BANK OF COLUMBIA v. OTT.

Case No. 879.

{2 Cranch, C. C. 575.}[1]

Circuit Court, District of Columbia. May TERM, 1825. NEGOTIABLE INSTRUMENTS—ACTION AGAINST INDORSER—PLEADING—LIMITATIONS.

In an action against the indorser of a promissory note, payable sixty days after date, non assumpsit infra tres annos is a bad plea upon general demurrer; it ought to be actio non accrevit.

{See Ferris v. Williams, Case No. 4,750; Union Bank of Georgetown v. Eliason, Id. 14,355.}

At law. Assumpsit against the administrator of {John Ott} the indorser of a promissory note, payable in sixty days after date. The defendant had pleaded "non assumpsit Infra tres annos," to which the plaintiff demurred generally. {See this case at last term. Bank of Columbia v. Ott, Case No. 878.}

Mr. J. Dunlop contends that the plea is bad upon general demurrer, because the note, being payable in sixty days after date, the plea ought to have averred that the cause of action did not accrue within three years, whereas it only avers that the defendant did not promise within three years. 2 Saund. 63c, which cites Gould v. Johnson, 2 Salk. 422, 2 Ld. Raym. 838; Puckle v. Moor, 1 Vent. 191; Birks v. Trippet, 1 Saund. 33, note 2; Bull. N. P. 151.

Mr. Marbury, contra. This is an action against the indorser, whose liability did not accrue until after the note became payable; and the declaration avers, that in consideration of that liability the defendant promised to pay. It was not debitum In presenti, solvendum in futuro.

Mr. Key, in reply. The plea does not relate to the implied promise which the law raises, and which is averred in the declaration as arising from the facts previously

averred. The Indorser makes a conditional promise at the time he indorses. The promise relates back to the time of the indorsement. The promise of the maker is stated in the same way, namely, "by reason whereof, and by force of the statute," &c. The liability of the indorser upon his original undertaking and the plaintiff's right of action did not accrue until sixty days after the promise; so that the promise may have been beyond the time of limitation, and the right of action within it

THE COURT, after consideration, (THRUSTON, Circuit Judge, contra,) was of opinion that the plea of "hon assumpsit infra tres annos," pleaded by the indorser of a promissory note payable sixty days after date, was bad, upon general demurrer. It ought to have been actio non accrevit

[1] {Reported by Hon, William Cranch, Chief Judge.}