It is objected that the plaintiff demanded from the defendant [295] the whole sum in his hands, and that, not being entitled to the whole, as winner of the race, he cannot recover the amount deposited by himself, on the ground of disaffirmance of the bet.

The demand of the whole sum staked included a demand for the amount deposited by the plaintiff; and, if he was not entitled to receive the whole, he was not the less entitled to his own deposit because he demanded more than he had a lawful right to. Moreover, after the decision was made against him by the judges of the race, he forbid the defendant to pay the money to Breathitt, and refused to proceed with the race. The motive by which he was influenced is not material; it is enough that he put an end to the contract and countermanded his money; he is, therefore, entitled to recover. The costs were correctly taxed. Affirm the judgment.

Judgment affirmed.

BROWN *v.* SIMPSON

Nashville, March, 1834.

EVIDENCE—CONTRACT TO PAY SO MUCH IN CASH NOTES—BURDEN OF PROOF. Upon the execution of a writ of enquiry on a judgment by default, a contract to pay so many dollars in cash notes on solvent men is *prima facie* evidence that such notes were of cash value when they should have been paid, and it lay upon the defendant to prove they were worth less, and how much. [See Murray *v.* McMackin, 4 Yer. 41, and Williams *v.* Brasfield, 9 Yer. 270.]

Appeal in the nature of a writ of error from Montgomery circuit court. The facts of this case are stated in the opinion delivered by the chief justice. The cause was argued by—

Thompson, for plaintiff in error.

W. K. Turner, for defendant in error.

[296] CATRON, Ch. J., delivered the opinion of the court.

Brown and Simpson in *assumpsit*, and declared that Simpson, on the 1st of January, 1832, promised to pay Brown $450 in cash notes on solvent men in Montgomery county. To this the money counts were added.

On the trial (judgment by default for want of plea having been taken) the plaintiff read the note to the jury and rested his case. Damages were assessed to the amount of $450, with interest. Defendant moved to set the verdict aside. The court refused. Exceptions were filed; a writ of error prosecuted to the circuit court, where the judgment was affirmed; and the defendant below now brings the cause to this court, and insists that the jury were not

authorized to assess any damages above nominal, because no proof of the value of the promissory notes was made on the trial of the writ of enquiry. Two of the decisions of this court in manuscript have been read to us to sustain the position.

In the first cause, it is contended, with great plausibility, that the only measure of damages could be the precise sum in dollars called for on the face of the paper. The court decided that the jury must estimate the cash value of the notes of hand on the day the contract was broken.

In the second, the notes were proved worth less, when sold in market to those in the habit of speculating in paper, than the amount called for on the face of the contract; but the jury found the full value. The court affirmed the judgment, for the reasons stated in the opinion. Murry *v.* McMackin, 4 Yer. 47.

In this present case, the court is of opinion the contract was *prima facie* evidence that the notes of hand (on good solvent men of the county where the contract was made) were of cash value when they should have been [297] paid; and, if they were not of equal value to cash, it lay upon the defendant to prove they were worth less, and how much. The court have in this, as in every other case of construing contracts, felt it their duty to avoid extremes either way. To say the contract was conclusive of the value would often be untrue, and violate the sense of society; and to hold that the contract was no evidence of value would be evidently in violation of its intention. In enforcing the performance, therefore, of contracts for the payment of bank-notes, and notes of hand, this court has permitted the cash value to be proved, but it never has been doubted that the sum called for in the contract was the *prima facie* standard of value. The judgment will be affirmed.

Judgment affirmed.

ZOLLICOFFER *v.* TURNEY.

Nashville, March, 1834.

WITNESS—MUST TESTIFY ALTHOUGH HIS ANSWERS MAY RENDER HIM LIABLE TO A CIVIL SUIT. A witness, no party to the suit, cannot refuse to answer a question relevant to the matter in issue, on the sole ground that the answering of the question may tend to establish, or establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of the plaintiff in the action then on trial, or of any other person; and it is error, therefore, to exclude a person from testifying because he was a partner of the defendant, and equally liable with him in the result of the suit. [See Cook *v.* Corn, 1 Tenn. 340, and Act of 1870, 78, T. & S. Rev. 3813, c, *et seq.*, the latter doing away with objections to competency on the score of interest.]