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[1] MICHAELMAS TERM, 20 GEO. II. 1746.

RAWLINSON *versus* STONE. In error. B. R. A promissory note payable to A. B. or his order, may be indorsed and assigned over by his administratrix; and the indorsee being plaintiff, need not make a profert in Curiam of the letters of administration. 2 Barnes, 137, 164. 2 Stra. 1260. S. C. cited 2 Bur. 1225. [See 1 Term Rep. K. B. 487, that the executors are liable personally on such indorsement.]

This was an action upon the case, brought in the C. B. against Rawlinson by Stone, upon a promissory note, payable to A. B. or order, and indorsed by the administratrix of A. B.; Rawlinson the defendant below demurred specially to the declaration, and shewed for causes of demurrer; 1st, that Stone, in his declaration, had not made a profert in Curiam of the letters of administration; and 2dly, that it did not appear by whom administration was granted; a third objection was taken at the Bar of the C. B. viz. that an executor or administrator cannot by indorsement negotiate or assign over a promissory note by the custom of merchants, so as to give the indorsee an action thereupon in his own name.

This case was argued in C. B. three times; the last time, in Hilary term 18 Geo. 2, by Serjeant Prime for the plaintiff there [Stone], and Serjeant Birch for the defendant there [Rawlinson], when per totam Curiam, the two first objections were over-ruled, because the letters of administration cannot be supposed to be in the custody or power of the plaintiff Stone the indorsee; and upon the trial of the cause, it would be incumbent upon him to shew to the Court and the jury, that the person who indorsed the note to him was the legal and proper administrator of A. B.; and the third objection was likewise over-ruled, because it is well known to be the constant practice and usage among merchants for executors and administrators to indorse and negotiate both promissory notes and bills of exchange; and the Courts of Justice will always endeavour to adapt the rules of law to the usage and course of trade, ad ea quæ frequentius accidunt jura adaptantur; and the Courts of Law are warranted in this, by the words of the statute 3 and 4 Ann. c. 9, sect. 1, which says, that promissory notes, payable to any person [2] or persons, his, her, or their order, shall be assignable or indorsable over in the same manner as inland bills of exchange are or may be according to the custom of merchants. The Court said, that the equitable interest

to take up the bill and note, and to save the plaintiff, Chilton, harmless; they broke their promise, Chilton was terrified and arrested. Here is an injury to a certain degree, but no debt owing by the defendants to Chilton, before his body was in execution for the certain sum. How could the plaintiff, Chilton, at the time of the commission of bankruptcy issued, have sworn to a debt, before he had advanced a shilling for the defendants? He certainly could not: but now his body being in execution, he has thereby paid the debt. So the postea must be delivered to the plaintiff, and he must have judgment. Per totam Curiam.

[18] EASTER TERM, 9 GEO. III. 1769.

TULLIDGE *versus* WADE. C. B. Trespass for getting plaintiff's daughter with child per quod servitium amisit.

Trespass against the defendant, that he with force and arms made an assault upon A. B. daughter and servant of the plaintiff, and got her with child, whereby he lost the benefit of her service for a certain space of time, and was put to great charge and expence in her time of lying-in: the defendant pleaded not guilty. The cause was tried before Mr. Justice Gould, at the last assizes; when the jury found a verdict for the plaintiff, and gave him 50l. damages.

Serjeant Davy moved for a new trial, and grounded his motion upon an affidavit tending to shew, that under the circumstances of the case appearing at the trial, the damages were excessive; and also, that evidence was given, at the trial, of a promise of marriage made by the defendant to A. B. which ought not to have been permitted, because she may have another sort of action upon that promise.

Whereupon Mr. Justice Gould made his report to the Court; and, after stating the declaration as above, he said, that A. B. the plaintiff's daughter was called as a witness at the trial, and swore that the plaintiff was a maltster, and kept a public house; that she was his daughter and servant, and was about thirty years old; that the defendant was an exciseman, made his addresses to her as a lover, with an intention (as she then thought) to marry her; that he was well received on that account by the plaintiff her father, and very civilly treated by him and his family, and often spent the evening with them: she also swore, that he promised her marriage, and got her with child. The brother of A. B. was also called, who deposed that the plaintiff was wholly deprived of A. B.'s service and assistance in his business, and paid some money on account of her lying-in. The counsel for the defendant, at the trial, objected to the evidence given, as to the promise of marriage; upon which A. B. [19] offered to give the defendant a release as to that promise; but the counsel for the defendant refused to accept thereof. Upon summing up the evidence to the jury, the Judge (Gould) was pleased to say, that he told them over and over again, that, in giving damages in this action, they must not consider the injury done to A. B. as to the promise of marriage, but must leave that matter quite out of the question, because A. B. might have her action for breach of that promise; that he thought the plaintiff, A. B.'s father, was by nature bound to take care of her while she laid in, and that they should consider his expences on that account, as well as his loss of his daughter's service. Whereupon the jury gave 50l. damages, with which the Judge said he was not at all dissatisfied; and that he thought, if the jury had then considered the promise of marriage, they would have given six times as much damages.

Lord Chief Justice Wilmot. Actions of this sort are brought for example's sake; and although the plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages; and if A. B. brings another action against defendant for the breach of promise of marriage, so much the better; he ought to be punished twice. A. B. being of the age of 30, is nothing to mitigate damages, or lessen the defendant's fault, and we will pay no regard to any affidavit read to us, Brother Gould being satisfied with the verdict; if much greater damages had been given, we should not have been dissatisfied therewith; the plaintiff having received this insult in his own house; where he had civilly received the defendant, and permitted him to make his addresses to his daughter.

Clive Justice. If the jury had given 100l. damages, I should not have thought them too much.

Bathurst Justice. To be sure, the giving the promise of marriage in evidence at the trial of this cause, was very improper; but as the jury were cautioned not to take notice of it, I am inclined to think they did not; for if they had, I think they would have given more than 50l. in damages. In actions of this nature, and of assaults, the circumstances of time and place, when and where the insult is given, require different damages; as it is a greater insult to be beaten upon the Royal Exchange, than in a private room. I am of the same opinion with my Lord Chief Justice and my brothers.

Serjeant Davy took nothing by his motion; so the plaintiff had judgment per totam Curiam.

[20] MICHAELMAS TERM, 10 GEO. III. 1769.

DYE *versus* LEATHERDALE AND SIMPSON. C. B. Declaration in trespass for taking plaintiff's hog.

Norfolk, (to wit).—John Leatherdale, late of, &c. and Cornelius Simpson, late of, &c. were attached to answer John Dye, of a plea, wherefore, with force and arms, &c. the said J. L. and C. took a certain hog of the said J. D. of the value of, &c. at Frenze in the county aforesaid, there found and being, and drove and carried away the same, and converted and disposed thereof to their own use, and there did other wrongs to the said J. D. to the great damage of the said J. D. and against the peace of our said lord the now King, &c. and thereupon the said J. D. by Robert Greenacre his attorney complains, that the said J. L. and C. on the first day of September, in the year our Lord 1768, with force and arms, &c. took a certain hog of the said J. D. of the value of four pounds, at F. aforesaid there found and being, and drove and carried away the same, and converted and disposed thereof to their own use (to wit) at F. aforesaid, and then and there did other wrongs to the said J. D. to the great damage of the said J. D. and against the peace of our said lord the now King, &c. wherefore the said J. D. saith, that he is injured, and hath sustained damage to the value of 4l. and thereupon he brings this suit, &c.

And the said J. L. and C. by Henry Browne their attorney, come and defend the force and injury when, &c. and say, that they are not guilty of the trespass aforesaid, above laid to their charge, in manner and form as the said J. D. hath above thereof complained against them, and of this they put themselves upon the country, and the said J. D. likewise.

And for further plea, as to the taking the said hog, in the said declaration mentioned, and driving and carrying the same away, by the said J. L. and C. above supposed to have been **[21]** done, they the said J. L. and C. by leave of the Court here to them for this purpose granted, according to the form of the statute in such case made and provided, say, that the said J. D. ought not to have or maintain his aforesaid action thereof against them; because they say, that the said C. long before, and at the said last time, when, &c. was lawfully possessed of, and in a certain close, called Newson's Lay, lying and being at F. aforesaid, in the county aforesaid. And because the said hog, at the said last time, when, &c. was in the said close of the said C. eating up the wheat then growing there, and there doing damage to the said C. He the said C. in his own right, and the said J. L. as his servant, and by his command, at the said last time, when, &c. took the said hog, in the said declaration mentioned, so being, in the said close called N. L. and doing damage there as aforesaid, for and in the name of a distress, and drove the same away, and impounded the same in the common pound there, (to wit) at F. aforesaid and there left the same, as it was lawful for him to do, for the cause aforesaid; which are the same taking the said hog, in the said declaration mentioned, and driving and carrying the same away, whereof the said J. D. hath above complained against them, and this they are ready to verify; wherefore the said J. L. and C. pray judgment, if the said J. D. ought to have or maintain his aforesaid action thereof against them, &c. WM. JEPHSON.

And as to the plea of the said J. L. and C. by them lastly above pleaded in bar, as to the taking the said hog, in the said declaration mentioned, and driving and carrying away the same, by the said J. L. and C. above done, he the said J. D. says that by any thing in that plea above alledged, he ought not to be barred from having