Rhett Vs. Poe

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Appellant : Rhett

Respondent : Poe

Judgement :

Rhett v. Poe - 43 U.S. 457 (1844)
U.S. Supreme Court Rhett v. Poe, 43 U.S. 2 How. 457 457 (1844)

Rhett v. Poe

43 U.S. (2 How.) 457

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF SOUTH CAROLINA

SYLLABUS

Where the drawer of a bill has no right to expect the payment of it by the acceptor -- where, for instance, the drawer has withdrawn or intercepted funds which were destined to meet the bill, or its payment was dependent upon conditions which he

must have known he had not performed -- such drawer cannot claim to be entitled to notice of the nonpayment of the bill.

It becomes a question of law whether due diligence has or has not been used whenever the facts are ascertained, and therefore there is no error in the direction of a court to the jury that they should infer due diligence from certain facts where those facts, if found by the jury, amounted in the opinion of the court to due diligence.

If the drawer and acceptor are either general partners or special partners in the adventure of which the bill constitutes a part, notice of the dishonor of the bill need not be given to the drawer.

Page 43 U. S. 458

A court is not bound to grant an instruction prayed for where it is merely a recital of general or abstract principles, and not accompanied by or founded upon a statement of the testimony.

The strictness of the rule requiring notice between parties to a bill is much relaxed in cases of collateral security or of guarantee in a separate contract; the omission of such strict notice does not imply injury as a matter of course. The guarantor must prove that he has suffered damage by the neglect to make the demand on the maker and to give notice, and then he is discharged only to the extent of the damage sustained.

This suit was brought in the court below by Poe, the cashier of the bank, against Rhett as the endorser upon a note for $8,000 under the following circumstances:

Dixon Timberlake was a merchant who, it appeared from the evidence, had been for several years prior to 1837 in the habit of going from New York to the south during the cotton buying season and then returning to New York. In the winter of 1836-1837, he was at Augusta, in Georgia, with large letters of credit from various houses in New York, and also one from Benjamin R. Smith, then a merchant in Charleston, South Carolina. By the aid of these letters he acquired a credit at the

Bank of Augusta and purchased considerable quantities of cotton and some bank and other stocks in the course of the season. Some of these purchases were upon the joint account of Smith and himself, but the evidence was contradictory as to the particular purchases thus made.

In February and March, 1837, Timberlake, being in Augusta, drew several bills upon Smith in Charleston which all became due in May. The whole amount of the bills thus due in May, was $21,500. A separate bill for $14,000 is not included amongst these, because it was paid.

This sum of $21,500 was divided into two classes, one class consisting of $8,000 and the other of $13,500.

It appeared by the evidence that Smith was to provide for the first class of $8,000, and Timberlake for the remaining $13,500.

In order to carry out the arrangement respecting the first class, a bill was discounted drawn by Timberlake upon Smith for $8,000, and the note which was the subject of the present suit offered and accepted as collateral security. The note was as follows:

Page 43 U. S. 459

"$8,000 Charleston, May 9, 1837"

"Sixty days after date, I promise to pay to W. E. Haskell or order eight thousand dollars for value received."

"BENJAMIN R. SMITH"

"Endorsed, W. E. HASKELL, per attorney B. R. SMITH"

"R. BARNWELL SMITH, per attorney B. R. SMITH"

R. Barnwell Smith, whose name it was admitted was placed upon the note by proper authority, was the same person as R. Barnwell Rhett, his name having

been changed after the time of the endorsement.

Timberlake having made no provisions for the other class of bills, amounting to $13,500, Smith was unable to take them up, and they were protested.

On 2 June, Smith made an assignment of his property for the benefit of his creditors in a certain order which it is unnecessary to state, and it was further proved that at and before the maturity of the note on which the action was brought, Benjamin R. Smith was insolvent.

On 11 July, both the bill drawn by Timberlake upon Smith for $8,000, and the note in question for $8,000, became due, but neither being paid, the note was regularly protested and certain proceedings had upon the bill which constitute the defense in this case, where suit is brought upon the note.

It was given in evidence on the part of the plaintiff, in order to establish the regularity of the proceedings with regard to the bill, that the notary demanded payment at the store of Smith, the acceptor, and his clerk (Smith being absent) replied, "there were no funds for paying the same;" that the notary thereupon protested the bill for nonpayment and enclosed the notice thereof for Timberlake, the drawer, in a letter sent by mail, addressed to Robert F. Poe, the cashier of the Bank of Augusta, as was the custom in similar cases; that the notary, at the time when he protested the draft, did not know where Timberlake was to be found; that he had heard that he had resided and done business at Augusta, but was told that he had left that place. That he had made inquiries for Timberlake, and was then told that he had left Augusta, and it was not known where he had gone to. That the discount clerk of the Bank of Augusta had it in charge, as a part of his business, to make diligent search for the parties upon whom notices were to be served; that such notices were served upon them, personally, by said clerk if they were in Augusta,

and transmitted to them through the post office if they were at a distance; that said clerk was in Augusta on 11 July, 1837, and believes the notice would have been

served on Timberlake if he had been in Augusta; that said clerk has searched for the notice to Timberlake and cannot find it; that Timberlake lived in a boarding house whilst in Augusta; that he was insolvent when said bill became due. It was further testified by the postmaster and his assistant that two or more letters were received at the post office for Timberlake during the summer after he had left Augusta, which were not advertised; that he leased a box at the post office for a time which did not expire until 1 October, 1837, into which his letters were placed; that such letters could not have been forwarded to the general post office because they were not advertised; that Timberlake left Augusta on 30 June, 1837, in the public stage, and that he left no agent in Augusta.

On the other hand it was given in evidence on the part of the defendant, upon the cross-examination of Timberlake himself in this case, that Timberlake left Augusta on 30 June, having requested the postmaster to forward his letters after him, and that he received several letters, forwarded from Augusta agreeably to his directions, but never received any letter or notice of the nonpayment of the bill.

The defense rested chiefly on the ground that proper diligence had not been used to give notice to the drawer of the dishonor of the bill, and that consequently the securities upon the note which was given collaterally were exonerated from its payment.

In the trial of the cause in the court below, two separate sets of instructions were prayed for on behalf of Rhett, the defendant. The first set consisted of two prayers, which were refused by the court and were as follows:

"1st. That by omission to inquire for the residence of Timberlake or to send notice after him, the plaintiff has lost his right of action against him as drawer of the bill for $8,000."

"2d. That if the jury find that the note was given as collateral security for the bill drawn by Timberlake and that Timberlake is discharged, then the plaintiff cannot recover against the defendant on the note sued upon."

The second set of instructions consisted of five prayers which the court was asked to grant, but the court refused to do so, with the exception of the fourth, and gave its own instructions to the jury. The prayers and instructions given are as follows:

And the defendant, by his counsel, before the jury retired from the bar, further prayed the court to instruct the jury as follows:

"1st. The parties having shown that Timberlake had drawn upon Smith four bills, amounting in all to $21,500, which Smith had accepted, and had, at the time of the acceptance of the said bills, $10,000 in hand, received of Timberlake, to meet those bills, the defendant prayed the court to instruct the jury that if the evidence was believed, then Timberlake had funds in the hands of Smith and was entitled to notice."

"2d. The defendant having shown that Timberlake resided in New York, and came habitually, between the months of October and January, to Augusta and resided in Augusta during the winter and spring, and that Timberlake left Augusta on 30 June, 1837, and that the notice of nonpayment of the draft was forwarded by the notary in Charleston, to the plaintiff, on 11 July, 1837, and nothing was shown to prove that the plaintiff had made any inquiry after Timberlake, or endeavored to give him notice."

The defendant prayed the court to instruct the jury that the plaintiff had not used due diligence to give the drawer notice.

"3d. And inasmuch as evidence had been given that the bills drawn by Timberlake on Smith were drawn for purchases of cotton or stock on the joint account of Smith and Timberlake, and Timberlake had diverted the property purchased on joint account to his own use, and was therefore bound to provide for the bills which fell due in May to the amount of $13,500, and had not done so; the defendant prayed the court to instruct the jury that the default of Timberlake to take up the bills for $13,500 did not excuse the want of notice to make him liable on the bill for

$8,000."

"4th. And the defendant prayed the court to instruct the jury that if Timberlake had effects at any time between the drawing and the maturity of the said bill, in the hands of Smith, he was entitled to notice."

"5th. The defendant prayed the court to instruct the jury that the insolvency of the acceptor and drawer before the maturity of the bill did not excuse the holder from giving notice of nonpayment to the drawer."

And the court instructed the jury as follows:

"On the first instruction asked, the court instructed the jury that if they believe from the evidence that Timberlake had in the hands of Smith, when Smith accepted the bill for $8,000, $10,000, that Timberlake was entitled

Page 43 U. S. 462

to notice of the dishonor of the bill from the holder. But if the jury also believed from the evidence that the $10,000 in the hands of Smith was a fund raised upon Smith's letter of credit to Timberlake, and was to be applied to the payment of purchases on joint account, and had been so applied, and that there was an arrangement afterwards between Timberlake and Smith in respect to all the bills drawn by Timberlake, amounting to $21,500; that Timberlake was to put Smith in funds to pay bills to the amount of $13,500, of the $21,500, which were to become due before the bill of $8,000 became due, and that on Timberlake's doing so, Smith was to pay the $8,000 bill; and that Timberlake did not put Smith in funds to pay the $13,500, and that the same were protested, of which Timberlake had notice; then that Timberlake had no right to notice of the nonpayment of the $8,000 bill from the holder."

On the second instruction asked, the court instructed the jury

"That if they believe from the evidence that Timberlake resided in New York, and was a sojourner in Augusta from time to time, as stated in the instruction asked, that then, as drawer of the bill, he was entitled to notice of its dishonor; but if the

jury believe from the evidence, though he may have resided in New York, that he had made Augusta his residence since the fall of 1834 or 1835, and that he had removed from Augusta, and out of the State of Georgia, after the bill for $8,000 was drawn, and before its maturity, that then due diligence had been used to give him notice of the dishonor of the bill."

On the third instruction asked, the court instructed the jury

"That if they believe from the evidence that the bills drawn by Timberlake upon Smith were drawn for purchases of cotton or stock on the joint account of Smith and Timberlake, and that Timberlake had diverted the property purchased on joint account to his own use, and that after promising Smith, the acceptor, to take up the bills to the amount of $13,500, he had failed to do so, and had not supplied Smith with money to take up the bills for $13,500, after the same were dishonored, up to the time when the $8,000 draft became due, and that there was an arrangement between Timberlake and Smith, after the $8,000 bill was accepted, that Timberlake was to put Smith in funds to take up the drafts for $13,500, which had been dishonored, and did not do so, that Timberlake was not entitled to notice of the dishonor of the bill for $8,000."

To the fourth instruction asked, the court instructed the jury

"If

Page 43 U. S. 463

they believe from the evidence, that Timberlake had effects in the hands of Smith at any time between the drawing of the bill, and the maturity of the said bill, that he was, as drawer, entitled to notice."

To the fifth instruction asked, the court instructed the jury that the insolvency of the drawer and the acceptor, before the maturity of the bill, did not excuse the holder of the bill from giving notice of nonpayment to the drawer. But the court further instructed the jury that if the insolvency of the drawer and acceptor was known to each other, and that this bill was drawn to pay for a purchase on joint account, or a

transaction in which they were partners, and that the property so purchased had been diverted by the drawer to his own use, and that the payment of all the bills had been the subject of private arrangement between the acceptor and the drawer, that then the holder was excused from giving notice of the nonpayment of the bill for $8,000.

"Whereupon, the said counsel, on behalf of the said defendant, before the jury retired from the bar, excepted to the aforesaid opinion and charge of the court, on the first, second, third, and fifth instructions moved for, and now excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this nineteenth day of April, in the year eighteen hundred and forty-one."

"JAMES M. WAYNE [L.S.]"

"R. B. GILCHRIST [L. S.]"

The jury found a verdict for the plaintiff for $8,000, with interest from the 11th July, 1837.

To review all these prayers and instructions, the writ of error was brought.

Page 43 U. S. 478

MR. JUSTICE DANIEL delivered the opinion of the Court.

The instrument upon which this suit was instituted in the circuit court was, as the foregoing statement evinces, in form simply a common promissory note, signed by Benjamin R. Smith, made payable to William E. Haskell, endorsed by Haskell to Robert Barnwell Smith alias Robert Barnwell Rhett, and by this last individual to Robert F. Poe, cashier of the Bank of Augusta, the plaintiff in the action. Such being the nature of the instrument, and it appearing that the formalities of demand at its maturity and notice to the endorsers have been regularly fulfilled by the holder, a question as to the justice of a recovery by the latter could scarcely be suggested, if the rights and obligations of the several parties shall be viewed as dependent upon their relation to the note itself considered as a distinct and

separate transaction. Such, however, is not precisely the attitude of the parties to this controversy. It is in proof that there was held by the plaintiff below, beside this note, a draft for $8,000 drawn by Timberlake on 6 May, 1837, at sixty days, in favor of the plaintiff, on Benjamin R. Smith, and accepted by Smith, and further that upon the note was written by the plaintiff's agent, a memorandum in the following words: "This note is collateral security for the payment of the annexed draft of D. Timberlake on B. R. Smith of $8,000." Upon the effect of both these instrument as constituting parts of one transaction the questions propounded to the circuit court and brought hither for review have

Page 43 U. S. 479

arisen. The further proofs contained in this record will be adverted to in the progress of this opinion as notice of them shall become necessary to explain the instructions prayed for and those given by the circuit court on the trial of this cause.

The second series of instructions, embracing a more extended and varied survey of the evidence than is contained in that preceding it, will be first considered. It is to the first, second, third, and fifth instructions of this second series that exceptions are taken. To the first proposition affirmed by the court in this first instruction it is difficult to imagine any just ground of objection on the part of the defendant below, as that proposition concedes almost in terms the prayer of that defendant. To the second branch of this instruction it is not perceived that any valid objection can be sustained, for although it might have been true that at the date of acceptance of Timberlake's draft on Smith for $8,000, the latter had been in possession of $10,000 placed in his hands by Timberlake, it would not follow under the circumstances proved, or under those assumed in the instruction, that Timberlake as the drawer of that draft was entitled to notice. If, as the instruction supposes, the acceptances for $21,500 which Smith had come under for Timberlake were drawn for the accommodation of the latter upon the faith of funds to be furnished by him for their payment; that the $10,000 had been furnished by Timberlake in part for that purpose, but had been withdrawn by him for his own uses prior to the maturity of the draft for $8,000 -- that he should have intercepted before the

maturity of the draft all the funds against which he knew the acceptances of Smith were drawn, and that he the drawer, and Smith the acceptor, had, before such maturity, become notoriously insolvent, under such a predicament the law would not impose the requirement of notice to the drawer upon the holder.

No useful or reasonable end could be answered by such a requisition. Where a drawer has no right to expect the payment of a bill by the acceptor, he has no claim to notice of nonpayment. This is ruled in the following cases: *Sharp v. Baily,* 9 Barn. & C. 44; 4 Man. & Ry. 18; *Bickerdike v. Bollman,* 1 T.R. 405; *Brown v. Meffey,* 15 East 221; *Goodall v. Dolly,* 1 T.R. 712; *Legge v. Thorpe,* 12 East 171. If the $10,000 said to have been in the hands of Smith were by the agreement or understanding between Smith and Timberlake to be applied in payment of joint claims against them, and falling due before the draft for $8,000, and had been so applied, it had answered the sole object for which it had been raised, and could not in the

apprehension of these parties constitute a fund against which the draft of $8,000 subsequently to become due was drawn. Those $10,000 were gone, were appropriated by these parties themselves. Then if, after this appropriation, there was, as this instruction assumes, an arrangement between Timberlake and Smith in respect to the bills drawn by Timberlake to the amount of $21,500, that he was to put Smith in funds sufficient to pay $13,500 of the amount just mentioned, which were to become payable before the $8,000 draft, and that on Timberlake's supplying those funds Smith was to pay the $8,000 draft, and Timberlake failed to put Smith in funds to take up the $13,500, and that the drafts for the same were protested, of which Timberlake had notice, he, Timberlake, could have no claim to notice of nonpayment of the draft for $8,000. There could be no reason for such a notice from the holder of the draft. Timberlake could have had no right to calculate on the payment of this draft; on the contrary, he was bound to infer its dishonor. He knew that payment of the draft for $8,000 was dependent upon a condition to be performed by himself, and he was obliged to know from the notice of the dishonor of all his bills that he had not performed that condition, and had thereby

intercepted the very funds from which the acceptances by Smith were to be met. He therefore *quoad* this draft had never any funds in the hands of Smith, and consequently, never had any claim to notice of nonpayment from the holder.

The case of *Claridge v. Dalton,* in 4 Mau. & Selw., is strongly illustrative of the principle here laid down. That was a case in which the drawer had supplied the drawee with goods which were still not paid for. To this extent, then, the former unquestionably had funds in the hands of the latter, but on the day of payment of the bill, the credit upon which the goods were sold had not expired, and the court thereupon unanimously ruled that *quoad* the obligations of the parties arising upon these transactions, the drawer must be understood as having no effects in the hands of the drawee, and therefore, not entitled to notice. The second instruction affirms in the first place what must be admitted by all and what is not understood to be matter of contest here, *viz.:* that whenever a party to a bill or note is entitled to notice, such notice, if not given him in person, must be by a timely effort to convey it through the regular or usual and recognized channels of communication with the party or his agent, or with his known residence or place of business. It is to so much of this instruction as is applicable to what may amount to

a dispensation from the regular or ordinary modes of affecting parties with notice, that objection is made; to that portion in which the court charged the jury that if they believed from the evidence that although Timberlake may have resided in New York, that he had since the autumn of 1834 or 1835 made Augusta his residence, and that he had removed from Augusta, and out of the State of Georgia after the bill for $8,000 was drawn and before its maturity, that then due diligence had been used to give him notice of the dishonor of the bill.

It is not considered by this Court that this charge in any correct acceptation of it trenches upon the legitimate province of the jury, or transcends the just limits of the authority of the court, or contravenes any established doctrine of the law. 'Tis a doctrine generally received, one which is recognized by this Court in the case of the *Bank of Columbia v. Lawrence,* 1 Pet. 578, that whenever the facts upon

which the question of due diligence arises are ascertained and undisputed, due diligence becomes a question of law; *see also Bank of Utica v. Bender,* 21 Wend. 643. In the case before us, every fact and circumstance in the evidence which was to determine the residence of the drawer in Augusta, or his abandonment of that residence, or his removal from the State of Georgia; the unsettled and vagrant character of his after-life, the fruitless inquiries by the notary to find out his residence, the notoriety of his having neither domicile nor place of business in Georgia, the effort to follow him with notice of dishonor of his draft, were all submitted to the jury to be weighed by them. The charge of the court should be interpreted with reference to the testimony which is shown to have preceded it, upon which, in truth, it was prayed; with reference also, to the reasonable conclusions which that testimony tended obviously to establish. Interpreted by this rule, it amounts to this and this only -- a declaration to the jury that if the evidence satisfied them of the residence of Timberlake in Augusta at the time of drawing the draft, of the certainty and notoriety of his having abandoned that residence and the entire state before its maturity, leaving behind him no knowledge of any place, either of his residence or for the transaction of his business, satisfied them also of the real but unavailing effort of the notary who protested the draft to discover his whereabouts, they ought to infer that due diligence had been practiced by the holder of the draft.

In the case of an endorser, with respect to whom greatest strictness is always exacted, it has been ruled that the holder of a bill is excused for not giving regular notice of dishonor

Page 43 U. S. 482

to the endorser, of whose place of residence he is ignorant, if he use reasonable diligence to discover where the endorser may be found. Thus, Lord Ellenborough in *Bateman v. Joseph,* 2 Campb. 462, remarks,

"When the holder of a bill of exchange does not know where the endorser is to be found, it would be very hard if he lost his remedy by not communicating immediate notice of the dishonor of the bill, and I think the law lays down no such rigid rule.

The holder must not allow himself to remain in a state of passive ignorance, but if he uses reasonable diligence to discover the residence of the endorser, I conceive that notice given as soon as this is discovered is due notice within the custom of merchants."

See to the same effect 12 East 433; *Baldwin v. Richardson,* 1 Barn. & C. 245; *Beveridge v. Burgis,* 3 Campb. 262. It has been held in Massachusetts that where the maker of a promissory note had absconded before the day of payment, presentment and demand could not be required of the holder in order to charge the endorser. Opinion of Parsons, Chief Justice, in *Putnam v. Sullivan,* 4 Mass. 53. In *Duncan v. McCullough,* 4 Serg. and R. 480, it was ruled that if the maker of a promissory note is not to be found when the note becomes due, demand on him for payment is not necessary to charge the endorser if due diligence is shown in endeavoring to make a demand. *Hartford Bank v. Stedman,* 3 Conn. 487, where the holder of a bill who was ignorant of the endorser's residence, sent the notice to A. who was acquainted with it, requesting him to add to the direction the endorser's residence, it was held that reasonable diligence had been used. The measures adopted in this case by the holder of Timberlake's draft, when viewed in connection with the condition and conduct of the drawer himself, appear to come fully up to the requirement of the authorities above cited, and therefore, in the judgment of this Court, affect him with all the consequences of notice, supposing this now to be a substantial proceeding upon the draft itself.

Next and last in the order of exception is the fifth instruction. The first position in this is given almost literally in the terms of the prayer. The court proceeds further to charge that if the insolvency of the drawer and acceptor were known to each other, and that this bill was drawn to pay for purchases on joint account, or a transaction in which they were partners, and the property so purchased had been diverted by the drawer to his own use, and that the payment of the bills had been the subject of private arrangement between the acceptor and drawer, that then the holder was excused from giving notice of the

nonpayment of the bill for $8,000.

With respect to the exception taken to this instruction, all that seems requisite to dispose of it is the remark that if the drawer of the bill was in truth the partner of the acceptor, either generally or in the single adventure in which the bill made a part, in that event notice of dishonor of the bill by the holder to the drawer need not have been given. The knowledge of the one partner was the knowledge of the other, and notice to the one notice to the other. Authorities upon this point need not be accumulated; we cite upon it *Porthouse v. Parker,* 1 Campb. 82, where Lord Ellenborough remarks, speaking of the dishonor of the bill in that case, "as this must necessarily have been known to one of them, the knowledge of one was the knowledge of all;" also, *Bignold v. Waterhouse,* 1 Mau. & Sel. 259; *Whitney v. Sterling,* 14 Johns. 215; *Gowan v. Jackson,* 20 *id.* 176. Recurring now to the first series of instructions prayed for, we will consider how far the two propositions presented by them were warranted by the correct principles upon which the opinion of the courts may be invoked; and how far the court was justifiable in rejecting the propositions in question, upon the ground either of want of connection with any particular state or progress of the evidence -- or of support and justification as derived from the entire testimony in the cause.

It is a settled rule of judicial procedure that the courts will never lay down as instructions to a jury, general or abstract positions, such as are not immediately connected with and applicable to the facts of a cause, but require that every prayer for an instruction should be preceded by and based upon a statement of facts upon which the questions of law naturally and properly arise. It is equally certain that the courts will not, upon a view of the testimony which is partial or imperfect, give an instruction which the entire evidence in a cause when developed would forbid.

Tested by these rules, the two instructions prayed for in the first series are deemed to be improper. They are accompanied with no statement of the testimony as their proper and immediate foundation; they are bottomed exclusively upon assumption, and such assumption too as the testimony taken altogether is believed to contradict. The court therefore properly refused these instructions; for

this refusal it was by no means necessary that the causes should be assigned by the court *in extenso* -- these are to be seen in the character of the instructions themselves and in the testimony upon the record.

This Court has thus considered and disposed of the several prayers for instruction in this cause, and of the rulings of the circuit court thereupon.

Page 43 U. S. 484

Whilst this procedure has been proper with the view of ascertaining how far the rights of the parties have been affected by the several questions presented and adjudged in the circuit court, it is our opinion that the true merits of this controversy are to be found within a much more limited and obvious range of inquiry than that which has been opened by these questions.

The note on which the action below was instituted was given as a guarantee for the solvency of the parties to the bill for $8,000, drawn in favor of the plaintiff and for its punctual payment at maturity. Such being the character and purposes of the note, was it necessary, in order to authorize a recovery upon it, that every formality, all that strictness should have been observed in reference to the bill intended to be guaranteed, which it is conceded are indispensable to maintain an action upon a mercantile paper against a party upon that paper?

It is contended that a guarantee is an insurance of the punctual payment of the paper guaranteed, is a condition and a material consideration on which this paper is received, and therefore that a failure in punctual payment at maturity is a forfeiture of such insurance on condition, rendering the obligation of the guarantor absolute from the period of the failure. Whether this proposition can or cannot be maintained to the extent here stated, the authorities concur in making a distinction between actions upon a bill or note and actions against a party who has guaranteed such bill or note by a separate contract. In the former instances, notice in order to charge the drawer or endorser is with very few established exceptions uniformly required; in the latter, the obligation to give notice is much more relaxed, and its omission does not imply injury as a matter of course.

In *Warrington v. Furbor,* 8 East 242, where the guarantee was not by endorsement of the paper sued upon and the action was upon the contract, Lord Ellenborough said

"That the same strictness of proof is not necessary to charge the guarantees as would have been necessary to support an action on the bill itself, where by the law merchant a demand and a refusal by the acceptor ought to be proved to charge any other party on the bill, and this notwithstanding his bankruptcy. But this is not necessary to charge guarantees who insure as it were the solvency of the principal, and if he becomes bankrupt and notoriously insolvent, it is the same thing as if he were dead, and it is nugatory to go through the ceremony of making a demand upon him."

Le Blanc, Justice, says in the same case,

"There is no need of the same proof to charge a guarantee as there is a party whose name is on a bill of exchange, for

Page 43 U. S. 485

it is sufficient as against the former to show that the holder could not have obtained the money by making demand of it."

The same doctrine may be found in *Philips v. Astling,* 2 Taunt. 205. So too, Lord Eldon, in the case of *Wright v. Simpson,* 6 Ves. 732, expresses himself in terms which show his clear understanding of the position of a collateral guarantee or surety, his language is

"As to the case of principal and surety, in general cases, I never understood that as between the obligee and the surety there was an obligation to active diligence against the principal, but the surety is a guarantee, and it is his business to see whether the principal pays and not that of the creditor."

The case of *Gibbs v. Cannon,* 9 Serg. & R. 198, was an action against a guarantor who was not a party on the note, upon his separate contract. The Supreme Court of Pennsylvania decided in this case that provided the drawer and

endorser of the note were solvent at the maturity of the note, notice of nonpayment should be given to the guarantor, and that the latter under such circumstances may avail himself of the want of notice of nonpayment, but it places the burden of proving solvency, and of injury flowing from want of notice upon the guarantor. The last case mentioned on this point, and one which seems to be conclusive upon it, is that of *Reynolds v. Douglass,* 12 Pet. 497, in which the Court establish these propositions.

1st. That the guarantor of a promissory note whose name does not appear upon the note is bound without notice where the maker of the note was insolvent at its maturity, unless he can show that he has sustained some prejudice by want of notice of a demand on the maker, and of notice of nonpayment.

2d. If the guarantor can prove he has suffered damage by the neglect to make the demand on the maker, and to give notice, he can be discharged only to the extent of the damage sustained. Tried by the principles ruled in the authorities above cited, and especially by that from this Court, in 12 Peters. it would seem that this case should admit of neither doubt or hesitancy. The note on which the action was brought was given as a guarantee for the payment of the bill for $8,000, as is proved and indeed admitted on all hands. It is the distinct and substantive agreement by which the guarantee of the bill was undertaken. It is established by various and uncontradicted facts and circumstances in the cause, and finally by the solemn admissions of Timberlake the drawer and Smith the acceptor of the bill, both of whom have testified in the cause, that at the maturity of the

bill they were both utterly insolvent; that Timberlake was probably so before the commencement of these transactions, and that Smith before the maturity of the bill had made an assignment of everything he had claim to, for the benefit of others, and, amongst the creditors named in that assignment, providing for the plaintiff in error as ranking high amongst the preferred class.

Under such circumstances, to have required notice of the dishonor of the bill would have been a vain and unreasonable act such as the law cannot be presumed to exact of any person. Upon a review of the whole case, we think that the judgment of the circuit court should be

Affirmed.

ORDER

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of South Carolina, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said circuit court in this cause be and the same is hereby affirmed with costs and damages at the rate of six percentum per annum.