Case No. 7,212.

JANNEY ET AL. V. GEIGER ET AL.

{1 Cranch, C. C. 547.}[1]

Circuit Court, District of Columbia. July Term, 1809.

PROMISSORY NOTE—ACTION ON—INDORSEMENT—AVERMENT OF CONSIDERATION—INSUFFICIENT PLEA.

1. A count upon the indorsement of a promissory note not payable to order, without averring a consideration for the indorsement, is bad in Virginia.

{Cited in McComber v. Clarke, Case No. 8,711.}

2. A plea that the maker of the note had, at the date of the writ, goods and chattels to a greater amount than the plaintiffs' claim, is no answer to an averment of insolvency.

Assumpsit. The declaration had three counts.

1. The first count stated a promissory note made by G. N. Lyles, to Amos Allison and Jacob Geiger, for four hundred and seventy-nine dollars and eighty-nine cents, at ninety days, dated 17th July, 1804, for value received, "negotiable at the Bank of Alexandria," but not payable to order, and avers that it was assigned by indorsement by Allison and Geiger, to the plaintiffs {Aquila Janney and Elisha Janney}, whereby the plaintiffs were entitled to demand the money from Lyles; but that when payable, he refused to pay it, and was insolvent, of which the defendants had notice, whereby they became liable to pay, &c, and being liable, in consideration thereof promised to pay, &c.

2. The second count stated that the defendants, in order to give a credit to the said note, and to induce some person or persons to receive the same for the full amount and value thereof, and to enable the said Lyles to pass the same for its full value, indorsed the same, and delivered it to Lyles to be negotiated by him for value received, who passed it to the plaintiffs for value received, by means whereof the plaintiffs became entitled to demand of Lyles, the amount thereof; that when payable they demanded payment of Lyles, who refused; of which the defendants had notice; that Lyles was insolvent, by means whereof the defendants became liable, &c.

The third count was for money had and received.

The defendants pleaded,—1. Non assumpserunt. 2. That on the day of suing out the writ (January 3, 1805,) Lyles had property in his possession, of his own proper goods and chattels, far exceeding the amount claimed by the plaintiffs. 3. That the defendants never received any value, or consideration of any kind of or from the plaintiff's, or any other person, for the note, or for their indorsement. To the second plea there was a general demurrer and joinder. To the third, the plaintiffs replied, that the defendants indorsed the note to give it credit. That after its indorsement it was assigned and delivered to the plaintiffs for a full and valuable consideration; and that the plaintiffs received it upon the

credit of the defendants as well as that of the said Lyles. To this replication there was a general demurrer and joinder.

Mr. Youngs, for defendants, upon the argument on the demurrers, contended that the first fault was in the declaration which did not aver any consideration for the defendants' indorsement. That if the plaintiffs can recover at all it must be upon the principles of the common law, for the statute of Virginia of the 4th of December, 1786, p. 36, § 4, which makes promissory notes assignable, only authorizes the assignee to sue in his own name, but gives no right of action against the assignor. By the common law the assignor is only liable to refund what he has received for the note, and if he has received nothing is not liable at all. Mandeville v. Riddle, 1 Cranch {5 U. S.} 298; Norton v. Rose, 2 Wash. {Va.} 233; Picket v. Morris, Id. 253; Lee v. Love, 1 Call, 497; Mackie v. Davis, 2 Wash. {Va.} 219. It is necessary, therefore, in a declaration by the assignee against the assignor, to state the consideration.

Mr. Swann, contra. In Vowell v. Lyles {Case No. 17,021}, this court decided that if the defendant indorsed the note to give it credit no other consideration is necessary to support the action. The like instruction was given to the jury by this court in Patton v. Violett {Id. 10,839}, at November term, 1807.

THE COURT was of opinion that the first count (upon the mere indorsement of a promissory note not payable to order, without stating any consideration) was bad, but gave the plaintiffs leave to amend.

At July term, 1809, THE COURT (Duckett, Circuit Judge, absent) was of opinion that the second plea was bad.

Judgment for the plaintiffs.

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