

Case No. 7,478.

JONES v. LOVELL.

{1 Cranch, C. C. 183.}¹

Circuit Court, District of Columbia.

July Term, 1804.

EVIDENCE—SUBSCRIBING WITNESS.

The testimony of the subscribing witness may be dispensed with if he is absent from the country.

Assumpsit on promissory note. The note was not suffered by the court to go in evidence to the jury; not being proved by the subscribing witness, and the absence of the witness not accounted for. The plaintiff then offered evidence to prove that the subscribing witness was a resident of this district some few years ago, and that he went off in a clandestine manner, to avoid the payment of his debts, and proved by many witnesses that they did not know, nor believe that he was now residing in the district of Columbia, or within the reach of the process of this court, and having proved the handwriting of the subscribing witness, and of the defendant, THE COURT permitted the note to go to the jury. *Prince v. Blackburn*, 2 East, 250, and *Cunliff v. Sefton*, Id. 183.

The following were the grounds upon which THE COURT decided the case: The only reason why those cases should not apply to this country, is, that here we may issue a commission to examine witnesses resident abroad. But the answer to that objection is, 1st. That in this case it was not known where the subscribing witness resided; and therefore it was impossible to know where to send a commission. 2d. That upon such a commission the plaintiff could not compel the subscribing witness to testify. 3d. That the plaintiff ought not to be compelled to send his original security abroad, and run the risk of its loss. 4th. That if the defendant wished to avail himself of the evidence of the subscribing witness he might summon him or take his deposition. 5th. That the rule was a hard one, particularly with regard to negotiable paper, and the court would not extend it beyond the cases already decided. The reason why the testimony of a subscribing witness is required, is because the best evidence which the circumstances of the case admit ought to be produced. And the reason of that rule is because the not producing such evidence, raises a presumption that if produced it would make against the party who ought to produce it. But the circumstances of this case do not admit of the production of the testimony of the subscribing witness; and they do sufficiently account for its non-production. This destroys the presumption arising from the want of that testimony, and thereby removes the ground upon which the rule was founded.

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