nothing. Declarations of this sort having been allowed to go to the jury, and counsel to comment upon them as evidence of the condition of affairs on deck, the jury regarded it in the same way that it would have done the sworn evidence of an eye-witness; which certainly it was not.

Mr. R. H. Dana, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

It is hardly necessary for us to enter into a lengthy discussion on the admissibility of the testimony in question. The opinion of the Circuit Court, which has been laid before us, is sufficiently full on the subject, and need not be repeated. We have no hesitation in regarding the incident testified to as part of the *res gestæ*, and as entirely competent for the purposes for which it was offered. The statements of the sergeant were not offered in evidence for the purpose of proving the facts stated by him, but the whole incident (including those statements) was adduced in evidence for the purpose of showing the manner in which the officers attended to their duty whilst the disturbance was going on, the fact that notice of its progress was communicated, the time that it continued, and the degree of alarm it was calculated to excite in such a person as the sergeant appeared to be. These were substantially the purposes for which the evidence was professedly offered, and for these purposes, as part of the *res gestæ*, it was clearly competent.

JUDGMENT AFFIRMED.

YEAGER *v.* FARWELL.

1. A., residing in St. Louis, and treating through B., of the same place, for a loan of money from C., in Boston, got a promise from C. of the money wanted, A.'s own note and a mortgage by him on real estate near St. Louis being contemplated and agreed on as the security to be given. C. relied wholly on B. to look after the sufficiency of the security (which he desired "first and foremost" should be ample) and after the preparation of the note and mortgage, all of which B. assumed to do. Having

Statement of the case.

had both note and mortgage executed by A., B. sent them to C. with a slight departure in the note from the agreement, and, in addition, a slight informality in the mortgage. No money being yet advanced by C. he returned both papers to B. in order to have the informality in the mortgage corrected, and, at the same time, requested B. to indorse the note, saying: "This will do you no harm, and will be an accommodation to me." B. did indorse the note. The mortgaged property having proved insufficient to pay the debt, B., on suit brought by C., was held liable as indorser.

2. On the last day of grace, B., in St. Louis, wrote to C., in Boston (which letter, of course, C. did not get until some days after the said last day of grace), saying that A. could not take up the note, expressing regret therefor, and adding that he, B., held himself "responsible for the payment of the note," and should see that "it was done at an early day." *Held*, that he was liable as indorser, although no demand of payment had been made of A., or notice given to him, B., and though, thus in point of fact, B. (except in so far as it may have been prevented by his letter) had been, as indorser, discharged.

3. When an indorser of a matured note, not knowing whether demand has or has not been made of the maker, writes to the holder, stating that the maker is unable to pay, expressing regret that this is so, and promising, himself, to pay the note, such indorser will be held to have waived proof of demand and notice, and will be held liable as indorser, although quite without reference to his letter, and before any receipt of it, no demand of payment was made or notice of dishonor given.

ERROR to the Circuit Court for the District of Missouri, the case being thus:

Yeager & Co., shippers of flour, in St. Louis, and intimately associated with one Kerckhoff, a miller of that place, who was then building a mill, and needing $15,000 to complete it, wrote to Farwell & Co., flour commission merchants and capitalists, of Boston, intimate correspondents of their own, telling them what Kerckhoff was doing; that he wanted $15,000; that he would give security by trust deed on a valuable farm near St. Louis; that the security was good, and urging them to lend him the amount, "for, say one or two years, or even one year, after which," says the letter, "we would make the advances ourselves." As an inducement for "coming to a favorable conclusion on their proposition," they request Farwell & Co. to bear in mind that they, Farwell & Co., will get, as flour commission merchants in Boston, a large share of the business of the new mill.

Farwell & Co. did not (so far as their real wishes were expressed in their letters) seem much disposed to lend the money; at least they wanted 13 per cent. interest. However, on some remonstrance at such a rate from Yeager & Co., who proposed 10 per cent., they conclude "to come as near the wishes of Yeager & Co. as they can," and to lend the money at 12 per cent., provided, "first and foremost," they can feel that the farm is good and ample security beyond a question, for which certainty they say that they rely on Yeager & Co. "The rate of interest," they add, "in itself is no object, for we can use our money to better advantage in Boston; but, desiring very much," they continue, "to accommodate you, and for the further consideration of getting a large share of the business of the new mill, we are willing to lend you the money on the above terms, but shall be very glad if you can obtain it more cheaply."

Yeager & Co. now directed a note for the $15,000 and a trust deed of the farm to be prepared, and both were executed and the deed put on record. For some reason the rate of interest on both was put at 10 per cent, instead of 12, the rate agreed on. There were also certain clerical errors in the deed of trust, showing some carelessness in the preparation of it. Farwell & Co., on receiving the papers, and not having themselves as yet advanced any part of the money (though Yeager & Co. had advanced about $4000 to Kerckhoff as on account of the $15,000), noted the departure from the rate of interest proposed, as also the clerical errors in the deed. They accordingly returned both papers to Yeager & Co., saying, in regard to the interest, that unless a new note should be made, the drafts on them by Kerckhoff must be for 2 per cent. less, and requesting, unconditionally, that one of the clerical errors, deemed by them more important, in the deed, should be rectified, remarking that they think it better to have it put right "in the beginning." In the letter inclosing the papers they add:

"And, too, we will thank your Mr. Yeager to indorse the notes in the name of your firm, or his individual name, as may

be preferred. This will do him no harm, and will be an accommodation to us."

Yeager did accordingly indorse the note with his firm's name, and the clerical error in the deed and in the record of it was corrected. After this, the balance of the $15,000 was advanced by Farwell & Co. to Kerckhoff as drawn for by him.

The note, which by its terms was payable at one of the banks in Boston, fell due October 15th to 18th, 1867, but it was not paid, *neither was demand of payment made, or any notice of dishonor given to the indorsers, Yeager & Co.*

On the 18th of October, 1867, the last day of grace, Yeager & Co., not knowing, of course, what had or had not been, or would or would not be then done in or about the note in Boston, wrote this letter from St. Louis to Farwell & Co.:

ST. LOUIS, October 18th, 1867.

GENTLEMEN:

Mr. Kerckhoff fully expected to be able to place funds in our hands in time for us to have them with you to-day to meet his note of $15,000, but owing to the stringency of the money market, he has been unable thus far to complete arrangements to raise the money so as to have it in your hands to-day; but in a week or ten days it will be forthcoming, and he assures us it will be done without fail, and feels very sorry that circumstances were such as to prevent his meeting the note at maturity. We also feel very much annoyed about it, but we *hold ourselves responsible for the payment of this note, and shall see that it is done at an early day.* Thanking you for your many acts of kindness to us, we are

Yours, very truly,
YEAGER & Co.

Of course this letter did not reach Boston until some days after the last day of grace.

The note not being paid, the farm was sold under the trust deed, but did not bring enough to pay the sum due on the note. Thereupon Farwell & Co. sued Yeager & Co., in assumpsit, as *indorsers of the note.* The defences were:

1. That the indorsement was made at the instance and

special request of the plaintiffs, after the note had passed into their possession, solely as an accommodation to them, and without any value or consideration whatever.

2. That if this was not so, and if Yeager & Co. had ever been liable as indorsers, they had been discharged by want of demand on the maker, and notice of non-payment to them.

The plaintiffs disclaimed all demand on the defendants *as guarantors.*

The court charged "that if Yeager & Co. placed their names on the back of the note before the negotiations for the loan by the plaintiffs was closed, or before the plaintiffs advanced any money on the said loan, they were liable as indorsers."

Verdict and judgment accordingly, and writ of error here.

Messrs. G. P. Strong, Slayback, and Haeussler, for the plaintiffs in error:

The suit is against Yeager & Co., as indorsers simply. No claim is made on them as guarantors. Now,

1st. The indorsement was made after the execution of the papers, and after the record of the trust deed, by which the lien on the farm attached. It was purely at the instance of Farwell & Co. as "an accommodation" to them, and on their assurance that it should do "no harm" to Yeager. On such an indorsement the original indorsers cannot recover.*

2d. If this is not so, still the whole case of the other side rests on Yeager & Co.'s letter of the 18th October, 1867. But, when this letter reached Boston and was accepted, Yeager & Co. had been discharged from all liability for several days. The idea of the court below was, of course, that the letter was a waiver of demand of payment, and notice of non-payment. But there is not a word in the letter about either. To give such a letter value, for the purpose for which it is used, the other side should show that, in consequence of it, the holder of the note had omitted

* Moore *v.* Maddock, 33 Missouri, 575; Dowe *v.* Schutt, 2 Denio, 624; Corlies *v.* Howe, 11 Gray, 127; Slade *v.* Hood, 13 Id. 99; Parish *v.* Stone, 14 Pickering, 201; Schoonmaker *v.* Roosa, 17 Johnson, 304.

to make demand and to give notice (which assumes that the letter had been written before the time for demand); or show (if the letter was written after the demand) that it was written with full notice of the fact that no demand was made. Neither can be here pretended. The letter is used as a mere godsend in the case, and to reimpose, without consideration, a liability confessedly once clear gone. That it cannot do.*

Mr. T. T. Gantt, contra.

Mr. Justice DAVIS delivered the opinion of the court.

This case resolves itself into two points:

First. Were Yeager & Co. indorsers of the note in controversy.

Secondly. If so, were Farwell & Co. relieved from the necessity of proving on the trial that they demanded payment of the maker, and gave notice to the indorsers of the dishonor of the note.

It is very clear that Yeager & Co. were liable as indorsers, if they placed their names on the back of the note in question before Farwell & Co. closed the negotiations for the loan to Kerckhoff, or made any advances on it to him. And the condition of the parties is not altered by the fact that Yeager & Co., without consideration, indorsed the note at the request of Farwell & Co. after negotiations concerning the loan had been some time in progress, and when they had a right to suppose Farwell & Co. were satisfied with the landed security which Kerckhoff offered. It may be true that Farwell & Co. originally intended to let the money go on the security of the trust deed, but they were not legally bound to do so, and could alter their minds on the subject, and forbear to loan the money unless Yeager & Co. (who were the middlemen in the negotiation) should also indorse the note. If they chose to do this before the transaction

* Freeman *v.* Boynton, 7 Massachusetts, 488; Garland *v.* Salem Bank, 9 Id. 408; Low *v.* Howard, 11 Cushing 268 Kelley *v.* Brown, 5 Gray, 108; Cayuga Bank *v.* Dill, 5 Hill, 404.

was completed or any portion of the money loaned was actually advanced to Kerckhoff, then their liability as indorsers is fixed, and so the learned court told the jury. Whether the indorsement was before or after the conclusion of the negotiations for the loan, or before or after the advancements to Kerckhoff, were questions of fact for the determination of the jury. As there was evidence tending strongly to support the finding of the jury on this point, and as they were correctly instructed in relation to it, the plaintiff in error cannot justly complain of the action of the jury.

The undertaking, however, of the indorser of a negotiable note is only to pay it in case the maker does not, and he is immediately notified of this default. The remaining defence set up in this action is, that this was not done, and, therefore, the indorsers were not chargeable. But the indorser can, by his own conduct, place himself in such a position that he is estopped from alleging want of demand and notice of non-payment. Although, accurately speaking, there can only be a waiver of demand and notice by the indorser before the note is due, yet, after it is due, he can waive proof of them; or, what is more to the purpose, he can so act towards the holder of the note as to render the fact that demand was not made or notice given wholly immaterial.* The inquiry is, whether Yeager & Co. have, by their course of action, put themselves in this category. The court below held that they had, and, as the evidence on the subject was undisputed, took it from the jury and decided it as a question of law.

The letter of Yeager & Co., which constituted this evidence, substantially informed the Farwells that Kerckhoff was unable to pay his note, but would be able to do so in a week or ten days at farthest. After expressing the annoyance felt by the writers, on account of the dishonor of the paper, it concludes in these words: "But we hold ourselves responsible for the payment of the note, and shall see it is done at an early day."

* 1 Parsons on Bills and Notes, chapter 13, p. 594.

Necessarily, this letter could not have reached its destination in due course of mail until after the note was due; but, for the purpose of holding the indorser, this is immaterial, for, as we have seen, he can dispense with the conditions for his benefit as well after as before the paper matures. It has been held by this court, in *Sigerson* v. *Mathews*,* that if the indorser, with full knowledge of the fact that no demand has been made or notice given, makes a subsequent promise, he is liable, and cannot, when sued, set up as a defence the want of such demand and notice; and to the same effect are the decisions of the courts in this country generally.† Applying the principle of these decisions to the admitted facts of this case there is no difficulty in charging the indorsers. Their promise to pay was expressly made after they knew of the laches of the maker of the note, and they cannot now be allowed to repudiate it.

The most formal demand and notice could have been of no service to them, for they knew the demand would be useless, and the notice could only tell them what they were advised of without it. Acting under the weight of the knowledge of Kerckhoff's default, they did not choose to wait in order to see whether Farwell & Co. had taken the requisite steps to charge them, but preferred at once to acknowledge their liability, and, accordingly, made the direct promise to pay the note. Under these circumstances this promise is binding, and does not require for its enforcement the proof of demand and notice.

JUDGMENT AFFIRMED.

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* 20 Howard, 496.

† See 1 Parsons on Bills and Notes, p. 595, note m.