

WITTERS v. SOWLES *et al.*

(Circuit Court, D. Vermont. March 1, 1888.)

## NEGOTIABLE INSTRUMENTS—ASSUMPSIT—COMMON COUNTS AGAINST MAKER AND INDORSER—JUDGMENT—EFFECT.

Under Rev. Laws Vt. § 938, which provides for a judgment against the defendants found liable in an action founded on contract, and in favor of those who are not liable, a judgment in favor of one of the defendants, upon the report of a referee, in an action brought upon the common counts in *assumpsit*, in which plaintiff sought to hold the defendants as makers of a company note, given to one of the defendants and indorsed to plaintiff, is not a bar to a judgment, in the same suit against the indorser, the indorsement being within the scope of the cause referred, since a common count may be amended so as to cover a count upon an indorsement of a note.

## Exceptions to Report of Referee.

*Chester W. Witters, pro se.**Edward A. Sowles, pro se.*

WHEELER, J. This action was brought upon the common counts in *assumpsit*. By agreement of the parties it was referred to a referee, who has made report. It has now been heard on exceptions of the defendant Sowles to the report. From the report it appears that the Glens Falls Shirt Company made a note payable to defendant Sowles or order, which was indorsed by him to the bank of which the plaintiff is receiver. The plaintiff claimed that the defendants were the Glens Falls Shirt Company, and that they were liable as makers of the note. The referee has found against this claim, and that they were not so liable. On that finding the defendant Burton has judgment in his favor.

The plaintiff claims to hold the defendant Sowles as indorser. The defendant Sowles claims that he is not liable as indorser upon the common counts, and that the judgment in favor of the other defendant is a bar to any judgment against him in this suit. By the statutes of the state provision is made for judgment against the defendants found liable in an action founded on contract, and in favor of those who are not. R. L. Vt. § 938. The procedure of the state courts is adopted in common-law cases in the United States courts. Rev. St. U. S. § 914. Therefore that judgment in favor of defendant Burton was proper, and has no effect upon the liability of the defendant Sowles. Also, by that procedure, when a cause is referred, all is referred that belongs to it, and which might be brought into it by any proper amendment of the pleadings. *Eddy v. Sprague*, 10 Vt. 216; *Granite Co. v. Farrar*, 53 Vt. 585. The common counts may be so amended as to cover a count upon an indorsement of a note. *Austin v. Burlington*, 34 Vt. 506. Therefore this indorsement was within the scope of the cause referred to the referee. The exceptions to the report merely raise these questions.

Exceptions overruled, and judgment on report for the plaintiff against the defendant Sowles, for the amount of the note, \$5,736.44, ordered.

ROSENSTEIN *v.* MAGONE, Collector.

(Circuit Court, S. D. New York. March 3, 1888.)

## CUSTOM DUTIES—COVERINGS—MATCH-BOXES—ACT CONG. MARCH 3, 1883, § 7.

Boxes containing matches, and being of use in the *bona fide* transportation of the matches to the United States, are free of duty under the seventh section of the tariff act of March 3, 1883, although the boxes are put to a use otherwise than in the *bona fide* transportation. The case of *O. Steuffer v. Robertson*, 116 U. S. 499, 6 Sup. Ct. Rep. 462, criticised, but followed.

At Law. Action to recover back custom duties.

This action was brought to recover duties alleged to have been exacted unlawfully upon boxes containing matches imported from Sweden. The matches were of two kinds. Some were known as "safety matches," and could be ignited only on a specially prepared surface; and the boxes containing them had on their edges a piece of such prepared surface. The others were known as "parlor matches," and could be ignited on any rough dry surface; and the boxes containing them had on their edges a piece of sand-paper. The boxes of both kinds were taxed at 100 per cent. *ad valorem*, under the proviso to section 7 of the tariff act of March 3, 1883, whereas the plaintiff claimed that both were properly duty free, under section 7 itself. It appeared on the trial that the boxes performed a function in the *bona fide* transportation of the matches into this country, though this function was slight, since these boxes were themselves packed several times in stronger packages and boxes. It also appeared that the boxes performed a function during the use of the matches in this country, and that the matches would have no appreciable commercial value in the markets of this country if not contained in such boxes.

*Nelson Smith* and *H. Applington*, for plaintiff.

*Stephen A. Walker*, U. S. Atty., and *Macgrane Cox*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*orally*.) This case lies within a narrow compass, both as to the law and as to the facts. It calls for a construction only of section 7 of the act of 1883. The facts are few in number, and there is no dispute about them. The method in which these matches are packed; the method in which they are conveyed to this country, and how they are used when they are here; what happens to the boxes during use and afterwards,—is all proved in the case. It is a matter of common knowledge, without proof, and it is proved here, that while there may be no use of the box disconnected from the matches, there is a use made of the box disconnected from the transportation. Now, section 7, in its latter part, contains a proviso under one branch of which the government claims that these goods come. The proviso is as follows: "Provided that if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the *bona fide* transportation of goods to the United States, the same shall be subject to a duty of one hundred