

Union Bank v. Hyde.

before the chancellor of Virginia. This is setting up a wrong in Straas, to support a right in his assignee.

Decree affirmed.

UNION BANK v. HYDE.

Promissory note.—Waiver of demand and notice.—Parol evidence.

A protest of an inland bill, or promissory note, is not necessary ; nor is it evidence of the facts stated in it.

The following undertaking of the indorser of a promissory note, " I do request that hereafter any notes that may fall due in the Union Bank, in which I am, or may be, indorser, shall not be protested, as I will consider myself bound in the same manner as if the said notes had been, or should be, legally protested," held to be ambiguous, as to whether it amounted to a waiver of demand and notice ; and parol proof admitted, to show that it was the understanding of the parties, that the demand and notice required by law to charge the indorser should be dispensed with.

ERROR to the Circuit Court for the District of Columbia.

March 14th, 1821. This cause was argued by *Jones*, for the plaintiff in error, and by *Swann* and *Key*, for the defendant in error.

March 16th. JOHNSON, Justice, delivered the opinion of the court.—This *573] cause turns upon the construction of a written *instrument, in these words :

"I do request that hereafter any notes that may fall due in the Union Bank, on which I am, or may be indorser, shall not be protested, as I will consider myself bound, in the same manner, as if the said notes had been, or should be, legally protested.

(Signed)

THOMAS HYDE."

Two constructions have been contended for: the one, literal, formal, vernacular ; the other, resting on the spirit and meaning, as a mercantile and bank transaction. The former has been sustained in the court below, and the correctness of that opinion is now to be examined.

The defendant, it appears, became indorser to one Foyles, and the note was discounted in the Union Bank : on its falling due, it is admitted, that no demand was made on the maker, or notice given to the indorser.

The case presents the right of the plaintiffs under two aspects : 1st. Upon the just construction of the written instrument : 2d. The practical exposition of it by the defendant himself : and it might also have presented a third—the specific waiver of demand and notice on the note in suit. By some assumed analogy, or mistaken notion of law, this practice of protesting inland bills, has now become very generally prevalent ; and since the inundation of the country with bank transactions, and the general resort to this mode of exposing the breaches of punctuality which occur upon notes, a *574] solemnity, cogency *and legal effect have been given to such protests, in public opinion, which certainly has no foundation in the law-merchant. The nullity of a protest on the legal obligations of the parties to an inland bill, is tested by the consideration, that independently of statutory provision (if any exists anywhere) or conventional understanding, the protest on an inland bill is no evidence in a court of justice of either of the incidents which convert the conditional undertaking of an indorser, into an

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absolute assumption. The protest belongs altogether to foreign mercantile transactions, upon which, on the contrary, it is an indispensable incident to making a drawer of a bill, or indorser of a note, liable. On foreign bills, it is the evidence of demand, and an indispensable step towards the legal notice of non-payment, in consequence of which the undertaking of the drawer or indorser becomes absolute. Hence, as to foreign transactions, it is justly predicted of a protest, that it has a legal or binding effect.

But the writing under consideration has reference, exclusively, to inland bills, and as to them, the protest has no legal or binding effect. The indorser became liable, only on demand and notice, and of these facts, the protest is no evidence. How, then, shall the waiver of the protest be adjudged a waiver of demand and notice, or, in effect, convert his conditional into an absolute undertaking? Had the defendant omitted one word from his undertaking, it would have been difficult to maintain an affirmative answer to this proposition. But what *are we to understand him to [*575 intend, when he says, "I will consider myself bound in the same manner as if said notes had been, or should be, *legally* protested?" Except as to foreign bills, a protest has no legal binding effect, and as to them, it is evidence of demand, and incident to legal notice. It either, then, had this meaning, or it had none.

This reasoning, it may be said, goes no further than to a waiver of the demand, but what effect is to be given to the word bound? It must be, to pay the debt, or it means nothing. But to cast on the indorser of a foreign bill an obligation to take it up, protest alone is not sufficient; he is still entitled to a reasonable notice, in addition to the technical notice, communicated by the protest. To bind him to pay the debt, all these incidents were indispensable, and may, therefore, be well supposed to have been in contemplation of the parties, when entering into this contract.

It is not unworthy of remark, that the writing under consideration asks a boon of the plaintiff for which it tenders a consideration. It requests to be exempted from an expense, exposure or mortification, on the one hand; and on the other, what is tendered in return? The intended object and conceived effect of the protest, on the one hand, is to convert his undertaking into an unconditional assumption, and the natural return is, to make his undertaking at once absolute, as the effectual means of obtaining the benefit solicited.

If this course of reasoning should not be held conclusive, it would, at least, be sufficient to prove the *language of the undertaking equivocal; and that the sense in which the parties used the words in which they [*576 express themselves, may fairly be sought in the practical exposition furnished by their own conduct, or the conventional use of language established by their own customs or received opinions. On this point, the evidence proves, that, by the understanding of both parties, this writing did dispense with demand and refusal, that the company, on the one hand, discontinued their practice of putting the notes indorsed by defendant in the usual course for rendering his assumption absolute, and the defendant, on the other, continued, up to the last moment, to acquiesce in this practice, by renewing his indorsements, without ever requiring demand or notice. This was an unequivocal acquiescence in the sense given by the company to his undertaking, and he cannot be permitted to lie by, and lull the company into a state of

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security, of which he might, at any moment, avail himself, after making the most of the credit thus acquired.

Judgment reversed, and *venire facias de novo* awarded.

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*CLARK *et al.* v. GRAHAM.

Execution of power.—Lex loci rei sitæ.—Deeds.—Parol exchange.

A power to convey lands must possess the same requisites, and observe the same solemnities, as are necessary in a deed directly conveying the lands.¹

A title to lands can only be acquired and lost, according to the laws of the state in which they are situate.

The laws of Ohio require all deeds of land to be executed in the presence of two witnesses, and a deed executed in the presence of one witness only, is void.

A parol exchange of lands, or parol evidence that a conveyance should operate as an exchange, will not convey any estate or interest in lands.²

ERROR to the Circuit Court for the district of Ohio.

March 16th, 1821. TODD, Justice, delivered the opinion of the court in this cause, which was submitted without argument.

This is an action of ejectment, brought in the circuit court for the district of Ohio. At the trial, the plaintiff proved a title sufficient in law, *prima facie*, to maintain the action. The controversy turned altogether upon the title set up by the defendants. That title was as follows: A letter of attorney, purporting to be executed by John Graham, bearing date the 23d of September 1805, authorizing Nathaniel Massie to sell all his estate, &c., in all his lands in Ohio. This power was executed in the presence of two witnesses, in Richmond, in Virginia, and was there acknowledged by Graham, *578] before a notary-public. *Nathaniel Massie, by a deed dated the 7th day of June 1810, and executed by him in Ohio, in his own right, as well as attorney to John Graham, conveyed to one Jacob Smith, under whom the defendants claimed the land in controversy. This deed was executed in the presence of one witness only, and was duly acknowledged and recorded in the proper county in Ohio. The deed and letter of attorney, so executed and acknowledged, were offered in evidence by the defendants, and were rejected by the court, upon the ground, that they were not sufficient to convey lands, according to the laws of Ohio.

The defendants also offered in evidence, a deed from Jacob Smith and wife, to the said Graham, dated the 7th of March 1811, duly witnessed acknowledged and recorded, conveying a certain tract of land in Ohio, and offered further to prove, that the tract of land so conveyed was given in exchange for and in consideration of the lands conveyed by the deed first mentioned to Smith. This evidence also was rejected by the court. A bill of exceptions was taken to these proceedings, by the defendants; and the jury found a verdict for the plaintiff, upon which a judgment was entered for the plaintiff, and the present writ of error is brought by the defendants to revise that judgment.

¹ Piatt v. McCullough, 1 McLean 69.

² Purcell v. Miner, 4 Wall. 513.