

Case No. 8,954.

MAGNER v. JOHNSTON.

[3 Cranch, C. C. 249.]¹

Circuit Court, District of Columbia.

Dec. Term, 1827.

SALE—TIME OF PAYMENT—SUIT BROUGHT—ASSUMPSIT.

The plaintiff, in October, 1826, sold a horse to the defendant for his bill on the postmaster-general, payable on the 1st of January following. The defendant gave the bill, but counter-manded it the next day; and acceptance was refused; held, that the plaintiff had no right of action of indebitatus assumpsit for the price of the horse, before the 1st of January.

Indebitatus assumpsit for \$60, for a horse sold and delivered by the plaintiff [Thomas Magner] to the defendant [James W. Johnston]. The defendant offered evidence, that the original agreement was, that the plaintiff should sell the horse to the defendant for the plaintiff's draft or bill on the postmaster-general for \$60, payable on the 1st of January, 1827. The sale was accordingly so made, on the 19th of October, 1826. The defendant drew the bill, and delivered it to the plaintiff, who delivered the horse to the defendant the plaintiff, on the next day countermanded the bill; and acceptance was refused; and the plaintiff on the same day, (October 20,) brought this action of indebitatus assumpsit, for the price of the horse.

Mr. Wallach, for defendant, contended, that the plaintiff had brought his action too soon; he should have waited till after the 1st of January. *Dutton v. Solomonson*, 3 Bos. & P. 582.

Mr. Morfit, contra, cited *Chit. Bills*, 128, note c; *Puckford v. Maxwell*, 6 Term R. 52; *Stedman v. Gooch*, 1 Esp. 5.

THE COURT, (THRUSTON, Circuit Judge, absent,) at the request of the defendant's counsel, instructed the jury, that if they should be satisfied by the evidence, that it was part of" the original contract of sale, and a condition thereof, that the plaintiff should take the defendant's draft on the postmaster-general, payable on the 1st of January, the plaintiff cannot recover in this action of indebitatus assumpsit for the price of the horse, the plaintiff having commenced his action before the 1st of January, although the defendant himself was the cause of the non-acceptance of the draft.

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