

## SMITH ET AL. V. JOHNSON.

{2 Cranch, C. C. 645.}<sup>1</sup>

Circuit Court, District of Columbia. April Term, 1826.

NOTES—PLACE OF  
PAYMENT—DEMAND—PAYMENT.

1. In action against the maker of a promissory note, payable at a particular bank, it is not necessary to aver or prove a demand of payment at that bank.
2. A promissory note, given as collateral or counter security for a note borrowed, is not discharged or vacated by the borrower's discharging or taking up the borrowed note with funds furnished by the lender.

Debt against the maker of a promissory note for \$5,000, dated January 8th, 1824, payable to and indorsed by Jacob Hoffman to the plaintiffs {Walter and Clement Smith}, and given by Hoffman to them as a collateral guaranty to secure them against their note for the like amount, dated January 9th, 1824, lent to Hoffman for the use of the defendant {George Johnson} and Hoffman in a business in which they were jointly concerned. The note was made payable at the Fanners' and Mechanics' Bank in Georgetown, and the declaration avers a demand at that bank.

Mr. Jones and Mr. Taylor, for defendant, prayed the court to instruct the jury, that they must be satisfied that payment of the note was demanded at the said bank before the plaintiffs can recover in this action. *Rowe v. Young*, 2 Brod. & B. 165; *Chit. Bills*, 321.

Mr. Key, contra, cited the case of *Rhodes v. Gent*, 5 Barn. & Ald. 244; 7 Serg. & R. 84; *Foden v. Sharp*, 4 Johns. 183; *Wolcott v. Vantvoord*, 17 Johns, 248; 3 *Chit. Pl.* 4; *Butterworth v. Le Despencer*, 3 Maule & S. 150; *Pearse v. Pemberthy*, 3 Camp. 261.

THE COURT (nem. con.) refused to give the instruction; considering the averment in the declaration as immaterial in an action against the maker.

The counsel for the defendant, prayed the court, in substance, to instruct the jury, that if the defendant, or Mr. Hoffman, his partner, had paid and taken up the lent note, the plaintiffs could not recover upon the guaranty note. And the plaintiffs prayed the court, in substance, to instruct the jury that, if the lent note was taken up, in whole, or in part, with funds furnished by the lenders, the plaintiffs are entitled to recover upon the guaranty note, to the extent of the funds thus furnished by them. Both of which instructions THE COURT in effect gave.

Verdict for the plaintiffs, \$2,135.68, and interest from the 31st of May, 1825.

Five bills of exception were taken; but no writ of error was issued.

{See Case No. 13,061.}

<sup>1</sup> [Reported by Hon. William Cranch, chief Judge.]

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