WHITE v. BURNS.

Case No. 17,539.

{5 Cranch, C. C. 123.}[1]

Circuit Court, District of Columbia. March Term, 1837.

PROMISSORY NOTES—DISCHARGE OF INDORSER—COMPETENCY OF WITNESS.

1. If new notes are taken by the holder of a note, and time given without consent of the indorser upon the old note, he is discharged.

2. The maker of a note is a competent witness, not to prove its original invalidity, but the improper use afterwards made of it, and that time was given him without the consent of the indorser.

{See Bank of Columbia v. French, Case No. 867.}

Assumpsit {by W. G. W. White} against {Benjamin Burns} the indorser of J. B. Gorman's note for one hundred dollars.

Mr. Bradley, for defendant, offered to examine J. B. Gorman, the maker of the note, to prove that it was made to be discounted at the Bank of Washington to take up a note for one hundred and five dollars, with the defendant's indorsement, then about becoming due at the Bank of the United States; but that it was discounted by the plaintiff without the consent of the defendant, and that time was given to the maker, also without the defendant's consent.

Mr. Hoban, for plaintiff, relied on the case of Bank of U. S. v. Dunn, 6 Pet. {31 U. S.} 54, that the party to the note cannot be a witness to invalidate it.

THE COURT (nem. con.) permitted Mr. Gorman, the maker, to be sworn and examined as to those facts.

Mr. Bradley then prayed the court to instruct the jury that if they should be of opinion, from the evidence, that after the note upon which this action is brought became due the maker thereof, without the knowledge or assent of the defendant, made an agreement with the plaintiff to forbear any suit upon the said note, and in consideration thereof paid to the plaintiff five dollars, and gave his two promissory notes to the plaintiff, one for $45, at thirty days, and one for $50 at sixty days, and also paid him the further sum of $3.50, and that the plaintiff did, in fact, thereupon forbear any suit until after both the said notes had become due, the plaintiff did thereby discharge the defendant from liability upon the said note.

Mr. Bradley cited Theo. Prin. & Sur. 164, 184; Hubbly v. Brown, 16 Johns. 70; 2 Wheeler, 212; Woodhull v. Holmes, 10 Johns. 231; Skilding v. Warren, 15 Johns. 270.

Mr. Hoban contended that the agreement to forbear was upon an usurious consideration, and, therefore, not binding upon the plaintiff; and, therefore, did not discharge the defendant; and prayed the court to instruct the jury that if they should believe, from the evidence, that more than lawful interest was given for the forbearance of the two notes

of fifty and forty-five dollars, such forbearance did not discharge the defendant, and he is liable upon the note of one hundred dollars.

But THE COURT (nem. con.) refused to give the instruction asked by Mr. Hoban, and gave that asked by Mr. Bradley.

Verdict for the defendant.

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

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