

1799.

*Joseph Boggs, or his order.* On general principles of law; stock contracts cannot be regarded as negotiable; but a contractor may certainly make himself liable as if they were so; and the maxim, *modus et conventio vincunt leges*, applies forcibly to the case:

With respect to the alledged inconvenience, that in the present form of action the Defendant is debarred from the benefit of a set-off, it would be enough to answer, that as this is the consequence of his own act and agreement, he has no reasonable cause of complaint: But it is also obvious, that when the contract was assigned, and the present action was instituted, there did not exist between him and *Boggs* any mutual debt, or demand, which could be the subject of defalcation, upon the principles of the act of Assembly.

VERDICT for the *Plaintiff*.

---

ROBERTS *versus* WHEELER *et al.*

THE Plaintiff had obtained a verdict; but a new trial was granted, upon condition, that a judgment should be entered as a security, for whatever might be ultimately recovered. On the second trial, THE COURT instructed the jury, that where a judgment was given merely as a security, the interest ought not to be calculated on the amount of the judgment, (which included principal and interest) but only on the sum originally due.

---

PETERSON *versus* WILLING, *et al.*

THIS was an action for money had and received to the Plaintiff's use, founded on the following facts:—On the 17th of December, 1796, *Levinus Clarkson* executed a mortgage

1799.

gage to *Samuel Clarkson*, on certain stores and lots of ground in *Philadelphia*, to secure the payment of 8,000 dollars, with interest. Before the execution of the mortgage, *Samuel Clarkson* had advanced or secured, a considerable sum of money to accomodate *Levinus Clarkson*, (who was in very embarrassed circumstances) and had taken a bill of sale of a ship, &c. as an indemnity; which, however, he thought was insufficient for the purpose, and had repeatedly pressed for an additional security. About this time, *Levinus Clarkson*, being indebted by note to the Plaintiff, and having deposited a considerable amount of *Morris* and *Nicholson's* notes, by way of collateral security, proposed to the Plaintiff to release the deposit, and accept in lieu of it, a note endorsed by *Samuel Clarkson*, who was then in good credit. The Plaintiff acceded to the proposition; and *Levinus Clarkson*, in order to induce *Samuel Clarkson* to indorse the note, promised to execute the mortgage above mentioned, not only as a security in this transaction, but as an auxiliary to the fund, for indemnifying *Samuel Clarkson*, on account of his previous advances and engagements. Accordingly, on the 13th of *December*, 1796, the note drawn by *Levinus Clarkson*, and endorsed by *Samuel Clarkson*, was delivered to the Plaintiff; the notes of *Morris* and *Nicholson* were restored to *Levinus Clarkson*; and the mortgage was executed a few days afterwards. Both the *Clarksons* failed before the debt due to the Plaintiff was paid: *Levinus Clarkson* was discharged under the insolvent laws; and *Samuel Clarkson* assigned his property in trust, for the benefit of all his creditors, to the Defendants; who, by virtue of the assignment, had received a considerable sum arising from the sale of the mortgaged premises, which had been enforced by a creditor having a previous lien.

The Plaintiff claimed so much of the money thus received by the Defendants, as would be sufficient to satisfy his debt; And his counsel offered *Levinus Clarkson* as a witness to prove, that the mortgage, although expressed in absolute terms to be for the use of *Samuel Clarkson* himself, was, in fact, given in consideration of the indorsement of the note delivered to the Plaintiff; and on a positive promise that the note should be paid out of the proceeds of the mortgaged premises, the surplus only being destined to exonerate *Samuel Clarkson* from his other engagements for *Levinus Clarkson*. Hence it was intended to argue, that an implied trust was created for the benefit of the Plaintiff to the amount of his debt.

The Defendant's counsel objected to the competency of the proposed witness, on these grounds:—1st. That parol testimony cannot be admitted to contradict, alter, modify, or explain, a solemn instrument under seal:—2nd. That if parol testimony

1799.

ny were at all admissible, *Levinus Clarkson* was not competent to give it; because its effect would be to invalidate an instrument, to which he himself had given sanction; and though the evidence might not totally destroy the deed, it would communicate a new direction and operation to it, equally within the mischief, which the rule of the law was intended to guard against. 1 *T. Rep.* 296.—3d. That *Levinus Clarkson* was excluded by his interest in the event of the cause; for, the tendency of his evidence would be to enable the Plaintiff to recover out of the fund in the hands of the Defendants, and so discharge the witness from the responsibility on his note of hand.

But, BY THE COURT:—It cannot be agreeable to be called on thus suddenly to give a judicial opinion, on an important question; and, therefore, in the present, as well as in every other case, we shall be ready to listen to any motion, which will introduce a re-consideration and revision of the decisions pronounced in the course of a trial.

The objections, however, do not appear to be sufficiently cogent to exclude the witness. The evidence will not *contradict* the deed, though it may enable the jury to apply the property to the uses originally intended by the parties. Nor is the evidence calculated to *invalidate* the deed; but to support and direct it to the purposes for which it was given. As to the *interest* of the witness, it does not seem to be affected by the event of this cause: And the laudable liberality of courts of justice, in modern times, has set us the example, for referring all such objections of doubtful and distant interests, to the credit, rather than to the competency, of the party.

The objections are, therefore, over-ruled.

ON examining the witnesses, it appeared, that at the time the mortgage was promised and executed, and for some time afterwards, the Plaintiff did not know of the transaction; that he surrendered *Morris* and *Nicholson's* notes, in consideration of *Samuel Clarkson's* indorsement, without reference to any other security; and that the amount due from *Levinus Clarkson* to *Samuel Clarkson*, exceeded the proceeds of all the securities placed in the hands of the latter. In a written statement made by *Samuel Clarkson*, at the time, however, he had set forth the engagements, for which the mortgage and other securities had been given, inserting, among the rest, the note held by the Plaintiff; but this seemed merely to be descriptive of

of the engagements against which *Samuel Clarkson* was to be indemnified, and not an appropriation of the securities, as a fund for paying the persons to whom he was bound. 1799.

THE COURT expressed a decided opinion, that, under such circumstances, there was no express trust, nor any ground for an implied trust, in favor of the Plaintiff. He had made his bargain simply on the credit of *Samuel Clarkson's* indorsement, without contemplating any other security. The mortgage was taken by *Samuel Clarkson* for his own indemnification. The transactions were, therefore, substantive and unconnected: And no trust being declared, or contemplated, at the time, a court of law cannot, on the suggestions of humanity, undertake to create one, in opposition to other legal and meritorious claims.

The Plaintiff suffered a non-suit.

*E. Tilghman* and *M. Levy*, for the Plaintiff: *Lewis* and *Hallowell*, for the Defendant.

CIRCUIT