*John Smith T. *v.* John W. Honey.

Appellate jurisdiction.

Where the verdict for the plaintiff in the circuit court is for a less amount than $2000, and the defendant prosecutes a writ of error, this court has not jurisdiction; although the demand of the plaintiff in the suit exceeded $2000.

Error to the District Court of Missouri. In the district court of Missouri, John W. Honey instituted an action of trepass on the case, for the recovery of damages from John Smith T., the defendant in the action, for the use of a "new and useful improvement in screening tables for discriminating, selecting and separating perfect from imperfect shot," for which letters-patent had been granted to the plaintiff by the United States. The damages were laid in the declaration at $2000; and at September term 1827, the cause was tried, and a verdict rendered for the plaintiff, for $100, upon which judgment was entered for the plaintiff below. On the trial, the counsel for the defendant filed several bills of exception to the opinion of the court, and prosecuted this writ of error.

After the case was opened for the plaintiff in error, The Court ordered the writ of error to be dismissed, the same having been sued out by the defendant in the district court, and the sum in controversy, as to him, being no more than $100, the amount of the verdict in that court. See the case of *Gordon* v. *Ogden*, at this term (*ante*, p. 33).

Benton and *Hempstead*, for the plaintiff in error; *Lawless*, for the defendant.

Afterwards, *McGinness*, for the plaintiff in error, on affidavit, stating that the plaintiff in the district court estimated the damages which had accrued to him by the use of his machine by the defendant at $2000, and had sought to recover the same in the action, moved to reinstate the cause.

The Court overruled the motion.

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*470] *John G. McDonald, Plaintiff in error, *v.* George B. Magruder, Defendant.

Accommodation indorsers.

A note was discounted at the office of discount and deposit of the Bank of the United States, in the city of Washington, for the accommodation of the maker, indorsed by Magruder and McDonald; neither of the indorsers receiving any value for his indorsement, but indorsing the note at the request of the maker, without any communication with each other. The note was renewed, from time to time, under the same circumstances, and was at length protested for non-payment; and separate suits having been brought by the bank against the indorsers, the maker being insolvent, judgments in favor of the bank were obtained against both the indorsers. The bank issued an execution against Magruder, the first indorser, and he having paid the whole debt and costs, instituted this suit against McDonald, the second indorser, for contribution, claiming one-half of the sum so paid by him in satisfaction of the judgment obtained by the bank: *Held*, that he was not entitled to recover.

That a prior indorser is, in the regular course of business, liable to his indorsee, although that indorsee may have afterwards indorsed the note, is unquestionable; when he takes up the note,

he becomes the holder as entirely as if he had never parted with it, and may sue the indorser for the amount. The first indorser undertakes that the maker shall pay the note, or that he, if due diligence be used, will pay it for him; this undertaking makes him responsible to every holder, and to every person whose name is on the note, subsequent to his own, and who has been compelled to pay its amount.[1] p. 474.

The indorser of a promissory note, who receives no value for his indorsement from a subsequent indorser, or from the maker, cannot set up the want of consideration received by himself; he is not permitted to say, that the promise is made without consideration; because money paid by the promisee to another, is as valid a consideration as if paid to the promisor himself. p. 476.

Co-sureties are bound to contribute equally to the debt they have jointly undertaken to pay; but the undertaking must be joint, not separate and successive. p. 477.

Magruder *v.* McDonald, 3 Cr. C. C. 299, reversed.

ERROR to the Circuit Court of the district of Columbia, and county of Washington.

This was an action of *assumpsit*, instituted in the circuit court, by the defendant in error, against the plaintiff in this court. The matters in controversy were submitted to the jury by a case agreed, which stated, that the plaintiff produced in evidence a promissory note drawn by Samuel Turner, Jr., in favor of George B. Magruder, or order, at sixty days, for $900, payable at the office of discount and deposit at Washington, for value received; which note was signed by *Samuel Turner, and indorsed by George B. Magruder, and by John G. McDonald. [*471

The note was so drawn and indorsed, with the understanding of all the parties thereto, that it should be discounted in the office of discount and deposit, for the sole use and accommodation of the maker, Samuel Turner; no value being received by either of the indorsers. It was so discounted, and the proceeds thereof applied to the credit of Turner, in the office. Long before the making of the note, viz., in the year 1819, Turner had two notes discounted for his use and accommodation in the office, viz., one for $270, indorsed by George B. Magruder and by G. McDonald, and one for $710, indorsed by George B. Magruder and one Samuel Hambleton; which last-mentioned note was continued, by renewal, with the indorsement of Magruder and Hambleton, until September 1820, when, in consequence of Hambleton's absence, it was protested; after which, the office permitted the accommodation to be renewed, upon condition, that Turner would get another good indorser in the place of Hambleton. Whereupon, John G. McDonald, upon the solicitation of Turner, indorsed a note for the sum of $710, which was brought to him, already indorsed by George B. Magruder. That in March 1821, a small part of the money having been paid, the two notes were consolidated and renewed, by one note for $950, made by Turner, and indorsed by Magruder and by McDonald, which was, from time to time, renewed by notes similarly drawn and indorsed; the last of which is this note, so produced in evidence by the plaintiff. Neither at the time of indorsing the notes, respectively, nor at any other time, was there any communication between Magruder and McDonald upon the subject of such indorsement. Both of them, however, knew, at the time of indorsement, the notes were intended to be discounted for the accommodation of Turner;

[1] S. P. McCarty *v.* Roots, 21 How. 432, 437; Youngs *v.* Ball, 9 Watts 139. And see Allison *v.* Purdy, 6 Penn. St. 501; Dygert *v.* Gros, 9 Barb. 506.

and in every instance, Magruder was the first indorser. The note, so produced in evidence by the plaintiff, not having been paid when due, was duly protested; and the payment thereof having been duly demanded, and due notice given of such demand, and of non-payment having been
*472] *given to the indorsers, judgments at law were recovered against both, by the Bank of the United States; and the whole amount having been paid by Magruder, he brought this suit to recover from McDonald one-half of the amount so paid by him.

By consent of the parties, a verdict was rendered for the plaintiff, for one-half of the amount so paid by the said Magruder, in satisfaction of the judgment against him; subject to the opinion of the court upon the case agreed. Upon the case stated, the court below gave judgment for the plaintiff; and the defendant sued out this writ of error.

Jones, for the plaintiff in error, contended: 1. That by the showing of the plaintiff himself, in the case stated, there never was any contract between the parties, but what their several indorsements on the note import.

2. That the import and effect of the contract of indorsement, the only contract between the parties, and that not attempted to be explained or modified by any collateral agreement or understanding whatever, were, that the plaintiff himself, as first indorser and payee of the note, should pay and satisfy the whole amount of the note, in default of the maker, and should completely indemnify and save harmless the defendant, as last indorser, against all recourse from the holder. Consequently, if the bank had chosen to enforce the separate judgment which they had recovered against the last, instead of the first indorser, the former would have been entitled to recover of the latter, not a moiety, but the whole of the amount.

3. That this, the legal effect of the only contract subsisting between the parties, so far from being changed or impaired, is confirmed and strengthened by the origin and circumstances of the debt, as explained in rhe case stated; from which it appears, that near three-fourths of the amount consisted of a prior debt due from the plaintiff to the bank, for which McDonald never was liable, till he made himself so, as indorsee of the plaintiff below, and as second indorser.

This action was brought by the first indorser against the second indorser
*473] of a promissory note, for contribution, he *having paid the note to the holder. There never was any contract between the parties but that which appears on the face of the note. In the true sense of this agreement, Magruder promises to pay the note, in case of the failure of the maker to do so, and to save the subsequent indorser, the plaintiff in error, harmless. There is nothing collateral to this agreement; were it necessary or proper to go into any inquiry as to the real circumstances of the parties, three-fourths of the sum received on the discount of the note were for Magruder's use.

The only circumstance upon which the claim of the defendant in error can be supposed to rest, is, that the note was to go into bank for the benefit of the maker; and this will not raise a contract, either express or by implication, different from that which is the known and established construction of such instruments. This is well known; and all who become parties to such

contracts, are bound by the well-established principles of law, operating upon them under such relations.

Key, for the defendant, said, the question presented in this case is not novel. It has been frequently discussed in courts, and the position assumed for the defendant in error is founded in equity. It is claimed to divide the loss sustained by the failure of the maker of the note between the indorsers. The bank had judgment against the indorsers. Magruder paid the whole amount of the execution against him, and proceedings on the execution against McDonald were stayed, until this suit shall determine the rights of the parties. In this case, the note was made for the sole purpose of discount for the maker, and the indorsers put their names upon it for that purpose only. As between the bank, there is no doubt, the obligation of each was for the whole amount of the note; but between themselves, it was not so. They united for the maker and they made no contract with each other for indemnity. The only contract was, that each should become one of two indorsers, for the benefit of the maker, and that they would become mutual and equal sureties.

*In other commercial contracts, the circumstances under which they arise are gone into. A bill of exchange drawn without funds in the hands of the drawer, is not subject to the strict rules of notice. So also, where a note has been discounted for the use of the indorser. *Bank of Columbia* v. *French*, 4 Cranch 141. These cases show, that in actions on negotiable paper, you may go beyond the form of the contract. In the present case, the note was drawn, and after it was indorsed by Magruder, was handed back to Turner; it was then, at the request of Turner, indorsed by McDonald, and was delivered to the bank by the maker. Between the indorsers, there was no contract, no consideration passed from the first to the second, and they stood as sureties between each other. 13 Johns. 52; 3 Har. & Johns. 125. [*474

Marshall, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment rendered by the circuit court of the United States, for the county of Washington, in the district of Columbia, in an action of *indebitatus assumpsit*, brought by the first indorser of a promissory note against the second indorser, to recover half its amount. The note was made by Samuel Turner, Jr., and indorsed George B. Magruder and John G. McDonald. At the trial of the cause, a case was agreed by the parties, and the judgment of the circuit court was rendered in favor of the plaintiff, on a verdict given by the jury, subject to the opinion of the court.

That a prior indorser is, in the regular course of business, liable to his indorsee, although that indorsee may have afterwards indorsed the same note, is unquestionable. When he takes up the note, he becomes the holder as entirely as if he had never parted with it, and may sue the indorser for the amount. The first indorser undertakes that the maker shall pay the note; or that he, if due diligence be used, will pay it for him. This undertaking makes him responsible to every holder, and to every person whose name is on the note, subsequent to his own, and who has been compelled to pay its amount.

*This is the regular course of business where notes are indorsed for value: but it is contended, that where less than the amount is [*475

received, the indorser is responsible to his immediate indorsee only for the sum actually paid; consequently, if nothing is paid, the mere indorsement does not bind the indorser to pay his immediate indorsee anything. If B. indorses to C., the note of A., without value, and A. fails to take it up, it is, as between B. and C., a contract without consideration, on which no action arises. This is undoubtedly true, if C. retains the note in his own possession; and may be equally true, if he indorses it for value. When he repays the money he has received, he is replaced in the situation in which he would have been, had he never parted with the note. If he puts it into circulation on his own account, new relations may be created between himself and his immediate indorsee, which may be affected by circumstances.

In the case under consideration, the note took the direction intended by all the parties. It was indorsed by Magruder, for the purpose of enabling Turner to discount it at the bank. To insure this object, Turner applied to McDonald, who placed his name also on the paper. No intercourse took place between the indorsers; no contract, express or implied, existed between them, other than is created by their respective liabilities, produced by the act of indorsement. What are these liabilities? The first indorser gave his name to the maker of the note, for the purpose of using it in order to raise the money mentioned on its face; he made himself responsible for the whole sum, upon the sole credit of the maker; his undertaking is undivided; he does not understand that any person is to share this responsibility with him. But either the bank is unwilling to discount the note on the credit of the maker and his single indorser, or the maker supposes his object will be insured, by the additional credit given by another name. He presents the note, therefore, to McDonald, and asks his name also. McDonald accedes to his request, and puts his name on the instrument. If the maker passes the note for value, the liability of McDonald to the holder is the same as if that value had been received *by McDonald himself. Why is this? No consideration is received by McDonald, and this fact is known to the holder and discounter of the note. But a consideration is paid by the holder to the maker, and paid on the credit of McDonald's name. He cannot set up the want of a consideration received by himself; he is not permitted to say, that the promise is made without consideration; because money paid by the promisee to another, is as valid a consideration as if paid to the promisor himself. In what does the claim of the second on the first indorser differ from that of the holder on the second indorser? Neither has paid value to his immediate indorser; but the holder has paid value to the maker, on the credit of all the names to the instrument. The second indorser, if he takes up the note, has paid value to the holder, in virtue of the liability created by his indorsement. If this liability was founded equally on the credit of the maker and of the first indorser, if his undertaking on the credit of both subjects him to the loss consequent on the payment of the note; how can the contract between him and his immediate indorser be said to be without consideration?

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If it be true, as we think it is, that Magruder, when he indorsed the note, and returned it to the maker to be discounted, made himself responsible for its amount, on the failure of the maker, if this responsibility was then complete, how can it be diminished by the circumstance that McDonald became a subsequent indorser? How can the legal liability of a first

indorser to the second, who has been compelled to take up the note, be changed, otherwise than by an express or implied contract between the parties? This question has arisen and been decided in the courts of several states. *Wood* v. *Repold*, 3 Har. & Johns. 125, was a bill drawn by A. Brown, Jr. at Baltimore, on Messrs. Goold & Son of New York, in favor of G. Wood & Co., and indorsed by G. Wood & Co., and afterwards by Repold, the plaintiff. The bill was drawn and indorsed, for the purpose of raising money for the drawer, and was discounted at the bank of Baltimore. On being protested for non-payment, it was taken up by Repold, and this suit brought against the *first indorser. Payment was resisted, because, the indorsement was without consideration, for the accommodation of the drawer; but the court sustained the action. The same question arose in *Brown* v. *Mott*, 7 Johns. 361, on a promissory note, and was decided in the same manner. In that case, the court said, that if he had taken it up at a reduced price, it would seem, that he could only recover the amount paid. Undoubtedly, if McDonald had been compelled to pay a moiety of this note, he could have recovered only that moiety from Magruder. The case of *Douglas* v. *Waddle*, 1 Ohio 413, was determined differently; this case was undoubtedly decided on general principles; but the custom of the country, and a statute of the state, are referred to by the court, as entitled to considerable influence. The weight of authority, as well as of usage is, we think, in favor of the liability of the first indorser. [*477

The claim of Magruder has also been maintained, on the principle, that they are co-sureties, and that he who has paid the whole note may demand contribution from the other. The principle is unquestionably sound, if the case can be brought within it. Co-sureties are bound to contribute equally to the debt they have jointly undertaken to pay; but the undertaking must be joint, not separate and successive. Magruder and McDonald might have become joint indorsers. Their promise might have been a joint promise. In that event, each would have been liable to the other for a moiety. But their promise is not joint. They have indorsed separately and successively, in the usual mode. No contract, no communication, has taken place between them, which might vary the legal liabilities these indorsements are known to create. Those legal liabilities, therefore, remain in full force. Upon this question of contribution, the counsel for the defendants in error rely on two cases, reported in 2 Bos. & Pul. 268 and 270. The first, *Cowell* v. *Edwards*, was a suit by one surety in a bond against his co-surety, for *contribution. It was intimated by the court, that each surety was liable for his aliquot part, but not liable at law to any contribution, on account of the insolvency of some of the sureties. The party who had paid more than his just proportion of the debt, could obtain relief in equity only. The second case, *Sir Edward Deering* v. *The Earl of Winchelsea*, was a suit in chancery, in the exchequer. Thomas Deering had been appointed receiver of fines, &c., and had given three bonds, conditioned for faithful accounting, &c. In one of these, the plaintiff was surety, in another, Lord Winchelsea, and in the third, Sir John Rous. Judgment was obtained on the bond in which the plaintiff was surety, and this suit was brought against the sureties to the two other bonds, for contribution. It was resisted, on the ground, that there was no contract between the parties, they having entered into special obligations. The Lord Chief Baron was [*478

disposed to consider the right to contribution as founded rather on the equity of the parties than on contract, and the court decreed contribution. In this case, the parties were equally bound, were equally sureties for the same purpose, and were equally liable for the same debt. Neither had any claim upon the other, superior to what that other had on him. The parties stood in the same relation, not only to the crown, to whom they were all responsible, and to the person for whom they were sureties, but to each other. Under these circumstances, contribution may well be decreed *ex equali jure*. But, in the case at bar, the parties do not stand in the same relation to each other. The second indorser gives his name, on the faith of the first indorser, as well as of the maker; the first indorser gives his name, on the faith of the maker only. Unquestionably, these liabilities may be changed by contract;[1] but no contract existing between these parties, it is not a case to which the principle of contribution applies.

No notice has been taken of the form of the action. It is admitted, that
*479] Magruder, having paid the whole note, *may recover a moiety from McDonald, if their undertaking is to be considered as joint; if he, as first indorser, is not responsible to McDonald for any part of it which McDonald may have paid. The judgment is to be reversed, and the cause remanded, with directions to set aside the verdict, and enter judgment as on a nonsuit.

Judgment reversed.

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[1] See Phillips *v.* Preston, 5 How. 278.