

## SLACUM v. POMERY.

*Damages on protested bill.—Action against indorser.—Error.*

In an action by the indorsee against the indorser of a foreign bill of exchange, the defendant is liable for damages according to the law of the place where the bill was indorsed.<sup>1</sup>

The indorsement is a new and substantive contract.

In an action of debt against the indorser of a bill of exchange, under the statute of Virginia, it is necessary that the declaration should aver notice of the protest for non-payment.

It is not too late to allege, as error, in the appellate court, a fault in the declaration, which ought to have prevented the rendition of a judgment in the court below.<sup>2</sup>

*Pomery v. Slacum, 1 Cr. C. C. 578, reversed.*

ERROR to the Circuit Court for the district of Columbia, sitting at Alexandria, in an action of debt (under the law of Virginia), brought by Pomery against Slacum, as indorser of a bill of exchange, dated the 6th of August 1807, drawn in the island of Barbadoes, by Charles Cadogan, a merchant residing there, at 60 days' sight, upon Barton, Irlam & Higginson, at Liverpool, in England, for 138*l.* 17*s.* 9*d.* sterling, payable to Slacum, or order, who indorsed it, at Alexandria, in the district of Columbia, to the plaintiff.

The declaration was, "of a plea that he render unto him 138*l.* 17*s.* 9*d.* sterling money of Great Britain, with interest at the rate of five per centum per annum, from the 23d day of December 1807, until paid, together with fifteen per cent. damages on the said 138*l.* 17*s.* 9*d.* and 10*s.* 6*d.* sterling, of the value of \$2.33, current money of the United States, costs of protest, which to him he owes," &c.

It then stated the making and indorsing of the bill, the non-acceptance and non-payment, and the protest for non-payment, "by reason of which premises, and by force of the statute in that case made and provided, action hath accrued to the plaintiff to demand and have of the defendant the said sum of 138*l.* 17*s.* 9*d.* sterling, and interest at the rate of five per cent. per annum, from the 23d of December 1807, until paid, \*together with fifteen per cent. damages, and 10*s.* 6*d.* sterling, of the value," &c.

Upon the trial of the cause, on the issue of *nil debet*, the defendant below took a bill of exception, stating that evidence was offered of the bill, the indorsement by the defendant to the plaintiff, in Alexandria (both parties being inhabitants of that town), the protest for non-payment, and that, by the laws of Barbadoes, the damages, upon protested bills of exchange, were only ten per cent. upon the principal and interest due upon the bill. Whereupon, the defendant prayed the court to instruct the jury, that the plaintiff was not entitled to recover more than the damages allowed upon protested bills, according to the law of Barbadoes, and that he was not entitled in this case to fifteen per cent. damages, which instruction the court refused to give.

The verdict and judgment being for the plaintiff, for the whole amount demanded in the declaration, the defendant brought his writ of error.

The act of assembly of Virginia (P. P. 113) provides, "that where any bill of exchange is or shall be drawn, for the payment of any sum of money, in which the value is or shall be expressed to be received, and such bill is or shall be protested for non-acceptance or non-payment, the drawer or indorser shall be subject to fifteen per centum damages thereon, and the bill shall

<sup>1</sup> *Lenox v. Wilson*, 1 Cr. C. C. 170.

<sup>2</sup> *Woodward v. Brown*, 13 Pet. 5; *Maher v. Ashmead*, 30 Penn. St. 344.

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carry an interest of five per centum per annum, from the date of protest, until the money therein drawn for shall be fully satisfied and paid." " And that it shall be lawful for any person or persons having a right to demand any sum of money, upon a protested bill of exchange, to commence and prosecute an action of debt, for principal, damages, interest and charges of protest, against the drawers or indorsers jointly, or against either of them separately ; and judgment shall and may be given for such principal, damages and charges, and interest upon such principal, after the rate aforesaid, to the time of such judgment, and for interest upon the said principal money recovered, after the rate <sup>\*</sup>of five per centum per annum, until the same [\*223] shall be fully satisfied.

*Swann*, for the plaintiff in error, contended : 1. That the damages must be according to the law of the place where the bill was drawn. 2. That it was not averred in the declaration, that the defendant had notice of the protest for non-payment. And although this might have been taken advantage of in the court below, in arrest of judgment, yet it was also a fatal objection upon a writ of error. The record does not show that the plaintiff was entitled to his judgment. 2 Doug. 679.

*Youngs*, contrâ.—This is not an action upon the custom of merchants, but upon the statute of Virginia.

**MARSHALL**, Ch. J.—It has never been doubted, in Virginia, that notice is as necessary, in an action upon the statute, as upon the custom of merchants.

*Youngs*.—There was no motion in arrest of judgment. This objection was not taken in the court below.

**MARSHALL**, Ch. J.—There can be no doubt, that anything appearing upon the record, which would have been fatal upon a motion in arrest of judgment, is equally fatal upon a writ of error.

*Youngs*.—This court, in the case of *Mandeville v. Riddle*, 1 Cranch 290, decided, that an action by a holder of a promissory note against an indorser, is only by reason of the value received, and yet in the case of *Wilson v. Codman*, 3 Cranch 193, 208, this court decided, that the averment of value received was an immaterial averment, and need not be proved. In our case, if notice were necessary to entitle the <sup>\*</sup> plaintiff to a verdict, it will [\*224] be presumed, after verdict, that notice was proved.

The statute upon which this action is founded does not require notice. The declaration avers all that the statute requires to constitute a cause of action. The want of notice is only to be taken advantage of by the defendant, in his defence at the trial. The time of bringing this action shows that reasonable notice was given. This court has decided, that it is not necessary to give notice of a protest for non-acceptance.

As to the question of damages. The law of the place where the contract was made must prevail. The contract of the defendant as indorser, was made in Alexandria. Every indorsement creates a new contract, and is in the nature of a new bill.

March 5th, 1810. **MARSHALL**, Ch. J., delivered the opinion of the court, as follows, viz :—Upon a critical examination of the act of assembly on which

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this action is founded, the court is of opinion that it is rightly brought. Although the drawer of the bill was not liable to the damages of Virginia, the indorser is subject to them, he having indorsed the bill in Alexandria.

The words of the act are, that where a bill of exchange shall be protested, "the drawer or indorser shall be subject to fifteen per cent. damages thereon." The third section gives an action of debt "against the drawers or indorsers jointly, or against either of them separately. The act of assembly appears to contemplate a distinct liability in the indorser, founded on the contract created by his own indorsement, which is not affected by the extent of the liability of the drawer. This is the more reasonable, as a bill of exchange is taken as much on the credit of the indorser, as of the drawer ; and the indorsement is understood to be, not simply the transfer of the paper, but a new and a substantive contract.

\*There is, however, an objection taken to this declaration. It <sup>\*225]</sup> omits to allege notice of the protest ; an omission which is deemed fatal. It has been argued, that the act of assembly which gives the action of debt, not requiring notice to be laid in the declaration, that requisite, which is only essential in an action founded on the custom of merchants, is totally dispensed with. But this court is not of that opinion. In giving the action of debt to the holder of a bill of exchange, and in giving it the dignity of a specialty, the legislature has not altered the character of the paper in other respects. It is still a pure commercial transaction, governed by commercial law. Notice of the protest is still necessary, and the omission to aver it in the declaration, is still fatal.

Had this error been moved in arrest of judgment, it is presumable, the judgment would have been arrested ; but it is not too late to allege, as error, in this court, a fault in the declaration, which ought to have prevented the rendition of a judgment in the court below. The judgment is reversed, and the cause remanded, with direction that the judgment be arrested.

After the opinion was delivered, *Youngs* prayed that the cause might be remanded with leave to amend.

MARSHALL, Ch. J.—Here is a verdict, which must be set aside, before an amendment can be allowed. It might be set aside by the court below, but this court can see no reason in the record for setting it aside.