

BRANDT vs. WEBER.

Promissory Note—Illegal Consideration—Excussion of Principal.

P. Weber sold ammunition in the Transvaal to the representative of the Government of the land of Goossen, and received, in payment, a promissory note endorsed by the defendant as surety. The plaintiff, who had received the note from the said P. Weber, sued the defendant for payment. Held, firstly, that the plaintiff could not proceed against the defendant, who had renounced none of the privileges of a surety, without first excussing the principal debtor; secondly, that the consideration for the note was illegal, and that, consequently, the note itself could not be sued on, and that as the plaintiff, who had received the note with knowledge that it had been dishonoured, could be met by the same defence which might have been used against the original holder of the note, he could not succeed.

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The summons set out that, on October 5th, 1882, a certain W. O'Neill, acting on instructions from the Chairman of the Government or Directorate of the land of Goossen, a certain N. C. Gey, bought goods to the value of £382 10s. and 53 oxen from P. L. M. Weber at Sterkfontein in the Transvaal; that the said O'Neill q.q. gave P. L. M. Weber a promissory note in payment, which note was endorsed by the defendant, H. C. Weber, as surety; that on February 5th, 1883, P. L. M. Weber presented the note for payment to N. C. Gey, at the office of the Government of the land of Goossen, but that payment was refused, and that, thereupon, the note was protested for non-payment according to the customs of the land of Goossen; and that the plaintiff was the present holder of the note. The plaintiff claimed payment of the £382 10s. and delivery of the 53 oxen by the defendant as surety.

The defendant pleaded that he endorsed the note in his capacity as General of the Forces of the land of Goossen, and could not be sued in his private capacity. Secondly, that the consideration for the note was illegal. Thirdly, that the principal must be excussed before he, as surety, could

be sued. Fourthly, that it was not said what the customs of the land of Goossen were.

It appeared, in evidence, that the £382 10s. and the 53 oxen constituted the price for which the said P. L. M. Weber sold to O'Neill ammunition for the use of the inhabitants of the land of Goossen in a war against a Kaffir chief, Moshete. The sale took place in the Transvaal, and was, consequently, a contravention of Law 6 of 1873, which gives the Government of the Transvaal the sole right to sell ammunition. The note was ceded by P. L. M. Weber to the plaintiff after it had, to the knowledge of the plaintiff, been dishonoured by the above-mentioned N. C. Gey. The case was heard by Kotzé, C.J., and Esselen, J.; Jorissen, J., having previously acted as counsel in the case, being unable to sit.

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Kleyn, with him *Tobias*, for the plaintiff:—

The defendant signed as surety and is liable in his personal capacity. There is no allegation that the ammunition was sold without a licence. No protest was necessary because no definite place was mentioned, and, further, there was no notary.

De Villiers, for the defendant:—

The defendant signed in his capacity as *General*. He cannot be sued *personally*. Vide *Chitty on Contracts*, p. 254.

The consideration for the note was illegal, being in contravention of Law 6 of 1873. P. L. M. Weber had no licence to sell ammunition.

If the defendant signed as surety the principal ought first to be excused. The plaintiff does not say what the customs of the land of Goossen were, as regards protesting notes for non-payment. He knew that he had to receive payment at the laager of Moshete. He did receive something in part payment from the Government of the land of Goossen. Vide *Story on Promissory Notes*, § 408.

Tobias, in reply: The principal was outside of the Transvaal, and, therefore, it was not necessary to excuse him first. The part payment received by the plaintiff was received after issue of *suramons*.

Cur. adv. vult.

Posteà, December 20th, 1886.

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Korzé, C.J. : The Court is of opinion that, granting that the defendant signed the promissory note, which is being sued on, as surety, and that the word *General*, written after his name, must be looked upon as descriptive, and not as showing that Weber endorsed in his capacity of General of the country of Goossen, it appears, *ex facie* the promissory note, that it was given by the Government of the country of Goossen, for the amount of £382 10s. and 53 oxen four years old. The promissory note was dated Sterkfontein, district of Bloemhof, 5th Oct., 1882, and was payable at sight at the “laager” of Moshete. Now, if the defendant must be looked upon as a surety, then the principal debtor must be first excused. It is of no avail to say that the debtor is out of the country, and, therefore, the surety can be proceeded against directly, for it appears, *ex facie* the document, that at the time of the transaction the debtor was out of the country and that the debt had to be paid outside the country. Now, did Brandt do everything to obtain payment from the Government of the country of Goossen? It has been proved that he received some oxen in part payment, and, further, that, after summons had been taken out by him, he entered into an agreement with the Government of the country of Goossen on August 12th, 1884, whereby provision was made for the payment of the promissory note. He was afterwards desirous of obtaining land as payment, and the witness Stanson declared that Brandt told him that the old Government of the country of Goossen had transferred all farms to him in payment of his claim. If this is so then Weber is discharged. It has been proved that Brandt applied to Administrator Shippard for payment of his claim on the promissory note. This claim received favourable consideration, but before the money was paid out a demand was made to see the original promissory note, and as it was in the possession of the Registrar of this Court among the other documents, the payment was not made. We must also not forget that the promissory note was given in payment for powder and ammunition, and that the transaction took place within the boundaries of the Republic. The defendant pleaded that such a transaction is against the law and is forbidden by the law. The onus of proving that P. Weber, who sold the ammunition to the Government of the country of Goossen,

had a licence from the Government of this Republic rests on the plaintiff, for Law No. 6 of 1873, which was in force when the transaction was entered into, makes dealing in ammunition punishable, and gives the Government the exclusive right of dealing therein. The plaintiff has failed to produce such a licence. We must, therefore, consider the sale of the ammunition, for which the promissory note was given, as void and unlawful, and, therefore, no claim on the promissory note against the defendant can be allowed. It appears that the plaintiff received the promissory note after it had been dishonoured, and that he was aware of this when he accepted the promissory note. The plaintiff can, therefore, be met by the same exception or defence which the defendant could have made against the person from whom the plaintiff received it. This person was the original taker of the promissory note. Under the circumstances, the Court is of opinion that there must be judgment in favour of the defendant, with costs.

ESSELEN, J., concurred.

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BOK, N. O. *vs.* EBDEN AND JONES.

Concessions—Cancellation—Penalty.

The Government of the South African Republic on January 24th, 1884, granted two concessions to Ebdén on the farms Tweefontein and Waterval. Under these concessions, which were confirmed by the Volksraad, Ebdén acquired the exclusive right to exploit gold reefs on the said farms on payment of £250 per annum on each farm. One of the provisions of the concessions was, that on non-fulfilment of any of the conditions therein contained, all moneys paid by the concessionaire should be forfeited and the concessions should lapse. Ebdén paid £500 on January 24th, 1884, but failed to pay anything during the two following years. In March, 1885, he ceded one quarter interest in the concessions to Jones without the latter's knowledge or consent. The Government instituted