Musson Vs. Lake

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Appeal No. : 45 U.S. 262

Appellant : Musson

Respondent : Lake

Judgement :

Musson v. Lake - 45 U.S. 262 (1846)
U.S. Supreme Court Musson v. Lake, 45 U.S. 4 How. 262 262 (1846)

Musson v. Lake

45 U.S. (4 How.) 262

ON CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT

OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SYLLABUS

By the law merchant, when a demand of payment is made upon the drawee of a foreign bill of exchange, the bill itself must be exhibited.

Neither the statutes of Louisiana nor the decisions of the courts of that state, have changed the law in this respect.

The statutes and decisions examined.

If, therefore, the notarial protest does not set forth the fact that the bill was presented to the drawee, it cannot be read in evidence to the jury.

Even if the laws of Louisiana, where the drawee resided, had made this change in the law merchant, it would not affect the contract in the present case, which is a suit against an endorser residing in Mississippi, where the contract between him and all subsequent endorsees was made, and where the law merchant has not been changed.

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The question which was certified to this Court will be found at the conclusion of the following statement.

Lake was sued as endorser of the following bill of exchange:

"Vicksburg, 17 December, 1836"

"Exchange for $6,133 00/000."

"Twelve months after first day of February, 1837, of this first of exchange (second of the same tenor and date unpaid), pay to the order of R. H. & J. H. Crump six thousand one hundred and thirty-three dollars, value received, and charge the same to account of STEELE, JENKINS & Co."

"TO KIRKMAN, ROSSER & CO., *New Orleans* "

"Endorsed:"

"R. H. & J. H. CRUMP"

"W. A. LAKE"

"Kirkman, Rosser & Co., New Orleans, 3d February, 1838 -- protested for nonpayment. A. MAZUREAU, *Not. Pub.* "

It being admitted that Vicksburg, where said bill bore date, was in the State of Mississippi, and New Orleans in the State of Louisiana, the plaintiffs then offered to read in evidence to the jury, the protest of said bill of exchange, which protest, thus offered to be read, is in the words and figures following, to-wit:

"UNITED STATES OF AMERICA, *State of Louisiana:* "

"By this public instrument, protest, be it known, that on this third day of February, in the year one thousand eight hundred and thirty-eight, at the request of the Union Bank of Louisiana, holder of the original draft, whereof a true copy is on the reverse hereof written, I, Adolphe Mazureau, a notary public in and for the city and parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, demanded payment of said draft, at the counting house of the acceptors thereof, and was answered by Mr. Kirkman that the same could not be paid."

"Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said draft, as against all others whom it doth or may concern, for all exchange, reexchange, damages, costs, charges, and interests, suffered or to be suffered for want of payment the said draft."

"Thus done and protested, in the presence of John Cragg and Henry Frain, witnesses."

"In testimony whereof, I grant these presents under my signature,

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and the impress of my seal of office, at the City of New Orleans, on the day and year first herein written."

"A. MAZUREAU, *Notary Public* "

The copy of the said bill of exchange, referred to in said protest, on the reverse side thereof written, is in the words and figures following, to-wit:

"Vicksburg, 17 December, 1836"

"Exchange for $6,133 00/000."

"Twelve months after the first day of February, 1837, of this first of exchange (second of same tenor and date unpaid), pay to the order of R. H. & J. H. Crump six thousand one hundred and thirty-three dollars, value received, and charge the same to account of STELLE, JENKINS & Co."

"TO KIRKMAN, ROSSER & CO., New Orleans"

"Endorsed:"

"R. H. & J. H. CRUMP"

"W. A. LAKE"

"WM. NOLL & CO., in liquidation."

But the defendant objected to said protest, and the copy of the bill on the reverse side thereof written being read in evidence to the jury, on the ground that it was not stated in said protest that the notary presented said bill of exchange to the acceptors, or either of them, or had it in his possession when he demanded payment of the same.

And that for this alleged defect, which it was insisted could not be supplied by other proof, the said protest was invalid and void upon its face, and could not be received as evidence of a legal presentment of the bill for payment, or of the dishonor of the bill. And, thereupon, on the question whether the said protest could be read to the jury, as evidence of a legal presentment of the bill for payment, or of the dishonor of said bill, the judges were opposed in opinion. Which is ordered to be certified to the Supreme Court of the United States for their decision.

"J. Mc KINLEY [L.S.]"

"J. GHOLSON [L.S.]"

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MR. JUSTICE Mc KINLEY delivered the opinion of the Court.

The plaintiffs brought an action of assumpsit, in the Circuit Court of the United States for the Southern District of Mississippi, against the defendant, as endorser of a bill of exchange, drawn at Vicksburg, in said state, by Steele, Jenkins & Co., for $6,133, payable twelve months after the first day of February, 1837, to R. H. & J. H. Crump; and addressed to Kirkman, Rosser & Co., at New Orleans, and by them afterwards accepted, and endorsed by the payees and the defendant.

On the trial of the cause, the plaintiffs offered to read as evidence to the jury a protest of the bill of exchange, to the reading of which the defendant objected; because it did not appear in the

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protest, that the notary had presented the bill to the acceptors, or either of them, when he demanded payment thereof. And upon the question, whether the protest ought to be read to the jury as evidence of a presentment of the bill to the acceptors for payment, or as evidence of the dishonor of the bill, the judges were opposed in opinion. Which division of opinion they ordered to be certified to this Court; and upon that certificate the question is now before us for determination.

The endorser of a bill of exchange, whether payable after date or after sight, undertakes that the drawee will pay it, if the holder present it to him at maturity and demand payment; and if he refuse to pay it, and the holder cause it to be protested, and due notice to be given to the endorser, then he promises to pay it. All these conditions enter into and make part of the contract between these parties to a foreign bill of exchange; and the law imposes the performance of them upon the holder, as conditions precedent to the liability of the endorser of the bill. A presentment to and demand of payment must be made of the acceptor personally,

at his place of business or his dwelling. Story on Bills, 325. Bankruptcy, insolvency, or even the death of the acceptor will not excuse the neglect to make due presentment, and in the latter case it should be made to the personal representatives of the deceased. Chitty on Bills, 7th London ed. 246, 247; Story on Bills, 360; 5 Taunt. 30; 12 Wend. 439; 2 Douglass 515; *Warrington v. Furbor,* 8 East 245; *Esdaile v. Sowerby,* 11 East 117; 14 East 500.

The reasons why presentment should be made to the drawee are, first, that he may judge of the genuineness of the bill; secondly, of the right of the holder to receive the contents; and thirdly, that he may obtain immediate possession of the bill upon paying the amount. And the acceptor has a right to see that the person demanding payment has a right to receive it, before he is bound to answer whether he will pay it or not; for, notwithstanding his acceptance, it may have passed into other hands before its maturity. And he, as well as the drawee, has a right to the possession of the bill, upon paying it, to be used as a voucher in the settlement of accounts with the drawer. Story on Bills 361; *Hansard v. Robinson,* 7 Barn. & Cressw. 90.

Mr. Justice Story has given the form of a protest now in use in England, in his treatise on bills of exchange, by which it will be seen that the words "did exhibit said bill" are used, and a blank is left to be filled up with "the presentment, and to whom made, and the reason, if assigned, for nonpayment." Story on Bills, 302, note. This, with the authorities already referred to, shows that the protest should set forth the presentment of the bill, the demand of payment, and the answer of the drawee of acceptor. The holder of the bill is the proper person to make the presentment

of it for payment or acceptance. Story on Bills 360. But the law makes the notary his agent for the purpose of presenting the bill, and doing whatever the holder is bound to do to fix the liability of the endorser. Everything, therefore, that he does in the performance of this duty must appear distinctly in his protest. He is the officer of a foreign government; the proceeding is *ex parte,* and the evidence contained

in the protest is credited in all foreign courts. Chitty on Bills 215; *Rogers v. Stephens,* 2 T.R. 713; *Brough v. Parkings,* 2 Ld.Raym. 993; *Orr v. Maginnis,* 7 East 359; *Chesmer v. Noyes,* 4 Camp. 129. The evidence contained in the protest must therefore stand or fall upon its own merits. It rests upon the same footing with parol evidence, and if it fails to make full proof of due diligence on the part of the plaintiff, it must be rejected.

But the counsel for the plaintiffs insists, that the statute of Louisiana, and the interpretation given to it by the supreme court of that state in the case of *Nott's Executor v. Beard,* 16 La. 308, have so changed the law merchant, as to render unnecessary the presentment of a foreign bill for payment. After a careful examination of the opinion of the court in that case, we are unable to perceive any intention manifested to depart from the settled usages of the law merchant; but, on the contrary, they attempt by argument and authority to bring the case within that law. The question before that court was the identical question now before us. The protest was objected to because it did not show that the bill had been presented by the notary to the acceptors for payment. To this objection, that court said it might perhaps have been more specific if in the protest it had been stated that the bill was presented, and payment thereof demanded. And they admit the law is well settled that before the holder of an accepted bill can call on the drawer for payment, he must make a presentment for, or demand of, payment, and give notice of the refusal. Here, then, is a definite proposition, asserting that a presentment for payment and a demand of payment are convertible terms, and that the proof of either would be sufficient.

To support this proposition, they refer to Chitty on Bills, and Bayley on Bills, and the annotators on them. And as further proof and illustration, and to show that *demand* of payment should be preferred to presentment for payment, they refer to the statute of Louisiana, passed in 1827, in which they say the word demand is used in it, and that the word *presentment* is not, and they refer to the statute, also, to show that notaries were vested with certain powers by it, which give authority to their acts, and that they being public officers, the presumption of law is that they do their duty, and therefore, if the protest here defective, and liable to the

objection urged against it, this presumption of law would cover

all such defects. This is substituting presumption for proof, in violation of all the rules of evidence.

With all due respect for that distinguished tribunal, we are constrained to dissent from the general proposition they have laid down on the subject of demand and presentment, and from all their reasoning in support of it. Due diligence is a question of law, and we think we have shown, by abundant authority, that the holder of an accepted bill, to fix the liability of the drawer or endorser, must present it to the acceptor and demand payment thereof. It may be well here to repeat what Lord Tenterden, C.J., said on this subject, in delivering the judgment of the court of King's Bench, in the case of *Hansard v. Robinson* before referred to. He said

"The general rule of the English law does not allow a suit by the assignee of a chose in action. The custom of merchants, considered as part of the law, furnishes in this case an exception to the general rule. What, then, is the custom in this respect? It is that the holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and, upon receipt of the money, deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher, and discharge *pro tanto,* in his account with the drawer. If, upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer or retain his money?"

This extract, we think, furnishes a full answer to all that has been said by the supreme court of Louisiana to prove that it is not necessary to present the bill to the acceptor for payment, and to the presumption of law relied on to cure the defects in the protest.

But to show that, by the statute of Louisiana, the presentment of a bill to the acceptor for payment is not dispensed with, and that the presentment is, by a fair construction of the act, as much within its true intent and meaning as the demand,

we proceed to examine its provisions. The principal object of the legislature in passing this statute seems to have been, to give authority to notaries to give notices, in all cases of protested bills and promissory notes; and to make their certificates evidence of such notices. And therefore all that is said on the subject of the demand and the manner of making it, and the other circumstances attending it, was not intended as a new enactment on these subjects, but as inducement to the powers conferred on the notary, which was the principal object of the statute, as will appear, we think, by reading it. That part of it which relates to this subject is in these words:

"That all notaries, and persons acting as such, are authorized, in their protests of bills of exchange, promissory notes, and orders for the payment of money, to make mention of the demand made upon the drawee, acceptor, or person on whom such

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order or bill of exchange is drawn or given, and of the manner and circumstances of such demand; and by certificate, added to such protest, to state the manner in which any notices of protest to drawers, endorsers, or other persons interested were served or forwarded, and whenever they shall have so done, a certified copy of such protest and certificate shall be evidence of all the notices therein stated."

It seems to have been taken for granted by the legislature, that the notaries knew how to make out a protest, and therefore they did not prescribe the form, but gave the substance of it, to which the notary was required to add a certificate of the manner in which he had given notices, and when done, according to the statute, a certified copy of the protest and certificate should be evidence not of the demand and manner and circumstances of the demand, but of the notice only. This shows that the intention of the legislature, in passing this part of the statute, was merely to authorize the notaries to give notices, and to make the copy of the protest, and the certificate added to it, evidence of notice in the courts of Louisiana. But independent of this view of the subject, we think the language employed in this statute includes the presentment of the bill for payment, and for all other purposes,

as fully as it does the demand of payment. In giving construction to the act, the phrase, "and of the manner and circumstances of such demand," cannot be rejected, but must receive a fair interpretation. When taken in connection with other parts of the statute, what do these words mean? The manner of making a demand of payment, we have seen, is by presenting the bill to the drawee or acceptor, and so important is this part of the proceeding that the omission to present the bill to the acceptor will justify his refusal to pay it, although payment be demanded. The legislature cannot be presumed to have intended to make so important a change in the law merchant as that ascribed to them by the counsel for the plaintiffs, without at the same time providing some other mode of obtaining the acceptance and payment of bills of exchange, and of holding drawers and endorsers to their liabilities. It is but reasonable, therefore, to give to the phrase before referred to such construction, if practicable, as will leave the law merchant as it stood before the passage of the statute, and carry into effect the main intention of the legislature. This, we think, may fairly be done without doing any violence to the intention or the language of the statute.

The *manner of the demand* must, therefore, mean the presentment of the bill for either acceptance or payment; and *the circumstances of the demand,* we think, means the place where the presentment and demand is made, and the person to whom or of whom it is made, and the answer made by such person. It is very clear, that bills payable at sight, and after sight, are within the

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meaning of the statute; because it provides for a demand of payment of the acceptor of a bill. Now how can there be an acceptor of a bill, without a presentment for acceptance? Until the bill become due, payment cannot be demanded of the drawee. This shows that without the word presentment and the word demand also, the plain meaning of the statute could not be carried into effect. A bill payable at a fixed period after its date need not be presented for acceptance; it is sufficient to present it and demand payment when it arrives at maturity, but a bill payable at sight or after sight can never become due until after it has been accepted. How is the holder or the notary to obtain the acceptance of

such a bill, under the decision of the Supreme Court of Louisiana? Will it be sufficient to demand payment of the bill? That would be a nugatory act, because it is not due; then it must be admitted that, by fair and necessary construction, the word "presentment" is within the plain meaning and intention of the statute, and that the bill may be presented for acceptance or for payment, and therefore neither the statute nor the decision of the Supreme Court of Louisiana has changed the law merchant in any of these respects.

There is, however, another question, entirely independent of the statute and the decision of the Supreme Court of Louisiana, which may be decisive of the case before this Court, and that question is whether the contract between the holder and endorser of the bill in controversy is to be governed by the law of Louisiana, where the bill was payable, or by the law of Mississippi, where it was drawn and endorsed. The place where the contract is to be performed is to govern the liabilities of the person who has undertaken to perform it. The acceptors resided at New Orleans; they became parties to the bill by accepting it there. So far, therefore, as their liabilities were concerned, they were governed by the law of Louisiana. But the drawers and endorsers resided in Mississippi; the bill was drawn and endorsed there, and their liabilities, if any, accrued there. The undertaking of the defendant was, as before stated, that the drawers should pay the bill, and that if the holder, after using due diligence, failed to obtain payment from them, he would pay it, with interest and damages. This part of the contract was, by the agreement of the parties, to be performed in Mississippi, where the suit was brought, and is now depending. The construction of the contract, and the diligence necessary to be used by the plaintiffs to entitle them to a recovery, must therefore be governed by the laws of the latter state. Story on Bills 366; 29 U. S. 4 Pet. 123; 2 Kent's Common. 459; 13 Mass. 4; 12 Wend. 439; Story on Bills 76; 4 Johns. 119; 12 Johns. 142; 5 East 124; 3 Mass. 81; 3 Cowen 154; 1 Cowen 107; 9 U. S. 5 Cranch 298.

Whatever, therefore, may have been the intention of the legislature in passing the statute, and of the Supreme Court of Louisiana in the decision of the case referred to, neither can affect, in the slightest degree, the case before us. In Mississippi, the custom of merchants has been adopted as part of the common law, and by that law and their statute law, this case must be governed. We think, therefore, the protest offered by the plaintiff, as evidence to the jury, ought not to have been received as evidence of presentment of the bill to the acceptors for payment, nor as evidence of the dishonor of the bill, which is ordered to be certified to the circuit court accordingly.

MR. JUSTICE Mc LEAN.

I think the protest was evidence. The notary made demand of payment, at the maturity of the bill, and we know that he had possession of the bill, from the fact of the protest being made on the same day. Now as the notary could not make a legal demand in the absence of the bill, the fair, if not the necessary, inference is that he had possession of the bill when he demanded payment.

MR. JUSTICE WOODBURY.

I regret being compelled to dissent from a portion of the opinion of the majority of the Court which has just been pronounced. This I should be content to do without explanation, if the grounds for it did not a pear to be misunderstood. I do not question that a note should be present usually when payment is demanded, *Freeman v. Boynton,* 7 Mass. 483; 17 Mass. 449; 3 Metcalf 495, and that a written protest is the proper evidence to show a presentment or demand in the case of a foreign bill of exchange, 21 U. S. 8 Wheat. 333; *Burke v. McKay,* 2 How. 71. But in my view, a protest like this was competent evidence to be submitted to the jury, in order that they might infer from it that the note was presented when the demand was made. That was the point presented by the division of opinion between the judges in the court below. One held it was competent evidence from which to make such an inference, and the other, it was not, and we are merely to decide which was right.

The question of due presentment and demand is a mixed one of law and fact, and not one of mere law, unless all the facts are first conceded or agreed, *United States v. J. Barker,* 1 Paine's C.C. 156. This is in analogy to the rule about notice, 26 U. S. 1 Pet. 583. In all cases where it is possible for the jury on any reasonable hypothesis to infer a proper presentment from the protest offered, it is safer that the writing should not be withdrawn from them, but go in, and the court instruct the jury on the whole evidence what the law was on such facts as they might be satisfied of. Chancellor Kent, 3 Comm. 107, thinks it very difficult, in these mixed questions of law and fact about commercial paper, to do

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justice by any other course. In this case, the jury might or might not be satisfied of the fact of the bill being present when the demand was made. But why not let them pass on that fact? It is manifest that no evil or danger would result from leaving the matter to them, under due instructions from the court, provided there be no legal obstacle to such a course.

Is there, then, any such obstacle?

It is conceded, on both sides, that the protest is competent evidence, and contains enough from which the jury could infer a demand of payment. That is the most material part of the notary's duty. It is not only so described in some elementary treatises, but the duty of having the note present, or of calling with it at the hours of business alone, are not described separately; but are involved or implied in the general duty of making a demand. Thus Dane, in his Abridgment, *Bills of Exchange,* art. 11, 1, says -- "In making a protest, three things are to be done -- the noting, demanding, and drawing up the protest." "The material part is the making of the demand." So the word demand is at times used as synonymous with the word "presentment" by Bailey. 16 La. 311.

But the protest in this case states not only a demand, but that payment of the bill was refused, and that he had it in possession, so as to make a copy "of the original draft" on the back of the protest, or, to use his own words, "whereof a true

copy is on the reverse hereof written," and also "demanded payment of said draft," and was answered, "that the same could not be paid."

Under these expressions, it could hardly be deemed unfair or any stretch of probability to infer that the bill was present at the demand, and the more especially as the notary knew it was his duty to have it present, and does not state that any objection was made, or refusal to pay, on account of its absence, as he should have stated, if such was the truth. My views do not differ from those of a majority of this Court concerning the importance of having the principles as to commercial law, and especially commercial instruments, uniform, and as little fluctuating as possible, and hence as to them I would make no innovation here. But our difference is rather on a question of evidence. Thus, had the testimony offered been submitted to the jury, and they had inferred from it a due presentment of the note, it would not change any commercial principle as to the necessity of presentment, but merely establish the fact of presentment here on evidence deemed by the jury to render that fact probable. And if juries should be disposed to find such a fact on slight testimony, it would do no injury to commercial paper, or commercial principles, or substantial justice between parties, but merely indicate an increased liberality as to forms, where substance has been regarded; that is, where the vital point in the transaction is beyond controversy, namely, that payment has clearly

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been demanded and not made. Such a course would accord also, in spirit, with that was laid down by this Court in 26 U. S. 1 Pet. 583, that rules as to commercial paper ought to be formed and construed so as to be reasonable and founded in general convenience and with a view to clog as little as possible, consistently with the safety of parties, the circulation of paper of this description.

There is nothing in the nature of protests and presentments which on principle requires any increased strictness in the proof of them, but, on the contrary, much to justify every reasonable presumption in their favor. Any holder would be anxious to get his money at once of the drawee, and not neglect to have the note with him

so as to give it up on payment and prevent delay. So would he wish to be paid and excused entirely from making protest, rather than resort to that and notice, and suffer the delay of recovering it of a drawer or endorser.

Both of these considerations strengthen the inference that he and his agent would present the note, or have it with them, when demanding payment, and render it reasonable, after slight proof of presentment, to leave it to the opposite party to rebut that inference, so natural, by stronger proof that the note was not present, if the facts would warrant such proof.

Another consideration against requiring great or greater rigidity in the evidence of a presentment and form of protest is the fact, that a protest is of less materiality than notice.

As an illustration, that the notice is deemed more material than the protest, "omitting to allege in the declaration a *protest* of a bill is only form, not to be taken advantage of on a general demurrer." 1 Dane's Abr., *Bills of Exchange,* ch. 20, art. 11, 9; Lill.Ent. 55; 3 Johns. 202; *Salomons v. Staveley,* Doug. 684, in note to *Rushton v. Aspinall.*

But, omitting to state a demand or *notice* is bad after verdict. Doug. 684.

Dane, in his Abridgment, vol. 1, 395, ch. 20, art. 10, 1, says -- "Notice is very material. Protests are mere matter of form." Yet notice may be very loose, and it answers in all cases, if it disclose merely the fact of *demand,* and a reliance on the person notified for payment. *Shed v. Brett,* 1 Pick. 401; *Miller v. Bank of United States,* 11 Wheat. 431; *Gilbert v. Dennis,* 3 Metc. 495; 2 Johns.Ch. 337; 12 Mass. 6; 4 Wash.C.C. 464.

"The notice, however, should inform the party to whom it is addressed, either in express terms or by necessary implication, or, at all events, by *reasonable intendment,* what the bill or note is that it has become due, that it has been duly *presented* to the drawer or maker, and that payment has been refused."

Chitty on Bills (9th Lond. & 10th Amer. edit) 469.

But it has again and again been held, that the notice need not

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state a presentment in express terms, and that it will be implied from stating a demand and nonpayment, and a looking to the endorser. 34 U. S. 9 Pet. 33; 3 Kent's Comm. 108; 10 Mass. 1; 4 Mason 336; 1 Johns.Cas. 107. So, "Your note has been returned dishonored," is enough from which to intend all. *See* various other illustrations, 6 Adolph. & Ellis 499; 5 Dowl. 771; 2 Chit. 364; 2 Mees. & Welsb. 109.

It may be a letter -- merely to that effect -- and need not be a copy of the protest. 1 Chit. (2d Eng. & 1st Amer. edit) 363, 364, 498, 499; 3 Camp. 334; 2 Starkie 232; *Goodwin v. Harley,* 4 Adolph. & Ellis 520, 870; 4 Eq. 48. *See* 8 Mass. 386. And it has been adjudged, that the notice need not state, in express terms, that the note was present, or if present was exhibited, if it only contained matter from which, by *reasonable intendment,* this can be inferred. Chitty on Bills (last edit) 469; 27 U. S. 2 Pet. 254; 34 U. S. 9 Pet. 33.

It not being necessary, then, to inform the endorser of the presentment of the note itself, in so many words, there seems to be no use in having the fact stated at length in the protest, if enough appear to render the fact probable.

It would be difficult to find a reason, in the absence of positive law, why the form of the protest should not be dealt by as liberally as that of notice, and if, like the other, it disclose a demand, allow the jury to infer from that, as in the case of notice, that the note was present. Indeed, a protest is not required to be in writing at all except in case of foreign bills, drawn on persons abroad. 1 Chitty on Bills, 643; *Rogers v. Stevens,* 2 D. & E. 713; 2 Starkie on Ev. 232; 19 U. S. 6 Wheat. 572; 21 U. S. 8 Wheat. 333; 3 Wend. 173; 27 U. S. 2 Pet. 179. And then it doubtless originated in a rule merely allowing it to be done to save the expense and trouble of bringing a witness from abroad to prove the fact, rather than making it imperative.

Instead of a written protest being better evidence than a witness of the presentment and demand in case of inland bills or promissory notes, or even foreign bills drawn on persons here, it is inferior evidence to witnesses for proving presentment and demand, and is usually inadmissible, except by special statutes. 1 Chitty on Bills, 405; 3 Pick. 415; 19 U. S. 6 Wheat. 572; 5 Johns. 375; 4 Wash.C.C. 148; 4 Camp. 129; 43 U. S. 2 How. 71.

Some seem to suppose that there is danger in allowing an informal written protest to go to the jury as evidence to be weighed in proving that the note was present. But there can be no more in that than in allowing an informal notice to go to the jury. The jury must be satisfied, in both cases, and should so be instructed, that all has been done which the law in both requires. If there be any defense in either case, that all proper has not been done, it can

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probably be shown by counter evidence in one as well as the other. Why should it not be? and why is not that an ample security against being improperly charged? For the protest is not a written contract between the parties, or a sealed instrument not open to be contradicted by parol evidence. But it is a mere certificate of a notary, a subordinate officer, admitted for convenience as *prima facie* evidence of certain facts, and allowed to that extent in order to save the expense of witnesses and delays, but ought to be always open to be impaired or disproved by the other party in interest, who has never been heard before him, and of course cannot reasonably be concluded forever by his acts. The notary is not required to swear to them, when they are admissible as evidence, as he would be to a deposition, because of his official obligations and standing. But the character and construction that properly belong to his certificate as evidence seem to be like those of a deposition; and if it states, in so many words, that the note was presented, or states what justifies such an inference, there appears to be no good reason why the contrary may not be proved, if such was the fact, and the endorser be thus protected against statements or inferences not well founded. And the absurdity of the contrary course is still more apparent as to protests, when one made by any respectable merchant, and attested by two witnesses, in the absence of a notary,

has the same validity as his. Chitty on Bills 303; Story on Bills 276.

In *Nicholls v. Webb,* 8 Wheat. 336, counter testimony was held to be admissible against the minutes of a notary offered to prove demand and notice.

So is it admissible, that the notary mistook the place, and did not demand the bill at the place of business for the drawee. *Insurance Company v. Shamburgh,* 2 Martin's (N. S) 513.

In *Vandewall v. Tyrrell,* Mood. & Malk. 87, counter evidence was offered, and avoided the protest, because the clerk of the notary, and not the notary himself, as stated in the protest, made the demand. *See* Chitty on Bills 495, note.

This point thus being established on both principle and precedent, all the danger or difficulty as to the merits of the case, by admitting a protest like this, is obviated. But it is further urged against it, that presentment is averred in the declaration, and therefore must be proved. This we admit. Chitty on Bills 643-647. And so is notice averred in the declaration and notice of a presentment, and so that must be proved. 1 Chit. 633; Doug. 654, 680. All we urge here is to let them be proved by similar general statements, from which the similar inferences may be drawn in one case as the other, that the note was present at the time of the demand, unless the contrary is shown -- as it may be, if true.

Again, it is said that the forms of protest generally state, that the bill was present or exhibited. This is true. 1 Chitty

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395, 396 (1st Amer. edit); Story on Bills of Exchange, 276, note.

But we are aware of no case deciding that this fact must be stated, in so many words, in the protest itself, though we admit that the jury must be satisfied that the fact existed. Minutes in the book of a messenger deceased have been held to be proof to be submitted to a jury as evidence of due demand and notice. *Welsh v. Barrett,* 15 Mass. 380. Yet there does not appear to have been a presentment stated, *eo nomine,* or that there was any but inferential evidence that he had the

note with him. *See also North Bank v. Abbott,* 13 Pick. 469. And it is not a little remarkable, that the only statute in England, 9 and 10 Will. 3, which prescribes the form of a protest, and which is in relation to inland bills of five pounds and upwards, in order to recover damages and interest, the form does not state in so many words that the bill was present or was exhibited, but merely "at the usual place of abode of the said A. have demanded payment of the bill," &c.;, Chitty on Bills 465 (9th ed). In such cases, precisely that and that alone must be done which is contended for here -- namely leave it to the jury to infer the presence of the bill from its payment being demanded, and any other facts stated, unless the contrary is shown. Look at another analogy. It is necessary that the exhibit of the note and the demand be made in the legal hours of business. Chitty on Bills, 349, 354; *Ruben v. Bennet,* 2 Taunt. 388; 2 Camp. 537; *Parker v. Gordon,* 7 East 385; 1 Maul. & Selw. 20. But, as in respect to the presence of the note, no case holds that this must appear by so many words in the protest. And it is not stated, in the common forms, that the demand was made in the usual hours of business. 1 Chitty on Bills 396. On the contrary, the jury are allowed or instructed that they may infer, from the statement of the demand and nonpayment, that they were made within the proper hours. And if it was not, the other party would doubtless be allowed to disprove it by counter evidence.

How can such a case, then, be distinguished in principle from this, except that there is much less in the usual form of protest from which to infer that the bill was presented in legal hours than there is in this protest from which to infer that the bill was present when the demand was made. I am the more inclined, also, to the opinion, that this protest is competent evidence, because, under a special law in Louisiana, passed March 13, 1827, such protests have been adjudged sufficient. Their law uses the word "demand" when describing what the protest shall contain, and such a protest is there allowed to go to the jury as evidence from which in infer that the note was present. *Nott's Executor v. Beard,* 16 La. 308.

The bill now in dispute was on its face payable in Louisiana, and hence the principles of commercial law require that the protest

be made at the time and in the manner prescribed by that state. Story on Bills of Exchange 176; 1 Chitty on Bills 193, 506; Story's Conflict of Laws 360.

But whether the statute of Louisiana prescribing what protest shall be sufficient ought to be considered as affecting anything beyond the evidence of protest in its own courts is not very clear on principle. *See* cases, Story on Bills 172.

Hence, in forming an opinion, I have placed it mainly on general considerations, though in the construction of a Louisiana statute, which clearly affected the contract, and not the evidence; and where the judgment of its court clearly rested on the statute alone, about which some doubt exists, it ought unquestionably to control us in respect to contracts made or to be fulfilled there, even if a departure from the general principles of commercial law. I wish, also, to avert some serious consequences that I apprehend may result from the decision of the majority of the Court in several of the states of the Union.

Bills of exchange drawn in one state on persons in another must be considered, under the previous decisions of this Court, as foreign bills. *Townsley v. Sumrall,* 2 Pet. 179, 27 U. S. 586 ; *Lonsdale v. Brown,* 4 Wash.C.C. 87, 153; 1 Hill 44; 12 Pick. 283; 15 Wend. 527; 5 Johns. 375; *Dickins v. Beal,* 10 Pet. 579. Demand of payment, then, cannot be proved in suits upon them out of the state where presented, unless by a written protest, according to the cases before cited.

Whenever the protest, then, in such case, does not state in detail a presentment or presence of the bill, though stating a demand, refusal, and no objection, the protest must, as in this decision, be ruled out as incompetent evidence, and the same decision virtually implies, that no other evidence except the written protest is admissible to show that fact, or indeed any fact which may be omitted by accident or otherwise in the written protest, and that no inference can be admitted to be drawn from the protest as to presentment, when only a demand, refusal, and no objection are stated, as here. These consequences, with others before named, I would avoid, by making the protest competent evidence, and when it showed a demand, refusal, and no objection explicitly, as here, would leave it to the jury, from that and the other circumstances, to say whether they were or were not

satisfied that the note was present.

In this way it is easy to reconcile full action of the jury on the facts with that of the court on the law, and this, too, without any innovation or change in the rule as to commercial paper, or any violation of adjudged cases, but rather in conformity to them and to several strong analogies.

This Court has in other cases gone still farther, and held it proper even to expand or enlarge the rules of evidence in certain exigencies. In *Nicholls v. Webb,* 8 Wheat. 332, the principle laid

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down by Lord Ellenborough in *Pritt v. Fairclough,* 3 Camp. 305, as to the rules of evidence, was adopted -- namely, "That they must expand according to the exigencies of society." And in *Bank of Columbia v. Lawrence,* 1 Pet. 583, speaking of a rule as to diligence, Thompson, J., says -- "For the sake of general convenience it has been found necessary to enlarge this rule."

But all I ask here is to go as far as the existing rules of evidence seem to justify, and let reasonable inferences and presumptions be made by the jury from all that is stated in the protest, and thus decide whether the note was not probably present when the demand was made.