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the force of the argument of necessity as to barring by alienation. The case of descendible freeholds, the entails of which are barred in that way, may have influence on the present case.

The case was ordered to stand for argument a second time, next Michaelmas term; and Lord MANSFIELD said, that, probably, several arguments would be necessary.

THE PRESIDENT, DIRECTORS and COMPANY OF THE BANK OF THE UNITED STATES v. SMITH.

Demurrer to evidence.—Action on promissory note.

On a demurrer to evidence, the judgment of the court stands in the place of the verdict of a jury; and the defendant may take advantage of any defects in the declaration, by motion in arrest of judgment, or by writ of error.¹

It seems, that as against the maker of a promissory note, or against the acceptor of a bill of exchange, payable at a particular place, no averment in the declaration, or proof at the trial, of a demand of payment at the place designated, is necessary.²

But as against the indorser of a bill or note, such an averment and proof is in general, necessary.

Where the bill or note is made payable at a particular bank, and the *bank itself is the holder, such averment and proof may be dispensed with, and all that is necessary is, for [*172 for the bank to examine the account of the maker with them, in order to ascertain whether he has any funds in their hands.³

On a demurrer to evidence, the court is substituted in the place of the jury, as judges of the facts, and everything which the jury might reasonably infer from the evidence, is to be considered as admitted.⁴

The practice of demurring to evidence is to be discouraged, and courts will be extremely liberal in their inferences, where the party takes the question of fact from the appropriate tribunal.⁵

Proof necessary to support an action against the indorser of a bill or note.

United States Bank v. Smith, 2 Cr. C. C. 319, reversed.

ERROR to the Circuit Court for the District of Columbia.

February 7th, 1826. This cause was argued by *Lear*, for the plaintiffs, citing 2 H. Bl. 509; 3 Mass. 403; Ibid. 524; 12 Ibid. 403; 8 Ibid. 430; 1 Wheat. 373; 1 Doug. 132, 218; 1 Johns. 241; 5 Ibid. 1; 2 Wash. 253; and by *Taylor*, for the defendants, citing 2 Brod. & Bing. 165; 17 Johns. 248; Chitty on Bills 321.

¹ A court of error is bound to notice a fatal defect, apparent in the face of the declaration. *Maher v. Ashmead*, 30 Penn. St. 344.

² If the maker or acceptor was at the place of payment, at the time designated, and was ready and offered to pay, it is matter of defence to be pleaded, and proved on his part. *Wallace v. McConnell*, 13 Pet. 136; *Cox v. National Bank*, 100 U. S. 714; *Caldwell v. Cassidy*, 8 Cow. 271; *Huxtun v. Bishop*, 3 Wend. 13.

³ *Rahm v. Philadelphia Bank*, 1 Rawle 335; *Jenks v. Doylestown Bank*, 4 W. & S. 505; *Sherer v. Easton Bank*, 33 Penn. St. 134; *Hallowell v. Curry*, 41 Id. 322.

⁴ *Smith v. Steinbach*, 2 Caines Cas. 158; *Forbes v. Church*, 3 Johns. Cas. 159; *Thornton v. Bank of Washington*, 3 Pet. 36; *Snowden v. Phoenix Ins. Co.*, 3 Binn. 457. The testimony is to be taken most strongly against the party

demurring, and such conclusions only as a jury might justifiably draw, the court ought to draw; but he is not bound to admit forced and violent inferences. *Pawling v. United States*, 4 Cranch 219; *United States v. Williams*, 1 Ware 175.

⁵ A demurrer to evidence not being a matter of right, it has fallen into disuse; and in lieu of it, the practice has prevailed, of requesting the court to give a binding instruction to the jury, that admitting the evidence to be true, the plaintiff is not entitled to recover; this answers the same purpose, and is to be tested by the same rules. *Parks v. Ross*, 11 How. 362. If the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly. *Pleasants v. Fant*, 22 Wall. 121; *Schuchardt v. Allen*, 1 Id. 370.

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February 13th. THOMPSON, Justice, delivered the judgment of the court.—This case comes before the court on a writ of error to the circuit court for the district of Columbia, and the questions presented for consideration grow out of a demurrer to the evidence, and out of exceptions taken to the declaration.

*173] The action is by the plaintiffs, as indorsees, *against the defendant, as indorser of a promissory note made by William Young. The note is made payable at the office of discount and deposit of the bank of the United States, in the city of Washington. And the questions which have been raised and argued, relate, in the first place, to the sufficiency of the averment in the declaration of a demand of payment of the maker of the note: and secondly, to the sufficiency of the evidence to sustain the plaintiffs' right of recovery.

It is alleged, however, on the part of the plaintiffs, that this court cannot look beyond the demurrer to the evidence, and inquire into defects in the declaration. This position cannot be sustained. The doctrine of the king's bench, in England, in the case of *Cort v. Birkbeck*, 1 Doug. 208, that, upon a demurrer to evidence, the party cannot take advantage of any objections to the pleadings, does not apply. By a demurrer to the evidence, the court in which the cause is tried is substituted in the place of the jury. And the only question is, whether the evidence be sufficient to maintain the issue. And the judgment of the court upon such evidence, will stand in the place of the verdict of the jury. And after that, the defendant may take advantage of defects in the declaration, by motion in arrest of judgment, or by writ of error. But the present case being brought here on writ of error, the whole record is under the consideration of the court; and the defendant, having the judgment of the court below in his *174] favor, may avail himself of all defects in the declaration, *that are not deemed to be cured by the verdict.

The objection to the declaration is, that it does not contain an averment, that a demand of payment of the maker of the note, was made at the place where it was made payable. It is a general rule in pleading, that where any fact is necessary to be proved on the trial, in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact, in order to let in the proof. But the declaration need not contain any averment which it is not necessary to prove. For the purpose, therefore, of determining whether the declaration in this case is substantially defective, for want of an express averment that demand of payment of the maker was made at the office of discount and deposit of the Bank of the United States, in the city of Washington, it is proper to inquire, whether proof of that fact was indispensably necessary to entitle the plaintiffs to recover?

Whether, where the suit is against the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place, it is necessary to aver a demand of payment at such place, and upon the trial, to prove such demand, is a question upon which conflicting opinions have been entertained in the courts of Westminster Hall. But that question, may, perhaps, be considered at rest in England, by the decision in the late case of *Rowe v. Young*, 2 Brod. & Bing. 165, in the House of Lords. It was *there *175] held, that if a bill of exchange be accepted, payable at a particular

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place, the declaration, in an action on such bill, against the acceptor, must aver presentment at that place, and the averment must be proved. A contrary opinion has been entertained by courts in this country, that a demand on the maker of a note, or the acceptor of a bill, payable at a specific place, need not be averred in the declaration, nor proved on the trial; that it is not a condition precedent to the plaintiff's right of recovery. As matter of practice, application will generally be made at the place appointed, if it is believed that funds have been there placed to meet the note or bill. But, if the maker or acceptor has sustained any loss by the omission of the holder to make such application for payment at the place appointed, it is matter of defence, to be set up by plea and proof. 4 Johns. 183; 17 Ibid. 248. This question, however, does not necessarily arise in the case now before the court, and we do not mean to be understood as expressing any decided opinion upon it, although we are strongly inclined to think, that, as against the maker or acceptor of such a note or bill, no averment, or proof, of demand of payment at the place designated, would be necessary.

But when recourse is had to the indorser of a promissory note, as in the present case, very different considerations arise. He is not the original and real debtor, but only surety. His undertaking is not general, like that of the maker, but conditional, that if, upon due diligence having *been used against the maker, payment is not received, then the indorser [*176 becomes liable to pay. This due diligence is a condition precedent, and an indispensable part of the plaintiff's title, and right of recovery, against the indorser. And when, in the body of the note, a place of payment is designated, the indorser has a right to presume, that the maker has provided funds at such place to pay the note, and has a right to require of the holder to apply for payment at such place. And whenever a note is made payable at a bank, and the bank itself is not the holder, an averment, and proof of the demand at the place appointed in the note, are indispensable. In the present case, the bank at which the note is made payable, is the holder, and the question arises, whether, in such case, an averment and proof of a formal demand are necessary. If no such proof could be required, the averment would be immaterial, and the want of it could not be taken advantage of upon a writ of error.

In the case of *Saunderson and others v. Judge*, 2 H. Bl. 509, the plaintiffs, at whose house the note was made payable, being themselves the holders of the note, it was held to be a sufficient demand, for them to turn to their books, and see the maker's account with them, and it was deemed a sufficient refusal, to find that the maker had no effects in their hands. So, in the case of the *Berkshire Bank v. Jones*, 6 Mass. 524, decided in the supreme judicial court of Massachusetts, Chief Justice PARSONS, *in [*177 delivering the opinion of the court, said, that, "the plaintiffs being the holders of the note, we must presume it was in their bank, and there it was made payable. They were not bound to look up to the maker, or to demand payment of him, at any other place. The defendant, by his indorsement, guarantied, that on the day of payment, the maker would be at the bank and pay the note, and if he did not pay it there, he agreed he would be answerable for it, without notice of the default of the maker." The rule here laid down has received the sanction of that court in subsequent cases (12 Mass. 404; 14 Ibid. 556), and is founded in good sense and

practical convenience, without in any manner prejudicing the rights of the maker, or the indorser of the note. The indorser, knowing that the maker has bound himself to pay the note at a place appointed, has a right to expect that he will provide funds at that place to take up the note; and he will be more likely to be exonerated from his liability, by having the demand made there, than upon the maker personally. But if the bank, where the note is made payable, is the holder, and the maker neglects to appear there, when the note falls due, a formal demand is impracticable, by the default of the maker. All that can, in fitness, be done, or ought to be required, is, that the books of the bank should be examined, to ascertain whether the maker had any funds in their hands; and if not, there was a default, which *178] gave to the holder a right to look *to the indorser for payment. And even this examination of the books was not required in the cases cited from the Massachusetts reports. The maker was deemed in default, by not appearing at the bank to take up his note when it fell due. We should incline, however, to think, that the books of the bank ought to be examined, to ascertain whether the maker had any balance standing to his credit; for, if he had, the bank would have a right to apply it to the payment of the note; and no default would be incurred by the maker, which would give a right of action against the indorser.

The declaration in this case does contain an averment, that the note was presented to the maker, that he refused to pay it, and that notice of the non-payment was given to the indorser. Whether this averment is broad enough to admit all the proof necessary to sustain the action against the indorser, is the question which arises upon the declaration. If, by reason that the bank where the note was made payable was the holder, no personal presentment or demand of the maker could be required, the averment, so far as it asserts such presentment, is surplusage, and no proof was necessary to support it. What, then, in such case, is a presentment of the note? It would be an idle ceremony, to require the bank to take the note from its files, and lay it upon the counter, or make any other public exhibition of it. All that could be required is, that the note be there, ready to be delivered *179] up, if payment should be offered. When the note *is held by a third person, it is practicable, and there is a fitness in requiring the holder to inquire at the bank for the maker, and whether he has provided any funds there to pay the note. But when the bank itself is the holder, it would be impracticable for it to make such inquiry, in any other manner than by ascertaining that the note was there, and examining the books to see if the maker had any funds in the bank. If the note was there, it was a presentment, and if the maker had no funds in the bank, it was a refusal of payment, according to the legal acceptance of these terms, under such circumstances.

The evidence upon the trial was introduced under this averment, without objection, and if that is sufficient to entitle the plaintiff to recover, the court ought not readily to yield to technical objections, where the defendant has had the full benefit of whatever defence he had to make. Under this state of the case, we think, the exception taken to the declaration cannot prevail. And the next inquiry is, whether the evidence to which the defendant demurred was sufficient to sustain the action.

By this demurrer, the defendant has taken the questions of fact from the

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jury, where they properly belonged, and has substituted the court in the place of the jury, and everything which the jury could reasonably infer from the evidence demurred to, is to be considered as admitted. The language of adjudged cases on this subject is very strong, to show that the court will be extremely liberal in their inferences, where the *party, [*180 by demurring, will take the question from the proper tribunal. It is a course of practice, generally speaking, that is not calculated to promote the ends of justice. If the objection to the sufficiency of the evidence is made by way of motion for a nonsuit, it might be removed by testimony within the immediate command of the plaintiff. The deficiency very often arises from mere inadvertence, and omission to make inquiries, which the witnesses examined could probably answer.

In order to determine whether the evidence was sufficient to support the action, it is proper to state what proof was necessary. The plaintiffs, to entitle them to recover, were bound to show that they were the indorsees and holders of the note; that the note was at the bank where it was made payable, at the time it fell due; that the maker had no funds there to pay the note; and that due notice of the default of the maker was given to the defendant.

The indorsement of the note to the plaintiffs, and that it was discounted in the office of discount and deposit of the Bank of the United States, at Washington, where it was made payable, was fully proved. And the jury would have had a right to presume that the note was then at the bank, where it was discounted; and the bank being the holder and owner of the note, the presumption, at least, *prima facie*, is, that it remained in the bank, to be delivered up, when paid. This establishes the two first points; and to show that the maker had no funds in the bank, *the book keeper [*181 was examined as a witness, who swore, that on the 19th day of July 1817, when the note fell due, there was no balance to the credit of the maker, or either of the indorsers, on the books of the bank. And the remaining question is, whether due notice of the default of the maker was given to the defendant?

The only objection to the sufficiency of the evidence on this point is, that the notice of non-payment was left at the post-office in the city of Washington, addressed to the defendant, at Alexandria, without any evidence that that was his place of residence. The testimony on this point is that of Michael Nourse, a notary public, who swore, that on the day the note fell due, he presented it at the store of the defendant, and demanded payment of his clerk, who replied, that Mr. Young was not within, and he would not pay it. And that, on the same day, he put in the post-office notice of non-payment, addressed to the defendant, at Alexandria. If the defendant's place of residence was Alexandria, it is not denied, but that due and regular notice was given him. The notary was a sworn officer, officially employed to demand payment of this note, and it is no more than reasonable, to presume that he was instructed to take all necessary steps to charge the indorsers. This must have been the object in view, in demanding payment of the maker. And it is fair, also, to presume, that he made inquiry for the residence of the defendant, before he addressed a letter to him; for it is absurd, to suppose, he would direct to him at that *place, without some knowledge or information that he lived there, this being the [*182

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usual and ordinary course of such transactions, and with which the notary was, no doubt, acquainted. The jury would, undoubtedly, have been warranted to infer, from this evidence, that the defendant's residence was in Alexandria. If that was not the fact, this case is a striking example of the abuse which may grow out of demurrers to evidence. For a single question to the witness would have put at rest that point, one way or the other, if the least intimation had been given of the objection. It was, manifestly, taken for granted by all parties, that the defendant lived at Alexandria. And if a party will, upon the trial, remain silent, and not suggest an inquiry, which was obviously a mere omission on the part of the plaintiff, a jury would be authorized to draw all inferences from the testimony given, that would not be against reason and probability; and the court, upon a demurrer to the evidence, will draw the same conclusion that the jury might have drawn.

We are, accordingly, of opinion, that the evidence was sufficient to entitle the plaintiffs to recover. That the judgment of the court below most be reversed, and the cause sent back, with directions, to enter judgment for the plaintiffs, upon the demurrer to evidence, for the amount of the note, and interest.

JUDGMENT.—This cause came on, &c. : On consideration whereof, it is *183] ordered and adjudged, that the judgment of the said circuit *court, on the demurrer to evidence in the said cause, be reversed. And it is further ordered and adjudged, that the said cause be remanded to the said circuit court, with instructions that judgment be entered there on said demurrer, for the plaintiffs in the cause; and further, that the court there do render judgment on the contingent verdict found for the plaintiffs, according to the tenor thereof, with costs, &c.(a)

(a) The demurrer to evidence is an unusual and antiquated practice, which this court, and other courts, have recently endeavored to discourage, as inconvenient, and calculated to suppress the truth and justice of the cause. It is allowed or denied by the court, where the cause is tried, in the exercise of sound discretion, under all the circumstances of the case; and, it seems, that the exercise of this discretion cannot be made the foundation of a writ of error. The party demurring is bound to admit as true, not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence legally may conduce to prove. It follows, that it ought never to be admitted, where the party demurring refuses to admit the facts which the other side attempts to prove; nor where he offers contradictory evidence, or attempts to establish inconsistent propositions. *Young v. Black*, 7 Cranch 565. See also, *Pawling and others v. United States*, 4 *Ibid.* 219; *Phil. Ev.* 216, 217; *Bull. N. P. c. 4*, p. 318.