

No. 14555 $\frac{1}{2}$

Supreme Court of Illinois

Strong

vs.

King

83
Reply of
Appellants

SUPREME COURT,

April Term, 1863.

DAVID O. STRONG, <i>et al.</i> ,	}	<i>Appeal from Cook.</i>
<i>vs.</i>		
JOHN B. KING.		

REPLY OF APPELLANTS TO POINTS FOR APPELLEE.

ARRINGTON & DENT.

Beach & Barnard, Print, 14 Clark st.

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REPLY OF APPELLANTS TO POINTS FOR APPELLEE.

I. The counsel of the appellee suggests "that the defence of the appellants is technical"; meaning by this to insinuate that it is opposed to equity and conscience.

The answer to this is found in the testimony of John Ackerman, the book-keeper of the Trust Company, who swears "that the appellants had on deposit with said company, to their credit, after the said draft was debited to their account, the sum of \$9,887 61;" and "that if the Trust Company's check had been presented to the American Exchange Bank on the 22d of August, 1857, it would have been paid." (Record, p. 120.)

And to the same effect is the testimony of the appellee's witness, De Pew. (Record, pp. 104, 105.)

And John Ackerman, on cross-examination, says, in positive terms, "that all checks of the Trust Company on the American Exchange Bank, which were presented on the 22d, were paid." (Record, p. 121.)

John S. Carr, a clerk in the American Exchange Bank, testifies to the same fact; and adds: "I know of no refusals to pay such checks until Monday, August 24, 1857, at noon." (Record, p. 127.)

Hence, the non-payment of the bill was manifestly caused by the failure of the holder to comply with the settled rule of commercial law—which requires the demand to be for money, in order to charge the drawer and indorsers; and therefore, in justice, the loss should fall on the party whose fault actually produced it.

II. The counsel for appellee insists that the evidence shows a *uniform* custom; but they quote only that part of the testimony which seems to be the most strongly in their favor. Even that, however, is against them. Thus, the witness, De Pew, says that "the custom of the Trust Company to give checks in payment of drafts, was general and universal; and never departed from, *except by especial request.*" (Record, p. 103.)

This is the most forcible statement of any in all the evidence, to support the alleged custom. Nevertheless, it is most cogent proof against the custom. What kind of a law, rule or custom is that which admits of variation or departure at special request? The same sort of evidence would show a custom to pay in checks in the case of every banker; or even merchant, who keeps his funds in a bank.

But what is the evidence, which the appellee has not cited?

The appellee's witness, Ambler, swears "that a person could get money for a draft, at the Trust Company, by asking for it." And, that "if a private individual got this draft, the check given for it would not go through the Clearing House." (Record, p. 100.)

De Pew also says, that drafts on the Trust Company

would have been paid in gold or currency, if demanded. (Record, p. 105.)

So says the witness, Booth. (Record, p. 108.)

The witness, Waite, says: "A party presenting a draft for payment, would usually receive a check for it. A party could always get the money upon a draft, if he asked for it; or he could get the check certified." (Record, p. 112.)

To the same effect is the testimony of J. Morse. (Record, p. 113.)

W. S. Morse swears "that a party presenting a draft for payment to the Trust Company, in 1857, could have obtained the money upon it, if he insisted. (Record, p. 115.) He also says: "It would be usual to take a check for a draft; but it was usual to get the check certified at once. (Record, p. 115.)

In short, all the testimony shows that there was no uniform custom on the subject.

III. The brief of Messrs. Farwell & Smith is elaborate upon the point, that the taking of a check does not operate as payment. And such is the undoubted rule, as between creditor and debtor, under an absolute engagement. But what has that rule of law to do with the present controversy? The case of *Olcott vs. Rathbone*, 5 Wendell, 490, simply adjudged "that where the cashier of a bank, upon a note holden by the bank falling due, accepted a check of a third person for part of the amount, and a new note for the balance, and delivered up the old note; upon the check being dishonored, an action might be maintained on the original note, against the maker, to recover the amount of the check.

That decision has no pertinency to this case. The question, here, is not whether the taking of the check was payment, as between the Trust Company and the final holder

of the draft; because it clearly was not payment, as between them. But the question is, whether the taking of the check on the 22d, and retaining it until the 24th, and the failure to protest the bill on the day of its presentment for payment, had the effect of discharging the drawers and indorsers. The distinction is presented with great clearness in a recent work: "Receiving a check on a bank, in payment of a draft or note, would not extinguish the latter, in the absence of any intention to give the maker or acceptor a further credit; but a surrender of the note or bill would embarrass the holder in his attempt to recover on the instrument; *and a delay to protest the same, for non-payment, on the day it became payable, would discharge the drawers and indorsers.*" (Edwards on Bills, pp. 506, 507.)

And Story makes the same distinction: "If the holder accepts a draft or check, it will ordinarily discharge the drawer and indorsers; but it will operate, as to himself, as a conditional payment only." (Story on Bills, § 419; see, also, same section, note 3.)

The reason upon which the distinction rests, is obvious. The maker of a note and the acceptor of a bill are bound absolutely to payment. But the engagement of the drawer and indorser of a bill, is conditional only. That is to say, they promise to pay provided the drawee does not; and provided, also, there shall be due presentment, protest and notice. And this consideration scatters all the authorities of the counsel for the appellee to the four winds.

IV. Messrs. Farwell & Smith press the point, that the draft in question, in form and substance, is merely a check.

Now, suppose the fact to be true—although it is not—what is the inference? Plainly, nothing, to the purpose. As the writer before cited says: "A check drawn on a bank, is a bill of exchange payable on demand. If drawn

on a foreign bank, it is a foreign bill." (Edwards on Bills, p. 396.)

And, of course, if it be a foreign bill, the rules appertaining to that class of commercial paper must govern the case.

V. Messrs. Farwell & Smith also make the point, that the draft was not *dishonored* on Saturday, the 22d, "because payment was not refused on that day."

But what is the dishonor of a bill?

Bouvier says (Law Dict., vol. 1, p. 474): "To dishonor a bill of exchange, is to refuse or *neglect* to pay it at maturity." Such, also, is the definition of Burrill, and all the text books. Every bill of exchange is either honored or dishonored at maturity, upon its presentment. There is no intermediate state, or *quid tertium*, such as the gentlemen seem to imagine.

VI. The case of *Russell vs. Hankey*, 6 T. R., p. 12, is strenuously urged, on the other side, as showing that a check may be taken for a draft, without discharging the drawer and indorsers.

To this, there are two answers:

1. There is nothing to show that the check, in that case, was held until the following day; or that the draft was protested on the following day.

2. That case was overruled in England, and has long ceased to be law.

Chitty, in reference to that case, says, expressly: "But in a subsequent case it was considered that the drawer and indorsers of a bill would be discharged by the holders taking a check from, and delivering up the bill to, the acceptor, in case the check were not paid." (Chitty on Bills, p. 400.)

There is no case in the books; there is not so much as a *dictum*, either from the bench or the bar, which intimates that a check may be taken for a bill of exchange, upon presentment for payment; and the bill be protested for non-payment on a subsequent day, so as to charge a drawer or indorser.

VII. The cases, in reference to the custom of particular banks, in 9th and 11th Wheaton, are explained and controlled by the case of *Adams vs. Otterback*, 15 Howard, p. 545, where the Supreme Court of the Union expressly rules: "That to constitute a usage, it must apply to a place rather than to a particular bank. It must be the rule of all the banks of the place."

Bnt, as we showed in our first brief, the rule in New York which must govern this case is even more vigorous, and will not allow a usage of New York city to control the commercial law of the State:

Woodruff vs. Merchants' Bank, 25 Wend., 675.

VIII. The case of *Hooker vs. Franklin*, 2 Bosworth, p. 500, quoted on the other side, simply adjudges that a check need not be presented on the day it is received; which has always been the law. But the check, in that case, was not taken for a bill.

And all the other cases adduced for the appellee are of a similar character. They relate merely to checks, and to controversies between absolute debtor and creditor; and not one of them to any question between the holder of a bill and the drawer or indorser.

IX. Messrs. Farwell and Smith contend that this was an inland, and not a foreign bill; and, as a proof of their view, refer to the statute in respect to "Negotiable Instruments," and to certain Ohio cases.

To this, we answer :

1. That the statute says not one word about inland bills.
2. That if the second section has any reference to inland bills, its effect must be to require such bills to be protested for non-acceptance or non-payment.
3. That this precise question was definitely settled by the case of *Robinson vs. Strawbridge*, 5 Gilman, p. 472 ; and certainly this court ought not to be called upon to change its own opinion to follow those anomalous decisions from Ohio, which are in conflict with the rule as established in every other State of the Union.

X. In the brief of Messrs. Farwell and Smith, great reliance is placed on the new promise ; and, in respect to that, several considerations are submitted :

1. The fact of the promise is incredible, *a priori*. The testimony of Swift and Johnston represents the appellants as, at first, refusing to pay ; and then, without any apparent motive, as voluntarily promising to pay ; and then, again, as refusing to pay.
2. Swift and Johnston sold the bill of exchange to the appellee, for the express purpose of qualifying themselves to be witnesses in this case. (Record, pp. 69, 70, 71, 72, 86, 92.) And they were advised to adopt this course by counsel. (Record, p. 86.)
3. The two juries, which disagreed, failed to credit the fact of the new promise ; and the jury which found for the appellants must have wholly disbelieved it. Otherwise, their verdict would have been different.
4. A mere inspection of the evidence and instructions shows that the chief point of the evidence, in the court below, related to the question of custom ; and not to the new promise.

5. It may be fairly presumed—as the fact truly was—that on the two former trials, the question of custom was not submitted to the jury at all; because, if it had been submitted under instructions like those given on the last trial, no jury could hesitate to find for the appellee; since the instructions virtually told the jury to bring in such a verdict.

6. It is true, this court might not feel itself compelled to disturb the verdict, on the question of the new promise, if that were the only point in controversy, or upon which the verdict could rest. But it is *not* the only point in controversy; and it is *not* the real point upon which the verdict was probably found. The question of custom, if determined for the appellee, was also decisive of the case as against the appellants. Hence, we were entitled to have proper rulings and proper instructions, in the court below, upon the question of custom; and because that court erred in all its rulings and instructions upon the question, to our prejudice, we are entitled to have such errors corrected by this court, and thus obtain a fair trial, in accordance with the laws of the land.

ARRINGTON & DENT,
For Appellants.

State of Illinois, Third Grand Division.

SUPREME COURT,

APRIL TERM, 1863.

JOHN B. KING, DEFENDANT IN ERROR, }
vs ads
DAVID O. STRONG ET AL., PL'FFS. IN ERROR. }

BRIEF FOR DEFENDANT IN ERROR.

On the 19th of August, 1857, and for a long time previous, the plaintiffs in error (defendants below) were bankers, doing business in the city of Chicago, and among other things dealing in Exchange on New York, and for that purpose placed their funds in the hands of the Ohio Life Insurance and Trust Co., to draw against. On the 19th of August they sold the draft in question to Williams & Brother [a business firm in Chicago]. The draft was dishonored in New York, and Strong and Wiley Brothers, although they subsequently promised to pay it, finally refused to respond and make the draft good; hence this suit against them by King, the holder of the draft. The defendants below placed their defense upon two grounds.

1st. That the taking of the check on the 22d of August, of the Trust Co., operated as a payment of the draft.

2d. That the draft was not formally protested in time by Notary Public, as required in case of foreign bills of Exchange, or in other words, that there was laches in respect to protest within the rules of commercial law, which operated to discharge the drawers.

The plaintiff below urged, and it is believed rightfully maintained, the converse of these two propositions, and in addition a subsequent promise to pay the draft.

I.

Was the draft paid by the Trust Co. on the 22d of August? Did the giving of the check under the circumstances operate as payment? As to the facts bearing upon this point there is no substantial conflict or controversy. Lyman P. Swift testified that the draft was received by Swift, Ransom & Co. on the 22d of August, 1857, that, as was the usual course with all drafts received, it was first marked with a stamp on the back of it the words, "received payment." Then he wrote, "Swift, Ransom & Co.," under the words received payment, and sent a porter or messenger out with it to the Ohio Life Insurance and Trust Co. They gave him their check on their Bank, the American Exchange Bank. He further testifies, that on receiving the check he deposited it on the same day in the Merchants' Bank, so as to have it go through the clearing house on the next business day. *That this draft was not credited to Swift, Brother & Johnston, as it was their way never to advise any one of the payment of any draft or collection until after ascertaining that the check was good at the clearing house.* That such was the usual custom among bankers, and adopted as a rule to prevent confusion. *That the check in controversy was not good, which means among bankers, no money to pay it at the clearing house.* That after ascertaining that the check was not good at the clearing house, he procured a Notary Public for the purpose of having the draft duly protested, and went with him to the Trust Co. to get the draft and see that it was protested. *That the Trust Co. gave him the draft, and he gave it to the Notary, who made the usual demand of payment, which was refused.* That the Sheriff was in possession of the office books and papers of the said Life Insurance and Trust Co. *That the officers of said Company were willing that the draft should be taken away by Swift, Ransom & Co., but the Sheriff declined* (see direct examination of Lyman P. Swift, inserted between pages 101 and 102 of Record).

On cross examination he testified that he procured the draft of the Trust Co. and sent it to Swift, Brother & Johnston, at their request, on the 22nd of Sept., 1857. That it was not sent sooner on account of the Sheriff having possession of the books and papers of the Trust Co., and the "general fuss and scare consequent upon the failure of so large a concern."

It further appears that at the time the Trust Co. gave their check on the American Exchange Bank for this draft, they had no funds there, but their account was largely overdrawn, some \$50,000.00 (see testimony of De Pew, page 104 of Record. Also testimony of Booth, page 107 of Record).

This was a draft drawn on a New York party, was payable in New York, and it was there presented and a check was there given; and in determining its effect on the question of payment, the laws of New York must govern; this was expressly adjudged in *Vandeeff vs. Therasson*, 3 Pick., 12, and by the well established law in New York, the receiving of the check did not operate as payment, "*unless it was expressly agreed to be accepted as such, or unless the circumstances clearly show that such was the understanding of the parties,*" and that the giving up of the draft to the Trust Co., at the time of taking the check, is not evidence that the check was received as payment. This was expressly adjudged in *Olcott vs. Rathbone*, 5 Wend., 490. And the same doctrine has been repeatedly laid down, both by the Supreme Court of this and other States. But it is unnecessary to multiply authorities. Here there is no evidence of an express agreement, nor are there circumstances to show that this check was received in payment of the draft, but the contrary understanding clearly appears. When Swift returned on Monday with the Notary to demand payment and protest the draft, the Trust Co. did not pretend that it had been paid, but readily surrendered it up to be protested, and were willing that Swift should take it away, but the Sheriff who had seized the papers and effects of the Company, refused to allow the draft to be taken away until such time as he could ascertain what was proper to be retained and what was proper to be released. Indeed it is difficult to conceive how it can be claimed that the mere giving of a check, upon a bank where the party had no funds, and where the drawer's account was already largely overdrawn, and where he consequently had no right to draw, should be held as payment, and it is safe to say that no authority for such a proposition can be found.

II.

The next question is, was there such laches in the presentment and protest of this draft as to discharge the drawers? We submit that there was not. The facts in relation to this point are these: The draft was drawn upon the 19th of August, 1857, in favor of Williams & Bro., and by them endorsed to Swift Brother & Johnston, and by the latter endorsed and transmitted by mail to their bankers in New York, Swift,

Ransom & Co., for collection and credit, all upon the same day. (See testimony of Johnston, pages 55 and 56 of Record, also testimony of Lyman P. Swift, inserted between 101 and 102 pages of Record.) It was received by Swift, Ransom & Co. in New York, in due course of mail on Saturday, the 22d of August, who sent it immediately by their messenger to the office of the Ohio Life Ins. & Trust Co., and they gave him their check on the American Exchange Bank for it, which check, Swift, Ransom & Co. immediately, and upon the same day deposited in the Merchants' Bank, where they kept their account, "so as to have it go through the usual course of passing through the clearing house at the earliest possible moment, which would be the next business day at 10 o'clock A. M." It passed through the clearing house on the next business day, Monday the 24th of August, and was dishonored, upon receiving notice of which Lyman P. Swift, of Swift, Ransom & Co., immediately upon the same day procured a notary, went with him to the office of the Trust Co., procured the draft, and it was duly protested on that day by the notary, and on the same day, notice of protest by him transmitted to Strong & Wiley Brothers, at Chicago, by mail, postage prepaid. (See testimony of L. P. Swift, between pages 101 and 102, also testimony of Edwards, the notary, 44 to 49 of Record.) L. P. Swift also testifies, that *he telegraphed* to Swift Bro. & Johnson, on the 24th of August, "the non-payment *and dishonor* of the said draft in controversy." Johnston testified that Swift Bro. & Johnston received this dispatch Monday or Tuesday the 24th or 25th of August, that he, *immediately* on receipt of the dispatch, went to the office of Strong & Wiley Bros. with the dispatch in his hand, and told them that the Trust Co. had failed, that their draft was unpaid, and that "on its return we would look to them for payment." (See 55 and 56 of Record.)

It also appears that the Trust Co. kept no funds in their office, but kept their funds in the Bank of Commerce, and in the American Exchange Bank. (See testimony of Ambler, page 96 of Record.)

It appears from the testimony that the course pursued with this draft was in strict accordance with the course of business of the Ohio Life Ins. and Trust Co., and the whole Banking System of New York city connected with this transaction. *The taking of the check, in the first instance, of the Trust Co., for the draft, was in strict accordance with the course of business of all those dealing with the Trust Co. in like cases.*

Ambler, who testifies that he was in New York, in the banking business, from 1843 to 1856, as clerk of Wadsworth & Sheldon, whose business was large, their Western business of receipts and disbursements being about \$100,000 a day, says that he knew the Trust Company

all this time; that said company did a banking business all this time with Wadsworth & Sheldon, receiving and paying drafts; that Wadsworth & Sheldon had checks on the Trust Company "daily, or nearly so;" that the Trust Company paid drafts on them by checks; that he "*never knew the Trust Company to pay a draft in any other manner than by check.*"

(*See 95 to 99 of record*). He further says that he never knew of any banker getting money on a draft (on the Trust Company) except as a matter of spite, and then upon demand of a notary, (*See page 100 of record.*)

De Pew testifies that "the general rule and custom (of the Trust Company) was to pay such drafts (as the one rendered) by *checks on banks with whom they had accounts*;" "that custom of payment existed for five years to my knowledge, during which time I was a clerk with the Ohio Life Insurance Company at New York; that the custom of payment of drafts by checks was *general and universal, and never was departed from except by especial request.*" (*See 102 to 104 of Record.*)

In answer to a question on cross-examination, as to whether gold could not have been obtained, he says: "I suppose they would have been paid in gold or currency, though the demand for payment in gold or currency, *was never made, so far as I know,*" (*See 105 of Record.*)

Booth also testifies that "the general custom would be to give a check," (*See 108 of Record.*) Booth also states that the Trust Company had no money in the American Exchange Bank, on the 22d of August, the day the check was drawn, (*See 109 of Record.*)

The testimony of the defendants' witnesses is corroborative. The first witness they called, H. H. Edwards, says, "the custom as to obtaining payment of a draft, was to present the draft for payment and if a check was given for it and there was no doubt of the responsibility of the party drawing the check, to receive the check and deposite it in bank, &c.," (*See 110 of Record.*)

Wm. H. Waite, called by defendants below, testified that he was in the banking business in Metropolitan Bank, New York; that he had seen the draft in suit, and knew the Trust Company; that a party presenting a draft for payment would *usually* receive a check for it; he also testifies that the Trust Company stood well; was in good credit on the 22d of August, 1857. He was shown the draft in suit, and asked the following question: "What would you do with this draft if received

August 22d, 1857, by a banking house in New York?" He answered, the first thing would be to mark it paid and send a messenger with it to get the money or a check; this check would be deposited in the bank where the party kept his account, to go through the clearing house; next day if not paid, it would be sent back to the party depositing it," (*See 112 and 113 of Record*).

Not only does it appear that it was strictly in accordance with the course of business to receive the check, but the evidence shows that the check was disposed of by sending it through the clearing house, strictly in conformity with such course of business. [*See testimony of Lyman P. Swift, J. C. Ambler, De Pew and Waite.*] Nor is there any substantial conflict of testimony on this subject. Under this state of facts, were the drawers discharged on the ground of laches, of negligence of the holder in respect to demand, protest or notice?

The plaintiffs in error claim: 1st. That this draft was a foreign bill, which requires the formal protest of a notary on the very day it is dishonored. 2d. That the bill was dishonored on Saturday the 22d of August, and not being protested until Monday, the 24th of August, the drawers were therefore discharged.

We insist, in the first place, that this was not a foreign bill, within the rule, making a notary's protest indispensable. It is in form a mere check. It is drawn on a banker, payable immediately, (*Chit. on Bills, marg. page 511*) unless the fact that it was drawn on a banker doing business beyond the State line, changes its nature, no doubt could be entertained on this point, and we insist that no authority or reason can be urged for a distinction like this. It is going too far to hold that sight drafts on New York, so much dealt in by our Bankers, are foreign bills, requiring all the technical formalities to charge the drawer. But clearly under our statute it is not a foreign bill.

See chap. 73, Revised Statutes, sec. 1 and 2.

A clear distinction is there made between foreign bills and a bill drawn on a party outside of this State, but within the United States. The first section provides that "When any foreign bill of exchange shall be protested," &c., ten per cent. damages may be recovered. The second section provides that "If any bill of exchange, drawn upon any person or body politic or corporation, out of this State, but within the United States or their Territories," shall be protested, five per cent. damages shall be recoverable. The expression, "any foreign bill," used in the first section, in connection with the provisions of the second section, indicates a legislative intent to exclude all bills drawn upon parties

within the jurisdiction of the United States, from the class of bills known as foreign bills in the commercial law. No other construction can harmonize the provisions of the two sections. Under the provisions of the Ohio Statute, which is similar to our Statute (except that its language is much less marked, the expression *foreign bill* not being there used in contradistinction to a bill drawn on any party within the United States), the Supreme Court of that State have repeatedly held that a bill drawn on a party within the United States, but outside of that State, is not a foreign bill within the rule making a notarial protest indispensable to a recovery against the drawer or indorsers.

Case vs. Heffner, 10 Ohio, 180.

McMurchee vs. Robinson, do., 496.

Estep vs. Cecil, 6 Ohio State R., 536.

If this was not a foreign bill, then the plaintiffs in error have nothing to stand upon; for, admitting that the draft was dishonored on Saturday, notice of its dishonor was telegraphed by Swift, Ransom & Co., on Monday, the 24th of August, the next business day, to Swift Brother & Johnston, and by the latter received on either Monday or Tuesday, and notice by them immediately communicated to Strong & Wiley Brothers. This was clearly sufficient.

Chitty on Bills, marg. page 470, 471, 482.

1 *Hill, N. Y. Reps.* 263.

But treated as a foreign bill we insist there is no case of laches. The draft was received by Swift, Ransom & Co. on Saturday, the 22nd of August, and was duly presented by a Notary Public at the office of the Trust Co. for payment, payment demanded and refused, and the draft duly protested and notice of the protest mailed to the drawers, postage prepaid, on Monday, the 24th, being the next business day after its receipt. The counsel for the plaintiffs in error are obliged to admit that if Swift, Ransom & Co. had placed the draft, upon its receipt on Saturday, in their vault and taken no steps to obtain payment till Monday, the 24th, and then procured a Notary and had payment demanded and the draft protested, no possible defence could be made, and they are therefore driven to the somewhat extraordinary position of insisting that the extra effort and vigilance, so to speak, displayed prior to Monday by Swift, Ransom & Co., toward obtaining the money on this draft, operated to discharge their clients on the ground of laches, or negligence. Had the draft been dishonored on Saturday, the 22nd of August; that is, had peremptory demand of payment been made, and had there been a refusal or default of payment, by the Trust Co., on that day, then (this being held a foreign bill), we admit that a formal protest, or at least a noting of protest, by a Notary would have been necessary, and that a protest upon

the next Monday would have been too late ; but the draft was not dishonored on Saturday, within the meaning of the rule requiring or even allowing a protest ; there was no default, no refusal by the Trust Co. on Saturday. And a default or *refusal* was necessary to constitute a dishonor ; this is the language employed in the books in speaking of the time when protest must be made :

“ A foreign bill should be noted for non-acceptance or non-payment on the day on which acceptance or payment is refused.”

Bailey on Bills, page 259, 260.

In *Lefley vs. Mills*, 4 Term Reps. 170, 174, Buller, J. says :

“ With regard to foreign bills of Exchange, all the books agree that the protest must be made on the last day of grace : *now that supposes a default in payment, for a protest cannot exist unless default be made.*”

Such is the language employed by the authorities relied upon by the counsel for the plaintiffs in error.

“ If the bill be presented in the first place by the holder, *and payment refused*, it should thereupon be placed in the hands of a Notary whose duty it is to present it again to the drawee and demand payment ; *and in case he shall again refuse to pay, the Notary makes a note of the refusal, of the reason assigned therefor, and of the time*, adding his initials.”

Edwards on Bills, page 581.

“ In England and America the protest is noted on the very day of the dishonor, although it is not, or may not be, ordinarily, drawn out in form on that day.” “ By our law it (protest) should, ordinarily, be made or at least noted on the same day on which the non-acceptance or *refusal* has taken place.”

Story on Bills, Sec. 278, 283.

Chitty says : “ But it may now be considered as settled in England, as well as Scotland and America, that it is sufficient to note a foreign bill for non-payment *on the day of refusal*, and that the protest may be formally drawn up and signed, or as it is technically termed, extended by the Notary and truly ante-dated at any time after.”

Chitty on Bills, marg. page 477.

Here it seems clear that the Trust Co. committed no default until the check, which was given as a means of obtaining the money, was dishonored on Monday, the 24th of August; nor was there any refusal by them to comply with any demand made on them, until they refused the demand made on them by the Notary on the same day; hence, in the light of the authorities no protest was necessary or even admissible upon Saturday, the 22nd of August.

But, say the counsel, "The bill having no time of payment expressed, was payable on presentment." "The bill was protested for payment on Saturday, the 22nd of August, 1857, therefore it became payable on that day." "A foreign bill must be protested for non-payment on the very day it becomes payable, or the drawer stands discharged." Hence they urge that the notarial demand and protest being on Monday, the 24th, it was one day too late, and the drawers were therefore discharged. This is more specious than sound.

The draft specifying no time of payment was in a certain sense payable immediately—that is, the holder could have demanded payment of the drawers the next instant after it was executed, and the drawers could not object that the demand was premature, but it does not follow that demand of the money must therefore be made the next instant and the bill protested to charge the drawer, but the law is quite otherwise, and it is with reference to this question as to how soon the holder has a right to demand payment that those expressions are used in the books. The very authorities quoted by counsel show that *Edwards* in his treatise on bills, at page 154, says: "If no time be specified, the law adjudges *that the money is payable immediately*. For certain purposes it is payable on demand: for others, it is by operation of law payable *immediately*, and draws interest from date. The same rule applies to checks drawn on banks, which being made paid generally are *payable on demand*." The right of the holder to make a peremptory demand of the money, and put the drawers upon their refusal, and thus dishonor the draft attached instantly upon its execution, and the sending the draft to the Trust Company on Saturday, and receiving the check, in nowise increased or diminished that right. Nor did it in any manner change the nature of the draft or the time when it became due and payable. And as we have already shown that there was no such *default*, no such *refusal* on the part of the Trust Co. on Saturday, as amounted to a dishonoring of the draft so as to require or even admit of a protest on that day, there remains only the question whether, under all the facts and circumstances, there was such laches as to discharge the drawers, in not putting the Trust Co. to such default or refusal until Monday, the 24th of August.

There is no dispute as to what is the rule governing such cases. Chitty says: "But it may now be considered settled that the time when the presentment *for payment* must be made is in general a question of law. We have, therefore, to examine what is the rule of law upon this subject. Upon this question it has been observed that there is no other settled general rule, than that the presentment must be made *within a reasonable time*, which must be accommodated to other business and affairs of life, and that a party is not bound in any case to present a bill or note on the same day it is issued or *received by him*." Chitty on Bills, marg. page 380. Again he says: "With respect to a check on a banker, it is now settled that it suffices to present it *for payment* to the banker, at any time during banking hours (in London five o'clock) *on the day after it is received*, and that no laches can be imputed to the holder in not presenting it *for payment* earlier in the morning of the second day, although the bankers paid drafts on them until four o'clock in the afternoon, and then stopped payment." Was the receiving of the check in the first instance laches under the circumstances. It did not operate to extend the time one moment beyond the shortest time for making final demand and protest. Strong & Wiley Brothers had for a long time kept their funds to draw against in the hands of the Trust Company, who kept an office or place of business in one part of the city, and their funds in another part deposited in bank: the general and ordinary, and we may say, under the testimony, uniform course of business of the Trust Company had been for a long term of years to give a check in the first instance for drafts on them. Indeed, this seems to have been the only practicable and businesslike method of getting at the money; hence, in the language of the witnesses, this practice was "*general and universal, and never departed from except by special request*," and to have exacted the cash in the first instance would have actually deranged the whole course of business, producing a delay of from 15 to 30 minutes, while the company sent out a special messenger to their bank of deposit, to procure the money. Ambler states that he never knew of any banker getting the money on a draft (in the first instance of the Trust Company), *except as matter of spite*, and then upon the demand of a notary. Reasonable diligence according to the course of business and circumstances surrounding them was all that was required of Swift, Ransom & Co., and we submit that it is absurd to say that they were required to take the extraordinary course of exacting the money in the first instance, thus going counter to the whole course of banking business, producing actual derangement and a delay of half an hour—a course which would have indicated spite and ill blood on their part, rather than the *bona fide* prosecution of a commercial transaction, especially when the taking of the check did not delay the final demand and protest of the draft one moment beyond the shortest time required by the strictest rules of law. But the case is not without authority upon this point. Chitty says:

"Payment is frequently made by a draft on a banker, in which case, if the person receiving the draft do not use diligence to get it paid, the person from whom he received it, and every other party to the bill will be discharged, but not otherwise, unless the holder agree to run all risk.

chitly on Bills. Mang - page - 399

In *Russel vs. Hankey*, 6 Term Rep., 12. The defendant was sued for negligence in taking a check for a draft which check was dishonored. It being according to ordinary course of trade and business of bankers to take the check, the Court held that there was no negligence, and defendant was acquitted. This would seem to be in point, for if there had been negligence the drawers and endorsers of the bill for which the check was given would have been discharged and the action would lie.

In *Robson & Waugh vs. Bennet, et al.*, 2 Taunton's Reps. 388, the defendant was sued in assumpsit for coal sold and delivered. His defence was that he had given his check on his banker, where he had funds, for the coal, to the plaintiff, who had been guilty of laches in presenting and protesting the check, and in the mean time the banker failed. The check was drawn on the 11th of September, during all of which day, the bankers, the drawees, continued payment. It was presented at the banking house of the drawees on the 11th, to a member of the house, who said it was good, and marked it accordingly, and returned it. The check passed through the clearing house on the next day according to the custom and course of dealing among London bankers, and was dishonored, the drawees having stopped payment at noon the 12th. Notice of its dishonor was given the next day, the 13th. The Court held that there was no laches.

Lord Mansfield said: "The first question is, whether there is laches as to the time of presentment; as to that the case of *Appleton vs. Sweetapple*, decides, that a check need not be presented on the day on which it is drawn; now this bill was in fact presented and accepted on the very day on which it was drawn." He further said that: "the mark on the check is an engagement to pay at a particular place (the clearing house); is not then the presenting at that place equivalent to presenting it at the banking house. It seems that it is, and it therefore is no laches; consequently the surplus of the money for the coal remains due,"

This seems to be a case in point; here was a check which need not have been presented and the money demanded till the next day after it was received, but it was presented on the same day but the drawees did not pay the money, but marked it in a way which by the course of business of bankers was equivalent to an agreement that the money should

be paid the next day at the clearing house; the next day it was presented at the clearing house and dishonored, and Lord Mansfield held that inasmuch as the next day was in time to present the check and demand the money, the party was not prejudiced by presenting it the day before, though he did not demand or receive the money. So with the case at bar, the giving of the check was equivalent to an agreement that the money on the draft should be paid through the clearing house the next business day, and that the holder should not be prejudiced by the fact that the draft was sent on Saturday to the Trust Co., and a check received as a means of obtaining the money on the next business day through the clearing house.

But the custom or course of business of the Ohio Life Insurance and Trust Co. is proper to be considered and is most material in determining this question of diligence in dishonoring and protesting this draft. It is not introduced to change the effect of the contract or to do away with any positive rule of law, as the counsel for the plaintiffs in error seem to suppose, but simply as evidence bearing upon the question whether the contract has been fulfilled by the use of due diligence in protesting the draft. The contract is that the drawers will respond, if the holder of the draft, with reasonable diligence under the circumstances, demands the money on it, and causes it to be protested in case of refusal or default of payment; and the usual and ordinary course of business of the banking house on which the draft is drawn, is always a most material circumstance in determining this question. The authorities are abundant on this subject.

In 9 *Wheaton*, 588, which was an action against the endorser of a note payable at, and discounted by the Bank of Columbia, the Court held that it was competent to show that it was the established practice of said bank to demand payment of notes by it discounted, on the 4th instead of the the third day of grace. The same doctrine was reiterated in the 11th of *Wheaton*, 431, where the Court held that a note made for the purpose of being negotiated at a bank whose custom is to demand payment on the 4th day instead of the third day of grace—that such a custom forms a part of the law of the contract, and that it is not necessary that a personal knowledge of the usage should be brought home to the endorser. In 9 *Reps. Mass.*, 155, where a bank had by their usage and by-laws established the practice of demanding payment of the maker by merely sending him notice the day before the note fell due—the note being payable at, and discounted by the bank), the Court held—that such demand was sufficient to charge the endorser upon the principle that, where a banking company have established usages and by-laws respect-

ing demands on makers of promissory notes, and notices to endorsers thereof, the dealings and contracts of those doing business with such company are to be understood and enforced according to such usages and by-laws.

Whitwell vs. Johnson, 17 *Mass. Reps.*, 449, was an action against the endorser of a note, and the only demand of the makers was a notice left by the messenger of the bank at a room where one of the makers desired it might be left. This method of demand was in accordance with the usage established by the bank, and there was no evidence that the endorser had knowledge of this usage; and Parker, C. J., in delivering the opinion of the Court, said that the demand upon the promissors in this case being made without any presentment of the note to them would have been wholly nugatory, but for the usage of the bank which was known and assented to by the makers of the note. To the same effect is the case in the 3d of *Pick.* 414, where the Court held that commencement day at Harvard College is not a holiday, but that the usage of any bank in respect to notes falling due on that day, to make demand on the maker and give notice to the endorser on the day preceding will be binding on the endorser of a note discounted for him at the bank. See also 19 *Pick.* 373, 11 *Mass. Reps.* 85, as holding the same doctrine. See also, *The Bank of the U. S. vs. Norwood*, 1st *Har. and Johnson*, 423, in which it is held that where notice to an endorser of a promissory note of which a bank is the holder, is given according to the usage of the bank, it is sufficient to charge the endorser. See also 6 *Har. & Johnson*, 172, which holds a similar doctrine. In *Gindrat vs. Mechanic's Bank of Augusta*, 7 of *Alabama Reps.* 324., it is held—that it is competent for a bank by custom or usage, and consequently by rule, to establish a mode for giving notice to charge parties to a bill, different from that which obtains in the general commercial law; as, for instance, to provide that notice may be sent by post even where all parties reside in the same place, and such custom, &c., will be binding on the parties to a bill made payable at the particular bank. In the *Bridgeport Bank vs. Dyer*, 19th *Conn. Reps.* 136, it is held, that the usage of a bank to send checks received by it on New York banks, by steamboat once a week, instead of by next mail, was binding on the endorser. ~~Other~~ and similar cases might be cited, but this array of authorities would seem sufficient to establish the proposition that the usage and course of business of the Ohio Life Insurance and Trust Co. to give checks in the first instance, on the bank where they kept their funds for drafts drawn on them, is material upon the question of diligence in dishonoring and protesting the draft in suit, and is binding on the Plaintiffs in Error, who had for a long time done business with the Trust Company, making it the depository of their funds to draw against in selling exchange on New York.

See

4 Hill 104 + 107
9 Wendall - 346 -
19 - 386
5 Hill - 437

If receiving the check in the first instance was justifiable under the circumstances, then clearly there was no laches in its presentations through the clearing house on the next business day after its receipt. The clearing house was instituted for the *very* purpose of facilitating the presentation of checks, and this method of presentation was according to the established usage of banks, of the city of New York, and inasmuch as this mode of presentation worked no delay, the check being presented and dishonored, next business day after its receipt, which is in time according to all the authorities. Surely no objection can be urged to this mode of presentation. This precise question has been adjudged in the case of *Hooker vs. Franklin*, 2 Bosworth's Reps. 500. In this case Franklin was sued as the endorser of a check, drawn by the Chicago, St. Paul and Fond du Lac Railroad Company, on the American Exchange Bank. He alleged as a defence, laches in the presentation and protest of the check. He endorsed and deposited it in the Continental Bank, (of which Hooker was President) on the 15th of April; the Continental Bank sent the check to the American Exchange Bank through the clearing house on the following day, and it was on the latter day dishonored and sent back to the Continental Bank. The court adjudged that there was no laches.

In *O'Brien vs. Smith*, 1st Blacks. U. S. Reps., 99, the Court held that where a check was drawn upon Saturday, and presented for payment on the next Monday, there was no negligence or delay which would discharge the drawer. C. J. Taney, in delivering the opinion of the Court, said: "The authorities referred to by the counsel for the defendant in error are conclusive, and it cannot be necessary to discuss here questions which we consider as too well settled to be now open to serious controversy."

III.

But were Strong & Wiley Brothers otherwise discharged, they became liable upon their subsequent promise to pay the draft. We submit that a clear case was established upon this point.

The notice of protest was mailed to Strong & Wiley Brothers, by Edwards, the notary, on Monday, the 24th August, and is presumed to have been received by the former in due course of mail, which would have been on the 27th, or at furthest the 28th of August. By this

knowledge was brought home to Strong & Wiley Brothers that the money was not demanded on the draft by the notary or the draft protested by him, until Monday, the 24th of August.

The witness Johnston testifies that subsequently to the 25th of August, Swift Brother & Johnston "received advice from New York " that Swift, Ransom & Company had taken a check from the Trust " Company on their bankers for the amount of said draft, which check " was thrown out at the clearing house. Whereupon Swift, Ransom & " Company went to the Trust Company to get back the draft, but the " office of the trust company being in charge of the sheriff, they were " unable to do so. *Of this fact Mr. Strong and myself had several con-* " *versations subsequently to the date and prior to the 25th of September.* " Mr. Strong came up stairs to the room in which I was, and told me " *that if we would get back their draft from New York they would pay* " *in the amount.* I was busy at the time, and made a memorandum to " write to New York for the draft. Before I wrote for the draft, Swift, " Ransom & Co. sent it to us in their letter dated September 22d, 1857, " which letter is attached to the deposition of Lyman P. Swift in this " cause. On receipt of the draft I went over to the office of Strong & " Wiley Brothers for payment of it, which payment Mr. Strong there " refused." (See pages 56 and 57 of rec.)

That Swift, Brother & Johnston "received a letter from Swift, " Ransom & Co., dated August 24th, 1857, which stated that the Ohio " Life and Trust Company had closed; that they (Swift, Ransom & Co.) " held the Trust Company's check." (Page 60, rec.)

He was then asked this question :

" State whether or not, after the receipt of said letter of Swift, " Ransom & Co. last referred to, you exhibited said letter to said de- " fendants, or either of them? If so, what was said by you and them, " or either of them, in regard to said letter, if anything; or if anything " was said in regard to said draft, or said check referred to in said letter " —state fully and particularly."

Answer. " I think I did not exhibit the letter to them. Mr. Strong " and I had conversations in regard to the check having been taken for " the draft in question, and he claimed that their firm were released on " the draft by Swift, Ransom & Co. taking the check of the Trust Com- " pany on their bank.

(*At page 65 of Record*)—Johnston further says: "We had more than one conversation in which Mr. Strong said that Swift, Ransom & Co. having taken the Ohio Life and Trust Company's check for the draft, they, Strong & Wiley Brothers, were released on the draft."

The witness, R. K. Swift, being shown his letter of Sept. 17th, in which he wrote for the draft, testified as follows:

"I have seen this letter before. I wrote it the day it bears date, say about half past two o'clock, upon my return to the office from dinner that day. I only refer to the letter to remember the date. On that day just as I started for dinner, I met Strong (defendant) on the sidewalk, very near the corner of La Salle and Randolph street, and within 20 feet of my office. He stopped me and said: If you will get that draft back I will pay it, referring to the draft in question. Don't remember that he said the \$1000 draft, this was the only draft we had drawn by them. I went to dinner and upon my return wrote the letter as before stated, and sent it to New York without mentioning to any one that I had so written.

He also testified: "I think Strong in our conversation said he would write to the Trust Company himself and tell them to hand over the draft to our house in New York. I wrote in my letter as near as I could what he told me." [See pages 89 and 90 of Record].

Swift also testifies, that before this promise to pay, that one of the firm of Strong and Wiley Brothers had told him that a check had been taken and for that reason the defendants were discharged. [See pages 90 and 91 of Record].

Thus it appears that Strong & Wiley Brothers, knowing that a check had been taken in the first instance and knowing that the money was not demanded or the draft protested by the Notary until Monday the 24th of August, and claiming that the taking of the check operated to release them from liability as drawers, subsequently promised to pay the draft, if Swift, Brother & Johnston would get it back from New York, and agreed themselves to write to the Trust Company directing them to hand over the draft, and it is insisted that this constitutes a clear case of promise to pay, with full knowledge of the facts operating as a waiver of any supposed laches in demand of payment or protest of the draft, within the well established rules of law and the adjudged case of the Supreme Court of this State. See

Curtis vs. Martin, 20 Ills. 557.

Tobey vs. Berley, 26 Ills. Reps. 426.

The only possible objection which the ingenuity of the counsel for the defendants below could devise against the overwhelming testimony on this branch of the case, was, that although before the promise, repeated conversations were had, in which it appeared that Strong & Wiley Brothers had knowledge of the taking of the check, in the first instance, and claimed that they were thereby released from liability, still it was not proven affirmatively with sufficient particularity that they knew when the check was taken, whether Saturday or Monday, or all the particulars in relation thereto, and the steps taken to procure the money thereon, but to this we answer, that when it is shown that they had knowledge of the taking of the check in the first instance, and especially as it appears that they claimed that *they* were thereby discharged from liability, it will be presumed that they had correct information relative to all the essential facts. Such seems to be the rule laid down by his Honor Judge Breese; in the elaborately considered case in the 26 of Illinois, 426, above quoted, he says :

“ We therefore are of opinion that when a man against whom there is a demand, promises to pay it, for the necessary facilitation of business transactions between man and man *everything must be presumed against him.*”

Indeed a more stringent rule would amount to a practical abrogation of the well established doctrine that subsequent promise operates as a waiver of laches in demand and protest.

IV.

The counsel for the plaintiffs in error, cite the case in the 19 Barbour, as in point. But is it a case in point? It was the case of a sight draft on one Warren, sent to the Troy City Bank, (where Warren kept his account) for collection. It was presented to Warren for payment at the bank, on the 19th of November. Warren had no funds in the bank, but he drew his check on the bank for amount of draft and some other sums, and the bank accepted the check and gave up the draft to him. On the same day Warren deposited in the bank more than enough to meet the check and draft; on the 20th, the bank allowed him to draw out \$18,000, which was more than the amount of the draft; on the 22d of November, Warren returned the draft and said he would not pay it, and it was then protested. Here, by accepting Warren's check, and charging it to him, the bank practically lent him the money, with which

to pay the draft. But at all events by the deposit on the same day (which should have been applied against the draft) the draft was paid. But if not, who could pretend that there were not laches in not protesting the draft until the 22d, three days after it was presented.

The counsel claims the custom attempted to be set up, is "bifurcate." How bifurcate? Those who had been for a long term of years conversant with the course of business of the Trust Company, say that they "never knew the Trust Company to pay a draft in *any other manner, than by check.*" The custom was "*general and universal, and never departed from except by special request.*" It is true that some outsiders, who knew nothing of the general course of business of the Trust Company, testified that they had known instances of cash being paid by the Trust Company, on drafts. But this only shows that the company would, upon special request or demand, depart from their established usage and course of business.

The counsel seem to think that a usage or custom must be so inflexible that no special request or demand could induce a departure, and the fact that the Trust Co. in some cases on special request may have departed from their usage is urged as evidence that the usage had never existed. And as to passing checks through the clearing house, it was always done in dealings between bankers where the check was drawn on a bank belonging to that institution, as the American Exchange Bank did. But inasmuch as the check was presented and dishonored on the next day after it was drawn, why is it material how it was presented, whether through the clearing house or otherwise?

The case of the *Montgomery Co. Bank vs. The Albany City Bank*, 8 Barb. 396, was a case of a draft payable on a day fixed and specified, besides the Counsel for the plaintiffs in error (inadvertantly no doubt) mis-quote this case; the Court did not say: "There can be no custom of the city of New York to leave a bill of exchange one day with the drawee," nor any thing to that effect.

We deem it unnecessary to spend time or space in reply to the Counsel's criticisms on the instructions, it is sufficient to say that they are very full and voluminous, extending from page 128 to 137 of record in behalf of the plaintiff below, and from page 144 to page 159 of record, for defendants below, and fully presented the case to the jury upon correct issues. Besides, even if some of them were not abstractly correct, it does not follow that the judgment should be for that reason reversed, 27 Ills. 115.

The counsel misapprehended both what Ambler actually said, and the effect of what he did in fact say, with reference to ascertaining whether a check was good or not at the clearing house. On cross-examination (page 99), Ambler said: "I could ascertain if check drawn on American Exchange Bank was good by taking it to the bank, but I could not ascertain at the clearing house." That is the bank having checks and drafts on the American Exchange Bank, sends its messenger to the clearing house with the budget containing them; there he meets the messenger of the American Exchange Bank, and exchanges budgets, and the latter takes the budget received, carries it back to his bank, and there it is inspected, bad checks thrown out, and sent back from where they came, in this case to the Merchants' Bank, where Swift, Ransom & Co. deposited it. This is the manner in which the business is done. Hence the statement that it could not be ascertained *at the clearing house* whether the check was good, but this is by no means saying that it would not be ultimately ascertained by sending it through the clearing house; and it would be absurd so to say—for this is the very purpose of the institution—besides the testimony of L. P. Swift is positive that this check was dishonored through the clearing house.

There was no error in overruling the questions in the shape they were originally put; as to where the risk was to fall in case a check was given.—(*Page 110 and 111 of Record.*) They called for an opinion on a question of law, and for a local custom, abrogating a positive rule of law. But substantially the same question was put, and the evidence finally given, which would cure any error, if error had been committed.

Upon the whole, therefore, we submit that a clear case of liability was made out against the defendants below, and that no error of law or fact was committed, and that the judgment below should be affirmed.

FARWELL & SMITH,
Counsel for Defendants in Error.

²³²
Supreme Court

David C Strong

at 232

John B King

Add. Brief for

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Appellees

1863

Filed May 2^d 1869.
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in Error

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State of Illinois, Third Grand Division.

SUPREME COURT,

APRIL TERM, 1863.

JOHN B. KING, DEFENDANT IN ERROR,

DAVID O. STRONG ET AL., PL'FFS. IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

On the 19th of August, 1857, and for a long time previous, the plaintiffs in error (defendants below) were bankers, doing business in the city of Chicago, and among other things dealing in Exchange on New York, and for that purpose placed their funds in the hands of the Ohio Life Insurance and Trust Co., to draw against. On the 19th of August they sold the draft in question to Williams & Brother [a business firm in Chicago]. The draft was dishonored in New York, and Strong and Wiley Brothers, although they subsequently promised to pay it, finally refused to respond and make the draft good; hence this suit against them by King, the holder of the draft. The defendants below placed their defense upon two grounds.

1st. That the taking of the check on the 22d of August, of the Trust Co., operated as a payment of the draft.

2d. That the draft was not formally protested in time by Notary Public, as required in case of foreign bills of Exchange, or in other words, that there was laches in respect to protest within the rules of commercial law, which operated to discharge the drawers.

The plaintiff below urged, and it is believed rightfully maintained, the converse of these two propositions, and in addition a subsequent promise to pay the draft.

I.

Was the draft paid by the Trust Co. on the 22d of August? Did the giving of the check under the circumstances operate as payment? As to the facts bearing upon this point there is no substantial conflict or controversy. Lyman P. Swift testified that the draft was received by Swift, Ransom & Co. on the 22d of August, 1857, that, as was the usual course with all drafts received, it was first marked with a stamp on the back of it the words, "received payment." Then he wrote, "Swift, Ransom & Co.," under the words received payment, and sent a porter or messenger out with it to the Ohio Life Insurance and Trust Co. They gave him their check on their Bank, the American Exchange Bank. He further testifies, that on receiving the check he deposited it on the same day in the Merchants' Bank, so as to have it go through the clearing house on the next business day. *That this draft was not credited to Swift, Brother & Johnston, as it was their way never to advise any one of the payment of any draft or collection until after ascertaining that the check was good at the clearing house.* That such was the usual custom among bankers, and adopted as a rule to prevent confusion. *That the check in controversy was not good, which means among bankers, no money to pay it at the clearing house.* That after ascertaining that the check was not good at the clearing house, he procured a Notary Public for the purpose of having the draft duly protested, and went with him to the Trust Co. to get the draft and see that it was protested. *That the Trust Co. gave him the draft, and he gave it to the Notary, who made the usual demand of payment, which was refused.* That the Sheriff was in possession of the office books and papers of the said Life Insurance and Trust Co. *That the officers of said Company were willing that the draft should be taken away by Swift, Ransom & Co., but the Sheriff declined* (see direct examination of Lyman P. Swift, inserted between pages 101 and 102 of Record).

On cross examination he testified that he procured the draft of the Trust Co. and sent it to Swift, Brother & Johnston, at their request, on the 22nd of Sept., 1857. That it was not sent sooner on account of the Sheriff having possession of the books and papers of the Trust Co., and the "general fuss and scare consequent upon the failure of so large a concern."

It further appears that at the time the Trust Co. gave their check on the American Exchange Bank for this draft, they had no funds there, but their account was largely overdrawn, some \$50,000.00 (see testimony of De Pew, page 104 of Record. Also testimony of Booth, page 107 of Record).

This was a draft drawn on a New York party, was payable in New York, and it was there presented and a check was there given; and in determining its effect on the question of payment, the laws of New York must govern; this was expressly adjudged in *Vancleef vs. Therasson*, 3 *Pick.*, 12, and by the well established law in New York, the receiving of the check did not operate as payment, "*unless it was expressly agreed to be accepted as such, or unless the circumstances clearly show that such was the understanding of the parties,*" and that the giving up of the draft to the Trust Co., at the time of taking the check, is not evidence that the check was received as payment. This was expressly adjudged in *Olcott vs. Rathbone*, 5 *Wend.*, 490. And the same doctrine has been repeatedly laid down, both by the Supreme Court of this and other States. But it is unnecessary to multiply authorities. Here there is no evidence of an express agreement, nor are there circumstances to show that this check was received in payment of the draft, but the contrary understanding clearly appears. When Swift returned on Monday with the Notary to demand payment and protest the draft, the Trust Co. did not pretend that it had been paid, but readily surrendered it up to be protested, and were willing that Swift should take it away, but the Sheriff who had seized the papers and effects of the Company, refused to allow the draft to be taken away until such time as he could ascertain what was proper to be retained and what was proper to be released. Indeed it is difficult to conceive how it can be claimed that the mere giving of a check, upon a bank where the party had no funds, and where the drawer's account was already largely overdrawn, and where he consequently had no right to draw, should be held as payment, and it is safe to say that no authority for such a proposition can be found.

II.

The next question is, was there such laches in the presentment and protest of this draft as to discharge the drawers? We submit that there was not. The facts in relation to this point are these: The draft was drawn upon the 19th of August, 1857, in favor of Williams & Bro., and by them endorsed to Swift Brother & Johnston, and by the latter endorsed and transmitted by mail to their bankers in New York, Swift,

Ransom & Co., for collection and credit, all upon the same day. (See testimony of Johnston, pages 55 and 56 of Record, also testimony of Lyman P. Swift, inserted between 101 and 102 pages of Record.) It was received by Swift, Ransom & Co. in New York, in due course of mail on Saturday, the 22d of August, who sent it immediately by their messenger to the office of the Ohio Life Ins. & Trust Co., and they gave him their check on the American Exchange Bank for it, which check, Swift, Ransom & Co. immediately, and upon the same day deposited in the Merchants' Bank, where they kept their account, "so as to have it go through the usual course of passing through the clearing house at the earliest possible moment, which would be the next business day at 10 o'clock A. M." It passed through the clearing house on the next business day, Monday the 24th of August, and was dishonored, upon receiving notice of which Lyman P. Swift, of Swift, Ransom & Co., immediately upon the same day procured a notary, went with him to the office of the Trust Co., procured the draft, and it was duly protested on that day by the notary, and on the same day, notice of protest by him transmitted to Strong & Wiley Brothers, at Chicago, by mail, postage prepaid. (See testimony of L. P. Swift, between pages 101 and 102, also testimony of Edwards, the notary, 44 to 49 of Record.) L. P. Swift also testifies, that *he telegraphed* to Swift Bro. & Johnson, on the 24th of August, "the non-payment *and dishonor* of the said draft in controversy." Johnston testified that Swift Bro. & Johnston received this dispatch Monday or Tuesday the 24th or 25th of August, that he, *immediately* on receipt of the dispatch, went to the office of Strong & Wiley Bros. with the dispatch in his hand, and told them that the Trust Co. had failed, that their draft was unpaid, and that "on its return we would look to them for payment." (See 55 and 56 of Record.)

It also appears that the Trust Co. kept no funds in their office, but kept their funds in the Bank of Commerce, and in the American Exchange Bank. (See testimony of Ambler, page 96 of Record.)

It appears from the testimony that the course pursued with this draft was in strict accordance with the course of business of the Ohio Life Ins. and Trust Co., and the whole Banking System of New York city connected with this transaction. *The taking of the check, in the first instance, of the Trust Co., for the draft, was in strict accordance with the course of business of all those dealing with the Trust Co. in like cases.*

Ambler, who testifies that he was in New York, in the banking business, from 1843 to 1856, as clerk of Wadsworth & Sheldon, whose business was large, their Western business of receipts and disbursements being about \$100,000 a day, says that he knew the Trust Company

all this time ; that said company did a banking business all this time with Wadsworth & Sheldon, receiving and paying drafts ; that Wadsworth & Sheldon had checks on the Trust Company " daily, or nearly so ;" that the Trust Company paid drafts on them by checks ; that he "*never knew the Trust Company to pay a draft in any other manner than by check.*"

(See 95 to 99 of record). He further says that he never knew of any banker getting money on a draft (on the Trust Company) except as a matter of spite, and then upon demand of a notary, (See page 100 of record.)

De Pew testifies that "the general rule and custom (of the Trust Company) was to pay such drafts (as the one rendered) by *checks on banks with whom they had accounts* ;" "that custom of payment existed for five years to my knowledge, during which time I was a clerk with the Ohio Life Insurance Company at New York ; that the custom of payment of drafts by checks was *general and universal, and never was departed from except by especial request.*" (See 102 to 104 of Record.)

In answer to a question on cross-examination, as to whether gold could not have been obtained, he says : "I suppose they would have been paid in gold or currency, though the demand for payment in gold or currency, *was never made, so far as I know,*" (See 105 of Record).

Booth also testifies that "the general custom would be to give a check," (See 108 of Record). Booth also states that the Trust Company had no money in the American Exchange Bank, on the 22d of August, the day the check was drawn, (See 109 of Record.).

The testimony of the defendants' witnesses is corroborative. The first witness they called, H. H. Edwards, says, "the custom as to obtaining payment of a draft, was to present the draft for payment and if a check was given for it and there was no doubt of the responsibility of the party drawing the check, to receive the check and deposit it in bank, &c.," (See 110 of Record.)

Wm. H. Waite, called by defendants below, testified that he was in the banking business in Metropolitan Bank, New York ; that he had seen the draft in suit, and knew the Trust Company ; that a party presenting a draft for payment would *usually* receive a check for it ; he also testifies that the Trust Company stood well ; was in good credit on the 22d of August, 1857. He was shown the draft in suit, and asked the following question : "What would you do with this draft if received

August 22d, 1857, by a banking house in New York?" He answered, the first thing would be to mark it paid and send a messenger with it to get the money or a check; this check would be deposited in the bank where the party kept his account, to go through the clearing house; next day if not paid, it would be sent back to the party depositing it," (*See 112 and 113 of Record*).

Not only does it appear that it was strictly in accordance with the course of business to receive the check, but the evidence shows that the check was disposed of by sending it through the clearing house, strictly in conformity with such course of business. [*See testimony of Lyman P. Swift, J. C. Ambler, De Pew and Waite.*] Nor is there any substantial conflict of testimony on this subject. Under this state of facts, were the drawers discharged on the ground of laches, of negligence of the holder in respect to demand, protest or notice?

The plaintiffs in error claim: 1st. That this draft was a foreign bill, which requires the formal protest of a notary on the very day it is dishonored. 2d. That the bill was dishonored on Saturday the 22d of August, and not being protested until Monday, the 24th of August, the drawers were therefore discharged.

We insist, in the first place, that this was not a foreign bill, within the rule, making a notary's protest indispensable. It is in form a mere check. It is drawn on a banker, payable immediately, (*Chit. on Bills, marg. page 511*) unless the fact that it was drawn on a banker doing business beyond the State line, changes its nature, no doubt could be entertained on this point, and we insist that no authority or reason can be urged for a distinction like this. It is going too far to hold that sight drafts on New York, so much dealt in by our Bankers, are foreign bills, requiring all the technical formalities to charge the drawer. But clearly under our statute it is not a foreign bill.

See chap. 73, Revised Statutes, sec. 1 and 2.

A clear distinction is there made between foreign bills and a bill drawn on a party outside of this State, but within the United States. The first section provides that "When any foreign bill of exchange shall be protested," &c., ten per cent. damages may be recovered. The second section provides that "If any bill of exchange, drawn upon any person or body politic or corporation, out of this State, but within the United States or their Territories," shall be protested, five per cent. damages shall be recoverable. The expression, "any foreign bill," used in the first section, in connection with the provisions of the second section, indicates a legislative intent to exclude all bills drawn upon parties

within the jurisdiction of the United States, from the class of bills known as foreign bills in the commercial law. No other construction can harmonize the provisions of the two sections. Under the provisions of the Ohio Statute, which is similar to our Statute (except that its language is much less marked, the expression *foreign bill* not being there used in contradistinction to a bill drawn on any party within the United States), the Supreme Court of that State have repeatedly held that a bill drawn on a party within the United States, but outside of that State, is not a foreign bill within the rule making a notarial protest indispensable to a recovery against the drawer or indorsers.

Case vs. Heffner, 10 *Ohio*, 180.

McMurchee vs. Robinson, do., 496.

Estep vs. Cecil, 6 *Ohio State R.*, 536.

If this was not a foreign bill, then the plaintiffs in error have nothing to stand upon; for, admitting that the draft was dishonored on Saturday, notice of its dishonor was telegraphed by Swift, Ransom & Co., on Monday, the 24th of August, the next business day, to Swift Brother & Johnston, and by the latter received on either Monday or Tuesday, and notice by them immediately communicated to Strong & Wiley Brothers. This was clearly sufficient.

Chitty on Bills, marg. page 470, 471, 482.

1 *Hill, N. Y. Reps.* 263.

But treated as a foreign bill we insist there is no case of laches. The draft was received by Swift, Ransom & Co. on Saturday, the 22nd of August, and was duly presented by a Notary Public at the office of the Trust Co. for payment, payment demanded and refused, and the draft duly protested and notice of the protest mailed to the drawers, postage prepaid, on Monday, the 24th, being the next business day after its receipt. The counsel for the plaintiffs in error are obliged to admit that if Swift, Ransom & Co. had placed the draft, upon its receipt on Saturday, in their vault and taken no steps to obtain payment till Monday, the 24th, and then procured a Notary and had payment demanded and the draft protested, no possible defence could be made, and they are therefore driven to the somewhat extraordinary position of insisting that the extra effort and vigilance, so to speak, displayed prior to Monday by Swift, Ransom & Co., toward obtaining the money on this draft, operated to discharge their clients on the ground of laches, or negligence. Had the draft been dishonored on Saturday, the 22nd of August; that is, had peremptory demand of payment been made, and had there been a refusal or default of payment, by the Trust Co., on that day, then (this being held a foreign bill), we admit that a formal protest, or at least a noting of protest, by a Notary would have been necessary, and that a protest upon

the next Monday would have been too late; but the draft was not dishonored on Saturday, within the meaning of the rule requiring or even allowing a protest; there was no default, no refusal by the Trust Co. on Saturday. And a default or *refusal* was necessary to constitute a dishonor; this is the language employed in the books in speaking of the time when protest must be made:

"A foreign bill should be noted for non-acceptance or non-payment on the day on which acceptance or payment is refused."

Bailey on Bills, page 259, 260.

In *Lefley vs. Mills*, 4 Term Reps. 170, 174, Buller, J. says:

"With regard to foreign bills of Exchange, all the books agree that the protest must be made on the last day of grace: *now that supposes a default in payment, for a protest cannot exist unless default be made.*"

Such is the language employed by the authorities relied upon by the counsel for the plaintiffs in error.

"If the bill be presented in the first place by the holder, *and payment refused*, it should thereupon be placed in the hands of a Notary whose duty it is to present it again to the drawee and demand payment; *and in case he shall again refuse to pay, the Notary makes a note of the refusal, of the reason assigned therefor, and of the time*, adding his initials."

Edwards on Bills, page 581.

"In England and America the protest is noted on the very day of *the dishonor*, although it is not, or may not be, ordinarily, drawn out in form on that day." "By our law it (protest) should, ordinarily, be made or at least noted on the same day on which the non-acceptance *or refusal* has taken place."

Story on Bills, Sec. 278, 283.

Chitty says: "But it may now be considered as settled in England, as well as Scotland and America, that it is sufficient to note a foreign bill for non-payment *on the day of refusal*, and that the protest may be formally drawn up and signed, or as it is technically termed, extended by the Notary and truly ante-dated at any time after."

Chitty on Bills, marg. page 477.

Here it seems clear that the Trust Co. committed no default until the check, which was given as a means of obtaining the money, was dishonored on Monday, the 24th of August; nor was there any refusal by them to comply with any demand made on them, until they refused the demand made on them by the Notary on the same day; hence, in the light of the authorities no protest was necessary or even admissible upon Saturday, the 22nd of August.

But, say the counsel, "The bill having no time of payment expressed, was payable on presentment." "The bill was protested for payment on Saturday, the 22nd of August, 1857, therefore it became payable on that day." "A foreign bill must be protested for non-payment on the very day it becomes payable, or the drawer stands discharged." Hence they urge that the notarial demand and protest being on Monday, the 24th, it was one day too late, and the drawers were therefore discharged. This is more specious than sound.

The draft specifying no time of payment was in a certain sense payable immediately—that is, the holder could have demanded payment of the drawers the next instant after it was executed, and the drawers could not object that the demand was premature, but it does not follow that demand of the money must therefore be made the next instant and the bill protested to charge the drawer, but the law is quite otherwise, and it is with reference to this question as to how soon the holder has a right to demand payment that those expressions are used in the books. The very authorities quoted by counsel show that *Edwards* in his treatise on bills, at page 154, says: "If no time be specified, the law adjudges *that the money is payable immediately*. For certain purposes it is payable on demand: for others, it is by operation of law payable *immediately*, and draws interest from date. The same rule applies to checks drawn on banks, which being made paid generally are *payable on demand*." The right of the holder to make a peremptory demand of the money, and put the drawers upon their refusal, and thus dishonor the draft attached instantly upon its execution, and the sending the draft to the Trust Company on Saturday, and receiving the check, in nowise increased or diminished that right. Nor did it in any manner change the nature of the draft or the time when it became due and payable. And as we have already shown that there was no such *default*, no such *refusal* on the part of the Trust Co. on Saturday, as amounted to a dishonoring of the draft so as to require or even admit of a protest on that day, there remains only the question whether, under all the facts and circumstances, there was such laches as to discharge the drawers, in not putting the Trust Co. to such default or refusal until Monday, the 24th of August.

There is no dispute as to what is the rule governing such cases, Chitty says: "But it may now be considered settled that the time when the presentment *for payment* must be made is in general a question of law. We have, therefore, to examine what is the rule of law upon this subject. Upon this question it has been observed that there is no other settled general rule, than that the presentment must be made *within a reasonable time*, which must be accommodated to other business and affairs of life, and that a party is not bound in any case to present a bill or note on the same day it is issued or *received by him*." Chitty on Bills, marg. page 380. Again he says: "With respect to a check on a banker, it is now settled that it suffices to present it *for payment* to the banker, at any time during banking hours (in London five o'clock) *on the day after it is received*, and that no laches can be imputed to the holder in not presenting it *for payment* earlier in the morning of the second day, although the bankers paid drafts on them until four o'clock in the afternoon, and then stopped payment." Was the receiving of the check in the first instance laches under the circumstances. It did not operate to extend the time one moment beyond the shortest time for making final demand and protest. Strong & Wiley Brothers had for a long time kept their funds to draw against in the hands of the Trust Company, who kept an office or place of business in one part of the city, and their funds in another part deposited in bank; the general and ordinary, and we may say, under the testimony, uniform course of business of the Trust Company had been for a long term of years to give a check in the first instance for drafts on them. Indeed, this seems to have been the only practicable and businesslike method of getting at the money; hence, in the language of the witnesses, this practice was "*general and universal, and never departed from except by special request*," and to have exacted the cash in the first instance would have actually deranged the whole course of business, producing a delay of from 15 to 30 minutes, while the company sent out a special messenger to their bank of deposit, to procure the money. Ambler states that he never knew of any banker getting the money on a draft (in the first instance of the Trust Company), *except as matter of spite*, and then upon the demand of a notary. Reasonable diligence according to the course of business and circumstances surrounding them was all that was required of Swift, Ransom & Co., and we submit that it is absurd to say that they were required to take the extraordinary course of exacting the money in the first instance, thus going counter to the whole course of banking business, producing actual derangement and a delay of half an hour—a course which would have indicated spite and ill blood on their part, rather than the *bona fide* prosecution of a commercial transaction, especially when the taking of the check did not delay the final demand and protest of the draft one moment beyond the shortest time required by the strictest rules of law. But the case is not without authority upon this point. Chitty says:

"Payment is frequently made by a draft on a banker, in which case, if the person receiving the draft do not use diligence to get it paid, the person from whom he received it, and every other party to the bill will be discharged, but not otherwise, unless the holder agree to run all risk:

In *Russel vs. Hankey*, 6 Term Rep., 12. The defendant was sued for negligence in taking a check for a draft which check was dishonored. It being according to ordinary course of trade and business of bankers to take the check, the Court held that there was no negligence, and defendant was acquitted. This would seem to be in point, for if there had been negligence the drawers and endorsers of the bill for which the check was given would have been discharged and the action would lie.

clitty on Bills - Mang - page 399

In *Robson & Waugh vs. Bennet, et al.*, 2 Taunton's Reps. 388, the defendant was sued in assumpsit for coal sold and delivered. His defence was that he had given his check on his banker, where he had funds, for the coal, to the plaintiff, who had been guilty of laches in presenting and protesting the check, and in the mean time the banker failed. The check was drawn on the 11th of September, during all of which day, the bankers, the drawees, continued payment. It was presented at the banking house of the drawees on the 11th, to a member of the house, who said it was good, and marked it accordingly, and returned it. The check passed through the clearing house on the next day according to the custom and course of dealing among London bankers, and was dishonored, the drawees having stopped payment at noon the 12th. Notice of its dishonor was given the next day, the 13th. The Court held that there was no laches.

Lord Mansfield said: "The first question is, whether there is laches as to the time of presentment; as to that the case of *Appleton vs. Sweetapple*, decides, that a check need not be presented on the day on which it is drawn; now this bill was in fact presented and accepted on the very day on which it was drawn." He further said that: "the mark on the check is an engagement to pay at a particular place (the clearing house); is not then the presenting at that place equivalent to presenting it at the banking house. It seems that it is, and it therefore is no laches; consequently the surplus of the money for the coal remains due."

This seems to be a case in point; here was a check which need not have been presented and the money demanded till the next day after it was received, but it was presented on the same day but the drawees did not pay the money, but marked it in a way which by the course of business of bankers was equivalent to an agreement that the money should

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be paid the next day at the clearing house ; the next day it was presented at the clearing house and dishonored, and Lord Mansfield held that inasmuch as the next day was in time to present the check and demand the money, the party was not prejudiced by presenting it the day before, though he did not demand or receive the money. So with the case at bar, the giving of the check was equivalent to an agreement that the money on the draft should be paid through the clearing house the next business day, and that the holder should not to be prejudiced by the fact that the draft was sent on Saturday to the Trust Co., and a check received as a means of obtaining the money on the next business day through the clearing house.

But the custom or course of business of the Ohio Life Insurance and Trust Co. is proper to be considered and is most material in determining this question of diligence in dishonoring and protesting this draft. It is not introduced to change the effect of the contract or to do away with any positive rule of law, as the counsel for the plaintiffs in error seem to suppose, but simply as evidence bearing upon the question whether the contract has been fulfilled by the use of due diligence in protesting the draft. The contract is that the drawers will respond, if the holder of the draft, with reasonable diligence under the circumstances, demands the money on it, and causes it to be protested in case of refusal or default of payment ; and the usual and ordinary course of business of the banking house on which the draft is drawn, is always a most material circumstance in determining this question. The authorities are abundant on this subject.

In 9 *Wheaton*, 588, which was an action against the endorser of a note payable at, and discounted by the Bank of Columbia, the Court held that it was competent to show that it was the established practice of said bank to demand payment of notes by it discounted, on the 4th instead of the the third day of grace. The same doctrine was reiterated in the 11th of *Wheaton*, 431, where the Court held that a note made for the purpose of being negotiated at a bank whose custom is to demand payment on the 4th day instead of the third day of grace—that such a custom forms a part of the law of the contract, and that it is not necessary that a personal knowledge of the usage should be brought home to the endorser. In 9 *Reps. Mass.*, 155, where a bank had by their usage and by-laws established the practice of demanding payment of the maker by merely sending him notice the day before the note fell due—(the note being payable at, and discounted by the bank), the Court held—that such demand was sufficient to charge the endorser upon the principle that, where a banking company have established usages and by-laws respect-

ing demands on makers of promissory notes, and notices to endorsers thereof, the dealings and contracts of those doing business with such company are to be understood and enforced according to such usages and by-laws.

Whitwell vs. Johnson, 17 *Mass. Reps.*, 449, was an action against the endorser of a note, and the only demand of the makers was a notice left by the messenger of the bank at a room where one of the makers desired it might be left. This method of demand was in accordance with the usage established by the bank, and there was no evidence that the endorser had knowledge of this usage; and Parker, C. J., in delivering the opinion of the Court, said that the demand upon the promissors in this case being made without any presentment of the note to them would have been wholly nugatory, but for the usage of the bank which was known and assented to by the makers of the note. To the same effect is the case in the 3d of *Pick.* 414, where the Court held that commencement day at Harvard College is not a holiday, but that the usage of any bank in respect to notes falling due on that day, to make demand on the maker and give notice to the endorser on the day preceding will be binding on the endorser of a note discounted for him at the bank. See also 19 *Pick.* 373, 11 *Mass. Reps.* 85, as holding the same doctrine. See also, *The Bank of the U. S. vs. Norwood*, 1st *Har. and Johnson*, 423, in which it is held that where notice to an endorser of a promissory note of which a bank is the holder, is given according to the usage of the bank, it is sufficient to charge the endorser. See also 6 *Har. & Johnson*, 172, which holds a similar doctrine. In *Gindrat vs. Mechanic's Bank of Augusta*, 7 of *Alabama Reps.* 324., it is held—that it is competent for a bank by custom or usage, and consequently by rule, to establish a mode for giving notice to charge parties to a bill, different from that which obtains in the general commercial law; as, for instance, to provide that notice may be sent by post even where all parties reside in the same place, and such custom, &c., will be binding on the parties to a bill made payable at the particular bank. In the *Bridgeport Bank vs. Dyer*, 19th *Conn. Reps.* 136, it is held, that the usage of a bank to send checks received by it on New York banks, by steamboat once a week, instead of by next mail, was binding on the endorser. ~~Other~~ and similar cases might be cited, but this array of authorities would seem sufficient to establish the proposition that the usage and course of business of the Ohio Life Insurance and Trust Co. to give checks in the first instance, on the bank where they kept their funds for drafts drawn on them, is material upon the question of diligence in dishonoring and protesting the draft in suit, and is binding on the Plaintiffs in Error, who had for a long time done business with the Trust Company, making it the depository of their funds to draw against in selling exchange on New York.

See

4 - Hill 104 + 107
 9 Wendall 346
 14 " 386
 5 - Hill 437

If receiving the check in the first instance was justifiable under the circumstances, then clearly there was no laches in its presentations through the clearing house on the next business day after its receipt. The clearing house was instituted for the *very* purpose of facilitating the presentation of checks, and this method of presentation was according to the established usage of banks, of the city of New York, and inasmuch as this mode of presentation worked no delay, the check being presented and dishonored, next business day after its receipt, which is in time according to all the authorities. Surely no objection can be urged to this mode of presentation. This precise question has been adjudged in the case of *Hooker vs. Franklin*, 2 Bosworth's Reps. 500. In this case Franklin was sued as the endorser of a check, drawn by the Chicago, St. Paul and Fond du Lac Railroad Company, on the American Exchange Bank. He alleged as a defence, laches in the presentation and protest of the check. He endorsed and deposited it in the Continental Bank, (of which Hooker was President) on the 15th of April; the Continental Bank sent the check to the American Exchange Bank through the clearing house on the following day, and it was on the latter day dishonored and sent back to the Continental Bank. The court adjudged that there was no laches.

In *O'Brien vs. Smith*, 1st Blacks. U. S. Reps., 99, the Court held that where a check was drawn upon Saturday, and presented for payment on the next Monday, there was no negligence or delay which would discharge the drawer. C. J. Taney, in delivering the opinion of the Court, said: "The authorities referred to by the counsel for the defendant in error are conclusive, and it cannot be necessary to discuss here questions which we consider as too well settled to be now open to serious controversy."

III.

But were Strong & Wiley Brothers otherwise discharged, they became liable upon their subsequent promise to pay the draft. We submit that a clear case was established upon this point.

The notice of protest was mailed to Strong & Wiley Brothers, by Edwards, the notary, on Monday, the 24th August, and is presumed to have been received by the former in due course of mail, which would have been on the 27th, or at furthest the 28th of August. By this

knowledge was brought home to Strong & Wiley Brothers that the money was not demanded on the draft by the notary or the draft protested by him, until Monday, the 24th of August.

The witness Johnston testifies that subsequently to the 25th of August, Swift Brother & Johnston "received advice from New York " that Swift, Ransom & Company had taken a check from the Trust " Company on their bankers for the amount of said draft, which check " was thrown out at the clearing house. Whereupon Swift, Ransom & " Company went to the Trust Company to get back the draft, but the " office of the trust company being in charge of the sheriff, they were " unable to do so. *Of this fact Mr. Strong and myself had several con-* " *versations subsequently to the date and prior to the 25th of September.* " Mr. Strong came up stairs to the room in which I was, and told me " *that if we would get back their draft from New York they would pay* " *in the amount.* I was busy at the time, and made a memorandum to " write to New York for the draft. Before I wrote for the draft, Swift, " Ransom & Co. sent it to us in their letter dated September 22d, 1857, " which letter is attached to the deposition of Lyman P. Swift in this " cause. On receipt of the draft I went over to the office of Strong & " Wiley Brothers for payment of it, which payment Mr. Strong there " refused." (See pages 56 and 57 of rec.)

That Swift, Brother & Johnston "received a letter from Swift, " Ransom & Co., dated August 24th, 1857, which stated that the Ohio " Life and Trust Company had closed; that they (Swift, Ransom & Co.) " held the Trust Company's check." (Page 60, rec.)

He was then asked this question :

"State whether or not, after the receipt of said letter of Swift, " Ransom & Co. last referred to, you exhibited said letter to said de- " fendants, or either of them? If so, what was said by you and them, " or either of them, in regard to said letter, if anything; or if anything " was said in regard to said draft, or said check referred to in said letter " —state fully and particularly."

Answer. "I think I did not exhibit the letter to them. Mr. Strong " and I had conversations in regard to the check having been taken for " the draft in question, and he claimed that their firm were released on " the draft by Swift, Ransom & Co. taking the check of the Trust Com- " pany on their bank.

(At page 65 of Record)—Johnston further says: "We had more than one conversation in which Mr. Strong said that Swift, Ransom & Co. having taken the Ohio Life and Trust Company's check for the draft, they, Strong & Wiley Brothers, were released on the draft."

The witness, R. K. Swift, being shown his letter of Sept. 17th, in which he wrote for the draft, testified as follows:

"I have seen this letter before. I wrote it the day it bears date, say about half past two o'clock, upon my return to the office from dinner that day. I only refer to the letter to remember the date. On that day just as I started for dinner, I met Strong (defendant) on the sidewalk, very near the corner of La Salle and Randolph street, and within 20 feet of my office. He stopped me and said: If you will get that draft back I will pay it, referring to the draft in question. Don't remember that he said the \$1000 draft, this was the only draft we had drawn by them. I went to dinner and upon my return wrote the letter as before stated, and sent it to New York without mentioning to any one that I had so written.

He also testified: "I think Strong in our conversation said he would write to the Trust Company himself and tell them to hand over the draft to our house in New York. I wrote in my letter as near as I could what he told me." [See pages 89 and 90 of Record].

Swift also testifies, that before this promise to pay, that one of the firm of Strong and Wiley Brothers had told him that a check had been taken and for that reason the defendants were discharged. [See pages 90 and 91 of Record].

Thus it appears that Strong & Wiley Brothers, knowing that a check had been taken in the first instance and knowing that the money was not demanded or the draft protested by the Notary until Monday the 24th of August, and claiming that the taking of the check operated to release them from liability as drawers, subsequently promised to pay the draft, if Swift, Brother & Johnston would get it back from New York, and agreed themselves to write to the Trust Company directing them to hand over the draft, and it is insisted that this constitutes a clear case of promise to pay, with full knowledge of the facts operating as a waiver of any supposed laches in demand of payment or protest of the draft, within the well established rules of law and the adjudged case of the Supreme Court of this State. See

Curtis vs. Martin, 20 Ills. 557.

Tobey vs. Berley, 26 Ills. Reps. 426.

The only possible objection which the ingenuity of the counsel for the defendants below could devise against the overwhelming testimony on this branch of the case, was, that although before the promise, repeated conversations were had, in which it appeared that Strong & Wiley Brothers had knowledge of the taking of the check, in the first instance, and claimed that they were thereby released from liability, still it was not proven affirmatively with sufficient particularity that they knew when the check was taken, whether Saturday or Monday, or all the particulars in relation thereto, and the steps taken to procure the money thereon, but to this we answer, that when it is shown that they had knowledge of the taking of the check in the first instance, and especially as it appears that they claimed that *they* were thereby discharged from liability, it will be presumed that they had correct information relative to all the essential facts. Such seems to be the rule laid down by his Honor Judge Breese; in the elaborately considered case in the 26 of Illinois, 426, above quoted, he says :

“ We therefore are of opinion that when a man against whom there “ is a demand, promises to pay it, for the necessary facilitation of business transactions between man and man *everything must be presumed “ against him.*”

Indeed a more stringent rule would amount to a practical abrogation of the well established doctrine that subsequent promise operates as a waiver of laches in demand and protest.

IV.

The counsel for the plaintiffs in error, cite the case in the 19 Barbour, as in point. But is it a case in point? It was the case of a sight draft on one Warren, sent to the Troy City Bank, (where Warren kept his account) for collection. It was presented to Warren for payment at the bank, on the 19th of November. Warren had no funds in the bank, but he drew his check on the bank for amount of draft and some other sums, and the bank accepted the check and gave up the draft to him. On the same day Warren deposited in the bank more than enough to meet the check and draft; on the 20th, the bank allowed him to draw out \$18,000, which was more than the amount of the draft; on the 22d of November, Warren returned the draft and said he would not pay it, and it was then protested. Here, by accepting Warren's check, and charging it to him, the bank practically lent him the money, with which

to pay the draft. But at all events by the deposit on the same day (which should have been applied against the draft) the draft was paid. But if not, who could pretend that there were not laches in not protesting the draft until the 22d, three days after it was presented.

The counsel claims the custom attempted to be set up, is "bifurcate." How bifurcate? Those who had been for a long term of years conversant with the course of business of the Trust Company, say that they "never knew the Trust Company to pay a draft in *any other manner, than by check.*" The custom was "*general and universal, and never departed from except by special request.*" It is true that some outsiders, who knew nothing of the general course of business of the Trust Company, testified that they had known instances of cash being paid by the Trust Company, on drafts. But this only shows that the company would, upon special request or demand, depart from their established usage and course of business.

The counsel seem to think that a usage or custom must be so inflexible that no special request or demand could induce a departure, and the fact that the Trust Co. in some cases on special request may have departed from their usage is urged as evidence that the usage had never existed. And as to passing checks through the clearing house, it was always done in dealings between bankers where the check was drawn on a bank belonging to that institution, as the American Exchange Bank did. But inasmuch as the check was presented and dishonored on the next day after it was drawn, why is it material how it was presented, whether through the clearing house or otherwise?

The case of the *Montgomery Co. Bank vs. The Albany City Bank*, 8 Barb. 396, was a case of a draft payable on a day fixed and specified, besides the Counsel for the plaintiffs in error (inadvertantly no doubt) mis-quote this case; the Court did not say: "There can be no custom of the city of New York to leave a bill of exchange one day with the drawee," nor any thing to that effect.

We deem it unnecessary to spend time or space in reply to the Counsel's criticisms on the instructions, it is sufficient to say that they are very full and voluminous, extending from page 128 to 137 of record in behalf of the plaintiff below, and from page 144 to page 159 of record, for defendants below, and fully presented the case to the jury upon correct issues. Besides, even if some of them were not abstractly correct, it does not follow that the judgment should be for that reason reversed, 27 Ills. 115.

The counsel misapprehended both what Ambler actually said, and the effect of what he did in fact say, with reference to ascertaining whether a check was good or not at the clearing house. On cross-examination (page 99), Ambler said: "I could ascertain if check drawn on American Exchange Bank was good by taking it to the bank, but I could not ascertain at the clearing house." That is the bank having checks and drafts on the American Exchange Bank, sends its messenger to the clearing house with the budget containing them; there he meets the messenger of the American Exchange Bank, and exchanges budgets, and the latter takes the budget received, carries it back to his bank, and there it is inspected, bad checks thrown out, and sent back from where they came, in this case to the Merchants' Bank, where Swift, Ransom & Co. deposited it. This is the manner in which the business is done. Hence the statement that it could not be ascertained *at the clearing house* whether the check was good, but this is by no means saying that it would not be ultimately ascertained by sending it through the clearing house; and it would be absurd so to say—for this is the very purpose of the institution—besides the testimony of L. P. Swift is positive that this check was dishonored through the clearing house.

There was no error in overruling the questions in the shape they were originally put; as to where the risk was to fall in case a check was given.—(*Page 110 and 111 of Record.*) They called for an opinion on a question of law, and for a local custom, abrogating a positive rule of law. But substantially the same question was put, and the evidence finally given, which would cure any error, if error had been committed.

Upon the whole, therefore, we submit that a clear case of liability was made out against the defendants below, and that no error of law or fact was committed, and that the judgment below should be affirmed.

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Supreme Court

David C. Stro
et al
vs

John B. King

Additional Brief
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