appeal was taken before the commissioners were appointed, upon the ground that no libel could be sustained *in personam*, in such cases.

*430] *February 15th, 1826. *D. Hoffman*, for the respondent, stated, that the appeal might be considered as well taken. The case of the *The Palmyra*, 10 Wheat. 502, was distinguishable from this, as the damages there claimed were a part only of an entire decree *in rem* and *in personam;* but that here the sole inquiry is, whether any libel *in personam* could be sustained, which was an objection that covered the whole libel, and the entire decree; that although the report of the commissioners, when made, might be appealed from, yet the inquiry was only as to the amount; and that if no libel could be sustained, and expensive and tedious investigation would be saved, by first establishing the point that a libel *in personam* cannot be sustained in such cases.

The Court were of opinion, that the case was embraced by the principle decided in the case of *The Palmyra*, since an appeal would still lie from the damages, when ascertained; but that, had the decree of the circuit court dismissed the libel, such decree would have been final.

Appeal dismissed.

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*431] *Mills, Plaintiff in error v. The President, Directors and Company of the Bank of the United States, Defendants in error.

Notice of non-payment.—Rule of court.

No precise form of notice to the indorser of a promissory note is necessary;[1] and it is not necessary to state, in the notice, who is the holder; nor will a mistake as to the date of the note vitiate the notice, if it convey to the party a sufficient knowledge of the particular note which has been dishonored.[2]

It is not necessary, that the notice should contain a formal allegation, that it was demanded at the place where payable; it is sufficient, that it state the fact of non-payment of the note, and that the holder looks to the indorser for indemnity.[3]

By the general law, demand of payment of a bill or note must be made on the third day of grace, but where a note is made for the purpose of being negotiated at a bank, whose custom is to demand payment, and give notice on the fourth day, that custom forms a part of the law of the contract; and it is not necessary that a personal knowledge of the usage should be brought home to the indorser, for that purpose.

The general rule of law, requiring proof of the title of the holders of a note, may be modified by a rule of court, dispensing with proof of the execution of the note, unless the party shall annex to his plea an affidavit that the note was not executed by him.[4]

Error of the Circuit Court of Ohio.

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[1] Reedy v. Seixas, 2 Johns. Cas. 337.

[2] A notice of non-payment is insufficient, if there be two or more notes in existence, and over-due, to which it would equally apply. Cook v. Litchfield, 9 N. Y. 279. But a notice is sufficient, if it reasonably apprise the indorser of the particular instrument in which he is sought to be charged, though he may have indorsed several notes of like tenor, only distinguished by a number on the margin, which is not referred to in the notice. Hodges v. Shuler, 22 N. Y. 114. A notice is sufficient, though the note be misdescribed, if there be no other in existence to which the description could be applied, and the indorser could not have been misled. Cayuga County Bank v. Worden, 1 N. Y. 413; s. c. 6 Id. 19. s. p. Bank of Cooperstown v. Woods, 28 Id. 545, 551.

[3] See Ransom v. Mack, 2 Hill 587.

[4] Odenheimer v. Stokes, 5 W. & S. 175; McAdams v. Stilwell, 13 Penn. St. 90. And see Miller v. Weeks, 22 Id. 89; McGovern v. Hoesback, 53 Id. 176.

March 8th, 1826. This cause was argued by *Wright*, for the plaintiff in error; and by *Webster*, for the defendants in error.

March 13th. Story, Justice, delivered the opinion of the court.—*This is a suit originally brought in the circuit court of Ohio, by the Bank of the United States, against A. G. Wood and George Ebert, doing business under the firm of Wood & Ebert, Alexander Adair, Horace Reed, and the plaintiff in error, Peter Mills. The declaration was for $3600, money lent and advanced. During the pendency of the suit, Reed and Adair died. Mills filed a separate plea of *non assumpsit*, upon which issue was joined; and upon the trial, the jury retured a verdict for the Bank of the United States, for $4641; upon which, judgment was rendered in their favor. At the trial, a bill of exceptions was taken by Mills, for the consideration of the matter of which, the present writ of error has been brought to this court. [*432

By the bill of exceptions, it appears, that the evidence offered by the plaintiffs in support of the action, "was, by consent of counsel, permitted to go to the jury, saving all exceptions to its competence and admissibility, which the counsel for the defendant reserved the right to insist, in claiming the instructions of the court to the jury on the whole case."

The plaintiffs offered in evidence a promissory note signed Wood & Ebert, and purporting to be indorsed in blank by Peter Mills, Alexander Adair and Horace Reed, as successive indorsers, which note, with the indorsements thereon, is as follows, to wit:

"Chilicothe, 20th of July 1819.

Dollars 3600.

"Sixty days after date I promise to pay to Peter Mills, or order, at the office *of discount and deposit of the Bank of the United States, at Chilicothe, three thousand six hundred dollars, for value received. [*433

Wood & Ebert."

Indorsed, "Pay to A. Adair or order, Peter Mills.

"Pay to Horace Reed or order. A. Adair.

"Pay to the P. Directors and Company of the Bank of the U. States, or order. Horace Reed."

On the upper right-hand corner of the note is also indorsed, "3185. Wood & Ebert, 3600 dollars, Sep. 18–21."

It was proved, that this note had been sent to the office at Chilicothe, to renew a note which had been five or six times previously renewed by the same parties. It was proved by the deposition of Levin Belt, Esq., Mayor of the town of Chilicothe, that, on the 22d day of September 1819, immediately after the commencement of the hours of business, he duly presented the said note at the said office of discount and deposit, and there demanded payment of the said note, but there was no person there ready or willing to pay the same, and the said note was not paid, in consequence of which, the said deponent immediately protested the said note for the non-payment and dishonor thereof, and immediately thereafter prepared a notice for each of the indorsers respectively, and immediately, on the same day, deposited one of said notices in the post-office, directed to Peter Mills, at Zanesville (his place of residence), of which notice the following is a copy:

"Chilicothe, 22d of September 1819.

*434] "Sir—You will hereby take *notice, that a note drawn by Wood & Ebert, dated the 20th day of September 1819, for 3600 dollars, payable to you, or order, in sixty days, at the office of discount and deposit of the Bank of the United States, at Chilicothe, and on which you are indorser, has been protested for non-payment, and the holders thereof look to you. Yours, respectively,

"Peter Mills, Esq." LEVIN BELT, Mayor of Chilicothe."

It was further proved by the plaintiffs, that it had been the custom of the banks in Chilicothe, for a long time previously to the establishment of a branch in that place, to make demand of promissory notes and bills of exchange, on the day after the last day of grace (that is, on the 64th day), that the Branch Bank, on its establishment at Chilicothe, adopted that custom, and that such had been the uniform usage in the several banks in that place, ever since. No evidence was given of the handwriting of either of the indorsers.

The court charged the jury: 1. That the notice being sufficient to put the defendant upon inquiry, was good, in point of form, to charge him, although it did not name the person who was holder of the said note, nor state that a demand had been made at the bank when the note was due. 2. That if the jury find that there was no other note payable in the office at Chilicothe, drawn by Wood & Ebert, and indorsed by defendant, except the note in controversy, the mistake in the date of the note, made by the notary, in the notice given to that defendant, does not impair the liability
*435] of the said defendant, and the plaintiffs *have a right to recover. 3. That should the jury find that the usage of banks, and of the office of discount and deposit in Chilicothe, was to make demand of payment and to protest and give notice, on the 64th day, such demand and notice are sufficient.

The counsel on the part of the defendant prayed the court to instruct the jury, "that before the common principles of the law relating to the demand and notice necessary to charge the indorser, can be varied by a usage and custom of the plaintiffs, the jury must be satisfied, that the defendant had personal knowledge of the usage or custom, at the time he indorsed the note; and also, that before the plaintiffs can recover as the holder and indorsee of a promissory note, they must prove their title to the proceeds, by evidence of the indorsements on the note;" which instructions were refused by the court.

Upon this posture of the case, no questions arise for determination here, except such as grow out of the charge of the court, or the instructions refused on the prayer of the defendant's (Mills's) counsel. Whether the evidence was, in other respects, sufficient to establish the joint promise stated in the declaration, or the joint consideration of money lent, are matters not submitted to us upon the record, and were proper for argument to the jury.

The first point is, whether the notice sent to the defendant, at Chilicothe, was sufficient to charge him as indorser. The court was of opinion, that it
*436] was sufficient, if there was no other *note payable in the office at Chilicothe, drawn by Wood & Ebert, and indorsed by the defendant.

It is contended, that this opinion is erroneous, because the notice was fatally defective, by reason of its not stating who was the holder, by reason of its misdescription of the date of the note, and by reason of its not stating that a demand had been made at the bank, when the note was due. The first objection proceeds upon a doctrine which is not admitted to be correct; and no authority is produced to support it. No form of notice to an indorser has been prescribed by law. The whole object of it is to inform the party to whom it is sent, that payment has been refused by the maker; that he is considered liable; and that payment is expected of him. It is of no consequence to the indorser, who is the holder, as he is equally bound by the notice, whomsoever he may be; and it is time enough for him to ascertain the true title of the holder, when he is called upon for payment.

The objection of misdescription may be disposed of in a few words. It cannot be for a moment maintained, that every variance, however immaterial, is fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party, of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact, without any doubt, the variance cannot be material, either to guard his rights, or avoid his responsibility. In the present case, the misdescription was merely in the date. The sum, the *parties, the time and place of payment, and the indorsement, were truly and accurately described. [*437
The error, too, was apparent on the face of the notice. The party was informed, that on the 22d of September, a note, indorsed by him, payable in sixty days, was protested for non-payment; and yet the note itself was stated to be dated on the 20th of the same month, and, of course, only two days before. Under these circumstances, the court laid down a rule most favorable to the defendant. It directed the jury to find the notice good, if there was no other note payable in the office at Chilicothe, drawn by Wood & Ebert, and indorsed by the defendant. If there was no other note, how could the mistake of date possibly mislead the defendant? If he had indorsed but one note for Wood & Ebert, how could the notice fail to be full and unexceptionable in fact?

The last objection to the notice is, that it does not state that payment was demanded at the bank, when the note became due. It is certainly not necessary that the notice should contain such a formal allegation. It is sufficent, that it states the fact of non-payment of the note, and that the holder looks to the indorser for indemnity. Whether the demand was duly and regularly made, is matter of evidence, to be established at the trial. If it be not legally made, no averment, however accurate, will help the case; and a statement of non-payment, and notice, is, by necessary implication, an assertion of right by the holder, founded upon his having complied *with the requisitions of law against the indorser. In point of fact, [*438
in commercial cities, the general, if not universal, practice is, not to state in the notice the mode or place of demand, but the mere naked non-payment. Upon the point, then, of notice, we think there is no error in the opinion of the circuit court.

Another question is, whether the usage and custom of the bank, not to make demand of payment until the fourth day of grace, bound the defendant, unless he had personal knowledge of that usage and custom. There is no doubt, that according to the general rules of law, demand of payment

ought to be made on the third day, and that it is too late, if made on the fourth day of grace. But it has been decided by this court, upon full consideration and argument, in the case of *Renner* v. *Bank of Columbia*, 9 Wheat. 582, that where a note is made for the purpose of being negotiated at a bank, whose custom, known to the parties, it is to demand payment and give notice on the fourth day of grace, that custom forms a part of the law of such contract, at least, so far as to bind their rights. In the present case, the court is called upon to take one step farther; and upon the principles and reasoning of the former case, it has come to the conclusion, that when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment, and give notice on the fourth day of grace, the parties
*439] are bound by that usage, whether they have a personal *knowledge of it or not. In the case of such a note, the parties are presumed, by implication, to agree to be governed by the usage of the bank at which they have chosen to make the security itself negotiable.

Another question propounded by the defendant is, whether the plaintiffs were entitled to recover, without establishing their title to the note, as holders, by proof of the indorsements. There is no doubt, that by the general rule of law, such proof is indispensable on the part of the plaintiffs, unless it is waived by the other side. But in all such cases, the defendant may waive a rule introduced for his benefit; and such waiver may be implied from circumstances, as well as expressly given. It is in this view, that the rule of the circuit court of Ohio, of 1819, which has been referred to at the bar, deserves consideration. That rule declares, "that hereafter, in any actions brought upon bond, bill or note, it shall not be necessary for the plaintiffs, on trial, to prove the execution of the bond, bill or note, unless the defendant shall have filed, with his plea, an affidavit, that such bond, bill or note, was not executed by him." We think the present case falls completely within the purview of this rule. Its object was to prevent unnecessary expense and useless delays, upon objections at trials, which were frivolous and unconnected with the merits. If the rule attempted to interfere with, or control the rules of evidence, it certainly could not be supported. But it attempts no such thing; it does not deny to the party
*440] *the right to demand proof of the execution or indorsement of the note at the trial; but it requires him, in effect, to give notice, by affidavit, accompanying the plea, that he means to contest that fact, under the issue. If the party gives no such notice, and files no such affidavit, it is on his own part a waiver of the right to contest the fact, or rather an admission that he does not mean to contest it. We see no hardship in such a rule; it subserves the purposes of justice, and prevents the accumulation of costs; it follows out, in an exemplary manner, that injunction of the judiciary act of the 2d of March 1793, ch. 22, which requires the courts of the United States "to regulate the practice thereof, as shall be fit and necessary for the advancement of justice, and especially, to that end, to prevent delays in proceedings." As no affidavit accompanied the plea of the defendant, in the present case, he had no right to insist upon the proof of the indorsements.

Another objection now urged against the judgment is, that the count demands $3600 only, and the jury gave damages amounting to $4641. But there is no error in this proceeding, since the *ad damnum* is for a larger sum. In all cases where interest, not stipulated for by the terms of the contract, is given by way of damages, the sum demanded in the declaration is less than the sum for which judgment is rendered. The plaintiffs may not recover more, as principal, than the sum demanded as such in *the declaration; but the jury have a right to add interest, by way of damages, for the delay. [*441

Some other objections have been suggested at the bar, such as, that the jury had no right, without evidence, to presume that there was no other note of Wood & Ebert, in order to help the misdescription; and that the case proved was of several liabilities of the defendants, which would not support a declaration on a joint contract. These questions have been fully argued by counsel, but are not presented by the record in such a shape as to enable the court to take cognisance of them.

Upon the whole, it is the opinion of the court, that the judgment ought to be affirmed, with costs.

Judgment affirmed.

Miller's Heirs *v.* McIntire and others.

Land-law of Kentucky.

Quære? Whether the compact of 1789, between Virginia and Kentucky, restrained the legislature of Kentucky, from prolonging the time for surveying one entry to the prejudice of another?

By the construction of the act of Kentucky of 1797, granting further time for making surveys, with a proviso, allowing to infants, &c., three years after their several disabilities are removed, to complete surveys on their entries; if any one or more of the joint-owners be under the disability of infancy, &c., it brings the entry within the saving of the proviso, as to all of the other owners.

Appeal from the Circuit Court of Kentucky.

*March 3d, 1826. This cause was argued by *Sheffey*, for the appellants; and by *Talbot*, for the respondents. [*442

March 13th. Marshall, Ch. J., delivered the opinion of the court.—This is an appeal from a decree of the circuit court of the United States for the district of Kentucky, by which the bill of the plaintiffs was dismissed *pro formâ*.

An original bill was filed by Miller's heirs, in the year 1808, to obtain from the defendants therein mentioned, the legal title to lands in their possession, to which the plaintiffs claimed the equitable right, under a prior entry. The decree made by the court, in that cause, against several of the defendants, was brought before this court by appeal, and in that case, the court determined in favor of the entry under which the title of the plaintiffs arose. (2 Wheat. 316.) An amended bill was filed in 1815, against the present defendants in error, who, in their answer, contend, among other things, that the title of the plaintiffs has been forfeited, by failing to make their survey within the time prescribed by the laws of Virginia; and that the compact between the two states restrained Kentucky from varying in any manner the laws by which titles originating anterior to the separation are to be governed.

Henry Miller, for whom the entry was made, died in March or April