, 1843, he called at the house of James Pitcher, in the city of Little Rock, on business; and whilst there Pitcher informed

him that defendant had sent to him, Pitcher, a lot of bacon to be sold on commission. After witness had gotten through with his business, and was about to leave the house, Pitcher called to him, and told him he had a paper that belonged to defendant, and went to his desk, took out the note read in evidence by defendant's counsel, and handed it to witness, saying "this belongs to the old man," meaning defendant. Witness came home in a few days afterwards, and delivered said note to defendant; he tore his signature therefrom, but made no remark at that time. A few days afterwards, defendant exhibited to witness the memorandum copied above, signed "*Pitcher,*" said something about the note sent up by witness, and expressed the opinion that Trapnall had never had posession of it. Said memorandum had been sent to defendant some time before witness took him the note, by Sam'l Hays, and witness knew it to be in the handwriting of *Pitcher,* who was now dead. A short time before his death, witness called at his house, at defendant's request, to make inquiry concerning the bacon which defendant had consigned to him, and was informed that Pitcher was at the point of death. He then called on his book-keeper, but he informed witness that he had no knowledge of the business. Witness knew that defendant did consign a lot of bacon to Pitcher, and had always understood, and believed that Norris had never received any account of sales from Pitcher, or the proceeds thereof. That defendant stated to witness, when he returned from Little Rock, after making the inquiry respecting the bacon, that the proceeds thereof had been appropriated by Pitcher to the payment of the note sent up by witness, and, as a reason for so believing, mentioned the facts of his previously having written to Trapnall promising to ship produce to Little Rock to raise money to pay the note: of Pitcher sending him a memorandum, by Hays, soon after the bacon was shipped, and of his subsequently sending the note by witness. Defendant told witness that he had received a letter from Trapnall & Cocke upon the subject of the payment of the note, after the note had been sent to him by Pitcher, but he did not answer it, because he was not

certain that they had ever had the note in their possession. The above being all the evidence introduced by the parties, on motion of defendant's counsel, the court instructed the jury as follows:

"That if the jury believed from the evidence that the note mentioned in the declaration, was placed in the hands of Pitcher by Trapnall & Cocke, plaintiff's attorneys, with the expectation that Norris would make consignments to Pitcher, for the purpose of having the proceeds appropriated to the payment of the note; and that the proceeds of produce afterwards shipped by defendant to Pitcher were appropriated to the payment of said note, they should find for defendant.

"That the circumstance of defendant having written to Trapnall & Cocke promising to ship produce to Little Rock, to raise the means of paying the note, of his subsequently shipping a lot of bacon to his commission merchant at that place, of the commission merchant having sent the memorandum and note (if they believed that such facts did transpire) were to be taken as circumstances tending to show that the proceeds of the bacon, if shipped, were appropriated by Pitcher to the payment of the note.

"That the fact of Pitcher having the note in his possession, raises a presumption that he was lawfully possessed of it, and had a right to collect it."

Plaintiffs brought error.

RINGO & TRAPNALL for the plaintiffs. The attorneys for the plaintiffs had the note to collect and they never authorized Pitcher to collect or surrender it: a new trial should then have been granted: 1st. Because the justice of the case had not been tried, 2 *Bibb.* 33. *Bacon vs. Brown* 1 *Bibb.* 336. *Price vs. Cochran id.* 571. 3 *J. J. Marsh.* 391. 2d. Because the note never was paid and came unfairly and fraudulently into the hands of the defendant, who concealed the fact of his possession; and the plaintiffs were taken by surprise, believing the note to be lost.

The instructions were calculated to mislead the jury: they as-

sume without proof that the note was handed to Pitcher by the plaintiffs' attorneys, that the note was paid to Pitcher: that the fact of possession by Pitcher raised a presumption that he had a right to collect: when the testimony shows that the attorneys were the only legally authorized agents of the plaintiffs, that the note was not paid to them, nor did they know of Pitcher's possession of it. "Where instructions are too unqualified and will probably mislead the jury, it is error to give them," *Byrd vs. Bertrand,* 5 *Ark.* 656.

The exclusion of the plaintiffs affidavit was error: a party's own affidavit of the loss of a note is sufficient to authorize parol proof thereof, 2 *Marsh.* 115.

MR. CHIEF JUSTICE JOHNSON, delivered the opinion of the court.

The question first presented relates to the propriety of the decision of the Circuit Court in refusing to admit the affidavit of Edward N. Kellogg in evidence. The affidavit appears to have been taken before an individual fully competent to administer oaths, and the authentication is believed to be in strict accordance with the law. It does not appear upon what ground the affidavit was rejected, but we suppose it was for the circumstance that it was taken *ex parte.* The 112th *Sec.* of the 126th *Chapter* of the *Digest* provides that "whenever a party to any suit shall have been permitted to prove by his own oath the loss of any instrument of writing, in order to admit of other proof of its contents, the adverse party may also be examined by the court on oath, to disprove its loss, and account for such instrument." The affidavit contemplated by this statute is no part of the proof in the cause, but is merely designed to establish the fact of the loss of the instrument in order to lay the foundation for the introduction of testimony going to the merits of the matter in controversy.— We consider it clear that the act does not require a *dedimus and notice* to the adverse party simply to establish the fact of the loss, but that on the contrary, such proof may be made *ex parte,* and that the only privilege secured to the defendant in respect to it is in case he shall desire it, to be examined by the Court on oath to

disprove its loss, and to account for such instrument. The Court below consequently erred in rejecting the affidavit.

The testimony presents two distinct questions, and it must be conceded that they are not entirely free from difficulty. The first is whether the defendant has ever discharged the note; and the second that, in case he has discharged it, whether it is such a discharge as releases him from his legal liability to the plaintiffs.— There can be but little doubt from the testimony of Trapnall, when considered in connection with the letter of the plaintiffs purporting to enclose the note to him, that the note actually came into his possession. If the note really did reach the hands of Trapnall for collection, and that it did we consider sufficiently shown, the greatest extent that the defendant could claim would be that it was handed over to Pitcher by him or Cocke, his partner, and that he had discharged it with bacon in the hands of Pitcher.— This is the strongest possible view of the case in favor of the defendant that the testimony could be brought to countenance, and even this concession would be not only without the aid, but in direct opposition to the testimony of Trapnall.

It is believed that illegal testimony was permitted to go the jury but without objection at the time, and consequently we are now bound to give to the whole such weight as we may think it entitled to under all the circumstances of the case.

But suppose we should put it upon the ground that Pitcher obtained the note from Trapnall or Cocke, the question still recurs whether it has been discharged by Norris in such a manner as to preclude the plaintiffs from a recovery in this suit. Could Trapnall & Cocke who held the note under a general retainer to collect it, and without any authority to substitute others in their place, delegate their authority to Pitcher. In the case of Johnson *vs.* Cunningham (*V. 1. N. S. Alabama Reports p.* 258) the Court held that an attorney at law, in virtue of his ordinary powers, could not delegate his authority to another so as to raise a privity between such third person and his principal; or to confer on him, as to his principal, his own rights. duties and obligations. And if there was anything in the nature of the employment from

which a delegation of the authority might be implied, or to show that it was contemplated by the parties, it should have been shown by proof, and that in the absence of such evidence it is clear that the agreement of the agent of the plaintiffs' attorney could not bind the plaintiffs. If this doctrine be correct, and that it is, we do not entertain a doubt, it is perfectly manifest that Trapnall & Cocke could not delegate an authority to Pitcher to collect the debt so as to bind their clients by his act. The defendant wholly failed to show any privity between Pitcher and the plaintiffs, and in the absence of such proof, even admitting that he paid the debt to Pitcher, they are not bound to look to him for it, but are still entitled to proceed against the defendant.

The last point presented arises upon the instructions. They all assume that the defendant had made a prima facie case, and one from which the jury were authorized to infer a payment of the note. The instructions were good so far as they extended, but we do not think that they covered sufficient ground, as the testimony, if not conclusive, was very strong to show that Trapnall & Cocke once had the note under a general retainer to collect, and it most clearly failed to establish any privity between Pitcher and the plaintiffs. With these facts before the jury the bare possession of Pitcher did not carry the presumption of authority to collect it, and that presumption could only have arisen upon proof of a privity between Pitcher and the plaintiffs. It is conceded that, as a general rule, the bare possession of negotiable paper raises a presumption of authority to collect, yet that is a mere legal presumption, and consequently liable to be rebutted by proof. We think that the circumstances of this case fully rebutted the presumption arising from possession, and that the defendant was called upon before he could claim a verdict to show an authority from the plaintiffs to Pitcher. This he did not do, and consequently the instructions were not authorized by the state of facts.

The judgment of the Circuit Court of Pope county herein rendered, must, therefore, be reversed and the cause remanded.