

so decided in this case. And we are of opinion, that a replication stating the creditor's want of capacity to testify, may be sustained by the oath of the plaintiff.

Plumer
v.
Drake.

WILLIAM TENNEY *versus* JOHN R. SANBORN.

A note made by the defendant, and payable to a third person, or order, and by such third person endorsed to the plaintiff, may be given in evidence to support a count for money had and received.

ASSUMPSIT for money had and received. The cause had been referred to an auditor, who reported that the plaintiff offered in evidence a note made by the defendant, for \$42,03, payable to R. C. or order, and by R. C. endorsed to the plaintiff, and the question was, whether the note was evidence to maintain the count for money had and received ?

Tenney, for the plaintiff, relied upon the following cases. 4 Pick. 421, *Wild v. Fisher* ; 15 Mass. Rep. 331, *Boardman v. Gore* ; 12 Johns. 90, *Pierce v. Crafts* ; 12 Mass. Rep. 172, *State Bank v. Hurd*.

Parker, for the defendant.

By the court. A negotiable note is *prima facie* evidence of money had and received by the maker, of the payee, and also of an agreement on the part of the maker, to hold the money for the use of any one to whom the note may be legally transferred. There is no doubt that the note was proper evidence to maintain the count. *Bayley on Bills*, 244 ; 1 *Mason*, 306, *Weston v. Penniman*.