Case No. 14,353.

UNION BANK OF GEORGETOWN v. CORCORAN.

{5 Cranch, C. C. 513.}[1]

Circuit Court, District of Columbia. Nov. Term, 1838.

STATUTE OF FRAUDS—DEBT OF ANOTHER—NOTES—PAYMENT—USAGE.

1. The defendant's note for $7,400. made payable directly to the plaintiff's, on demand, with interest, but not payable to order, and upon which there is an indorsement stating that it is held by the plaintiffs as collateral security for the defendant's obligation upon a previous note of Thomas Corcoran, senior, deceased, is not void under the statute of frauds as being a promise to pay the debt of another, without a consideration therein expressed.
2. In an action upon such a note, with such an indorsement, the burden of proof is on the defendant to show that the former note or some part of it had been paid.
3. If a bank discounts a note made payable directly to the bank, and takes the interest in advance, for the time the note has to run, it is not usury, such being proved to be the usage of the banks.

Assumpsit upon the following promissory note: "$7,400. Georgetown, May 3d, 1832. On demand we jointly and severally promise to pay the president and directors of the Union Bank of Georgetown, $7,400, with interest from the 1st instant, for value received. James Corcoran. T. Corcoran." Upon which note was this indorsement: "The within note is given as collateral security for our obligation to the Union Bank of Georgetown, on a note of Thomas Corcoran, deceased, for $7,400, and is held by said bank only as collateral security for said note; when, therefore, said note with the interest thereon shall have been paid, this is to be returned to us or cancelled by said bank. T. Corcoran." And the following indorsement: "I reassume and reacknowledge the within note, and

agree not to avail myself of limitations as a bar. T. Corcoran." 30th April, 1835.

Mr. Marbury, for defendant, objected that this was a promise to pay the debt of another, and that it did not express the consideration, and therefore the plaintiffs could not recover.

But THE COURT (nem. con.) overruled the objection, the plaintiffs' counsel, in opening the case to the jury, having admitted that certain property had been assigned to a trustee to be applied to the payment generally of the debts of Thomas Corcoran, senior, and that $1,800 had been paid into the plaintiffs' bank, to be so applied, a proportion of which was applicable to the note of Thomas Corcoran, senior, mentioned in the indorsement aforesaid.

Mr. Coxe, for defendant, objected to the admissibility in evidence of the note upon which this action was founded.

But THE COURT overruled the objection, and the note was lead. Whereupon the defendant's counsel prayed the court to instruct the jury that upon this evidence the plaintiffs were not entitled to recover; or if entitled to recover, not more than nominal damages, without first showing the note of Thomas Corcoran, senior, as described in the said indorsement, and showing further what amount of money is now due thereon. Chitty, 154, last edition. But THE COURT, (THRUSTON, Circuit Judge, absent,) refused to give the instruction, and the defendant's counsel took a bill of exceptions.

The defendant's counsel then objected that the note of Thomas Corcoran, senior, being made payable directly to the president and directors of the Union Bank of Georgetown, or order, and discounted by the bank to the credit of Thomas Corcoran, senior, the transaction was a direct loan, and not a mercantile discount, and that taking the interest in advance for the time the note had to run, was usurious; and that the

note in suit, being given as a security for that loan, was void under the statute of usury.

R. J. Brent, having suggested that the same question would arise in another case now on the trial docket of this term, in which he was concerned as counsel, was permitted to argue the point to the court. He contended that there is a difference between a loan and a discount. The taking of the interest in advance can only be justified upon a real mercantile discount of negotiable paper actually negotiated, or by the usage of the banks, known to the legislatures at the time of granting the privilege of banking. Com. Usury, 86; Ord, Usury, 68; Marsh v. Martindale, 3 Bos. & P. 154; Bank of Washington v. Thornton, 3 Pet. [28 U. S.] 38; 3 Serg. & L. 95, not; Law Md. 1836, c. 272, authorizing the discount of notes made payable directly to the banks; Bank of Kentucky v. Brooking, 2 Litt. (Ky.) 42.

On the other side, it was said that such notes are discounted in Boston daily. There cannot be usury without an intention to take usurious interest. Bank of U. S. v. Waggener, 9 Pet. [34 U. S.] 399; Fleckner v. Bank of U. S., 8 Wheat. [21 U. S.] 354; Chitty. 558 100; Bank of Kentucky v. Brooking, 2 Lift. (Ky.) 42; Wood v. Dummer [Case No. 17,944].

THE COURT (CRANCH, Chief Judge,) giving no opinion, not having examined the authorities cited,) decided instanter that the transaction was usurious.

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