

\*JOSEPH PEARSON AND ROBERT Y. BRENT, executors of ROBERT BRENT, deceased, Plaintiffs in error, v. The BANK OF THE METROPOLIS, Defendants in error.

*Promissory note.—Notice of non-payment.—Pleading.*

In an action against the indorser of a promissory note, made "negotiable in the Bank of the Metropolis," the declaration averred a demand of the same, at that bank; no other notice of the non-payment of the note was sent to the indorser, but that left for him at the Bank of the Metropolis; and it was proved, that there was an agreement, by parol, with the indorser, as to other notes discounted previously, by the bank, for his accommodation, that payment and demand of payment, should be made at the bank; the indorser residing a considerable distance from the bank. The court held, that parol evidence was admissible, to show the agreement relative to the place where payment of the note was to be demanded; although the agreement did not appear on the face of the note: such an agreement, is a circumstance extrinsic to the contract made by the note; and its proof, by parol, is regular.<sup>1</sup> p. 92.

The indorser of such a note is himself bound by the contract made by the maker, and by the established and known usage of the bank. p. 93.

Where it was omitted to allege, in the declaration on the note, a demand of payment on the person of the maker, but it averred a demand at the bank, "where the note was negotiable," such averment in the declaration could not be true, unless there was an agreement between the parties, that the demand should be made there; and the averment must have been proved at the trial, or the plaintiff could not have obtained a verdict and judgment: and after a verdict, the judgment will be sustained. p. 93.

ERROR to the Circuit Court for the District of Columbia. This action was instituted in the circuit court for the county of Washington, by the Bank of the Metropolis, on a promissory note, dated May 26th, 1819, made by George A. Carroll, and indorsed by W. Carroll and Robert Brent, for \$1100, payable at sixty days, and negotiable at the Bank of the Metropolis. The declaration set out the note, and averred a demand of payment, at the Bank of the Metropolis.

In support of the issue on the part of the plaintiffs in error, evidence was offered, that the accommodation given by the said bank to George A. Carroll, on a note similarly made and indorsed with the present, was given by the bank, about three years before the date of the note on which the suit was brought, and was given with the knowledge of the indorsers thereon, and in consequence of their solicitation; and for the purpose of proving, that it was the agreement and understanding of the bank and W. Carroll, at the time of agreeing to give him his accommodation, that the note to be discounted should be payable at the Bank of the Metropolis, and the notes severally taken for the renewal of such notes, and for the continuance of the  
 \*90] said accommodation, should be in like manner \*payable and demanded at the bank, they offered to prove, by parol evidence, that the said Carroll did not reside in the district, after the winter in which W. Carroll lived in the city of Washington, and that that winter, was the winter of 1817; and that after such time, said George A. Carroll occasionally visited the city, and resided at Washington, in Maryland, about twenty miles from the city, and at Port Tobacco; and that many of the notes, taken for the continuance of the said accommodation, were expressed to be payable at the bank;

<sup>1</sup> s. p. United States Bank v. Dunn, 6 Pet. 51; Cox v. National Bank, 100 U. S. 713. It may be shown by parol, that one of several joint and several makers of a sealed note, was

a mere surety, so as to let in the defence, that he was discharged by giving time to the principal debtor. Miller v. Stern, 2 Penn. St. 286. s. p. Hubbard v. Gurney, 47 N. Y. 457.

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and that all notes, previous to the one now sued on, were there demanded, and such demand acquiesced in, as sufficient, and subsequent notes given in renewal of the notes so demanded; that it was the custom of the said bank to require, in all cases where the maker was a non-resident, that there should be an agreement to pay such notes at the bank; that the bank never would have agreed to discount the notes, except upon such a condition, and this was the understanding of the bank, and necessarily presumed to be known to W. Carroll, and the indorsers, at the time of making such accommodation, or at the time of his removal from the city of Washington.

The counsel for the defendants objected to the evidence; but the court overruled the objection, and admitted the evidence to be given. And the counsel for the defendants prayed the court to instruct the jury, that to enable the plaintiffs to sustain their action aforesaid against the defendants, it was necessary that a personal demand should have been made upon the maker of the note, for the money in the said note mentioned; but the court refused to give the instruction; but instructed the jury, that if, from the evidence given as aforesaid, the jury should be satisfied, that it was agreed by all parties, whose names appear on the notes, and the plaintiffs, that the payment should be demanded at the Bank of the Metropolis; and that it was so demanded, at the bank, then, a personal demand of the maker, was not necessary. To which several refusals and opinions of the court, the defendants, by their counsel, excepted, and sued out this writ of error.

*Swann*, District-Attorney, and *Worthington*, for the plaintiffs in error.

1st. Parol evidence cannot be admitted, to show the agreement alleged to have been made: 3 Stark. Evid. 4, p. 995, 999, 1002; 3 B. & Ald. 233; 8 Taunt. 92; 4 Mass. 414; 8 Johns. 187; 2 W. Bl. 1249; 7 Taunt. 278; 1 Cow. 249; 14 Mass. 155; 1 Gow 74; 3 Camp. 57; 1 Taunt. 347.

2d. As to the custom claimed by the bank. 2 Stark. Evid. 455; 1 Phil. Evid. 429; 3 Stark. 1038-40; *Renner v. Bank of Columbia*, 9 Wheat. 581.

\**Key*, for the defendants in error, cited the following cases [\*91  
Chitty on Bills 237; 12 Mass. 172; *Union Bank v. Hyde*, 6 Wheat. 572; also 7 Johns. 99; 4 Bos. & Pul. 172; 1 Call 250.

MARSHALL, Ch. J., delivered the opinion of the court.—This was a suit brought in the circuit court of the United States for the district of Columbia, on a note made by G. A. Carroll, and indorsed by William Carroll and Robert Brent, the testator of the plaintiffs in error, and made negotiable in the Bank of the Metropolis. The declaration set out the note, and averred a demand of the same, “at the Bank of the Metropolis,” where the said note was payable.

At the trial, the plaintiffs below proved that the accommodation given by the bank to said G. A. Carroll, on a note similarly drawn and indorsed with the present, was given by the bank, about three years before the date of the note on which this suit was brought; and was given with the knowledge of the indorsers thereon, and in consequence of their solicitation. For the purpose of showing an agreement between the bank and the maker of the note, that the note to be discounted, and those thereafter to be made for its renewal, should be payable at the Bank of the Metropolis, and there

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demand, the bank proved by parol testimony, that the said G. A. Carroll did not reside in the district, after the winter of 1817, in which W. Carroll lived in Washington, but resided at Port Tobacco, in Maryland, about twenty miles from the city, which he occasionally visited; that many of the notes, taken for the continuance of the accommodation, were expressed to be payable at the said bank; and that all the notes, previous to that on which this suit was brought, were there demanded, which demand was acquiesced in, as sufficient, and subsequent notes given in renewal of those so demanded. The bank also proved, that it was its custom, in all cases where the maker was a non-resident, to require an agreement to pay such notes at the bank, and that they never would have agreed to discount the said notes, but on this condition. The counsel for the defendants below objected to this testimony, but the court permitted it to go to the jury. The counsel for the defendants below then prayed the court to instruct the jury, that to enable the plaintiffs to sustain their action, it was necessary to prove that a personal demand had been made on the maker of the note. The court refused to give this instruction; but did instruct the jury, that if they \*92] \*should be satisfied, from the evidence, that it was agreed by all the parties whose names appear on the notes, that the payment should be demanded at the Bank of the Metropolis, and that it was so demanded, then a personal demand on the maker, was not necessary. An exception was taken to these opinions of the court, and their correctness is now to be examined.

The plaintiffs in error contend, that the testimony ought not to have been admitted, because it is an attempt, by parol proof, to vary a written instrument. But this is not an attempt to vary a written instrument. The place of demand is not expressed on the face of the note, and the necessity of a demand on the person, when the parties are silent, is an inference of law, which is drawn only when they are silent. A parol agreement puts an end to this inference, and dispenses with a personal demand. The parties consent to a demand, at a stipulated place, instead of a demand on the person of the maker; and this does not alter the instrument, so far as it goes, but supplies extrinsic circumstances, which the parties are at liberty to supply. No demand is necessary to sustain a suit against the maker; his undertaking is unconditional; but the indorser undertakes conditionally to pay, if the maker does not; and this imposes on the holder the necessity of taking the proper steps to obtain payment from the maker. This contract is not written, but is implied. It is, that due diligence to obtain payment from the maker shall be used. When the parties agree what this due diligence shall be, they do not alter the written contract, but agree upon an extrinsic circumstance, and substitute that agreement for an act which the law prescribes, only where they are silent. We think, then, that there was no error in admitting the parol evidence which was offered to sustain the action.

If the testimony was admissible, there is no error in the instruction given by the court. It was, that if the jury believed, from the evidence, that it was agreed by all the parties, that the demand should be made at the Bank of the Metropolis, and that it was so made, then a demand of the maker was not necessary. This point is, we think, involved in the question respecting the admissibility of parol testimony to establish the agreement. Had the note purported on its face to be payable at the Bank of the Metropolis, that

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express agreement would undoubtedly have dispensed with a personal demand. If that agreement can be made by parol (and unless it can, the testimony was inadmissible), the effect of the parol contract is the same, on this point, as if it had been in writing. The only \*inquiry, therefore, is, whether the testimony was sufficient to be submitted to the jury [\*93 for the purpose of proving the agreement? We think it was.

The circumstances, that the indorsers were themselves active in procuring the accommodation for the maker of the note; that the accommodation had been continued for years, without a demand on the person of the maker; that it was the invariable usage of the bank, when the maker of an accommodation note resided out of the city, to require, as the condition of the loan, a stipulation that a demand at the bank should be sufficient; that this accommodation would not have been continued, after the removal of the maker out the city, but on this condition; that the note purports, on its face, to be negotiable at the Bank of the Metropolis; are facts, from which the jury might justifiably infer the agreement of the parties to dispense with a demand on the person of the maker.

A verdict having been rendered for the bank, the defendants in the court below filed reasons in arrest of judgment. The error alleged, is, that the first count in the declaration neither charges a personal demand on the maker of the note, nor excuses the omission to make such a demand. The declaration certainly does not charge a demand on the person of the maker; but this was not necessary, if the parties had agreed that a demand at the bank should be substituted for a demand on the maker. The plaintiffs in error contend, that the agreement is not alleged in the declaration, and we admit, that the omission to make this averment would be fatal. In that event, the plaintiff below would have shown no cause of action. But the declaration avers a demand of the note, "at the Bank of the Metropolis," where the said note was payable. The note is set out in the declaration, and does not purport, on its face, to be made payable at the bank. But the averment in the declaration, that it was payable there, cannot be true, unless there was an agreement of the parties to that effect. It is an averment which must have been proved at the trial, or the plaintiff below could not have obtained a verdict and judgment. After a verdict, it is, we think, sufficient to sustain the judgment. There is no error, and the judgment is affirmed, with costs.

**Judgment affirmed.**