(App) (Resp)
Mitenberger, Eugene et al v. Spaulding, John W. et al.

33 Mo 421 500/2

427/21

St. Louis

March, 1863

Sept 1860

$6307

Foreign bill of exchange, drawn in MO upon partner in Baltimore - must be governed by laws of place of partner

App
Voullaire

Resp
H. M. Hart

Non-payment, ~~[illegible]~~ made demand at residence of one partner - despite making demand on only one partner

Bay, - reversed - notary
Bates absent

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State of Missouri } ss.
County of St Louis }

Be it remembered that on the 13th day of August A.D. 1859, there was filed in the office of the St. Louis Circuit Court, the following Petition, which is in the words and figures following, to wit:-

Petition

Eugene Miltenberger, Camille Miltenberger and Charles Miltenberger doing business under the name and style of E. Miltenberger & Co

vs

John W. Spalding and Gallitzen A. Horrell doing business under the name and style of J. W. Spalding & Co.

In the St Louis Circuit Court September Term 1859. St Louis County Missouri

Eugene Miltenberger, Camille Miltenberger, and Charles Miltenberger Plaintiffs state, that on the Twenty eighth day of June eighteen hundred and fifty-eight, they were partners, doing business in the city of St Louis, under the name and style of E. Miltenberger & Co; that on said Twenty eighth day of June 1858, John W. Spalding, and Gallitzen A. Horrell, were doing business in the city of St Louis, under the name and style of J. W. Spalding & Co, - that on said last day said Defendants Spalding and Horrell, under the firm name of J. W. Spalding & Co, made their Bill of Exchange in writing, herewith filed, dated June 28. 1858, and directed the same to Mess Roloson, Appold & Co of the city of Baltimore, and State of Maryland, and thereby requested the said Roloson Appold & Co, ninety days after the date thereof to pay to the order of De=

fendants J. W. Spalding & Co the sum of Sixty three hundred and seven Dollars and Sixty nine cents, for value received. That afterwards, to wit, on the 3d day of July 1858, Robson, Appold & Co, duly accepted said Bill of Exchange. That on said 28th day of June 1858, Defendants assigned, and transfered the same by endorsement thereon, under the firm name to Plaintiffs, and delivered the same to plaintiffs for valuable consideration. Plaintiffs further state, that said ninety days and grace, have long since elapsed, and said Bill of Exchange has become due and payable, and remains still unpaid. That when said Bill of Exchange became due and payable, to wit; on the twenty ninth day of September 1858, the same was presented at the residence of Mr Appold, one of the late firm of the acceptors thereof, and payment thereof demanded, and by a servant assured that Mr Appold had gone to the country, and payment thereof refused, whereupon said Bill of Exchange was protested for non-payment, and said Defendants notified thereof, all of which will more fully appear by reference to the Notary's certificate of protest of the same herewith filed. That neither of said Defendants have since paid or offered to pay said Bill of Exchange, or any part thereof to said plaintiffs, the lawful holders thereof, but that said Bill of Exchange, and every part thereof still remains due and unpaid.

Wherefore Plaintiffs pray judgment against Defendants for the amount of the principal and interest, due upon said Bill of Exchange, together with costs of protest and damages.

Seymour Vallaire
Atty for Pltffs

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State of Missouri } ss.
County of St Louis }

Eugene Millenberger Plaintiff, makes oath and says the above petition, and the matters therein as stated he believes to be true.

E. Millenberger

Sworn to and Subscribed before me the undersigned, this 13th day of August 1859.

S. Rice Clk.

And afterwards, on the 13th day of August A. D. 1859 the following Summons was issued.

Summons

State of Missouri } ss
County of St Louis }

To the Sheriff of St. Louis County - Greeting:

We command you to Summon John M. Spalding and Gallitzen A. Norrell to appear before the Judge of our Circuit Court, on the first day of the next Term thereof, to be held in the city of St Louis, within and for the county of St Louis, on the last Monday of September next, then and there to answer the complaint of Eugene Millenberger, Camille Millenberger, and Charles Millenberger, or set forth in the annexed petition; and have you then and there this writ.

Witness, Stephen Rice, Clerk of our said Court, with the seal thereof hereto affixed, at office, in the city of St Louis, this 13th day of August, in the year of our Lord eighteen hundred and fifty nine

Seal

Stephen Rice Clerk

Upon which the Sheriff made the following Return:

Return

Executed this writ in the county of St Louis, this 16th day of August 1859, by delivering a copy of this writ;

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and Petition, as furnished by the Clerk to John W. Spalding. And I further executed this writ by delivering a copy thereof to Gallitzen A. Howell on the same date

W. S. Cerre Sheriff
By J. A. Guion Deputy.

And afterwards, on the 26th day of September A.D. 1859 the following Answer was filed:

Answer

Eugene Miltenberger, Camille Miltenberger, and Charles Miltenberger, doing business under the name and style of E. Miltenberger & Co Plaintiffs

vs

John W. Spalding and Gallitzen A. Howell doing business under the name and style of J. W. Spalding & Co In the St Louis Circuit Court. Defendants

September Term 1859. St Louis County Missouri

Defendants say they are not liable on the Bill of Exchange described in plaintiffs Petition for the following causes and reasons

First - They deny that the Bill of Exchange mentioned and described in plaintiffs petition, was legally presented for payment, and payment thereof demanded of the acceptors Robson, Appold & Co

Second. They deny that the defendants were ever notified of the protest of said Bill of Exchange as alleged in plaintiffs petition

Third. These defendants deny the correctness of the certificate of the Notary to be true as filed by plaintiffs.

Wherefore defendants pray judgment for costs

Henry N. Hart
Atty: for Defts.

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State of Missouri } ss.
County of St Louis }

John M. Spalding one of the defendants, makes oath and says that he believes the foregoing answer, and the matters as therein stated are true.

J. M. Spalding.

Sworn to and subscribed before me this 24th day of September A. D. 1859.

Herman A. Haensler
Notary Public
St Louis County Mo:

Exquire And afterwards on the 28th day of February A. D. 1860, the following proceedings were had herein:

Eugene Millenberger, Camille Millenberger and Charles Millenberger } On Bill of Exchange.
vs
John M. Spalding & Gallitzin A. Norrell }

Now come the parties, by their respective attorneys, and waiving a Jury, submit the cause to the Court, upon the pleadings and proofs, and the Court having duly heard and considered the same, and being fully advised of and concerning the premises, doth find the issues herein joined in favor of the defendants, and against the plaintiffs. It is therefore considered by the Court that the plaintiffs take nothing by their suit, but that the defendants go hence without day and recover of said plaintiffs their costs and charges in this behalf expended, and have execution therefor.

And afterwards, on the 13th day of April A. D. 1860, the following proceedings were had herein

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Mo: for new trial overruled

Eugene Millenberger et al. vs John M. Spalding et al } The plaintiffs motion for a new trial being heard and fully considered by the Court is overruled.

and afterwards on the 16th day of June A. D. 1860, the following proceedings were had herein.

Order of Appeal

Eugene Millenberger et al. vs J. M. Spalding et al } Order of Appeal.

Plaintiffs file a Bill of Exceptions and also an affidavit for an appeal, and on their motion an appeal is allowed them to the Supreme Court, from the judgment herein rendered, and they thereupon file an appeal bond in the sum of two hundred dollars, with Eugene Millenberger, as principal, and Britton A. Neill, and D. M. Neill, as securities, which bond is approved by the Court.

Said Affidavit for an appeal is as follows:-

Affidavit for an Appeal

Eugene Millenberger, Camille Millenberger and Charles Millenberger, doing business under the name and style of E. Millenberger & Co vs John M. Spalding, and Galletzin & Worrell doing business under the name and style of J. M. Spalding & Co } In the St Louis Circuit Court Feby. Term 1860. St Louis County Mo:

Eugene Millenberger, one of the above-named plaintiffs, for himself and his

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co-plaintiffs, being sworn, on his oath says that the appeal which plaintiff prays in this case, is not made for vexation or delay, but because the said plaintiffs, appellants believe that they are aggrieved by the judgment of the Court in the premises

Sworn and Subscribed before me this 16th day of June 1860.

E. Miltenberger

S. Rice Clerk.

Appeal Bond

Said Appeal Bond is as follows:-

Know all men by these presents that we Eugene Miltenberger, as principal, and Billon A. Neill, as surety, are held and firmly bound unto John M. Spalding and Gallitzen A. Worrell in the sum of Two hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated at St Louis this sixteenth day of June A. D. 1860.

The condition of the above obligation is such, that whereas, Eugene, Camille, and Charles Miltenberger have appealed from the Judgment rendered against them and in favor of John M. Spalding and Gallitzen A. Worrell, in the St Louis Circuit Court for costs.

Now if the said appellants will prosecute appeal with due diligence to a decision in the Supreme Court, and shall perform such judgment as shall be given by the Supreme Court, or such as the Supreme Court may direct the St Louis Circuit Court to give; and shall, if the judgment, or any part thereof be affirmed, comply with and perform the same so far as it may be affirmed;

and pay all damages and costs which may be awarded against them by the Supreme Court, then this obligation shall be void, otherwise it shall remain in full force and effect.

E. Millenberger (Seal)
Britton A. Hill (Seal)
D. W. Hill. (Seal)

Approved
June 16. 1860
S. M. Breckinridge, Judge.

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Said Bill of Exceptions is as follows:-

Bill of Exceptions

Eugene Millenberger, Camille Millenberger and Charles Millenberger, doing business under the name and style of E. Millenberger & Co. vs John W. Spalding, and Gallitzin A. Worrell, doing business under the name and style of J. W. Spalding & Co

In the St. Louis Circuit Court. February Term 1860

St. Louis County, Missouri.

Be it remembered that at the trial of the above entitled cause, Plaintiffs offered the following evidence viz: The Bill of Exchange sued upon and Protest thereof: All of which was objected to by Defendants - objections overruled, and excepted to by Defendants.

Said Bill and Protest thereof then read in evidence

Bill of Exchange

No 380. 7304. Baltimore 69, due 26/29 Sept:

Exch. for $6307 St Louis June 28th 1858

Ninety days after date this first of Exchange (Second unpaid) pay to the order of Ourselves, Sixty three hundred Seven & 69/100 Dollars, value received, and charge the same to account as advised.

Mills Rolosan, Appold & Co

8683. Baltimore Md. J. W. Spalding & Co

28/09 Sept

Upon the face of which Bill of Exchange was written the following:-

Sept 29/58 Prot. non. pay. Original

H. W. Gilmer N. P.

Accepted July 9d 1858.

Rolosan, Appold & Co.

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And upon the back of which was written the following:
J. W. Spalding & Co.

Protest.

No. 388 – 7304. – Baltimore – due 26/29 Sept June 28. 1858
Exch. for $4307. – 69 – St Louis
Ninety days after date of this First of Exchange (second unpaid) pay to the order of ourselves. Sixty Three hundred Seven 69/100 Dollars. value received and charge the same to accounts as advised. J. W. Spalding & Co
To Mess. Rolosen, Appold & Co
8683. 2 30 31 Baltimore Md.
26/29 Sept. – Endorsed
J. W. Spalding & Co –
E. Miltenberger & Co – for collection Bank of Commerce –
Guyuke, Reutgen & Reuhen – Pay D. Spriggs Esqr Cashr or order Richd King for Cashr

Original Accepted June 3 1858 Rolosen Appold & Co

United States of America
State of Maryland, To wit:
On this day the Twenty ninth of September, in the year of our Lord Eighteen hundred and fifty eight, at the request of Cashier of the Merchants Bank of Baltimore bearer of the original Bill of Exchange, whereof a true copy is above written, I William Gilmor, Notary Public, by letters patent, under the great seal of the State of Maryland, commissioned and duly qualified, residing in the city of Baltimore, in the State aforesaid, presented the said Bill of Exchange, at the residence of Mr Appold, one of the late firm of the acceptors thereof, and demanded payment therefor, and was answered by a servant "Mr Appold has gone to the country"

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Wherefore, I, the said Notary, at the request aforesaid Have Protested, and by these presents do solemnly protest, as well against the acceptors, Drawers and Endorsers of the said Bill of Exchange, as all others whom it may concern, for Exchange, Re-exchange, and all costs, charges, damages and interests suffered, and to be suffered for want of payment of the said Bill of Exchange.

Thus done and protested at the City of Baltimore aforesaid, and on the same day I addressed written notice to the Drawers and Endorsers of said Bill of Exchange informing them that it had not been paid, payment there for having been demanded and refused, and that they would be held responsible for the payment thereof.

Notice for J. W. Spalding Esq Drawers and Endorsers, E. Millenberger Esq, Gilpike, Rudgen & Renhew and He. F. Vail Cash, Endorsers; I enclosed to He. F. Vail Esqr Cashier Bank of Commerce, New York and put the same in Baltimore Post Office this day.

Seal

In testimony whereof I have hereunto set my hand and affixed my seal notarial the day and year aforesaid

Wm Gilmor Notary Public.

Protest 2.00
Postage .03

The plaintiffs then offered in evidence, the deposition of William Gilmor, duly certified with all the exhibits, and papers thereto annexed and therein alluded to. all of which was objected to by defendants. Objections overruled and excepted to by defendants

Said deposition with exhibits and papers therein al-

luded to, were then read in evidence.

Deposition of W. Gilmor

William Gilmor of lawful age being sworn and examined on the part of the plaintiffs, deposeth and saith:

I reside in the city of Baltimore Maryland - I am forty four years or thereabouts - I am a Notary Public - duly appointed and commissioned by the Govenor of the State of Maryland - I held the office on the 29th day of September 1858, and prior thereto. - I know the firm of Rolosm, Appold & Co - I do not know whether or not they were engaged in business on the 29. day of September 1858 - I do not remember having presented a draft on Rolosm Appold & Co on the 29th day of September 1858 - I have no particular recollection of having presented such a draft - there being so many, I have to divide them among the clerks employed in my office, who take different sections of the city. - I have examined the paper now in my hands; it is a true copy of the Protest of Bill of Exchange, of which a copy is found in said papers. (here the witness filed the paper hereunto annexed, marked W. G.) the protest was made by me on the date of said paper (the 29th day of September 1858 - the endorsements on said Bill of Exchange are true copies of the original endorsements - the said paper marked W. G. is a copy from the Record in my office - The original Bill of Exchange was not presented by me for payment in person - it was presented by Daniel G. Lemony - he was, at the time of making the presentation, my deputy - it was the custom of my office to employ deputies to present Bills and Notes for payment - I have a large number of Bills and Notes to protest for non-acceptance and non-payment, and it would be impossible

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for me to present them in person — it is the uniform custom in the city of Baltimore, for notaries to employ deputies to make presentation of Bills and notes for acceptance or payment. — I derived my knowledge of the facts attending the demand from Mr Emory the deputy — in all cases the facts attending the demand and presentation of a Bill or note, are returnable to the office by the deputy making such presentation or demand, and then incorporated in the protest — In all cases the protest themselves are signed and sealed by me, as was done in this case. The notice to drawers, and endorsers of the Bill of Exchange in this case were sent as set forth in the protest. The protest in this case is in the usual form as made in the city of Baltimore. I know of no other form.

Wm Gilmor
Notary Public

Cross Examined on the part of P. W. Spalding for whom alone William Schley Esqr appears as Counsel and on his behalf cross-examined the Witness.
I. J. Carley Esqr appear as Counsel for all the Defendants and cross-examined the Witness

Cross-examined by William Schley Esqr
I am certain I was in Baltimore on the 29th day of September 1858. — I cannot tell who made up the record from which the paper marked W. G. was copied — not having the record before me. — I do not remember that it was made up by me. There were four Notaries residing in the city of Baltimore on the 29 day of September 1858 — Mr Emory above spoken of by me was a clerk in the Bank of Baltimore — he was there

engaged in the morning, and came to me in the afternoon as a deputy clerk – All my clerks have the same power – There is a head clerk who keeps the accounts – my deputies are not sworn – Mr Emory was not sworn – I do not know that there is such an officer as deputy Notary under any law in Maryland. I cant say who deposited said notices in the Baltimore Post office – I am not in the habit personally of depositing notices in the Post Office – the initials of the name of the person who deposited them in the Post office are marked on the Record or else on the Book of Protest of that day. – Upon looking at the Record, I am now able to say the notices were deposited in the Baltimore Post Office by Robert C. Smith.

Wm Gilmor
Notary Public

I. I. Early adopts the cross-examination of William Schley Esqr as his own on behalf of all the defendants.

Examination in chief resumed.

Mr Emory in making the demand for payment of the Bill of Exchange in this case acted as my deputy with full authority from me – Mr Emory's employment as my deputy or clerk, was entirely independent of his employment at Bank – he was, at the time of making the demand, acting as my deputy generally – there was no special appointment in this case

Wm Gilmor
Notary Public

The following are the Exhibits &c referred to in deposition

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of Wm Gilmor.

No. 380 _ 7304 _ Baltimore due 26/29 Sept W. G

Exchange for $1307.69 St Louis June 28. 1858.

Note & Protest.

Ninety days after date of this First of Exchange (Second unpaid) pay to the order of Ourselves. Sixty three Hundred Seven & 69/100 Dollars. Value received and charge the same to account as advised.

To Mess Roloson Appold & Co } J. W. Spalding & Co

31 _ 8683 _ Baltimore Md.

26/29 Sept.

Endorsed

J. W. Spalding & Co

E. Mittenberger & Co

for collection Bank of Commerce

Geljuke, Reutgen & Reuhen

Pay D. Sprigg Esqr Cashr

or order Richd King Cash.

Received July 31st 1858

Roloson, Appold & Co

United States of America,

State of Maryland to wit:

On this day the Twenty ninth of September, in the year of our Lord, Eighteen hundred and fifty eight, at the request of Cashier of Merchants Bank of Baltimore, bearer of the original Bill of Exchange, whereof a true copy is above written, I, William Gilmor, Notary Public, by Letters Patent, under the great seal of the State of Maryland, commissioned and duly qualified, residing in the city of Baltimore, in the State aforesaid, presented the Bill of Exchange at the residence of Mr Appold, one of the late firm of the acceptors thereof, and demanded payment therefor, and was answered by a servant "Mr Appold has gone to the country"

Wherefore, I, the said Notary, at the request aforesaid,

have protested, and by these presents do solemnly protest, as well against the acceptors, Drawers and endorsers, of the said Bill of Exchange, as all others whom it may concern, for Exchange, Re-exchange, and all costs, charges, damages, and interests, suffered and to be suffered for want of payment of the said Bill of Exchange.

Thus done and protested at the City of Baltimore aforesaid, and on the same day, I addressed written notices to the Drawers and endorsers of said Bill of Exchange, informing them that it had not been paid, payment therefor having been demanded and refused, and that they would be held responsible for the payment thereof. Notices for J. W. Spalding & Co. Drawers and endorsers, E. Millenberger & Co, Selpke, Rentgen & Reuken, and Richd King as Cashr, Endorsers. I enclosed to H. F. Hail Esqr Cashier of Bank of Commerce, New York, and put the same in the Baltimore Post office this day.

In testimony whereof, I have hereunto set my hand, and affixed my seal Notarial, the day and year aforesaid

Seal

Wm Gilmor
Notary Public.

United States of America
State of Maryland, to wit:

I. Wm Gilmor, Notary Public, by Letters Patent, under the great seal of the State of Maryland, commissioned and duly qualified, residing in the city of Baltimore, in the State aforesaid, do hereby certify, attest and make known, that the annexed copy of an original protest, of which it purports to be a copy, is a true and correct one, having been by me duly and carefully compared with the said original.

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In testimony whereof, I the said Notary, have hereunto set my hand, and affixed my notarial seal this fifth day of December, in the year of our Lord one thousand eight hundred and fifty nine.

Seal

Wm Gilmor
Notary Public.

W. G.

This is the paper referred to as W. G. in the annexed deposition

Jas B. Latimer
Commissioner for the
State of Missouri.

Plaintiff then offered in evidence the depositions of Daniel G. Emory duly certified with all the exhibits and papers thereto annexed, and therein alluded to, all of which was objected to by defendants, - objections overruled and exception by defendants - Said deposition with Exhibits and papers therein alluded to were then read in evidence:

Deposition of D. G. Emory.

Daniel G. Emory of lawful age, being sworn and examined on the part of the plaintiff, deposeth and saith:- I reside in the city of Baltimore, Maryland - I am 31 years of age, or thereabouts - my regular occupation during September 1858, was that of discount clerk in the Bank of Baltimore, at Baltimore, Maryland. - I was employed in the afternoon of the day to assist Mr William Gilmor, Notary Public, in said City of Baltimore - My duties with Mr Gilmor were to make out protests, make presentations and demand payment of Bill and notes placed in his hands for protest, and to deliver notices of protest, - I have examined the protest as set forth in paper marked W. G., annexed to William Gilmor's deposition - I presented

the original acceptance for payment, and demanded payment thereof. — I know of a firm of Rolasm, Appold & Co, — I know one of the members of said firm — I am under the impression that firm had a place of business on Water Street in the City of Baltimore on the 29th of September 1858. I am not prepared to answer whether said firm had that place of business open on said 29th day of September 1858 — I know that said firm had been protested before that time — whether their place of business was closed at that time, I cannot say — The place of business of Rolosm, Appold & Co, was not in my district as deputy of Wm Gilmor — It would not have been in the course of my regular district, as deputy of Mr Gilmor to have presented the Bill of Exchange at the place of business of Rolosm, Appold & Co — It was the usual custom in Mr Gilmor's office to make the demand at the place of business of the party on whom the demand was to be made if he had such place of business — I demanded payment of the Bill of Exchange in this case, in the manner, and at the time and place set forth in the protest of said Bill of Exchange of which said paper marked W. G. is a copy — the said demand was made by me between three and five o'clock P. M. of the day of the demand — I am under the impression that I first went to the place of business of Rolosm, Appold & Co before going to the house of Mr Appold, and found their place of business closed, but I cannot affirm to it positively — I know I did go to the place of business of Rolosm, Appold & Co to make demand of payment for a Bill or Note during the month of September 1858 and found it closed. — I did make the demand at the house of Mr Appold, one of the firm of Rolosm, Appold & Co, and received the answer as set

forth in said protest.

Saml. Grant Emory.

Cross-examined on the part of J. W. Spalding for whom alone William Schley Esqr appeared as counsel, and on his behalf cross-examined the Witness

I. I. Early appears as counsel for all the defendants, and cross-examined the Witness.

Cross examination by William Schley Esqr.

I do not know who composed the firm of Rolosen, Appold & Co - I know Mr Appold, but I do not know his first name - I do not know where W. Ne. Rolosen or Robert C. Wilson resided in September 1858 - I saw a colored girl at Mr Appold's house - no one else - I am under the impression that Appold was married - I think I enquired for his wife - I did not see her - I left no message for her or for him.

Saml Grant Emory

I. I. Early Esqr, adopts the Cross-examination of Wm Schley Esqr, as his own, on behalf of all the defendants.

Examination in chief resumed.

I had the Bill of Exchange with me when I made the demand - About the time of demand of payment of this Bill I had been by the place of business of Rolosen, Appold & Co nearly every day - it was not opened at any of those times - it was always closed

Saml. Grant Emory.

Plaintiff then offered in evidence the deposition of George Peter Hoffman, duly certified with all the exhibits and papers therein annexed, and alluded to, which were read in evidence:-

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Deposition of G. P. Hoffman

George Peter Hoffman, of lawful age, being sworn and examined on the part of the plaintiff, deposeth and saith:- I was in the employment of William Gilmor, Notary Public, residing in the City of Baltimore, State of Maryland, on the 29th day of September 1858, in the capacity of his deputy - My duty was to present Bills or Notes for payment or acceptance; to make out notices of protest, and to write protest and records of protest - I know there had been a firm of Rolosan, Appold & Co in Baltimore, and that said firm had stopped payment prioins to the 29th day of September 1858 - I could not say whether the firm of Rolosan, Appold & Co, had a place of business open for the transaction of business on the 29th September 1858, - I was at the place of business that they did occupy on the 22d day of September 1858, to present an acceptance of theirs to them for payment, and found the house closed, and it had every appearance of being unoccupied - My decided impression is that their sign was taken down and that "For Rent" was posted on the door - I am positive that such was the case about that period, and I think it was on that day - I cannot say positively that such was the case prior to September 29. 1858, though I think so. The acceptance in this case was given to Mr Emory to make presentment and demand for payment thereof, because we were under the impression in Mr Gilmor's office that the place of business was closed, and Mr Appold was the only member of the firm that we knew where to find, and Appold's house was in Emory's beat or district - Our information or belief that the place of business of Rolosan, Appold & Co was closed, upon which we acted in giving the acceptance to Mr Emory, was derived from my having gone to the

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place of business a few days previous to the 29th ult September 1858, to demand payment of an acceptance of theirs as above stated, and having then found the place of busines in an evidently unoccupied condition - I made no demand elsewhere for payment of the acceptance that I had to present on the 22d September 1858. having gone to the place of business and found it closed, as above stated - I did not know on the 22d September 1858, the place of residence of any of the members of the firm of Rolosan, Appold & Co. - We used Woods Directory of 1858 and 1859, in Mr Gilmors office in September 1858 - We have that directory generally as good as any in giving the residence of parties - The names of William Rolosan, and Robert E. Wilson and Robert E. Wilson, do not appear in said Directory - I do not find Rolosan, Appold & Co, put down as a firm in said Directory. - The name of Theodore R. Appold. No: 174, North Eutaw Street, appears in said Directory, and opposite to it is Rolosan & A in brackets

Geo. R. Hoffman

Cross-examined on the part of J. W. Spalding, for whom alone William Schley Esqr, appears as counsel, and on his behalf cross-examined the Witness.
I. I. Early Esqr, appears as counsel for all the defendants, and cross-examined the Witness.

Cross-examination by William Schley Esqr
We had in our office a Woods Directory of 1856 and 1857 - I find in it the names of Rolosan & Appold, No. 14. Water Street, which I presume is the place to which I went on the 22d September 1858, as already

mentioned - I find in the Directory of 1856 & 1857, the name of William H. Rolosm (R. & Appold) opposite in brackets, No: 80 Camden Street - I find in said directory 1856 & 1857 the name of Theodore Appold (Rolosm & A) in brackets opposite - dwelling 245 West Lombard Street.

Ged. P. Hoffman

I. I. Early Esqr adopts the cross examination of Wm Schley Esqr as his own on behalf of all the defendants.

Plaintiffs then offered in evidence the deposition of Robert Carter Smith, duly certified, with all the Exhibits, and papers therein annexed and alluded to, all of which was then objected to by defendants - Objections overruled and exceptions taken by defendants, &

Said depositions, Exhibits, and papers were then read in evidence: -

Deposition of R. C. Smith.

Robert Carter Smith, of lawful age, being sworn and examined, on the part of the plaintiff deposeth and saith: -

My name is Robert Carter Smith - I am thirty years of age or thereabouts - I reside in the City of Baltimore - I was in the employment of William Gilmor, Notary Public, in September 1838, as a clerk - my duties were to present notes and drafts for payment and acceptance, with notices of protest; to write protest and records of protest; to deliver notices of protest when the parties resided in the City, and deposit in the Post Office letters containing notices of protest for parties residing out of the City - on the 29. day of September 1838, I was at Mr Gilmor's office, and deposited all letters

of that day in the past Office - I deposited the letters containing notices of protest, demand for payment, and refusal as set forth in paper Ml. G. annexed to William Gilmor's deposition, in the Post office on that day - The notices were drawn, directed and deposited in the office on the 29th day of September 1858, just as set forth in said paper Ml. G. - I was a clerk for Wilson M. Carey, Notary Public in Baltimore for four years, before I went to live with Mr Gilmor - It has been the custom for Notaries in Baltimore, since I have been connected with them to employ clerks or deputies to make demand of payment, or acceptance of notes or Bills - It has been the custom of Notaries, since I have known said custom, which was during my employment with Mr. Carey, and Mr Gilmor, about five years and a half to employ their clerks or deputies to send notices, or put them in the Post office just as I did in this case. The protest of the Bill in this case is in the usual form of protest in Baltimore City.

R. Carter Smith.

Cross-examined on the part of J. M. Spalding for whom alone William Schley Esqr appears as Counsel and on his behalf, cross-examined the witness.

I. I. Early Esqr appears as Counsel for all the defendants, & cross-examines the witness

Cross-examined by William Schley Esqr.

I know that I deposited the notices in this case, as set forth in paper Ml. G. before referred to, from the record of protest being marked with my initials, of having mailed the letters containing notices of protest - The

initials are marked in my handwriting I believe, but I am not certain. Frequently I marked them - sometimes the clerks - Before depositing letters containing notices of Protest in the Post Office, we examine the letters to see that there is one for each Cashier to whom we have notices to send - I could not state from memory, which notices of protest I sent on the 29th of September 1858, - I could not speak in this case without reference to the Record and my initials, and I testify from reliance on my usual habit, and from seeing my initials on the record - Independently of the books and initials, I could not speak in this case - I am positive I was at the office on the 29th of September 1858 - engaged as usual

R. Carter Smith.

I. I. Carty adopts the Cross-examination of William Schley Esqr as his own, on behalf of all the defendants.

Examination in chief resumed.

I have no doubt from reference to the Record and my initials at this time, that I did put the notices in the Post office, as I have before testified - I mail so many that it would be impossible for me to remember them particularly without the aid of the books and initials.

R. Carter Smith.

Testimony of Leon. Bogy.

Then Leon Bogy, being duly sworn, on his oath testifies as follows; on the part of the Plffs.

I know John M. Spalding and Galileon A. Norrell composing the firm of J M. Spalding & Co - I served a notice of protest of this Bill of Exchange, at

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Office of J. W. Spalding & Co, by giving said notice to one of their clerks, in Spalding's presence, in the morning before dinner, about the first of October 1858, but I am not certain as to what day - Mr Millenberger gave me the notice - it came from the Post Office - He gave it to me as soon as taken from the past office - The letters for E. Millenberger & Co were usually received from the Post Office at 9 or half past 9 O'clock A. M. - I went at about 11 O'clock A. M. to give the notice to J. W. Spalding & Co - the same day I got it. - I am, and was then clerk for E. Millenberger & Co: - I think I saw the inside of the said notice - I do not remember the name signed to the notice - I cannot say if it was Gilmore - I Know the notice alluded to this Bill of Exchange, because this Bill of Exchange was the only one E. Millenberger & Co, ever bought of J. W. Spalding & Co

Lewis Bogy, being Cross-examined on the part of the defendants, testified as follows:-
It was I thought a regular notice of protest - I read a part of it - I only know it came from the Post office by the fact that all the letters came from the Post office by Mr Millenbergers brother - he opened all the letters and took out their contents - I know of the letter containing the notice coming from the Post office, only from the fact of all of them coming down with postage stamps on them - I did not bring the letters from the post office J. W. Spalding & Co's office was then on Commercial Alley and Market Street - At the time I gave the notice Spalding was sitting down at the desk behind the railing - I did not like to go to him and I handed it

to the clerk - I know Spalding and Herrell - I had no conversation at that time with Spalding - his partner was not in the office at the time - I thought at the time it was a notice of Protest - I thought it started all right, like all notices do - I do not recollect whether or not I saw the letters opened - The letters came from the Post office from nine to half past nine o'clock, and they were opened John Millenberger came to the office about that time

Testimony of Geo. Locker

Then George Locker being duly sworn, on his oath testified as follows: on the part of the plaintiff.

I know Plaintiffs and J. W. Spalding, a member of the firm of J. W. Spalding & Co. - I know Mr Rollosan, of the firm of Rollosan & Appold & Co - I have had transactions with them - Mr Rollosan has been in St Louis - Rollosan, Appold & Co have failed. - I was present at the meeting of J. W. Spalding the creditors of J. W. Spalding & Co and of Rollosan, Appold & Co in the latter part of October 1858. at H. N. Hart & Co Office - it was called in consequence of the failure of Rollosan, Appold & Co of Baltimore - I have never seen this Bill before - E. Millenberger was at that meeting - he went there at the request of J. W. Spalding, for the purpose of making a settlement of their affairs of J. W. Spalding & Co, and of Rolosan, Apold & Co by some means. - Spalding was present at that meeting - I do not know whether Spalding and Millenberger had any conversation then - I held paper of J. W. Spalding & Co E. Millenberger was present, at that meeting - There was nothing done at that meeting but conversations.

no Bills of Exchange were shewn by the parties – there was no other meeting – I have heard Spalding speak of his indebtedness to Millenberger – Spalding complained that he (Millenberger) alone would not give him time to pay. I had no conversation with Spalding in Millenbergers presence.

George Locker being then cross-examined by defendants testified as follows, on the part of the defendants:–
I speak with reference to General debts – I had no special conversation with reference to this particular bill – I know of no other Bill held by E. Millenberger & Co than that one – Rolosm said he could pay so much, and wanted time for the balance.
The arrangements so far as we (Locker & Co) were concerned have been consummated – as to Millenberger I believe not – This meeting was got up by Rollosan – I do not know that Millenberger had anything to do with the matter, except that I saw him at the meeting.

Plaintiffs then again offered in evidence the Bill of Exchange and upon, and protest thereof;
All of which was objected to by defendants – Said Bill and protest then were read in evidence
(Refer to page 9.)

Here the plaintiffs rested their case.

defendants then asked the following Instructions which were given by the Court, to which plaintiffs objected

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Objections overruled and exceptions taken by Plaintiffs

Defendants Instructions

The Jury are instructed that upon the evidence in this case the plaintiffs are not entitled to recover.

Given

2. If the Court sitting as a Jury believe from the evidence in the cause that the Bill of Exchange sued on was drawn by persons in this State, upon persons in another State, it is a foreign Bill of Exchange.

4. That to fix the liability of the defendants to pay the Bill sued on, and to entitle plaintiffs to recover in this action, it must be shown by proof satisfactory to the Court sitting as a Jury, that when said Bill became due and payable, plaintiffs used all proper and reasonable diligence and endeavors to make demand of and procure payment from the acceptors; and if the proof in the cause does not shew that such diligence was used by plaintiffs or bearer, it leaves it doubtful or uncertain as to whether such diligence was used by plaintiffs, then the plaintiff cannot recover in this action, and the verdict should be for defendants.

Given

5 If the Court, sitting as a Jury find from the evidence that when the Bill sued on became due and payable, the acceptors, Robson, Appold Bro, had a place of business in the City of Baltimore, or that two or more of the persons composing said firm of Robson, Appold and Bro. had places of residence in that city, and the person whose duty it was to make presentment and demand for payment of said Bill, went to the place of residence of Mr Appold, only there saw a colored servant

Given

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Civil

from whom he heard that Mr Appold was out of town. and did nothing more - made no further enquiry concerning Mr Appold, or said firm, or any other member thereof, left no message concerning said Bill for Mr Appold or said firm, then the acts and doings of said person, do not constitute the diligence which the law requires in such cases, and plaintiffs are not entitled to recover.

6. If the Court, sitting as a Jury find from the evidence that payment of the Bill sued on was demanded by a Notary or his deputy by calling at the place of residence of Mr Appold, one of the acceptors, that he there saw a colored servant, who told him Mr Appold was out of town, whereupon he left without further act or making further enquiry respecting the acceptors, and without leaving any message relating to said Bill, then the acts of said Notary or deputy, are not sufficient to constitute the diligence required by law of the holders of said Bill, and the plaintiffs cannot recover in this action.

Civil

Defendants then asked the following Instructions which were refused by the Court, to which Defendants objected to - objections overruled and exceptions taken by Defendants

Defendants Instructions Refused

3 That the duty of the Notary in making presentment and demand for payment of a foreign Bill of Exchange is personal, and cannot be performed by a clerk or third person - it must be done by the Notary himself and if the Court sitting as a Jury find from the evidence

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Refused

that the presentment and demand for payment of the Bill sued on was not made by the Notary in person, but by a clerk or deputy, then such presentment and demand was insufficient to entitle the plaintiffs to a recovery in this action, and the verdict must be for defendants.

Refused

7. The Jury are further instructed, that if they believe from the evidence, that when the Bill of Exchange sued on became due and payable, payment thereof was demanded, of the acceptors, and by them refused, then it was the duty of the plaintiffs to give direct and immediate notice of such demand and refusal to defendants after the dishonor of said Bill, and if the proof in the cause does not show such diligence in giving notice to defendants, to have him used by plaintiffs, plaintiffs cannot recover, and the verdict should be for defendants.

Refused

unless the Notary in person, or some other persons interested in said Bill, presented and demanded said Bill for payment, from the acceptors, and protested the same, then the said Bills have not been properly presented for payment and protested, and the plaintiffs cannot recover.

Refused

Nothing said to or replied by a colored person, as testified to in this case, can be received in evidence in this case, as any proof of a demand or refusal to pay said draft, or of any other fact in this case, and must be excluded in this case.

When the Court, sitting as a Jury, in due time rendered the

following judgment
(Refer to page 5

Motion for a new trial

In due time Plaintiffs filed a motion for a new trial, which was by the Court overruled, to which ruling plaintiffs excepted to:-

Eugene Millenberger et al: vs J. M. Spalding et al: } In the St. Louis Circuit Court of St Louis County.

Now at this day come the plaintiffs, by their attorney, and move the Court to set aside the verdict rendered in said Cause, and grant a new trial for the following reasons:-

Because the verdict is against law.
Because it is against the evidence.
Because it is against the law and the evidence.
Because the Court admitted improper and erroneous instructions.
Because the presentment made of the Bill of Exchange for payment was sufficient and lawful.
Because due diligence has been used by the Notary or his clerk in presenting said Bill of Exchange for payment, and in demanding payment for the same.
Because the Notary's Protest of said Bill of Exchange is in all its particulars and form, lawful, correct, and sufficient.
Because all the acts of the Notary and his clerk, concerning said Protest, and service of notice show due diligence, on their part.
Because defendants since said protest assumed the liability to pay said Bill of Exchange

Because, Defendant, John M. Spalding, for himself, and as a member of the firm of J. M. Spalding & Co, by his acts since the Protest of said Bill of Exchange, rendered himself and his co-defendants liable and responsible for the payment of said Bill of Exchange.

Seymour Vaillaire
Atty for Plaintiffs.

Whereupon Plaintiffs filed their Affidavit for an appeal to the Supreme Court, and herewith file their Bill of Exceptions, asking that the same may be made a part of the Record in the said cause, in their appeal to the Supreme Court, which is done

S. M. Breckinridge (Seal)

State of Missouri } ss.
County of St Louis }

I, Stephen Rice, Clerk of the Saint Louis Circuit Court within and for the County and State aforesaid, certify the above and foregoing to be a true and complete transcript of the record and proceedings in the above entitled cause, as fully as the same remains of record in my office.

In testimony whereof I hereto set my hand and affix the seal of said Court at office in the City of Saint Louis, this 21 day of September 1860.

Stephen Rice clk

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(21) ~~40.~~ ~~[illegible]~~ 27.

March Term 1863

Costs Pd by plff — 27.90

Eugene Miltenberger

et al appellants

vs

John W Spaulding

et al

M-E respondents

Transcript for Supreme Court - from Circuit Ct.

Filed 22d Sept. 1860

W S Glanville Ck

J. Voullaire for appellant

H. N. Hart for appellee

Fee $17 90/11

$10.00 paid by Eugene Miltenberger Jeff. 1

Apl 26/62 Aft of errors filed

1863 March 23d Statement & briefs filed Argued & submitted Dp

1863 April 10. Reversed & Remanded Opin filed Dp 148

Eugene Mittenberger Vol. appellants
vs.
John W. Spalding Vol. Respondents.

IN SUPREME COURT,
October Term, 1860.

And now come the said appellants and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said appellants assign the following, to wit:

1. That said Court admitted improper and illegal testimony offered by respondents
2. That said Court rejected proper and legal testimony offered by appellants
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by appellants.
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the defendants when it should have been rendered for the plaintiffs.
10. That said Court overruled the motion for a new trial, made by plaintiffs.
11. The Court erred in declaring the presentment made of the bill of exchange for payment insufficient and unlawful.
12. The Court erred in declaring that due diligence was not used by the notary and his clerk concerning the protesting of said bill.
13. The Court erred in its judgment because defendants after the protest assumed the liability to pay said bill.

Seymour Voullaire
Atty for Appellants.

And now come the said John W. Spalding and for joinder in error say, that there is no error in the record and proceedings of said St Louis Circuit Court in said cause, as assigned by said

Cox & Hart
for Respondents
Spalding

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Eugene Mittenberger
&c.

(3).

John W. Spalding &c.

Assignment of Errors
S. Vaulloire
atty. for appts.

Filed April 26. 1862
A.W. Mead
Clerk

Miltenberger et al
vs
Spaulding et al

Statement of the Case.

This was an action upon a bill of Exchange drawn by the firm of Spaulding & Co of St Louis upon the house of Robson Appold & Co of Baltimore. It was dated June 28 1858 payable 90 days after date to the order of Spaulding & Co. and by them indorsed to the plaintiffs. It was accepted July 3d 1858. The only issues raised by the pleadings or proved on the bill of exceptions were whether the bill was duly presented for payment or due notice of its dishonor given to the defendants. Upon the trial of these issues before the Court sitting in judgment on the facts a judgment was rendered for the defendants. The Court after the evidence was in gave among other instructions the declaration that upon the Evidence the Plffs was not entitled to recover. The appeal is prosecuted to reverse the judgment as erroneous

Martin & Bell
for Plffs.

Mittenberger et. al
vs
John W. Spaulding
et. al

Pltffs Statement

Filed March 23. 1863
A W Mead
Cl

To hold the drawer demand must be made or due diligence exercised to make demand. As to what is due diligence is a question of law. But there is no universal rule. It depends altogether upon the circumstances of each case.

1 Parsons Notes & Bills 443.
Plaktis adms v Patchin 26 Md. 389.

The presentment of this bill of Exchange was sufficient

The demand by the notary's clerk must be sufficient here if it was in accordance with the uniform usage there.
Cribbs v. Adams 13 Gray 597.
Nelson v Tattral 7 Leigh 179.
Atwell v. Grant 11 Md. 101
Chitty on Bills 459.
Parsons Notes & Bills 641 note a.

A demand upon one partner is sufficient
1 Parsons Notes & Bills 362.

Otsego Co. Bank vs Warren 18 Barb. 290
Erwin vs Downs 15 N.Y. 575
Brown vs Thorn 15 Ala. 832.
Hunter vs. Hempstead 1 Md. 67.

A demand at the residence of the acceptor is sufficient even though he have a well known place of business.

1 Par. Notes & Bills 422.

Stevens vs. Prentis 3 B. Mon. 461, 463.

Commagere vs Schamburgh vs Commagere 10 Mart. 18

DeGrand v Banks 16 La. 461

Susan B. v. Baldwin 2 Harrison 488

Wiscans vs Davis 3 Harrison 277

McGrude v. Bank Wash. 9 Wheat 198.

Oakley v Beauvis 11 La. 487

Chitty Bills 365, 366.

The demand of the servant & in her presence was sufficient to indicate the nature of the notary business. It was not necessary to leave a message.

The answer of the colored servant to the inquiry of the notary's clerk is competent testimony, and does not fall under our rule of law which excludes the testimony of colored persons. It was a declaration of a person in charge of the acceptor's residence and who held to him the relation of servant or agent. A declaration at such a place and coming from such a person justified the notary in accepting it as true, and relieved him from the obligation of asking the acceptor any further or making additional inquiry.

Biles v. Holmes 11 Iredell 16.

Dufour v. Morse 9 La. 333.

Bank v. Allen 16 Maine 41.

Hawkins v State 7 Mo. 190

Fackler v Chapman 20 Mo. 249

Marr v Hill 10 Md. 328
Wallow v Perryman 27 Md. 279.

Under the Common law outlaws, and villeins of the soil could be appointed agents.
Storys Agency p. 9.
Com. Dig. Attorney C. 4.

Under the Civil law a slave could be an agent
Storys Agency p. 10.

Waiver of Demand & Notice

There is evidence in this cause tending to show that Spaulding, one of the defendants agreed to pay this bill after its dishonor and thereby waived demand & notice. The Court could not say as a declaration of law that the evidence does not establish such agreement or promise to pay. Therefore the Court erred in the first instruction which was equivalent to such a declaration.
Upon such an instruction the testimony must be admitted sufficient to establish such an acknowledgment of indebtedness & promise to pay. Harris v Woody 9 Md. 113.

Martin D Bell
for Plff.

C

Miltenberger et al
vs
John W Spaulding
et al

Pltfs brief

Filed March 23/1863

Eugene Muttenberger et. al.
Appellants
vs.
F. W. Spalding
Respondent.

In the Supreme Court State of Missouri.

Respondent's Brief.

The Court did not err in granting the instructions which were given on the application of defendant.

There is no rule of the law merchant better settled than that the endorser of a bill of exchange is liable, as guarantor, not by reason of any express obligation, but by operation of law. And for his protection the law annexes to his liability, as a condition, that all reasonable endeavours shall be made to procure payment from those who are liable before him in order to fix his liability.

1. Parsons on Contracts 223.

This due diligence was not used in this case. The evidence in the cause discloses that the notary, or his clerk, on the day of the maturity of the bill went or called at the place of residence of Appold, one of the acceptors, where he saw a colored servant woman, who informed him that Appold was out of town. With this information,

thus obtained, he departed and thereupon the bill was protested. This was all that he did. He made no inquiry for the wife of Appold, or for any other person. He failed to make his business known, omitted to leave any message either for Appold or his wife. This was not a sufficient presentment of the bills. It is far from constituting that reasonable diligence which the law nicely exacts in such cases.

The acceptors of this bill were a well known firm in the City of Baltimore, two of whom, at least, Robson and Appold, are shown to have had places of residence in that city. It is not pretended that demand was made, either at the place of business of the firm, or at the dwelling house of Robson. It is sought to excuse the failure to make demand at their place of business by attempting to show that at the time of the maturity of the bill it was closed. On this point the evidence is by no means conclusive; but, whether it was closed or not, the failure to make demand at that place is not excused unless the demand alleged to have been made at the dwelling house of Appold can be considered sufficient. Ordinarily demand made

at the place of residence of one co-partner may be considered sufficient. But it is insisted that calling to make demand at the residence of one partner, especially in the manner in which it is proved to have been done in this instance, without application at the last place of business of the firm, and without application at the place of residence of either of the other partners, cannot be held to be a good and sufficient presentment and demand. I admit in no case can a demand at the residence of one partner only of a servant - a negro servant - without more, be considered as fulfilling that measure of diligence which the law requires. It will not suffice to call at the place of residence ~~of~~ of one of two or more acceptors and on learning from a colored servant that he is out of town, and without further inquiry and without making the business known to him and to demand to dishonor the paper by protesting it. If such were admitted to be due diligence the paper of men of undoubted credit may often be ~~dishonored~~ wrongfully dishonored, for, although the party be absent, he may have made provision for payment, the wife or a friend

may have been furnished with means and authorised to meet the demand. Whether such be the case or not, the notary might easily ascertain by seeing the wife, or by making known his business, and it is no answer to this to say that it is not probable such provision had been made. It is the duty of the notary to make inquiries such as we have indicated, or, at all events, to ~~go~~ prosecute his inquiries much beyond the point at which the notary in this case was content to stop.

Edwards on Bills 483.
3. Kent. 104.
Ellis's Admr. vs. Commercial Bank of Natchez 7. How (Miss) 294-303.
The Granite Bank vs. Ayers
16. Pick. 392.
Porter vs. Judson
1. Gray (Mass.) 175.
Pierce vs. Gardner 5 Mete. 352.
Phipps vs. Chase 6. ib. 491.

The last two cases cited are cases touching the degree of diligence necessary as to notice, but the same rule applies as to presentment and demand, hence the citation.

II. The onus of showing that due diligence was used the law casts upon the appellants as a prerequisite to their right to recover

and the evidence should be absolutely certain and conclusive, leaving no doubt whatever on the mind of the Court that it has been used "Probabilities will not answer. Presumptions cannot be indulged." Hence whatever may be the impressions of the notary as to what he did, they are entitled to no consideration. The Court is entitled to be informed with absolute certainty as to what he did.

Rives vs. Parmley
18. Ala. 256-262.

III- There is not a title of proof to that Respondent after protest assumed the liability to pay the bill sued on.

Henry R. Hart,
with whom is
W. Hamilton Cox
for Respondent
Standing

No. 136.

Eugene Mittenberger et al

vs

Spalding

~

Respondent's Brief.

~

Filed March 23/63

A.W. Mead
Clk

Henry N. Hart
with whom is
N. Cox
for Respondent
Spalding

Appeal from Circuit Court

Eugene Miltenberger et al } Woollaire for appt
app
vs.
Johnell Spaulding et al } Hall Bar for Res
Res

This was a suit by the Indorsers of a foreign bill of Exchange against the Indorsers - The Acceptors resided in the City of Baltimore and the demand was made by the Clerk of a Notary Public and ~~the~~ one of the ~~principal~~ questions presented by the record is whether such a demand can be made by the Clerk of a Notary - This bill was drawn in Missouri upon parties residing in Maryland and is therefore placed upon the footing of a foreign bill for in this respect the several States of the Union are considered as foreign to each other - Gilmer, the Notary Public who protested the bill for non payment, states in his deposition that he did not present the bill for payment, but procured one of his clerks to make the demand - that it was customary in Baltimore for Notaries to employ Clerks and the Clerks so employed frequently made

demands, though he knew of no statute in Maryland which authorised it. The record also contains the deposition of the clerk showing that the demand was made by him at the request of the Notary ~~also proof that it was a uniform custom in Baltimore for clerks of Notaries to make such demands~~.

The books furnish several cases in which the right of a clerk to make the demand is contended for. In Nelson vs Fotterall 7 Leigh 171 the Court of Appeals of Virginia after a laborious investigation of the subject held that the presentment of a bill by the Clerk of a Notary was regular and legal, more particularly if sanctioned by local usage. The same is implied in Poole vs Dicas 1 Bing N C 649. In Sutton vs Gregory Peake Add cases 150 Lord Kenyon admitted evidence of an entry made by a clerk in a Notary's book to prove presentment of a bill of exchange and there are several repeated cases in which plaintiff recovered on the evidence of

a demand made by a Clerk but in none of them was the question directly raised as to the power of the Clerk to make the Assessment - Notwithstanding these cases and probably others which we may have overlooked it is very clear that the weight of authority is largely against it

a demand by a clerk but in none of them was the question directly raised — Notwithstanding those cases and probably others which we may have overlooked it is very clear that the weight of authority is largely against it —

In Lofty vs Mills 4 T R 970 the demand was made by a clerk and a doubt was expressed as to its propriety, notwithstanding it was an inland bill. I Buller observed "The demand of a foreign bill must be made by a Notary public; to whom credit is given, because he is a public officer"

In Chitty on Bills it is said that the presentation must be made by the Notary Public himself as an accredited public officer and will not be good if presented by his clerk — The same doctrine is maintained in Sacrider vs Brown 3 McLean 481. Chenoweth vs Chamberlain 6 B. Monroe 60. Carter vs Union Bank 7 Humphrey 548. Carmichael

vs The Bank of Pennsylvania 4 Howard (Miss) 567. The Onondaga Bank vs Bates 3 Hill 53 Ellis vs Commercial Bank of Natchez 7 Howard (Miss) 294, and many other cases necessary to cite.

As proof of protest is necessary to recover on a foreign bill, the should appear that the demand was made by a duly authorized Officer. A Notary Public is a Commissioned and Sworn Officer, clothed with certain powers, and in many states required to give bond for the faithful discharge of his duties, and as he is supposed to be appointed with reference to his capacity and integrity, he is entitled to a certain degree of public confidence, but not so with his clerk who is in no sense a public Officer and cannot be made amenable to the public for any unfaithful act. The law although does not concede to the Notary the power to delegate his authority

to an irresponsible agent -

In Louisiana there is a special statute authorising Notaries to appoint deputies, which acts the manner of the appointment of the deputies of a Sheriff under our law, and the Notary is specially empowered to make demands & protests by and through his deputy, and his Certificate of protest must state the fact that the demand was made by deputy and such Certificate is made by law Evidence of the facts therein stated - In the absence however of any statutory regulation it must be held as a general rule that the clerk of the Notary cannot make the demand -

We are next to consider whether proof of a local usage to the contrary prevailing in Baltimore defeats the application of this general rule ~~to~~ to the case in hand. The record shows that at the time the presentment was made there were but four Notaries in the City of Baltimore a number wholly inadequate to discharge the business which in so large a Commercial Metropolis would necessarily devolve upon them and that it was a uniform custom ~~there~~ to employ Clerks to make demands and presentments.

It is well settled that contracts made in one place to be executed in another must be governed by the law of the place of performance. Some of the text writers say that the demand must be made according to the law of the place ~~where demanded~~ presented, others according to the law or usage. The usages of particular places and of different trades and kinds of business, when uniform reasonable and just, and not contrary to general law, are legally presumed to enter

into the agreement of parties and to determine the effect to be given to these agreements. Bateman on Commercial Law 116. One of the stipulations of the contract on the part of the defendants in this case is to pay if the acceptors refuse upon a legal and proper demand and the mode of making the demand must be governed by the law, and in the absence of any positive legislative enactment by the uniform and well known usage of the place of presentment and such law or usage enters into and becomes a part of the contract whether known to the parties or not; hence it is that on a bill of exchange, on its face payable on a fixed day, ~~allows~~ three days of grace are allowed, it being an established custom among merchants, and therefore making a part of the contract.

But the judgment in this case must be reversed for error in holding that the Notary did not use due diligence to obtain payment of the Acceptas - The proof ~~is~~ tends to show that the Acceptas were partners in business, but at the maturity of the bills had failed and closed their business house and had no other office or place of business in the City - The Clerk of the Notary thereupon called with the bills at the dwelling house of Mr. Appleton one of the Acceptas and was informed by a colored Servant who opened the door that Mr. Appleton had gone into the country - The Clerk also states in his deposition that he thinks he inquired for the wife of Mr. Appleton but did not see her. The Court below seemed to think this did not disclose due diligence - We think otherwise - It is true that some of the authorities go so far as to hold that in a case of this kind demand should have been made of the wife but there is no satisfactory proof that

Appold had a wife - The deputy thought he had a wife but it was a mere impression unsupported by any knowledge or information in his possession, and acting upon such impression he inquired for her but did not see her -

In the case of Belmont Bank vs Patterson 17 Ohio 78 the Notary called at the Hotel in Cincinnati where the Acceptor was boarding and was informed that he had gone down the river to be absent some days whereupon the Notary returned to his office and protested the bill, and this was held by the Supreme Court of Ohio sufficient to fix the liability of the indorser -

Under all the circumstances of this case we think the Notary exercised all the diligence required by law -

The judgment will be reversed, and the cause remanded for further trial - Judge Lloyden concurring, Judge Bates absent -

N. V. N. Bay

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Miltenberger et al

vs

Spaulding et al

Opinion

W. T. V. Bay

Filed April 10. 1863

A. W. Mead Clk

R & R-

Parsons on notes & bills. Vol. 1
p 341. 441. note A.

Byles on Bills 321 - note

Carmichael vs Bank of Penn
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