Bowling Vs. Harrison

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Court : US Supreme Court

Decided On : 1848

Appeal No. : 47 U.S. 248

Appellant : Bowling

Respondent : Harrison

Judgement :

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Bowling v. Harrison

47 U.S. (6 How.) 248

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SYLLABUS

Where the holder of a protested note and the party entitled to notice reside in the same city or town, nonce should be given to the party entitled to it, either verbally or in writing, or a written notice must be left at his dwelling house or place of

business.

The term "holder" includes the bank at which the note is payable, and the notary who may hold the note as the agent of the owner for the purpose of making demand and protest.

A memorandum upon the note, that the "third endorser, J. P. Harrison, lives at Vicksburg," was not sufficient to go to the jury as evidence of an agreement upon his part to receive notice through the post office.

It was a suit by the endorsee of a promissory note against the endorser. Bowling, the endorsee, lived in Maryland, and Harrison, the endorser, in Mississippi.

The note was as follows:

"$5,800 *Vicksburg, November, 26, 1836* "

"Two years after date I promise to pay to the order of W. M. Pinckard five thousand eight hundred dollars for value received, negotiable and payable at the office Planters' Bank, Vicksburg."

"[Signed] A. G. CREATH"

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Endorsed: "Pay Pinckard and Payne or order. W. M. Pinckard." "Pay J. P. Harrison, or order. Pinckard and Payne." "Pay John D. Bowling, or order. J. P. Harrison."

At the foot of said note and on the face thereof was the following memorandum: "Third endorser, J. P. Harrison, lives at Vicksburg."

At May term, 1840, suit was commenced by Bowling against Harrison, and the cause came on for trial at May term, 1842. The jury, under the instructions of the court, found a verdict for the defendant, when the following bill of exceptions was

taken by the counsel for the plaintiff.

" *Bill of Exceptions* "

"The plaintiff proved, by Alexander H. Arthur, a witness, who was sworn, that said memorandum was in the hand writing of the defendant, J. P. Harrison, and thereupon said memorandum was read to the jury. The plaintiff then proved by said Arthur that said note was deposited in the office of the Planters' Bank at Vicksburg, Mississippi, on 29 November, 1838, for collection, and that on that day, 29 November, 1838, he demanded payment thereof of the teller of said bank, who refused to pay the same; that on the same day he deposited in the post office at Vicksburg a written notice of the nonpayment of said note, directed to said defendant, Jilson P. Harrison, informing him of the nonpayment of said note. The said witness further stated that he acted as the agent of the Planters' Bank in making demand of payment, and giving notice of nonpayment of said note. Said witness further stated, that Jilson P. Harrison, the defendant, lived in the Town of Vicksburg, in which is and was the office of the Planters' Bank, when the note sued on was payable at the date of the maturity of said note. That for several years prior to the maturity of said note, it had been the usage of the Planters' Bank of Vicksburg to have notice served personally upon the endorsers resident in Vicksburg unless there was a memorandum on the note appointing some place at which notice would be received, and if there was a memorandum on the note designating a place where notice was to be served, then the notice was left at such place. That this usage applied to notes discounted or deposited in bank for collection. That the language of these agreements was generally as follows: 'Endorser will receive notice at Vicksburg post office,' &c.;, though sometimes they were in the language of the one attached to the note sued on; that seeing the defendant's name written at the foot of this note sued on, he supposed it to be an undertaking on his part to receive notice through the Vicksburg

post office according to the usage of the bank, and accordingly gave him notice of the nonpayment of the note by depositing the same in the Vicksburg post office

addressed to him at Vicksburg, and that he gave no other notice of the nonpayment of the note to defendant. This being all the evidence in the cause, the court instructed the jury that to charge an endorser, if he lived in the town in which the note was made payable, the notice must be personal, unless he had agreed to receive it elsewhere or unless, by the custom and usage of the bank at which the note is made payable, notice of nonpayment was left at the post office. That the memorandum attached to the note sued on was not a sufficient agreement to receive notice at the post office, and dispense with personal service on the endorser. The court further instructed the jury, that the custom and usage of the bank, as proved in this case by the witness, Arthur, was not sufficient to dispense with personal notice. To which opinion of the court, the plaintiff, by his attorney, excepted before the jury retired from the box, and presented this his bill of exceptions, and prays that the same be signed, sealed, enrolled, and made a part of the record in this cause, which is done accordingly."

"J. Mc KINLEY [SEAL]"

Upon this exception the case came up to this Court.

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MR. JUSTICE GRIER delivered the opinion of the Court.

The first assignment of error in this case is to the instruction

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given by the court to the jury

"That to charge an endorser if he lived in the town in which the note was made payable, the notice must be personal unless he had agreed to receive it elsewhere or unless, by custom and usage of the bank at which the note is payable, the notice of nonpayment was left at the post office."

As the only question on the trial of the cause was the sufficiency of notice left at the post office at Vicksburg to charge an endorser residing there, and not whether a copy left at his dwelling house or place of business would be proper, the phrase "personal notice" was evidently intended and understood to include the latter in opposition to the former. This instruction is therefore not objected to on the ground of any inaccuracy of expression on that point. But the complaint is that the rule of law on this subject was erroneously enunciated by the court in stating the conditions under which a personal service of notice on an endorser is required to be *"residence in the town where the note was made payable."*

It is true the terms in which the rule of law on that subject is usually stated differ from those used by the court on this occasion. In *Williams v. United States Bank,* 2 Pet. 101, it is thus stated by this Court:

"If the parties reside in the same city or town, the endorser must be personally noticed of the dishonor of the bill or note, either verbally or in writing, or a written notice must be left at his dwelling house or place of business."

Mr. Justice Story (Story on Bills, 312) states the rule in these words:

"Where the *party entitled to notice* and the holder reside in the same town or city, the general rule is that the notice should be given to the party entitled to it, either personally, or at his domicile or place of business."

The endorsee or owner of the note in this case resided in Maryland, and the endorser in Vicksburg, and it is contended that, as they are the only parties, and do not reside in the same place, the rule is inapplicable to the case.

But we are of opinion that whether we regard the reasons upon which this rule is founded or a correct construction of the terms in which it is usually stated, the instruction given by the court below was correct, and not such as to mislead the jury in the application of the law to the circumstances of the case before them.

The best evidence of notice is proof of personal service on the party to be affected by it or by leaving a copy at his dwelling. Depositing a notice in the post office

affords but presumptive evidence of its reception, and is permitted to be substituted for the former only where the latter would be too

inconvenient or expensive. Hence, when the convenience of the public post is not needed for the purpose of transmission or conveyance, there is no reason for its use, or for waiving the more stringent and certain evidence of notice, and therefore, in the practical application of the rule, the relative position of the *person giving the notice* and the party receiving it forms the only criterion of the necessity for relaxing it.

A very large portion of the commercial paper used in this country is similar to that which is the subject of the present suit. They are notes made payable at a certain bank. The last endorsee or owner transmits it to that bank for collection; if funds are not deposited there to meet it when due, it is handed to a notary or agent of the bank, who makes demand and protest and gives notice of its dishonor to the endorsers; if they live in the same town or city where the bank is situated and the demand made, and *"where the note was payable,"* he serves it personally, or at their residence or place of business; if they live at a distance, so that such a service would be inconvenient and expensive, he sends the notice by mail to the nearest post office, or such other place as may have been designated by the party on whom it is to be served. This is and has been the daily practice and construction of the rule in question over the whole country, and the only one consonant with reason.

This practical application of the rule is correctly stated by the court in their instruction to the jury as connected with the circumstances of the case before them, and also within its terms as it is usually stated in the books. The term "holder" is properly applied to the person having possession of the paper and making the demand, whether in his own right or as agent for another. The Planters' Bank of Vicksburg were the "holders" of this note for collection, and were bound to give notice to all the endorsers. *Smedes v. Utica Bank,* 20 Johns. 372. The notary also, who held the note as agent of the owner for the purpose of

making demand and protest, may be properly considered as the "holder" within the letter and spirit of this rule. On a careful examination of the very numerous cases in the books in which the rule under consideration has been enunciated in the terms above stated, they will be found not essentially to differ from the present in their circumstances. In some instances also the rule has been stated in the terms used by the court below. *See* Bayley on Bills.

An exception is taken also to the instruction of the court

"That the memorandum attached to the note in this case was not a sufficient agreement to receive notice at the post office,

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and to dispense with personal notice on the endorser, and that the custom and usage of the bank, as proved in this case, were not sufficient to dispense with personal notice."

The memorandum is in the following words: "Third endorser, J. P. Harrison, lives at Vicksburg." The only direct evidence of usage was

"that for several years prior to the maturity of said note, it had been the usage of the Planters' Bank of Vicksburg to have notice served personally upon the endorsers resident in Vicksburg, unless there was a memorandum on the note designating a place where notice was to be served; then the notice was left at such place."

This is in fact no usage peculiar to Vicksburg, but the general rule of commercial law. The notary appears to have mistaken this memorandum for an agreement to receive notice at the Vicksburg post office, and, however willing to excuse himself, he has not ventured to swear directly that there was any known usage to justify this construction, or rather misconstruction, of this memorandum. The counsel for plaintiff in error complain that the court did not submit it to the jury to say whether an inference might not be drawn, from some equivocal or obscure expressions of the witness, that there was such a usage.

It is true the jury are the proper judges of the credibility and weight of testimony, but the court should not instruct them to presume or infer important facts, unless there be testimony which, if believed, would justify such a conclusion.

It is of the utmost importance to commercial transactions, that the rules of law on the subject of notice which is to charge an endorser be stable and certain, and not suffered to fluctuate and vary with the notions or caprice of banking corporations or village notaries. A usage, to be binding, should be definite, uniform, and well known. It should be established by clear and satisfactory evidence, so that it may be justly presumed that the parties had reference to it in making their contract. Every day's experience shows that notaries, in many places, fall into loose ways of performing their duties, either through negligence or ignorance, and courts should be cautious how they encourage juries to presume usages and customs contrary to the settled rules of law, in order to sanction the mistakes or misconceptions of careless or incompetent officers. It was as easy to have written the memorandum on this note, "The endorser, J. P. Harrison, agrees to receive notice at the Vicksburg post office," as to write it in its present form; and one can hardly conceive of the possibility of a well known and established usage, that a written memorandum should be construed without any regard to its terms or plain meaning. Those who affirm the existence of such a strange usage should be held to

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strict proof of it, and the court were right in not submitting it to the jury to infer such an improbable and unreasonable custom, by forced or astute construction of equivocal expressions from a willing witness.

Let the judgment 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 Southern 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 circuit court in this cause be and the same is hereby affirmed with costs.