

ELIJAH AMES vs. MATHER WITHINGTON.

In an action upon a promissory note against one of several makers, another of the makers is a competent witness for the defendant, being released by the latter from all claim to contribution.

ASSUMPSIT, upon two promissory notes, dated September 7, 1821, for \$100 each, one made by *Winslow Ames* and the defendant, and the other by *Winslow Ames, Jonas Wright*, and the defendant.

The cause was tried here, upon the general issue, at April term, 1824, when the defendant, to prove payment of the notes, called *Winslow Ames*, one of the makers of the notes, the said *Ames* having been released by the defendant from all claims to contribution, in case the plaintiff should recover. To the admission of *Ames*, as a witness, the plaintiff objected; but he was admitted; and the jury having returned a verdict for the defendant, the plaintiff moved the court to grant a new trial, on the ground, that *Ames* ought not to have been admitted, as a witness.

Lawrence, for the plaintiff.

B. M. Farley, for the defendant.

By the court.—The question to be decided is, whether *Winslow Ames* was a competent witness in this case? As the defendant had released the witness from all claim to contribution, *Ames* had no interest in the event of the suit, unless he can use the judgment in this case as a bar to any suit, that may be brought against him upon the note.

It is a well settled principle of law, that in an action upon a contract against two, if one be defaulted, yet if the other shows a good defence, the plaintiff can have judgment against neither. 2 *N. H. Rep.* 283, *Pillsbury vs. Cammett*.—1 *Levintz* 63, *Porter vs. Harris*.—10 *John.* 524, *Clason vs. Morris*.

But it seems never to have been supposed, that a judgment in favor of one maker of a note could avail another maker of the same note, in a suit brought against him. 14 *Mass. Rep.* 303.—16 *Mass. Rep.* 118, *Fox vs. Whitney*.—*Peake's N. P. cases* 174, *Goodacre vs. Breame*.—1 *Esp. N. P. cases* 103, *Young vs. Bairner*.—1 *Pick.* 118, *Gibbs vs. Bryant*.

We are therefore of opinion, that there ought to be

Judgment on the verdict.