Case No. 2,183.

BURNS v. SEMMES.

[4 Cranch, C. C. 702.][1]

Circuit Court, District of Columbia.

March Term, 1836.

GRUARANTY—NOTICE OF ACCEPTANCE—ACTION ON—PLEADING—TRIAL—INSTRUCTIONS.

1. In an action upon a letter of guaranty, the plaintiff must show that he gave notice in a reasonable time, to the defendant, of his acceptance of the guaranty, and of the value of the articles furnished.

[See Dobbins v. Bradley, Case No. 3,944; Wildes v. Savage, Id. 17,653; Hank v. Crittenden, Case No. 6,024.]

2. The court will not give an instruction not warranted by the evidence.

3. Although the person in whose favor the letter of guaranty is given, has passed to the credit of the defendant, in account, the value of the goods obtained upon the guaranty, and that account has been settled, yet the plaintiff cannot recover upon the count for money had and received.

At law. This was an action, [by Benjamin Burns against George Semmes] upon the following letter of guaranty: "23d December, 1829. Dear Sir:—The bearer, Mr. Edward Tolson, informs me that he is unacquainted with you, and wishes to get a suit of clothes to be paid for next April. If you will furnish him therewith, I will guaranty payment for them. Yours respectfully, George Semmes. To Benjamin Burns, Esq., Merchant-Tailor, Washington, District of Columbia."

On the trial, the defendant's counsel, R, J. Brent, objected that there was no evidence of notice to the defendant, that the guaranty would be accepted; nor that it had been accepted; nor of the amount or value of the clothes furnished. The letter is only an offer to guaranty the payment, if the plaintiff should furnish the clothes. Norton v. Eastman, 5 Am. Com. Law 529; Babcock v. Bryant, 12 Pick 133; Cremer v. Higginson [Case No. 3,383]; Norton v. Eastman, 4 Greenl. 522; Rapelye v. Bailey, 3 Conn 438; Duval v. Trask, 12 Mass 154; Green v. Dodge, Ohio Cond. R. 436; Douglass v. Reynolds, 7 Pet. [32 U. S.] 113; Caton v. Shaw, 2 Har. & G. 22; Kounsalaer v. Clarke [Case No. 7,927].

Mr. Bradley, contra. It is an original undertaking to pay; not a promise to pay if the other should not. 5 Am. Com. Law, 530; Douglass v. Reynolds, 7 Pet. [32 U. S.] 113; Grice v. Ricks, 3 Dev 62; Lawrason v. Mason, 3 Cranch [7 U. S.] 492. If it is a sufficient guaranty, and if the declaration avers that the goods were furnished upon the faith of the guaranty, notice is not necessary. Warrington v. Furbor, 8 East 242; Swinyard v. Bowes, 5 Maule & S. 62; Fell, Guar.; Allen v. Rightmere, 20 Johns. 365.

THE COURT (THRUSTON, Circuit Judge, contra), at the prayer of the defendant's counsel, instructed the jury that the plaintiff cannot recover in this ease, unless he satisfies the jury by evidence, that the plaintiff gave notice to the defendant, in a reasonable time, of his acceptance of the guaranty, and of the value of the clothes furnished.

Mr. Bradley, for the plaintiff, then prayed the court to instruct the jury, in effect, that if they should be satisfied by the evidence, that the goods were originally furnished to Mr. Tolson, upon the credit and at the request of the defendant, it is an original

undertaking by the defendant, under the count for goods sold and delivered by the plaintiff to the defendant at his request.

But THE COURT (CRANCH, Chief Judge, doubting) refused to give this instruction, because there was no evidence of any contract between the plaintiff and the defendant, other than the letter of guaranty.

Mr. Bradley then prayed the court to instruct the jury, in effect, that if the defendant was, at the time of giving the letter of guaranty, indebted to Tolson in a larger sum than the value of the clothes, and that it was agreed between them that Tolson should give the defendant credit in their account, for the value of the clothes, and that credit was so given, and that the account between Tolson and the defendant has been settled, the plaintiff may recover upon the count for money had and received. But the court refused to give the instruction.

Verdict for the plaintiff for $65, with interest from the first of May 1831.

The defendant moved for a new trial on the ground that the verdict was against the evidence, and the instruction of the court upon the point of want of notice. But the court overruled the motion.

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