

McAfee Vs. Doremus

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Court : US Supreme Court

Decided On : 1847

Appeal No. : 46 U.S. 53

Appellant : McAfee

Respondent : Doremus

Judgement :

McAfee v. Doremus - 46 U.S. 53 (1847)

U.S. Supreme Court McAfee v. Doremus, 46 U.S. 5 How. 53 53 (1847)

McAfee v. Doremus

46 U.S. (5 How.) 53

ERROR TO THE DISTRICT COURT OF THE UNITED

STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI

SYLLABUS

By the laws of Louisiana, a notary is required to record in a book kept for that purpose all protests of bills made by him and the notices given to the drawers or endorsers, a certified copy of which record is made evidence.

Under these statutes, a deposition of the notary, giving a copy of the original bill, stating a demand of payment; a subsequent protest and notice to the drawers and endorsers respectively is good evidence.

The original protest must be recorded in a book. Its absence at the trial is therefore sufficiently accounted for.

Where a joint action against the drawers and endorser was commenced under the statute of Mississippi (which statute this Court has heretofore, [41 U. S. 16](#) Pet. 89, held to be repugnant to an act of Congress), the plaintiffs may discontinue the suit against the drawers and proceed against the endorser only.

On 8 December, 1839, the following bill of exchange was drawn.

"\$4,000 *Locopolis, Miss., Dec. 8, 1839* "

"Ninety days after date of this my first of exchange (second of same tenor and date unpaid), pay to the order of Morgan McAfee, four thousand dollars, value received, and charge the same to account of your obd't servants."

"CLYMER, POLK & CO."

"Messrs. KEYS & ROBERTS, *New Orleans* "

The firm of Clymer, Polk & Co., consisted of Isaac Clymer, Benjamin C. Polk, William C. Ivins, and Hiram Clymer.

McAfee endorsed it, and it came to the hands of the defendants in error, merchants and partners in New York, trading under the firm of Doremus, Suydams, and Nixon.

When the bill became due it was not paid, and was protested under the circumstances set forth in the first bill of exception.

In May, 1842, Doremus, Suydams, and Nixon brought a suit against the four makers and also against McAfee, the endorser. The action was a joint one, as required by a statute of Mississippi, passed on 13 May, 1837, which was as

follows.

"Section 1. Be it enacted by the Legislature of the State of Mississippi, that in all actions founded upon bills of exchange and promissory notes, the plaintiff shall be compelled to sue the drawers and endorsers living and resident in this state in a joint action, and such suit shall be commenced in the county where the drawer or drawers reside, if living in the state, and if the drawer or drawers be dead, or reside out of the state, the suit shall be brought in the county where the first endorser resides."

"Sec. 2. Be it further enacted that in all cases where any drawer, acceptor, or endorser shall have died before the commencement of

Page 46 U. S. 54

the suit, a separate action may be brought against the representatives of such drawers, endorsers, and acceptors."

"Sec. 3. Be it further enacted that the court shall receive the plea of nonassumpsit and no other, as a defense to the merits, in all suits brought in pursuance of this act, and all matters of defense may be given in evidence under the said plea. And it shall be lawful for the jury to render a verdict against part of the defendants, and in favor of the others, if the evidence before them require such a verdict, and the court shall enter up the proper judgment in such verdicts against the defendants; which judgments and verdicts shall not be reversed, annulled, or set aside for want of form."

"Sec. 4. Be it further enacted that new trials shall alone be granted to such defendants as the verdicts may have been wrongfully rendered against, and judgments shall be entered against all the other defendants in pursuance of the "

"Sec. 5. Be it further enacted, that the clerk shall issue duplicate writs to the several counties where the various defendants may reside, and shall endorse on all executions the names of the drawers and endorsers, particularly specifying the first, second, and third endorsers."

"Sec. 6. Be it further enacted, that it shall be the duty of the sheriff, in all cases, to make the money on the executions, out of the drawer or drawers, acceptor or acceptors, and in no case shall a levy be made on the property of any security or securities, endorser or endorsers, unless an affidavit from some credible person be made and filed among the papers in the case, setting forth that the principal or principals have no property in this state, out of which the plaintiff's money and costs can be made; and in such event the plaintiff may proceed with the executions against the defendants next liable, and so on until his executions be satisfied."

"Sec. 7. Be it further enacted that no sheriff or other officer shall take more than one forthcoming bond in any case for the same cause of action."

"Sec. 8. Be it further enacted that any plaintiff shall have the right to discontinue his suit against any one or more of the endorsers or securities, that he may sue in any joint action, before verdict, on payment of the costs that may have accrued by joining said defendant in such suit."

"Sec. 9. Be it further enacted, that in all suits brought under the provisions of this act, the defendants shall not be allowed to sever in their pleas to the merits of the action, and no plea of abatement shall be allowed to be filed in any cause, unless affidavit be made of the truths of the facts pleaded in the plea of abatement."

"Sec. 10. Be it further enacted, that if any plaintiff or plaintiffs shall cause to be levied an execution on any security, or their endorsers or their property, when the principal has sufficient property in this state to satisfy such execution, the party so offending shall

Page 46 U. S. 55

be deemed a trespasser, and shall be liable to an action from the party aggrieved, and exemplary damages shall, in all such cases, be awarded by the jury trying the same. Approved, May 13, 1837."

This statute was, in part, adopted by a rule of court in 1839, as follows:

"Rule XXX. The practice and proceedings in action at law, by the laws of this state, and the rules of practice for the government of the courts of law, made by the late supreme court, where not incompatible with the laws of the United States, the rules which may be prescribed by the Supreme Court of the United States for the government of this Court, or with the existing rules of this Court, shall be considered the rules and practice of this court, provided, however, and it is hereby expressly understood, that this rule does not adopt the whole of the act entitled 'An act to amend the laws respecting suits to be brought against endorsers of promissory notes,' approved May 13, 1837, but that all of said act, except the tenth section thereof, is and it is intended to be adopted."

At June term, 1842, McAfee pleaded the general issue.

In June, 1843, three of the four drawers of the bill having been served with process and the remaining one not, the suit was discontinued as to the drawers, and continued against McAfee alone.

In December, 1843, the cause came on for trial, when a verdict was found for the plaintiffs. During the trial, however, the two following bills of exception were taken.

" *First Exception* "

"Be it remembered that on the trial of this cause, on this 8 June, 1844, the plaintiffs in this case offered in evidence a bill of exchange in these words:"

"\$4,000 *Locopolis, Miss., Dec. 8, 1839* "

"Ninety days after date of this my first of exchange (second of same tenor and date unpaid), pay to the order of Morgan McAfee four thousand dollars, value received, and charge the same to account of your ob't servants."

"CLYMER, POLK & CO."

"Messrs. KEYS & ROBERTS, *New Orleans* "

Having endorsed thereon the following names, three of which were erased:

"Pay to Doremus, Suydams & Nixon, or order. Morgan McAfee, Charleston P.O., "

"A. H. Davidson, Charleston P.O., Miss.; G. Davidson, Charleston P.O., Miss.; M. L. Cooper & Co."

The plaintiff then proved that the names of A. H. Davidson and G. Davidson had been erased before the maturity of the bill. The plaintiff then offered in evidence the copy of the original

Page 46 U. S. 56

protest, accompanied by the deposition of the notary public, in these words:

"United States of America, Eastern District of Louisiana, City of New Orleans, ss:"

"Be it remembered, that on this thirteenth day of May, in the year of our Lord one thousand eight hundred and forty-four, before me, M. M. Cohen, a commissioner duly appointed on 19 April, 1842, by the circuit court of the United States in and for the Eastern District of Louisiana, under and by virtue of the acts of Congress, entitled, "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed Feb. 20, 1842, and the act of Congress, entitled "An act in addition to an act entitled *An act for the more convenient taking of affidavits and bail in civil causes depending in the courts in the United States,*' passed March 1, 1817, and the act entitled '*An act to establish the judicial courts of the United States*'" passed Sept. 24, 1789, personally appeared H. B. Cenas, a person of sound mind and lawful age, a witness for the plaintiff in civil suit now depending in the district court of the United States, in and for the Northern District of Mississippi, wherein Doremus, Suydams, and Nixon are plaintiffs and Clymer, Polk & Co. (drawers), and Morgan McAfee (endorser) are defendants, and the said H. B. Cenas being by me first carefully examined, and cautioned, and sworn to testify the whole truth and nothing but the truth, did depose and say that he is a notary public, duly commissioned and sworn, in and for the City and Parish of New Orleans, State of Louisiana; that he held said office on the tenth day of March, A.D. 1840, on which day, at the request of the Commercial Bank of New Orleans, holder of the original draft, of which the

following is a copy, to-wit:"

"\$4,000 Locopolis, Miss., December 8, 1839"

" Ninety days after date of this my first of exchange (second of same tenor and date unpaid), pay to the order of Morgan McAfee four thousand dollars, value received, and charge the same to account of your obedient servants."

"CLYMER, POLK & CO."

" Messrs. KEYS AND ROBERTS, New Orleans."

" Endorsed: MORGAN Mc AFEE, *Charleston P. O.* "

" Messrs. M. D. COOPER & Co."

"He, the said notary, presented said draft to a clerk of the drawees at their counting room (said drawees not being in) and demanded payment thereof, and was answered that the same could not be paid; whereupon he, the said notary, did publicly and solemnly protest said draft for nonpayment, and of protest did give notice to Clymer, Polk & Co., drawers, and to Morgan McAfee, endorser, and M. D. Cooper & Co., endorsers, by letters to the

Page 46 U. S. 57

drawer and first endorser severally written and addressed, informing them of said protest, and that the holders looked to them for payment; which letters he, the said notary, did direct to the said drawers and said first endorsers, respectively, as follows -- the one for Clymer, Polk & Co., drawers, to them at Locopolis, Mississippi, and that for the said Morgan McAfee, the first endorser, to him at Charleston P.O., Mississippi, and by delivering that for the last endorsers to themselves. Which letters he, the said notary, did put into the post office at New Orleans aforesaid, on the day and date of said protest. All of which was done under the hand of said notary, and recorded in presence of competent witnesses and in due form of law."

"The notary's fees for said protest and notices amounted to \$3.50."

"The document A., M. M. Cohen, United States commissioner, is sworn to by me,"

"H. B. CENAS, *Notary Public* "

"United States of America, North circuit and Eastern District of Louisiana, City of New Orleans, ss:"

"I, M. M. Cohen, a commissioner duly appointed on 19 April, 1842, by the Circuit Court of the United States for the Ninth Circuit and Eastern District of Louisiana, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 20, 1812, and the act of Congress, entitled "An act in addition to an act entitled *An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,*" passed March 1, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is that the witness lives in New Orleans, State of Louisiana, more than one hundred miles from Pontotoc, State of Mississippi, the place of trial of the cause for and in which said deposition is taken and is necessary. I further certify that no notification was made out and served on the defendants, or adverse parties, their agent or attorney, to be present at the taking of the deposition, and to put interrogatories if he or they may think fit, and that no notification of the time and place of taking the said deposition was made out and served on said defendants or adverse parties, because neither the said adverse parties nor any attorney or agent of said adverse parties was, at the time of taking said deposition, within (100) one hundred miles of the said City of New Orleans, the place of taking the said deposition. I further certify, that, on this thirteenth day of May, A.D. 1844, I was by the witness, who is of sound mind and lawful age, and the witness was by

me carefully examined and cautioned, and sworn to testify the whole truth, and the deposition was by me reduced to writing in the presence of the witness; and after carefully reading the same to the witness, he subscribed the same in my presence."

"I have retained the said deposition in my possession for the purpose of sealing up, directing, and forwarding the same with my own hands to the court for which the same was taken."

"I further certify that I am not of counsel or attorney to either of the parties in said deposition and caption named or in any way interested in the event of the said civil cause named in the caption."

"In testimony whereof, I have hereunto set my hand and seal, the words 'are plaintiffs' being first interlined on page 1, *ante*. "

"M. M. COHEN [L.S.]"

" *U.S. commissioner circuit and district court United States* "

" *for the Ninth circuit and Eastern District of Louisiana* "

"Commissioner's fee, \$10.00"

"Notary for copy annexed, 2.59"

"Paid by plaintiffs"

"M. M. COHEN, *U.S.C.* "

"United States of America, State of Louisiana:"

"By this public instrument of protest be it known that, on this tenth day of March, in the year one thousand eight hundred and forty, at the request of the Commercial Bank of New Orleans, holder of the original draft, whereof a true copy is on the reverse hereof written, I, Hilary Breton Cenas, a notary public in and for the City and Parish of New Orleans, State of Louisiana aforesaid, duly commissioned and

sworn, presented said draft to a clerk of the drawees at their counting room (said drawees not being in), and demanded payment thereof, and was answered 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, re-exchange, costs, charges, and interests, suffered or to be suffered, for want of payment of the said draft. Thus done and protested in the presence of Law. Dornan and Ernest Granet, witnesses."

"In testimony whereof, I grant these presents under my signature, and the impress of my seal of office, at the City of New Orleans, on the day and year first above written."

"H. B. CENAS, *Notary Public* "

"[L. S.]"

"Original signed"

"LAW. DORNAN"

"E. GRANET"

"\$4,000 *Locopolis, Miss., Dec. 8, 1839* "

"Ninety days after date, of this my first of exchange (second of same tenor and date unpaid), pay to the order of Morgan McAfee

Page 46 U. S. 59

four thousand dollars, value received, and charge the same to account [of] your obedient servants."

"CLYMER, POLK & Co."

"Messrs. KEYS & ROBERTS, New Orleans"

"Endorsed -- Morgan McAfee, Charleston P. O., Miss., M. D. Cooper & Co."

"I, the undersigned notary, do hereby certify that the parties to the draft, whereof a true copy is embodied in the accompanying act of protest, have been duly notified of the protest thereof by letters to them by me written and addressed, dated on the day of said protest, and served on them respectively this day, in the manner following, viz., by depositing those for the drawers and first endorsers in the post office in this city on the same day as this protest, directed to them respectively as follows: that for the drawers, to them at Locopolis, Miss.; and that for the first endorser, to him at Charleston P. O., Miss.; and by delivering that for the last endorsers to themselves."

"In faith whereof, I hereunto sign my name, together with Law. Dornan, and Ernest Granet, witnesses, at New Orleans, this 11 March, 1840."

"Original signed -- Law. Dornan, E. Granet."

"H. B. CENAS, *Not. Pub.* "

"I certify the foregoing to be a true copy of the original protest, draft, and memorandum of the manner in which the notices were served on file and of record in my office."

"In faith whereof I grant these presents, under my signature, and the impress of my seal of office, at New Orleans, on this ninth day of November, in the year of our Lord one thousand eight hundred and forty-three."

"H. B. CENAS, *Not. Pub.* "

"[L.S.]"

"Sworn to before me."

"M. M. COHEN, *U.S.C.* "

"To the introduction of which copy the defendant by counsel objected, but such objection was overruled by the court, and said copy allowed to be read; to which

opinion of the court the defendant excepted, and this his bill of exceptions, before the jury retired from the box, was signed and sealed by the court, and ordered to be made a part of the record."

"S. J. GHOLSON [SEAL]"

" *Second Exception* "

"The second bill of exceptions referred to the statute and rule above-mentioned, and to the discontinuance of the suit against the drawers of the bill, after three of them had been served with process. A motion was made in arrest of judgment, which was overruled by the court, to which overruling the second exception was taken. "

Page 46 U. S. 62

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

The suit was commenced on a bill of exchange against Isaac Clymer, Benjamin C. Polk, William C. Ivins, and Hiram Clymer, late merchants and partners in trade, under the firm and style of Clymer, Polk & Co., makers, and Morgan McAfee, endorser. The process was served on Polk and McAfee. The latter pleaded the general issue, and an alias summons was issued against the defendants not served. This writ was served on Isaac Clymer and William C. Ivins; and at the succeeding June term the plaintiffs, by leave of the court, discontinued the suit against Clymer, Polk & Co., leaving McAfee, the endorser, the only defendant.

On the trial the plaintiffs offered the deposition of H. B. Cenas, a notary public at New Orleans, to prove a copy of the protest, which was objected to by the defendant; but the court admitted the evidence, and this constitutes the first exception.

By the Louisiana acts of 1821 and 1827, the notary is required to record, in a book kept for that purpose, all protests of bills made by him and the notices given to the drawers or endorsers; a certified copy of which record is made evidence.

Under these statutes it is held, in Louisiana, that "a certified copy of a protest is sufficient without producing the original." *Whittemore v. Leake*, 14 La. 394.

It is admitted that in respect to foreign bills of exchange the notarial certificate of protest is of itself sufficient proof of the dishonor of a bill, without any auxiliary evidence. [*Townsley v. Sumrall*](#), 2 Pet. 179. But the rule is different, under the principles of the common law, in regard to inland bills.

The protest offered is certified, under the seal of the notary, "to be a true copy of the original protest, draft, and memorandum of the manner in which the notices were served on file and of record in his office." But the deposition of Cenas, the notary, was relied on as proving the protest and notice. The exception taken was not to the deposition, but to the copy of the protest.

It is insisted that the deposition does not identify the protest, and if it does, that it is not competent to prove the copy without accounting for the nonproduction of the original.

In regard to the latter objection, it appears from the statutes above cited, that the notary records the protest and the manner in which notice was given, and this record is, in fact, the original. It is presumed that nothing more than a short memorandum of the demand and notice is taken, from which the record is made in due form; so that there is, strictly, no original except that which is of record. And a copy of this is made evidence by the statute. Now this sufficiently accounts for the nonproduction of the original; and a sworn or a certified copy is the only evidence of the protest which can be produced.

And we think that the copy of the protest was properly considered as a part of the deposition. It was offered in connection with it, and is referred to as "Document A," as no other meaning can be given to that reference. The commissioner who took the deposition states, the copy was sworn to before him, and the exception was to the "copy" and not that it was no part of the deposition. And the original being a

matter of record, and of course not within the power of the plaintiffs in the circuit court, a sworn copy was admissible as evidence.

After the verdict was rendered against McAfee, the endorser, a motion was made in arrest of judgment on the ground that it appeared from the return of the marshal, the process had been duly served on three of the partners of the firm of Clymer, Polk & Co., who were the drawers of the bill, and that the suit had been discontinued as to them; which motion the court overruled, May 1837, which excepted.

It appears that the district judge, by a rule of court, adopted nine of the first sections of the statute of Mississippi, entitled "An act to amend the laws respecting suits to be brought against endorsers of promissory notes," &c.;, approved 13 May 1837, which required

Page 46 U. S. 64

suit to be brought against the drawers and endorsers of a bill of exchange jointly. Under this statute, the suit was brought against the drawers and also the endorser of the bill.

This statute as adopted by the district judge, was brought before this Court in the case of [Keary v. Farmers and Merchants' Bank of Memphis](#), 16 Pet. 89, in which the Court held that "the law of Mississippi is repugnant to the provisions of the act of Congress, giving jurisdiction to the courts of the United States."

We see no objection, in principle or in practice, to the discontinuance of the suit against the drawers of the bill. Their liability was distinct from that of the endorser. In no respect could the endorser be prejudiced by the discontinuance. As a matter of course it was permitted at the cost of the plaintiffs.

In the case of [Minor v. Mechanics' Bank of Alexandria](#), 1 Pet. 46, the Court held that when the defendants sever in the pleadings, "a *nolle prosequi* ought to be allowed against one defendant," that

"it is a practice which violates no rules of pleading, and will generally subserve the public convenience. In the administration of justice, matters of form not absolutely subjected to authority may well yield to the substantial purposes of practice."

The judgment of the circuit court is affirmed with costs.

ORDER

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

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