COYLE v. GOZZLER.

Case No. 3,312.

{2 Cranch, C. C. 625.}[1]

Circuit Court, District of Columbia. Dec. Term, 1825.

ACTION ON NOTE—PLEADING AND PBOOF—DEMAND—PROTEST—CUSTOM.

1. A note payable in sixty days, "with interest from date," will not support a declaration upon a note payable in sixty days without interest.
2. If an intermediate indorsement is averred in the declaration, it must he proved at the trial, although the suit is brought for the use of such intermediate indorser.
3. If the notary-public has no memorandum nor recollection of the day of demand and notice, but has a memorandum in his hook that demand was made and notice given to the indorsers, and testifies that it was his universal practice to make the demand and give notice on the day after the last day of grace, such testimony is competent evidence for the consideration of the jury.
4. A special custom of the banks and merchants of the county of Washington, to demand payment on the day after the last day of grace, may be given in evidence without being averred in the declaration.

{See Auld v. Mandeville, Case No. 653.}

At law. Assumpsit against the indorser of Stull and Williams's note at sixty days, dated 21 October, 1816.

J. Dunlop, for defendant, at the trial at May term, 1825, objected to the note offered in evidence by the plaintiff, because it had the words, "with interest from date," which words were not in the note described in the declaration; and he contended also that the hand-writing of the intermediate indorsement must be proved; as the indorsement was averred in the declaration. He also objected that the testimony of Mr. R. Johns, the notary-public, was not competent to go to the jury. Mr. Johns testified that he did not then recollect, nor had he any minute in his book, of the time when he gave notice to the indorser; but it contains a memorandum that notice, was given to the indorsers, as well as a memorandum of the demand. And he further testified that it was his universal practice to give notice on the day on which he made the demand, which was on the 24th of December, which was the day after the last day of grace; and that he believes he gave the notice on that day.

THE COURT decided that his testimony was competent evidence for the consideration of the jury. That as the declaration averred an intermediate indorsement, it must be proved, although it was proved that the indorsement was made after the note had become payable, and that the suit was brought for the use of that intermediate indorser; and that the variance between the note produced in evidence and that described in the declaration, was fatal, as it could not be given in evidence upon that declaration.

A juror was then withdrawn and the plaintiff had leave to amend; and the cause was continued, without costs. MORSELL, Circuit Judge, dissenting as to the continuance.

The cause came on again for trial at the present term, when Mr. Ashton, for plaintiff, offered evidence of the particular custom of the banks and merchants in the county of Washington, to demand payment of the maker, and to protest and give notice to the indorsers, on the day after the last day of grace.

Mr. Key, for defendant, objected to such evidence, because there was not, in the declaration, any averment of such a custom, and referred the court to the case of Renner v. Bank of Columbia (in the supreme court of the United States) 9 Wheat. [22 U. S.] 581.

THE COURT (THRUSTON, Circuit Judge, absent) permitted the evidence to be given. The declaration stated the demand and notice to have been made and given on the 24th of December, 1816, which was the day after the last day of grace.

[1] {Reported by Hon. William Cranch, Chief Judge.}